

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VALLEY RECORD DISTRIBUTORS, : CIVIL ACTION  
INC. :  
 :  
v. :  
 :  
THE #1 MOVIE COMPANY, INC. : NO. 98-CV-294

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**July , 1998**

Presently before the Court is the Defendant's Motion to Dismiss Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Defendant, The #1 Movie Company, Inc. ("MCI") contends that the Court lacks subject matter jurisdiction. For the reasons stated below, Defendant's motion is denied.

**BACKGROUND**

MCI entered into an oral agreement with Star Video Entertainment ("Star") for the purchase of videotapes. ¶ 4. Star delivered videotapes to MCI between May and December, 1997. ¶ 5. The complaint alleges that MCI did not pay for approximately \$117,106.55 worth of goods. ¶ 8. On May 20, 1997, Valley Record Distributors, Inc. ("Valley") bought the assets of Star, including its accounts receivable. This action was filed in January, 1998.

MCI is a Pennsylvania corporation and its principal place of business is in Pennsylvania. ¶ 2. The complaint alleges that

Valley is a California Corporation with its principal place of business in California. ¶ 1. An affidavit, submitted by Valley's credit manager in response to the Motion to Dismiss, states that Valley maintains its executive offices, books and records, and files its income tax returns in California.<sup>1</sup> Valley's employs approximately 600 people at its main distribution facility in California. Valley has approximately 35 employees and earns 10% of its income in Pennsylvania. The allegations in Valley's affidavit were uncontroverted.

#### **LEGAL STANDARD**

On a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the moving party may challenge the substance of the complaint's jurisdictional allegations, despite their formal sufficiency. L.A. Gold Clothing Co., Inc. v. L.A. Gear, Inc., 954 F. Supp. 1068, 1070 (W.D. Pa. 1996). The burden of proof is on the party invoking jurisdiction. Sitkoff v. BMW of North America, Inc., 846 F. Supp. 380, 383 (E.D. Pa. 1994). Citizenship, for purposes of diversity jurisdiction, must be proven by a preponderance of the evidence. Coggins v. Carpenter, 468 F. Supp. 270, 276 (E.D. Pa. 1979). The party asserting jurisdiction must be allowed a reasonable opportunity to demonstrate jurisdiction. L.A. Gold, 954 F. Supp. 1070.

---

<sup>1</sup> Valley is a distributor of music and video products.

Therefore, the Court may consider evidence relating to jurisdiction that is outside the pleadings. Id.

### **DISCUSSION**

MCI's contention seems to be that it did business with Star, a company that had its principal place of business in Pennsylvania, and thus diversity jurisdiction does not exist in this case. MCI also contends that Valley's principal place of business is in Pennsylvania, and thus there is no diversity jurisdiction.

The fact that MCI contracted with Star, and not Valley, is irrelevant for purposes of diversity jurisdiction. Diversity jurisdiction is tested based on the facts as they existed at the time the action was filed. Field v. Volkswagenwerk AG, 626 F.2d 293 (3d Cir. 1980). At the time this action was filed, Valley had purchased Star's rights under the MCI-Star contract. The transfer of contract rights from a non-diverse to a diverse corporation does not preclude diversity jurisdiction, provided the transaction was not undertaken to collusively invoke jurisdiction in violation of 28 U.S.C. § 1359. See Drexel Burnham Lambert Group, Inc. v. Galardi, 777 F.2d 877, 881 (2d Cir. 1985). There is no allegation that the Valley-Star transaction was entered into for the purpose of improperly

creating diversity jurisdiction. Therefore, the only question is Valley's citizenship.

The diversity statute provides:

(c) For purposes of this section . . . --

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

28 U.S.C. § 1332(c)(1).

Two tests have developed for determining a corporation's principal place of business. In this Circuit, courts primarily apply the "center of corporate activities test." Kelly v. United States Steel Corp., 284 F.2d 850 (3d Cir. 1960). Under this test, a corporation's principal place of business is the state where its production or service operations are centered. Other courts apply the "nerve center" test, which focuses on the location of the corporate decision makers. See, e.g., In re Balfour MacLaine Int'l Ltd., 85 F.3d 68 (2d Cir. 1996). Still other courts combine the tests and consider a corporation's "total activities." 13B, Wright, Miller & Cooper, Federal Practice and Procedure, § 3625. Under any of these tests, Valley's principal place of business is California.

The Defendant submitted an affidavit from one of its shareholders which states that a business continues to operate, under the name "Star Video," in Bristol, Pennsylvania. The affidavit also states, however, that the affiant was informed

that Valley purchased Star's assets. In fact, the Valley-Star asset purchase agreement was attached to Defendant's Motion. The relevance of MCI's affidavit is difficult to understand. MCI's motion does not contend that Star continues to exist as a separate legal entity, any such argument is refuted by the asset purchase agreement. Valley owns the rights under the MCI-Star contract and Valley is a citizen of California. Therefore, diversity jurisdiction was appropriately invoked in this case.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VALLEY RECORD DISTRIBUTORS, : CIVIL ACTION  
INC. :  
 :  
v. :  
 :  
THE #1 MOVIE COMPANY, INC. : NO. 98-CV-294

**ORDER**

AND NOW, this day of July, 1998, upon consideration of the Motion to Dismiss Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), and the Plaintiff's response thereto, it is ordered that the Motion is DENIED.

BY THE COURT:

---

JAMES MCGIRR KELLY, J.