

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 25 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 the defendant Lead2Net.Net ("Lead2") (docket entry no. 336). 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. Prior to the date of the hearing, the Court granted the application to withdraw filed by Lead2's counsel. The Court ordered Lead2 to obtain new counsel so as to be prepared to appear at the October 11 hearing. Because Lead2 failed to obtain counsel as required, the Court is forced to rely solely upon its briefs and supporting papers in determining this matter. Based upon careful consideration of the parties' submissions and the plaintiff's presentation on hearing of the matter, the Court makes its determination as follows.

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”).

Lead2 is a Florida corporation with its principal place of business in Boca Raton, Florida. It is an “intermediary,” or purchaser and seller of “leads,” identifying potential borrowers in connection with mortgages and other loans. Lead2 does not have any Oklahoma bank accounts, offices, agents, employees, facsimile or telephone numbers, and it does not recruit employees from Oklahoma. Lead2 does not have any Oklahoma-based stockholders who own an equity interest in Lead2. It does not advertise in any Oklahoma newspapers or periodicals, and does not control, own or lease any property in Oklahoma. Lead2 placed advertisements with the search engine “Google” for approximately six weeks during 2005. Lead2 is not licensed to conduct business in Oklahoma, has not sent any employees to Oklahoma for business activities, and does not pay taxes in Oklahoma. Lead2 does not have and has never had any contracts with or worked with any mortgage brokers or mortgage lead vendors with a principal place of business in Oklahoma.. Lead2 has a website which is located at www.lead2net.net. Since the inception of Lead2 in March, 2003 to the present, only 9 of approximately 2,100 potential Oklahoma clients have visited the website and sought information. Only one actually purchased leads from Lead2.

In January of 2004, an alleged mortgage spam message was transmitted through Robert Braver’s servers to secondchance@ohww.norman.ok.us. Mr. Braver responded to the email by connecting to an included link which took him to the onlinegrantshere.com website. He input decoy information employing the identity of Ron Bartles of St. Louis, Missouri. It appears that after being

commercially traded by a number of individuals and entities, Mr. Braver's decoy mortgage lead was purchased by Ameriquest. One of the intermediate owners of the decoy mortgage lead was Lead2.

Lead2 offers the affidavit of its chairman and CEO, Nicholas Passalacqua as evidence that Lead2 did not direct or cause any email to be sent to Mr. Braver or his servers. He asserts that none of its actions relating to the Roger Griffith decoy mortgage lead or any other Oklahoma-related mortgage lead it has purchased and sold occurred in Oklahoma. It argues that, therefore, it cannot be subject to this Court's jurisdiction. Robert Braver proffers no evidence that Lead2 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 Lead2 invoked the personal jurisdiction of this Court when it operated its own lead-generating and lead-selling websites, when it responded to third-party generated mortgage inquiries from Oklahomans, and when it, through its agents or co-conspirators, caused mortgage spam to be transmitted to his Oklahoma servers.

Analysis

Lead2 alleges that the Court lacks personal jurisdiction first because Robert Braver cannot demonstrate that Lead2 has any substantial 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.

1. General Jurisdiction

Mr. Braver alleges that the Court has both general and specific personal jurisdiction over Lead2. He contends that not only does Lead2's routine commerce in mortgage information generated by others, but known by it to be intimately related to Oklahoma residents and Oklahoma real property constitute continuous and systematic contact with this state sufficient to invoke this Court's general personal jurisdiction, but also that Lead2 is advertising, soliciting, and doing business in Oklahoma through its interactive commercial websites.

Lead2 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 Lead2'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 Lead2's commerce in those leads constitutes contacts with Oklahoma. Lead2 insists it does not.

