UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHY KNIGHT-McCONNELL		
Plaintiff,	:	**MEMORANDUM AND O R D E R**
- against -	:	03 Civ. 5035 (NRB)
MARY CUMMINS	:	
Defendants.	:	

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff pro se Kathy Knight-McConnell has brought this suit against defendant pro se Mary Cummins, alleging, inter alia, defamation and privacy violations.[1] Now pending is defendant's motion to dismiss on the following grounds: 1) lack of personal jurisdiction; 2) improper venue; and 3) failure to state a claim. For the reasons set forth below, defendant's motion is granted. However, as set out infra, plaintiff is granted limited leave to replead.

[1]Plaintiff alleges, as a fifth cause of action, a "Civil conspiracy" to involve plaintiff as a defendant in a federal action: Harvest Court, LLC v. Nanopierce Technologies, Inc., No. 02-7579, now pending before Judge Sand. We know of no statutory or judicial authority, nor does plaintiff suggest one, for imposing liability based on this allegation.

BACKGROUND

Although plaintiff's complaint lacks a clear description of her work, we gather from her exhibits that she runs a website, investortoinvestor.com, which is a forum for investor discussions and publishes a newsletter on various stocks. Pl.'s Ex. A. Plaintiff's site explicitly states that plaintiff is not a licensed analyst, and that the newsletter is offered as "research material" and not as investment advice. Id.

For reasons that are not at all clear, defendant, a day trader who apparently has never met plaintiff, has nonetheless devoted a remarkable amount of time and energy to writing about her on the Internet. On various website discussion groups, as well as on her own website (which she has linked to plaintiff's site without permission), defendant has posted numerous messages describing plaintiff as a securities fraud "criminal," "insane," "paid to lie to investors," a cheat, a thief, Pl.'s Ex. J, and "obese," Id. Ex. F. According to the complaint, defendant has also repeatedly reported plaintiff to the SEC and written to various "clients"[2] and/or associates of plaintiff's, accusing plaintiff of fraud.

After sending a cease and desist letter to defendant on September 10, 2002, plaintiff filed this action.

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[2]As noted throughout, our analysis is somewhat hampered by plaintiff's vagueness as to her business and her client relationships.

DISCUSSION

I. Legal Standard

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), we accept as true all material factual allegations in the complaint, Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l, Ltd., 968 F.2d 196, 198 (2d Cir. 1992), and may grant the motion only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." Still v. DeBuono, 101 F.3d 888, 891 (2d Cir. 1996); see Conley v. Gibson, 355 U.S. 41, 48 (1957). At the same time, we are not required to accept any legal conclusions contained in the complaint. Papasan v. Allain, 478 U.S. 265, 286 (1986); Joint Council v. Delaware L. & W. R.R., 157 F.2d 417, 420 (2d Cir. 1946).

In addition to the facts set forth in the complaint, we may also consider documents attached thereto and incorporated by reference therein, Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 67 (2d Cir. 1998), as well as matters of public record, Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998), cert. denied, 525 U.S. 1103 (1999).

Because the complaint includes multiple federal and state causes of action, our resolution of the threshold issues of venue and personal jurisdiction depends, in part, on our determination of the validity of these causes of action. Thus, the threshold issues

will be discussed in the context of the various claims.

II. Plaintiff's Federal Claims

A. Plaintiff's securities law claim

Plaintiff alleges that defendant has intentionally maligned certain stocks promoted by plaintiff to drive down their price in violation of 15 U.S.C. §§ 78i, 78j, 78t.[3] See Compl. ¶ 11. Regardless of the merit of these allegations, plaintiff lacks standing to sue under these provisions because she does not allege that she purchased or sold stock in reliance on any representation or statement by defendant, even assuming the existence of a duty on defendant's part. Cohen v. Citibank, N.A., 954 F. Supp. 621, 629 (S.D.N.Y. 1996)("[A] private right of action under Section 9 [15 U.S.C. § 78i] accrues only to purchasers or sellers of securities at prices affected by acts or transactions in violation of section 9."); Ontario Public Service Employees Union Pension Trust Fund v. Nortel Networks Corp., 369 F.3d 27, 31-32 (2d Cir. 2004) (stating identical rule with respect to § 78j).[4] Therefore, plaintiff's securities claims are dismissed.

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[3]We are at a loss as to why plaintiff has invoked § 80b-2, as this provision merely defines terms used in other provisions.

[4] As § 78t only creates liability for any party controlling a party liable under other provisions of § 78, "to any person to whom such a controlled person is liable," a plaintiff has standing to raise a § 78t claim only if she would have standing to raise a claim under other provisions of § 78.

B. Trademark/Copyright claim

Plaintiff further claims that defendant is violating federal intellectual property law by linking her website to the plaintiff's website without permission or authorization, using the plaintiff's name in the post-domain path of the URLs for seven of her web-pages (and submitting these URL's to search engines), and posting links on Internet chat forums and discussion boards directing users to visit these web-pages. Plaintiff contends that these acts violate the "false designation of origin" provision of the Lanham Act, 15 U.S.C. § 1125(a)(1), and the Berne Convention. This contention is incorrect.

