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DATE FILED: 6/12/18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EVERGREEN LINE A JOINT SERVICE AGREEMENT FMC No. 011982,

Plaintiff,

-against-

US DYNAMICS RECYCLING LLC,

Defendant.

ORDER DENYING MOTION TO DISMISS

18 Civ. 313 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Evergreen Line A Joint Service Agreement FMC No. 011982 ("Plaintiff") filed this maritime action on January 12, 2018. *See* 28 U.S.C. § 1333(1); Fed. R. Civ. P. 9(h). Plaintiff and its members are vessel-operating common carriers that ship international cargo. Broadly stated, the complaint alleges that US Dynamics Recycling LLC ("Defendant"), a Texas-based recycling company, booked one of plaintiff's cargo containers but failed to properly deliver the container to plaintiff's shipyard. As a result of this error, the container was marked as empty and mistakenly shipped to an international port in China, where local customs officials imposed fines and penalties that plaintiff now seeks to recover. Now before the Court is defendant's motion to dismiss the complaint for lack of standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). For the reasons that follow, the motion is denied.

Background

The following facts are taken largely from plaintiff's complaint, which I must "accept[] as true" for the purpose of this motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

This case concerns a maritime shipping dispute between plaintiff and its members, vessel-operating common carriers that ship international cargo, and defendant, a

Texas-based recycling company. The complaint alleges that, consistent with plaintiff's normal business practice, "defendant booked the use of" one of plaintiff's shipping containers, which was "to be packed with a cargo of old clothes for carriage by sea by plaintiff from the Port of Los Angeles to Malaysia." Complaint, ECF 1, at ¶ 4. "By making the booking, defendant agreed to be bound by plaintiff's standard bill of lading terms and conditions . . . ." *Id.* at ¶ 5.

The complaint alleges that after packing and sealing the container, defendant hired a truck driver to transport the loaded container to the Port of Los Angeles, where plaintiff maintains an operating center. *Id.* at ¶¶ 6–7. But when the driver made the delivery, he mistakenly entered the "empty container lane[,] rather than the lane dedicated to incoming fully loaded containers." *Id.* at ¶ 8. Unaware of the mistake, and believing that defendant's container was empty, plaintiff marked the container as empty and loaded it on a ship bound for the Chinese Port of Ningbo, rather than Malaysia, where the container was originally scheduled to be sent. *Id.* at ¶ 9. When defendant's container arrived at the Port of Ningbo, local customs officials "refused entry for the unmanifested and undeclared cargo in the Container and assessed fines and penalties on plaintiff," totaling RMB ¥375,247, or approximately $57,735.50. *Id.* at ¶¶ 10–11.[1] This action followed to recover the fines and penalties under various provisions of the Bill of Lading.

Discussion

Defendant moves to dismiss the complaint under Federal Rules 12(b)(1) 12(b)(6). For the reasons explained herein, the complaint sufficiently pleads the elements of standing and states a valid cause of action. The motion is denied.

[1] Because the container was marked as empty but filled with cargo, local customs officials imposed an anti-smuggling penalty, among others.

A. Standing Under Rule 12(b)(1)

Defendant first argues that plaintiff has failed to adequately plead the elements of standing. To satisfy the "irreducible constitutional minimum of standing," a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). As the party invoking the Court's jurisdiction, plaintiff bears the burden of establishing these elements. *Id.* at 1547. But where, as here, this issue arises at the pleading stage, I must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *United States v. Vazquez*, 145 F.3d 74, 81 (2d Cir. 1998) (internal quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

Although defendant challenges only the first and second elements of standing, all three are clearly met in this case. First, to assert an injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). Here, plaintiff specifically alleges tangible, financial losses in the form of fines and penalties imposed by customs officials in the Port of Ningbo. There is nothing hypothetical or conjectural about this injury.

Second, to plead causation plaintiff must allege facts demonstrating that the alleged injury is fairly traceable to the conduct of the defendant. *See Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). The Second Circuit has explained that "particularly at the pleading stage, the 'fairly traceable' standard is not equivalent to a requirement of tort causation and . . . for purposes of satisfying Article III's causation requirement, we are concerned with something *less than the concept of proximate cause*." *Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013)

(quoting *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 346 (2d Cir. 2009)). Here, the complaint draws a direct link between the alleged injury—fines and penalties assessed by customs officials—and defendant's mistaken delivery to the "empty container lane[,] rather than the lane dedicated to incoming fully loaded containers." Complaint, ECF 1, at ¶ 8. This is sufficient to satisfy the "fairly traceable" standard. *Spokeo*, 136 S. Ct. at 1547.

To avoid this result, defendant suggests that the chain of causation is broken by the independent actions of third parties—namely, customs officials at the Port of Ningbo. But the Second Circuit has made clear that although "causation is lacking if the claimed injury results from 'the independent action of some third party not before the court,' a plaintiff need not allege that 'the defendant's actions [were] the very last step in the chain of causation' to demonstrate that the defendant's actions caused the claimed injury." *Carver v. City of New York*, 621 F.3d 221, 226 (2d Cir. 2010) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). Instead, "[i]t suffices that the defendant's actions had a 'determinative or coercive effect upon the action of someone else' who directly caused the claimed injury." *Id.* (quoting *Bennett*, 520 U.S. at 169). The fact that the fines and penalties at issue in this case were imposed by the Port of Ningbo is not fatal to plaintiff's claim. The central question is simply whether the injury alleged is fairly traceable to the mistaken delivery, and on that issue the complaint contains sufficient facts to connect the various links in the causal chain.[2] Nothing more is required at this stage.[3]

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[2] Defendant also suggests that the actions of the trucking company it hired also constitute an "independent action of [a] third part[y] not before the court." Memorandum in Support of Motion to Dismiss the Complaint, ECF 13, at 3. This argument misses the mark, for it is well settled that "[t]he act of delegation . . . does not relieve the delegant of the ultimate responsibility to see that the obligation is performed. If the delegate fails to perform, the delegant remains liable." *Merryman v. Citigroup, Inc.*, No. 15 CIV. 9185 (CM), 2018 WL 1621495, at *17 (S.D.N.Y. Mar. 22, 2018) (internal quotation marks omitted) (quoting *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 924 (2d Cir. 1977)).

