

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

TREX COMPANY, LLC,)	CIVIL ACT. NO. 5:01CV00009
)	
Plaintiff,)	
v.)	
)	<u>FINAL ORDER</u>
CANTON LUMBER COMPANY and)	
DIVERSIFIED BUSINESS CREDIT, INC.,)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is accordingly
this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. Defendant Diversified Business Credit, Inc.'s February 28, 2001 Motion to Dismiss for Lack of Personal Jurisdiction, or in the Alternative, Transfer Venue shall be, and hereby is, GRANTED in part, and DENIED in part, consistent with the accompanying Memorandum Opinion;
2. The entire above-captioned civil action shall be, and hereby is, TRANSFERRED to the District of Minnesota.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record, and to take the necessary steps to transfer this action forthwith to the District of Minnesota.

ENTERED: _____
Senior United States District Judge
_May 16, 2001_____

Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

TREX COMPANY, LLC,)	CIVIL ACT. NO. 5:01CV00009
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Plaintiff,)	
v.)	
)	<u>MEMORANDUM OPINION</u>
CANTON LUMBER COMPANY and)	
DIVERSIFIED BUSINESS CREDIT, INC.,)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the plaintiff's Complaint for Declaratory Judgment and Motion for Preliminary Injunction, and Defendant Diversified Business Credit, Inc. ("Diversified")'s Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, Transfer Venue. Having considered fully all pleadings, motions, memoranda and exhibits from the parties, and after a full hearing in open court on April 23, 2001, and for the reasons stated herein, the court finds that it lacks personal jurisdiction over Diversified, and shall transfer the case to the District Court of Minnesota.

I.

Plaintiff Trex is a limited liability company engaged in the business of developing, manufacturing, assembling and marketing synthetic wood products, based in Winchester, Virginia. Defendant Canton Lumber Company ("Canton") is a foreign corporation and authorized dealer of Trex products. Although Canton is now defunct, when operational,

Canton was a Minnesota Company with facilities in Minnesota and Tennessee. Diversified is a commercial finance company that offers loans to mid-sized companies, based in Minneapolis, Minnesota.

On August 8, 1996, Canton entered a “Distributor Agreement” with Mobil, who was succeeded by Trex. The Distributor Agreement authorized Canton to purchase and sell Trex products in Minnesota, North Dakota, South Dakota, Nebraska, Iowa, and Wisconsin. For several years, Canton picked up Trex products FOB from Trex’s Winchester location for delivery to Canton’s Minnesota and Tennessee facilities, ultimately to be sold to customers.

One year after Canton entered into the Distributor Agreement with Trex, Canton entered into a revolving Credit and Security Agreement with Diversified (“C&S Agreement”), in which Diversified agreed to make loans to Canton. All Canton inventory – including Trex product – was used as collateral for the C&S Agreement. The Distributor Agreement forbids Canton from selling, assigning, conveying, transferring, encumbering, etc. Canton’s license to use the Trex Trademark in violation of the Distributor Agreement, absent written consent from Trex. Trex and Canton agreed that such transfer is “null and void and without any legal effect.” Compl. Ex. A, Dist. Agree., at ¶ 16(g).¹

During the calendar year 2000, Canton encountered severe financial setbacks. Diversified continued to loan Canton money, lending an additional \$1.6 million to Canton in August, 2000. However, by November, 2000, Diversified declined to extend Canton any additional credit. In late 2000, Canton sought the services of bankruptcy counsel to consider the possibility of a Chapter 11 proceeding. None of Canton’s financial difficulties were

¹ An agreement by Canton and a third party that uses Trex product as collateral, which has the potential to lead to the unauthorized distribution of Trex product, without the written consent of Trex, could be null and void under the terms of the Distributor Agreement. Although raised by the court at the hearing, no party has contested the validity of any agreement at issue in this action.

conveyed to Trex by either defendant.² Diversified disavows knowledge of Canton's financial problems prior to late December, 2000.

