

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-06-236

ALISSA COHEN,

Plaintiff

v.

ORDER

JOYCE ZAIC,

Defendant

DONALD L. GARDRECHT
LAW LIBRARY

SEP 07 2007

This matter comes before the Court on Defendant's motion to dismiss per M.R. Civ. P. 12(b)(2). Following hearing, the Motion is Denied.

BACKGROUND

Plaintiff Alissa Cohen ("Cohen") is a resident of Kittery, Maine. Defendant Joyce Zaic ("Zaic") is a resident of Las Vegas, Nevada. Cohen operates a business over the Internet as a food consultant, selling vegetarian and raw food books, DVDs, and other products. She does business at alissacohen.com under the name "Alissa Cohen LLC." On that site, the address for sending payments is 103 Norton Road in Kittery, Maine, but the website was registered to Cohen at a Deerfield Beach, Florida address. Another of Cohen's sites lists her as living with her husband in Laguna Beach, California.

In April 2006, after viewing Cohen's website, Zaic called Cohen to order a book, DVD, and appliance set. She did not place an online order because she was concerned about the security of the website. Per Cohen's instructions, Zaic sent a personal check for \$86.12 to Cohen's Kittery address as payment for the products; the check was cashed on May 2, having been endorsed "Alissa Cohen." When she did not receive the products after a month, Zaic called several phone numbers listed for the company, one

of which was toll free and two of which were not Maine numbers. At first, she sought shipment of her order; eventually, she sought a refund. To address the problem, Zaic spoke with Dennis Marciello, Cohen's husband and business partner, and Carmel, her assistant. She was unable to resolve the problem by communicating with Cohen's business.

Subsequently, Zaic reported her dissatisfaction on several websites, including www.complaints.com and www.sunfood.com. Cohen posted a message on the website in response, accusing Zaic of calling her business to harass her husband and her office assistant. Cohen alleges that, under her own name and under pseudonyms, Zaic criticized her business practices and ethics. Some of the claims allegedly made by Zaic were that Cohen "stole \$100 from a young girl" and threatened her, that she "threatened a customer's life," and that she acted fraudulently "by cashing a check and then not delivering an ordered product." In a June 3, 2006 post, however, Cohen claimed that Zaic was not damaging her business, but was actually increasing the number of potential patrons who viewed her site. Zaic eventually agreed to add a posting to the site that she had received a refund when she got her money back, but she never did so because she never received a refund.

In July 2006, Cohen filed suit against Zaic in this Court, alleging defamation and trade libel/ injurious falsehood and seeking damages, as well as temporary and permanent injunctive relief. Cohen made numerous attempts to serve Zaic at her Las Vegas residence via a Nevada process server, and ultimately, the summons and complaint were left at her home on October 5, 2006. Upon Cohen's motion, this Court also signed an order for service by publication in December 2006. In January 2007, Zaic filed a motion to dismiss for lack of personal jurisdiction, arguing that she did not have sufficient contacts with Maine to allow for jurisdiction. Cohen contends that Zaic has

had more than minimal contact with Maine and is subject to this Court's jurisdiction. Alternatively, she requests the opportunity to conduct limited discovery regarding jurisdictional issues.

DISCUSSION

1. Standard of Review.

A motion to dismiss for lack of personal jurisdiction may be made per M.R. Civ. P. 12(b)(2). A plaintiff's version of the facts pertaining to jurisdiction is viewed favorably for purposes of deciding such a motion to dismiss. *Dorf v. Complastik Corp.*, 1999 ME 133, ¶ 14, 735 A.2d 984, 988-989. "When the Court proceeds only upon the pleadings and affidavits of the parties, the plaintiff need only make a prima facie showing that jurisdiction exists. . ." *Id.* (internal quotation marks omitted).

2. Did Zaic Have Sufficient Contacts with Maine to Warrant the Personal Jurisdiction of this Court?

Maine's "long-arm statute" permits the State to exert jurisdiction over an individual "with certain significant minimal contacts" with Maine. 14 M.R.S.A. § 704-A(1) (2005). For example, those contacts may include transacting business within the state or committing a tortious act in Maine. *Id.* § 704-A(2).

a. Minimum Contacts Standard & Due Process.

When a litigant seeks to bring a nonresident defendant under a Maine court's jurisdiction, the Law Court has stated that, to comply with due process, "a person must have sufficient contacts with a state before the state can force that person to defend a suit in that state." *Connelly v. Doucette*, 2006 ME 124, ¶ 6, 909 A.2d 221, 223 (citing *Intl. Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). The Court explained that due process requirements have been satisfied when the following three-prong test has been met:

(1) Maine has a legitimate interest in the subject matter of the litigation; (2) the defendant, by his or her conduct, could have anticipated litigation in Maine; and (3) the exercise of jurisdiction by Maine courts comports with traditional notions of fair play and substantial justice.

