

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 07-60983-CIV-SEITZ/McALILEY

NATIONWIDE RELOCATION SERVICES,
INC.,

Plaintiff,

vs.

TIM WALKER, CONSUMERS FIRST CORP.,
SHARON BAYOLO, FARRAH LEIGH
WANNER, DIANE last name unknown, and
DOES 1 through 150 inclusive,

Defendants.

DEFENDANTS TIM WALKER AND CONSUMERS FIRST CORP.'S
MOTIONS TO DISMISS AMENDED COMPLAINT
FOR LACK OF PERSONAL JURISDICTION

Defendants TIM WALKER (“Mr. Walker”) and CONSUMERS FIRST CORP. (“Consumers First”) by and through their undersigned counsel and pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, respectfully request that this Court dismiss Plaintiff’s Amended Complaint [D.E. 32] for lack of personal jurisdiction. In support of their Motion, Defendants state the following:

1. On July 11, 2007, Plaintiff Nationwide Relocation Services, Inc. (“Plaintiff”) filed this action in the United States District Court for the Southern District of Florida against Mr. Walker and Consumers First (collectively, the “Defendants”), along with Farrah Wanner, Sharon Bayolo and numerous unidentified others.

2. In response to Defendant Wanner’s Motion to Dismiss, Plaintiff filed its

Amended Complaint [D.E. 32] on September 12, 2007.

3. This Court lacks personal jurisdiction over Mr. Walker as he is without minimum contacts with this State.

4. This Court lacks personal jurisdiction over Consumers First because it is without minimum contacts with this State.

5. Plaintiff's Amended Complaint should therefore be dismissed.

MEMORANDUM OF LAW

Statement of Facts

Plaintiff is the self-described "largest residential moving and corporate relocation broker in the country." Compl.¹ ¶ 36. It is a Florida corporation having its principal office in Ft. Lauderdale, Florida. Compl. ¶ 12. Since at least 2000, Plaintiff has brokered contracts between consumers and moving companies. *Id.* Plaintiff alleges that its name has come to signify it as a preeminent and high quality moving services broker. Compl. ¶ 83.

Plaintiff alleges herein that the Defendants have collectively harmed it through their activities on the website www.movingscam.com. Defendant Walker is alleged to be the principal owner, primary content provider and primary decision maker for the site. Compl. ¶ 13. Defendant Consumers First is also a business operator and the registrant of the movingscam.com website. Compl. ¶ 18. Defendants Bayolo, Ms. Wanner and "Diane" are alleged to be contributors and moderators, among other things. The roles of "Does 1 through 150, inclusive" are not otherwise specified. Plaintiff claims generally that the website uses its name / service mark without permission, defames it, interferes with its potential customers

and otherwise constitutes false advertising.

Plaintiff's Complaint attempts to invoke the Lanham Act, 15, U.S.C. § 1125, as to Count I (false advertising; conspiracy) and II (infringement of its service mark; conspiracy). The remaining Counts III (defamation; conspiracy) and IV (tortious interference with advantageous business relationships; conspiracy) travel under Florida common law. Plaintiff asserts jurisdiction for the Lanham Act claims based on federal question jurisdiction (28 U.S.C. § 1331 & 1338(a) & (b)) and asserts that supplemental jurisdiction (under 28 U.S.C. § 1367) exists for the State law claims. Compl. ¶ 2.

Argument

This Court should dismiss Plaintiff's Amended Complaint for lack of personal jurisdiction over Mr. Walker and Consumers First. Neither has the requisite minimum contacts with this State.

I. The Exercise Of Personal Jurisdiction Over Defendants Walker And Consumers First Would Run Afoul Of The Requirement That Contacts With The Forum State Be "Purposeful" Such That They Would Have Fair Warning That They Might Be Subject To Litigation In Florida.

Legal Standard

Under Florida law, Plaintiff has the ultimate burden of proving personal jurisdiction. *See Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 627 (11th Cir. 1996). When a defendant raises through evidence a meritorious challenge to personal jurisdiction, the plaintiff must then prove jurisdiction by putting forth his own evidence. *See Sculptchair*, 94 F.3d at 627 (citing *Jet Charter Serv., Inc. v. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1990),

¹ Paragraphs of the Amended Complaint are referenced herein as "Compl. ¶ ____".

cert. denied, 499 U.S. 937, 111 S.Ct. 1390, 113 L.Ed.2d 447 (1991)).

