

Firm No. 41441

In the Circuit Court of Cook County, Illinois

E360Insight, LLC, an Illinois Limited Liability Company and David Linhardt, an individual,

Plaintiffs,

v.

Mark James Ferguson, *et al.*,

Defendants.

No. 07 L 4983
Judge Quinn

FILED-2
2007 AUG 15 AM 5:26
CIRCUIT COURT OF COOK
COUNTY ILLINOIS
LAW DIVISION
CLERK
DOROTHY BROWN

Defendant Robert Saecker's Motion to Dismiss Pursuant to §2-619

Defendant moves as follows:

Statement of Facts

Robert Saecker (Saecker) is a self-employed painting contractor who resides in Olympia, Washington. (Saecker's Affidavit in support of this motion to dismiss, is attached hereto as exhibit 1, and is referred to hereafter as Ex. 1). Saecker's company, RPS Paintings, operates exclusively in Olympia, Washington and the surrounding areas. (Ex. 1) Saecker owns a personal computer, which is located in his home and can access the Internet via an Internet service provider located in Tenino, Washington. (Ex. 1). Approximately once a week Saecker accesses the Internet through his Internet service provider and posts information and opinions on an online forum. (Ex. 1).

Plaintiffs allege that Saecker is liable for defamation and for tortious interference with both prospective business advantages and existing business relationships as a result of statements allegedly made by Saecker on an online forum and through emails. Plaintiffs allege that Saecker, using the online name Fudo, posted defamatory statements

online referring to plaintiffs as “spammers,” a epithet describing those who send unsolicited and unwanted ‘junk’ e-mails. The complaint further alleges that Saecker sent out emails to blocking entities alleging that e360 was a spammer and alleges that as a result of these postings and emails e360 has lost clients and business opportunities, as the internet marketing industry looks unfavorably upon spammers.

For the reasons that follow, this court should dismiss these claims against Saecker with prejudice because this court lacks personal jurisdiction over Saecker.

§2-619 Motion

I. Count I of the Complaint Against Robert Saecker Should be Dismissed; There is No Basis for the Exercise of Personal Jurisdiction

The Due Process Clause of the 14th Amendment to the United States Constitution guarantees an individual’s liberty interests by prohibiting being subject to judgments of a forum with which one has no meaningful connection. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). This proceeding here runs afoul of the defendant’s constitutional right. Saecker’s contacts with Illinois are nonexistent. His activities don’t even reach the threshold of a meaningful discussion of what a ‘meaningful connection’ with Illinois would need to be as defined in *Burger King, supra*. for there to be jurisdiction. The out-of-state defendant must have such minimum contacts with the forum state such that it would be reasonably foreseeable that he would be haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Saeckers’ contacts are not just minimal, they are non-existent.

The plaintiff’s Count I should be dismissed because Saecker’s alleged online postings were made outside of the State of Illinois and therefore made without creating any contacts with the State of Illinois sufficient to exert jurisdiction over him. Assuming

arguendo that Saecker even made the alleged postings that are allegedly defamatory, those postings would have been made outside of Illinois on Saecker's home computer in Washington State. (Ex. 1). The website Saecker posts to, news.admin.net-abuse.email, is reached by Saecker through Saecker's Internet service provider in Tenino, Washington. (Ex. 1). Saecker's alleged acts occurred completely outside of Illinois and therefore jurisdiction cannot be obtained over him.

Plaintiffs' allegation that posting information that can be accessed from within Illinois creates personal jurisdiction is not just incorrect, it ignores the state of jurisprudence in this area in Illinois. No court in Illinois has ever held that the mere ability to access posted information on the internet from Illinois creates personal jurisdiction over the poster. The Second and Third Districts of the Appellate Courts of Illinois have adopted a 'sliding scale' approach for analyzing when online activities are sufficient for a court to exert jurisdiction over a defendant. *Larochelle v. Allamian*, 361 Ill. App. 3d 217, 836 N.E.2d 176 (2nd Dist. 2005), *cert. denied* 217 Ill. 2d 603, 844 N.E.2d 966 (2006) and *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114, 824 N.E.2d 1175 (3rd Dist. 2005). The sliding scale approach, originally fashioned by the United States District Court for the Western District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), is described as follows:

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 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 of 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. *Zippo Manufacturing Co.*, 952 F. Supp. at 1124 (internal citations omitted).

The plaintiffs' allegations here, no matter how they are interpreted, cannot be characterized as more than mere posting of information on a passive web-site in another state. Applying the *Zippo*'s sliding scale approach followed in Illinois, Saecker's posting of information on an online forum is precisely the sort of passive online activity that fails to achieve the level of minimum contacts necessary for courts to exercise personal jurisdiction. Count I should be dismissed under the sliding scale approach.

The sliding scale approach is not the only method through which to analyze this issue, but the result is the same. The Fifth District of the Appellate Court of Illinois has rejected *Zippo*'s sliding scale in favor of a more traditional approach that examines whether the defendant had continuous and systematic business contacts with the forum state through the web site. *Howard v. Mo. Bone and Joint Ctr, Inc.*, XXX Ill. App. 3d XXX, 2007 Ill. App. LEXIS 414 (5th Dist. 2007). Under the Fifth District's approach, Saecker's alleged postings could not be characterized as indicative of continuous and systematic business contacts, as they would be apparently and merely statements regarding unwanted and unsolicited emails. Saecker not only has no business contacts with Illinois, he has no contacts of any kind with this state. He is a self-employed painting contractor working exclusively within the Olympia, Washington community. (Ex. 1). Therefore, under the Fifth District's approach Count I of the complaint should be dismissed with prejudice.

