

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ENGLISH SPORTS BETTING, INC. : CIVIL ACTION  
and DENNIS J. ATIYEH :  
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 :  
 v. :  
 :  
 :  
 CHRISTOPHER "STING" TOSTIGAN, :  
 WWW.PLAYERSODDS.COM, and :  
 WWW.THEPRESCRIPTION.COM, c/o :  
 Ken Weitzner : No. 01-2202

M E M O R A N D U M

WALDMAN, J.

March 15, 2002

Plaintiffs have asserted defamation claims against defendants arising from three articles authored by defendant Tostigan and posted on the defendant websites which provide sports and gambling information. Plaintiff Atiyeh is a citizen of Pennsylvania and owner of English Sports Betting, Inc. That corporation is organized under the laws of Jamaica and has its principal place of business in Montego Bay. Defendant Tostigan is a resident of New York.<sup>1</sup> Defendant www.playersodds.com is a Canadian corporation "believed" by plaintiffs to be located in Toronto.<sup>2</sup> Defendant www.theprescription.com is maintained by an Australian corporation and is located in Chesapeake, Virginia.

Subject matter jurisdiction is asserted pursuant to 28 U.S.C. § 1332. Presently before the court is the motion of

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<sup>1</sup>There is no allegation as to Mr. Tostigan's citizenship. He was served by certified mail in New York.

<sup>2</sup>Plaintiffs acknowledge that they cannot find the physical location of this defendant and have never effected service upon it. It appears that the actual website no longer exists.

defendant [www.theprescription.com](http://www.theprescription.com) to dismiss the claim against it for lack of personal jurisdiction.

The pertinent facts alleged by plaintiffs are as follow.

Plaintiffs own and operate a website for users to place off-shore sports bets on line. Christopher Tostigan, under the pseudonym "Sting," wrote a column captioned "Sting's Offshore Insider" which appeared on the [playersodds](http://playersodds.com) website. He also occasionally writes columns for the [prescription](http://www.theprescription.com) website.

On November 15, 2000, an article by Mr. Tostigan entitled "English Sports Betting Owner Indicted After Long History of Encounters With the Law" was posted on [www.playersodds.com](http://www.playersodds.com). In the article, Mr. Tostigan cited an Allentown Morning Call account of Mr. Atiyeh's recent federal grand jury indictment, along with his brother, on charges of money laundering and then continued:

Dennis Atiyeh's dark past includes two murders; one involving a patron at his old nightclub; the other, one of Dennis' former employees who went off with the customer list, and opened his own book on the Island of Jamaica called Tuff Turf. Atiyeh has been arrested for violent assaults more than half a dozen times.

In this article, Mr. Tostigan also discusses the contemporaneous legal difficulties of Mr. Atiyeh's cousin, Randall Hadeed, who was then under investigation for allegedly making terroristic threats on the answering machine of Ken Weitzner, the president of [www.theprescription.com](http://www.theprescription.com). Mr. Tostigan wrote:

[Mr. Hadeed's] voice was positively identified and should he be charged, Hadeed could possibly face a life sentence along with his cousin Dennis, who is expected to become PITCHER to Hadeed, the CATCHER.

Plaintiffs allege that the references to pitcher and catcher are vulgar slang for sodomy.

On November 28, 2000, an article by Mr. Tostigan entitled "Who Got Plucked for Thanksgiving . . . and Who is Doing the Plucking?" was posted on [www.theprescription.com](http://www.theprescription.com). In the article, Mr. Tostigan wrote "[a]s has been noted here and elsewhere, the Feds got themselves one of the biggest birds out there in Dennis Atiyeh, the super heavyweight of offshore (and, ahem onshore) gambling." On November 30, 2000, another article by Mr. Tostigan was posted on the same website in which he chronicled Mr. Atiyeh's legal difficulties dating back to 1984 and characterized plaintiff as a "bully" and "scumbag."<sup>3</sup>

While the factual allegations of the complaint are taken as true, the plaintiff bears the burden of proving with affidavits or other competent evidence that personal jurisdiction exists. See Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996); Leonard A. Fineberg, Inc. v. Central Asia Capital Corp., 936 F. Supp. 250, 253-54 (E.D. Pa. 1996).