Determination of personal jurisdiction requires a two-part inquiry. *See Future Tech. Today, Inc. v. OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir. 2000). First, the state statute governing personal jurisdiction must be satisfied. *Id.* The extent of Florida’s long-arm statute will be construed according to Florida state court precedent.² *Sculptchair*, 94 F.3d at 627. Thereafter, if the requirements of the long-arm statute are satisfied, the court must inquire as to “whether sufficient minimum contacts exist between the defendants and the forum state so as to satisfy ‘traditional notions of fair play and substantial justice’ under the Due Process Clause of the Fourteenth Amendment.” *Sculptchair*, 94 F.3d at 626 (quoting *International Shoe v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

Determination of minimum contacts involves its own three-part test. First, the contacts must be related to the plaintiff’s cause of action. Next, the contacts must involve some act by which the defendant purposefully avails itself of the privilege of conducting activities in this State. Last, the defendant’s contacts must be such that it would reasonably anticipate being haled into court there. *Baker Electronics, Inc. v. Pentar Systems, Inc.*, 219 F.Supp.2d 1260, 1264 (M.D. Fla. 2002). The foreseeability that is critical to the due process analysis is “that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

² Defendants recognize that under Florida’s long-arm statute, commission of a tort outside of Florida that causes injury within Florida subjects the tortfeasor to personal jurisdiction under Fla. Stat. § 48.193(1)(b). *See Stateline Power Corp. v. Kremer*, 404 F.Supp.2d 1373 (S.D. Fla. 2005). Instead, Defendants will follow the reasoning of *Instabook* which assumed that the “tortious conduct” portion of the long-arm statute was satisfied but nevertheless demonstrated that the exercise of personal jurisdiction in these circumstances did

Although Plaintiff focuses much on the interactivity of the movingscam.com website, the influence of that characteristic on the due process analysis is unsettled. The most-cited case in this area is Zippo Mfg Co. v. Zippo Dot Com, Inc., 952 F.Supp 1119 (W.D. Pa. 1997), which espoused a “sliding scale” of jurisdiction based upon the website’s “interactivity”. Recently, the Middle District of Florida recognized that Zippo’s appeal has not been universal. Instabook Corp. v. Instantpublisher.com, 469 F.Supp.2d 1120, 1125 (M.D. Fla. 2006). The court agreed with observations of the Maryland District Court in Shamsuddin v. Vitamin Research Products, 346 F.Supp.2d 804 (D. Md. 2004), which noted criticism of Zippo’s emphasis on interactivity. The internet, Shamsuddin ruled, “does not warrant a departure from the well-worn path of traditional personal jurisdiction analysis.” Id. at 811. While interactivity may have some bearing on jurisdiction –depending upon the facts– it is not determinative. Id. at 113. Interactivity is only important to the extent that it reflects commercial activity purposefully targeting residents of the forum state or availing of the benefits of the forum state. Id. Shamsuddin concluded that two sales to forum state residents and maintenance of a commercial website were not contacts of the kind and nature that justify the exercise of personal jurisdiction. Id. Following Shamsuddin, the Instabook Court found that two instances of sales to Florida residents did not support personal jurisdiction over the Tennessee website operators. Instabook, 469 F.Supp.2d at 1126.

Important to the Instabook Court was the website’s conditions of use which provided for exclusive jurisdiction in Shelby County, Tennessee. Id. While this provision did not dispose of the Due Process analysis, it was “far from irrelevant.” Id. Even courts following

not comport with due process.

the Zippo analysis, Instabook noted, endorsed the use of such agreements as a means for website operators to limit their amenability to suit in foreign jurisdictions. Id. The court found that exercise of jurisdiction was therefore improper where there were only 2 sales to Florida residents from the interactive website, there was no indication of targeting Florida residents and use was conditioned on an agreement to litigate in Tennessee. Id. at 1127. Exercise of jurisdiction would have run afoul of the requirement that the contacts be “purposeful” such that residents would have fair warning that they might be subject to litigation in the forum. Id.

Plaintiff’s Stated Basis for Personal Jurisdiction

In the instant case, Plaintiff asserts the following bases for personal jurisdiction over Mr. Walker:

3) This Court has personal jurisdiction over Defendant Tim Walker (“Walker”), individually and as a possible sole proprietor, partner, or joint venture partner with the other Defendants in the business operating under the name MovingScam.com (the “MovingScam.com Business”) because all claims for relief in this action against him arise from doing one or more of the following acts under Section 48.193(1), Florida Statutes:

- (a) operating, conducting, engaging in, or carrying on a business or business venture in Florida,
- (b) having an agent, partner, or joint venture partner who resides in Florida, or
- (c) committing a tortious act within Florida.

