

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, an individual,)
Plaintiff,)

vs.)

Case No. CIV-04-1013-W

AMERIQUEST MORTGAGE COMPANY, a)
Delaware corporation, INNOVATIVE MARKETING,)
INC., d/b/a LEAD EXTREME, a Washington corporation,)
THE LOAN PAGE, INC., a Delaware corporation,)
STECROFT HOLDINGS, INC., as successor in interest to)
GO APPLY, INC., d/b/a ELEADZ, a Nevada corporation,)
JOHN DOES 1-50, MI SOLUTIONS, INC., a California)
corporation, LEAD ASSOCIATION CORP, a California)
corporation, THE LEAD SOURCE, INC., a California)
corporation, COMMISSION JUNCTION, INC., a)
Delaware corporation, AVALON TRADING COMPANY,)
LLC, a California corporation, IMPACT WEB)
ENTERPRISES, INC., a California corporation,)
LEAD2.NET, INC., a Florida corporation, SUNBURN)
MARKETING GROUP, LLC, a California limited liability)
company, MONEYNEST HOLDINGS, INC., a California)
Corporation, INTERNATIONAL WEBWORKS.COM,)
LLC, a Colorado limited liability company, NICK)
HETCHER, an individual, LIBERTY LEAD SOURCE,)
INC, a Nevada corporation, TIM FAUST, an individual,)
DOTCOM MARKETING GROUP, INC., a Florida)
corporation, INETMEDIA, a California corporation,)
LEADCORP, a California corporation, LEAD)
TRANSFER, LLC, a Nevada limited liability company,)
ABACUS ENTERPRISES, INC., a California corporation,)
TANDAX, INC., a Washington corporation)
Defendants.)

AMERIQUEST MORTGAGE)
COMPANY, a Delaware corporation,)
Cross-Complainant,)

vs.)

INNOVATIVE MARKETING, INC. d/b/a)
LEAD EXTREME, a Washington Corporation;)
VISIUM SOLUTIONS CORPORATION, a)
Florida corporation; and PROFESSIONAL)
EQUITY MARKETING, a California)
Corporation, and ROES I-50, inclusive,)
Cross-Defendant.)

FILED
OCT 20 2006
ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY *RS* DEPUTY

ORDER

This matter comes before the Court on the motion to dismiss filed by specially appearing defendant MoneyNest Holdings, Inc. (“MoneyNest”) (docket entry no. 185). The matter has been fully briefed and on October 11, 2006, the Court conducted a hearing on the motion and heard the parties’ oral arguments. Based upon careful consideration of the parties’ submissions and arguments, the Court makes its determination as follows.

On October 28, 2005, MoneyNest filed its motion to dismiss the plaintiff’s claims against it on several grounds including the ground that the Court lacks personal jurisdiction over MoneyNest because it has no contacts with the plaintiff or with the State of Oklahoma and none are alleged in the complaint. Since the filing of the motion to dismiss, the plaintiff, Robert H. Braver has been granted time to conduct discovery into the issue of personal jurisdiction. He has also amended his complaint. Thus, while MoneyNest’s motion to dismiss is directed at Mr. Braver’s Second Amended Complaint, its supplemental motion and memorandum in support of the motion addresses the Third Amended Complaint filed with leave of Court on January 27, 2006.

It is the plaintiff’s burden to establish that the court has personal jurisdiction over the defendants. Behagen v. Amateur Basketball Ass’n, 744 F.2d 731, 733 (10th Cir. 1984). The weight of that burden depends on whether the court, in its discretion, elects to resolve the jurisdiction issue solely on the basis of pleadings, declarations, and discovery materials or after conducting a hearing. Id. If the court relies exclusively on papers submitted, the plaintiff need only make a prima facie showing. Id. However, if the court elects to hold a hearing on the matter, the plaintiff must prove by a preponderance of the evidence the facts necessary to establish personal jurisdiction. *See* Federal

Deposit Ins. Corp. v. Oaklawn Apartments, 959 F.2d 170,174 (10th Cir. 1992); *see also* Baldrige v. McPike, Inc., 466 F.2d 65 (10th Cir. 1972).

Factual background

The plaintiff, Robert Braver, represents himself to be an Oklahoma provider of Internet access and electronic mail services whose servers were inundated with allegedly unlawful commercial electronic mail promoting mortgage services (“mortgage spam”). In order to discover who was behind the mortgage spam, Mr. Braver created decoy identities and responded to several of the mortgage spam messages. Each of these decoy “leads” resulted in Mr. Braver’s receiving communications from the defendant Ameriquest Mortgage Company (“Ameriquest”).

MoneyNest is a California corporation having its principal place of business in California. It is an “intermediary, or middleman for marketing leads.” It does not maintain a place of business in Oklahoma, nor does it own real property in Oklahoma, maintain bank accounts, offices or telephone numbers there. It does not advertise in Oklahoma or employ Oklahoma employees. It does not pay taxes in Oklahoma, nor does it have a registered agent there.

