

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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CAMBRIDGE WHO'S WHO
PUBLISHING, INC.,
Plaintiff,

-against-

MEMORANDUM & ORDER
06-CV-6590(JS)(ETB)

XCENTRIC VENTURES, LLC,
and EDWARD MAGEDSON,
Defendants.

-----X.

APPEARANCES:

For Plaintiff: Gary Ettelman, Esq.
Suzanne Fertig, Esq.
Ettelman & Hochheiser, P.C.
100 Quentin Roosevelt Blvd., Suite 401
Garden City, NY 11530

For Defendants:
Xcentric Ventures,
LLC: Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 North Central Avenue
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Edward Magedson: No Appearance.

SEYBERT, District Judge:

INTRODUCTION

On November 12, 2006, Cambridge Who's Who Publishing, Inc. ("Plaintiff"), a New York corporation, filed a diversity action against Xcentric Ventures, LLC ("Xcentric"), an Arizona limited liability company, and Edward Magedson ("Magedson") (collectively, "Defendants"). Pending before the Court is Defendants' motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(2), for lack of personal jurisdiction, and

Plaintiff's cross-motion for jurisdictional discovery. For the reasons stated below, Defendants' motion to dismiss is DENIED and Plaintiff is granted the limited jurisdictional discovery set forth below.

BACKGROUND

The Court deems the factual allegations in Plaintiff's Complaint as true for the purposes of this motion.

Plaintiff sells products and services aimed at professional networking. (Complaint ("Compl.") ¶ 22.) For example, Plaintiff annually publishes the "Cambridge Who's Who", a registry that compiles biographical and professional information for members of Plaintiff's organization. (Id. ¶ 22.) The registry is available on Plaintiff's website, located at the domain name "cambridgewhoswho.com." (Id. ¶ 24.)

Xcentric is the registered owner of the internet domain names "ripoffreport.com" and "badbusinessbureau.com". (Id. ¶ 18.) Both domain names lead to a website entitled "Rip-off Report" (hereinafter, the "Website."). (Id.) Magedson is the founder, editor, publisher, and promoter of the Website. (Id. ¶ 20.) The Website allows internet users to post reviews and complaints about various companies. (Id. ¶ 30.)

A keyword query of Plaintiff's name on an internet search engine will link users to negative reviews of Plaintiff's services on the Website. (Id. ¶¶ 26, 39.) Plaintiff alleges that

Defendants publish these reviews with reckless disregard for the truth of their contents, and the reports are "materially false, deceptive, and defamatory." (Id. ¶ 26.) According to Plaintiff, Defendants exercise editorial control over the content of the Website by adding additional language to the reports, publishing fictional reports with false names, and choosing to include a large number of negative comments while generally omitting positive comments. (Id. ¶ 31.) Plaintiff further alleges that Defendants charge businesses a fee when they request removal from the Website, and that Defendants will publish positive comments only after receiving a fee. (Id. ¶¶ 35-38.)

On June 12, 2006, Plaintiff commenced this action, alleging extortion, racketeering, defamation, trademark infringement, tortious interference with contract, tortious interference with prospective economic gain, and conspiracy to injure in trade, business, and reputation. Defendants moves to dismiss, alleging that this Court lacks personal jurisdiction because Xcentric is a resident of Arizona with no contacts with New York State.¹

¹Although not entirely clear, it appears that Defendants are also alleging that they are immune from suit because of the Communications Decency Act, 47 U.S.C. § 230 ("CDA"). While the CDA grants immunity to internet providers from *liability* for defamatory comments published by third parties, the Court is not aware of any case that interprets the CDA as providing immunity from *suit* altogether. See Energy Automation Sys. v. Xcentric Ventures, LLC, 06-CV-1079, 2007 U.S. Dist. LEXIS 38452 (D. Tenn. May 25, 2007) ("[B]ecause the [CDA] itself does not use the term

I. Standard of Review

"On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant." Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996). Where, as here, a defendant's 12(b)(2) motion is "made before any discovery, [a plaintiff] need only allege facts constituting a prima facie showing of personal jurisdiction." PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997); see also Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981). "In deciding a question of personal jurisdiction, district courts must conduct a two-part analysis, looking first to the state's long-arm statute and then analyzing whether jurisdiction comports with federal due process." Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L., 264 F.3d 32, 37 (2d Cir. 2001). The two part analysis is sequential; if the district court finds no basis for long arm jurisdiction, it need not engage in a federal due process analysis. Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).

"immunity" nor contain any provision regarding the exercise of personal jurisdiction, it could not withstand a construction that would bar the federal courts from exercising personal jurisdiction.") Moreover, the CDA only provides immunity from liability for defamatory comments published by third parties. Here, Plaintiff alleges that Defendants authored some of the defamatory comments.

II. Long Arm Jurisdiction

New York's long-arm statute creates personal jurisdiction over a non-domiciliary that transacts business within the state. See N.Y. C.P.L.R. § 302(a)(1). Courts have held that a defendant transacts business in New York when it "purposefully avails itself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." Novak v. Overture Servs., Inc., 309 F. Supp. 2d 446, 454 (E.D.N.Y. 2004) (quoting Citigroup Inc. v. City Holding Company, 97 F. Supp. 2d 549, 564 (S.D.N.Y. 2000)). Proof of a single transaction within New York is enough to confer jurisdiction, so long as the totality of the circumstances demonstrates that Defendants' actions were purposeful. Novak, 309 F. Supp. at 454. If a defendant has transacted business in New York, personal jurisdiction is only appropriate "where the cause of action arises out of the subject matter of the business transacted." Best Van Lines, Inc. v. Walker, No. 03-CV-6585, 2004 U.S. Dist. LEXIS 7830, at *6 (S.D.N.Y. May 4, 2004) (internal quotations omitted). Plaintiff argues that the Court has personal jurisdiction because Defendants transacted business in this state by maintaining an interactive website accessible to New Yorkers.

A. Transacting Business On The Internet

The concept of "transacting business" has changed dramatically since the internet boom. Courts must now determine

whether an out-of-state resident purposely availed itself of conducting business activities in New York by operating a website accessible to New Yorkers. See Best Van Lines, Inc. v. Walker, 490 F.3d 239, 254 (2d Cir. 2007); New Angle Pet Prods. v. MacWillie's Golf Prods., 06-CV-1171, 2007 U.S. Dist. LEXIS 46952 (E.D.N.Y. June 28, 2007); D'Amato v. Starr, 06-CV-2429, 2007 U.S. Dist. LEXIS 24154 (E.D.N.Y. Feb. 27, 2007). This question has become increasingly difficult because the internet is now accessible from nearly anywhere through portable devices, and websites are rarely targeted to residents of one state. Accordingly, courts must examine "the nature and quality of commercial activity that an entity conducts over the internet" when determining whether New York may exercise personal jurisdiction. Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000) (internal quotations omitted).

Courts have created a scale of varying internet activity to assist in determining whether a defendant transacted business in New York. At the lowest end of the spectrum are "passive" websites, which do "little more than make information available to those who are interested in it [and are] not grounds for the exercise [of] personal jurisdiction." Zippo Mfg. Co. v. Zippo DOT Com, 952 F. Supp. 1119, 1124 (D. Pa. 1997) (citing Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996)). At the opposite end are websites in which the defendant "clearly does

business over the Internet", and therefore is subject to personal jurisdiction in the forum state. Hsin Ten Enter. United States v. Clark Enters., 138 F. Supp. 2d 449, 456 (S.D.N.Y. 2000). In the middle are "interactive" websites, which disseminate information between the internet user in the forum state and the defendant in another state, and may confer jurisdiction "depending on the level and the nature of the exchange." Knight-McConnell v. Cummins, No. 03-CV-5035, 2005 U.S. Dist. LEXIS 11577, at *9 (E.D.N.Y. June 10, 2005).

The Website in the present action falls in the middle ground. Internet users and Defendant exchange information on the Website regarding business reports and consumer advocacy. Plaintiff argues that the level and nature of this exchange is sufficiently high to confer personal jurisdiction over Defendant. Among other things, the Website allows users to post and read reviews, purchase books, and recommends tactics for consumer complaints. The Website also advertises the "Rip-off Report Corporate Advocacy Program" (hereinafter, "CAPS"), under which Defendants will investigate negative reports, for a fee, and will "expose [reports] posted erroneously." (Compl. ¶ 22.)

After considering the various services and features provided through the Website, the Court holds that the reviews, book sales, and consumer advice do not satisfy the transaction of business test. However, Plaintiff has made a substantial showing

of personal jurisdiction premised on CAPS, which may constitute a transaction of business in New York. At this early stage, Plaintiff is entitled to jurisdictional discovery to establish whether this Court has personal jurisdiction over Defendants based upon this activity.

At the outset, "[a]lthough section 302(a)(1) does not exclude defamation from its coverage, 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." Best Van Lines, Inc. v. Walker, 490 F.3d 239, 250 (2d Cir. 2007). The transmittal of defamatory statements into New York, without more, will not constitute a transaction of business. See id.; D'Amato v. Starr, No. 06-CV-2429, 2007 U.S. Dist. LEXIS 24154, at *15 (E.D.N.Y. Feb. 27, 2007) ("In cases involving only online postings of information, . . . it is unlikely that jurisdiction will be appropriate and the mere fact that an allegedly defamatory posting may be viewed in New York is insufficient to sustain a finding of jurisdiction.") (internal quotations omitted); Hammer v. Trendl, No. 02-CV-2462, 2003 U.S. Dist. LEXIS 623, at * 14 (E.D.N.Y. Jan. 18, 2003) ("Simply posting book reviews on a website that can be read by New York Internet users does not demonstrate the type of purposeful activity in New York sufficient to support the exercise of personal jurisdiction.")

Plaintiff alleges that Defendants posted defamatory

statements on the Website and allowed third-parties to post complaints without verifying the comments for accuracy. However, as explained above, "making defamatory statements outside of New York about New York residents . . . does not, without more, provide a basis for jurisdiction, even when those statements are published in media accessible to New York readers." Best Van Lines, 490 F.3d at 253.

Moreover, the Website is not purposely directed at New York companies or to New York consumers; rather, it is accessible by anyone who can access the internet, and posts information about companies located throughout the United States and in various Canadian territories. The broad geographic scope of the website suggests that Defendants did not avail themselves of the privilege of conducting business in New York. See id at 253 ("Material on the [w]ebsite discuss[ing] interstate moving companies located in many states for the putative benefit of potential persons in many states" did not establish a transaction of business in New York.); D'Amato v. Starr, No. 06-CV-2429, 2007 U.S. Dist. LEXIS 24154, at *15-16 (E.D.N.Y. Feb. 27, 2007) (although website operator asked New Yorkers for information, the court found that "those requests [were] insufficiently focused on New York to satisfy the long-arm requirement."); Knight-McConnell v. Cummins, 2005 U.S. Dist. LEXIS 11577, at *10-11 (E.D.N.Y. 2005).

Plaintiff next argues that Defendants transact business

by selling advertising space on the Website and by marketing and selling two books. Both books offer consumer advocacy advice and do not publish any allegedly defamatory comments. Although these activities may be a transaction of business in New York, they do not establish personal jurisdiction because Plaintiff's cause of action does not arise from either the advertising space or the book sales. See Best Line, 490 F.3d at 250 (holding that defendant's request for donations on its website, movingscam.com, did not establish personal jurisdiction because the monetary transactions were too far attenuated from plaintiff's defamation cause of action). Courts have interpreted the "arises from" language to require "some articulable nexus between the business transacted and the cause of action sued upon, ... or a substantial relationship between the transaction and the claim asserted." Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100, 103 (2d Cir. 2006) (internal quotations omitted). Here, Plaintiff has not alleged any cause of action related to the advertising space or the consumer advocacy books. See Realuyo v. Villa Abrille, 2003 U.S. Dist. LEXIS 11529 (E.D.N.Y. 2003) (defamation claim did not arise from interactive advertising links, but rather "solely from the aspect of the website from which anyone - in New York or throughout the world - could view and download the allegedly defamatory article."). Accordingly, neither activity supports a finding of personal jurisdiction.

Lastly, Plaintiff alleges that Defendants will verify complaints and investigate negative reports for a fee. After the investigation, businesses are asked to pay another fee before Defendants will note on the Website that the business has resolved the consumer complaint. The Court cannot say at this juncture whether the investigative program amounts to a transaction of business in this state, but does find that Plaintiff has made a "threshold showing of jurisdiction" and is entitled to jurisdictional discovery on this issue. Unique Indus. v. Sui & Sons Int'l Trading Corp., 05-CV-2744, 2007 U.S. Dist. LEXIS 83725, at *24 (S.D.N.Y. Nov. 9, 2007). District Courts are given latitude in allowing jurisdictional discovery where a plaintiff has "made less than a prima facie showing, but 'made a sufficient start toward establishing personal jurisdiction.'" Drake v. Lab. Corp. of Am. Holdings, 02-CV-1924, 2007 U.S. Dist. LEXIS 17430, at * 25 (E.D.N.Y. March 13, 2007) (quoting Uebler v. Boss Media, 363 F. Supp. 2d 499, 506 (E.D.N.Y. 2005)); see also Smit v. Isiklar Holding A.S., 354 F. Supp. 2d 260, 263 (S.D.N.Y. 2005) (allowing limited discovery "targeted at the missing jurisdictional elements"). Plaintiff alleges that Defendants received a fee from New York companies for investigating the allegedly defamatory reports. If Defendants investigated defamatory comments for New York companies, this may constitute a transaction of business that is sufficiently related to Plaintiff's cause of action.

Accordingly, the Court grants Plaintiff an opportunity to conduct jurisdictional discovery on the limited issue of whether Defendants targeted New York companies to participate in CAPS, the number and percentage of New York companies that participated in the program, and the amount of revenue generated from New York companies participating in the program.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is denied with leave to renew after the completion of limited discovery. Plaintiff is granted limited jurisdictional discovery on the issue of whether CAPS establishes that this Court has personal jurisdiction over Defendants.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: December 28, 2007
Central Islip, New York