Section 43(a) of the Lanham Act prohibits the commercial use of any "word, term, name, symbol, device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact," which would either (1) cause confusion about the origin, affiliation, connection, association, or sponsorship of a product or service ("false designation of origin") or (2) constitute a misleading representation about the nature, qualities, or geographic origin of the product or service being offered ("false advertising"). See 15 U.S.C. § 1125(a)(1)(A); 15 U.S.C. § 1125(a)(1)(B).

In order to succeed on a false designation of origin claim, a plaintiff generally must show that she has a valid and

protectable mark and that the defendant's conduct is likely to cause confusion concerning the source or sponsorship of the good or services in question. See Register.com, Inc. v. Verio, Inc. 126 F. Supp.2d 238 (S.D.N.Y. 2000) aff'd, 356 F.3d 393 (2d Cir 2004); W.W.W. Pharmaceutical Co. v. Gillette Co., 984 F.2d 567 570-71 (2d Cir. 1993) (noting that it is well-settled that a plaintiff must demonstrate likelihood of confusion in order to succeed on the merits of a false designation of origin claim).

Even if we assume that plaintiff's name is a valid and protectable mark, plaintiff has not alleged that the defendant engaged in any conduct that is likely to cause confusion as to the origin of the defendant's website. The mere appearance on a website of a hyperlink to another site will not lead a web-user to conclude that the owner of the site he is visiting is associated with the owner of the linked site. This is particularly true in this case because defendant's website advertises real estate and web design services, not investment services, and defendant is continuously disassociating herself from plaintiff by criticising her and accusing her of misconduct.

We similarly find that, given the overall circumstances of this case, defendant's use of the plaintiff's name in the post-domain path of a URL and placement of URLs using the plaintiff's name in the post-domain paths on chat forums, discussion boards, and search engines do not give rise to any source confusion. See

Interactive Products Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d 687, 696 (6th Cir. 2003) (noting that the post-domain path of a URL "merely shows how the website's data is organized within the host computer's files" and does not suggest an association between items, even if various search engines link plaintiff's product and defendant's Web page).

Finally, there is no merit to the plaintiff's claim that the defendant's activities violated the Berne Convention (which relates to copyrights). We initially observe that a plaintiff may not enforce the provisions of the Berne Convention by stating a cause of action pursuant to the convention itself. See Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 (2d Cir. 1998) (citing 17 U.S.C. § 104(c) and Pub. L. 100-568). As plaintiff is pro se, we construe her complaint leniently and assume that she means to state a claim under the Copyright Act of 1976, 17 U.S.C. § 101, et seq.

However, a claim for copyright infringement may not be pursued unless the plaintiff has registered a copyright. See 17 U.S.C. § 411 ("no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title"). See Well-Made Toy Mfg. Co. v. Goffa Int'l Corp., 354 F.3d 112, 114 (2d Cir. 2003) (holding that plaintiff's failure to register its copyright deprived the court of subject matter jurisdiction). As

plaintiff has not alleged that she has any registered copyrights that the defendant infringed, she is precluded from raising a copyright claim here.

To summarize, we find that plaintiff has failed to state a valid federal claim. However, defendant's assumption that this conclusion disposes of plaintiff's case is incorrect, as this Court potentially has diversity jurisdiction over plaintiff's state law claims.[5]

III. Plaintiff's State Law Claims

In addition to her federal claims, plaintiff has claimed that defendant is liable under state law for privacy violations (including placing plaintiff in a "false light"), defamation, and tortious interference.[6] Although defendant's brief does not

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[5]Although we have serious doubts as to whether plaintiff could establish damages amounting to $75,000 (the statutory minimum for diversity jurisdiction), the Supreme Court has held that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). At this time, we do not find that plaintiff's damages are deficient "to a legal certainty," although our conclusion may change, should plaintiff choose to file an amended complaint that clarifies the nature of plaintiff's business and the relationships allegedly harmed by defendant's conduct.

[6]Plaintiff uses the word "conversion," in her complaint, see ¶ 11, which suggests that she may also intend to allege that defendant has committed the tort of conversion. However, this tort only covers "[t]angible personal property or specific money," Fiorenti v. Central Emergency Physicians, PLLC., 305 A.D.2d 453, 454-55, 762 N.Y.S.2d 402, 403-04 (2d Dep't 2003), and is therefore inapplicable to this case. Plaintiff's invocation of the concept of "misappropriation," see ¶ 11,

address the merits of these claims, we have examined them in the interest of efficiency.

Plaintiff's complaint appears to state a defamation claim. However, under New York law, a defamation claim does not give rise to personal jurisdiction over an out-of state defendant.[7] Moreover, plaintiff's claims of privacy violation are not

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is similarly unavailing, as that tort requires a showing that "the defendant must have misappropriated the labors and expenditures of another." Werlin v. Reader's Digest Ass'n, Inc., 528 F. Supp. 451, 464 (D.C.N.Y. 1981). "Misappropriation of identity," as a form of privacy tort, is not recognized in New York. See infra.

[7]See N.Y.Civ.Prac.L. Section 302(a) (emphasis added):

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 nondomiciliary, or his executor or administrator who in person or through an agent:

1. transacts any business within 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 act 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 course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

recognized under New York law. See Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 123-24, 596 N.Y.S.2d 350, 354-55 (1993) (declining, in the absence of any legislative initiative, to recognize the common law right to privacy that is recognized in certain jurisdictions).[8] Our continued jurisdiction over this case, therefore, depends on whether plaintiff has stated a valid tortious interference claim.

The elements of a claim of tortious interference with an existing contract are "(1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." Foster v. Churchill, 87 N.Y.2d 744, 749-50, 642 N.Y.S.2d 583, 586 (1996). Similarly, to plead tortious interference with prospective economic relations, a plaintiff must allege "that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct," and "name the parties to any specific contract [he] would have obtained." Vigoda v. DCA Productions Plus Inc., 293 A.D.2d 265, 266-67, 741 N.Y.S.2d 20, 23 (1st Dep't 2002).

Plaintiff has alleged that defendant has posted, on her own website and on various Internet discussion sites, defamatory

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[8]The New York Legislature has adopted part of the common law right to privacy. See Civil Rights Law §§ 50 and 51 (providing cause of action for use of a living person's name, portrait or picture for "advertising" or "trade" purposes without prior written consent). However, plaintiff has failed to plead any facts what might be covered by these sections.

statements about plaintiff intended to discredit her.[9] Plaintiff has further alleged that defendant has contacted plaintiff's "clients," and that, as a result, one of the companies plaintiff "covers," QuoteMedia.com, asked her to discontinue coverage out of fear that investors would believe defendant' statements and sell its stock. Plaintiff has failed, however, to allege specific contractual relationships, either present or future, that have been terminated or altered as a result of defendant's conduct. Moreover, there is an apparent inconsistency in plaintiff's position. Plaintiff states that defendant has defamed her by accusing her of being a paid promoter of stocks. If plaintiff is not in fact paid by the companies she "covers," it is difficult to see how she can claim that defendant's activities have disrupted "business relationships" of hers.

Despite these observations, as plaintiff is pro se and has not had an opportunity to address the concerns we raise here, rather than dismiss the complaint with prejudice, we will allow plaintiff two weeks to submit an amended complaint stating a proper claim for tortious interference, if such an amendment is possible consistent with Fed. R. Civ. P. 11's good faith

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[9]Plaintiff also alleges that defendant has targeted Nanopierce, a company that "plaintiff's business covers." Compl. ¶ 19-20. To the extent plaintiff is attempting to assert a claim on behalf of Nanopierce or any of its employees, plaintiff lacks standing to do so. To the extent plaintiff is arguing that she had a concrete business arrangement with Nanopierce that was disrupted by defendant's activities, plaintiff must state the underlying facts with specificity.

requirement. See Fed. R. Civ. P. 11(b)(3). Any amended complaint must state with specificity what contractual relationships, if any, were affected by defendant's conduct and how these relationships were affected, as well as the damages, if any, suffered by plaintiff. In this respect, it would be helpful if the complaint set forth the exact nature of plaintiff's business.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss is granted, and this case is dismissed without prejudice to the filing of an amended complaint as set forth above. In light of our decision here, plaintiff's motion for default and permanent injunction, Doc. 13, is denied.

As a final matter, plaintiff has moved for payment of costs of service pursuant to F. R. Civ. P. 4(b)(2)(C)(ii), in the amount of $381.98. Under Rule 4(d)(2), "[i]f a defendant located within the United States fails to comply with a request for waiver made by a plaintiff . . ., the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown." (emphasis added). The Committee Notes explain that this rule is intended to "impose upon the defendant those costs that could have been avoided if the defendant had cooperated reasonably in the manner

prescribed," and that the rule is a "useful" measure against "furtive" defendants. Advisory Committee Notes, 1993 Amendment.

Plaintiff originally attempted to serve the amended complaint by first class mail, return receipt requested with proper notice and acknowledgement forms enclosed. The acknowledgement was never returned, see Pl.'s June 17, 2004 Affirmation, and plaintiff was forced to proceed with personal service, the cost of which she has documented. Defendant has not offered any reasons for her failure to waive service, and any doubt as to her motivation is resolved by her Internet message to plaintiff ("Why would I make anything easy for you."), Ex. 5 to Pl.'s Opp'n to Mot'n to Quash Summons. Accordingly, plaintiff's Rule 4 motion is granted in the amount of $381.98, and defendant is directed to pay this sum.

SO ORDERED.

DATED: New York, New York
July 29, 2004

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been mailed on this date to the following:

Plaintiff Pro Se
Kathy Knight-McConnell
98 Van Cortlandt Park South, #8C
Bronx, NY 10463-2921

Defendant Pro Se
Mary Cummins
359 N. Sweetzer Avenue
Los Angeles, CA 90048