[3] Although defendant does not challenge the third element of standing, it is clear that a favorable decision—granting plaintiff money damages to compensate for the fines and penalties imposed by customs officials at the Port of Ningbo—would redress plaintiff's alleged injury.

B. Merits Under Rule 12(b)(6)

Defendant also moves to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. In ruling on a motion to dismiss, the court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001), *as amended* (Apr. 20, 2001). In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

"Under New York law, a breach of contract claim requires proof of (1) an agreement, (2) adequate performance by the plaintiff, (3) breach by the defendant, and (4) damages." *Fischer & Mandell, LLP v. Citibank, N.A.*, 632 F.3d 793, 799 (2d Cir. 2011). Defendant identifies a number of supposed errors in the pleadings, all of which hinge on the complaint's alleged lack of specificity.[4] For instance, defendant claims that the complaint runs afoul of Federal Rule 9(f), which states that "[a]n allegation of time or place is material when testing the sufficiency of a pleading." Fed. R. Civ. P. 9(f). But this misunderstands the purpose of Rule 9(f). "Rule 9(f) does not require the pleader to set out specific allegations of time and place; it merely states the significance of these allegations when they are actually interposed." *Rosen ex rel. Egghead.Com, Inc. v. Brookhaven Capital Mgmt., Co.*, 179 F. Supp. 2d 330, 334 (S.D.N.Y. 2002) (internal quotation marks omitted) (quoting *Abdulaziz v. City of Philadelphia*, Civ. A. 00–5672, 2001 WL 818476, at *4 (E.D. Pa. June 26, 2001)). Instead, the focus of Rule

[4] Defendant also claims that the complaint fails to allege causation and damages. But as I have already explained above with respect to standing, the complaint contains sufficient facts to plead both causation and damages under the contract.

9(f) is to "'permit[] consideration of allegations of time and place when the sufficiency of the complaint is challenged, and has thus been used primarily as a screening device' for time-barred claims 'where the averments in the complaint make clear that the claim is time-barred.'" *Tammaro v. City of New York*, No. 13CV6190, 2018 WL 1621535, at *11 (S.D.N.Y. Mar. 30, 2018) (quoting *Matthew v. United States*, 452 F. Supp. 2d 433, 446 (S.D.N.Y. 2006)). Put differently, Rule 9(f) is intended to "allow[] a limitations defense to be expeditiously raised in a Rule 12(b)(6) motion," *id.*, not to create a particularity requirement with respect to these elements. Defendant has not claimed that the complaint is time-barred and Rule 9(f) is therefore not relevant.

More fundamentally, the plausibility standard of *Twombly* and *Iqbal* is designed to give a defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted). By specifically identifying the booking number and container number associated with the Bill of Lading, plaintiff has given defendant adequate notice of the claims against it.[5]

Finally, defendant argues, for the first time in its reply brief, that it is implausible that such an arguably small mistake—a truck driver entering the wrong container drop-off lane—could result in the substantial fines and penalties imposed by the Port of Ningbo. Even if this argument were properly raised, *see Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993), the issue is not ripe for resolution at this stage. Defendant's argument is best understood as a claim that the damages alleged are too remote to be foreseeable under the contract. Such an inquiry is not

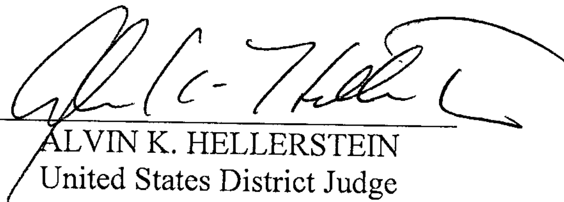
[5] Defendant also finds error in the complaint's conclusory statement that "[a]ll conditions precedent have been performed or have occurred." Complaint, ECF 1, at ¶ 13. But Rule 9(c) expressly permits plaintiff to plead a contract claim in this manner. *See* Fed. R. Civ. P. 9(c) ("In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity."). The case upon which defendant relies, *Swan Media Group v. Staub*, 841 F. Supp. 2d 804, 808 (S.D.N.Y. 2012), discusses the standard for pleading a plaintiff's own adequate performance, which is a specific element of a contract claim. *Swan Media* did not address the standard for pleading conditions precedent, which is resolved conclusive by Rule 9(c).

appropriate at this stage. *See Millgard Corp. v. E.E. Cruz/Nab/Fronier-Kemper*, No. 99 CIV. 2952 LBS, 2003 WL 22801519, at *2 (S.D.N.Y. Nov. 24, 2003) ("The scope of permissible consequential damages is an issue which must await the presentation of evidence as to what were the foreseeable consequences of wrongful termination."). Given the complexity and scope of the shipping industry and the procedural posture of the case, I cannot say that the series of events that took place here was implausible or unforeseeable.

For the reasons stated herein, the motion to dismiss is denied. The oral argument, currently scheduled for July 9, 2018, is cancelled. The parties shall appear for a status conference on July 6, 2018 at 10:00 a.m. to chart further progress in the case.

SO ORDERED.

Dated: June 11, 2018
New York, New York



ALVIN K. HELLERSTEIN
United States District Judge