UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DENISE McVEA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	Civil Action No: SA-07-CA-353-XR
	)	
JAMES CRISP,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S RULE 12(b)(2) MOTION AND GRANTING DEFENDANT'S RULE 12(b)(6) MOTION

On this date the Court considered James Crisp's Rule 12 Motions, filed July 11, 2007, in the above-numbered and styled case. The Court DENIES Defendant's Rule 12 (b) (2) motion asserting lack of personal jurisdiction and GRANTS Defendant's Rule 12 (b) (6) motion for Plaintiff's failure to state a claim upon which relief can be granted.

FACTUAL BACKGROUND

This dispute arises from statements posted on an internet website named www.thealamofilm.com in late April of 2006, concerning the research and works of both Denise McVea and Jeff Dunn as they relate to historical figures from Texas. Plaintiff, asserting proper diversity jurisdiction in Texas, alleges Defendant's internet postings contained defamatory statements concerning her work and comments about Jeff Dunn, causing her to suffer damage to reputation and emotional distress.[1] Defendant, acknowledging he authored the post on the internet website, counters that this Court lacks personal jurisdiction over him and, alternatively, Plaintiff fails to state

[1] Plaintiff's Original Petition at 3-6.

a claim, subjecting the petition to dismissal under Rule 12(b)(6).[2]

LEGAL ANALYSIS

Personal Jurisdiction

Defendant asserts that the posting of three communications on an internet website is insufficient to confer personal jurisdiction, directing the Court to the Fifth Circuit case *Revell v. Lidov*,[3] among others. Additionally, Defendant asserts the exercise of personal jurisdiction over him would offend traditional notions of fair play and substantial justice.

In *Revell,* the Fifth Circuit relied on the analysis in *Calder v. Jones.*[4] The Court in *Calder* found personal jurisdiction in California over a Florida defendant who wrote an allegedly libelous story concerning the activities of a California resident "based on the 'effects' of [the] Florida conduct in California.."[5] The Court reasoned the allegedly tortious conduct was aimed at California, and the defendants knew the brunt of the injury would be felt in California where the publication had its largest circulation.[6] The Court also expressly rejected any "suggestion that First Amendment concerns enter into the jurisdictional analysis."[7]

The Fifth Circuit applied the *Calder* analysis to the facts in *Revell*, which included the posting of an allegedly defamatory article about a Texas resident on an internet bulletin board hosted

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[2] Docket 11 at 1-5.

[3] 317 F.3d 467 (5th Cir. 2002).

[4] 465 U.S. 783 (1984).

[5] *Id.* at 788-89.

[6] *Id.* at 789-90.

[7] *Id.* at 790.

by Columbia University. Distinguishing *Calder*, the court noted the lack of reference to Texas and Texas activities by plaintiff Revell in defendant Lidov's article.[8] Further, the court stated the focal point of the article and harm to be suffered was not in Texas, noting that Lidov was unaware that Revell resided in Texas at the time he posted the article.[9] The court asserted that "[k]nowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test" and "defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court in that forum[.]"[10] Ultimately, the court affirmed dismissal for lack of personal jurisdiction.

In the present case, the factual scenario appears more analogous to *Calder* than the Fifth Circuit had before it in *Revell*. To begin with, the website host for the comments is www.thealamofilm.com, a website "dedicated to postings and topics of interests to academic and amateur historians on the subject of the Texas Revolution."[11] Thus, the state of Texas is in focus by virtue of the website content. In addition, there was a prior working relationship referenced between Plaintiff and Defendant, and the Plaintiff's previous internet posting indicated her location as San Antonio, Texas.[12] These factors support the likelihood that Defendant knew the brunt of the injury, if any, would be felt in Texas. This is the essential factor of the *Calder* test, which was

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[8] *Revell*, 317 F.3d at 473.

[9] *Id.*

[10] *Id.* at 475.

[11] Docket 11, Affidavit of James Crisp.

[12] Docket 11, Exhibit A-3.

missing in *Revell*.[13] Additionally, the geographic focus of the internet post was Texas, discussing historical research about a Texas revolutionary figure, another fact not present in *Revell*.[14] While the contents of the website and posts are not limited in their aim solely to Texas, the analysis does not require such a strict standard for jurisdiction. The Court finds the requisite factors are present to invoke jurisdiction based on the overall content and aim of the website, which is to provide information of interest about Texas, and the knowledge that harm inflicted by the allegedly defamatory statements would be felt in Texas.

The other determination made by the Fifth Circuit in *Revell*, which requires discussion by the Court, is the limit "imposed on the states by the Due Process Clause of the Fourteenth Amendment."[15] The inquiry concerns the fairness of "hauling a defendant from his home state before the court of a sister state[.]"[16] "[I]f you are going to pick a fight in Texas, it is reasonable to expect that it be settled there. It is not the fairness calibrated by the likelihood of success on the merits or relative fault. Rather, we look to the geographic focus of the article[.]"[17] Defendant's comments were aimed at a Texas resident and directed to a predominately Texas audience on a website devoted to Texas history. It is reasonable to settle the dispute in Texas.

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[13] *Revell*, 317 F.3d at 475.

[14] *Id.* at 476 (noting the article had a geographic focus of Washington, D.C., if any).

[15] *Id.*

[16] *Id.*

[17] *Id.*

Failure to State a Claim

Defendant also moves to dismiss the petition for failure of Plaintiff to state a claim upon which relief can be granted, as allowed by Rule 12(b)(6). Plaintiff has generally alleged a defamation cause of action arising out of defendant's internet posting on the website www.thealamofilm.com. A defamation cause of action under Texas law requires a plaintiff to prove that a defendant: "(1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement."[18]

The initial question, to be resolved as a matter of law, is to determine whether the words used are reasonably capable of a defamatory meaning.[19] "The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement."[20] The alleged defamatory statements are all elicited from an internet posting of April 27, 2006.[21] Standing alone, several of the statements are reasonably capable of a defamatory meaning. Taken in context, though, a person of ordinary intelligence would recognize the fundamental disagreement over the historical evidence supporting the respective theories without

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[18] WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998); Carr v. Brasher, 776 S.W.2d 567, 569 (Tex. 1989).

[19] Musser v. Smith Protective Servs., Inc., 723 S.W2d 653, 654 (Tex. 1987); MKC Energy Invs., Inc. v. Sheldon, 182 S.W.3d 372, 377 (Tex. App.—Beaumont 2005, no pet.).

[20] *Musser*, 723 S.W.2d at 655. *See also* Turner v. KTRK Television, Inc., 38 S.W.3d 103, 114 (Tex. 2000) (stating the established law in Texas to construe an alleged defamatory statement in light of the surrounding circumstances).

[21] It is uncontested that Defendant posted comments on the website on two other occasions, but only twice mentioned Denise McVea. McVea's allegations stem from the last of these posts.

characterizing the comments as defamatory statements. The internet forum was named "No Holds Barred," the type of place an ordinary person would expect to find controversy and the accompanying rhetoric. In addition, the piecemeal allegations in plaintiff's petition overlook the fact that Defendant is complimentary of her "prodigious and ingenious archival research." In a previous post, Defendant wrote that he considered it a privilege to be connected to Plaintiff through this story. The Court is also mindful that the comments complained of by Plaintiff came in response to her prior comments on the website, which if taken piecemeal, could be considered defamatory. The fact that Plaintiff was able to respond to the criticism in this interactive debate does more than mitigate any potential harm, it shows the "surrounding circumstances" giving rise to a significant doubt that the words used could reasonably support a defamatory meaning. The Court denies the statements, taken as a whole in light of the surrounding circumstances, which included compliments and criticisms of Plaintiff's scholarly historical research and works in a website forum titled "No Holds Barred," are reasonably capable of a defamatory meaning to the ordinary person.

Defendant offers two additional claims that merit discussion. Defendant claims that in a "scholastic debate . . . the criticized scholar's remedy lies in publication of a rebuttal, rather than litigation."[22] The Texas case offered in support of this contention centered on statements published in a medical science article where the court relied on a series of Seventh Circuit cases to support the court's conclusion that the article was not reasonably capable of defamatory meaning.[23] While defendant's proposition is not binding on Texas, the *Ezrailson* reasoning is instructive and provides

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[22] Docket 11 at 3 (citing *Ezrailson v. Rohrich*, 64 S.W.3d 373, 382 (Tex. App.—Beaumont 2001, no pet.)).

[23] Ezrailson v. Rohrich, 64 S.W.3d 373, 382-83 (Tex. App.—Beaumont 2001, no pet.).

a further basis supporting the conclusion that a person of ordinary intelligence would not find the words used reasonably supportive of defamatory meaning. The ordinary person, armed with the knowledge that these historians had conducted extensive research into the controversy, as they freely admit, would expect a rebuttal to either's conclusions, and there was one here.

Defendant further claims his comments have First Amendment protection as a statement of protected opinion. Texas courts are bound by *Milkovich v. Lorain Journal Co.*[24] in determining whether a statement is "an actionable statement of fact or a constitutionally protected expression of opinion."[25] The focus of the analysis is on the "statement's verifiability and **the entire context in which it was made**."[26] One Court of Appeals, following the rules set out in *Bentley* and *Milkovich,* reasoned "[a] statement is considered to be an opinion when, upon consideration of 'the entire context in which it was made,' it cannot be objectively verified."[27] In addition, the Constitution protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. This provides assurance that the public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."[28] The Court concludes the statements at issue are constitutionally protected expressions of opinion. While it is apparent that the Defendant was less than tactful in his description of Plaintiff's

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[24] 497 U.S. 1 (1990).

[25] Bentley v. Bunton, 94 S.W.3d 561, 579 (Tex. 2002).

[26] *Id.* at 581 (emphasis added).

[27] Morris v. Blanchette, 181 S.W.3d 422, 424 (Tex. App.—Waco 2005, no pet.) (quoting from *Bentley*).

[28] *Milkovich*, 497 U.S. at 20 (citations omitted).

theory and work, his assertions were subjective and not objectively verifiable. The quarrel arises from conclusions predicated on evidence that is more than 100 years old. The differing theories have developed from this evidence, and the academic debate that has followed shows there is room for reasonable differences of opinion.

Plaintiff's reply to Defendant's motion correctly states that the issue before the Court, whether Defendant's statements are protected expression, is a question of law.[29] Her reply fails in its application of the law to the facts presented. Whether the statements are protected expressions must be determined not only by their verifiableness, but also in light of the "entire context in which [they are] made."[30] The statements were made in reply to previous website postings by the Plaintiff in a forum titled "No Holds Barred" concerning the existence or nonexistence of a person over 100 years ago.

CONCLUSION

The Court DENIES Defendant's Rule 12(b)(2) motion and asserts personal jurisdiction over the Defendant in this matter based on the specific jurisdiction analysis found in *Calder* and *Revell*. The Court GRANTS Defendant's Rule 12(b)(6) motion for Plaintiff's failure to state a claim for defamation because the statements at issue were not reasonably capable of a defamatory meaning when considered in light of the circumstances in which they were made.

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[29] Plaintiff also claims that defendant's statements were made with actual malice, a standard unnecessary for the Court's analysis here. Defendant has not raised any public figure defense which would require a stricter burden for the plaintiff, and the Court has not analyzed the motion under a heightened standard.

[30] *Bentley*, 94 S.W.3d at 581.

It is so ORDERED.

SIGNED this 5th day of November, 2007.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE