

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

GEOFFREY K. DAVIDIAN,

Plaintiff,

v.

Case No. 02-CV-9453

Case Code: 30106

30301

30704

STEVE CORDER,
T. MICHAEL O'MARA,
JIMMY DALE SHIPLEY and
JOHN C. DUFFY,

Defendants.

BRIEF IN SUPPORT OF MOTION TO DISMISS

The defendants, STEVE CORDER, T. MICHAEL O'MARA, JIMMY DALE SHIPLEY and JOHN C. DUFFY, by their attorneys, CRIVELLO, CARLSON & MENTKOWSKI, S.C., submit the following Brief in Support of their Motion to Dismiss:

LEGAL ANALYSIS

I. STANDARD OF REVIEW

A motion to dismiss for lack of personal jurisdiction raises a two-part inquiry into the court's ability to proceed against the party claiming that jurisdiction is absent. There must be a statutory basis for personal jurisdiction and the application of that statute to the individuals must meet the requirements of due process. *Bushelman v. Bushelman*, 2001 WI App 124, ¶ 7, 246 Wis. 2d 317, 323, 629 N.W.2d 795; citing *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596 (1981).

Due process requires sufficient contact between the defendant and Wisconsin to make the exercise of jurisdiction over the defendant comport with the concept of fairness. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

§ 801.05 of the Wisconsin Statutes is an attempt to codify the concept of minimum contacts for personal jurisdiction that was established in *International Shoe*. Compliance with this section is ‘prima facie’ compliance with the due process requirements. *Bushelman*, 2001 WI App. at ¶ 7, 246 Wis. 2d at 323.

The plaintiff has the burden of establishing that jurisdiction exists under § 801.05. *Lincoln*, 104 Wis. 2d at 9. If a plaintiff establishes jurisdiction exists under § 801.05, a defendant may rebut the presumption of compliance with the requirements of due process. *Bushelman*, 2001 WI App. At ¶ 7, 246 Wis. 2d at 323. The courts have employed a five-factor test to analyze a defendant’s contacts for due process purposes: “the quantity, nature, and quality of the contacts, the source of the cause of action and its connection with those contacts, the interest of Wisconsin in the action, and convenience to the parties.” *Id.* at ¶ 7, 246 Wis. 2d at 324.

Under § 801.08(1) Wis. Stats., issues of fact and law raised by an objection to the court’s jurisdiction over person or property shall be heard by the court without a jury. In conducting the review of personal jurisdiction, the court “may consider documentary evidence and weigh affidavits in reaching a determination as to whether this burden has been met.” *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, at ¶ 8, 245 Wis. 2d 396, 409, 629 N.W.2d 662; citing *Ammon v. Kaplow*, 468 F. Supp. 1304, 1309 (DC Kan. 1979).

Factual determinations made by the court in determining the question of personal jurisdiction over the defendant[s] shall not be binding on the parties in the trial of the action on the merits.

§ 801.08(2).

II. NO JURISDICTION EXISTS UNDER § 801.05.

Of the four defendants, only one has ever been to the State of Wisconsin; in 1980, Mr. Shipley spent a brief layover at the Milwaukee Airport. O'Mara Affidavit at ¶ 2; Shipley Affidavit at ¶ 2; Corder Affidavit at ¶ 2; Duffy Affidavit at ¶ 2.

According to the allegations of the Amended Complaint, the basis for jurisdiction upon the defendants, who are all residents of Tennessee, stems from an event that occurred on September 26, 2001. Amended Complaint at ¶ 8-15; O'Mara Affidavit at ¶ 1; Shipley Affidavit at ¶ 1; Corder Affidavit at ¶ 1; Duffy Affidavit at ¶ 1.

