

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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GARY NULL & ASSOCIATES, INC.,

Plaintiff,

INDEX NO. 110508/09

-against-

LEE PHILLIPS,

Defendant.
-----X

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

JOAN A. MADDEN, J.:

In this action for defamation based on internet communications, defendant moves for an order pursuant to CPLR 3212(a)(5), (7) and (8) dismissing the complaint for lack of personal jurisdiction, for failure to state a cause of action and as time-barred by the statute of limitations.

Plaintiff Gary Null & Associates, Inc. commenced the action on July 24, 2009. The complaint alleges that defendant Lee Phillips "is a resident of Washington, D.C.," and asserts a first cause of action for defamation, seeking \$10,000,000 in damages, and a second cause of action for "injunctive relief directing defendant Phillips "to immediately and permanently take the aforementioned articles off of the Internet." As to the specific allegedly defamatory statements, the complaint alleges that: 1) on or about April 18, 2008, Phillips "wrote and placed an open letter on the Internet entitled 'Open Letter to WPRW: Gary Null's Hazardous Broadcast,'" stating "I realize he refers to himself as Dr. Null, and likes to decorate his name with a Ph.D., but his degree turns out to be as bogus as the M.S. that he sometimes puts after his name on publications"; 2) on or about April 21, 2008, Phillips "wrote and placed on the Internet

an article entitled 'Gary Null's Goons Threaten to Sue Me: My Response,'" stating "'then we can move on to his bogus credentials'"; 3) on or about May 2008, Phillips, published on the internet "another article, 'Does Gary Null have a real Ph.D,' in which he further discredits Null's academic credentials"; and 4) on November 6, 2008, Phillips published an article on the internet stating "'Indeed, Gary Null is a real nutjob. His Ph.D happen to be bogus.'" With respect to the foregoing statements, the complaint alleges that Phillips, "in his articles, falsely asserts that Null never received a doctorate degree and that his degree is 'bogus,'" and that "[i]n fact, Dr. Null graduated from Union Institute & University, an accredited university, with a Ph.D degree in human nutrition." The complaint also alleges that Phillips' "placement of these articles on the internet" was negligence, causing special harm, which constitutes defamation per se.

In seeking to dismiss the complaint, defendant contends that no basis exists for exercising long-arm jurisdiction over him, since he resides in Virginia, works in Washington, D.C., and he wrote all of the statements at issue on his personal computer at his home in Virginia, and did not send the statements to any person or entity in New York. Plaintiff responds by conceding that defendant resides in Virginia and works in Washington, D.C., but argues that the court has personal jurisdiction over defendant, since his contact with New York through his website constitutes sufficient minimum contacts for the court to find that he "purposefully availed" himself of New York law.

As an out-of-state resident, defendant Phillips cannot be subject to personal jurisdiction in New York unless plaintiff proves that New York's long-arm statute confers jurisdiction over him by reasons of his contacts within the state. See Copp v. Ramirez, 62 AD3d 23, 28 (1st Dept), lv

app den 12 NY3d 711 (2009). The burden rests on plaintiff, as the party asserting jurisdiction.

See id. New York long-arm jurisdiction is governed by CPLR 302, which provides in relevant part, as follows:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, *except as to a cause of action for defamation of character* arising from the act; or
3. commits a tortious action without the state causing injury to person or property within the state, *except as to a cause of action for defamation of character* arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent courses of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the states, or
 - (ii) expects or should reasonably expect the act to have consequences in the state, and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

(emphasis added).

