

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN M. FLOYD & ASSOC., INC.)	CIVIL ACTION NO. 5:02CV00101
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION & ORDER</u>
)	
FIRST BANK,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

The plaintiff in this action alleges breach of a contract to install an overdraft protection program. The defendant has filed a motion to dismiss asserting that this court lacks subject matter jurisdiction and that the plaintiff has failed to state a claim. After a thorough examination of each party's objections, the supporting memoranda, the applicable law, and the Report and Recommendation, this court adopts the recommendation of the magistrate judge to deny the defendant's motion to dismiss.

I. PROCEDURAL POSTURE

The plaintiff, John M. Floyd & Associates ("Floyd"), instituted this action on October 15, 2002. On November 5, 2002, the defendant, First Bank, moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) and Rule 12(b)(6). On December 12, 2002, the court held a pretrial conference during which the plaintiff moved for leave to file an amended complaint. The defendant did not object, and the court granted leave to file an amended complaint with the understanding that the defendant's motion would be denied without prejudice to be renewed upon refile. On January 13, 2003, the plaintiff filed its First Amended Complaint, and on January 29, 2003, the defendant again moved to dismiss the complaint.

In his report filed May 28, 2003 (“Report and Recommendation”), the magistrate judge recommended that an order enter denying the defendant’s motion to dismiss and declining to convert the motion into one for summary judgment. The defendant has filed timely objections to the Report and Recommendation.¹

II. STANDARD OF REVIEW

According to § 636(b)(1)(C), this court “shall make a de novo determination of those portions of the report . . . to which the objection is made.” 28 U.S.C. § 636(b)(1)(C) (2000). To decide a motion to dismiss under Rule 12(b)(6), the court must determine “whether the complaint under the facts alleged and under any facts that could be provided in support of the complaint, is legally sufficient.” *E. Shore Mkts., Inc. v. J.D. Assocs.*, 213 F.3d 175, 180 (4th Cir. 2000). “A court, when ruling on a 12(b)(6) motion to dismiss, can consider any documents attached to the complaint or incorporated in the complaint by reference.” *Hammonds v. Builders First Source-Atl. Group, Inc.*, 2002 WL 535071, at *2 (W.D. Va. Mar. 28, 2002). The court must “assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint’s allegations . . . [but] need not accept the legal conclusions drawn from the facts . . . [or] accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *E. Shore Mkts., Inc.*, 213 F.3d at 180 (citations omitted). “A motion to dismiss for failure to state a claim for relief should not be granted ‘unless it is clear that no relief could be granted under any set of facts that

¹ The defendant contests the magistrate judge’s conclusions that the complaint sufficiently alleged the elements of breach of contract and damages. The defendant also contends that development of the facts of this case is unnecessary to the resolution of the matter before the court. Finally, the defendant disputes the magistrate judge’s finding that this court has jurisdiction over this case.

The court pauses to note a glorious instance of irony in the memorandum encompassing defendant’s objections. In counsel’s haste to cast stones at the magistrate judge’s erratum, he forgets to do so before leaving the confines of his own proverbial glass house. The court politely reminds counsel that use of “[sic]” is to be reserved for egregious gaffes and not for minor lapses that may be adjusted without violent damage to the text ascribed to the author.

could be proved consistent with the allegations.’ ” *Id.* (quoting *G.E. Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001)).

III. DISCUSSION

A. Motion to Dismiss for Lack of Jurisdiction

The magistrate judge properly determined that this court has subject matter jurisdiction over the matter before it. “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States” 28 U.S.C. § 1332(a). Floyd is incorporated under the laws of Texas with its principal offices located in that state, and First Bank is a Virginia corporation with its offices in Strasburg, Virginia. Having determined that the parties are diverse, *id.* § 1332(c), the court considers whether the amount in controversy exceeds \$75,000. Upon the face of the complaint, the plaintiff alleges that its expectation damages from the breach of contract amount to twenty-five percent of the savings from the installation of the program. Floyd estimates that \$460,000 and \$590,000 in savings would have been generated. With abacus in hand, the court concludes that the resulting range of damages, from a low estimate of \$115,000 to a high estimate of \$147,500, exceeds the jurisdictional threshold. The defendant has not demonstrated “to a legal certainty” that the plaintiff cannot recover this amount. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). Therefore, this court has jurisdiction over the controversy, and the defendant’s objection to the Report and Recommendation on this ground is overruled.

B. Motion to Dismiss for Failure to State a Claim

The plaintiff has properly pled a cause of action for breach of contract. Federal courts sitting in diversity must apply the conflicts law of the state in which the district court is situated. *Klaxon*

Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). A contract breach is a performance issue and, thus, is regulated by the law of the place of performance, in this case, Virginia. *Sneed v. Am. Bank Stationary Co.*, 764 F. Supp. 65, 66-67 (W.D. Va 1991). In Virginia, “[t]he elements of a contract are an offer and an acceptance supported by consideration.” 4A MICHIE’S JUR. *Contracts* § 2 (1999). The defendant admits that the complaint sufficiently alleges these elements. First Bank, however, contests whether Floyd has sufficiently alleged a breach of that agreement, or nonperformance. In the complaint, Floyd states that the installation of the overdraft privilege program was a recommendation pursuant to the terms of the contract and that approval or installation of this recommendation satisfied a condition precedent of the agreement, entitling Floyd to the contract price. It is further alleged that, upon nonpayment of the contract price, repudiation of the agreement, and substitution of a competing service-provider for Floyd, the contract was breached. Assuming the facts alleged to be true and upon this interpretation of the contract, Floyd has stated a claim.

Perhaps the aspect of this conclusion troubling the defendant is the inference that several interpretations of the contract are plausible. Notwithstanding the defendant’s characterization of the contract as clear on its face, the magistrate judge was correct to conclude that further development of the record is necessary to ascertain the terms of an ambiguous contract. “Where it is necessary to determine the meaning of words not of certain and definite import, consideration will be given to the situation of the parties, the subject matter of the contract, the acts of the parties thereunder, the purpose sought to be accomplished thereby, and the general circumstances attending its execution.” 4A MICHIE’S JUR. *Contracts* § 41 (1999). In this case, the meaning of the contract is not plain or unambiguous. When such uncertainty obfuscates the court’s view of the parties’ intention, it is the “duty of the court” to construe the true meaning of the contract by ascertaining the factual background and attendant circumstances. *Id.* Dismissal at this stage of the proceedings without

further investigation of the contextual circumstances therefore would be improper. Accordingly, the defendant's objection to further development of the record is overruled.

Moreover, the court resists the defendant's impulse to convert the motion to dismiss to one for summary judgment. To the extent entitlement to judgment depends on development of the underlying facts in the case, it would be premature for the court to consider summary judgment prior to the completion of the discovery process. *See Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Corp.*, 109 F.3d 993, 995-96 (4th Cir. 1997).

It is accordingly this day

ADJUDGED, ORDERED, and DECREED

as follows:

1. The proposed findings and recommendations of the May 28, 2003 Report and Recommendation shall be, and they hereby are, ACCEPTED in accordance with the attached memorandum opinion.
2. The defendant's objections to the Report and Recommendation shall be, and they hereby are, OVERRULED.
3. The defendant's Motion to Dismiss First Amended Complaint, filed January 29, 2003, shall be, and it hereby is, DENIED.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

Date