

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

Case No. CV 09-1870 DSF (AGR_x)

Date 8/12/09

Title Imageline, Inc. v. David Hendricks, et al.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (In Chambers) Order GRANTING Motion to Dismiss (Docket No. 16)

Before the Court is Defendant David Hendricks's motion to dismiss for lack of personal jurisdiction and lack of venue. For the reasons given below, the motion is GRANTED.

I. BACKGROUND

Plaintiff Imageline, Inc. filed this complaint on March 18, 2009 against Defendants David Hendricks and Freedom Vending, Inc., seeking monetary and injunctive relief for copyright infringement. Plaintiff is a corporation that produces and distributes software packages containing a variety of graphic files for use in word-processing applications. (Compl. ¶ 2.) Plaintiff alleges that Defendants have violated Plaintiff's copyrights by selling unauthorized copies of Plaintiff's clip-art images through the online auction website eBay. (Compl. ¶ 13.)

Plaintiff asserts two claims for relief: Copyright Infringement in violation of 17 U.S.C. §§ 501, et seq. (Compl. ¶¶ 18-22.) and Alteration of Copyright Management Information in violation of 17 U.S.C. §§ 1202, et seq. (Compl. ¶¶ 23-29.)

Plaintiff is allegedly a Virginia corporation with its principal place of business in Ashland, Virginia. (Compl. ¶ 7.) Defendant Hendricks is a citizen of Washington.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

(Compl. ¶ 10.) Defendant Freedom Vending is not an incorporated legal entity, but a “d/b/a” used by Defendant Hendricks, who is sole proprietor. (Mot. to Dismiss 8.) “freedomvendinginc” is an eBay User ID used by Defendant Hendricks. (Compl. ¶ 11.)

Plaintiff alleges that Defendants have sold and distributed infringing works to California citizens through the website eBay. (Compl. ¶ 13.) Plaintiff does not allege the amount of infringing sales Defendants have made to California citizens, though Plaintiff does allege that Defendants have made more sales to California than any other state. (Opp’n to Mot. to Dismiss 1.) In addition, Defendants allegedly operate a website (www.freedomvending.com) used to conduct infringing business. The website is hosted in California. (Opp’n to Mot. to Dismiss 1.)

On June 22, 2009 Defendants filed a motion to dismiss for lack of jurisdiction or to transfer venue.¹ Defendant Hendricks argues that this Court lacks personal jurisdiction because he has not purposefully directed business activities to the State of California and could not have reasonably anticipated being haled into court here. (Mot. to Dismiss 8.) Defendant argues that venue is similarly improper because 28 U.S.C. § 1400(a), the federal statute governing venue in copyright actions, stipulates that venue is proper “in the district in which the defendant or his agent resides or may be found.” (Mot. to Dismiss 9.) Defendant Hendricks alleges that neither he nor another agent resides or may

¹Plaintiff argues that Defendants have waived their objection to personal jurisdiction by failing to assert the Fed. R. Civ. P. 12(b)(2) motion prior to their responsive pleading. Defendants’ Answer was filed on June 8, 2009 (Opp’n to Mot. to Dismiss 2), but the Motion to Dismiss was not filed until June 22, 2009. However, Defendants did include an objection to personal jurisdiction in their Answer. (Answer 4.) (*Id.*) Fed. R. Civ. P. 12(b) states that a motion asserting a defense of lack of personal jurisdiction “must be made before pleading if a responsive pleading is allowed.” Plaintiff argues for a strict reading of this statute but provides no case law in support of this position. Indeed, many courts have chosen to reject a strict interpretation of Rule 12. See *Pope v. Elabo GmbH*, 588 F. Supp. 2d 1008, 1013 (D. Minn. 2008) (“[I]f the defense of lack of personal jurisdiction is ‘[i]ncluded . . . in a responsive pleading’ (such as an answer), the defense is not waived merely because the defendant failed to file a pre-answer Rule 12(b)(2) motion.”); *In re Arthur Treacher’s Franchisee Litig.*, 92 F.R.D. 398, 414 (E.D. Pa. 1981) (rejecting a “literal and restrictive interpretation” of Rule 12(b) on the basis that defendant had included the 12(b) defense in its answer as its first affirmative defense). These cases are supported by language in Rule 12(b) stating that “[n]o defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.” Defendants did not waive their Rule 12(b) objections.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

be found in the Central District of California. (Id.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(2) permits a court to dismiss a matter for lack of personal jurisdiction. It has long been settled that a court may exercise personal jurisdiction over a nonresident defendant only if he has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

Where there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits. Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1110 (9th Cir. 2002). California permits “[a] court of [the] state [to] exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” Cal. Civ. Proc. Code § 410.10; see also Ballard v. Savage, 65 F.3d 1495, 1500 n.4 (9th Cir. 1995) (“California permits its courts to exercise personal jurisdiction to the extent permitted by the federal due process clause.”); Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990) (holding that California’s statutory limitation is “coextensive with the outer limits of due process under the state and federal constitutions, as those limits have been defined by the United States Supreme Court”).

Personal jurisdiction may be either general or specific. See Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn. 8 & 9 (1984). A defendant is present “generally” in the forum when its activities in the state are “substantial” or “continuous and systematic.” Sher, 911 F.2d at 1361; Dole Food, 303 F.3d at 1111. “Specific jurisdiction” exists where the claim for relief arises directly from defendant’s contacts with the forum state. See AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996).

Where general jurisdiction does not exist, the Ninth Circuit has established a three-part test for determining when a state may constitutionally exercise specific jurisdiction over a defendant: (1) The nonresident defendant must do some act or consummate some transaction with the forum state or perform some act by which it purposefully avails itself of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of or result from the defendant’s forum-related activities; and/or (3) the exercise of jurisdiction

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

must be reasonable.

Ochoa v. J.B. Martin & Sons Farms, Inc., 287 F.3d 1182, 1188 (9th Cir. 2002) (footnote omitted).

In actions that sound in tort, courts typically apply the “effects test,” which examines whether a non-resident defendant’s conduct caused sufficient effects in the forum state to support the exercise of personal jurisdiction over the defendant. See Calder v. Jones, 465 U.S. 783, 789 (1984). This requires that the defendant: 1) committed an intentional act, 2) expressly aimed at the forum state, and 3) caused harm that the defendant knew was likely to be suffered in the forum state. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 805 (9th Cir. 2004).

Plaintiffs have the burden of establishing that defendants have sufficient minimum contacts with California to satisfy due process. See AT&T, 94 F.3d at 588. Dismissal is appropriate if the plaintiff has not made a prima facie showing of personal jurisdiction. Id. In determining whether plaintiff has made this prima facie showing, “uncontroverted allegations in the plaintiff’s complaint must be taken as true, and conflicts between the facts contained in the parties’ affidavits must be resolved in plaintiff’s favor for purposes of deciding whether a prima facie case for personal jurisdiction exists.” Id. (internal quotation marks omitted); see also Ballard, 65 F.3d at 1498 (plaintiff need only demonstrate facts that if true would support jurisdiction). If, however, the plaintiff successfully shows that “the defendant has purposefully directed his activities at forum residents, the defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1400 (9th Cir. 1986) (internal quotation marks omitted).

To determine whether the exercise of jurisdiction would be reasonable, courts examine seven factors: 1) existence of an alternative forum; 2) burden on the defendant; 3) convenience and effectiveness of relief for the plaintiff; 4) most efficient judicial resolution of the dispute; 5) conflict with the sovereignty of the defendant’s state; 6) extent of purposeful interjection; and 7) the forum state’s interest in the suit. Core-Vent Corp v. Nobel Indus. AB, 11 F.3d 1482, 1487-88 (9th Cir. 1994). No one factor is dispositive. Id. at 1488.

III. DISCUSSION

A. Defendants’ Contacts with California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

Plaintiff alleges that Defendants sold copies of pirated software that infringed on Plaintiff's copyrights. Defendants used the Internet auction website eBay for many of these transactions. Some of the items sold through eBay were sold to California residents.

B. General Jurisdiction

Plaintiff fails to show that the above contacts constitute substantial, continuous, or systematic activity sufficient to establish the Court's general jurisdiction over Defendants. Defendants have no offices or employees in California, are not licensed in California, own no property in California, and have never actively advertised their products or promoted their business in California. (See Mot. to Dismiss.) Defendants' use of two websites hosted in California is insufficient to constitute continuous, systematic, and substantial activity in the forum, as is Defendants' agreeing to eBay's user agreement with its choice-of-law and choice-of-forum provisions. See Bancroft & Masters, Inc. v. Augusta National Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (holding that a defendant that is not licensed to do business in California, pays no taxes in California, and does not advertise in California is not subject to general jurisdiction despite its use of a California-hosted website, license agreements with several California vendors, and the "occasional" sales of merchandise to California residents); see also Schwarzenegger, 374 F.3d at 801 (Defendant's contacts with forum, including use of California importers, California consulting company and California-based marketing company, and maintenance of website accessible in California, fell "well short of the 'continuous and systematic' contacts necessary to confer general jurisdiction).

Plaintiff argues that the 10% of Defendants' sales made to California residents is "substantial" enough to confer general jurisdiction. However, the sales amount to 1,071 transactions with California residents over an approximately eight-year period, averaging just over 100 sales per year. For the purposes of general personal jurisdiction the connections must be so strong as to "approximate physical presence" in the forum state. Schwarzenegger, 374 F.3d at 801. One hundred sales per year of relatively small value items cannot rationally be classified as so continuous, systematic or substantial as to approximate physical presence in California, especially when 90% of Defendants' sales are elsewhere. See also Salu, Inc. v. Original Skin Store, 2008 U.S. Dist. WL 3863434 at *3 (E.D. Cal. Aug. 13, 2008) (no general jurisdiction despite 14% of sales going to California customers and user agreements with Google and eBay).

C. Specific Jurisdiction

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

1. Purposeful Direction

Applying the Calder “effects test” analysis, this Court concludes that Defendants have not purposefully directed² harmful acts into the forum state sufficient to confer personal jurisdiction. The “effects test” requires that a defendant 1) committed an intentional act, 2) expressly aimed at the forum state, and 3) caused harm that the defendant knew was likely to be suffered in the forum state. In Calder, the defendant, a Florida corporation, published an allegedly libelous article in California concerning the plaintiff. 465 U.S. at 785. The Calder court affirmed the exercise of personal jurisdiction. Id. at 791. It reasoned that the intentional act of publishing an article in California, knowing the plaintiff lived and worked there, and knowing that the brunt of the harm would be felt there, was sufficient to justify the exercise of personal jurisdiction. Id. at 789-91.

While the Defendants did commit intentional acts by selling products through eBay and shipping them to the purchasers, including California residents, the Defendants fail to satisfy elements 2 and 3 of the effects test. The Defendants’ sales to California residents were not specifically directed contacts, but instead occurred only because the purchasers of Defendants’ goods happened to reside in California. There was no “individual[ized] targeting” of California. Cf. Brayton Purcell LLP v. Recordon & Recordon, No. 07-15383, slip op. at 10399 (9th Cir. August 5, 2009) (“Brayton Purcell has thus satisfied its burden of showing that Recordon expressly aimed its conduct at the Forum by individually targeting a known forum resident.”). In addition, the relevant “effects” cases, including Calder and Schwarzenegger, involved a resident plaintiff that felt the brunt of harm in the forum state. Here, there is no evidence that Defendants, residents of Washington, would reasonably know that Plaintiff, a Virginia corporation, would be likely to suffer harm in California as a result of the allegedly infringing behavior such that Defendants would be subject to a lawsuit in California.

The Ninth Circuit has addressed whether the sale of an item via eBay provides sufficient “minimum contacts” to support jurisdiction over a nonresident defendant. See Boschetto v. Hansing, 539 F.3d 1001, 1004 (9th Cir. 2008). In Boschetto, the defendant,

² The terms purposeful avilment and purposeful direction are often conflated. However, “[a] purposeful avilment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort.”

Schwarzenegger, 374 F.3d at 802 (internal citations omitted).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

a Wisconsin resident, sold a vintage car through eBay to the plaintiff, a California resident. The Ninth Circuit concluded that the car sale to a California resident was “insufficient to have created a substantial connection to California.” *Id.* at 1017. The sale “did not create any ongoing obligations” in California. *Id.* The *Boschetto* court viewed the sale to a California citizen not as a purposeful contact with the state but “involved the forum state only because that is where the purchaser happened to reside.” *Id.* at 1019. While the contacts in *Boschetto* were much less extensive than the contacts in this case – *Boschetto* involved a one time transaction – the reasoning remains applicable. As in *Boschetto*, Defendants did not purposefully direct actions towards California. Instead, they made their goods available on the Internet and those goods happened to have been purchased in California. And while Defendants here have had more interactions with California than the defendant in *Boschetto*, *Boschetto* involved harm to a California plaintiff – making it more foreseeable that the *Boschetto* defendant would be sued in California.

Defendants’ contacts are not the “deliberate creation of a ‘substantial connection’ with California” nor are they “promotion of business in California.” See *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990). The listings did not target California, but simply went to California residents who turned out to be the eBay purchasers. See also *The Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 748 (E.D. Mich. 2000) (defendant selling goods over eBay not subject to Michigan jurisdiction in copyright action because she had not “purposefully availed herself” of the privilege of doing business in Michigan” through the “random and attenuated” contacts with the forum).

Defendant has not purposefully directed sales into California in a sufficient manner to allow it to be sued over those sales in California.

2. Reasonableness

Even if the other aspects of specific personal jurisdiction were satisfied, the Court would find that exercise of jurisdiction is unreasonable.

If the plaintiff has demonstrated sufficient minimum contacts with the forum state, the burden shifts to the defendant to present “a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). The defendant must demonstrate that the exercise of personal jurisdiction fails to “comport with fair play and substantial justice.” *Dole*, 303 F.3d at 1111. The court considers seven factors (enumerated below) to determine

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

whether exercising personal jurisdiction is reasonable. Id. at 1114.

a. Extent of Defendants' Purposeful Interjection into the Forum State's Affairs

This factor obviously weighs in Defendants' favor because the Defendants' contacts are insufficient to meet the purposeful direction prong of the personal jurisdiction analysis. See Core-Vent Corp., 11 F.3d at 1488. Moreover, "[t]he smaller the elements of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise." Id. The Court recognizes that the purposeful direction analysis in this case is somewhat close, but even if the Court were to find purposeful direction, Defendants' interjection into California's affairs would be slight.

b. Burden on Defendant from Defending in the Forum

Defendants contend that the burden of defending in California would be substantial because Defendant Hendricks lives in Washington and operates his entire business himself as sole proprietor. Defendants have no employees or other contacts with California and would be required to travel to California to defend against this action. This factor favors Defendants.

c. Extent of Conflict With the Defendants' State

This factor "entails an examination of the competing sovereign interests" at stake in a case. Dole Food Co., 303 F.3d at 1115. Plaintiff's Complaint states only copyright claims, which are governed by federal law. Therefore, the same laws would be applied regardless of whether the suit was adjudicated in California, Washington, or Virginia. This factor is neutral.

d. Forum State's Interest in Adjudicating the Dispute

California has a strong interest in providing means of redress to its residents. Panavision International, L.P. v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998). However, in the present action, neither Plaintiff nor Defendants are residents of California, so California has little interest in providing a venue for the non-resident parties involved in this dispute. This factor weighs in favor of Defendants.

e. Importance of Forum to Plaintiff's Interest in Convenience and

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

JS 6

Effective Relief

When evaluating this factor, courts look “primarily at where the witnesses and the evidence are likely to be located.” Core-Vent Corp., 11 F.3d at 1489. Because none of the parties reside in California, it is unlikely that many witnesses or much evidence will be located in California. Plaintiff’s primary reason for selecting California as the forum appears to be that Plaintiff’s counsel is located in California. This factor weighs in favor of Defendants.

f. Existence of Alternative Forum

Washington is clearly an adequate alternative forum, considering Defendant Hendricks resides there and operates his business from there. Defendants concede that Virginia would be an appropriate alternative venue as well. This factor weighs in favor of Defendants.

g. Conclusion

The reasonableness factors weigh strongly in favor of Defendants’ position. There is virtually no connection between this dispute and California other than the presence of Plaintiff’s attorneys and investigator and no apparent reason for bringing the case in California or this District. Further, Defendants would be burdened in defending the case here and there are at least two alternative forums. The Court finds that exercising personal jurisdiction over Defendants would be unreasonable.

IV. CONCLUSION

Plaintiff has not established that this Court has personal jurisdiction over Defendants. Defendants’ motion to dismiss for lack of personal jurisdiction is GRANTED.

IT IS SO ORDERED.