

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

ALBERT SNYDER, *

Plaintiff *

v. * Civ. No.: 1:06-cv-01389-RDB

FRED W. PHELPS, SR., *
et al. *

Defendants. *

* * * * *

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING
THEIR MOTION TO DISMISS**

Defendants Fred W. Phelps, Sr. ("Phelps") and Westboro Baptist Church, Inc. ("WBC") respectfully move to dismiss the Complaint, pursuant to Fed. R. Civ. Proc. 12(b) and all other applicable provisions of law. The grounds for this Motion are set forth below.

I. **INTRODUCTION**

Defendant files this Motion to Dismiss, because the Complaint fails to establish diversity jurisdiction in this Court, the Complaint fails to establish a sufficient claim against Fred Phelps and WBC, this Court lacks personal jurisdiction and venue over Defendants, the Complaint fails to state a claim upon which relief can be granted, service was insufficient, the motion for alternative service failed to be

served upon the attorneys listed in the order for alternative service, and the order for alternative service by posting was granted contrary to governing law and the facts. Fed. R. Civ. Proc. 12(b)(2) and (6).

II. **ARGUMENT**

A. The Complaint Fails to Establish Diversity Jurisdiction in this Court.

Plaintiff has failed to establish diversity jurisdiction in this Court.

In this civil action, this Court may only exercise diversity jurisdiction (1) if the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and (2) is between citizens of different states. 28 U.S.C. § 1332(a); *Lincoln Prop. Co. v. Roche*, ___ U.S. ___, 126 S. Ct. 606, 613 (2005). Additionally, corporations, including WBC, "shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1); *Lincoln Prop. Co.*, 126 S.Ct. at 613.

To establish diversity jurisdiction in a federal trial court, the complaint must "plead facts from which the existence of such jurisdiction could properly be inferred." *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660, 663 (4th Cir. 1998).

Here, Plaintiff has failed to meet its burden to show that the matter in controversy exceeds the sum or value of \$75,000.

For instance, the Complaint's *ad damnum* clause does not state the amount sought in damages. The Complaint only states a dollar figure in ¶ 2, with merely parroting back the essential elements of 28 U.S.C. § 1332(a), rather than making any effort at showing how the matter in controversy exceeds \$75,000.

The "'mere allegation of the jurisdictional amount when challenged as it was here is not sufficient and [] the burden is upon the plaintiff to substantiate its allegation.'" *Powder Power Tool Corp. v. Powder Actuated Tool Co.*, 230 F.2d 409, 413-14 (7th Cir. 1956) (quoting *Seslar v. Union Local 901, Inc.*, 186 F.2d 403, 406 (7th Cir. 1951)). Because the Complaint fails sufficiently even to allege a jurisdictional amount nor to put Defendants on notice thereof, the Complaint should be dismissed, just as *Powder Power Tool* determined that the complaint in that case should have been dismissed by the trial court for neither alleging nor proving the jurisdictional amount. *Powder Power Tool*, 230 F.2d at 413-14.

"It is well settled that the amount in controversy is determined by the amount claimed by the plaintiff in good faith." *Mas v. Perry*, 489 F.2d 1396, 1400 (5th Cir. 1974), *cert. denied*, 419 U.S. 842 (1974). In this instance, for reasons discussed *infra*, the Complaint fails sufficiently to plead that

Plaintiff is legally eligible for any damages. Assuming, *arguendo*, the availability of any damages, the Complaint fails to show that \$75,000 is a good faith amount claimed, in part because the Complaint makes conclusory allegations of harm without providing any facts to show that the legally available damages come anywhere near \$75,000.