Lead2's argument is premised upon its depiction of its business as one which traded nothing more than lists of information which it characterizes as "merchandise." 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 Lead2 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 a prima facie showing that Lead2 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 Lead2 based upon its continual and systematic lead-generating and lead-selling activities within this state. He alleges that Lead2 generated Oklahoma mortgage leads through the www.emortgagetree.com website and through its advertisements placed on Google. He further alleges that Lead2 sold Oklahoma mortgage leads to third parties through its www.lead2net.net website which advertised on Google. In his affidavit, Nicholas Passalacqua admits that Lead2 generated leads through its www.emortgagetree.com website from June 20, 2005 until August 8, 2005. However, he denies that website ever solicited leads through unsolicited email. In its responses to Mr. Braver's requests for admissions, Lead2 denies that it has solicited mortgage leads in Oklahoma. It does appear from Lead2's responses to discovery requests that in the period from September 9, 2005 until April 26,

2005, Lead2 sold 425 Oklahoma-related mortgage leads. The record is devoid of any evidence indicating that those leads were generated through www.emortgagetree.com as opposed to third-party lead generators as alleged by Lead2. Although it does appear that Lead2 generated one Oklahoma mortgage lead as a result of its Google advertisement, that single lead does not indicate continuous and systematic contact with Oklahoma. The Court finds it cannot exercise general personal jurisdiction over Lead2 based upon its mortgage-lead generation activities.

Mr. Braver also alleges that Lead2 is subject to the Court's jurisdiction based upon its sale of mortgage leads to Oklahoma clients through its www.lead2net.net website. The record indicates that only nine of approximately 2,100 potential lead-purchasing clients who visited www.lead2net.net were from Oklahoma. Of the nine potential Oklahoma clients, only one purchased leads from Lead2. The single transaction with that Oklahoma client resulted in a sale worth approximately \$600. A review of the evidence reveals that Lead2 operated interactive websites accessible to Oklahomans and designed to facilitate the generation and sale of mortgage leads. However, from the evidence before it, the Court observes that those websites resulted in the generation of only one Oklahoma mortgage lead and the sale of mortgage leads to only one Oklahoma client. The Court is unable to conclude those isolated transactions amount to continuous and systematic contact with Oklahoma for purposes of general personal jurisdiction.¹

¹Mr. Braver complains that Lead2 was less than forthcoming in its responses to his discovery requests. He suggests that had Lead2 complied with his discovery requests, he could prove that Lead2 had significant and continual contacts with Oklahoma. It does not appear, however, that Mr. Braver ever filed a motion to compel Lead2 to produce the materials and information to which he claims he was entitled.

2. Specific Jurisdiction

In addition to claiming the existence of general jurisdiction over Lead2, Mr. Braver alleges the existence of specific jurisdiction. He maintains that Lead2 not only trafficked in mortgage leads obtained from unlawful mortgage spam sent to his Oklahoma servers, but that it also 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 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, Lead2, 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. At least in the instance of the Ron Bartles decoy mortgage lead, Lead2 acted as a purchaser and reseller of a mortgage lead which it then sold to 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 Lead2 participated in a conspiracy must rest on its trade of a single mortgage lead. The Court concludes that any inference that Lead2 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

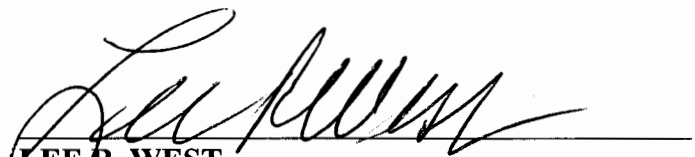
the plaintiff must provide “record proof” that the nonresident party had sufficient contacts with the state to assure that traditional notions of fair play and substantial justice not be offended should the court exercise personal jurisdiction. Conoco, Inc. v. Agrico Chemical Co., 2004 OK 83, 115 P.3d 829, 835.

Lead2 has proffered affidavits showing that it had no meaningful contacts with the State of Oklahoma and denying that it ever directed or caused email to be sent to Oklahoma. The record as developed following jurisdictional discovery and the plaintiff’s appearance at a hearing on the matter discloses no evidence that Lead2 purposely availed itself of the benefits of Oklahoma law. The Court, therefore, concludes that to exercise specific personal jurisdiction over Lead2 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 defendant Lead2Net.Net’s motion to dismiss for lack of personal jurisdiction and DISMISSES it from this action.

ENTERED this 25th day of October, 2006.


LEE R. WEST
UNITED STATES DISTRICT JUDGE