On or about October 17, 2003, an alleged mortgage spam message (the “October 17 email”) was transmitted through Robert Braver’s servers. Mr. Braver responded to the October 17 email by connecting to an included link which took him to the optinmailing.biz website. He input decoy information employing the identity of Roger Griffith of Norman, Oklahoma. It appears that after being commercially traded by a number of individuals and entities, Mr. Braver’s decoy mortgage lead was purchased by Ameriquest. Ameriquest alleges that it purchased the Roger Griffith decoy mortgage lead from MoneyNest. MoneyNest denies that it sold the Roger Griffith lead to Ameriquest and asserts that none of its actions relating to the approximately 10,752 Oklahoma-

related mortgage leads it has purchased and sold occurred in Oklahoma. It argues, that therefore, it cannot be subject to this Court's jurisdiction. Robert Braver does not suggest that MoneyNest itself "hit the send button" which transmitted mortgage spam to his Oklahoma servers or contacted him as a result of his decoy mortgage leads. Rather, he contends that MoneyNest invoked the personal jurisdiction of this Court when it responded to approximately 10,752 third-party generated mortgage inquiries from Oklahomans and when it conspired to transmit mortgage spam to his servers.

Analysis

MoneyNest alleges that the Court lacks personal jurisdiction first because Robert Braver cannot demonstrate that MoneyNest has any direct Oklahoma contacts, and second because the plaintiff has not established the elements of "conspiracy jurisdiction." Pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure, a federal court may exercise personal jurisdiction over a defendant in the manner provided by state law. Oklahoma's long-arm statute provides that "[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States." 12 O.S. 2001 § 2004 (F). In other words, Oklahoma's long-arm statute permits the exercise of personal jurisdiction to the full extent allowed by the Due Process Clause of the Fourteenth Amendment.

Because the limits of Oklahoma's statutory authorization for the exercise of personal jurisdiction are coterminous with the limits of the Due Process Clause, the statutory and constitutional inquiries necessarily merge into a single due process analysis. Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1247 (10th Cir. 2000). Due process is satisfied if the non-resident defendant has "minimum contacts" with the forum state such that requiring it to defend its interest here would not "offend traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The sufficiency of a defendant's contacts must be evaluated by examining the defendant's conduct and connections with the forum state to assess whether the defendant has purposely availed itself of the privilege of conducting activities therein. Williams v. Bowman Livestock Equipment Co., 927 F.2d 1128, 1131 (10th Cir. 1991).

Courts recognize two types of personal jurisdiction: general and specific. In order to establish general jurisdiction, it must be shown that the nonresident defendant has maintained continuous and systematic contact with the forum state. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415-416 (1984). The facts required to establish general jurisdiction must be continuous and systematic. Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1418 (10th Cir. 1988). Where general jurisdiction is found, all causes of action against a defendant, whether or not related to the defendant's activities in the state, may be pursued in that state's courts.

Less extensive contacts with the forum state will suffice to establish specific jurisdiction. Specific jurisdiction refers to a court's exercise of jurisdiction where the lawsuit arises out of the nonresident defendant's contacts with the forum state. A finding of specific jurisdiction requires a two-step analysis. First, a court must first determine whether a nonresident defendant has such minimum contacts with the forum state that he should reasonably anticipate being haled into court there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980). If minimum contacts are present, the court must then determine whether its assertion of jurisdiction would comport with the traditional notions of fair play and substantial justice. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 467 (1985). Such a determination requires a court to consider not only the burden imposed upon the out-of-state defendant, but also the forum state's interest in

adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. World-Wide Volkswagen at 292.

Mr. Braver alleges that the Court has both general and specific personal jurisdiction over MoneyNest. He contends that MoneyNest's routine commerce in mortgage leads generated by others but known by it to be intimately tied to Oklahoma residents and Oklahoma real property constitutes continuous and systematic contact with this state sufficient to invoke this Court's general jurisdiction.

MoneyNest makes no effort to controvert the allegation that it routinely engages in the purchase and sale of Oklahoma-related mortgage leads generated by third parties. It does resist the existence of general jurisdiction over it by asserting that such commerce does not represent continuous and systematic contact with the state. MoneyNest's own submissions show that the Oklahoma-related mortgage leads in which it traded were the result of a continuous and systematic approach to acquiring leads throughout a market which clearly included Oklahoma. The critical question is whether MoneyNest's commerce in those leads constitutes contacts with Oklahoma. MoneyNest insists it does not.

MoneyNest's argument is premised upon its depiction of its business as one which traded nothing more than merchandise in the form of information compilations. It appears to the Court that the mortgage leads here at issue constituted more than mere merchandise or tangible personal property. They are unfulfilled requests from would-be customers (made in response to third-party solicitations) for mortgage information. The Court is concerned that companies like MoneyNest

systematically respond to requests from prospective Oklahoma mortgage-services customers by helping to procure the requested service. Nonetheless, the Court finds no authority authorizing it to exercise general personal jurisdiction over such out-of-state defendants. The Court finds that Mr. Braver has failed to make even a prima facie showing that MoneyNest had continuous and systematic contact with Oklahoma by virtue of its routine trafficking in third-party generated Oklahoma mortgage leads.¹ The Court is, therefore, precluded from exercising general personal jurisdiction over those defendants.