A court may exercise personal jurisdiction over a non-forum resident only when the forum state's long-arm statute so

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<sup>3</sup> The latter reference appears in the context of a left-handed compliment. The author states that "since appearing on the offshore gaming scene a few years ago, I have had the displeasure of encountering much bigger scumbags than Atiyeh."

authorizes and when an exercise of such jurisdiction comports with due process. Pennsylvania's long-arm statute authorizes the exercise of personal jurisdiction over out-of-state defendants to the full extent permitted by the Constitution. See 42 Pa. C.S.A. § 5322(b); Pennzoil Products Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 200 (3d Cir. 1998); John Hancock Property & Cas. Co. v. Hanover Ins. Co., 859 F. Supp. 165, 168 (E.D. Pa. 1994). The statutory and constitutional assessments of jurisdiction are thus conflated. See Arch v. American Tobacco Co., 984 F. Supp. 830, 835 (E.D. Pa. 1997); Clark v. Matsushita Elec. Indus. Co., 811 F. Supp. 1061, 1065 (M.D. Pa. 1993).

Whether an exercise of personal jurisdiction comports with due process depends upon "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977). Where the defendant is a nonresident of the forum, the plaintiff must show that the defendant has purposefully directed its activities toward the residents of the forum state, see Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985), or otherwise has "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). See also IMO Industries, Inc. v. Kiekart AG, 155 F.3d 254, 259 (3d Cir. 1998).

General personal jurisdiction may be established by showing that a defendant maintains continuous and systematic

contacts with the forum state. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984); Field v. Ramada Inn, 816 F. Supp. 1033, 1036 (E.D. Pa. 1993). Contacts are continuous and systematic if they are "extensive and pervasive." Id. The standard for general jurisdiction thus "is much higher than that for specific jurisdiction." Clark v. Matsushita Elec. Indus. Co., 811 F. Supp. 1061, 1067 (M.D. Pa. 1993). See also American Cyanamid Co. v. Eli Lilly and Co., 903 F. Supp. 781, 786 (D.N.J. 1995); Sears, Roebuck & Co. v. Sears, PLC, 744 F. Supp. 1297, 1304 (D. Del. 1990).

Plaintiffs do not controvert the averments in Mr. Weitzner's affidavit regarding the passive nature of the website or defendant's dearth of forum contacts and do not contend that defendant has the type of contacts with Pennsylvania which could provide a basis for an exercise of general personal jurisdiction. Rather, plaintiffs contend that the court has specific personal jurisdiction because "the defamation was an activity outside of Pennsylvania which caused harm inside Pennsylvania" and defendant "purposely targeted a Pennsylvania resident with defamatory comments."

Where a plaintiff's cause of action arises out of the defendant's contacts with the forum, a court may exercise specific jurisdiction. See IMO Industries, 155 F.3d 259. To invoke specific jurisdiction, a plaintiff's cause of action must arise from or relate to the defendant's forum related activities

such that the defendant should reasonably anticipate being haled into court in the forum. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984); Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 690 (3d Cir.), cert. denied, 498 U.S. 847 (1990). The plaintiff must show that the defendant has constitutionally sufficient minimum contacts with the forum and that the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. See IMO Industries, 155 F.3d 259 (citing International Shoe Co. v. Washington, 326 U.S. 310 (1945)).

A defendant, however, need not be physically present in the forum. Personal jurisdiction may be exercised over a defendant who has committed an intentional tort when the forum is the focal point of the harm suffered by the plaintiff as a result of that tort and the defendant expressly aimed the tortious conduct at the forum which may thus be said to be the focal point of the tortious conduct. See Remick v. Manfredy, 238 F.3d 248, 258 (3d Cir. 2001); IMO Industries, 155 F.3d 265.

Defamation is an intentional tort. The recipient audience is not linked by geography but by a common interest in off-shore sports gambling. The brunt of any harm suffered by the plaintiff corporation would be in Jamaica. Even assuming that the brunt of any harm suffered by the individual plaintiff would be in Pennsylvania, there is no showing that the defendant

expressly aimed the tortious conduct at the forum. There is a difference between tortious conduct targeted at a forum resident and tortious conduct expressly aimed at the forum. Were the former sufficient, a Pennsylvania resident could hale into court in Pennsylvania anyone who injured him by an intentional tortious act committed anywhere.

It is not sufficient that the brunt of the harm falls within plaintiff's home forum, even when this was reasonably foreseeable. "There is an important distinction between intentional activity which foreseeably causes injury in the forum and intentional acts specifically targeted at the forum." Narco Avionics, Inc. v. Sportsman's Market, Inc., 792 F. Supp. 398, 408 (E.D. Pa. 1992). The articles were targeted at the international off-shore gambling community. See Remick, 238 F.3d at 259 (concluding Pennsylvania was not focal point of tortious conduct where defamatory material was published not just in Pennsylvania but throughout the national boxing community and there was no showing of a unique relationship between that community and Pennsylvania).<sup>4</sup>

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<sup>4</sup> Plaintiff Atiyeh suggests that he is not only a Pennsylvania resident who has been defamed but that he was defamed in "his status as a Pennsylvanian" as he was so identified. The articles in question do note that plaintiff was indicted in Pennsylvania and along with family members resides in the Lehigh Valley. The author also notes that plaintiff has family in Oregon and Antigua. The author, however, clearly focused on plaintiff as a figure in "the offshore gaming scene," describing him as "the super heavyweight of offshore (and ahem, onshore) gambling."

The courts in Virginia would clearly have general personal jurisdiction over this defendant. Plaintiffs must have appreciated this as English Sports Information Ltd., the Jamaica corporation which operated a sports book under the name of English Sports Betting, sued Mr. Weitzner and prescription.com a few years ago in the Eastern District of Virginia for defamation. The suit was settled after Mr. Weitzner asserted a counterclaim for defamation and joined plaintiff Atiyeh as a third-party defendant. As memorialized by the Court in its order of November 8, 1999, in settling that case "the parties have agreed to enter into cross-injunctions which prohibit any of them from commenting in any way about each other." Mr. Weitzner, directly and in the operation of www.theprescription.com, was accordingly enjoined by court order from, inter alia, making "any direct or indirect reference" to plaintiff Atiyeh and entities owned by him. For whatever reason, plaintiffs elected not to proceed in Virginia or to seek relief there pursuant to the injunctive order.<sup>5</sup>

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<sup>5</sup>A court in New York might also have personal jurisdiction in the circumstances alleged. It appears that defendant engaged a New York resident to author and transmit articles, including the offending articles, for publication. This ongoing commercial relationship may constitute a sufficient minimum contact. It appears that at defendant's behest, Mr. Tostigan may have facilitated the publication of the offending articles from New York. Plaintiffs' claim against defendant could be viewed as arising from or related to its commercial contact with New York, and defendant might reasonably be expected to have to answer in New York with a New Yorker engaged by it to disseminate a defamatory article from New York.

In any event, this court lacks personal jurisdiction to adjudicate the claim asserted against this defendant.

Accordingly, defendant's motion to dismiss will be granted and an appropriate order will be entered.<sup>6</sup>

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<sup>6</sup>Plaintiffs did not request a transfer to the Eastern District of Virginia, or any other district court which could be shown to have personal jurisdiction and venue to adjudicate the claim against defendant, in lieu of dismissal should the court find that personal jurisdiction was lacking. Courts have read 28 U.S.C. § 1406(a) to permit a district court that lacks personal jurisdiction to transfer a case in the interest of justice to a district in which personal jurisdiction and venue can be established. See Porter v. Groat, 840 F.2d 255, 257 (4th Cir. 1988); Manley v. Engram, 755 F.2d 1463, 1467 (11th Cir. 1985) (§ 1406(a) may be used when suit is filed in a district in which venue or personal jurisdiction is improper); Sincleair v. Kleindienst, 711 F.2d 291, 294 (D.C. Cir. 1983) (§ 1406(a) transfer appropriate to remove obstacles presented by "lack of personal jurisdiction"); Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978); Taylor v. Love, 415 F.2d 1118, 1120 (6th Cir. 1969), cert. denied, 397 U.S. 1023 (1970); Mayo Clinic v. Kaiser, 383 F.2d 653, 656 (8th Cir. 1967); Dubin v. U.S., 380 F.2d 813, 815 (5th Cir. 1967); Shaw v. Boyd, 658 F. Supp. 89, 92 (E.D. Pa. 1987). Courts have also read 28 U.S.C. § 1631 to permit transfers in the interest of justice for lack of personal, as well as subject matter, jurisdiction. See Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524, 1527 (10th Cir. 1987); Carty v. Beech Aircraft Corp., 679 F.2d 1051, 1065-66 & n.17 (3d Cir. 1982); Jaffe v. Julien, 754 F. Supp. 49, 53 (E.D. Pa. 1991); Nolt & Nolt, Inc. v. Rio Grande, Inc., 738 F. Supp. 163, 166 (E.D. Pa. 1990). Should plaintiffs prefer a transfer to the Eastern District of Virginia, or other district upon a showing it would have personal jurisdiction and venue, the court will entertain any motion filed within ten days to alter the order of dismissal to one of transfer.

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O R D E R

AND NOW, this day of March, 2002, upon consideration of the Motion of defendant Theprescription.com to Dismiss for Lack of Personal Jurisdiction (Doc. #5) and plaintiffs' response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and plaintiffs' claim against Theprescription.com is **DISMISSED** without prejudice for lack of personal jurisdiction; and, all claims herein having been dismissed, the above action is **DISMISSED**.

BY THE COURT:

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JAY C. WALDMAN, J.