Id. ¶ 7, 909 A.2d at 223 (citations omitted). On a defendant's motion to dismiss, it is the plaintiff's burden to meet "the first two prongs based on specific facts in the record, after which the burden shifts to the defendant" to satisfy the third prong. *Id.*

Regarding subject matter of interest to the state, "Maine has a 'legitimate interest' in affording a forum for its citizens to redress injuries caused by nonresidents." *Id.* ¶ 8, 909 A.2d at 223-224. In addition, "[a] defendant may reasonably anticipate litigation in a particular forum when" he or she intentionally acts in the state in a manner "invoking the benefits and protections of its laws," such as when he or she "purposefully directs his or her activities at Maine residents." *Id.* ¶ 9, 909 A.2d at 224. Lastly, to determine whether jurisdiction would comply with "traditional notions of fair play and substantial justice," the court weighs the facts of the case with policy concerns. *Harriman v. Demoulas Supermarkets, Inc.*, 518 A.2d 1035, 1038 (Me. 1986). Factors relevant to this analysis include the "number, nature, and purpose of the defendant's contacts with Maine, the connection between those contacts and the cause of action, the interest of Maine in the controversy, and the convenience to both parties." *Id.*

b. State and Federal Courts' Application of the Minimum Contacts Test.

In *Connelly*, the Law Court found that a Massachusetts motorist involved in a collision with a Maine resident while in New Hampshire and en route to Maine was not subject to Maine courts' jurisdiction. 2006 ME 124, ¶ 10, 909 A.2d at 225. It reasoned that the nonresident driver did not have sufficient contacts to anticipate litigation in Maine and "the collision could have occurred with a resident of any state." *Id.*

Similarly, Maine did not have jurisdiction over a defendant who bought a staircase from a Maine company. *Architectural Woodcraft Co. v. Read*, 464 A.2d 210, 212-213 (Me. 1983). One transaction and the communication surrounding it did not represent sufficient contact between the nonresident purchaser and resident seller to warrant jurisdiction. *Id.* at 213.

Conversely, sufficient contacts were established when a medical corporation did not “remedy an alleged defect in a credit report affecting a Maine debtor.” *Bickford v. Onslow Meml. Hosp. Found., Inc.*, 2004 ME 111, ¶ 1, 855 A.2d 1150, 1153. There, a Maine resident’s estranged wife moved to North Carolina where she sought medical care for her daughter. *Id.* ¶ 3, 855 A.2d at 1153. The hospital did not notify the Maine resident that he might face liability for the medical bills and he had not consented to pay. *Id.* Ultimately, the hospital referred him to a collection agency because he did not pay for the services, and when he called to correct the problem, the hospital declined to do so. *Id.* As a result, the resident was unable to obtain a mortgage. *Id.*

When the resident sued the hospital in Maine, the trial court dismissed the claim for lack of personal jurisdiction. *Id.* ¶ 4, 855 A.2d at 1153-1154. Vacating the dismissal, the Law Court determined that Maine has a valid interest in permitting its residents to “seek redress when out-of-state creditors refuse to correct erroneous credit reports.” *Id.* ¶ 11, 855 A.2d at 1155. Also, the Court found that the hospital could have anticipated the lawsuit because the resident informed it of the effects that the error had on his credit and it did not rectify the situation. *Id.* ¶ 13, 855 A.2d at 1156. Finally, the Court determined that the hospital did not meet its burden to show that defending the action in Maine would offend “traditional notions of fair play and substantial justice,” despite its inconvenience as a forum. *Id.* ¶ 15, 855 A.2d at 1156. Other factors, such as the state’s interest in protecting Mainers from credit reporting problems, the impact on the

resident, the expense of bringing suit in North Carolina, and the “hospital’s contact with Maine,” weighed in favor of jurisdiction in Maine. *Id.*

Lastly, the United States District Court for the District of Maine determined that it did not have jurisdiction over nonresidents who allegedly damaged the plaintiffs’ reputations in Maine via statements on a website.¹ *The Gentle Wind Project v. Garvey*, 2005 U.S. Dist. LEXIS 261 (D. Me. Jan. 10, 2005). There, the court applied a federal test for “specific personal jurisdiction” comprised of three elements: first, that the claim “relates to or arises out of the defendant’s contacts with the forum;” second, that “those contacts constitute purposeful availment of the benefits and protections afforded by the forum’s laws;” and third, that “a variety of pertinent factors” relating to “fundamental fairness” make it reasonable for the court to exert jurisdiction. *Id.* at *17 (citing *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999)). Applying this test, the court determined that the statements regarding the plaintiffs’ alleged “cult” behavior were not “intentionally directed at the state of Maine so as to constitute purposeful availment of the benefits and protections of Maine law.” *Id.* at *30 (internal quotation marks omitted). The court concluded that sending one cease-and-desist letter, which received no response, also was insufficient to make litigation in the forum foreseeable. *Id.* at *31. Finally, the court noted that “inferentially referring to [behavior that occurred in] Maine” does not equate with directly “targeting Maine,” and that finding otherwise would unnecessarily broaden the “purposeful availment” element. *Id.* at *20.

Gentle Wind, however, is distinguishable because the federal court applied a slightly different three-part test, and its analysis focused on the requirement of purposeful availment. But, in Maine, the test is whether a lawsuit in Maine would be

¹ The plaintiffs, incidentally, were not Maine residents. *Id.* at *19.

reasonably foreseeable, and availing oneself of the protections of Maine law is part of that analysis rather than an independent element of jurisdiction. While sending a cease-and-desist letter did not amount to purposeful availment in *Gentle Wind*, here, Zaic's threatened contact with the Kittery police to attempt to have Cohen punished more clearly amounts to availment of the "benefits and protections" of Maine law, which is relevant to foreseeability. Additionally, although Zaic's comments also were aimed at an online readership and not only at Maine readers, the intent behind them was to harm Cohen's professional reputation and her online, Maine-based business. This conduct is more directly aimed at injuring a Maine resident than were the statements in *Gentle Wind*, which also goes to foreseeability.

Nevertheless, Zaic correctly points out that her problems with Cohen stemmed from one Internet transaction gone awry. She argues that one transaction, like the lone contract for the staircase in *Read* or the single car accident in *Connelly*, should prevent Maine courts from assuming jurisdiction. If this were a simple breach of contract issue or a lawsuit solely arising from arranging the transaction, as was the case in *Read*, Zaic's view might prevail. Cohen's complaints, however, involve ongoing, allegedly tortious activity and communication initiated by Zaic and impacting Cohen. The bitter online dispute that arose between the two women transcends the single transaction, as the hospital's refusal to resolve its problems with the Maine resident in *Bickford* transcended the payment issue itself. On that basis, it was reasonable for the hospital to anticipate a lawsuit in Maine, and it was reasonable for Zaic to anticipate that her continued comments about Cohen's Maine business could result in litigation in this forum, whether or not she thought Cohen actually was damaged by her comments.² If

² Yet, Zaic notes that Cohen stated that the comments did not injure her, but actually attracted viewers to her website. It is unclear whether this was an actual statement about damages or mere

Zaic's statements tended to injure Cohen in her profession, they would constitute slander per se, and special damages would be presumed.³

Accepting Cohen's version of events bearing on jurisdiction as accurate, she has satisfied her burden to cite facts supporting jurisdiction in Maine. Despite her having other business or residential addresses, the address on www.alissacohen.com was a Kittery address, and Zaic sent her payment to that address in response both to the site's directions and Cohen's own instructions. The check was cashed in Maine several days after it was received. As Cohen's business is locally based, it is reasonable to believe that she has local customers who could have read Zaic's comments on the Internet, which might have had some impact on her business. If anything, the ongoing dialogue between Zaic and Cohen, largely initiated by Zaic, augments the likelihood that litigation in this forum was foreseeable to Zaic.

Also, Maine has a "legitimate interest" in ensuring that its local businesspeople can seek redress for allegedly tortious conduct against them. Defamation may affect the reputations of Maine residents even if it occurs via a widespread medium, and a defendant's use of the Internet should not prevent an injured party from pursuing relief where the injury occurs. Finally, "fair play and substantial justice" dictate that this Court has personal jurisdiction over Zaic. While it may be inconvenient for Zaic to defend the suit in Maine, her conduct exacerbated the situation and she has not met her burden to demonstrate that handling the litigation through her local counsel would be unfair or unjust. It would, however, be unjust to require Cohen to file suit in Nevada or

posturing, in light of the hostile tone of the conversation between the two women. Nevertheless, this statement is more relevant to the merits of Cohen's claim than to the jurisdictional issue before the Court.

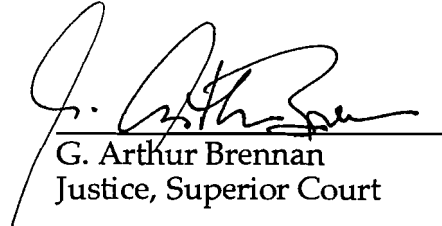
³ See *Ramirez v. Rogers*, 540 A.2d 475, 478 (Me. 1988) (noting that "[s]lander per se refers to words that on their face without further proof or explanation injure the plaintiff in his business or occupation" and, due to the nature of the injury, a "plaintiff may recover without proof of special damage").

any other state with which she presumably has no contacts and in which the alleged effects of Zaic's conduct were not felt. The foregoing three factors weigh in favor of personal jurisdiction over Zaic.

CONCLUSION

The motion to dismiss is Denied.

Dated: May 23, 2007



G. Arthur Brennan
Justice, Superior Court

Alfred C. Frawley, III, Esq. - PL
Jerrol A. Crouter, Esq. - DEF