In addition to claiming the existence of general jurisdiction over MoneyNest, Mr. Braver alleges the existence of specific jurisdiction. He maintains that MoneyNest not only trafficked in mortgage leads obtained from unlawful mortgage spam sent to his Oklahoma servers, but also that it conspired with other defendants to this action and with unnamed third persons to initiate and transmit mortgage spam and to obscure the trails between the parties actually transmitting that unlawful email and those encouraging such wrongful conduct for their ultimate financial gain.

To succeed on a civil conspiracy claim under Oklahoma law, a plaintiff must show that two or more persons acted in concert to accomplish an unlawful objective. Dill v. City of Edmond, Oklahoma, 155 F.3d 1193, 1208 (10th Cir. 1998). When a conspiracy is shown to have existed, each of the conspirators is responsible for the acts of his co-conspirators done in furtherance of such conspiracy. Blasdel v. Gower, 1918 OK 322, 173 P. 644. Thus, an out-of-state defendant may be

¹It appears the plaintiff may also suggest that general personal jurisdiction over MoneyNest is proper because MoneyNest, through its agents, transmitted thousands of mortgage spam messages into Oklahoma. The record discloses no evidence which might arguably support such allegations.

subject to personal jurisdiction in a state where his co-conspirators have engaged in acts undertaken on behalf of the conspiracy.

To establish personal jurisdiction under the “conspiracy theory” of jurisdiction, the plaintiff must do more than simply allege an actionable claim for civil conspiracy against the out-of-state defendant. He must present evidence showing that a conspiracy existed and that the out-of-state defendant was a member of the conspiracy. In addition, he must show that the out-of-state defendant’s co-conspirator committed an act in the forum state in furtherance of the conspiracy. *See Clark v. Tabin*, 400 F.Supp.2d 1290, 1297 (N.D.Okla. 2005). Having been granted an opportunity to conduct discovery into jurisdictional matters, and having been further granted a hearing on such matters, Mr. Braver is required to prove his factual case by a preponderance of the evidence.

Here, Mr. Braver has pointed to evidence which establishes that mortgage spam was intentionally transmitted to Oklahoma through his servers for the purpose of generating commercially marketable Oklahoma mortgage leads. When Mr. Braver replied to the mortgage spam messages, he received mortgage solicitation communications from the defendant Ameriquest, MoneyNest, Ameriquest, and other mortgage brokers who traded in leads generated from alleged mortgage spam sent to Mr. Braver’s servers had reason to know that the messages were sent: 1) using techniques designed to omit or misrepresent the point of origin or transmission path of the email messages; and 2) “containing false or misleading information including the addition of random characters, words, and/or sentences to the e-mail subject lines and/or bodies, and/or obfuscating the nature of the message by misspelling words or substituting various symbols for letters, in a deliberate attempt to thwart Braver’s spam filtering mechanisms.

The Court is mindful that ordinarily the law permits “great latitude” in the admission of circumstantial evidence tending to establish a conspiracy and the defendant’s connection therewith. *See* 15A Corpus Juris Secundum, *Conspiracy* § 33, p. 372-73 (2002); *see also* Felt v. Westlake, 1918 OK 360, 174 P. 1041 (Okla. 1918). However, where a plaintiff seeks to make an alleged conspiracy the basis of the court’s personal jurisdiction over an out-of-state defendant, due process demands that he offer sound evidence of the defendant’s participation therein. Here, Mr. Braver proffers absolutely no admissible evidence tying MoneyNest to an alleged conspiracy.² Thus he fails to meet his burden of providing “record proof” that the nonresident defendant had sufficient contacts with the state to assure that traditional notions of fair play and substantial justice not be offended should the court exercise personal jurisdiction. Conoco, Inc. v. Agrico Chemical Co., 2004 OK 83, 115 P.3d 829, 835.

MoneyNest has proffered affidavits showing that it had no meaningful contacts with the State of Oklahoma. The record as developed following jurisdictional discovery and a hearing on the matter discloses no evidence that MoneyNest purposely availed itself of the benefits of Oklahoma law. The Court, therefore, concludes that to exercise personal jurisdiction over MoneyNest pursuant to a conspiracy theory of jurisdiction would offend traditional notions of fair play and substantial justice.

² Mr. Braver has attempted to link MoneyNest to the alleged conspiracy by showing that it sold the Roger Griffith decoy mortgage lead to Ameriquest. In support of this allegation, he has submitted an affidavit from his attorney identifying an attached email as having come from Ameriquest’s legal counsel. The email identifies MoneyNest as the company from whom Ameriquest purchased the Roger Griffith decoy mortgage lead. MoneyNest objects to the email on the ground that it is inadmissible hearsay. The Court agrees.

Conclusion

For the reasons set forth above, the Court GRANTS the defendant MoneyNest Holdings, Inc.'s motion to dismiss for lack of personal jurisdiction and DISMISSES it from this action.

ENTERED this 20th day of October, 2006.

A handwritten signature in black ink, appearing to read "Lee R. West", is written over a horizontal line.

LEE R. WEST
UNITED STATES DISTRICT JUDGE