

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-023934

07/02/2004

HONORABLE CATHY M. HOLT

CLERK OF THE COURT
E. Schneider
Deputy

FILED: 07/07/2004

MATRIX INITIATIVES INC

KEVIN J PARKER

v.

JOHN DOE, et al.

FRANK W MOSKOWITZ

MINUTE ENTRY

After oral argument the Court took under advisement Defendant Floyd Schneider and Janet Boussart's¹ Motion to Dismiss This Action Against Them for Lack of Personal Jurisdiction. After considering the pleadings, case law, and argument of counsel, the Court makes the following findings and orders:

Defendant Schneider seeks a determination from this Court that this action cannot proceed in Arizona, because Arizona courts do not have personal jurisdiction over him. On the other hand, Plaintiff contends that Arizona does have personal jurisdiction over Defendant Schneider, and even if not, Defendant Schneider waived any defense to personal jurisdiction that he may have had.

Waiver of Defense of Lack of Personal Jurisdiction

Plaintiff claims that Defendant waived any defense to personal jurisdiction he may have had by: (1) failing to assert the defense of lack of jurisdiction in the answer to the complaint or in a motion before the answer, and (2) submitting to the Court's jurisdiction through conduct. Because the Court finds that the Defendant did submit to jurisdiction through his conduct, the

¹ Defendant Boussart has already been dismissed from this case. Therefore, this determination will only pertain to Defendant Schneider.

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Court does not need to reach the issue of Defendant's alleged failure to properly assert the defense.

Plaintiff claims that Defendant's conduct in actively participating in discovery, filing an opposition to a request for protective order, and invoking Arizona deposition time limits before making objection to personal jurisdiction constitutes waiver of the defense. Defendant cites *Maake v. L&J Press Corp.*, 147 Ariz. 362 for the proposition that participating in discovery does not waive a defense of lack of personal jurisdiction. However, the Court in *Maake* made it abundantly clear that the personal jurisdiction defense was not waived based on the fact that the defendant had merely defended himself against the discovery request propounded by the plaintiff. Further, the discovery sanction that defendant sought in *Maake*, was only sought after his objection to personal jurisdiction.

The facts in this case differ significantly from those in *Maake*. In this case, before making an objection to personal jurisdiction, Defendant actively propounded discovery requests. Defendant's actions with respect to discovery were not only defensive (like in *Maake*) but rather to affirmatively litigate in Arizona. Accordingly, the Court finds that his actions with respect to discovery, and his other actions invoking Arizona law, have the effect of waiving his defense of lack of personal jurisdiction.

Personal Jurisdiction Analysis

Nonetheless, even if the Court found that Defendant had not waived his defense of lack of personal jurisdiction, the Court finds that Arizona has personal jurisdiction over the Defendant.

From the pleadings, it is apparent that the Plaintiff in this action seeks that this Court assert *specific jurisdiction* over Defendant Schneider. Arizona will exert personal jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution. *Uberti v. Leonardo*, 181 Ariz. 565, 569 (1995). When a state exercises jurisdiction over a nonresident litigant, federal constitutional standards require that: the defendant has "minimum contacts" and purposeful availment with the forum state; the Plaintiff's claim arises from or relates to the Defendant's forum activities; and the exercising of jurisdiction over the foreign defendant be reasonable. *Id* at 569; see also *Rollin v. William V. Frankel & Co., Inc.*, 196 Ariz. 350 (App. 2000).

Minimum Contacts/Purposeful Availment

When exercising personal jurisdiction over a non-resident defendant, maintenance of the lawsuit must not offend "traditional notions of fair play and substantial justice." *Calder v. Jones*, 468 U.S. 783, 786 (1984). Defendants are not to be haled into a jurisdiction through "random",

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“fortuitous”, or “attenuated” contacts with a forum state. *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995); *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985).

There is a line of cases concerning claims of defamation where the plaintiff and defendant are from differing jurisdictions. This line of cases originated with *Calder v. Jones*, 468 U.S. 783 (1984), where the United States Supreme Court considered the issue of jurisdiction when allegedly defamatory newspaper stories were published nationwide about an out of state plaintiff. The Court concluded that jurisdiction may be had in plaintiff’s home state, where the defendant’s intentional conduct was allegedly calculated to effect and cause injury to plaintiff in the plaintiff’s home state. Put simply, a court may have personal jurisdiction over a person whose only contact with the forum state is purposeful direction of a foreign act having effect in the forum state. *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1485 (9th Cir. 1993). This has loosely become known as the “effects test.” See *EDIAS Software International v. BASIS International*, 947 F. Supp 413, 420 (D. Ariz. 1996).

Defendant argues that this case is not governed by the “effects test” of *Calder v. Jones* [citation omitted]. Defendant argues that this case is more like *Rollin v. Frankel*, 196 Ariz. 350 (App. 2000) (posting stock quotes on NASDAQ was not a purposeful direction to Arizona), *Bils v. Bils*, 200 Ariz. 45 (2001) (attorney’s mailing of pleadings in a California action to an Arizona resident not enough for sufficient minimum contacts with Arizona), and *Cybersell v. Cybersell*, 130 F.3d 414 (9th Cir. 1997) (Florida corporation’s use of Arizona corporation’s mark on an Internet site did not support exercise of personal jurisdiction). In each of these cases the court determined that it lacked personal jurisdiction over the defendant.

The facts in this case are markedly different from those in *Rollin*, *Bils*, or *Cybersell*. In none of the cases mentioned did the defendant allegedly intentionally defame the plaintiff—intending to cause the plaintiff damage as is alleged here. The allegedly defamatory statements made by the Defendant were not simply innocuous statements, or statements of fact (like NASDAQ quotes), or mistaken use of another’s service mark (like in *Cybersell*), placed into cyberspace. The statements are alleged to be specifically intended and geared toward harming the Plaintiff, a corporation with its principal place of business in Arizona. The brunt of the harm to the Plaintiff is alleged to be in Arizona, Plaintiff’s principal place of business, and where its key employees are. Thus, the Court finds that the *Calder* rule is applicable in this case, and further that the “effects test” has been met. In sum, the Court finds that Defendant’s allegedly defamatory Internet postings, coupled with the alleged intent to harm the Plaintiff through the statements, are indicative of “actions in their intended effect at the activities in [Arizona] and [an Arizona resident].” *Telco Communications v. An Apple a Day*, 977 F. Supp. 404, 407 (citing *First American First v. National Association of Bank Women*, 802 F.2d 1511 (4th Cir. 1986).

The Defendant goes on to further contend that the *Calder* analysis should not apply with the same force where the Plaintiff is a corporation, because the harmful effect on a corporation is not felt in a specific geographic location in the same sense that an individual does. *Cybersell*, 130 F.3d at 420. While it is true that the brunt of harm caused by defamatory conduct may be

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more difficult to geographically pinpoint when the plaintiff is a corporation rather than an individual, no case specifically forecloses the possibility that the brunt of harm to a corporation is ultimately in its principal place of business. *Panavision v. Toeppen*, 141 F.3d 1316, 1322 (FN2), *Core-Vent Corp. v. Nobel Industries*, 11 F.3d 1482 (9th Cir. 1993). See also *First American First*, 802 F.2d at 1517, *Blue Ridge Bank v. Veribanc, Inc.*, 755 F.2d 371 (4th Cir. 1985) (applying *Calder* in cases with corporate plaintiffs), and *Paccar Int'l, Inc. v. Commercial Bank of Kuwait*, 757 F.2d 1058, 1064 (9th Cir. 1985) (suggesting by negative implication that *Calder* can apply with a corporate plaintiff). Specifically in this case, the Court finds that the brunt of harm suffered by Plaintiff is in Arizona. Arizona is clearly the “focal point” of the potential harm of the Defendant’s actions. *Calder*, 465 U.S. at 789.

Further, even if Arizona did not have jurisdiction based on *Calder*, the Court finds that asserting personal jurisdiction would nonetheless be proper and within the confines of due process. The issue of personal jurisdiction over non-resident litigants whom allegedly misuse cyberspace is a relatively new issue. However, practically all of the cases the Court has found on point provide the same general principles. The general consensus is that a person whom passively posts information on the Internet, without more, is not subject to personal jurisdiction in another jurisdiction. However, if the defendant does “something more” to “indicate that the defendant purposefully directed his activity in a substantial way to the forum state,” the forum state may have jurisdiction. See *Panavision v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998); *Cybersell v. Cybersell*, 130 F.3d 414 (9th Cir. 1997). In this case, the Court finds that the Defendant did “something more” than posted pages on the Internet. Specifically, Defendant admitted in his deposition that he sent allegedly defamatory e-mail regarding the Plaintiff to the Arizona Attorney General. Accordingly, the Court finds that the sending of allegedly defamatory communications to the Arizona Attorney General about the Plaintiff, coupled with the Internet postings is enough to “indicate that the Defendant purposefully directed his activity in a substantial way” to Arizona, for the purpose of minimum contacts and purposeful availment purposes.