II. Counts II and III of the Complaint Should be Dismissed Because Saecker Engaged in no Acts that Constitute Minimum Contacts With the State of Illinois

An out-of-state defendant must have such minimum contacts with the forum state such that it would be reasonably foreseeable that he would be haled into court there. *World-Wide Volkswagen*, 444 U.S. 286 (1980). Saecker's contact with Illinois is so minimal it can only be characterized as non-existent. Saecker's computer is located in Olympia, Washington and connects to the Internet through an Internet service provider in Tenino, Washington. (Ex. 1). There are no allegations of how the alleged tortious conduct occurred, if at all, within the State of Illinois. An economic loss which is felt in Illinois is insufficient to confer jurisdiction in Illinois courts when the allegedly tortious act occurred outside of Illinois. *Talbert & Mallon, P.C. v. Stokes Towing Co.*, 213 Ill. App. 3d 992, 572 N.E.2d 1214 (5th Dist. 1991). Saecker's alleged acts created no contacts of any kind, let alone minimal contacts with Illinois, that would make it reasonably foreseeable for him to be haled into court here. Saecker lacked any contact with Illinois let alone minimal contact for jurisdictional purposes. Counts II and III fail because there is no basis for Illinois to assert personal jurisdiction over Saecker and therefore should be dismissed with prejudice.

III. Illinois Courts Cannot Exercise General Personal Jurisdiction over Robert Saecker

Section 2-209 of the Code of Civil Procedure specifies the bases upon which Illinois courts may exercise general personal jurisdiction over an individual. 735 ILCS 5/2-209(b). Illinois courts may exercise jurisdiction over an individual in any action, regardless of whether it arose in Illinois, when the defendant (1) resided in Illinois when the cause of action arose, the action was commenced, or process was served, (2) was

present in Illinois when served, (3) is a corporation organized under the laws of Illinois, or (4) is “doing business” within this State. Illinois courts interpret “doing business” as maintaining continuous and systematic general business contacts within the state. *Howard v. Mo. Bone and Joint Ctr, Inc.*, XXX Ill. App. 3d XXX, 2007 Ill. App. LEXIS 414 (5th Dist. 2007). None of the bases for general personal jurisdiction are applicable here. Saecker lives in and was served in Washington State. Saecker is not an Illinois resident, nor an Illinois corporation organized under the laws of Illinois, nor an individual doing business within Illinois. (Ex. 1). Saecker has not set foot in Illinois in approximately thirty years. (Ex. 1). He is self-employed as a painting contractor. (Ex. 1). Saecker’s painting business is limited to Olympia, Washington. (Ex. 1) Saecker has never solicited possible clients for painting services nor performed any painting assignments within the State of Illinois. (Ex. 1). Saecker therefore lacks the sufficiently continuous and systematic business contacts necessary to permit Illinois courts to exercise general personal jurisdiction over him. Saecker, in fact, lacks any contact with this state and there is no basis to assert personal jurisdiction.

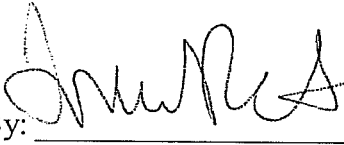
Conclusion

Robert Saecker is a Washington State resident who accesses the Internet through a computer located in his home and an Internet service provider in Tenino, Washington. His alleged defamatory postings were not made within the State of Illinois and Illinois courts reject the notion that the opportunity for an Illinois resident to read information posted online is sufficient to confer jurisdiction over an out of state author. Finally Saecker had no business dealings or any other presence within the State of Illinois sufficient for the courts to exercise jurisdiction over him.

Wherefore, Robert Saecker prays that the court dismiss the complaint against him with prejudice, that he go hence without day and have his costs, so wrongfully sustained, reimbursed him and for such other or further relief as the court determines is warranted.

August 15, 2007

Robert Saecker, defendant

By: 

One of his attorneys

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Affidavit of Robert Saecker

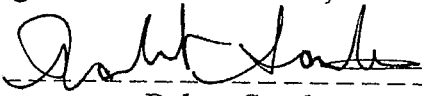
Robert Saecker, first being duly sworn on oath, deposes and states as follows:

1. I am an adult and could, if called as a witness, competently testify to the averments herein.
2. I am currently a resident of Olympia, Washington.
3. I have never been a resident of Illinois.
4. The last time I was in Illinois was approximately thirty years ago when I connected flights at O'Hare International Airport.
5. I am self-employed as a painting contractor.
6. The name of my company is RPS Paintings.

7. My business is limited to Olympia, Washington and the surrounding area.
8. Prior to the filing of this cause of action I have not engaged in any business dealings within the State of Illinois.
9. I own a computer that connects to the Internet.
10. This computer is located in my home.
11. My computer connects to the Internet through an Internet service provider located in Tenino, Washington.
12. On an irregular basis, averaging about once a week, I post information and opinions to an online forum.
13. The Internet address for this forum is news.admin.net-abuse.email.
14. I do not transact any business with Illinois residents through this forum, nor do I solicit business from Illinois residents through this forum.
15. Affiant further sayeth not.

Under penalties provided by section 1-109 of the Code of Civil Procedure, the undersigned certifies the foregoing is true.

August 9, 2007



Robert Saecker

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