4) As more fully set forth below in paragraphs 13 through 17 of this Complaint, this Court additionally has personal jurisdiction over Defendant Walker, individually and as a sole proprietor, partner, or joint venture partner with the other Defendants in the MovingScam.com Business under Section 48.193(2), Florida Statutes, because he is engaged in substantial and not isolated activity within Florida.

Paragraphs 13 through 17 of the Amended Complaint allege in generic terms that Mr. Walker sold products to Florida residents, discussed Florida moves and Florida movers with Florida residents, defamed Plaintiff in Florida and infringed on Plaintiff's mark in Florida. Similar generic charges are made against Consumers First. Plaintiff also believes that as part of the website's business Mr. Walker attended a Hard Rock Extravaganza in Orlando, Florida last year and –in 2004– traveled to Miami, Florida to pursue a claim against another moving company.

Walker's Affidavit

Walker resides in Warsaw, Illinois, within the geographic boundaries of the District Court for the Central District of Illinois, Peoria Division. See the Affidavit of Timothy Walker (hereinafter, the "Walker Aff.") at ¶ 2. Consumers First is a Delaware Corporation with its principal place of business in Des Moines, Iowa [Compl. ¶ 18; Walker Aff. ¶ 10], within the jurisdiction of the District Court for the Southern District of Iowa, Davenport Division.

Neither Mr. Walker nor Consumers First:

- have any property, bank accounts, stores, investments, warehouses, employees, investors, or partners in Florida. Walker Aff. ¶ 12.
- have ever been qualified to do business in Florida. Walker Aff. ¶ 13.
- have ever paid sales, use, or business tax in Florida. Walker Aff. ¶ 14.
- solicit business via television or radio, or purchase advertising space in any Florida newspaper. Walker Aff. ¶ 15.
- solicits non-members by email or telephone in Florida. Walker Aff. ¶ 16.

Mr. Walker did not visit Orlando, Florida in 2006, as Plaintiff alleged. Walker Aff. ¶ 6. Mr. Walker's 2004 trip to Miami was not in connection with the movingscam.com website. Walker Aff. ¶ 7. Neither his nor, to his knowledge, any other defendant's interactions with the movingscam.com website were in the Southern District of Florida. Walker Aff. ¶ 4-5.

The Walker Affidavit establishes that neither Mr. Walker nor Consumers First were "operating, conducting, engaging in, or carrying on a business or business venture in Florida" or "having an agent, partner, or joint venture partner who resides in Florida" as alleged in paragraph 3(a) and (b) of the Amended Complaint. For the jurisdictional allegations that remain, this Court must review the specific activities alleged to establish jurisdiction.

Specific Activities on the Website

The movingscam.com website is professedly "dedicated to providing solid, impartial consumer education and to working for better consumer protections in the moving industry." Even a brief review of the website demonstrates that its overarching purpose is the education of consumers and the betterment of the moving industry.

Because Plaintiff's causes of action are premised solely on the Defendants' activities on the website, a specific review of those activities is required. Closer scrutiny demonstrates that Plaintiff's claim for personal jurisdiction rests entirely on two (2) lost Florida clients, one (1) Florida message post and one (1) unrelated trip to Florida three years ago. Mr. Walker and Consumers First would not be and should not reasonably expect to be haled into court in Florida based on these contacts. This is especially true since the website conditions use on exclusive jurisdiction in Iowa.

Terms of Use

Use of the movingscam.com website is conditioned upon the acceptance of its Terms of Service. Walker Aff. ¶ 17. Links to the Terms of Service can be seen at the bottom of each of its pages. In fact, several of the screen shots Plaintiff attached to the original complaint show the link to the Terms of Service. A true and correct copy of the Terms of Service is attached to the Walker Affidavit as Exhibit A.

The Terms of Service posed on www.movingscam.com expressly limit the venues in which actions by site users may be undertaken. Walker Aff. ¶ 19. The mandatory terms provide:

Choice of Law

This Agreement shall be constructed and controlled by the laws of Iowa, without regard to its conflict of law provisions. Any dispute arising here under will be governed by the laws of Iowa and brought under jurisdiction of the courts of Black Hawk County, Iowa. Furthermore, each User agrees to jurisdiction by federal courts of Iowa.

