

EVAN K. AIDMAN, Plaintiff, v. MARK S. NELSON d/b/a LAW OFFICES OF MARK S. NELSON,
Defendant.
CIVIL ACTION NO. 99-CV-1833

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1999 U.S. Dist. LEXIS 16459

October 14, 1999, Decided

DISPOSITION: [*1] Defendant's Motion to Dismiss Complaint or in Alternative for Change of Venue (docket entry # 3) DENIED WITHOUT PREJUDICE.
CASE SUMMARY

PROCEDURAL POSTURE: Defendant moved to dismiss the complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) or in the alternative for change of venue pursuant to 28 U.S.C.S. § 1406(a) in an action alleging copyright infringement based on the unauthorized use of copyrighted material on an Internet website.

OVERVIEW: Defendant disputed personal jurisdiction or, in the alternative, venue in an action alleging copyright infringement based on the unauthorized use of copyrighted material on an Internet website. The court held that its jurisdiction over the defendant depended upon whether the defendant had the requisite minimum contact with the state in which the district court sat. Since the parties presented widely divergent characterizations of the defendant's conduct with respect to his use of the website, the court was unable to conclude that it had jurisdiction of the defendant and permitted limited discovery on the issue of personal jurisdiction. Since proper venue was dependent upon personal jurisdiction, which had not yet been determined, the court declined to reach the question of venue.

OUTCOME: Motion to dismiss was denied without prejudice to permit limited discovery to determine whether defendant's use of a website established the minimum contact with the forum state to provide personal jurisdiction; alternative motion for change of venue depended on personal jurisdiction and was thus also denied without prejudice.

CORE TERMS: website, personal jurisdiction, discovery, user, site, metatags, exercise of jurisdiction, amenable, venue, engine, Fifth Amendment, personam jurisdiction, nonresident, frivolous, keyword, comport, personal injury, docket entry, interactivity, reassertion, requisite, dialogue, virtual

CORE CONCEPTS -

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: Personal Jurisdiction

Where a federal district court has jurisdiction over the subject matter pursuant to the federal-question statute, 28 U.S.C.S. § 1331, the court's personal jurisdiction over a defendant depends on the presence of two conditions: first, if the requirements of the Due Process Clause of U.S. Const. amend. V must be satisfied; and second, the defendant must be amenable to service of summons.

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: Constitutional Limits

The requirements of the Due Process Clause of U.S. Const. amend. V are satisfied only if the defendant has sufficient minimum contacts with the relevant forum such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.

Civil Procedure: Pleading & Practice: Service of Process

Unless a federal statute authorizes nationwide service, a defendant ordinarily is amenable to service of process only if the defendant could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located. Fed. R. Civ. P. 4(k)(1)(A).

Civil Procedure: Pleading & Practice: Service of Process

Pennsylvania has a long-arm statute, which, by its terms, reaches as many extraterritorial defendants as the United States Constitution will allow. 42 Pa. Cons. Stat. Ann. § 5322(b).

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: Constitutional Limits

The Due Process Clause of U.S. Const. amend. XIV limits the power of a state court to exert personal jurisdiction over a nonresident defendant. The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established minimum contacts in the forum State.

Cyberlaw: Jurisdiction: Constitutional Requirements

Where the assertion of jurisdiction is premised solely on a nonresident defendant's operation of an Internet website, courts generally examine the level of interactivity on a particular website.

Cyberlaw: Jurisdiction: Constitutional Requirements

The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.

Cyberlaw: Contracts: Service Providers

Metatags are code intended to describe the contents of a website. "Description metatags" are intended to describe the website; "keyword metatags," at least in theory, contain keywords relating to the contents of the website. The more often a term appears in the metatags and in the text of a website, the more likely it is that a search engine will steer an Internet user who has used the term in a search toward the website.

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: Personal Jurisdiction

Where the plaintiff's claim is not clearly frivolous, the district court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging its burden of demonstrating contacts with the forum state sufficient to give the court in personam jurisdiction.

Copyright Law: Infringement: Jurisdiction & Venue

Venue over a copyright claim is governed by 28 U.S.C.S. § 1400 (a), which states, in relevant part: Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights may be instituted in the district in which the defendant or his agent resides or may be found. 28 U.S.C.S. § 1400(a)'s "may be found" clause has been interpreted to mean that a defendant is amenable to personal jurisdiction in a particular forum.

Civil Procedure: Venue & Choice of Forum: Change of Venue in Federal Courts

A district court may transfer a case pursuant to 28 U.S.C.S. § 1406(a) even if it does not have personal jurisdiction over the defendant.

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For MARK S. NELSON, DEFENDANT: LEIGH A. JERNER, LAW OFFICES OF NANCY D. WASSER, PHILA, PA USA.

JUDGES: BRUCE W. KAUFFMAN, J.

OPINIONBY: BRUCE W. KAUFFMAN

OPINION: MEMORANDUM & ORDER

Kauffman, J.

October 14, 1999

Before the Court is "Defendant' Motion to Dismiss Complaint, or in the Alternative for a Change of Venue" (docket entry # 3). For the reasons set forth below, the motion is denied without prejudice to its reassertion on a more fully developed record, and the parties may conduct limited discovery on the issue of personal jurisdiction.

BACKGROUND

Both Plaintiff and Defendant are attorneys who practice personal injury law. Plaintiff practices in Pennsylvania; Defendant practices in California. Plaintiff is the author of, and owns a copyright in, a book entitled *Winning Your Personal Injury Claim*. He maintains a website located at <http://www.legalaidman.com>, which provides information about, among other things, his legal[*2] practice and his book. In the Complaint, Plaintiff alleges that Defendant accessed Plaintiff' s website, copied information, including excerpts from *Winning Your Personal Injury Claim*, and then published it on his own website, located at <http://www.msnlaw.com>. Based on this alleged conduct, Plaintiff asserts causes of action for copyright infringement and unfair competition.

LEGAL DISCUSSION

Defendant moves to dismiss this action for lack of in personam jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). Alternatively, Defendant argues that venue is not proper in this district and requests that the matter therefore be transferred to a district in California. See 28 U.S.C. § 1406(a).

A. Personal Jurisdiction

Where a federal district court has jurisdiction over the subject matter pursuant to the federal-question statute, 28 U.S.C. § 1331, the court' s personal jurisdiction over a defendant depends on the presence of two conditions: first, the requirements of the Due Process Clause of the Fifth Amendment must be satisfied; and second, the defendant must be amenable to service of summons. See *Omni Capital Int' l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 98 L. Ed. 2d 415, 108 S. Ct. 404 (1987).[*3] With respect to the first condition, the requirements of the Due Process Clause of the Fifth Amendment are satisfied only if the defendant has sufficient "minimum contacts" with the relevant forum such that the exercise of jurisdiction "does not offend ' traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)).

With respect to the second condition, unless a federal statute authorizes nationwide service, see Fed. R. Civ. P. 4(k)(1)(D), (which the Copyright Act does not, see 17 U.S.C. §§ 101 - 1332), a defendant ordinarily is amenable to service of process only if the defendant "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Here, the district court is located in Pennsylvania. Pennsylvania has a long-arm statute, which, by its terms, reaches as many extraterritorial defendants as the United States Constitution will allow. See 42 Pa. Cons. [*4] Stat. Ann. § 5322(b). The Court therefore must look to the Due Process Clause of the Fourteenth Amendment, which "limits the power of a state court to exert personal jurisdiction over a nonresident defendant. 'The constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process ' remains whether the defendant purposefully established ' minimum contacts' in the forum State.' " *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 108-09, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987) (alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985) (quoting *International Shoe Co.*, 326 U.S. at 316)).

Defendant contends that he does not have the requisite minimum contacts with Pennsylvania and that the Court' s exercise of jurisdiction therefore would not comport with due process. The parties agree that where, as here, the assertion of jurisdiction is premised solely on a nonresident defendant' s operation of an Internet website, courts generally examine the level of "interactivity" on a particular website:

The[*5] likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). At the opposite end are situations where a defendant has

simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. E.g. *Bensusan Restaurant Corp., v. King*, 937 F. Supp. 295 (S.D.N.Y.1996). The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these[*6] cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. E.g. *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D.Mo.1996).

Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (quoted in *Molnlycke Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 64 F. Supp. 2d 448, 1999 U.S. Dist. LEXIS 13678, 1999 WL 695579, at *3 (E.D. Pa. 1999) (also citing *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 724-26 (E.D. Pa. 1999) (looking to same framework); *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 638 (E.D. Pa. 1998) (same); *Desktop Tech., Inc. v. Colorworks Reprod. & Design, Inc.*, 1999 U.S. Dist. LEXIS 1934, Civ. A. No. 98-5029, 1999 WL 98572, at *3 (E.D. Pa. Feb. 25, 1999) (same)).

