

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 I-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 BS DEPUTY

ORDER

This matter comes before the Court on the motion to dismiss filed by defendants Tim Foust and Tandax, Inc. (“Tandax”) (docket entry no. 265). The matter has been fully briefed and the Court makes its determination as follows.

On February 13, 2006, Tim Foust and Tandax filed their motion to dismiss the plaintiff’s claims against them on several grounds including the ground that the Court lacks personal jurisdiction because neither Tim Foust nor Tandax has any 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, Tim Foust’s and Tandax’s motion to dismiss is directed at Mr. Braver’s Second Amended Complaint, their reply 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 an evidentiary 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 Baldridge 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”).

Tim Foust is an individual and a resident of the State of Washington. Tandax was a Washington corporation with an office in Washington. Tim Foust appears to have been the owner and sole employee of Tandax, a company which served as a broker in the data industry. The data it brokered were generated in a variety of ways, including but not limited to, Internet-based marketing. Tandax has never maintained Oklahoma offices, telephone or facsimile numbers. It has never employed any Oklahoma-based employees, or advertised in any Oklahoma newspapers or magazines. It has never had any Oklahoma-based owners, nor has it owed or leased any property in Oklahoma. Tandax was never licensed to conduct business in Oklahoma and none of its employees have traveled to Oklahoma on official business.

In January 2004, several alleged mortgage spam messages were transmitted through Robert Braver’s Oklahoma servers. One such message was purportedly sent by a Glenna Manley. Mr. Braver responded to the message by connecting to an included link which took him to the quick-lender-search.biz website. He input decoy information using the identity of Clayton Fountain of California. Another message was purportedly sent by “lo4x17rh comet.” Mr. Braver responded to the message by connecting to an included link which took him to the onlinegrants.com website.

He input decoy information using the identity of Ron Bartles of Missouri. In the summer of 2004 several additional alleged mortgage spam messages were sent to Mr. Braver's servers. He responded those messages and created decoy mortgage leads under the identities of Frederick Freemont of South Carolina, Jake Sparks of Michigan, and Leroy Crockett of Texas. It appears that after being commercially traded by a number of individuals and entities, Mr. Braver's decoy mortgage leads were purchased by Ameriquest. Tim Foust and/or Tandax were intermediate owners of the decoy mortgage leads.¹ Tim Foust and Tandax assert that none of their actions relating to any mortgage leads occurred in Oklahoma. They argue, that therefore, they cannot be subject to this Court's jurisdiction. Robert Braver alleges Tim Foust and Tandax directly transmitted substantial quantities of mortgage spam to Oklahoma. Mr. Braver also contends that Tim Foust and Tandax invoked the personal jurisdiction of this Court when they responded to third-party generated mortgage inquiries from Oklahomans and when they conspired to transmit mortgage spam to his servers.

Analysis

Tim Foust and Tandax allege that the Court lacks personal jurisdiction first because Robert Braver cannot demonstrate that they had 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

¹The evidence Mr. Braver has submitted connecting Tim Foust and Tandax to the decoy leads was filed under seal pursuant to a confidentiality agreement entered by the parties, and the Court will refrain from any detailed discussion of its contents. While Tim Foust and Tandax, in their non-sealed reply attack the credibility of the plaintiff's evidence, they fail to offer any evidence of their own to refute it.

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 Tim Foust and Tandax. He contends that they both directed mortgage spam into Oklahoma in order to generate mortgage leads, and routinely trafficked in leads generated by others but known by them to be intimately tied to Oklahoma residents and Oklahoma real property. Such activities, he argues, constitute continuous and systematic contact with this state sufficient to invoke this Court's general jurisdiction.

Tim Foust and Tandax strenuously deny that they transmitted mortgage spam to Oklahoma. They contend that the mortgage leads they purchased and sold were all generated by third parties. Mr. Braver has offered no direct evidence that Tim Foust and Tandax transmitted mortgage spam. Rather, he argues that their failure to produce records revealing the parties from whom they purchased the Oklahoma mortgage leads supports an inference that Tim Foust and Tandax generated the leads themselves. The Court is unpersuaded by the plaintiff's reasoning. It notes that the defendants similarly failed to produce evidence showing the parties to whom they sold mortgage leads. Nonetheless, Mr. Braver alleges and offers evidence to show that Tim Foust and Tandax did in fact sell Oklahoma mortgage outside the state. The Court concludes it cannot exercise general jurisdiction over Tim Foust and Tandax on the basis of their alleged systematic transmission of mortgage spam to Oklahoma.

Mr. Braver also argues that the Court should exercise general jurisdiction over Tim Foust and Tandax on the ground that they routinely engaged in the sale of Oklahoma-related mortgage leads, even if those leads were generated by third parties. There is no evidence that Tim Foust and Tandax engaged in any purchases or sales of Oklahoma-related mortgage leads within Oklahoma. The Court has found no authority authorizing it to exercise general personal jurisdiction over out-of-state defendants whose commercial transactions occurred exclusively outside the forum state. The Court finds that Mr. Braver has failed to make a prima facie showing that Tim Foust and Tandax had continuous and systematic contact with Oklahoma by virtue of their routine trafficking in third-party generated Oklahoma mortgage leads. The Court is, therefore, precluded from exercising general personal jurisdiction over those defendants.

In addition to claiming the existence of general jurisdiction over Tim Foust and Tandax, Mr. Braver alleges the existence of specific jurisdiction. He maintains that they not only trafficked in mortgage leads obtained from unlawful mortgage spam sent to his Oklahoma servers, but also that they 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 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 if true 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. Tim Foust, Tandax, 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." Mr. Braver further proffers evidence that at least in the instances of the Clayton Fountain, Ron Bartles, Frederick Freemont, Jake Sparks, and Leroy Crockett decoy mortgage leads, Tim Foust and Tandax acted as sellers of mortgage leads which were ultimately acquired by Ameriquest.

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). Here, however, any inference that Tim Foust and Tandax participated in a conspiracy must rest on its trade of a handful of mortgage leads. None of those mortgage leads appeared to concern Oklahoma residents or real property. The Court concludes that any inference that Tim Foust and Tandax conspired to transmit mortgage spam to Oklahoma is too tenuous to survive the important due process considerations at stake in a personal jurisdiction

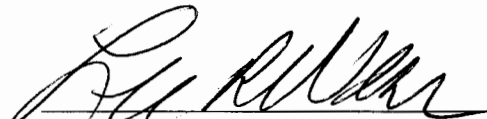
analysis. Due process demands that a court investigate “the extent to which the defendant has purposefully availed itself of the benefits of the forum’s laws.” Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1079 (10th Cir. 1995). Thus the plaintiff must provide “record proof” that the nonresident party 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.

Tim Foust and Tandax have proffered affidavits showing that they 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 Tim Foust and Tandax purposely availed themselves of the benefits of Oklahoma law. The Court, therefore, concludes that to exercise personal jurisdiction over Tim Foust and Tandax pursuant to a conspiracy theory of jurisdiction would offend traditional notions of fair play and substantial justice.

Conclusion

For the reasons set forth above, the Court GRANTS the motion to dismiss for lack of personal jurisdiction filed by the defendants Tim Foust and Tandax, Inc. Said defendants are accordingly DISMISSED from this action.

ENTERED this 20th day of October, 2006.



LEE R. WEST
UNITED STATES DISTRICT JUDGE