By its terms, the long-arm statute as quoted above, has limited applicability in defamation cases, since it is intended “to avoid unnecessary inhibitions on freedom of speech or the press.” Legros v. Irving, 38 AD2d 53, 55 (1st Dept 1971), app dism 30 NY2d 653 (1972); accord SPCA of Upstate New York, Inc. v. American Working Collie Association, ___ AD3d ___, 2010 WL 2196087 (3rd Dept 2010). Defamation actions are expressly exempted from CPLR 302(a)(2) and (3), so the only provision at issue in this case is CPLR 302(a)(1), which requires defendant Phillips to transact business within the state, and the defamation claim to arise from his transaction of that business. See Ehrenfeld v. Bin Mahfouz, 9 NY3d 501 (2007). “If either

prong of the statute is not met, jurisdiction cannot be conferred under CPLR 302(a)(1).” Johnson v. Ward, 4 NY3d 516, 519 (2005); accord Copp v. Ramirez, *supra* at 28. In determining whether a defendant has transacted business within the meaning of CPLR 302(a)(1), courts look to the totality of the defendant’s activities within the state, to decide if he has transacted business in such a way that it constitutes “purposeful activity,” which is defined as “some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” McKee Electric Co. Inc. v. Rauland-Borg Corp., 20 NY2d 377, 382 (1967) (quoting Hanson v. Denckla, 357 US 235, 253 [1958]); accord Fischbarg v. Doucet, 9 NY3d 375, 380 (2007).

The case at bar involves developing issues of New York long-arm jurisdiction in a defamation action based on statements appearing on an internet website. As the Second Circuit noted in 2007, “[w]hile no New York appellate court has yet explicitly analyzed a case of website defamation under the ‘transact[ing] business’ provision of section 302(a)(1), several federal district courts in New York have . . . [and] concluded that the posting of defamatory material on a website accessible in New York does not, without more, constitute ‘transact[ing] business’ in New York for the purposes of New York’s long-arm statutes.” Best Van Lines, Inc. v. Walker, 490 F3d 239, 250 (2nd Cir 2007) (citing Realuyo v. Villa Abrille, 2003 WL 21537754 [SDNY 2003], *aff’d* 93 Fed Appx 297 [2nd Cir 2004]; Starmedia Network, Inc. v. Star Media, Inc., 2001 WL 417118 [S.D.N.Y. 2001]; Competitive Technologies, Inc. v. Pross, 14 Misc3d 1224(A) (Sup Ct, Suffolk Co 2007)).

This court’s research reveals a recent appellate case from the Third Department, SPCA of Upstate New York, Inc. v. American Working Collie Association, *supra*, which relies on the

Second Circuit's reasoning in Best Van Lines, Inc. v. Walker, to conclude that defendants were not subject to long-arm jurisdiction in a defamation action based on writings posted on their website. Notably, the Third Department agreed with the Second Circuit's "apt" observation that "New York Courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation." SPCA of Upstate New York, Inc. v. American Working Collie Association, *supra* (quoting Best Van Lines, Inc. v. Walker, *supra* at 248).¹

Here, the issue is whether the conduct out of which plaintiff's claim arose was a "transact[ion] of business" under CPLR 302(a)(1), which requires plaintiff to establish that Phillips conducted purposeful activity within the state, and that a substantial relationship exists

¹At least one New York trial court recently considered the issue, and found that long-arm jurisdiction existed over a defamation action based on internet communications. See Intellect Art Multimedia, Inc. v. Milewski, 24 Misc3d 1248(A) (Sup Ct, NY Co 2009) (holding that plaintiff alleged sufficient facts to show that defendant transacts business in New York through its "Ripoff Report" website, "given the high level of interactivity of the website, the undisputed fact that information is freely exchanged between website users," defendants' "alleged role in manipulating user's information and data," and defendant's "solicitation of companies and individuals to 'resolve' the complaints levied against them on the Ripoff Report").

