

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 24 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 defendant Lead Association, Inc. ("LAI") (docket entry no. 199). The matter has been fully briefed and on October 11, 2006, the Court conducted a hearing on the motion and heard the parties' evidence and oral arguments. Based upon careful consideration of the parties' submissions and arguments, the Court makes its determination as follows.

On November 7, 2005, LAI filed its motion to dismiss the plaintiff's claims against it on several grounds including the ground that the Court lacks personal jurisdiction over LAI 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 LAI's motion to dismiss is directed at Mr. Braver's Second Amended Complaint, its supplement to that motion as well as its reply address 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* 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”).

LAI is a California corporation having its principal place of business in San Diego, California. It is a marketing company that buys and sells data, including mortgage leads, from other marketing companies and then sells that data to other lead vendors or mortgage brokers such as Ameriquest. LAI has never maintained offices in Oklahoma and it is not licensed to do business within the state. It does not own or lease real property in Oklahoma. It does not maintain bank accounts, telephone or facsimile numbers here. It does not advertise in Oklahoma newspapers or magazines. It employs no Oklahoma employees. It does not pay taxes in Oklahoma nor does it have a registered agent here. It’s employees have never traveled to Oklahoma on business.

On or about December 28, 2004, an alleged mortgage spam message was transmitted through Robert Braver’s servers. Mr. Braver responded to the email by connecting to an included link which took him to the xmastimerater.com website. He input decoy information employing the name Cleo Benitez which was the purported name of the email message’s sender. As a result of that decoy, a

short time later he received a call from neighborhoodloan.com, an entity which appears to have been previously owned by LAI. Later that same day he received a call from Ameriquest.

On or about April 22, 2005, an alleged mortgage spam message was transmitted through Robert Braver's servers. He responded to this email by clicking a link which took him to the xfhfP0BX2ug.perfect-mortgages.net website. He input decoy information employing the name Golda Coleman, the purported name of the email message's sender. That decoy lead also led to a call from neighborhoodloan.com, followed the next day by a call from Ameriquest.

On April 27, 2005, an alleged mortgage spam message was transmitted through Robert Braver's servers. He responded to this email by clicking a link which took him to the accepted.approved-loans.net website. He input decoy information employing the name Wendell Slater, the purported name of the email message's sender. The next day he received calls from neighborhoodloan.com and Ameriquest.

LAI asserts that it purchased the Cleo Benitez and Golda Coleman decoy mortgage leads from another mortgage lead vendor and subsequently sold those decoy mortgage leads to Ameriquest.¹ LAI contends that none of its actions relating to those decoy mortgage leads, or any of the other thousands of Oklahoma-related mortgage leads in which LAI traded, occurred in Oklahoma. It argues, therefore, that it cannot be subject to this Court's jurisdiction. Robert Braver argues that LAI itself sent the mortgage spam from which he created his decoy mortgage leads and that it then followed up on those leads by telephoning him in Oklahoma. He further argues that even if LAI did not itself "hit the send button" which transmitted mortgage spam to his Oklahoma servers

¹Neither LAI's briefs nor Michael Nittoli's affidavits address the Wendell Slater decoy mortgage lead.

or contact him as a result of his decoy mortgage leads, LAI became subject to the personal jurisdiction of this Court when it responded to third-party generated mortgage inquiries from Oklahomans and conspired to transmit mortgage spam to his servers.

Analysis

LAI alleges that the Court lacks personal jurisdiction first, because Robert Braver cannot demonstrate that LAI 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); 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.

1. **General Jurisdiction**

Mr. Braver alleges that the Court has both general and specific personal jurisdiction over LAI. He contends that LAI has invoked this Court's general jurisdiction by routinely generating and selling Oklahoma-related mortgage leads or by trading in mortgage leads generated by others but known by it to be intimately tied to Oklahoma residents and Oklahoma real property. LAI makes no effort to controvert the allegation that it routinely engaged 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. Nothing in LAI's submissions shows that the Oklahoma-related mortgage leads in which it traded were not the result of a continuous and systematic approach to acquiring leads throughout a market which clearly included Oklahoma. The critical question is whether LAI's commerce in those leads constitutes contacts with Oklahoma. LAI insists it does not.

LAI's argument is premised upon its depiction of its business as one which traded nothing more than information lists as tangible personal property. 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 LAI 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 out-of-state defendants solely on the ground of their out-of-state commercial transactions. The Court finds that Mr. Braver has failed to make even a prima facie showing that

LAI had continuous and systematic contact with Oklahoma by virtue of its routine trafficking in third-party generated Oklahoma mortgage leads.

