UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KENNETH MITAN,

and

FRANK MITAN

and

THERESA MITAN

and

KEITH MITAN

Plaintiffs,

vs.

EMORY DAVIS, et al.,

Defendants.

Case No. 3:08-CV-117-S

Civil Action

DEFENDANTS CULLINANES' BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b) AND FOR ALTERNATE RELIEF PURSUANT TO FED. R. CIV. P. 12(e)

CRAIG CULLINANE
LINDA CULLINANE AND
THOMAS F. CULLINANE, JR.
Tuckahoe Road
Richland, New Jersey 08350
Defendants Pro Se

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendants Craig Cullinane, Linda Cullinane and Thomas F. Cullinane, Jr. are all individually named in plaintiffs' Complaint seeking damages for an alleged cause of action sounding in libel per se (Count I) and slander per se (Count II). All three individual defendants reside in Richland, Atlantic County, New Jersey.

On March 5, 2008, the moving defendants received correspondence from the Office of the Secretary of State for the Commonwealth of Kentucky advising them for the first time that they are being sued in the United States District Court for the Western District of Kentucky. None of the individually named defendants resides in the Commonwealth of Kentucky nor do we have counsel in the Commonwealth of Kentucky. In fact, none of us have ever been to Kentucky nor have we ever done anything whatsoever to any of the three plaintiffs in or directed at them in the Commonwealth of Kentucky.

The plaintiffs' Complaint alleges that co-defendants created a "Mitan Alert" on a website in or about October 12, 1999. The factual allegations of the plaintiffs then state that the website, or information from the website, either by facsimile or orally, was transmitted down the line to the list of individually named defendants in the caption of plaintiffs' Complaint. Specifically with regard to us, plaintiffs state:

> d. On or about December 14, 2007, defendants Craig Cullinane, Linda and Thomas F. Cullinane, Jr., sent via facsimile or other means of physical transmission, and/or spoke with third persons regarding the information contained in a previously created "Mitan Alert" website, which they had been sent by defendants Emory Davis and Carol Davis, both individually and in their representative capacities for defendant Vitramax Group, Inc.;

Plaintiffs' Complaint, factual allegations, Paragraph 17d.

According to the allegations of the plaintiffs, the information contained on the "Mitan Alert" was false and defamatory and some Order of the United States Bankruptcy Court declared it and imposed an Order against co-defendants from retaining it. As the Complaint makes clear, we had nothing to do with any of what may have occurred in October of 1999. In fact, we have nothing to do with and have no relationship with any of the other co-defendants named in this lawsuit.

The factual allegations of plaintiffs' Complaint against us say only that we saw and acquired the "Mitan Alert" from the Internet and then faxed copies of it or spoke about it with alleged "third persons". The Complaint does not even allege that we authored or created any of the information on the website, nor does it allege that we did anything to harm any of the plaintiffs in the Commonwealth of Kentucky. The Complaint leaves undefined anything about where and to whom we transmitted information. It does not even allege that we made any transmission or disclosures or had discussions with anyone in the Commonwealth of Kentucky. Instead, it simply alleges that the Davis's sent the "Mitan Alert" to us either individually or in some capacity for Vitramax Group, Inc. The Complaint makes clear that whatever we did with the "Mitan Alert", that we neither created, authored or edited it, and all of what we did occurred exclusively within the confines of the State of New Jersey. The Complaint does not allege that anything we did in the State of New Jersey had any impact, reach or caused any actual publication within the Commonwealth of Kentucky.

The Complaint of the plaintiffs also makes absolutely no factual averment as to what contacts, if any, we have with the Commonwealth of Kentucky. Indeed, we have none. The Complaint also contains legal conclusions that we acted with some actual

malice against the plaintiffs. There is no actual allegation or clarification as to what we did that would establish actual malice.

LEGAL ARGUMENT

POINT I

PLAINTIFFS' CLAIMS AGAINST US FOR LIBEL AND SLANDER ARE BARRED BY 47 U.S.C. § 230, AND PLAINTIFFS' COMPLAINT AGAINST US MUST THEREFORE BE DISMISSED.

Plaintiffs' Complaint says nothing more than we received the "Mitan Alert" from a website and then faxed it and discussed it. Plaintiffs do not allege that we authored it, edited it, or even publicized it except for the undefined accusation that we transmitted the same website information to "third persons". We have no idea what the plaintiffs are talking about.

The crux of the plaintiffs' Complaint is that we can be liable under Kentucky law for libel and slander where we see, print and/or receive a copy of a website that we did not create, author or edit. Plaintiffs are essentially claiming that we are legally responsible for reading and then talking about a website appearing on the Internet and transmitted to us by co-defendant Davis.

47 U.S.C. § 230 provides an immunity for any liability from the "user" of an Internet website. The statute provides:

> No provider or user of an internet computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230 (c)(1).