Further, no party is permitted access to the www.movingscam.com message boards unless they first agree to be bound by the Terms of Service. If a party attempts to visit the message board, either through direct navigation on the www.movingscam.com website or through links indexed by search engines, such as Google, access is denied unless the user first agrees to the site's "clickwrap" agreement. Walker Aff. ¶ 18. A true copy of that page is attached to the Walker Affidavit as Exhibit B. As in Instabook, the mandatory venue provision of the clickwrap agreement clearly led Mr. Walker and Consumers First to reasonably believe that they would not be haled into court in any jurisdiction other than Iowa in connection with their website activities.

Statements Made on the Website

Despite the website's Terms of use, Plaintiff alleges that Defendants have made defamatory statements about it to customers in Florida (Compl. ¶ 11(b)), caused Plaintiff to lose one Florida customer in January 2005 and another in February 2006 (Compl. ¶ 11(c)). Those same Florida consumers were also allegedly confused by the movingscam.com website. (Compl. ¶ 11(d)).

The alleged defamatory statements identified in the Amended Complaint break down as follows:

- ¶ 60 [as to Wanner] (a) regarding move from NY to CA;
- (b) regarding move from WI to Texas;
- (c) regarding move from NY to CA;
- (d) unspecified locale;
- (e) reply to question from CO.
- ¶ 61 [as to Walker] (a) regarding move from CA to NY;
- (b) regarding move from Ft. Lauderdale to Central FL;
- (c) unspecified, possibly IL;
- [d]³ Maine;
- [e] continuation of (b) above, but with 1/6/03 date; and
- [f] Texas, with 1/6/03 date⁴.
- ¶ 62 [as to Bayolo] (a) regarding move in Texas;
- (b) unspecified locale, possibly CA;
- (c) regarding move from CA to VA;
- (d) regarding move from DC to AL;
- (e) regarding move from NY to KY;
- (f) unspecified locale; and

³ For convenience of reference, letters have been assigned to the Amended Complaint's bullet point paragraphs which follow the lettered subparagraphs.

⁴ If this date is accurate, it is outside of the 4 year statute of limitations period.

- (g) regarding a Michigan company.
- ¶ 63 [as to “Diane”] (a) regarding NY, GA & OH companies in response to CA poster’s question;
- (b) regarding NY intrastate move;
- (c) regarding move from Texas to VA;
- (d) regarding move from CA to NV;
- (e) identical entry to (a) above, but with 10/6/03 date.⁵

The portions of these posts (and those that follow) showing the purported state nexus appear as exhibits to the Walker Affidavit ¶¶ 21-25.

The Defendants’ enumerated endorsements of Plaintiff’s competitors break down as follows:

- ¶ 66 (a) regarding move from CA to NC (Wanner);
- (b) response to question regarding CA (Wanner);
- (c) regarding move from DC or NY to CA (“Diane”);
- [d] regarding move from CA to NC (not authored by any Defendant);
- [e] regarding move from RI to CO (Walker); and
- [f] regarding move from RI to CO (Bayolo).

Therefore, of the more than 30,300⁶ posts admittedly available to Plaintiff, it has identified no allegedly defamatory statement seemingly directed into Florida, other than that quoted at ¶ 61(b) and continued at ¶ 61[e]. Further, Plaintiff has identified no statement laudatory of Plaintiff’s competitors directed into Florida. From Plaintiff’s own enumeration of wrongs, it is clear that a substantial part of the events or omissions giving rise to its claim did *not* occur in the Southern District of Florida.

⁵ It is believed that this date is in error because it corresponds to the date “Diane” purportedly joined the forum.

⁶ (Walker – 3,300 [¶ 13]; Bayolo – 12,300 [¶ 21]; Wanner – 2,200 [¶ 25]; and “Diane” – 12,500 [¶ 30]).

VII. Conclusion.

The paucity of Florida contacts coupled with the affirmative steps taken to avoid litigation in unknown forums demonstrates that the exercise of personal jurisdiction over Mr. Walker and Consumers First does not comport with due process. Neither Mr. Walker nor Consumers First have minimum contacts with Florida. In light of the exclusive venue provisions of the website, neither Mr. Walker nor Consumers First could reasonably expect to be haled into court in Florida by virtue of their activities on the website. Just as with Instabook and Shamsuddin, the exercise of personal jurisdiction under these circumstances runs afoul of due process.

WHEREFORE, Defendants TIM WALKER and CONSUMERS FIRST CORP. move for an order dismissing the Amended Complaint for lack of personal jurisdiction.

DATED: October 5, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 5, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified as follows, in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing:

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