Despite apparently increasing financial difficulties, Trex alleges that Canton continued to order products from Trex throughout the fall of 2000 and early 2001 with no intent to pay for the product, but rather intending to stockpile inventory to increase the volume of Canton's available collateral for liquidation and to enhance the financial position of Diversified. However, Trex introduced evidence at the hearing that Canton canceled one of its orders of Trex product in late 2000. In a December 28, 2000 letter from Canton to Trex, Canton requested permission to cancel a shipment of four loads of Trex product, explaining that Canton was experiencing a below average winter and was seeking to "bring our inventory management into closer balance with our supply." Apr. 23, 2001 Hrg., Pl. Ex. 2. On December 29, 2000, Trex approved the cancellation of the shipment. *Id.*

Trex asserts in its complaint that, as late as January 3, 2001, Eric Canton (principal of Canton) assured Trex that Canton was financially solvent, requested eight additional loads of Trex product, and said product was shipped to Canton on January 8, 2001. Trex alleges that Canton's misrepresentations about its financial stability and Canton's ordering of additional shipments with no intention to pay Trex, were done "with the encouragement and under the guidance and direction" of Diversified. Compl. at ¶ 22. Diversified vehemently denies any role in Canton's alleged misdealings.

At the April 23, 2001 hearing ("hearing"), Trex conceded that the allegations in the complaint regarding the date of the final shipment of Trex product were in error, and that the final shipment was picked up by Canton FOB on January 2, 2001, not January 8, 2001. Trex

² The court notes that, although Trex makes mention of the fact that Diversified failed to notify Trex of Canton's financial problems, Trex points to no duty of Diversified to that end.

maintained at the hearing that Canton intentionally was stockpiling inventory in the dead of a particularly harsh winter, notwithstanding Trex's introduction of evidence that Canton actually canceled a shipment of Trex product in late December. Further, Trex conceded at the hearing that, despite extensive investigation, it has found no evidence in support of its assertion that the alleged bad faith acts of Canton were done "with the encouragement and under the guidance and direction" of Diversified. Compl. at ¶ 22.

By the end of 2000, Canton had defaulted on its obligations to Diversified under the C&S Agreement by, among other things, failing to make payments when due. Thus, Diversified asserted its right under the C&S Agreement to take possession of the collateral. Diversified was on-site at Canton's Minnesota facility continuously from January 4 through January 12, 2001. After three or four days of negotiations, Canton and Diversified entered into a Repossession Agreement on January 8, 2001, whereby Canton agreed to permit Diversified to take possession of the collateral, including Canton's inventory of Trex product. Canton allegedly fired all employees on the morning of January 8, 2001. Several Canton employees allegedly were hired by Diversified to assist in the liquidation of Canton.

Trex alleges that it was not until January 10, 2001, that Trex became aware that Canton had turned over assets to Diversified. However, on January 9, 2001, Trex asserted its rights of reclamation under the UCC and Virginia and Minnesota law. On January 11, 2001, Trex conducted an inventory of Diversified's Trex product.

On January 17, 2001, Diversified sent a Notice of Private Sale to Canton and other entities evidencing interest in the Collateral. Trex was not notified. On January 22, 2001, Trex moved the United States Bankruptcy Court for the District of Minnesota for relief. Diversified asserted that a sale was forthcoming of the Tennessee location and requested Relief From the Automatic Stay.

On January 24, 2001, Sandra Crawford, Vice-President of Diversified, sent a letter (“Crawford letter”) to Trex asserting that Diversified would not to sell Trex product for a period of seven days. During those seven days, Trex and authorized Trex distributors would have an exclusive purchasing option on the remaining Trex inventory. Allegedly based on the representations from Diversified contained in Crawford’s letter, Trex agreed to dismiss the involuntary Chapter 7 action against Canton. As seen through a glass darkly,³ it appears to the court that Canton initiated Chapter 11 bankruptcy proceedings, which Trex had moved the Bankruptcy court to convert to a Chapter 7 liquidation. The court must further assume that Trex agreed to withdraw the motion to convert Canton’s Chapter 11 proceedings to Chapter 7 proceedings, in consideration of the Crawford letter.

Trex alleges that despite Diversified’s representations in the Crawford letter, Trex representatives observed on January 26, 2001, several tractor-trailer loads of Trex product being shipped from the Minneapolis location. Trex claims that a Diversified employee confirmed that Diversified was actively marketing the remaining Trex product and shipped \$18,000.00 worth of Trex product to Millard Lumber at no charge, in partial satisfaction of Canton’s debts to Millard. Finally, on January 26, 2001, Trex personnel conducted another survey of the Diversified’s Trex product, and reported 80% of the product which had been inventoried on January 11, 2001, missing. (Diversified claims that any shipments of Trex product made during this seven day period were based on sales made prior to the Crawford letter). Also reported was that Trex product was not being properly maintained, Trex product had been sold to unauthorized distributors, and Trex product had been sold to a former Trex distributor.

