

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SPRINGS WINDOW FASHIONS, LLC,

Plaintiff,

v.

D & S, INC., CHARLES F. DUFFLEY
and BENJAMIN D. MORRIS,

Defendants..

ORDER

11-cv-226-bbc

In response to this court's June 29, 2011 order, plaintiff Springs Window Fashions, LLC, has verified the citizenship of the parties as being diverse. With the issue of jurisdiction resolved, I can take up the motion filed by defendant D & S, Inc. to dismiss the case against it for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted against this defendant.

Defendant D&S, Inc. contends that plaintiff has not alleged any facts that would give this court personal jurisdiction over it, but it is wrong. A review of the complaint shows that plaintiff made the following relevant allegations: Defendant D&S, Inc. is a Tennessee corporation, known as Dalphis, Inc. before July 10, 2010. It was a distributor and licensee

of plaintiff's products for more than 20 years. As a distributor, Dalphis/D&S purchased plaintiff's products on credit. As of June 28, 2010, it owed plaintiff \$706,484.84 in accounts payable. Around this time, the principals of Dalphis, Inc. told plaintiff that a new entity, Dalphis Holding, LLC, would acquire most of Dalphis Inc.'s assets and continue as distributor and licensee of plaintiff's products, if plaintiff approved. Plaintiff approved the arrangement on the condition that the new entity would assume the Dalphis, Inc. accounts payable. Dalphis Holding, LLC, then purchased substantially all of Dalphis, Inc.'s assets. On June 28, 2010, Dalphis Holding, LLC, executed certain agreements with plaintiff, including an "assumption agreement" and a "distribution and licensing agreement." It also submitted a credit application to purchase plaintiff's products on credit.

Defendant D&S, Inc. contends that it is not subject to this court's jurisdiction because it sold substantially all of its assets in June 2010 and, according to the assumption agreement attached to plaintiff's complaint (Exhibit A), plaintiff and defendant Dalphis Holding, LLC, agreed that any liabilities or obligations that D&S, Inc. might have to plaintiff at the time would become the obligation of Dalphis Holding, LLC.

There is no question that on the present record this court may exercise personal jurisdiction over D&S, Inc. for actions it took as Dalphis. In that incarnation, it had an ongoing relationship with plaintiff in the course of which it purchased goods and had them shipped to it in Tennessee. Under Wis. Stat. § 801.05, Wisconsin's long-arm statute, this

conduct suffices to give a court based in Wisconsin jurisdiction over the person of the purchaser. Subsection (5)(b) of § 801.05 provides in personam jurisdiction over persons in actions arising “out of services actually performed . . . for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant”; subsection (5)(d) provides for such jurisdiction in actions relating to goods . . . shipped from this state by the plaintiff to the defendant on the defendant’s order or direction.”

Exercising personal jurisdiction over D&S, Inc. in these circumstances raises no due process concerns. Defendant purposefully availed itself of the privilege of conducting business in this forum; it could have reasonably foreseen that it would be subject to suit here. Whether the assumption agreement relieves it of any obligation to plaintiff is a question separate from whether defendant is subject to personal jurisdiction in this state.

The only remaining question is whether plaintiff has stated a claim against defendant D&S, Inc. Defendant argues that it has failed to do so, but a review of the complaint’s allegations refutes defendant’s argument. The allegations are sufficient to state a claim when they are construed in favor of plaintiff, as they must be under Fed. R. Civ. P. 12(b)(6). Defendant D&S, Inc. argues that the affidavits attached to the complaint show that plaintiff released D&S from any obligations or liabilities; plaintiff denies this. The assignment and assumption agreement do not contain any language purporting to release D&S, Inc.

Defendant may have more evidence to support its position. If it does, it may move for summary judgment at an appropriate time. Its motion to dismiss will be denied.

ORDER

IT IS ORDERED that defendant D&S, Inc.'s motion to dismiss this case for lack of personal jurisdiction or for plaintiff Springs Window Fashions, LLC's failure to state a cause of action against defendant is DENIED.

Entered this 11th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge