

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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JESSE WILLMS, an individual, and 1021018
ALBERTA LTD., a numbered Alberta,
Canada corporation, d/b/a
Just Think Media,

Plaintiffs,

Index No. 111988/10

-against-

CTVglobemedia, Inc., an Ontario, Canada
corporation, and DOES 1 through 10,
inclusive,

Defendants.

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Emily Jane Goodman, J.S.C.:

In this defamation action, defendant CTVglobemedia, Inc., an Ontario, Canada corporation (CTV)¹ moves to dismiss the complaint pursuant to CPLR 3211 (a) (8) and 327,² for lack of long-arm jurisdiction and on the ground of forum non conveniens.

Plaintiffs Jesse Willms (Willms) and 1021018 Alberta Ltd., a numbered Alberta, Canada Corporation d/b/a Just Think Media, cross-move to amend the complaint to bring the action against CTV

¹None of the Doe defendants has been identified.

²The notice of motion cites to CPLR 3211 (a) (7) and 3211 (c) as well, but no grounds are raised to advance arguments under these sections.

Inc. (CTV Inc.), a subsidiary of CTV.

I. Background

CTV, a Canadian corporation, "amalgamated" under the laws of Canada (Pearce Aff, ¶ 4), is Canada's largest privately owned television network, operating 27 television stations in Canada, with interests in 30 cable channels, also in Canada. Both CTV and CTV Inc. have their principal places of business in Ontario, Canada.

Plaintiffs bring this action alleging defamation, trade libel and tortious interference with prospective economic advantage arising from the broadcast, and resulting internet availability, of a news program created by CTV Inc.'s news show *W5*, which focused on plaintiffs' allegedly questionable business practices, and the attention plaintiffs were receiving from Canadian authorities as a result of plaintiffs' allegedly unsavory actions.

For the program, *W5* reporter Paula Todd (Todd) traveled to plaintiffs' offices in Alberta, Canada, in a failed attempt to interview Willms. Todd interviewed a member of the Canadian Mounted Police Anti-Fraud Center in North Bay, Ontario. She interviewed seven of plaintiffs' customers worldwide, via webcam, including one in New York, all who claimed to have been deceived by CTV.

Todd also traveled to New York for one day to interview two

parties suing CTV, Dr. Mehmet Oz, suing over an allegedly false endorsement, and Roger FeFevre, the CEO of a Utah company, who happened to have been in New York that day. At least one other interview, that of a Californian party, was part of the broadcast.

Plaintiffs claim that they have been grievously wronged by the broadcast, which they claim is "nothing more than a piece of lurid sensationalism masquerading as journalism" (Memorandum in Opp., at 1), and that the broadcast has caused them to lose many customers and prospective customers.

CTV argues that this court lacks jurisdiction over it, as there is a lack of sufficient nexus between CTV's actions and the State of New York. Regardless of the question of jurisdiction, CTV claims that the action should be dismissed under the doctrine of forum non conveniens, arguing that this is an action which should be brought, if anywhere, in Canada.

II. Discussion

A. Long-Arm Jurisdiction

Jurisdiction is a threshold issue (*Elm Management Corp. v Sprung*, 33 AD3d 753 [2d Dept 2006]) which must be resolved before a forum non conveniens argument may be entertained. *Wyser-Pratte Management Co., Inc. v Babcock Borsig AG*, 23 AD3d 269 (1st Dept 2005); see also *Edelman v Taittinger, S.A.*, 298 AD2d 301 (1st Dept 2002).

Proving jurisdiction rests on the plaintiffs. *Stardust Dance Productions, Ltd. v Cruise Group International, Inc.*, 63 AD3d 1262 (3d Dept 2009); *Copp v Ramirez*, 62 AD3d 23 (1st Dept 2009). Initially, jurisdiction is not available to plaintiffs based on either CPLR 302 (a) (2) or (3), by virtue of the language of these sections, which specifically except defamation actions. See *Pontarelli v Shapero*, 231 AD2d 407 (1st Dept 1996).

CPLR 302 (a) (1), however, provides that:

[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non domiciliary ... who in person or through an agent: (1) transacts any business within the state or contracts anywhere to supply goods or services in the state

"Essential to the maintenance of this action ... are some purposeful activities within the State and a substantial relationship between those activities and the transaction out of which the action arose [internal quotation marks and citation omitted]." *Talbot v Johnson Newspaper Corporation*, 71 NY2d 827, 829 (1988). There must be a showing of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York] [internal quotation marks and citation omitted]." *Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 (2007). That is, there must be a "nexus" between the "purposeful" business activities and the defamation alleged. *Talbot v Johnson Newspaper Corporation*, 71 NY2d at 829; see also *Pontarelli v Shapero*, 231 AD2d at 410 (transaction of business in

the State must bear "a substantial relationship to the subject matter of the lawsuit ...").

Both prongs of the statute must be met before jurisdiction can be found. See also *Johnson v Ward*, 4 NY3d 516 (2005); *Copp v Ramirez*, 62 AD3d 23, *supra*. By so acting, the defendant, "invok[es] the benefits and protection of [our] laws [internal quotation marks and citation omitted]." *Ehrenfeld v Bin Mahfouz*, 9 NY3d at 508. Whether a court can find jurisdiction over a non-domiciliary "requires consideration of the totality of the circumstances." *SPCA of Upstate New York, Inc. v American Working Collie Association*, 74 AD3d 1464, 1465 (3d Dept 2010), citing *Wimmer Canada v Abele Tractor & Equipment Company*, 299 AD2d 47, 49-50 (3d Dept 2002). And, as noted in *SPCA of Upstate New York, Inc.*, "New York courts construe transacts any business within the state more narrowly in defamation cases than they do in the context of other sorts of litigation [interior quotation marks and citation omitted]." *Id.* at 1465; see also *Best Van Lines, Inc. v Walker*, 490 F3d 239 (2d Cir 2007). The courts' concerns with long-arm jurisdiction in defamation cases are "grounded in 'an intent to avoid unnecessary inhibitions on freedom of speech or the press.'" *SPCA of Upstate New York, Inc. v American Working Collie Association*, 74 AD3d at 1466, quoting *Kim v Dvorak*, 230 AD2d 286, 290 (3d Dept 2007). The broadcast in

issue was created in Canada, by Canadian parties about a Canadian company and its Canadian owner. The "purposeful activities" allegedly conducted within this State by defendant are the single one-day visit in which Todd interviewed two persons in New York, and the fact that the broadcast is available over the internet throughout the world, including New York. There is note that W5's broadcast can be heard in Buffalo, New York, due to the proximity of that part of this State to Canada. Plaintiffs also claim that CTV's broadcasts are available on cable in New York, a claim CTV denies.

Plaintiffs make much ado of Todd's single visit to New York, by speculating about possible hotel stays, restaurant meals, even hairdressing and makeup appointments which may have been involved, apparently intending to inflate the purposeful nature of the one-day visit. While this approach is creative, the court is not convinced that the incidental trappings of a visit to the State can transform one in-state visit into more "purposeful" action, and certainly, no discovery on these details is necessary.

Plaintiffs rely on two cases to establish that CTV' contacts with New York are sufficient to establish a significant nexus with the subject matter of the action. However, both *Davis v Costa-Gavras* (595 F Supp 982 [SD NY 1984]) (which involved the dissemination of a book and movie) and *Montgomery v Minarcin* (263

AD2d 665 [2d Dept 1999]) (which involved a broadcast) involve situations where it is unquestionable that substantial parts of the writing and production of the allegedly defamatory material were conducted in this State. See also *Legros v Irving*, 38 AD2d 53, 56 (1st Dept 1971) (jurisdiction found where "virtually all the work attendant upon publication ... occurred in New York"). Such is not the case here.

In *SPCA of Upstate New York, Inc. v American Working Collie Association* (74 AD3d 1464, *supra*), plaintiff sought to base jurisdiction against the Vermont-based defendant for allegedly defamatory remarks made in Vermont, which were then broadcast on a website. Jurisdiction was claimed to be had based on three phone calls defendant had made to New York, along with two short visits, as well as the website. The Court found that "we are unpersuaded that extending jurisdiction on these facts would be consistent with this state's narrow approach to long-arm jurisdiction in defamation cases." *Id.* at 1466.

In the present case, the court finds that the one-day visit to New York made by Todd, in which two persons were interviewed, one of whom was not even New York based, presents an insufficient ground upon which to base long-arm jurisdiction, even though the interviews made up three minutes of a 22-minute broadcast, out of what CTV claims were scores of witness complaints. As such, CTV did not "purposely avail [itself] of the privilege of conducting

activities within New York and thereby invoc[ing] the benefits and protections of its laws ... [internal quotation marks and citations omitted]." *Davis v Costa-Gavras*, 595 F Supp at 986.

The fact that the broadcasts were available on the internet is nonavailing. "[T]he mere maintenance of a web site in a distant state that was visited by people in New York [does] not subject the defendant to jurisdiction in New York." *National Football League v Miller*, 2000 WL 335566 *2 , 2000 US LEXIS 3929 *3-4 (SD NY 2000). Further

the "single act" of uttering a defamation, no matter how loudly, is not a "transact[ion of] business" that may provide the foundation for personal jurisdiction. In other words, when the defamatory publication itself constitutes the alleged "transact[ion of] business" for the purposes of section 301 (a) (1), more than the distribution of a libelous statement must be made within the state to establish long-arm jurisdiction over the person distributing it.

Best Van Lines, Inc. v Walker, 490 F3d at 248; see also *SPCA of Upstate New York, Inc. v American Working Collie Association*, 74 AD3d at 1466 (while allegedly defamatory statements placed on website for persons located throughout the country, "with no effort to direct the comments toward a New York audience," no long-arm jurisdiction arises); see also *Gary Null & Associates, Inc. v Phillips*, 29 Misc 3d 245, 251 (Sup Ct, New York County 2010) (postings on website not "specifically targeted to New York viewers," but to a "nationwide audience" not sufficient basis for long-arm jurisdiction). Thus, here, the broadcast itself, the

"act" of defamation, is not, as plaintiffs claim, a transaction of business in the State.

Plaintiffs rely on a line of cases discussing non-defamation actions in which an "interactive" website is ground for long-arm jurisdiction, because business is actively pursued therein (see e.g. *Baggs v Little League Baseball, Inc.*, 17 Misc 3d 212, 215 [Sup Ct, Richmond County 2007]), with "passive" sites which cannot confer jurisdiction. See e.g. *Grimaldi v Guinn*, 72 AD3d 37, 48 (2d Dept 2010). Plaintiffs claim that CTV' website is "interactive" because visitors must push a button that says "play" in order to see the broadcast.

These cases do not involve defamation actions, or CPLR 302 (a) (1). They are concerned with the transaction of sales via the internet as grounds to confer jurisdiction in cases where products were the cause of injury to plaintiffs. These cases have no value to the present discussion, and plaintiffs' suggestion that making people push "play" before viewing the broadcast is enough in-state contact to confer jurisdiction on CTV is not persuasive. In sum, plaintiffs have failed to prove that they have personal jurisdiction over the defendant in this action, and the action must be dismissed. This court finds that the other causes of action in the complaint, for trade libel and tortious interference with prospective economic advantage, are both completely dependant on the cause of action for defamation,

and so, must also be dismissed.

B. Forum Non Conveniens

Even had jurisdiction been found, the action would be dismissed on the ground of forum non conveniens. See *Sarfaty v Rainbow Helicopters, Inc.*, 221 AD2d 618 (2d Dept 1995) (a discussion of forum non conveniens presumes jurisdiction). The burden to show that an action should be dismissed on the ground of forum non conveniens rests on the defendant. *Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286 (1st Dept 2006).

"Founded upon the equitable principles of justice, fairness and convenience, the common-law doctrine of forum non conveniens, as codified in CPLR 327, is a highly flexible concept whereby a court, after considering and balancing certain competing factors, may entertain or decline to entertain jurisdiction over an action." *Intertec Contracting A/S v Turner Steiner International, S.A.*, 6 AD3d 1, 4 (1st Dept 2004), citing to *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), cert denied 469 US 1108 (1985). "Among the factors the court must weigh are 'the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts, with no one single factor controlling.'" *Salzstein v Salzstein*, 70 AD3d 806, 807 (2d Dept

2010), quoting *Prestige Brands, Inc. v Hogan & Hartson, LLP*, 65 AD3d 1028, 1029 (2d Dept 2009). "[O]ur courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York [interior quotation marks and citations omitted]."

Shin-Etsu Chemical Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d 171, 176 (1st Dept 2004).

This action has no substantial nexus to this State. All of the actors, including CTV, are Canadian, most of the witnesses and documents are in Canada, and Canada is a perfect and natural forum for the resolution of this matter. Plaintiffs argue that it is a shorter distance from Toronto, Ontario, where CTV is located, to New York, to Edmonton, Alberta, where, presumably, the action would be tried, nullifying the problem of the convenience of witnesses. However, CTV claims to have a corporate presence in Edmonton, if that is where the action is filed, and so, convenience is assured. This discussion is of no matter. The entirety of the factors raised show that the nexus to New York is attenuated, not substantial, and CTV should not be required to cross national lines just to litigate a matter which would better be brought elsewhere. Therefore, the action would be dismissible on the ground of forum non conveniens, even were there jurisdiction over the CTV.

C. Cross Motion to Amend Complaint to Add CTV Inc.

This cross motion is denied as moot. Although leave to amend should be freely given in the absence of prejudice (*Vue Management, Inc. v Photo Associates*, 81 AD3d 569 [1st Dept 2011]), and the addition of CTV Inc. to this action would be reasonable, amendment to add CTV Inc. would require a directive to serve this party to add them to the action within a certain amount of time, in a manner comporting with the CPLR. Such a directive would be impracticable, as the action is being dismissed.

III. Conclusion

Plaintiffs have failed to prove that this court has personal jurisdiction over the CTV, requiring the dismissal of the action.

Even were jurisdiction to exist, the action should be dismissed on the ground of forum non conveniens.

Accordingly, the motion to dismiss the complaint brought by defendant CTVglobemedia, Inc. is granted, and the complaint is hereby dismissed with costs and disbursements to this defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion is denied as moot.

Dated: June 16, 2011

ENTER:

J.S.C.