³ 1 Corinthians, ch 13, v.1 (“For now we see through a glass, darkly . . .”); *see also* *Wheat v. United States*, 486 U.S. 153, 162-63 (1988) (“in the murkier pre-trial context when relationships between parties are seen through a glass, darkly”).

Trex sued Canton and Diversified for various counts including: Breach of Distributor Agreement, Specific Performance and Injunctive Relief, Tortious Interference, Statutory Conspiracy, Conversion, Civil Conspiracy, and Fraud. Diversified claims that although Canton defaulted on its contractual obligation to pay for product purchased from various suppliers before going out of business, Diversified was not a party to these transactions and does not have knowledge of any specific contracts involved. Diversified alleges that it lost a significant amount of money due to the financial hardships of Canton.

Trex has moved for a Preliminary Injunction. Diversified has moved the Court to Dismiss for Lack of Personal Jurisdiction or Improper Venue. In the alternative, Diversified seeks Transfer of Venue to the District of Minnesota.

II.

The court must first address the jurisdictional question. As the prior section of this opinion indicates, this action is replete with factual controversy. For the purposes of Diversified's Motion to Dismiss for lack of personal jurisdiction, all reasonable factual inferences must be drawn in favor of Trex. *See Mylan Laboratories, Inc. v. Akzo, N.V.*, 2 F.3d 56, 60 (4th Cir. 1993). However Trex maintains the burden of making a prima facie showing of jurisdiction. *See id.* at 60; *Design88 v. Power Uptik Productions*, 133 F. Supp.2d 873 (W.D. Va. 2001).

A.

Whether the court has jurisdiction over the defendants is governed by the Virginia long-arm statute, Va. Code Ann. § 8.01-328.1 (Michie Supp. 2001). *See ESAB Group, Inc. v. Centricut*, 126 F.3d 617, 622 (4th Cir. 1997). Virginia's long-arm statute extends personal jurisdiction to the constitutionally permissible limits of the Due Process Clause of the Fifth

Amendment. See *Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir. 2000). The Due Process Clause requires sufficient minimum contacts with a forum state such that “maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Although the statutory and constitutional inquiries essentially merge in answering the question of personal jurisdiction, it is helpful to evaluate first, whether the defendant is subject to the long-arm statute. Next, the court can determine whether application of the statute comports with constitutional due process. See *Anita's New Mexico Style Mexican Food, Inc. v. Anita's Mexican Foods Corp.*, 201 F.3d 314, 317 (4th Cir. 2000).

B.

Trex relies on the sections (A)(1) and (2) of the Virginia long-arm statute to make out a prima facie case of jurisdiction over Diversified.⁴ Pl. Mem. in Opp. at 10. The statute states, in pertinent part,

- A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
 - 1. Transacting any business in this Commonwealth;
 - 2. Contracting to supply services or things in this commonwealth;

* * *

- C. When jurisdiction over a person is based solely upon this section, only a cause of action arising from the acts enumerated in this section may be asserted against him.

Va. Code Ann. § 8.01-328 (Michie Supp 2001).

⁴ Although Diversified has raised arguments that other sections of the statute would not suffice to assert jurisdiction, *see* § 8.01-328.1(A)(3)-(4), the plaintiff hangs its hat on (A)(1) and (2), accordingly the court considers those sections in detail in the text of the opinion. For the record, the court finds that it could not assert jurisdiction over Diversified under (A)(3) or (4).

In support of the argument that jurisdiction is proper because Diversified transacted business in Virginia or contracted to supply goods in Virginia, Trex relies on four factual statements. Pl. Mem. in Opp. at 9. None of Trex's four factual arguments are sufficient to make a prima facie showing of jurisdiction over Diversified. The court addresses each argument *seriatim*.

First, Trex argues that "Plaintiff substantially performed the contract within Virginia." Pl. Mem. in Opp. at 9. Although the location of performance of a contract is relevant for jurisdictional purposes, the contract to which Trex refers is the Distributor Agreement. Diversified was not a party to the Distributor Agreement. The fact that Trex performed in Virginia under the Distributor Agreement with Canton has no bearing on the Commonwealth's jurisdictional reach over Diversified.