The statute defines internet, 47 U.S.C. § 230(f)(1) and likewise defines

"interactive computer service" as follows:

> The term 'interactive computer service' means any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. § 230(f)(2).

The statute also defines a "information content provider" as follows:

> The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service.

47 U.S.C. § 230(f)(3).

The Federal Act has been interpreted by numerous Courts to provide a "broad immunity to providers or users of interactive computer services". Donato v. Mardow, 374 N.J. Super. 475, 485 (App. Div. 2005). Indeed, under the Federal Act, a "user" cannot be treated as the "publisher or speaker" as to any information provided by another information content provider. The Act says so. 47 U.S.C. § 230(c)(1). Moreover, any law in the Commonwealth of Kentucky which can expose us to liability for being an internet user is preempted by Congress:

> No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3). Zeran v. America On Line, Inc., 129 F. 3d. 327, 334 (4th Cir. 1997), cert. den. 524 U. S. 937, 118 S. Ct. 2341, 141 L. Ed. 2d 712 (1998).

As a number of Federal Circuits have determined, it is irrelevant whether the

website is commercially operated or directed at only a relatively limited user base. Batzel v. Smith, 333 F. 3d. 1018, 1021 (9th Cir. 2003), cert. den. –U.S.—124 S. Ct. 2812, 159 L. Ed. 2d 246 (2004). As the Ninth Circuit explained:

> There is, however, no need here to decide whether a list serve or website itself fits the broad statutory definition of 'interactive computer service,' because the language of section 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services. Section 230(c)(1).

Batzel, supra, 233 F. 3d at 1030-31.

The plaintiffs' Complaint herein does not allege that any of the statements appearing on the "Mitan Alert" website were authored by us. The Federal law has been clearly interpreted to provide immunity for the reasons set forth by the Congress to all but the actual author of any libelous or slanderous statements:

> By its plain language, section 230 creates a Federal immunity to any cause of action that would make server providers liable for information originating with the third-party user of the service. . .
>
> . . .none of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. . . Congress made a policy choice, however, not to deter harmful on line speech through the separate root of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages. . .

Zeran, supra, 129 F. 3d. 327 at 330-31.

Finally, the plaintiffs' conclusory allegations of "actual malice" do not defeat the immunity Congress intended. As the Appellate Division in the State of New Jersey explained it:

> . . .the complaint also alleges that Mardow posted the defamatory messages with actual malice. . .

> In our view, appellant's argument rests on a misconception about the purpose of a good samaritan provision. It was inserted not to diminish the broad general immunity provided by section 230(c)(1), but to assure that it not be diminished by the exercise of traditional publisher functions. If the conduct falls within the traditional publisher's functions, it cannot constitute, within the context of section 230(c)(2)(A), bad faith. . . .

Donato v. Mardow, supra, 374 N.J. Super. at 500.

We respectfully submit that the plaintiffs cannot sue us for having received, faxed or discussed the content of a website that we did not author, edit or create. We respectfully submit that to allow such a cause of action would run directly contrary to the purpose and intent of the immunity created by Federal law.

POINT II

PLAINTIFFS' COMPLAINT AGAINST US MUST BE DISMISSED FOR LACK OF PERSONAL JURISDICTION.

Pursuant to Fed. R. Civ. P. 12(b)(2), the Court must dismiss a Complaint if the Court lacks personal jurisdiction over the defendants. The plaintiffs bear the burden of establishing that the Court has such jurisdiction. Best Van Lines, Inc. v. Walker, 490 F. 3d 239, 242 (2d. Cir. 2007); Fielding v. Hubert Burda Media, Inc., 13 F. 3d. 419 (5th Cir. 2005). In this instance, given the lack of particular allegations against us, no hearing is required and the Complaint must be dismissed by accepting the plaintiffs' claims. Deferred Capital, Inc. v. Associates in Urology, 453 F. 3d 718, 720 (6th Cir. 2006). At a minimum, the plaintiffs must establish a prima facie showing that if the facts they have alleged are true, they would be sufficient to establish personal jurisdiction. Deferred Capital, Inc., Ibid.

Where a defendant raises a jurisdictional defense:

> The plaintiff bears the burden of demonstrating contacts with the forum state sufficient to give the court personam jurisdiction.

Timeshare Vacation Club v. Atlantic Resorts Ltd, 735 F. 2d 61, 63 (3rd Cir. 1984). The "constitutional touch stone" for a due process analysis of personal jurisdiction requires at least "minimum contacts" of a non-resident defendant. International Shoe Company v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945).

As the United States Supreme Court has held, contacts with the forum sufficient to support personal jurisdiction over a non-resident defendant must be of a type that the individual "should reasonably anticipate being hauled into Court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183 (1985). Although the definition of "minimum contacts" varies with the "quality and nature of the defendant's activity", Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958), clearly the "unilateral activity of a plaintiff claiming a relationship with a non-resident defendant does not suffice to create the requisite forum contacts." Ibid.; Helicopteros Nacionales De Colombia, SA v. Hall, 466 U.S. 408, 416, 101 S. Ct. 1868, 1873, 80 L. Ed. 2d 404 (1984).

In this case, plaintiffs allege absolutely nothing with regard to what we supposedly did to the plaintiffs in Kentucky. Assuming the plaintiffs' allegation as to us as true, we saw and received the Mitan Alert website. We then faxed it or spoke about it to third persons. The plaintiffs does not even allege that we spoke to anyone in Kentucky, faxed it, mailed it or delivered to any resident within the Commonwealth of Kentucky, or did anything whatsoever that could possibly impact the plaintiffs in

Kentucky. From the plaintiffs' three line allegation, the Court is supposed to guess or assume that our receipt of a website in New Jersey and our transmittal of that website information to "third persons" clearly in New Jersey, caused some direct harm to the plaintiffs in Kentucky. There is simply nothing alleged in the plaintiffs' Complaint that would lead any reasonable person to conclude that receiving, viewing or even sharing a copy of a website in or about their home community would have any affect whatsoever on unknown persons in Kentucky or that they could ever be hauled into a Kentucky Court to answer for having read or discussed information on that website. There is simply nothing in the plaintiffs' Complaint that would establish jurisdiction over us in circumstances such as these. We did not author it, and we did not distribute it; all of that was done via the website. The controlling rule of law which compels dismissal of the Complaint against us was framed by the Supreme Court in Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). In defining the "effects test", defendants in the State of Florida wrote a libelous story about the plaintiff for their employer in a nationally distributed magazine. The defendant's only contacts with the State of California was that they had called by telephone some people connected with the investigation for the story. The Supreme Court found that the Constitution permitted the California Courts to exercise personal jurisdiction over those defendants. The Calder decision has been explained by two Federal Circuits as follows:

> Thus, Calder establishes the proposition that, where intentional tortfeasors know that their actions will harm a plaintiff in a particular forum, and that the brunt of the injury caused by their actions will be felt in that

forum, they will be subject to jurisdiction there.

Brainerd v. Governors of the University of Alberta, 873 F. 2d 1257, 1259-60 (9th Cir. 1989); Wright v. Xerox Corp., 882 F. Supp. 399 (DNJ 1995).

In this case, plaintiffs allege nothing to establish that we are intentional tortfeasors, or that we could have ever foreseen reading and talking about the Mitan website in New Jersey would cause these plaintiffs harm in a particular forum, or that any injury would result in their forum by what we did. By the plaintiffs' own pleading, we didn't send anything into the Commonwealth of Kentucky, nor did we transmit any letter, facsimile or other communication into Kentucky at any time. Visha Intertechnology, Inc. v. Delta International Corp., 696 F. 2d 1062, 1066 (4th Cir. 1982) quoting Murphy v. Erwin-Wasey, Inc., 460 F. 2d 661, 664 (1st Cir. 1972).

POINT III

PLAINTIFFS' COMPLAINT MUST BE DISMISSED FOR IMPROPER VENUE.

Where plaintiffs' Complaint is improperly venued or the common law doctrine of forum non convenes requires dismissal, Fed. R. Civ. P. 12(b)(3) provides the remedy. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); Continental Casualty Company v. American National Insurance Company, 417 F. 3d 727, 733 (7th Cir. 2005).

Although plaintiffs claim that the website was sent by the Davis' from Kentucky, plaintiffs do not allege that we sent anything to Kentucky. Plaintiffs aver that we either faxed or communicated about the website with "third persons" yet neglects to even allege that we had contact with anyone in the Commonwealth of Kentucky. Indeed, from a fair reading of plaintiffs' sparse allegations, everything we did occurred at our

home in Richland, New Jersey. In order for a plaintiff to prove its case, they would necessarily require evidence and testimony from us as well as other "third persons" in the State of New Jersey. There are no proofs alleged against us having anything to do with the Commonwealth of Kentucky. Obviously, having to defend a lawsuit in the Commonwealth of Kentucky is sorely inconvenient. We have no residence, contacts, attorneys, or clue as to the Commonwealth of Kentucky. We would have to fly from New Jersey to Kentucky, at great expense, leaving our homes, businesses and families for extended periods for even the most summary of proceedings in the Court. All three of us reside exclusively in Richland, New Jersey and any alleged evidence, witnesses or Depositions which presumably will prove the plaintiffs' claims, would have to be conducted in New Jersey. It simply makes no sense to venue this case in Kentucky when we as the target defendants and the alleged proofs against us are all in the State of New Jersey. The only purpose for the plaintiffs to venue this matter in the Commonwealth of Kentucky is to create economically disastrous circumstances for us in defending it.

Respectfully Submitted,

Craig Cullinane

Linda Cullinane

Thomas F. Cullinane, Jr.