

Furst-McNess Co. V. Westminster Farms, Inc., No. 424-10-05 Wmcv (Wesley, J., Feb 1, 2006)

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**STATE OF VERMONT
WINDHAM COUNTY**

**FURST-MCNESS COMPANY,
Plaintiff,**

**WINDHAM SUPERIOR COURT
DOCKET NO. 424-10-05**

**WESTMINSTER FARMS, INC.,
Defendant.**

**ORDER ON MOTION TO DISMISS
AND MOTION TO AMEND**

This is a debt collection action in which Defendant Westminster Farms, Inc., moves to dismiss because Plaintiff failed to assert it was either a Vermont entity or a foreign entity authorized to do business in Vermont. Furst-McNess responds with a motion to amend clarifying its status as a foreign corporation engaged in interstate commerce and contending that it is exempt from state licensing requirements under the Commerce Clause.

Under V.R.C.P. 12 (b)(6), a motion to dismiss for failure to state a claim upon which relief can be granted must be denied unless it is beyond doubt “that there exist no facts or circumstances that would entitle the plaintiff to relief.” *Richards v. Town of Norwich*, 169 Vt. 44, 48(1999) quoting *Amiot v. Ames*, 166 Vt. 288, 291(1997) . The court must assume all factual allegations pleaded in the complaint as true, accept all reasonable inferences derived from them,

and reject any contravening assertions in defendant's pleadings as false. *Id.*

Assuming for purposes of analyses those facts and claims asserted in the amended complaint, Furs-McNess is an Illinois corporation and a major independent agribusiness nutrition company which serves the dairy, beef and swine industries with a complete line of livestock feeds as well as commodity merchandising and nutrition consulting. It is engaged in commerce throughout the United States. Furst-McNess sold grain to Westminster Farms that was shipped to Vermont from Quebec, Canada. There is no indication that Furst-McNess is authorized by the secretary of state to do business in Vermont.

As a matter of Vermont law, foreign corporations may not transact business within the state until they obtain a certificate of authority from the secretary of state. 11A V.S.A. § 15.01(a). Among other disabilities, this means that an unauthorized foreign corporation is not permitted to maintain proceedings in any state court. 11A V.S.A. § 15.02. However, the Commerce Clause of the United States Constitution limits the state's power to enforce these so called "door-closing statutes" where the corporations's intrastate activities are incidental to its interstate activities. *Meunerie Sawyerville, Inc. v. Birt*, 161 Vt. 280(1994)(concerning application of former 11 V.S.A. § 2120(a) which previously barred unregistered foreign corporations from maintaining suit in state court) . When a foreign corporation sends sales representatives into a state to "drum up" business, both the United States Supreme Court and the Vermont Supreme Court have held that the "drumming" is incidental activity which does not affect the otherwise interstate character of the corporation's activities, hence the exempt status of its interstate commerce. *Id.* at 282-283(citations omitted). Although originally decided in the early 1900s, the drummer cases continue to be reaffirmed. *Id.*

The proper focus in a drummer case is whether the foreign corporation's intrastate activities have become sufficiently localized and independent from its interstate enterprise to warrant compliance with the state's registration requirements. *Id.* at 284. As in the current case, the plaintiff in *Meunerie Sawyerville* sought to collect an unpaid balance on feed sales. Meunerie Sawyerville was a Canadian corporation which solicited grain orders initially on a visit to the defendant's farm. Later, the defendants placed their orders with the plaintiff's driver or by telephone. An agent of the plaintiff visited to provide forage analysis and nutrition consultations. The feed sold to the defendants was produced in Quebec. Although it accepted the trial court's finding that the contract was made in Vermont because the grain sale was initiated and consummated in state with the expectation that there would be an ongoing relationship for future grain purchases, the Vermont Supreme Court explained that locus of the contract could not resolve the Commerce Clause question. *Id.* at 281. Drawing conclusions from the trial court's factual findings, the court determined that the initial instate solicitation and follow-up nutritional analyses were incidental to the contract's central purpose: interstate grain sales. *Id.* at 285. This interstate purpose invoked the Commerce Clause and made the sales company exempt from the registration statute.

Although the factual record in the current case is not sufficiently developed to conclusively determine whether Furst-McNess is exempt from application of 11A V.S.A. § 15.02., it is plain that there are facts and circumstances which plaintiff could prove to invoke the Commerce Clause exemption to secure relief for its claims.

In light of this conclusion, and toward adjudication on the merits of this claim rather than its procedural technicalities, the Court **GRANTS** the motion to amend. V.R.C.P. 15(a). The

motion to dismiss is **DENIED**.

Dated at Newfane, Vermont, this ____ day of January, 2006.

Judge John P. Wesley