According to the allegations of the Amended Complaint, Steve Corder accessed the plaintiff's web site using Microsoft FrontPage software. Amended Complaint at ¶¶ 8, 14 and 15. The plaintiff alleges that he "shut down his Web site out of security concerns as to what malicious alterations and modifications had been or would be caused by the Defendants' alteration of his Web page." Amended Complaint at ¶ 16. The Amended Complaint alleges that the plaintiff spent "many arduous hours at his home in Shorewood, Wisconsin examining his Web site" as a result of the above "security concerns". Amended Complaint at ¶ 17.

With respect to the other named defendants, the plaintiff alleges that "Corder informed [plaintiff] that he had been instructed by the [sic] Jim Shipley's attorneys, T. Michael O'Mara and John Duffy, to 'download' certain pages from [the plaintiff's web site]" and was "instructed to take portions of the page; that is, to remove elements from their context so as to 'put the city's argument in the best light.'" With respect to Jim Shipley, the Amended Complaint does not allege that he was involved in the above conduct, rather it states that all of the defendants dislike the content of the plaintiff's web

site and all of the defendants engaged in an “on-going joint effort” to “prevent further reporting and to retaliate for past articles written by the plaintiff.” Amended Complaint at ¶ 23.

The plaintiff’s website is about the City of Cookeville, Tennessee, and the surrounding area. Duffy Affidavit at ¶ 6. The State of Wisconsin has no interest in a dispute involving the content of that website. The plaintiff’s claims do not belong in a Wisconsin Court.

The United States District Court for the Middle District of Tennessee has already addressed the subject matter of this lawsuit, in connection with the very events that the plaintiff alleges form the basis for the defendant’s actions. Duffy Affidavit at ¶ 6; Exhibit C to Corder Affidavit. The plaintiff’s claims do not belong in a Wisconsin Court.

The alleged basis for personal jurisdiction is summed up as follows:

The Defendants committed their tortious acts knowing the harmful effects would be felt within Wisconsin. The Defendants purposefully availed themselves to jurisdiction in Wisconsin by engaging in internet communications with [the plaintiff’s] Web page operated out of Wisconsin. The Defendants were aware that the damages from their internet intrusion would be suffered by Plaintiff in Wisconsin.

Amended Complaint at ¶ 34. There are similar allegations with respect to the other causes of action pled by the plaintiff.

The only other potential source of jurisdiction is found in the vague allegations regarding breach of contract. Amended Complaint at ¶ 43.

Under Sec. 801.05(4), personal jurisdiction exists for

any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either: (a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or (b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

In this case, the location of the servers for www.putnampit.com in Florida is contrary to a finding that an injury occurred within the State of Wisconsin. The plaintiff's claims stem from an accidental upload of data onto the servers that may have occurred. Corder Affidavit at ¶ 6. If any data was uploaded, it was uploaded onto servers located in Florida. Corder Affidavit at ¶¶ 3-6.

Even if it is assumed the plaintiff has alleged an injury to property within this state arising out of an act outside this state by the defendants, the plaintiff cannot satisfy the second prong of sec. 801.05(4) Wis. Stats. The plaintiff has not alleged, and cannot show, solicitation or service activities were carried on within this state. The term "service activities" under sub. (4) (a) requires that a defendant be engaged in some type of regular ongoing or repetitive activities in Wisconsin.

In *Housing Horizons, LLC v. Alexander Company, Inc.*, 2000 WI App 9, 232 Wis.2d 178, 606 N.W.2d 263, personal jurisdiction was absent despite allegations similar to those in the present case. The plaintiff argued

(1) Verkler's participation in the National Terminal apartment project was an "act or omission outside the state"; (2) Verkler's alleged negligence caused injury to Alexander, a Wisconsin corporation, within the state; and (3) Verkler conducted "service activities" in the state of Wisconsin by sending its representatives to participate in two meetings in Madison.

Id. at ¶ 9, 232 Wis. 2d at 184.

