

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS/PASCO COUNTY, STATE OF FLORIDA  
CIVIL DIVISION

LEXINGTON HOMES, INC.,  
Plaintiffs,

v.

Case No: 51-2004-CA-01018-WS

PETER SISKIND,  
Defendants.

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ORDER GRANTING MOTION TO DISMISS  
FOR LACK OF PERSONAL JURISDICTION

THIS MATTER came before the Court on Defendant, PETER SISKIND'S Motion to Dismiss for Lack of Personal Jurisdiction. After reviewing the motion, the memorandums of law, and being otherwise fully advised of the premises, this Court grants the motion.

I. FACTS:

Defendant engaged the services of plaintiff Lexington Homes, a Florida corporation with its principal office in Pasco County Florida, to construct a house in Hernando County. Early on, the business relationship between Siskind and Lexington began to deteriorate. Angered by Lexington, defendant created the website, www.bad-Lexingtonhomesinc.net. The home page of the website states: "This website is dedicated to: all the consumers who have had bad experiences using Lexington Builders (west coast of Florida) . . . and the wise, potential customers who read this and draw their own conclusions . . . This page will tell of my experiences when my wife and I contracted with

Lexington Builders. Everything said on this page is my opinion, but true. There will be stories from others that are unverified (my disclaimer) but I guarantee they are some of the most unbelievable stories anyone can imagine. Read before you build." On the site, defendant created a "gripe site" outlining his criticism of plaintiff and about his version of the facts. Plaintiff alleged that the website also included a section "Here a few stories," to which six Florida residents contributed their own narratives regarding Lexington Homes. The website solicited additional stories to be published on the site, and provided an on line form in which information could be transmitted to the website. It is further alleged that defendant corresponded with at least one of the residents, soliciting additional information to publish on the website.

Lexington Homes filed a complaint against Peter Siskind alleging two counts of Tortious Interference with Advantageous Business Relationships and Defamation. A motion to dismiss was filed asserting that this Court lacked personal jurisdiction over defendant. Plaintiff filed a Memorandum in support of his motion, and the defendant responded. Petitioner filed a reply.

## II. ANALYSIS

A court must conduct a two-part inquiry when deciding the issue of personal jurisdiction. Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623 (11th Cir.1996). First, the court must determine whether the applicable state statute governing personal jurisdiction is satisfied. Sculptchair, 94 F.3d at 626. If the requirements of the long-arm statute are satisfied, then the court must inquire as to, (1) whether defendant has established sufficient "minimum contacts" with the state of Florida; and (2) whether the

exercise of this jurisdiction over defendant would offend "traditional notions of fair play and substantial justice." Id. at 630-31 (quoting International Shoe v. Washington, 326 U.S. 310 (1945)); Future Technology Today, Inc. v. OSF Healthcare Systems, 218 F.3d 1247 (11th Cir. 2000).

Florida's long-arm statute, Florida Statute § 48.193, provides for personal jurisdiction over a nonresident defendant under two sets of circumstances. The first, contained in Fla. Stat. § 48.193(1), provides for specific personal jurisdiction when a claim arises from the defendant's forum-related contacts. Actions that give rise to specific jurisdiction include carrying on a business in Florida, which confers jurisdiction pursuant to § 48.193(1)(a), and committing a tortious act in Florida, which confers jurisdiction pursuant to § 48.193(1)(b). The second basis for jurisdiction, § 48.193(2), provides for general personal jurisdiction when the defendant's forum-related contacts are sufficiently extensive, even though the case did not arise out of those contacts.

In the instant case, plaintiff alleged in its Complaint that personal jurisdiction exists over defendant pursuant to Fla. Stat. § 48.193(1)(b), which provides for jurisdiction over a defendant who has committed a tortious act within this state, when the cause of action arises out of the tortious act. Plaintiff only alleges claims that arise from the website's electronic communications. The complaint alleges that the tortious acts occurred in Florida and Florida is the place of the injury to Lexington homes. (Lexington Homes is located in Florida and builds only in Florida). Plaintiff further argues that defendant's website concerns the Florida activities of a Florida corporation; it impugns the professionalism of a builder whose business exists solely in Florida; the website is

drawn from Florida sources; and the brunt of the harm, in terms of the injury to Lexington Homes' business reputation is suffered in Florida.

First, as argued by plaintiff, in order to commit a tortious act in Florida, a defendant's physical presence is not required. Wendt v. Horowitz, 822 So. 2d 1252 (Fla. 2002). Second, committing a tortious act in Florida under Section 48.193(1)(b) can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida. Wendt, 822 So. 2d at 1260. Therefore, it appears as though jurisdiction is proper pursuant to the Florida Long-Arm Statute. Walter Lorenz Surgical, Inc. v. Teague, 721 So. 2d 358 (Fla. 1<sup>st</sup> DCA 1998)(on a motion to dismiss for lack of jurisdiction over the defendant under the long-arm statute, the court's sole inquiry and determination should be whether the tort as alleged occurred in Florida, and not whether the alleged tort actually occurred) .

Regardless of plaintiff meeting the first part of the Court's inquiry into the existence of personal jurisdiction, the Court must now conduct a completely different analysis regarding minimum contacts and due process considerations. There are three considerations under the due process clause: (1) purposeful availment of the forum state; (2) the cause of action arises out of the activities of which one purposefully availed himself, i.e., the contacts must proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum state, Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), and (3) reasonable foreseeability that "[a defendant] should reasonably anticipate being haled into court there." " Burger King, 471 U.S. at 474 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980).

"A Florida Court obtains specific personal jurisdiction over a nonresident if the nonresident maintains certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Northwestern Aircraft Capital Corp. v. Stewart, 842 So. 2d 190, 195 (Fla. 5th DCA 2003)(quoting Glovegold Shipping, Ltd. v. Sveriges Angfartygs Assurans Forening, 791 So. 2d 4 (Fla. 1st DCA 2000)). "However, the law surrounding issues of jurisdiction and the internet has not fully developed, and the case law on this subject suggests that a Court must look at the nature of a website and the commercial activity actually being conducted over a website in order to determine whether personal jurisdiction can be constitutionally exercised. Miller v. Berman, 289 F. Supp. 2d 1327, 1335 (M.D. Fla. 2003)(citing Zippo Mfg. Co. v. Zippo Dot Com. Inc., 952 F. Supp. 1119, 1124 (W.D.Pa.1997). Florida courts have applied the Zippo precedent. Pursuant to Zippo, the likelihood that personal jurisdiction can be constitutionally exercised based on an entity's presence on the Internet computer network is directly proportionate, in the manner of a sliding scale, to the nature and quality of commercial activity that the entity conducts over the Internet. Id. The Zippo court described a sliding continuum for the evaluation of whether jurisdiction should attach. "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. . . . 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 personal jurisdiction. . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these 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. . . . " (Citations omitted). Id. at 1124.

Courts also have applied the "effects test". Personal jurisdiction is proper under the "effects test" only when the defamatory publication was "expressly aimed" at the forum state, which impels the conclusion that the defendant reasonably anticipated being haled into court thereto. Calder v. Jones, 465 U.S. 783, 789 (1984). With regard to the internet, the common thread, as stated in Zippo, is that "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." Cybersell, Inc. v. Cybersell, Inc. 130 F.3d 414 (9th Cir. 1997) (quoting Zippo Mfg. Co., 952 F. Supp. at 1124); see also International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); JB Oxford Holdings, Inc. v. Net Trade, Inc. 76 F. Supp. 2d 1363 (S.D.Fla.,1999).

Relying on the Calder "effects test", plaintiff argues that the minimum contacts phase of the constitutional analysis is satisfied because the defendant's website concerns the Florida activities of a Florida corporation; it impugns the professionalism of a builder whose business exists solely in Florida; the website is drawn from Florida sources; and the brunt of the harm, in terms of the injury to Lexington Homes' business reputation is suffered in Florida. Plaintiff argues that jurisdiction is proper under Calder and the Due Process Clause because the "effects" of Siskind's out of state conduct are felt in Florida. His intentional and allegedly tortious actions were "expressly aimed" at Florida, he knew

and intended that the website would have a devastating impact upon Lexington Homes, and he knew and intended that the injury would be felt by Lexington Homes in Florida where it operates. However, as explained in Wallace v. Herron, 778 F.2d 391, 395 (7th Cir. 1985), "the so-called "effects" test is merely another way of assessing the defendant's relevant contacts with the forum State. The defendant must still "purposefully avail [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Wallace, at 395 (citing Burger King, 471 U.S. at 475. "The forum State cannot hale the defendant into court "solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." Burger King, 471 U.S. at 475. Jurisdiction is proper "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." Id. at 2183-84 (emphasis in original). Thus, as stated in Wallace, the key to Calder is that the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum. Whether these effects, either alone or in combination with other contacts, are sufficient to support *in personam* jurisdiction will turn upon the particular facts of each case.

This Court finds that the nature and quality of the activity engaged in does not support the minimum contacts required for the exercise of personal jurisdiction. The touchstone of sufficient contacts is that the defendant "purposefully directed" its activities at residents of the forum state. See Burger King, 471 U.S. at 473-74. Plaintiff alleges that defendant's contacts with Florida consist of the following: defendant maintained a website regarding plaintiff's corporation, a Florida corporation that constructs homes on the west coast of Florida. The website stated that it is dedicated to: "All the consumers

who have had bad experiences using Lexington Builders (West Coast of Florida)." The website allowed internet users from around the country to email the operator of the website. It is also alleged that the website solicited additional stories to be published on the site, and provided an on-line form in which information could be transmitted to the website. Plaintiffs further allege that Florida residents viewed the website and submitted information using the on line form and defendant corresponded with at least one of these residents, soliciting additional information to publish on the website. Under these facts, this court can not find that the defendant 'purposefully directed' its activities at residents of the forum state. Mere maintenance of a website accessible in Florida is not enough to create jurisdiction, and the contacts that tie the defendant to Florida must be particular and specific and not merely contacts that link the defendant with equal strength to all states. J.B. Oxford Holdings, Inc., 76 F. Supp. 2d 1363. Here, there are no specific and particular contacts that tie defendant to Florida more than to any other state. Cf. Whitney Information Network, Inc. v. Xcentric Ventures, LLC, 347 F. Supp. 2d 1242 (M.D.Fla.2004)(personal jurisdiction found where defendant allowed consumers to target their search to Florida only; the website solicited funds from consumers to support the defendants, and the defendants sell products to assist consumers in prevailing in their disputes with companies.). Websites accessible in the state of Florida do not create jurisdiction absent some sort of active solicitation of activity in the State of Florida. Miller, 289 F. Supp. 2d 1327. Although it is alleged that six residents corresponded through email and one resident was asked to publish additional information on the website, there is no allegation that defendant 'solicited' residents of the state of Florida. Finally, as part of the purposeful avilment analysis, courts have also looked to whether

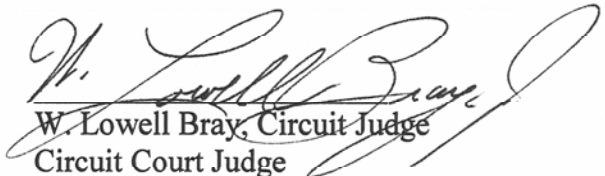


or not the defendant has engaged in commercial activity within the forum state. This Court is by no means suggesting that a commercial component is necessary to find personal jurisdiction, only that it does appear to be one factor considered in cases such as the one before this Court. Eg, Burger King Corp., 471 U.S. 462, 476 ("[s]o long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there); Zippo Mfg. Co., 952 F. Supp. at 1124; (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."); Miller, 289 F. Supp. 2d at 1335 -1336 (court looked at fact that defendants did not conduct business over the Internet or solicit business over the Internet as part of analysis). In this case, there is no allegation that defendant derived any commercial benefit from the website or purposefully availed himself of the state of Florida.

Therefore, it is,

ORDERED AND ADJUDGED that the Motion to Dismiss for Lack of Personal Jurisdiction is GRANTED.

DONE AND ORDERED in Chambers, at New Port Richey, PascoCounty, Florida this 2<sup>nd</sup> day of November, 2005.

  
W. Lowell Bray, Circuit Judge  
Circuit Court Judge

Copies:  
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