The Complaint fails to show diversity of citizenship. "As the Supreme Court has consistently held, however, state citizenship for purposes of diversity jurisdiction depends not on residence, but on national citizenship and domicile, see, e.g., *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828, (1989). ('In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States and be domiciled within the State. '), and the existence of such citizenship cannot be inferred from allegations of mere residence, standing alone. See, e.g., *Realty Holding Co. v. Donaldson*, 268 U.S. 398, 399, 69 L. Ed. 1014, 45 S. Ct. 521 (1925) ('The bill alleges that . . . appellee [is] a "resident" of Michigan. This is not a sufficient allegation of appellee's Michigan citizenship. ') "*Axel Johnson*, 145 F.3d at 663.

Here, the Complaint fails to allege the citizenship of the individual parties on the basis of state domicile. *Axel Johnson*, 145 F.3d at 663. As to the Plaintiff, the Complaint only states

that he resides in Pennsylvania, Complaint at ¶ 5, but neither says where he is domiciled or a state citizen. *Axel Johnson*, 145 F.3d at 663. As to Defendant Fred Phelps, the Complaint merely states that he has an office in Kansas, Complaint at ¶ 6, but neither says where he is domiciled or a state citizen. *Id.* Nor does the Complaint allege the citizenship of the Doe defendants; if any of them are citizens of the same state as Plaintiff, then complete diversity fails to exist, as does diversity jurisdiction in this Court. *Lincoln Prop. Co. v. Roche*, 126 S. Ct. at 613 ("we have read the statutory formulation 'between . . . citizens of different States' to require complete diversity between all plaintiffs and all defendants"). On the foregoing bases alone, the Complaint should be dismissed for failure to show both citizenship of the individual parties, as well as diversity of citizenship.

The Complaint also fails sufficiently to allege the citizenship of WBC. The Complaint, at ¶ 7, states that "Defendant Westboro Baptist Church, Inc., is a corporation organized under the laws of the state of Kansas with its principal place of business located at 3701 SW 12th Street, Topeka, Kansas 66604." Corporations, including WBC, "shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1); *Lincoln Prop. Co.*, 126

S.Ct. at 613. Here, the Complaint states that WBC is "organized under the laws of the state of Kansas," but does not state that WBC is incorporated there. For that reason, the Complaint should be dismissed against Defendant WBC. *District of Columbia ex rel. American Combustion, Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1043-44 (D.C. Cir. 1986) ("[i]n a properly pleaded diversity action between corporations the plaintiff will not only allege that there is diversity of citizenship, but will also advert to the factors set out by § 1332(c) that establish corporate citizenship").

B. The Complaint Fails To Establish A Sufficient Claim Against Fred Phelps And WBC

The Complaint fails to establish a sufficient claim against Defendant Fred Phelps. The Complaint only mentions Defendant Phelps by name twice: first in ¶ 6 (merely alleging he has an office in Topeka, KS), and ¶ 9 (alleging that Doe defendants conspired with Defendant Phelps "for the purpose of disrupting Marine Lance Corporal Matthew A. Snyder's funeral."

Although the Complaint proceeds to make blanket allegations against all the "defendants" - e.g., that "The defendants operate and maintain several websites," Complaint at ¶ 15, the Complaint fails to specify the actual defendants who have committed the multiple alleged wrongs. For instance, the notion that *all* defendants operated and maintained the designated

websites is inconsistent with the Complaint's claim that the Doe defendants "disrupted, funded or otherwise conspired with Fred W. Phelps, Sr. for the purpose of disrupting Marine Lance Corporal Matthew A. Snyder's funeral." Complaint at ¶ 8.

Consequently, each time the Complaint refers to "defendants" without designating the extent to which Fred Phelps or WBC are included in the word "defendants", the Complaint has failed to plead against Defendants Phelps and WBC with sufficient specificity to put them on sufficient notice of the allegations against them. Fed. R. Civ. P. 8; *Gulf Coast Western Oil Co. v. Trapp*, 165 F.2d 343, 348 (10th Cir. 1947) (in affirming the dismissal of a complaint for lack of specificity, the Court confirmed that "[e]ven under the liberal rules of pleading now in force, a complaint must not only define the issue but must also particularize it sufficiently to enable the defendant to prepare his defense"). See also *Leavitt v. Cole*, 291 F. Supp. 2d 1338, 1346 (M.D. FL 2003) ("the remaining allegations in Count IV, however, fail to plead even a 'short and plain statement of *the claim* showing that the pleader is entitled to relief' ... The masquerading described in paragraph (c), rather than reflecting on Dr. Cole's personal reputation, appears to raise an incomplete claim for fraud").

The Complaint fails to establish a sufficient claim against Defendant WBC.

The Complaint's fails not only to fail to make sufficiently specific allegations against Fred Phelps, *supra*, but also against WBC. The Complaint makes very few direct references to WBC other than allegations of one or more references to WBC on the websites detailed in Complaint at ¶ 15 (without stating which of the defendants own or operate said websites), and to financial contributions by unnamed defendants to WBC "in order to carry out their conspiracy and wrongful acts." Complaint at ¶ 59. The Complaint simply fails to put Phelps and WBC on sufficient notice of the charges against each of *them*.

C. **This Court Lacks Personal Jurisdiction Over Defendants.** *Dring v. Sullivan*, 423 F. Supp. 2d 540 (D. Md. 2006).

The Complaint fails to establish personal jurisdiction over Defendants where the Complaint fails to show that Fred Phelps has ever stepped foot in Maryland, nor any specific role that he played in having anybody protest Matthew Snyder's funeral, nor any specific role that WBC had in any person's involvement in such a protest.

Personal jurisdiction is analyzed here as follows:

Pursuant to Fed. R. Civ. P. 4(e), federal courts are authorized to exercise personal jurisdiction over a nonresident to the extent permitted by law of the state where the action is brought. *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 436 (3d Cir. 1987). Federal courts follow a two-step analysis to determine if personal jurisdiction is

proper: (1) if jurisdiction is proper under the forum's long-arm statute; and (2) the exercise of personal jurisdiction over the defendant comports with due process under the U.S. Constitution.

Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 723 (E.D. Pa. 1999).

"[A]nalysis under the long-arm statute remains a requirement of the personal jurisdiction analysis." *Dring v. Sullivan*, 423 F. Supp. 2d at 545. Consequently, we review Maryland's long arm statute to find that general jurisdiction is not provided by that statute:

(a) Condition. -- If jurisdiction over a person is based solely upon this section, he may be sued only on a cause of action arising from any act enumerated in this section.

(b) In general. -- A court may exercise personal jurisdiction over a person, who directly or by an agent:

(1) Transacts any business or performs any character of work or service in the State;

(2) Contracts to supply goods, food, services, or manufactured products in the State;

(3) Causes tortious injury in the State by an act or omission in the State;

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State;

(5) Has an interest in, uses, or possesses real property in the State; or

(6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

(c) Applicability to computer information and computer programs. --

(1) (i) In this subsection the following terms have the meanings indicated.

(ii) "Computer information" has the meaning stated in [§ 22-102 of the Commercial Law Article](#).

(iii) "Computer program" has the meaning stated in [§ 22-102 of the Commercial Law Article](#).

(2) The provisions of this section apply to computer information and computer programs in the same manner as they apply to goods and services.

Md. Ann. Code, Cts. Jud. Proc. art., § 6-103.

Applying the foregoing long-arm statute as follows to Defendants, it is clear that long-arm jurisdiction does not apply. The only possibly applicable sections of the long-arm statute to Defendants Phelps and WBC are Md. Ann. Code, Cts. Jud. Proc. art., § 6-103(b)(3) and (4). As to § 6-103(b)(3) ("causes tortious injury in the State by an act or omission in the State"), the Complaint does not allege that Defendant Phelps has ever been in Maryland, nor that he had any involvement with anybody else's activity's in Maryland. Nor does the Complaint show a sufficient nexus between WBC and any activities within Maryland. As to § 6-103(b)(4) ("causes tortious injury in the

State or outside of the State by an act or omission outside the State if he regularly does or solicits business [or] engages in any other persistent course of conduct in the State”), the Complaint does not allege that as to Defendants Phelps and WBC. *Dring v. Sullivan*, 423 F. Supp. 2d at 546-47. Consequently, the Court has no jurisdiction over Defendants Phelps and WBC. *Id.* at 549.

D. **Venue is Not Proper in this Court.**

Pursuant to 28 U.S.C. § 1391:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Id.

Consequently, venue is not proper here where the Complainant fails, for the reasons stated *infra*, to establish a sufficient nexus between Defendants Phelps and WBC and allegedly tortious events in Maryland.

E. **The Complaint Fails To State A Claim Upon Which Relief Can Be Granted.**

The Complaint fails to state a claim for defamation. The

Complaint fails to meet all the following necessary elements of a defamation claim: "(1) that the defendant made a defamatory communication -- i.e., that he communicated a statement tending to expose the plaintiff to public scorn, hatred, contempt, or ridicule to a third person who reasonably recognized the statement as being defamatory; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffered harm." *Carter v. Aramark Sports & Entm't Servs.*, 153 Md. App. 210, 237-38, 835 A.2d 262, cert. denied 153 Md. App. 210, 835 A.2d 262, 278 (2003).¹

Addressing the foregoing four elements in order, as to the first element, no cause of action arises for pure opinions allegedly made by Defendants Phelps and WBC. Most, if not all, of the statements listed in the Complaint --- which does not sufficiently tie said statements to Defendants Phelps and WBC -- are pure opinion without allegations of fact, and, consequently, are not actionable under the defamation count. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56-57 (1988) ("[t]he jury found against respondent on his libel claim when it decided that the Hustler

¹ For purposes of this Motion to Dismiss only, Defendant will assume for argument's sake that Maryland's choice of law provisions apply. *Crowley v. Fox Broadcasting Co.*, 851 F. Supp. 700, 702 (D.Md. 1994).

ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.'... The Court of Appeals interpreted the jury's finding to be that the ad parody 'was not reasonably believable')."

In other words, it "'is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Hustler Magazine*, 485 U.S. at 56 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). That is to say that opinion speech cannot amount to defamation.

Consequently, as to the second defamation element, there can be no falsehood when mere opinions are stated. *Hustler Magazine*, 485 U.S. at 56 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

As to the third element, the Complaint shows no fault as to Defendants Phelps and WBC both in that the Complaint (1) fails sufficiently to connect Defendants to the allegedly defamatory statements (and the Complaint fails to designate which statements Plaintiff considers to be defamatory, versus those it he does not allege to be defamatory) and (2) fails to show that making such alleged statements are anything but First Amendment-protected communications. *Hustler Magazine*, 485 U.S. at 56-57.

As to the fourth element, Plaintiff Snyder fails to show how he has suffered harm to his reputation or otherwise.

The Complaint's remaining counts are sufficiently countered by the First Amendment protections provided in *Hustler Magazine*, 485 U.S. at 56-57, and as further discussed above. Moreover, absent a specific statute - which does not exist here, and which surely would be violative of the First Amendment - there simply is no cause of action for protesting a funeral, particularly where the Complaint does not allege - nor can it - that any such protests took place at the site of Matthew Snyder's funeral.

Moreover, seeing that the Complaint makes allegations against WBC, a church, First Amendment freedom of religion protections apply in this civil action to WBC.

F. **Plaintiff did not obtain sufficient service.**

Reincorporating by reference Defendants' arguments in its motion (filed September 15, 2006) against the imposition of monetary sanctions, there was no basis in law for the alternative service order, particularly in that attorneys Margie Phelps and Rachel Hockenbarger's June 12, 2006, letter did not lawfully or Constitutionally establish them as lawyers authorized to accept service for Defendants Phelps and WBC.

III. **CONCLUSION**

WHEREFORE, for the foregoing reasons, Defendants respectfully move to dismiss the Complaint.

