

IN THE CIRCUIT COURT OF THE 15th
JUDICIAL CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA

CASE NO.: 50-2009CA043673 XXXMB

SMOLINSKI AND ASSOCIATES, INC.,
d/b/a PALM COAST TRAVEL,

Plaintiff,

vs.

CHRISTOPHER J. ELLIOTT and
PETER LAY,

Defendant.

**DEFENDANT, PETER LAY'S MOTION TO DISMISS FOR FAILURE TO STATE
CLAIMS FOR WHICH RELIEF CAN BE GRANTED AND LACK OF PERSONAL
JURISDICTION**

COMES NOW, Defendant, PETER LAY (hereinafter "Defendant" or "LAY"), by and through undersigned counsel, and pursuant to the applicable Florida Statutes and Rules of Civil Procedure, hereby file this Motion to Dismiss for Failure to State Claims for which Relief Can be Granted for Lack of Personal Jurisdiction and, in support thereof, states as follows:

FACTUAL BACKGROUND

1. Plaintiff, SMOLINSKI AND ASSOCIATES, INC. D/B/A PALM COAST TRAVEL (hereinafter "Plaintiff" or "SMOLINSKI") is a Florida corporation that avers itself as a "seller of travel", and specifically that "its business relies primarily upon bookings of, among other things travel packages and cruises. See, Compl. ¶ 1, 8.

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2. According to Plaintiff, Defendant, CHRISTOPHER J. ELLIOTT is a Florida resident who has published "falsehoods" about and interfered with Plaintiff's business in Florida "via an internet publication called Elliott.org". See, Compl. ¶ 2, 40-49.

3. Plaintiff has asserted allegations against Defendant, PETER LAY, a California resident, arising from alleged defamatory statements made by Mr. Lay about Plaintiff in connection with vacation bookings and travel insurance purportedly procured for Mr. Lay. Based upon these statements, SMOLINSKI also contends that Mr. Lay has improperly interfered with Plaintiff's business in Florida. See, Compl. ¶ 3, 28-31, 37-39.

RELEVANT PROCEDURAL HISTORY

4. On or about December 28, 2009, Plaintiff, SMOLINSKI AND ASSOCIATES, INC. D/B/A PALM COAST TRAVEL filed a Complaint against Defendants, CHRISTOPHER J. ELLIOTT and PETER LAY. See, Compl. Specifically, the Complaint sets forth the following claims:

- (1) **Count I – Defamation** (Defendant, CHRISTOPHER J. ELLIOTT), See, Compl. ¶ 50-55
- (2) **Count II – Tortious Interference** (Defendant, CHRISTOPHER J. ELLIOTT), See, Compl. ¶ 56-62.
- (3) **Count III – Defamation** (Defendant, PETER LAY), See, Compl. ¶ 63-69.
- (4) **Count IV – Tortious Interference** (Defendant, PETER LAY), See, Compl. ¶ 70-77.

SUMMARY OF THE ARGUMENT

Counts III and IV of Plaintiff, SMOLINSKI AND ASSOCIATES, INC. D/B/A PALM COAST TRAVEL'S Complaint (hereinafter "Complaint") should be dismissed because the claims of defamation and tortious interference asserted against Defendant, PETER LAY fail to state causes of action for which relief may be granted, and the Court cannot

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properly maintain personal jurisdiction over Defendant, PETER LAY in this matter.

LEGAL STANDARD GOVERNING A MOTION TO DISMISS

5. The primary purpose of a motion to dismiss is to request that the trial Court determine whether the Complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022 (Fla. 4th DCA 1996). In making this determination, the trial court must confine its review to the four corners of the complaint, accept all well-pleaded allegations as true, and view all allegations in the light most favorable to the plaintiff. *Bell v. Indian River Memorial Hospital*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001); *Alvarez v. E & A Produce Corp.*, 708 So. 2d 997, 999 (Fla. 3d DCA 1998). Thus, "[t]he question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *Cintron*, 681 So.2d at 860-61.

