IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD J. FRIEDMAN, JR.,
as Administrator of the Estate
of Michael Bratek, Deceased

Plaintiff,

v.

CASTLE AVIATION, et al.

Defendants.

Case No. 2:09-cv-749
JUDGE EDMUND A. SARGUS, JR.
MAGISTRATE JUDGE TERENCE P. KEMP

OPINION AND ORDER

This case arises out of an aviation accident in which Plaintiff's Decedent, Michael Bratek, died. As Administrator of Mr. Bratek's estate, Plaintiff filed this case against Defendants Avion Capital Corporation ("Avion"), Castle Aviation, the Columbus Regional Airport Authority ("CRAA"), Total Airport Services ("TAS"), The Cessna Aircraft Company ("Cessna"), and the Estate of James A. Babcock, deceased ("Babcock").

Just prior to the accident, the plane involved had departed from the Rickenbacker International Airport, which CRAA owns and operates. The plane had been manufactured by Cessna and at the time of the accident was owned by Avion, leased by Castle Aviation, and piloted by Babcock. The Complaint alleges that TAS provided ramp services including de-icing for the plane pursuant to a contract with CRAA. Plaintiff also alleges that an inappropriate type of de-icing fluid was used. However, Plaintiff voluntarily dismissed the claim against TAS and explains in its memorandum that the plane was actually de-iced by Airnet Services, another agent of CRAA. (Pl.'s Mem. 1.) Plaintiff indicates that he intends to amend his complaint to add Airnet Services as a defendant; however, he has not yet moved for leave to do so. (*Id.* at 2.)

This matter is before the Court for consideration of CRAA's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 14.)

I.

Rule 12(b)(6) requires dismissal if the complaint fails to state a claim upon which relief can be granted. While Rule 8(a)(2) requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief," in order "[t]o 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 v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Furthermore, "[a]lthough for the purposes of a motion to dismiss [a court] must take all of the factual allegations in the complaint as true, [it] [is] not bound to accept as true a legal conclusion couched as a factual allegation." *Id.*, 129 S. Ct. at 1949–50 (quoting *Twombly*, 550 U.S. at 555) (internal quotations omitted).

II.

In the Complaint, Plaintiff alleges that CRAA "failed to exercise reasonable care in contracting with and hiring a subcontractor for the provision of ramp services including de-icing services" and that "[CRAA] by virtue of its contracting authority with [TAS] exposed the flying public, including Plaintiff's Decedent[,] to the risk created by the use of inappropriate Type 1 de-icing fluid." (Compl. ¶ 40.) These claims are preceded by a header referring to the "negligence of" CRAA. (*Id.* at p. 14 (emphasis omitted).) The Complaint therefore suggests two potential claims against CRAA: a direct claim for negligent hiring and a vicarious claim for the negligence of the agent that performed de-icing services.

A. Direct Claim

By alleging that CRAA "failed to exercise reasonable care in contracting with and hiring a subcontractor for the provision of ramp services including de-icing services" (Compl. ¶ 40), Plaintiff invokes a potential direct claim for negligence in hiring.[1] *Cole v. Am. Cmty. Servs.*, No. 2:04-cv-738, 2006 U.S. Dist. Lexis 75431, 12 n.5 (S.D. Ohio Oct. 17, 2006) (noting that an employer may be liable under Ohio law "for its own negligence in selecting or retaining an independent contractor"). The elements of such a claim are: (1) an employment relationship between the employer and the agent, (2) evidence of the agent's incompetence, (3) evidence of the employer's knowledge of the agent's incompetence, (4) evidence that the agent's actions caused the plaintiff's injuries, and (5) evidence that the employer's negligent hiring of the agent proximately caused the plaintiff's injuries. *Id.*, 2006 U.S. Dist. Lexis 75431 at 16–17 (citing *Browning v. Oh. State Highway Patrol*, 151 Ohio App. 3d 798 (Ohio Ct. App. 2003)).

