

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Greenbelt Division

STEPHEN DRING,

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Plaintiff

*

v.

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Civil Action No.: DKC 05cv2804

WILLIAM SULLIVAN,

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Defendant.

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DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Defendant William Sullivan replies as follows to Plaintiff's Opposition to Defendant's Motion to Dismiss the Complaint.

Regarding Defendant's argument that Plaintiff has failed to state a claim upon which relief may be granted, Defendant reincorporates by reference his original Motion to Dismiss. Defendant devotes the remainder of this Reply to his argument that this Court lacks personal jurisdiction over him.

To assert personal jurisdiction, Plaintiff relies solely on Defendant's August 30, 2005, listserv message to justify long-arm jurisdiction over Defendant. To agree with such a notion stretches the long arm statute out of its socket, beyond recognition, and in violation of constitutionally-guaranteed due

process over out-of-state defendants. *International Shoe*, 326 U.S. 310, 318 (1945).

Particularly where, as here, Defendant is not alleged to have acted in a profit-making nor a business capacity, his one listserv message is insufficient for obtaining personal jurisdiction over him. Notably, Plaintiff seeks personal jurisdiction by relying on cases involving commercial defendants, whereas Plaintiff makes no claim that Defendant was acting in anything but a personal, non-profit-making capacity. Under Maryland's long arm statute, commercial actors are more susceptible to personal jurisdiction than are such non-commercial actors as Defendant William Sullivan. Md. Ann. Code, Cts. Jud. Proc. art., § 6-103.

In fact, a reasonable reading of Maryland's long-arm statute shows that the following is the only part of Maryland's long-arm statute that applies to Defendant: "Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State." Md. Ann. Code, Cts. Jud. Proc. art., § 6-103(b)(4) (emphasis added). The foregoing type of regular activity in Maryland and persistent course of conduct still has not been

alleged or shown by Plaintiff, which means that personal jurisdiction is absent as to Defendant. *See also CoStar Group, Inc. v. LoopNet, Inc.*, 106 F. Supp. 2d 780, 784 (D. Md. 2000) (one must analyze a state's long-arm statute in analyzing the availability of personal jurisdiction).

At worst for Defendant, he posted but one allegedly defamatory message on a listserv focused not on Maryland or on any other geographic region of the nation, but on the subject of the martial art of taekwondo. *See TRUE* listserv description page, attached to Plaintiff's Opposition Motion.

At the time Defendant posted the allegedly defamatory message (on August 30, 2005), the listserv at all times had been independently operated in an unmoderated fashion (other than deciding who could join the listserv) by Jeannette Woodard, who solely maintained the listserv's membership list, and who did not share the listserv's membership list with Defendant. *See Affidavit of Jeannette Woodard* (attached hereto). Particularly under such circumstances, Defendant was not purposefully directing his message to Maryland nor to Plaintiff. More who is not a party to this civil action.

Despite Plaintiff's efforts to argue the contrary, far from being in conflict with Fourth Circuit caselaw, *Barrett v. Catacombs Press*, 44 F. Supp. 2d at 717, 729 (E.D. Pa. 1999), from the neighboring Eastern District of Pennsylvania, is

entirely consistent with that caselaw. Of additional importance, *Barrett* is the most on-point case that undersigned counsel has found from any jurisdiction that addresses the relevant technology of listserv messages, as well as the extent to which a computer listserv message is sufficient to enable personal jurisdiction over the author of but one listserv message. *Id.* Reading *Barrett* together with Fourth Circuit caselaw, clearly Defendant's one listserve message, without more, is insufficient for obtaining personal jurisdiction over him.

While Plaintiff places great reliance on *First American First, Inc. v. National Asso. of Bank Women*, 802 F.2d 1511 (4th Cir. 1986), in granting personal jurisdiction over NABW, the Fourth Circuit found that NABW had repeated contacts with the forum state of Virginia as follows: "NABW made bi-monthly mailings of the NABW journal and annual mailings of its national directory, and of 'a call to convention' to its 1,150 Virginia members, and annually distributed operating manuals for state councils and local groups including those in Virginia." *Id.* at 1514. Defendant's situation is starkly different, where his one listserv message was his only activity alleged to have reached Maryland, and where the contents and context of his message show that his message was directed to the listserv rather than to Maryland.

Furthermore, the "effects test" does not create personal jurisdiction over Defendant: The *Calder* "effects test"

requires the plaintiff to show the following: (1) The defendant committed an intentional tort; (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; [and] (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity. . . . In order to make out the third prong of this test, the plaintiff must show that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum.

CoStar Group, Inc., 106 F. Supp. 2d at 785 (quoting *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 265-66 (3rd Cir. 1998)).

Here, the above-listed third prong of the effects test is absent, where Defendant focused his listserv message on a taekwondo listserv rather than to a particular state forum, and where Defendant's allegedly tortious conduct does not turn Maryland into the "focal point of the tortious activity."

CoStar Group at 785 (quoting *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 265-66 (3rd Cir. 1998)).

Moreover, the effects test by itself does not create personal jurisdiction without sufficient minimal contacts between the defendant and the forum state. For instance, a court cannot "automatically infer that a defendant expressly aimed its

tortious conduct at the forum from the fact that that defendant knew that the plaintiff resided in the forum..." *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 262 (3d Cir. 1998) (citing *Esab Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625-26 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998)).

Despite Plaintiff's discussion of *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003), that decision found no personal jurisdiction where the defendant's Internet activity was, at most, passive. *Id.* at 714-15. Specifically:

[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State.

Id. at 714 (emphasis added).

In other words, whether reading *ALS Scan* or *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 729, Defendant's posting of but one listserv message, with nothing more (and not enough

beyond "nothing more" exists in Defendant's case) is insufficient to obtain personal jurisdiction over him. *ALS Scan*, 293 F.3d at 714; *Barrett*, 44 F. Supp. 2d at 729.

It is critical to remember that Defendant's alleged activity involved not the publication and distribution of a newspaper, not a visit to Maryland, but the sending of but one message to a listserve concerning taekwondo.

To grant Defendant's motion to dismiss for lack of personal jurisdiction still enables Plaintiff to re-file its lawsuit just two states away, in New Jersey, where Defendant resides, in this diversity jurisdiction action. To deny Defendant's motion to dismiss will amount to unconstitutional over-reaching of Maryland's long-arm statute.

WHEREFORE, Defendant respectfully moves to dismiss the Complaint.

Respectfully submitted

MARKS & KATZ, L.L.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply was served by the CM/ECF filing system on January 17, 2006, to:

Glenn M Cooper, Esquire
Patricia M Weaver
Jay S. Marks, Esquire

____/s/ Jonathan L. Katz_____
Jonathan L. Katz