In concluding that Verkler was not subject to personal jurisdiction under § 801.05(4)(a), the court explained that participation in the two meetings did not constitute service activities carried on within this state. *Id.* The court noted “something more than isolated and fleeting encounters with the state of Wisconsin are necessary to come within the statutory language.” *Id.* at ¶ 9, 232 Wis. 2d at 185. It also observed that the requirement of § 801.05(4)(a) “is not satisfied when a defendant's contacts with Wisconsin are connected with a single, isolated transaction.” *Id.* at ¶ 12, 232 Wis. 2d at 186. In this case, the plaintiff has alleged no more than an isolated and fleeting encounter with the State of Wisconsin, an encounter connected with a single, isolated transaction.

As noted in *Housing Horizons*, the United States District Court for the Western District of Wisconsin “has also concluded that activities related to a single, isolated transaction are insufficient to constitute solicitation and service activities under § 801.05(4)(a), Stats.” *Id.* at 13, 232 Wis. 2d at 186-87; discussing *McPhee v. Simonds Saw and Steel Co.*, 294 F. Supp. 779 (W.D. Wis. 1969) (A distributor was not subject to suit in Wisconsin because it was alleged to have sold only the one carriage and saw unit in the state).

Importantly, the plaintiff cannot point to “regular or ongoing activities” conducted by the defendants in Wisconsin. *Housing Horizons*, 2000 WI App. 9, ¶ 15, 232 Wis. 2d at 188. Duffy Affidavit at ¶¶ 3 and 4.

As for the alleged “purposeful availment”, the defendants did not intend to do anything to the plaintiff's website. O'Mara and Duffy asked Corder to create trial exhibits and believed that this would be done from the archived articles and images contained on a CD-Rom provided by the plaintiff during the discovery process. O'Mara

Affidavit at ¶¶ 4 and 5; Duffy Affidavit at ¶¶ 7 and 8. In the process of creating those exhibits, Corder accessed the plaintiff's website using Microsoft's FrontPage software. Corder Affidavit at ¶ 5. During his editing of downloaded pages for trial exhibits, Corder believes he may have accidentally uploaded an edited page. Corder Affidavit at ¶ 5.

This is hardly sufficient to constitute purposeful or meaningful contact with the State of Wisconsin. Setting aside the question of whether any contact with Wisconsin occurred given the possibility that nothing was uploaded and the location of the website on servers in Florida, the defendant's actions were unintentional. To allow this suit to continue in Wisconsin is contrary to the long-arm statute and fundamental notions of due process.

The only other arguably applicable section the long-arm statute is sec. 801.05(5)(a). That section provides that personal jurisdiction "[a]rises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff" This section is equally unavailing to the plaintiff. Even under the most generous concept of notice pleading, the plaintiff's breach of contract claim is too indefinite to provide a basis for jurisdiction.

The mere "bargain[ing] for resolution of damages" is not sufficient for a contract to exist between the plaintiff and the defendant. Amended Complaint at ¶ 43. The alleged "contract" was nothing more than the plaintiff's demand for compensation from the defendants and the defendants requests for more information to evaluate the plaintiff's claim. Corder Affidavit at ¶¶ 10-12; Exhibits D, E and F to Corder Affidavit; Shipley Affidavit at ¶ 4; Exhibit A to Shipley Affidavit.

The City Council has never authorized the Shipley, the City Manager, to enter into a contractual agreement with the plaintiff. Shipley Affidavit at ¶ 3. The plaintiff's attempt to create a contract through the telephone conversations with Steve Corder and the email correspondence is refuted by the Corder and Shipley Affidavits, which demonstrate that no agreement existed and that Corder did not have the power to bind the City contractually. Corder Affidavit at ¶¶ 10-12; Shipley Affidavit at ¶ 3.

The plaintiff made a demand for compensation. Corder Affidavit at ¶ 10; Exhibit D to Corder Affidavit; Shipley Affidavit at ¶ 4; Exhibit A to Shipley Affidavit. The defendants asked for documentation to show the plaintiff had been damaged and denied the request for compensation based on information provided by the plaintiff. Corder Affidavit at ¶¶ 11 and 12; Exhibits E and F to Corder Affidavit. This does not constitute a contract.

Wisconsin Law requires the following must exist before a defendant is subject to jurisdiction under the contract provision.

(1) A claim arising out of the bargaining arrangement made with the defendant or on behalf of the plaintiff; (2) A promise or other act of the defendant made or performed anywhere, which evidences the bargaining agreement sued upon; and, (3) a showing that the arrangement itself involves or contemplates some substantial connection with the state.

Capitol Fixture and Woodworking Group v. Woodma Distributors, Inc., 147 Wis.2d 157, 161-62, 432 N.W.2d 647, 650 (Ct.App.1988). The plaintiff cannot satisfy these requirements. The plaintiff has no claim for breach of contract. The "bargaining for resolution" does not evidence a promise to compensate the plaintiff. The "contract" does not involve or contemplate a substantial connection with the state.

Even if it is assumed that the defendants' consideration of the plaintiff's claims resulted in an agreement, which is incorrect, the contract amounts to nothing more than "an agreement to agree". *Dunlop v. Laitsch*, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962). This is evident by the omission of the most basic and essential terms from the alleged "contract". There is no evidence that the parties ever reached an agreement as to the amount of compensation to be paid the plaintiff, which is not surprising since there is no evidence the defendants ever agreed to compensate the plaintiff. Corder Affidavit at ¶¶ 10-12.

The law cannot imply an essential contractual term, such as the amount of compensation. *Id.* Although the plaintiff has alleged that the "breach of contract" caused him damages in the amount of \$8,918.10, the plaintiff cannot show that the defendants ever agreed to compensate him in that amount, or any other amount. Amended Complaint at ¶ 44. Corder Affidavit at ¶¶ 10-12

As for the contact between the plaintiff and the defendants, the telephone conversation with Corder, and the vague "bargaining" do not confer jurisdiction. Amended Complaint at ¶¶ 14, 15 and 43. Further, telephone calls received or made by a defendant do not constitute sufficient contact to establish a basis for personal jurisdiction. *Dietrich v. Patients Compensation Board*, 169 Wis. 2d 471, 480, 485 N.W.2d 614 (Ct. App. 1992). Additionally, the plaintiff initiated the relevant contacts with the defendants. Corder Affidavit at ¶ 7; O'Mara Affidavit at ¶ 3.

The plaintiff has alleged claims based on theories of tort, not contract. This court has jurisdiction over the tort claims "only if some act or omission was committed in Wisconsin." *Pavlic v. Woodrum*, 169 Wis.2d 585, 486 N.W.2d 533, (Ct. App. 1992).

With respect to the “breach of contract” claim, there is no allegation of an “act or omission” “committed in Wisconsin.” Instead, the allegation is of an act committed outside of the state with consequences in Wisconsin. An act or omission occurring outside the state with consequences in the state does not fit the tort provisions of § 801.05(3) Wis. Stats. *Federated Rural Electric Ins. v. Inland Power & Light*, 18 F.3d 389 (1994).

III. THE EXERCISE OF PERSONAL JURISDICTION OVER THE DEFENDANTS IS CONTRARY TO DUE PROCESS

Even if the plaintiff can somehow fit his claims under § 801.50, personal jurisdiction requires that application of that statute to the defendants must meet the requirements of due process. *Bushelman*, 2001 WI App at ¶ 7, 246 Wis. at 323; citing *Lincoln*, 104 Wis. 2d at 10.

[It is] essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.' " [*Burger King Corp. v. Rudzewicz*] at 475, 105 S.Ct. at 2183 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958)). That requirement ensures that a defendant will not be haled into a jurisdiction based solely on activities that are random, fortuitous or attenuated. *Id.* at 475, 105 S.Ct. at 2183-84. A defendant has purposely availed himself of the privilege of conducting activities within a state where he deliberately engages in significant activities within the state or has created continuing obligations between himself and residents of the forum state. *Id.* at 475-76, 105 S.Ct. at 2183-84.

Cram v. Medical College of Wisconsin, 927 F.Supp 316, 320 (ED WI 1996).

The allegations of the complaint demonstrate that the defendants have had only “random, fortuitous or attenuated” contact with Wisconsin. The acts which are alleged to constitute “hacking” amount to nothing more than a possible accidental upload of data onto the plaintiff’s website. Corder Affidavit at ¶ 6. This does not constitute purposeful

availment.

The Defendants have not engaged in sufficient contact with Wisconsin for personal jurisdiction to exist. The key for exercising personal jurisdiction over a nonresident defendant is the “foreseeability” of his being subjected to suit in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). The defendants could not foresee that their actions in requesting the creation of trial exhibits for use in a Tennessee civil action would result in their being subject to suit in Wisconsin. O’Mara Affidavit at ¶¶ 4-5; Duffy Affidavit at ¶ 8. Duffy and O’Mara did not know that the website was going to be visited. *Id.* The plaintiff has failed to even allege that Shipley had any role in the accidental upload that may have occurred. Corder was attempting to download pages and did not intend and could not expect that an accidental upload would occur. Corder Affidavit at ¶¶ 5 and 6.

The contract claim is equally incapable of establishing personal jurisdiction. The defendants’ correspondence with the plaintiff regarding the plaintiff’s claim does not create continuing obligations between the defendants and the plaintiff, an alleged resident of Wisconsin.

In *Mid-States Mortgage Corp. v. Louie*, 841 F.Supp 871 (ED WI 1993), the court refused to hold that a single contract with the plaintiff was sufficient to confer personal jurisdiction over the defendant.

There is no indication that defendant Camara purposefully availed himself of doing business in Wisconsin. Here, defendant Camara, as well as defendants Brittain and Louie, entered into a single contract with Mid-States, a Wisconsin corporation. Although that contract was drafted within Wisconsin, the defendants executed the contract in California. Moreover, for practical purposes, the contract was to be effected in California through a California escrow company, which transferred the Phoenix stock to the defendants and transmitted the defendants’ payment for that stock to

Mid-States. See *Lakeside Bridge & Steel v. Mountain State Const.*, 597 F.2d 596, 604 (7th Cir.1979), cert. denied, 445 U.S. 907, 100 S.Ct. 1087, 63 L.Ed.2d 325 (1980) (holding a nonresident defendant's mere acceptance of a Wisconsin plaintiff's offer for the sale of goods, along with related exchanges of letters and telephone calls, was not sufficient to confer personal jurisdiction over the defendant in a Wisconsin court, even though the defendant knew the products at issue would be manufactured in Wisconsin).

Id. at 875-76. The court also noted that the defendant had not entered the state for any purpose. *Id.* at 876. Physical presence in a state is a relevant consideration in contract cases. *Id.* Here, the plaintiff has not alleged that any of the defendants have ever been present in Wisconsin, and the affidavits demonstrate only the most minimal contact with Wisconsin.

When the instant case is compared to the above, it is clear that personal jurisdiction is absent. Even if an accidental upload occurred, the defendants did not intend to do business or otherwise make contact with Wisconsin.


CONCLUSION

Based on the above argument and authorities, the defendants respectfully request that this Court dismiss the plaintiff's complaint, in its entirety, for lack of personal jurisdiction.

Dated this 27th day of November, 2002.

CRIVELLO, CARLSON &
MENTKOWSKI, S.C.
Attorneys for defendants

BY:


RAYMOND J. POLLEN
State Bar No.: 1000036
RYAN G. BRAITHWAITE
State Bar No.: 1037232

POST OFFICE ADDRESS:

710 N. Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722