Mr. Braver also argues that the Court may exercise general personal jurisdiction over LAI based upon LAI's own continual and systematic lead-generating activities within this state. He cites the affidavit of LAI's president, Michael Nittoli, dated November 3, 2005, and filed in conjunction with LAI's motion to dismiss, which states that LAI, through the "use of websites and search engine optimization techniques" generates its own mortgage leads which it then resells. In the brief supplementing its motion, as opposed to an affidavit or other evidentiary material, LAI asserts that the November 3, 2005 affidavit is mistaken and that LAI "***did not and does not*** engage in mortgage lead generation" (emphasis supplied). Mr. Nittoli's revised affidavit dated February 17, 2006 amends the references to LAI's lead generation efforts. It does not, however, retract Mr. Nittoli's critical sworn statement, nor does it set forth an unambiguous sworn statement that LAI did not and does not generate mortgage leads.

Mr. Nittoli's sworn affidavit states that LAI generates mortgage leads through websites that it owns. Mr. Braver has submitted evidence indicating that LAI owned the website neighborhoodloan.com from at least March 18, 2003 until approximately July 9, 2003. As part of its jurisdictional discovery, on December 22, 2005, the plaintiff submitted interrogatories to LAI. Because LAI designated its answers to those interrogatories confidential, the Court will refrain from discussing those answers in any detail. Rather, it will simply note that during a time coinciding with its apparent ownership of neighborhoodloan.com, LAI indicated it sold a substantial number of mortgage leads relating to Oklahoma residents and real property. Mr. Braver has offered evidence to show that neighborhoodloan.com generated mortgage leads via an interactive website designed

to solicit “affiliates” in Oklahoma and elsewhere to generate mortgage leads throughout the country. The number of Oklahoma-related mortgage leads acquired and sold by LAI during an approximately 18-month period, including the time of its ownership of neighborhoodloan.com, gives rise to a reasonable inference that a number of those leads were generated by LAI through its websites such as neighborhoodloan.com. The Court concludes that Mr. Braver has proved, by a preponderance of the evidence produced to this point in the litigation, that LAI engaged in continuous and systematic contacts with the State of Oklahoma through its operation of interactive websites. Accordingly, the Court finds that LAI is subject to its general personal jurisdiction. *See Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999).

2. Specific Jurisdiction

In addition to claiming the existence of general jurisdiction over LAI, Mr. Braver alleges the existence of specific jurisdiction. He maintains that LAI 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

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, the plaintiff meets his burden of showing that a conspiracy existed.² While his case is largely circumstantial, that is typically the case with conspiracy allegations. Direct evidence is most often in the possession and control of the alleged conspirators and can, therefore, seldom be obtained. Thus, “a conspiracy usually is susceptible of no other proof than that of circumstantial evidence.” 15A Corpus Juris Secundum, *Conspiracy* § 33, p. 372 (2002). The law permits “great latitude” in the admission of circumstantial evidence tending to establish a conspiracy, and to connect those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy. *Id.* at 372-73; *see also Felt v. Westlake*, 1918 OK 360, 174 P. 1041 (Okla. 1918).

²Contrary to LAI’s assertions, Mr. Braver is not subject to the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Mr. Braver’s conspiracy claim does not arise out of any allegation of fraud or mistake and Rule 9(b) is inapplicable for reasons more fully discussed in the Court’s order entered October 13, 2006, denying defendant Stecroft Holdings, Inc.’s motion to dismiss.

Mr. Braver has pointed to evidence which indicates 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, in every instance he received mortgage solicitation communications from neighborhoodloan.com, an entity once owned by LAI and now apparently owned by LAI's sister corporation. Even if neighborhoodloan.com could not tell from the face of the decoy mortgage leads that it was dealing with an Oklahoma-related lead, it had reason to know that its telephone calls were placed to an Oklahoma telephone number. Following the calls from neighborhoodloan.com, Mr. Braver almost immediately received calls from the defendant Ameriquest. Although LAI denies having sent the mortgage spam from which the Cleo Benitez and Golda Coleman mortgage leads were generated, the immediacy of the telephone calls to Mr. Braver from neighborhoodloan.com, gives rise to a reasonable inference that neighborhoodloan.com either directly transmitted the mortgage spam messages or caused them to be transmitted through one of the "affiliates" it solicited through its website.

While neighborhoodloan.com may be a separate entity from LAI, Mr. Braver has offered sufficient evidence of a relationship between the two to support an inference that LAI was aware of and endorsed neighborhoodloan.com's lead generation practices when it purchased mortgage leads generated by that entity. LAI then sold the allegedly spam-generated mortgage leads to Ameriquest. LAI, Ameriquest, and neighborhoodloan.com had reason to know that they were trading in mortgage leads generated from messages 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 concludes that Mr. Braver's evidence is sufficient to establish the existence of a conspiracy as well as LAI's connection to or membership in that conspiracy. Furthermore, the transmission of the Cleo Benitez, Golda Coleman, and Wendell Slater email messages to Mr. Braver's Oklahoma servers constitutes overt action taken in furtherance of the conspiracy within the State of Oklahoma and creates a substantial connection with this forum. Oklahoma follows the principle articulated by the United States Supreme Court that, "a state generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." Hough v. Leonard, 1993 OK 112, 867 P.2d 438, 444 . So long as it creates a substantial connection with the forum, "even a single act can support jurisdiction." Id. at 442 n. 11 (citing McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).

While this Court is mindful of the serious due process issues that arise in conjunction with an assertion of personal jurisdiction based on a claim of conspiracy, it finds that the plaintiff has proffered sufficient evidence of LAI's connection with co-conspirators who have undertaken overt actions in Oklahoma on behalf of the conspiracy. LAI, by virtue of its lead-generation activities and its concerted action with other defendants herein and with third-parties, has purposely availed itself of the privilege of conducting activities in Oklahoma. See Williams v. Bowman Livestock Equipment Co., 927 F.2d 1128, 1131 (10th Cir. 1991). Thus, any burden suffered by LAI in having to defend against Mr. Braver's action in Oklahoma is outweighed by Oklahoma's interest in adjudicating the dispute and by the plaintiff's interest in obtaining convenient and effective relief.

See World-Wide Volkswagen Corp., 444 U.S. 286 at 292. This Court's exercise of personal jurisdiction over LAI is reasonable and in no way offends traditional notions of fair play.

While the defendant is not precluded from raising the issue of personal jurisdiction later in this action should the evidence so warrant, Mr. Braver has met his burden of setting forth a prima facie showing that the Court's exercise of personal jurisdiction over LAI is proper.

3. Standing Under the CAN-SPAM Act

LAI adopts the argument set forth by defendant Lead Transfer, LLC ("Lead Transfer") in its motion to dismiss regarding Mr. Braver's standing to pursue his CAN-SPAM Act claims. The federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act") prohibits fraudulent, abusive and deceptive commercial email and provides for enforcement by federal agencies, states, and Internet service providers. 15 U.S.C. §7704. LAI adopts Lead Transfer's position that Robert Braver, as an individual, lacks standing to pursue a claim under the CAN-SPAM Act. The defendants seem to base their argument on the fact that portions of the legislative history of the CAN-SPAM Act refer to Internet Service Providers as "it." *See* Report of Committee on Commerce, Science, and Transportation on the CAN-SPAM Act of 2003 (July 16, 2003), 108 S.Rep. 102. The Court is unwilling to find that a legislative committee's employment of the pronoun "it" in its report was intended to preclude individuals from acting as Internet service providers under the Act. Taking as true the facts set forth in Mr. Braver's affidavit as well as the facts pleaded in his complaint, the Court finds, for purposes of the defendant's motion to dismiss, that Robert Braver is a provider of Internet services and may properly assert claims under the CAN-SPAM Act. The Court finds nothing in the Act and nothing in the earlier legislation from

which it adopts its definition of “Internet access service,” which excludes an individual from acting as a provider of Internet services. *See* 47 U.S.C. §151.

4. Oklahoma Statutory Claims

LAI also argues that Mr. Braver’s claim based on Oklahoma’s Fraudulent Use of Electronic Mail Act should be dismissed on the ground that the Act does not provide a basis for jurisdiction over LAI, and that Mr. Braver’s claim based on Oklahoma’s Unsolicited Commercial Email Act should be dismissed on the grounds that the Act does not provide for secondary liability and is in any event preempted by federal law. While LAI was permitted the opportunity to file, and did file a supplement to its motion to dismiss, it failed to raise these issues therein. Rather, it waited to broach these matters in its reply brief, effectively depriving the plaintiff of an opportunity to respond. The Court finds it would be inappropriate to consider dismissal of Mr. Braver’s state law claims without benefit of his response to LAI’s argument. The Court, therefore, declines to consider the issues raised for the first time in LAI’s reply.

Conclusion

For the reasons set forth above, the Court DENIES the defendant LAI’s motion to dismiss for lack of personal jurisdiction.

ENTERED this 24th day of October, 2006.



LEE R. WEST
UNITED STATES DISTRICT JUDGE