Plaintiff’s Claims Arise Out of Defendant’s Conduct Directed at Arizona

The second requirement for specific, personal jurisdiction is that the claim asserted in the litigation arises out of the defendant’s forum related activities. *Ziegler*, 64 F.3d at 474. Therefore, it must be determined that “but for” Defendant’s forum related activities, the harm to Plaintiff would not have occurred. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). In this case, the requirement is satisfied. Defendant’s Internet postings and contact with the Arizona Attorney General with the alleged intent to harm Plaintiff had the effect of allegedly injuring Plaintiff in Arizona. But for this conduct, the harm would not have occurred. The claims arise out of Defendant’s Arizona activity.

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Fair and Reasonable Exercise of Jurisdiction

Where the first two factors are met, to succeed on a claim that a court does not have personal jurisdiction, a defendant must present a compelling case that some other considerations would render jurisdiction unreasonable. *Panavision*, 141 F.3d at 1322. Several courts have detailed the factors to consider when determining reasonableness of exercising specific jurisdiction over a non-resident litigant. A court must consider: (1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) judicial economy in resolving the dispute; (6) the importance of the forum to the plaintiff's interest in effective relief; and (7) the existence of an alternative forum. See *Panavision*, 141 F.3d at 1322; *Ziegler*, 64 F.3d at 475. All seven of the above factors must be weighed, as no single factor is dispositive. *Id* at 475.

Purposeful Interjection

The degree of interjection of the defendant into the state is a factor to consider when assessing overall fairness of asserting jurisdiction. *Core-Vent*, 11 F.3d at 1488. In this case, Defendant's interjection was substantial. Not only did Defendant engage in activity allegedly geared toward harming a corporation with its main operations in Arizona, but he also contacted Arizona governmental agencies.

Defendant's Burden in Litigating

A defendant's burden in litigating in the forum is a factor to consider for reasonableness, but unless the "inconvenience is so great to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction." *Caruth v. International Psychoanalytical Association*, 59 F.3d 126, 128 (9th Cir. 1995) (citing *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991)). While the Court realizes that the Defendant is a resident of New Jersey, the inconvenience does not rise to the level that the "inconvenience is so great to constitute a deprivation of due process."

Sovereignty

In this case, there is no evidence that the exercise of jurisdiction in Arizona would conflict with the sovereignty of New Jersey. Therefore this factor must weigh favorably for the Plaintiff.

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Forum State's Interest

Arizona maintains a strong interest in providing effective protections for its residents tortiously injured. Plaintiff's principal place of business is in Arizona. Therefore, this factor weighs in favor of Plaintiff.

Efficient Resolution

This factor puts emphasis on the location of the evidence, and the witnesses. *Caruth*, 59 F.3d at 129. In this case, the witnesses that may be required to testify to the falsity of the alleged defamatory statements are likely located in Arizona, Plaintiff's principal place of business.

Convenient and Effective Relief for Plaintiff

Generally, little weight is given to the plaintiff's convenience. *Ziegler*, 64 F.3d at 476. While it may be significantly more costly for the Plaintiff to litigate in New Jersey, this factor weighs in Defendant's favor.

Alternative Forum

Plaintiff has not demonstrated the unavailability of another forum. Therefore this factor must weigh in favor of the Defendant.

In sum, the Defendant has not presented a compelling case that the "other considerations would render jurisdiction unreasonable." Thus the Court finds that jurisdiction in Arizona is proper. Accordingly,

IT IS ORDERED denying Defendant Floyd Schneider's Motion to Dismiss this Action Against [him] for Lack of Personal Jurisdiction.

IT IS FURTHER ORDERED denying as moot Defendants Floyd Schneider and Janet Bossart's Motion to Stay this Action Pending the resolution of their Motion to Dismiss for Lack of Personal Jurisdiction.