6. As a basic matter of proper pleading practice, Florida Rule of Civil Procedure 1.110(b) mandates that a complaint must allege *ultimate* facts in support of the claim so as to clearly appraise the court and the defendant of the nature of the claim and the wrongs being asserted. *Garnac Grain Co., Inc. v. Mejia*, 962 So.2d 408, 410 (Fla. 4th DCA 2007); *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999); *Greiner v. General Electric Credit Corp.*, 215 So. 2d 61, 63 (Fla. 4th DCA 1968). To survive a motion to dismiss, a complaint must allege a prima facie case. See *Alvarez*, 708 So. 2d at 999. Whether a prima facie case has been pled depends upon the sufficiency of the Plaintiffs' allegations of fact, excluding the bare conclusions of law. *Alvarez v. E & A Produce Corp.*, 708 So. 2d 997, 1000 (Fla. 3d DCA 1998). Where the

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allegations of the complaint do not establish a legal right to relief, and the ultimate facts, if proved, would not establish a cause of action for which relief may be granted; a Plaintiffs' action may be dismissed with prejudice. *Newton v. Davis Transport & Rentals, Inc.*, 312 So.2d 200, 201 (Fla. 1st DCA 1975).

7. Here, looking solely to the four corners of the Complaint, the Plaintiff has failed to sufficiently plead allegations giving rise to the alleged causes of action for defamation and tortious interference against Defendant, PETER LAY. Accordingly, Defendant, PETER LAY is entitled to an Order dismissing said claims against them.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT, PETER LAY'S MOTION
TO DISMISS COUNTS III AND IV OF THE PLAINTIFF'S COMPLAINT BASED UPON
THE PLAINTIFF'S FAILURE TO STATE CLAIMS FOR WHICH RELIEF CAN BE
GRANTED**

1. **Count III of the Plaintiff's Complaint asserting a claim for defamation against Defendant, Peter Lay should be dismissed because it fails to plead a prima facie case or state a claim for which relief can be granted.**

8. Florida law holds that "[d]efamation has the following five elements: (1) publication; (2) falsity; (3) actor must act with knowledge, reckless disregard, or negligence as to the falsity on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory." *Jews for Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1106 (Fla. 2008), *citing*, Restatement (Second) of Torts §§ 558B, 580A-580B; *See also*, *Bass v. Rivera*, 826 So.2d 534, 535 (Fla. 2d DCA 2002), *citing*, *Valencia v. Citibank Int'l*, 728 So.2d 330 (Fla. 3d DCA 1999).

9. "Defamation (libel and slander) may generally be defined as the unprivileged publication of false statements which naturally and proximately result in injury to another." *Wolfson v. Kirk*, 273 So.2d 774, 776 (Fla. 4th DCA 1973). In this

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regard, alleged defamatory statements that are protected by absolute or qualified privileges are not actionable under Florida law. In order for statements to be protected by a qualified privilege, the statements "must be made in good faith, that is, with a good motive, and not for the purpose of harming the subject of the defamation." *Lewis v. Evans*, 406 So.2d 489, 492 (Fla. 2d DCA 1981), citing, *Drennen v. Washington Electric Corp.*, 328 So.2d 52, 55 (Fla. 1st DCA 1976).

10. The entitlement of a qualified privilege also provides a presumption of good faith, which can only be overcome by proof of express malice. See, *Bass v. Rivera*, 826 So.2d 534, 535 (Fla. 2d DCA 2002), citing, *Nodar v. Galbreath*, 462 So.2d 803 (Fla.1984). Express malice is defined as where "the primary motive for the statement is shown to be an intention to injure the plaintiff." See, *Bass* at 535, citing, *Thomas v. Tampa Bay Downs, Inc.* 761 So.2d 401, 404 (Fla. 2d DCA 2000); See also, *Corporate Financial, Inc. v. Principal Life Ins. Co.*, 461 F. Supp. 2d 1274 (S.D. Fla. 2006).

11. In light of the pertinent Florida law relative to defamation, it is apparent that the alleged defamatory statements made by Mr. Lay are not actionable and are protected under a qualified privilege. Initially, it must be noted that Plaintiff has not satisfied the threshold element of falsity. All of the statements made by Mr. Lay were truthful, and merely reflected his experiences conducting business with Smolinski and Associates, Inc. In short, "if the statements are true, the required element of a false statement is not present." *Cape Publications, Inc. v. Reakes*, 840 So.2d 277, 280 (Fla. 5th DCA 2003), citing, *Linafelt v. Beverly Enterprises-Florida, Inc.*, 745 So.2d 386, 389 (Fla. 1st DCA 1999). In any event, the Plaintiff's failure to properly plead falsity in the

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Complaint is a fatal flaw to SMOLINSKI'S claim for defamation against LAY.

12. Florida Courts have held that truth is a complete defense to defamation if the statements are asserted with good motives. *See, Cape Publications, Inc.* at 280; *See also, e.g., Lipsig v. Ramlawi*, 760 So.2d 170, 183 (Fla. 3d DCA 2000), *rev. denied*, 786 So.2d 579 (Fla.2001); *Drennen v. Westinghouse Elect. Corp.*, 328 So.2d 52 (Fla. 1st DCA 1976). Here, Mr. Lay published statements as a concerned consumer, who was attempting to notify other consumers of his unfortunate business dealings with the Plaintiff, as well as offer crucial information as to the Florida Department of Financial Services' administrative findings and investigation of Smolinski and Associates, Inc. *See, Jews for Jesus, Inc.* at 1111, citing, *Abram v. Odham*, 89 So.2d 334, 335-36 (Fla.1956) (qualified privilege for fair and accurate statements made in reporting on official government activities).

13. Any statements allegedly made by Mr. Lay served the public interest; were solely inspired by good motives; and had no intent whatsoever to injure the Plaintiff. *See, Bass* at 535. Significantly, the Plaintiff has clearly failed to establish any malice on the part of Mr. Lay; and in this regard, the presumption of good faith has not been overcome and an essential element of defamation has not been properly pled. *Id*; *See also, Wolfson* at 776 ("[m]alice is an essential element of the tort... Without malice, either express or implied by law, no tort could result from the publication of a defamatory statement concerning another...").

14. Thus, upon review and consideration of the four corners of the Complaint, it is clear that the Plaintiff has failed to adequately plead and offer substantial evidence of alleged defamatory statements made by Defendant, PETER LAY or amply identify

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any actual damages incurred by the Plaintiff. *See, Bell* at 232. The Plaintiff has failed to plead a prima facie case for defamation, and the insufficient allegations of fact asserted in the Complaint are bare conclusions that do not permit any recovery under the circumstances. *See, Alvarez* at 1000. The Plaintiff's claim for defamation against Defendant, PETER LAY fails to satisfy and plead the required elements for this cause of action; and in this regard, SMOLINSKI has not established a legal right to relief under said claim. *See, Newton* at 201. Based upon the factual and legal assertions set forth herein, Count III of the Plaintiff's Complaint should be dismissed with prejudice. *Id.*

2. **Count IV of the Plaintiff's Complaint asserting a claim for tortious interference against Defendant, Peter Lay should be dismissed because it fails to plead a prima facie case or state a claim for which relief can be granted.**

15. In order to establish a valid claim for tortious interference with a business relationship, Florida law requires a Plaintiff to prove "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract, under which the plaintiff has legal rights; (2) the defendant's knowledge of the relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the interference." *Palm Beach County Health Care District v. Professional Medical Education, Inc.*, 13 So.3d 1090, 1094 (Fla. 4th DCA 2009), citing, *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 385 (Fla. 4th DCA 1999).

16. It is important to indicate that Florida law also requires a Plaintiff to prove that it "had a business relationship with 'identifiable customers.'" The cause of action cannot be established by proof that the defendant interfered with a relationship between the plaintiff and the public at large, yet that is precisely the basis of the claim asserted in

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this case." *Sarkis v. Pafford Oil Co., Inc.*, 697 So.2d 524, 526-7 (Fla. 1st DCA 1997), citing, *Ferguson Transportation Inc. v. North American Van Lines*, 687 So.2d 821 (Fla.1996). A claim for tortious interference requires "a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *Bortell v. White Mountains Ins. Group, Ltd.*, 2 So.3d 1041, 1048 (Fla. 4th DCA 2009), citing, *Ethan Allen Inc., v. Georgetown Manor, Inc.*, 647 So.2d 812, 815 (Fla.1994) (The Court found that there was no understanding or formal business agreement with which Ethan Allen interfered, explaining that Georgetown had no identifiable agreement with its past customers that they would return to Georgetown to purchase furniture in the future. The mere hope that some of its past customers may choose to buy again cannot be the basis for a tortious interference claim. Accordingly, Georgetown was not permitted to recover damages where the business relationship was based on speculation regarding future sales to past customers.).

17. Here, the Plaintiff failed to specifically identify any business relationships, agreements or customers in which Peter Lay interfered. See, *Palm Beach County Health Care District* at 1094. Conversely, the Plaintiff merely alleges that Mr. Lay interfered with "present and prospective business relationships with customers and cruise lines." See, Compl. ¶ 73. The Plaintiff further contends that Defendant, PETER LAY "is the author of emails circulated to members of the public..." See, Compl. ¶ 39. Rather than specifically identifying consumers, actual agreements or established relationships in which Mr. Lay allegedly interfered, the Plaintiff makes vague and broad assertions as to the purported impact Mr. Lay's statements had upon the Plaintiff. In this

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regard, SMOLINSKI has failed to demonstrate any actual damages sustained as a proximate result of Mr. Lay's alleged actions. See, *Palm Beach County Health Care District* at 1094.

18. Based upon the aforementioned Florida law, it is evident that the Plaintiff cannot succeed on its claim for tortious interference against Peter Lay due to its inability to demonstrate any actionable wrongdoing on the part of Mr. Lay. The Plaintiff's allegations under this cause of action are vague and unsupported, while failing to prove that the Plaintiff suffered from any cognizable damages as a result of Defendant, PETER LAY'S alleged statements and conduct.

19. In sum, the Complaint did not allege ultimate facts in support of the claim for tortious interference against Mr. Lay, which clearly establishes that SMOLINSKI did not state a claim for which relief may be granted. See, *Garnac Grain Co., Inc.* at 410; *Newton* at 201. Thus, Count IV of the Plaintiff's Complaint should be dismissed with prejudice. *Id.*

20. In conclusion, Plaintiff, SMOLINSKI AND ASSOCIATES, INC. D/B/A PALM COAST TRAVEL'S claims for defamation and tortious interference against Defendant, PETER LAY both fail to state causes of action for which relief may be granted; and accordingly, said claims should be dismissed.

WHEREFORE, Defendant, PETER LAY respectfully requests that this Court enter an Order granting his Motion to Dismiss Counts III and IV of the Plaintiff, SMOLINSKI AND ASSOCIATES, INC. D/B/A PALM COAST TRAVEL'S Complaint on the basis that the Plaintiff has failed to state claims for defamation and tortious

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interference upon which relief can be granted, and for any other relief this Court deems just and proper.

MEMORANDUM OF LAW IN SUPPORT OF THE COURT'S LACK OF PERSONAL JURISDICTION OVER DEFENDANT, PETER LAY IN THIS ACTION

21. Rule 1.140(b)(3) of the Florida Rules of Civil Procedure provides, "Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader... (2) lack of jurisdiction over the person..."

22. As set forth in the Plaintiff's Complaint, SMOLINSKI alleges that the Court maintains personal jurisdiction over Defendant, PETER LAY because he allegedly "committed tortious acts within this state..." See, Compl. ¶ 6.

23. Pursuant to Florida Statutes, § 48.193(1), "[a]ny person, whether a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself... for any cause of action arising from the doing of any of the following acts... (b) Committing a tortious act within this state". However, the occurrence of an alleged injury within the state is insufficient in itself to bring a non-resident Defendant within the statute; some part of the tortious conduct must occur in Florida. See, e.g., Doe v. Thompson, 620 So. 2d 1004 (Fla. 1993).

24. Defendant, PETER LAY is a California resident, who made allegedly defamatory statements about the Plaintiff via electronic internet submissions. Personal jurisdiction under § 48.193(1)(b), Fla.Stat. is inappropriate in this case because Defendant has not committed the alleged torts within the state of Florida. Under Florida law, the tort of defamation is committed in the place where it is published for purposes

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of determining the Court's jurisdiction. *Casita, L.P., et al v. Mapelwood Equity Partners L.P. et al*, 960 So.2d 854, 857 (Fla. 3rd DCA 2007) (The court lacked personal jurisdiction over the non-resident Defendants because the Plaintiff offered no proof that the alleged defamatory statements were published within the state of Florida. Furthermore, the Court held that even if the Defendant's conduct outside the state intended to cause injury in Florida, this does not meet personal jurisdiction under § 48.193(1)(b) unless some part of the alleged tortious conduct occurred in Florida, citing, *Firstamerica Dev. Corp v. Daytona Beach News-Journal Corp.*, 196 So.2d 97, 102 (Fla. 1966).

25. In *Alternate Energy Corp. v. Redstone*, 328 F.Supp.2d 1379 (S.D. Fla 2004), a corporation brought a defamation action in Florida against a non-resident operator of Internet websites. *Id* at 1381. The Plaintiff claimed that personal jurisdiction was appropriate because the Defendant published defamatory statements on the website which was subscribed to and viewed by Florida residents. *Id* at 1383. The Court determined that operating the website and selling subscriptions to an internet site to unknown, small numbers of Florida residents does not constitute the commission of a tortious act in Florida, nor does it constitute carrying on a business in Florida. *Id*. Therefore, the Court found that there was no personal jurisdiction under Florida's long-arm statute. *Id*.

26. Here, the Plaintiff has not alleged that the defamatory statements were published within Florida. Rather, Plaintiffs have only alleged that the Plaintiff's business was damaged in the state of Florida and that Mr. Lay sought to harm a Florida corporation and its business relationships. See, Compl. ¶ 6. Although the Plaintiff does

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not allege that Defendant, PETER LAY operated the Elliott Blog, the Plaintiff alleges that Mr. Lay used this website to publish allegedly defamatory statements about the Plaintiff. However, Courts in Florida have held that these types of communications do not permit personal jurisdiction against a non-resident Defendant under the circumstances. See, e.g., *Id.* Mr. Lay did not commit any actionable tortious acts in the State of Florida; and in this regard, the Court does not properly maintain personal jurisdiction over Defendant, PETER LAY in this action.

27. It is also crucial to note that the Court may exercise specific jurisdiction over a non-resident Defendant if the Defendant has purposefully directed his activities to forum state and alleged injury to forum resident arises out of those activities. *Structural Panels, Inc. v. Texas Aluminum Industries, Inc.*, 814 F.Supp. 1058 (M.D.Fla.1993).

28. In this matter, the Plaintiff alleges that "Lay willfully directed his actions toward this State..." See, Compl. ¶ 6. However, as indicated above, the statements and conduct that are the subject of the Plaintiff's allegations against Defendant, PETER LAY do not arise to tortious acts within the State of Florida; they were not published in the State of Florida; the Plaintiff's alleged damages are not sufficient to extend personal jurisdiction over Mr. Lay; Mr. Lay does not conduct business in Florida; Mr. Lay is not a resident of Florida; and in fact, Mr. Lay has never even visited Florida.

29. It is evident that Mr. Lay has not purposefully availed himself to the State of Florida; it is not foreseeable that he would be haled into the Florida Courts; and overall, Mr. Lay does not have sufficient contacts within the State of Florida be subject to personal jurisdiction in this matter. See, e.g., *Id.*; *Taskey v. Burtis*, 785 So.2d 557

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(Fla. 4th DCA 2001), citing, *Venetian Malami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla.1989); *Unger v. Publisher Entry Serv., Inc.*, 513 So.2d 674, 675 (Fla. 5th DCA 1987); *Northwestern Aircraft Capital Corp. v. Stewart*, 842 So.2d 190 (Fla. 5th DCA 2003); *Response Reward Systems, L.C. v. Meijer, Inc.*, 189 F.Supp.2d 1332 (M.D.Fla.2002).

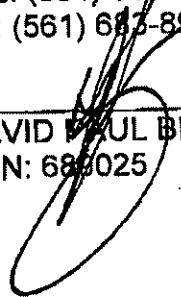
30. Based upon the totality of the factual circumstances and legal support stated herein, the Court lacks personal jurisdiction over Defendant, PETER LAY in the instant action. Accordingly, Counts III and Count IV of the Plaintiff, SMOLINSKI AND ASSOCIATES, INC. D/B/A PALM COAST TRAVEL'S Complaint should be dismissed.

WHEREFORE, Defendant, PETER LAY respectfully requests this Honorable Court to enter an Order dismissing Counts III and IV of the Plaintiff, SMOLINSKI AND ASSOCIATES, INC. D/B/A PALM COAST TRAVEL'S Complaint against this Defendant as set forth above, on the grounds of lack of personal jurisdiction as stated herein.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail this 16 day of March, 2010 to: Daniel S. Newman, Esq. and Jeffrey R. Geldens, Esq., Broad and Cassel, 2 South Biscayne Boulevard, 21st Floor, Miami, FL 33131; Gregory W. Herbert, Esq., Greenberg Traurig, P.A., 450 South Orange Avenue, Suite 650, Orlando, FL 32801.

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