Other recent cases have considered the issue of long-arm jurisdiction and the internet, but do not involve defamation claims. See e.g. Grimaldi v. Guinn, 72 AD3d 37 (2nd Dept 2010) (in breach of contract action, defendant's passive website alone did not provide basis for long arm jurisdiction, but defendant had other contacts with New York that were sufficient to confer jurisdiction); Zottola v. AGI Group, Inc., 63 AD3d 1052 (2nd Dept 2009) (in breach of contract action, Florida defendant who sold boat to New York plaintiff, had sufficient minimum contacts with New York for long-arm jurisdiction); CRT Investments v. Merkin, NYLJ, May 11, 2010, p 40, col 3 (Sup Ct, NY Co) (in fraud action, court considered defendant's e-mails and website, in determining that the totality of defendant's contacts with New York did not support any finding that it projected itself into New York to indicate the transaction of business under CPLR 302 [a][1]); LB International Inc. v. Rainmaker Liquidators Inc., NYLJ, May 4, 2010, p 28 col 1 (Sup Ct, Suffolk Co) (in breach of contract action, defendant's website alone, which provided information about its products but did not permit consumer to order products online, was insufficient to confer long-arm jurisdiction under CPLR 302 [a][1]).

between that activity and the defamation claim asserted against him. See Ehrenfeld v. Bin Mahfouz, supra. In other words, were Phillips' internet postings and writings the kind of activity by which he "purposefully availed himself of the privilege of conducting activities" within New York, thus invoking the benefits and protections of New York laws. Best Van Lines, Inc. v. Walker, supra at 253 (quoting McKee Electric Co. Inc. v. Rauland-Borg Corp., supra at 382); accord Kreutter v. McFadden Oil Corp., 71 NY2d 460, 467 (1988).

In its memorandum in opposition to the motion, plaintiff cites Best Van Lines, Inc. v. Walker, supra, and acknowledges that the posting of defamatory material on a website accessible in New York does not, without more, constitute "transacting business" in New York for the purposes of CPLR 302(a)(1), and that an out-of-state resident does not subject himself to jurisdiction in New York by simply maintaining a website visited by New Yorkers. Plaintiff contends, however, that this case involves more than mere business transactions incident to establishing a website, because Phillips "maintains his website along with advertisements from *Google.*" Specifically, plaintiff argues that Phillips' website "provides a means to transact business on the Internet on a daily basis because *Google* is directing users of their search engine" to his website, and therefore, "business 'arises from' searches from consumers who could be looking for accommodations or to consume in New York and simultaneously such consumers could observe defendant's false and defamatory articles." Plaintiff also argues that Phillips is "doing business projected at New York . . . through his website indirectly," since advertisements of New York businesses are "positioned on his website page [and] are adjacent to the articles" about plaintiff. Plaintiff further contends that Phillips' allegedly defamatory words can be found

on other websites, including the website of a “radio internet show in New York” known as the Leonard Lopate Show on WNYC, and that Phillips transacted business in New York by “intentionally appearing” on that “radio internet show within New York.”²

Plaintiff’s contentions are without merit, as neither the appearance of the Google ads on Phillips’ website, nor the presence of Phillips’ comments on the Leonard Lopate Show website, is sufficient to constitute the “transaction of business” within the meaning of CPLR 302(a)(1).

First, as to the Google advertisements, Phillips submits a reply affidavit explaining that in June 2005, he “signed up for ‘Google AdSense,’ a program that inserts ads from Google’s ad server on users’ websites,” and involves the placement of a “piece of code” on his website to designate where the ads were to appear. Phillips states that he has no control over which ads appear on his website, he does not know how Google chooses which ads to display, and he has “never selected any particular ad for display.” He also states that “[t]o the best of my knowledge, Google AdSense pays its participants based on the number of views or ‘clicks’ advertisers receive from their ads,” and in exchange for allowing the Google ads in his website, he has been paid approximately \$100 over the past few years. Phillips further states that Google is located in Mountain View, California.

Second, as to plaintiff’s allegations that Phillips’ “appeared” on the Leonard Lopate radio show, Phillips states that in August 2008, “while searching for information about Gary Null on my home computer, in Virginia, I came across a radio broadcast and related comments on the website of the Leonard Lopate Show,” and “placed a comment on the comment section

²Notably, the complaint does not include any allegations of defamation based on the comments Phillips posted on the Leonard Lopate program website.

expressing my views on Gary Null's academic credentials." Phillips states that he "did not appear on the Leonard Lopate program" and he did not "travel to New York at any time to conduct 'research' about Gary Null."

Based on the foregoing, it is clear that Phillips did not engage in any activity indicating that he "purposefully directed" his activities toward New York. The nature of Phillips' comments on his personal website does not suggest that they were specifically targeted to New York viewers, as opposed to a nationwide audience. See Best Van Lines, Inc. v. Walker, supra at 253. The fact that the website contains advertisements from Google does not alter that conclusion, as Phillips has no control over the random selection of advertisements appearing on his website, and those advertisements are not strictly limited to companies located in New York. See Rescuecom Corp. v. Hyams, 477 FSupp2d 522, 530 (NDNY 2006) (fact that defendant's website contained links to other websites selling merchandise or websites of plaintiff's competitors, "does not aid plaintiff in making a prima facie showing that defendant purposefully availed himself of the privilege of transacting business in New York"). Although Phillips received a small fee or commission for permitting Google to post advertisements on his website, it cannot be disputed that essential nature of his website is informational, and not commercial. See id. In any event, even if the appearance of the Google advertisements on Phillips' website were enough to constitute the transaction of business under CPLR 302(a)(1), plaintiff cannot satisfy the "arises from" prong of CPLR 302(a)(1), as the advertisements bear no relationship or "articulable nexus" to the defamation alleged in this action. Best Van Lines, Inc. v. Walker, supra; accord Talbot v. Johnson Newspapers Corp., 71 NY2d 827, 829; Copp v. Ramirez, supra.

Furthermore, contrary to plaintiff's assertion, Phillips did not "appear" on the Leonard Lopate "internet radio program," which originates from New York, but simply used his home computer to post a comment on the radio program's website. As noted above, the making of allegedly defamatory statements outside New York about a New York resident, does not without more, provide a basis for personal jurisdiction under CPLR 302(1)(a), even if those statements are posted on a website originating from New York and accessible to New York readers. See Best Van Lines, Inc., *supra* at 253; Competitive Technologies, Inc. v. Pross, *supra*. The fact that Phillips' statements are accessible from other websites does establish that they were posted in connection with some business activity. As with the report in Best Van Lines, Inc. v. Walker, *supra* and the column in Realuyo v. Villa Abrille, *supra*, the accessibility of Phillips statements from other websites, "arises solely from the aspect of the website from which anyone – in New York or throughout the world – could view and download the allegedly defamatory" material. Best Van Lines, Inc. v. Walker, *supra* at 253 (quoting Realuyo v. Villa Abrille, *supra*).

Finally, plaintiff has not made a sufficient showing to be entitled to jurisdictional discovery pursuant to CPLR 3211(d). While plaintiff asserts that there are "essential jurisdictional facts that are not yet known," it does not appear from the complaint or plaintiff's opposition papers that "facts essential to justify opposition may exist, but cannot now be stated." Copp v. Ramirez, *supra* at 31-32 (quoting Findlay v. Duthuit, 86 AD2d 789, 790-791 [1st Dept 1982]).

Thus, since plaintiff has failed to establish a basis under CPLR 302(a)(1) for exercising personal jurisdiction over defendant Lee Phillips, the complaint must be dismissed. In light of

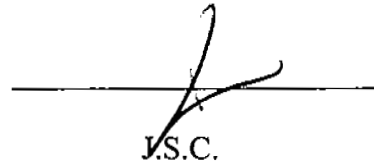
this determination, the court need not consider the additional grounds for dismissal raised in defendant's motion papers.

Accordingly, it is hereby

ORDERED that defendant Lee Phillips' motion to dismiss the complaint is granted, the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

DATED: June 28, 2010

ENTER:



J.S.C.

HON. JOAN A. MADDEN

J.S.C.

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK