

IN THE 15TH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

GABE HOFFMAN,

Plaintiff,

Case No. 50-2019-CA-013860-XXXX-MB

v.

THOMAS SCHOENBERGER, and
THOMAS SCHOENBERGER, LLC.

Defendants.

**DEFENDANT THOMAS SCHOENBERGER'S LIMITED AND SPECIAL
APPEARANCE FOR THE PURPOSES OF:
(1) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND
(2) MOTION TO QUASH SERVICE**

The Defendant, THOMAS SCHOENBERGER, by and through the undersigned counsel, enters this limited and special appearance in this matter for the sole and limited purposes of moving to quash the service of process and dismiss for lack of personal jurisdiction. Defendant Schoenberger does not seek or assert any affirmative relief at this time that could operate to waive his objection to personal jurisdiction. Further, Defendant Schoenberger does not, with this pleading, waive affirmative defenses available to him in initial responsive pleadings, such as dismissal for failure to state a claim.

Facts

1. The Plaintiff filed the original complaint in this matter on October 28, 2019, exactly two weeks after he filed a "companion case" in this judicial circuit, Hoffman v. Alexander, Case No. 50-2019-CA-013281XXXXMB. Both cases are nearly identical in procedural posture from the date of filing. Both involve out-of-state defendants who allegedly made defamatory statements online against the Plaintiff. Both cases are disputes between figures who are on the right wing of the current American political spectrum. Both cases involve parties

who have made their names on the internet and who use the internet almost every day of the year—often dozens or hundreds of times per day—to further their political goals and needle others with whom they disagree. All have years of “tweets” and other online statements available for review.

2. On June 13, 2020, the Defendant Schoenberger, a non-lawyer proceeding *pro se* due to his indigent status and unable to find a Florida lawyer due to his lack of funds and the fact that he lives more than 2,500 miles away from Palm Beach County, Florida, entered a limited and special appearance for the sole purposes of (a) moving to quash service and (b) moving to dismiss this case for lack of personal jurisdiction.

4. On August 13, 2020, a hearing was held on these two issues.

5. On August 20, 2020, this Honorable Court issued an Order denying Defendant’s motions to dismiss and quash service.

6. The timeline and dates are important, because of the “companion case” proceeding at exactly the same time.

7. In the “companion case,” Hoffman v. Alexander, Alexander—through retained counsel—was able to locate a Florida Supreme Court case that is precisely on point on the issue of personal jurisdiction involving statements made on the internet. Counsel for Alexander presented the case to the trial court through briefs and through oral arguments on the motions to dismiss and quash.

8. The trial court found the case dispositive on the issue of personal jurisdiction and dismissed the plaintiff’s case against Mr. Alexander and quashed service. The Order states that the case is dismissed for lack of personal jurisdiction, and the plaintiff would have to file again and serve Mr. Alexander with process again if the plaintiff wished to pursue the matter further.

9. The hearing for the Alexander case was on July 28, 2020, and the Order dismissing the case for lack of personal jurisdiction was issued on August 3, 2020.

10. The relevance of the Alexander case to the present Schoenberger case, of course, is the duty of parties and their lawyers to bring adverse precedent to a court's attention, particularly when it is beyond dispute the adverse precedent is 100% known to a party and his counsel because they are litigating—and losing—an identical case on an identical set of procedural facts in the identical judicial circuit at the identical time.

11. The actual dismissal of the Alexander case by Judge Janis Keyser of the 15th Judicial Circuit in Palm Beach County is not binding, of course. But what is binding is the judicial precedent upon which she based her decision. And the Plaintiff and his counsel had a duty to bring that binding adverse precedent to the attention of this Honorable Court.

12. They obviously failed to do so. And they failed to do so despite her order on dismissal being issued seven days before the hearing on the issue of personal jurisdiction in the present case and 17 days before this Honorable Court issued its order in the present case.

13. The Plaintiff and his counsel are without excuse for violating the duty to bring adverse precedent to this Court's attention. Their failure misled this Honorable Court as to Florida law on the issue of personal jurisdiction involving statements made online. There is no other way of looking at it.

14. Regardless of the issue of improperly concealing adverse precedent from this Court and the Defendant, the Plaintiff's amended complaint fails to allege facts sufficient to bring the Defendant within the personal jurisdiction of Florida courts. Because of this failure, the amended complaint must be dismissed.

15. Finally, Plaintiff's Amended Complaint sues an entity the Plaintiff identifies as Thomas Schoenberger, LLC. Upon information and belief, no such entity exists or has ever existed. If such an entity does exist, it is not believed that the Defendant, Thomas Schoenberger, has anything to do with such an entity.

Applicable Law

16. Florida's long-arm statute, Fla. Stat. 48.193, sets forth the acts subjecting a person to the jurisdiction of the state.

17. Florida's long-arm statute is to be strictly construed by trial courts when hearing a motion to dismiss for lack of personal jurisdiction. Crowe v. Paragon Relocation Resources, Inc., 506 F. Supp 2d 1113, 1119 (N.D. Fla. 2007).

18. If a plaintiff fails to allege any basis for long-arm jurisdiction, then a defendant's motion to dismiss should be granted without a hearing. Fishman v. Fishman, 657 So. 2d 44, 45 (Fla. 4th DCA 1995) (where petitioning litigant has not first pled legally sufficient basis for long-arm jurisdiction, responding litigant need not come forward with affidavits to prove that there is no jurisdiction).

19. A plaintiff who wishes to properly perfect personal jurisdiction in Florida over a nonresident must properly plead the specific acts or conduct that form the bases for subjecting the nonresident defendant to Florida's jurisdiction in the original complaint. Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989) (emphasis added).

20. In order to commit an act of defamation within the State of Florida, and out of state person must "publish" the defamation within the State of Florida. Publication within the State of Florida only occurs when the material is actually accessed—not merely accessible—by a third party within the State of Florida. Defendant points this Honorable Court specifically to the

verbatim language from Internet Solution Corp. v. Marshall, 39 So. 3d 1201, 1214-16 (Fla. 2010).

The operative statutory language is "committing a tortious act within the state." §48.193(1)(b). In Wendt, this Court interpreted section 48.193(1)(b) to include electronic communication "into" the state. The tortious act that ISC alleges Marshall committed within Florida is defamation, and a review of applicable defamation law as it pertains to personal jurisdiction is helpful." Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." Doe v. Am. Online, Inc., 783 So.2d 1010, 1016 (Fla.2001) (quoting Restatement (Second) of Tort § 577 (1977)). Under Florida law, the tort of libel is not completed until the statements are published. See Silver v. Levinson, 648 So.2d 240, 242 (Fla. 4th DCA 1994).[8] As explained in Silver:

[B]ecause the threshold question of personal jurisdiction turns on whether defendant committed an intentional tort in Florida, we must also necessarily review the complaint to determine whether it states a cause of action for libel. If the complaint does not set forth a cause of action for the tort of libel, then assertion of personal jurisdiction predicated on the commission of that specific tort would be improper.

....

Under Florida law, the tort of libel is not completed until the statements are published. In this case, the final element of the tort was not satisfied until the letters were received ... in Florida. Until that time, no tort had been "committed."

Id. at 241-42 (citations omitted). Further, the tort of defamation is committed in the place where the defamatory material is published. Casita, L.P. v. Maplewood Equity Partners, L.P., 960 So.2d 854, 857 (Fla. 3d DCA 2007) ("A telephonic, electronic, or written communication is deemed 'published' in Florida, subjecting the publisher to long-arm jurisdiction under section 48.193(1)(b) of the Florida Statutes if the communication was made into this state by a person outside the state, even if that person has no other contacts with the state." (citing Wendt, 822 So.2d at 1258)).

We conclude that allegedly defamatory material about a Florida resident placed on the Web and accessible in Florida constitutes an "electronic communication into Florida" when the material is accessed (or "published") in Florida. In the context of the World Wide Web, given its pervasiveness, an alleged tortfeasor who posts allegedly defamatory material on a website has [39 So.3d 1215] intentionally made the material almost instantly available everywhere the material is accessible. By posting allegedly defamatory material on the Web about a

Florida resident, the poster has directed the communication about a Florida resident to readers worldwide, including potential readers within Florida. When the posting is then accessed by a third party in Florida, the material has been "published" in Florida and the poster has communicated the material "into" Florida, thereby committing the tortious act of defamation within Florida. This interpretation is consistent with the approach taken regarding other forms of communication.

Id. (emphasis added).

Law Applied to Plaintiff's Complaint

21. In the present action, the Plaintiff's complaint fails to allege any basis for long-arm jurisdiction. Thus, it is due to be dismissed without a hearing. Fishman, 657 So. 2d at 45.

22. Specifically, the Plaintiff's complaint is void of any reference to Florida's long-arm statute and does not even pretend to identify a specific provision of the statute sufficient to provide a statutory basis for long-arm jurisdiction.

23. The Defendant, Schoenberger, is a resident of Utah. The amended complaint does not even bother to nakedly assert that all conditions precedent have been met and venue is appropriate. Further, the complaint fails to establish any basis whatsoever for this Court to strictly construe Florida's long-arm statute. As such, the complaint is due to be dismissed.

24. The Plaintiff's complaint is fatally void of the specific acts or conduct that form the bases for subjecting the nonresident defendant to Florida's jurisdiction in the original complaint. Venetian Salami Co. v. Parthenais, 554 So. 2d at 502 (emphasis added). Thus, not even an amended complaint can revive any deficiencies, and the Plaintiff's complaint must be dismissed.

25. The standard set forth by the Florida Supreme Court could not be clearer. Allegedly defamatory material is not published in Florida until "the posting is then accessed by a third party in Florida." Internet Solution Corp. v. Marshall at 1216 (emphasis added). The

ability to access the allegedly defamatory material is not enough. It must have been accessed by a third party.

25. In addition, “[i]f the complaint does not set forth a cause of action for the tort of libel, then assertion of personal jurisdiction predicated on the commission of that specific tort would be improper.” *Id.* at 1214 (citing *Silver v. Levinson*, 648 So.2d 240, 242 (Fla. 4th DCA 1994)). In other words, the complaint must allege the allegedly defamatory material was accessed by a third party in Florida, or it must be dismissed for lack of personal jurisdiction. No third party is alleged to have accessed the allegedly defamatory material.

26. Neither the original complaint nor the amended complaint makes this allegation. Thus, the amended complaint is due to be dismissed.

27. This is a case against a Utah resident. Based on the Plaintiff’s complaint and amended complaint, Florida courts do not have personal jurisdiction over the Defendant. Nevertheless, the Defendant has been haled into Florida courts and forced to appear on a limited basis at hearings multiple times and submit multiple pleadings. At some point, the Plaintiff’s failure to demonstrate a legal basis for submitting the Defendant to Florida courts must be determined to be permanently fatal to the Plaintiff’s case. Florida law compels this case finally to be dismissed.

28. Finally, service of process is the means by which a non-resident of Florida is notified a Florida court is exercising jurisdiction over a defendant. Where, as here, the court is without personal jurisdiction over the defendant, the service of process must be considered void. Thus, the Defendant’s motion to quash service should be granted.

Conclusion

The Plaintiff's complaint fails to allege any basis for personal jurisdiction. Thus, service is due to be quashed, and the complaint is due to be dismissed without a hearing.

Respectfully submitted on this the 9th day of December, 2020.

/s/ G. Baron Coleman
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CERTIFICATE OF SERVICE

I hereby certify that on December 9th, 2020, I have electronically filed the foregoing document with the Clerk of Court using the e-filing system which will send notification to all parties and counsel of record.

/s/ G. Baron Coleman
OF COUNSEL