Second, Trex argues that Canton initiated the contact with Trex in Virginia and maintained a continuous course of dealing in Virginia, and Diversified is Canton's successor-in-interest. This argument also goes predominantly to the court's jurisdiction over Canton, rather than Diversified. There is no doubt that the court has jurisdiction over Canton. The question is whether that translates into jurisdiction over Diversified. In an attempt to answer that question in the affirmative, Trex asserts that Diversified is the successor-in interest to Canton.

It is clear that, "If the successor is to stand thus in the place of the predecessor, it must do so for all purposes, including personal jurisdiction." *Crawford Harbor Associates v. Blake Const. Co., Inc.*, 661 F.Supp. 880, 883 (E.D. Va 1987) cited with approval in *City of Richmond, Va. v. Madison Management Group, Inc.*, 918 F.2d 438, 451 n.11 (4th Cir. 1990). Furthermore, "It is well established that, where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the

transferor.” *Madison Management*, 918 F.2d at 450 (internal citations and quotations omitted). However, liabilities and obligations can be assumed by implication. *Id.*

Trex argues that when Diversified assumed Canton’s assets, it also assumed Canton’s obligations by implication, thereby requiring Diversified to act in accordance with the Distributorship Agreement. *See id.* at 450-51. However, in the Repossession Agreement, Diversified explicitly assumes all rights of Canton, including litigation rights, but also expressly denies the assumption of any obligations to third parties. Unlike the company in *Madison Management*, which the Fourth Circuit deemed to have implicitly assumed the contractual obligations of the company it succeeded, Diversified’s agreement with Canton expressly states that Diversified makes no such assumption. Although the law permits implicit assumption of obligation, such a finding is improper in the face of an explicit declaration to the contrary. Assuming the validity of the Repossession Agreement -- which Trex has not challenged despite the court’s questioning of that agreement’s apparent inconsistency with the Distributor Agreement -- the court must credit Diversified’s explicit statement that it was not assuming the liabilities of Canton. Based on the uncontradicted evidence presently before the court, the court cannot find that Diversified is the successor-in-interest to Canton. Thus, Trex’s second factual assertion in support of jurisdiction is unpersuasive.

Third, Trex asserts that the Trex product was picked up FOB in Virginia at the direction of the defendants. Consistent with this argument, Trex often refers to the defendants as “Canton/Diversified,” furthering Trex’s allegation that the two entities acted as one. This third argument also relates Trex’s allegations that Canton’s alleged bad faith purchases of Trex product were done “with the encouragement and under the guidance and direction” of Diversified. Compl. at ¶ 22. These allegations support an agency theory of jurisdiction, no

doubt because the Virginia long-arm statute reaches those who act “directly *or by an agent*, as to a cause of action.” § 8.01-328(A) (emphasis added). Assertion of authority and direction over another company establishes agency. *See Anita's New Mexico*, 201 F.3d at 317; *Kolbe*, 211 Va. at 740, 180 S.E.2d at 667.

In support of the agency theory, there is nothing more in the record than the *ipse dixit* of Trex. Although Trex need only make a prima facie showing of jurisdiction, and reasonable factual inferences must be drawn in Trex’s favor, the record is devoid of any fact on which the court could rest an agency finding. At the hearing, Trex admitted that Canton’s last FOB pick-up of Trex product occurred on January 2, 2001. The earliest date on which the fact pattern presently before the court would permit a conclusion that Diversified took over Canton’s operations was on January 4, 2001. Thus, the only way for Canton’s FOB pick-ups in Virginia to have jurisdictional significance for Diversified, is if Canton was acting as Diversified’s agent in Virginia. Not only has Trex offered no evidence in support of the agency theory, but at the hearing, Trex conceded that, despite months of investigation, it has found no evidence to support its theory that Canton acted under the direction, guidance, or encouragement of Trex. Thus, Trex’s third argument -- that Canton acted in Virginia under the direction of Diversified -- does not support a *prima facie* case of jurisdiction.

Trex’s fourth argument will not long detain the court. Trex argues that Diversified is subject to the Commonwealth’s jurisdiction because Diversified maintains a website which advertises services and is accessible to Virginia residents twenty-four hours per day. Such a website is the classic example of a passive website. This court continues to agree with the Courts of Appeals to have addressed the issue, in holding that “mere access to a passive website in the forum state is insufficient to support a finding of personal jurisdiction.” *Design88 Ltd v. Power Uptik Productions, LLC*, 133 F. Supp.2d 873 (W.D. Va. 2001) (citing

cases).

Thus, Trex's four arguments in support of personal jurisdiction over Diversified all are insufficient. Much of Trex's arguments hinge on the court's jurisdiction over Canton, but there has been a complete failure to evince any showing sufficient to support Trex's successor-in-interest or agency theories, such that the court's jurisdiction over Canton could extend to Diversified.

Standing alone, Diversified simply has not conducted itself in such a way as to bring it within the reach of Virginia's long-arm statute for transacting business or contracting to supply services or things in Virginia. For example, Diversified owns no property in Virginia, pays no taxes here, has no bank accounts, offices or employees here. There are no allegations that Diversified employees ever traveled to Virginia in the scope of their employment in connection with this cause of action (or at all, for that matter). The only act of Diversified alleged to reach Virginia is the January 24, 2001 Crawford letter to Trex.

The Virginia Supreme Court has long recognized that a single act may constitute transacting business under the statute. *Kolbe, Inc. v. Chromomodern, Inc.*, 211 Va. 736, 180 S.E.2d 664 (1971). However, the single act at issue here -- the Crawford letter -- is insufficient as a single act to constitute the transaction of business. The letter stated that Diversified would not sell Trex product for a period of seven days. Trex argues that it dropped the bankruptcy proceedings against Canton in response to the letter, and that Diversified violated the terms of the letter by selling Trex product two days later, on January 26, 2001. Although Diversified denies selling Trex product during the seven days, that factual dispute is resolved in favor of Trex at this juncture in the proceedings. However, even if Diversified violated the terms of its own letter, the violation of the terms of the letter occurred in Minnesota, not Virginia. Pursuant to the long-arm statute, there is no Virginia

jurisdiction for claims that do not arise from the defendant's acts in the state. *See City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985).

C.

For the aforementioned reasons, there simply is insufficient evidence before the court to support Trex's allegations that the long-arm statute reaches Diversified for transacting business, contracting to supply goods, or taking any other action directly or through agents in Virginia, sufficient to confer jurisdiction here. *See* § 8.01-328.1. Because the court can not exercise jurisdiction over Diversified under the long-arm statute, the court need not reach the question of whether such exercise would have comported with constitutional due process.

III.

Notwithstanding the court's finding that it lacks personal jurisdiction over Diversified, the court maintains the authority to transfer the action to cure want of jurisdiction in the interests of justice, rather than dismiss the action. *See* 28 U.S.C. § 1631; *McCook Metals v. Alcoa, Inc.*, --F.3d --, (4th Cir. May 10, 2001); *see also Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962); *Roanoke River Basin Ass'n*, 776 F.2d at 488. Although Trex has failed to establish jurisdiction in Virginia over Diversified, there is no evidence that the arguments in support of jurisdiction were made in bad faith. It is in the interests of justice that Trex's allegations against Diversified be adjudicated in the proper forum, specifically the pending motion for preliminary injunction. The court recognizes that it has personal jurisdiction over Canton, but transfer as to Canton is in the interests of justice, based on want of jurisdiction over Diversified.⁵ 28 U.S.C. § 1404(a).

⁵ On April 12, 2001, Trex moved for Entry of Default Judgment against Canton, and on even date, the Clerk of the Court entered default against Canton. Trex's claim against Canton is not for a sum certain, and Trex has yet to establish the amount of default. Fed. R. Civ. P. 55. Accordingly, determinations remain to be made with respect to default judgment against Canton.

Accordingly, under the authority of 28 U.S.C. §§ 1631, 1404(a), and 1406(a), the court finds that it is in the interest of justice not to dismiss this action, but rather to transfer the entire civil action to the District of Minnesota.

IV.

For the foregoing reasons, the court finds that it lacks personal jurisdiction over diversified, and transfers the entire civil action to the District of Minnesota. An appropriate order shall this day enter.

ENTERED: _____
Senior United States District Judge

_May 16, 2001_____
Date