The parties present widely divergent characterizations of <http://www.msnlaw.com> and of Defendant's conduct with respect to the website. On the one hand, Plaintiff contends that "Defendant, through [<http://www.msnlaw.com>], engages in a virtual dialogue[*7] with prospective clients, asking questions and following up on them with requests for detail," and that Defendant has used "metatags" "to increase the likelihood that an Internet user who entered a search request on an Internet search engine, seeking a Pennsylvania personal injury lawyer, would be directed to the [website]." n1 On the other hand, Defendant contends that he never received any inquiries or business through <http://www.msnlaw.com>, never implemented the technology to engage in a "virtual dialogue" with perspective clients, never advertised the website, never held out the website to the general public for access, and never made the website "public to search engines." Defendant further contends that he did not create, own, maintain, or supervise <http://www.msnlaw.com>; he claims that the website was "under the control and administration of others, and had not been approved and/or adopted by Defendant." He has submitted affidavits to support his contentions.

n1 Metatags are code intended to describe the contents of a website. "Description metatags" are intended to describe the website; "keyword metatags," at least in theory, contain keywords relating to the contents of the website. The more often a term appears in the metatags and in the text of a website, the more likely it is that a search engine will steer an Internet user who has used the term in a search toward the website. See *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1045 (9th Cir. 1999).

[*8]

On the present record, the Court cannot conclude that it has personal jurisdiction over Defendant. Plaintiff, having anticipated that the Court might not find the requisite minimum contacts between Defendant and the forum, requests limited discovery on the issue of personal jurisdiction. Defendant opposes this request. Because Plaintiff's jurisdictional claim is not "clearly frivolous," the Court will permit limited discovery on this issue. *Compagnie Des Bauxites de Guinee v. L' Union Atlantique S.A. d' Assurances*, 723 F.2d 357, 362 (3d Cir. 1983) ("Where the plaintiff's claim is not clearly frivolous, the district court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging [its burden of demonstrating contacts with the forum state sufficient to give the court in personam jurisdiction.]). Accordingly, the motion to dismiss for lack of jurisdiction is denied without prejudice.

B. Venue

Defendant also argues that the Court should transfer this case to a district in California because this district is not the proper venue for this action. n2 Venue over Plaintiff's copyright claim is governed by 28 U.S.C. § 1400[*9] (a), which states, in relevant part: "Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights . . . may be instituted in the district in which the defendant or his agent resides or may be found." "Section 1400(a)'s 'may be found' clause has been interpreted to mean that a defendant is amenable to personal jurisdiction in a particular forum." *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441, 445 (7th Cir. 1993) (citing cases); see also *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F. Supp. 636, 638 (E.D. Pa. 1998); *Linzer v. EMI Blackwood Music, Inc.*, 904 F. Supp. 207, 215 (S.D.N.Y. 1995); *Advideo, Inc. v. Kimel Broadcast Group, Inc.*, 727 F. Supp. 1337, 1341 (N.D. Cal. 1989); *Crosfield Hastech, Inc. v. Harris Corp.*, 672 F. Supp. 580, 588 (D.N.H. 1987); *Donner v. Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1234 (E.D. Pa. 1979).

n2 A district court may transfer a case pursuant to 28 U.S.C. § 1406(a) even if it does not have personal jurisdiction over the defendant. See *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466-67, 8 L. Ed. 2d 39, 82 S. Ct. 913 (1962); *United States v. Berkowitz*, 328 F.2d 358, 361 (3d Cir. 1964).

[*10]

Because the Court declines to reach the question of personal jurisdiction at this time, it also declines to reach the question of venue. Accordingly, the motion to transfer is denied without prejudice. An Order follows.

ORDER

AND NOW, this 14th day of October, 1999, upon consideration of "Defendant' s Motion to Dismiss Complaint, or in the Alternative for a Change of Venue" (docket entry # 3), Plaintiff' s Response, and Defendant' s Reply, it is ORDERED that:

1. The parties may conduct limited discovery until November 15, 1999, on the issue of personal jurisdiction.
2. Defendant' s Motion is DENIED WITHOUT PREJUDICE to reassertion after November 15, 1999.

BY THE COURT:

BRUCE W. KAUFFMAN, J.