



OPINIONS IN THIS ISSUE

FOIA—ELECTRONIC CALENDARS

Electronic appointment calendars used by five out of six senior U.S. Department of Agriculture officials are agency records, and must be produced pursuant to a Freedom of Information Act request, the U.S. Court of Appeals for the D.C. Circuit holds, finding that they were generated within the agency, were subject to the control of the computer system's administrators, and were used to communicate the officials' availability and to facilitate scheduling of agency business (Consumer Federation of America v. Department of Agriculture, 6/30/06).

FIRST AMENDMENT—CATALOGING

A program run by the Library of Congress, involving the creation of bibliographic records for—and assignment of "LCCN" numbers to—books that are not yet published, does not violate the free speech rights of the plaintiff author, whose book does not meet the program's criteria, the U.S. Court of Federal

Claims rules. It also finds that the plaintiff's exclusion from the program does not constitute a government taking of the plaintiff's property (Overview Books LLC v. United States, 7/24/06).

ALSO IN THIS ISSUE—

The California Superior Court, Los Angeles County, grants a special motion to strike a libel complaint based on an article in the Columbia Journalism Review containing assertions that the plaintiffs' purported Al-Qaida terrorist training videos were forged (Bennett v. Columbia University, 5/15/06). Media defendants should have been granted summary judgment in a libel action stemming from news reports based upon a press release from the Odessa, Texas, police department that identified the plaintiff as a sex offender in describing law enforcement efforts to ensure compliance with the sex offender registry program, the Texas Court of Appeals holds (Freedom Communications Inc. v. Sotelo, 6/15/06).

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S.W.2d 512, 515 (Tex. App.—Tyler 1987, writ dismissed w.o.j.). Likewise, under Section 73.002(b)(2), the proper comparison should be between a news report or broadcast and an otherwise unprivileged record of the state or federal government.

The qualified privilege is lost when the communication is made with malice. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). To invoke the privilege on summary judgment, the defendant “must conclusively establish that the allegedly defamatory statement was made with an absence of malice.” *Id.*; *Martin v. Sw. Elec. Power Co.*, 860 S.W.2d 197, 199 (Tex. App.—Texarkana 1993, writ denied). Malice sufficient to overcome a qualified privilege in a defamation action requires a showing that the defendant acted with knowledge or in reckless disregard of the falsity of the publicized matter. *Id.* Affidavits from interested witnesses will negate actual malice as a matter of law only if they are “clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.” Rule 166a(c); see also *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 424 [28 Med.L.Rptr. 2158] (Tex. 2000).

Freedom Communication’s summary judgment proof consisted of David Jay Lee’s affidavit wherein he stated that he never acted with malice or knowingly wrote an untrue statement about Sotelo and that he based his statements on the news release from the OPD which were published in the *Odessa American* “in good faith to inform the readers . . . about a matter of public interest and concern.” Midessa Television’s summary judgment evidence includes affidavits of Jay Hendricks and Enza Locascio. Hendricks, news director of KWES, stated:

KWES and I personally rely on police department press release[s] on a regular basis. We routinely rely on press releases as a source and rarely, if ever, has a police department press release been inaccurate. The [n]ews [r]elease was a very credible source, and I still believe that to be true today.

Locascio, a producer at KWES, stated that, “[i]n the Broadcast, I reported on the exact information contained in the [n]ews [r]elease. . . . I believed the Broadcast accurately reflected, and it did accurate[ly] reflect, the information released by the Odessa Police Department about [Sotelo].” Having negated

actual malice, the burden shifts to Sotelo to raise a fact issue.

Sotelo’s controverting summary judgment evidence includes affidavits of Sotelo and of Robert Watson, a private citizen living in Midland County, Texas. The crux of Sotelo’s response to the motions for summary judgment was that (1) an average citizen would have understood Sotelo to be a sex offender after reading the article or seeing or hearing the broadcasts and (2) defendants could have easily checked whether Sotelo was a sex offender using the Texas Department of Public Safety’s Database, a link to which is provided on Midessa Television’s own website. After reviewing the summary judgment evidence, we find that Sotelo has not raised a material fact issue regarding actual malice.

Because the broadcasts and article concerning Sotelo were privileged and actual malice was negated, we reverse the summary judgment orders and render judgment that Sotelo take nothing. We need not address other theories raised by the media defendants. Pursuant to Section 51.015 of the Civil Practice and Remedies Code, each party will be liable for and taxed its own costs of this appeal. TEX. CIV.PRAC. & REM. CODE ANN. § 51.015 (Vernon 1997).

The orders of the trial court are reversed, and judgment is rendered that Sotelo take nothing.

Lexington Homes Inc. v. Siskind

**Florida Circuit Court
Pinellas/Pasco County**

LEXINGTON HOMES INC. v. PETER SISKIND

No. 51-2004-CA-01018-WS

November 2, 2005

REGULATION OF MEDIA CONTENT

[1] Defamation — Pre-trial procedures — Jurisdiction (§ 11.1203)

Florida court does not have personal jurisdiction over individual’s out-of-state Web site publication, which stated that it was dedicated to all consumers who had bad experiences with plaintiff builder, and which contained

“gripe site,” to which six Florida residents contributed personal narratives regarding defendant, since nature and quality of activity engaged in does not support minimum contacts required, since mere maintenance of Web site accessible in Florida is insufficient to create jurisdiction, since no specific and particular contacts tie defendant to Florida more than to any other state, since plaintiff did not allege that defendant solicited Florida residents, and since plaintiff did not allege that defendant derived any commercial benefit from Web site or that he purposefully availed himself of forum state.

Action by builder against individual for defamation and tortious interference with advantageous business relationships. On defendant’s motion to dismiss for lack of personal jurisdiction.

Granted.

Robert R. Warchola, of Shumaker, Loop & Kendrick, Tampa, Fla., for plaintiff.

Marc John Randazza, of Weston, Garrou, DeWitt & Walters, Altamonte Springs, Fla., for defendant.

Bray, J.:

*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. 1st 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 con-

duct 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 [10 Med.L.Rptr. 1401] (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.

[1] 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 availment 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.
