

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-62529-CIV-COHN/SELTZER

EXIST, INC.,

Plaintiff,

v.

THE VERMONT COUNTRY STORE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS OR TRANSFER

THIS CAUSE is before the Court on Defendant The Vermont Country Store, Inc.'s ("VCS") Motion to Dismiss or Transfer [DE 12] ("Motion"). The Court has considered the Motion, Plaintiff Exist, Inc.'s ("Exist") Response [DE 14], VCS's Reply [DE 17], and the record in this case, and is otherwise advised in the premises. For the reasons set forth below, the Court will grant VCS's Motion and transfer this case to the District of Vermont.

I. Background

In this action, Exist seeks a judgment declaring that it has not infringed the VCS registered copyright "ROCK FISH" fabric design—Reg. No. VA0000900446, registered to M.Mac, Inc. on June 2, 1998—or alternatively, that VCS's copyright is invalid and/or unenforceable. DE 5. Exist alleges that there is a need for such a declaration because VCS "has communicated an imminent threat to [Exist] asserting that [Exist] has infringed [the VCS copyright] and demanded immediate cessation of all sales, advertising, distribution and display of products bearing [Exist's] Fish Print design." Id. ¶ 5.

Exist is a Florida corporation and VCS is a Vermont corporation. Id. ¶¶ 3, 4. Exist's Amended Complaint does not allege that VCS has had any contacts with Florida other than its sending of the cease and letter to Exist in Florida. In its Motion, VCS argues that it is not subject to personal jurisdiction in Florida and that venue in Florida is improper. DE 12. Accordingly, VCS seeks transfer to the U.S. District court for the District of Vermont. VCS alternatively argues that transfer is appropriate for the convenience of the parties and witnesses and in the interest of justice under 28 U.S.C. § 1404(a).

Along with its Motion, VCS submits the Declaration of James C. Hall, the President and CEO of VCS. DE 12-1. Mr. Hall describes VCS's general lack of contacts with Florida. See, e.g., id. ¶ 5 ("VCS . . . does not maintain any offices, facilities, or physical structures in Florida."); ¶ 6 ("VCS does not maintain any business records or documents in Florida"); ¶ 9 ("VCS does not maintain any computer servers or other computer hardware in Florida."); ¶ 10 ("VCS has no employees who reside or work in Florida."); ¶ 11 ("VCS does not target any marketing efforts, advertising, or business solicitations at Florida or Florida residents specifically."). Mr. Hall also explains that, as it pertains to the VCS copyright at issue in this case, "all documents relating to the VCS copyright and the alleged conduct of VCS set out in the Complaint are located in Vermont" and "[a]ll of VCS's employees responsible for the activities conducted by VCS in connection with the VCS copyright are located in Vermont." Id. ¶¶ 13-14.

In its Response, Exist focuses almost exclusively on VCS's website. DE 14. Exist states that VCS "operates, and has operated for over 20 years, a commercial and highly interactive website available throughout the country and the world, including this District, through which it enters into contracts to sale [sic] products to residents in this District."

Id. at 1. Exist's counsel communicated with a VCS sales agent through VCS's website and confirmed that VCS products have been shipped to Florida in the past. DE 14-3. Exist therefore argues that based on the existence of VCS's interactive website and the fact that VCS has "conducted actual sales in Florida . . . personal jurisdiction is proper." DE 14 at 11 (citing Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). With respect to Florida's long-arm statute, Exist argues personal jurisdiction attaches under the "tortious act" provision because copyright infringement is a tortious act and "the acts alleged to be the infringement"—Exist's sale of allegedly infringing products—"occurred in Florida." Id. at 8-9.

VCS counters that it is its conduct, not Exist's conduct, that is relevant to the personal jurisdiction analysis. DE 17 at 6. VCS also argues that its "website, however 'interactive,' is a red herring because this case has nothing to do with VCS's ecommerce activities." Id. at 2.

II. Standard

A. Personal Jurisdiction

The Court must conduct a two-step inquiry to determine if personal jurisdiction exists over VCS. United Techs. Corp. v. Mazer, 556 F.3d 1260, 1274 (11th Cir. 2009). The court must first determine if jurisdiction is authorized by Florida's long-arm statute. If it is, the court must then decide whether the exercise of jurisdiction over VCS would violate the Due Process Clause of the Fourteenth Amendment. Id.

On a Rule 12(b)(2) motion, the plaintiff bears the initial burden of pleading facts sufficient to demonstrate a prima facie case of personal jurisdiction over a non-resident defendant. A prima facie case requires enough evidence to withstand a motion for a

directed verdict. Meier ex rel. Meier v. Sun Int'l Hotels, Ltd., 288 F.3d 1264, 1268-69 (11th Cir. 2002). If the defendant offers affidavits contesting jurisdiction, the burden shifts back to the plaintiff to submit countervailing evidence. Id. at 1269. The burden does not shift, however, if the defendant's affidavits contain only conclusory assertions that the defendant is not subject to jurisdiction. Id. If the plaintiff's allegations and supporting evidence conflict with the defendant's evidence, the court must construe all reasonable inferences in favor of the plaintiff. Id.

III. Discussion

A. The Court Lacks Personal Jurisdiction Over VCS

The Court agrees with VCS that “[t]his is not a close call.” DE 17 at 1. The overarching framework for personal jurisdiction asks “whether the defendant's conduct connects him to the forum in a meaningful way” such that it would be fair to call the defendant into court in that forum. Walden v. Fiore, 134 S. Ct. 1115, 1125 (2014). The focus of the inquiry is “the relationship among the defendant, the forum, and the litigation.” Id. at 1121 (internal quotation marks and citations omitted). Exist's arguments in support of personal jurisdiction over VCS in Florida fail because they incorrectly focus either on Exist's own conduct, as opposed to VCS's conduct, or on VCS's conduct that is unrelated to this litigation.

Beginning with Florida's long-arm statute, as noted above, Exist relies solely on the section of Florida's long-arm statute that triggers specific personal jurisdiction¹ for persons “[c]ommitting a tortious act in [Florida].” Fla. Stat. § 48.193(1)(a)(2). “For personal jurisdiction to attach under the ‘tortious act’ subsection of Florida's long-arm statute, a

¹ There is no allegation that VCS is subject to general personal jurisdiction in Florida.

plaintiff must show the defendant's tort caused injury inside the state. Kumbrink v. Hygenic Corp., 2016 WL 5369334, at *2 (S.D. Fla. Sept. 26, 2016) (citing Licciardello v. Lovelady, 544 F.3d 1280, 1283 (11th Cir. 2008)). Here, Exist has not alleged that VCS committed a tortious act at all, much less in Florida. Clearly, Exist cannot rely on its own conduct—its sale of possibly infringing products in Florida—as a basis for subjecting VCS to jurisdiction in Florida. Therefore, Exist's failure to show that jurisdiction is authorized by Florida's long-arm statute is itself sufficient grounds for the Court to grant VCS's Motion. See Wynn v. Davison Design & Dev., Inc., 2009 WL 4610924, at *3 (N.D. Fla. Dec. 1, 2009) ("The due process analysis only becomes relevant if the court first determines there is a basis for personal jurisdiction under the state long-arm statute."). But even if Exist had shown that jurisdiction was authorized by Florida's long-arm statute, the exercise of personal jurisdiction over VCS in Florida would plainly violate the Fourteenth's Amendment Due Process Clause.

"[A] fundamental element of the specific jurisdiction calculus is that plaintiff's claim must arise out of or relate to at least one of the defendant's contacts with the forum." Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1355 (11th Cir. 2013) (quoting Fraser v. Smith, 594 F.3d 842, 850 (11th Cir. 2010)). While Exist has shown that VCS has contacts with Florida through its website, Exist's claim does not "arise out of or relate to" those contacts. Rather, Exist's claim arises out of VCS's threat to assert a copyright infringement claim against Exist (not yet pled as a counter claim in this action) based on possibly infringing products that Exist sells in Florida and presumably on its website. And Exist does not, and cannot, dispute that VCS's transmittal of its cease and desist letter into Florida is, without more, "insufficient to establish the minimum contacts necessary for

specific personal jurisdiction.” Database Am., Inc. v. Bellsouth Advert. & Pub. Corp., 825 F. Supp. 1195, 1213 (D.N.J. 1993) (collecting cases).²

IV. Conclusion

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant The Vermont Country Store, Inc.’s Motion to Dismiss or Transfer [DE 12] is **GRANTED**.
2. The Clerk shall **TRANSFER** this action to the United States District Court for the District of Vermont; and
3. The Clerk shall **CLOSE** this case in the Southern District for statistical purposes.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 18th day of April, 2019.



JAMES I. COHN
United States District Judge

Copies provided to:
Counsel of record via CM/ECF

² Because the Court finds that VCS is not subject to personal jurisdiction in Florida, it is unnecessary to address VCS’s arguments that venue in Florida is improper and that transfer is appropriate for the convenience of the parties and witnesses and in the interest of justice under 28 U.S.C. § 1404(a). Additionally, the Court agrees with VCS that Exist’s request for “limited jurisdictional discovery regarding the extent of business performed in Florida through [Exist’s] commercial interactive website and other business activities,” DE 14 at 14, is due to be denied. This discovery is irrelevant because, as explained above, VCS’s ecommerce activities bear no connection to Exist’s claim that it did not infringe VCS’s copyright and/or that VCS’s copyright is invalid.