Considering Plaintiff's admission that the Complaint does not name the correct contractor, the Complaint cannot allege facts satisfying several elements of negligent hiring. This Court need not now determine whether the standard set forth in *Twombly* and *Iqbal* requires Plaintiff to plead specific facts satisfying *every* element of negligent hiring, given the potential difficulty in doing so prior to discovery, but the Court finds that, without alleging further facts regarding the contractor, the Complaint does not "contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

[1] Plaintiff's memorandum also describes an alternative theory of liability whereby a principal is liable for injuries to independent contractor employees if the principal actively participates in the job and fails to exercise ordinary care to eliminate a hazard. (Pl.'s Mem. 7–9; *see Hirschbach v. Cincinnati Gas & Elec. Co.*, 6 Ohio St. 3d 206, 207–08 (Ohio 1983).) The Complaint does not allege such a claim, however.

B. Indirect Claim

Plaintiff also alleges that, "by virtue of its contracting authority with [TAS][,] [CRAA] exposed the flying public, including Plaintiff's Decedent[,] to the risk created by the use of inappropriate Type 1 de-icing fluid." (Compl. ¶ 40.) Plaintiff thus invokes a potential claim of vicarious liability for the negligence of the agent that performed de-icing services. *See Albain v. Flower Hosp.*, 50 Ohio St. 3d 251, 257 (Ohio 1990) (holding that "an employer may be held vicariously liable for the negligence of an independent contractor performing certain 'non-delegable duties' which are imposed by statute, contract, franchise or charter, or by the common law") (citations omitted) (overruled on other grounds, *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St. 3d 435 (Ohio 1994)); *Covington & Cincinnati Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 222–23 (Ohio 1899) (holding that an employer hiring an independent contractor to do inherently dangerous work is liable for injuries caused by the contractor's negligence).

For the same reasons that apply to the direct claim, the Court finds that Plaintiff does not allege "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

Ohio law allows an injured party to sue the principal, the agent, or both. (Mot. 6; *Nat'l Union Fire Ins. Co. v. Wuerth*, 122 Ohio St. 3d 594, 599 (Ohio 2009) ("Although a party injured by an agent may sue the principal, the agent, or both, a principal is vicariously liable only when an agent could be held directly liable.").) While Plaintiff has alleged insufficient facts to state an indirect claim, and *must allege facts showing the correctly identified agent's direct liability*, the Court notes that Plaintiff need not name that agent as a defendant in order to proceed against CRAA.

The parties have also briefed the issue of whether the actual de-icing agent can be held liable under Ohio Workers' Compensation law because that agent was the Decedent's employer. Because the Complaint alleges insufficient facts as to Plaintiff's indirect claim, the Court cannot reach the merits on this issue. The Court notes the following, however. In addition to suggesting that the accident did not occur in the scope of Decedent's employment, Plaintiff suggests that the agent would be liable because its actions were sufficiently egregious to constitute an intentional tort under *Fyffe v. Jeno's, Inc.*, 59 Ohio St. 3d 115 (Ohio 1991). The standard set forth in *Fyffe* was superseded by Ohio Revised Code § 2745.01, which provides generally that an employer is not liable unless it acted with the intent to injure. *See Medlen v. Estate of Meyers*, 476 F. Supp. 2d 797, 801 n.2 (N.D. Ohio 2007).

III.

Federal Rule of Civil Procedure 15, which governs amendment of pleadings, states that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Sixth Circuit has interpreted Rule 15(a) as providing a "liberal policy of permitting amendments to ensure the determination of claims on their merits." *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987). On November 30, 2009, Plaintiff indicated in his memorandum that he intended to amend his complaint. Any motion to amend the pleadings was due on or before April 1, 2010 (Doc. 39 at 2), however, and Plaintiff has requested neither leave to amend nor an extension.

To ensure the merits-based determination of the claims noticed by Plaintiff's Complaint, and to minimize the effects of Plaintiff's failure to file a timely motion for leave to amend, the Court hereby **ORDERS** that, within fourteen (14) days of the date of this Opinion and Order, Plaintiff may amend his Complaint for the sole purpose of stating claims against CRAA for (i) negligence in hiring and (ii) vicarious liability for the negligence of the agent that performed

de-icing services. If Plaintiff does not amend his Complaint within fourteen (14) days, for the reasons discussed above, CRAA's motion to dismiss (Doc. 14) shall be granted as to the claims against CRAA. CRAA's motion for a ruling (Doc. 51) is hereby **DENIED** as moot.

IT IS SO ORDERED.

8-9-2010
DATED

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE