

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

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**GENE SMITH,  
Plaintiff**

**v.**

**CLYDE PAUL HOLLAND and LAW  
OFFICES OF CLYDE PAUL HOLLAND AND  
ASSOCIATES,  
Defendants**

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**CIVIL ACTION  
NO. 04-2349**

**MEMORANDUM OPINION AND ORDER**

**RUFE, J.**

**August 18, 2004**

According to the allegations of the Complaint and the evidence before the Court, Plaintiff Gene Smith was party to a lease and purchase agreement for a Tennessee property owned by a client of Defendant Clyde Paul Holland, Esq. On March 16, 2004, while Plaintiff was attempting to obtain financing to purchase the property, Plaintiff and Defendant participated in a telephonic conference call with Plaintiff's mortgage broker, Matt Thoman. Plaintiff was at his residence in Pennsylvania, Defendant was in Tennessee, and Mr. Thoman was in New Jersey. Plaintiff claims that during the call Defendant defamed him by stating to Mr. Thoman that Plaintiff is a "dead beat" and questioning why Mr. Thoman would lend money to Plaintiff. Mr. Thoman believed Defendant's remarks were "uncalled for and unrepresentative of Mr. Smith's character financially, or personally," but the record is silent on whether Mr. Thoman eventually approved or rejected Plaintiff's application for financing.<sup>1</sup>

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<sup>1</sup> Statement of Matt Thoman, dated 3/16/04, Ex. E to Pl.'s Answer to Defs.' Mot. to Dismiss.

On May 28, 2004, Plaintiff filed suit in this Court against Defendant and his law practice, alleging two counts of defamation. Jurisdiction is premised on diversity of citizenship, with Plaintiff being a citizen of Pennsylvania and Defendants being citizens of Tennessee.<sup>2</sup> Defendants now move to dismiss the Complaint for lack of subject matter jurisdiction, lack of personal jurisdiction over Defendants, and improper venue. Defendants' subject matter jurisdiction argument is premised on the notion that Plaintiff is actually a resident of Tennessee, but this contention is belied by the record.<sup>3</sup> Nonetheless, because the Court lacks personal jurisdiction over Defendants, the Complaint is dismissed. As such, the Court need not address the venue issue.

The legal standard and analysis governing a motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) are well known and are not rescribed at length here.<sup>4</sup> Defendants challenge this Court's exercise of in personam jurisdiction; therefore, the burden falls on Plaintiff to establish, through sworn affidavits or other competent evidence, that jurisdiction is proper.<sup>5</sup>

The only factual basis upon which Plaintiff attempts to meet his burden is his receipt of the defamatory statement while in Pennsylvania. Defendants have no other contacts of record with the Commonwealth of Pennsylvania. Pennsylvania's Long Arm Statute authorizes the exercise of personal jurisdiction over nonresident defendants who cause harm within the Commonwealth by

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<sup>2</sup> See 28 U.S.C. § 1332.

<sup>3</sup> In opposing Defendants' Motion, Plaintiff submitted an affidavit averring that he resides in Philadelphia, as well as invoices and account statements bearing his Philadelphia address. Defendants offer no persuasive evidence to the contrary.

<sup>4</sup> See, e.g., Remick v. Manfredy, 238 F.3d 248, 254-56 (3d Cir. 2001) (setting forth appropriate analysis).

<sup>5</sup> Mellon Bank (East) PSFS, Nat'l Assoc. v. Farino, 960 F.2d 1217, 1222-23 (3d Cir. 1992); Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984).

an act outside the Commonwealth.<sup>6</sup> However, the exercise of jurisdiction must still comport with the Due Process Clause of the Fourteenth Amendment, an issue governed in these circumstances by the “effects test” outlined in Calder v. Jones, 465 U.S. 783 (1984).

As articulated by the Third Circuit, consistent with Calder a court may exercise jurisdiction over a nonresident for his intentional torts committed outside the forum where the plaintiff shows:

- (1) The defendant committed an intentional tort;
- (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; and
- (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.<sup>7</sup>

Here, the first prong is satisfied because defamation is an intentional tort. As for the second prong, Plaintiff offers no evidence of any harm caused by Defendant’s alleged statement, let alone that he suffered harm in Pennsylvania. The Complaint contains boilerplate allegations that Plaintiff suffered humiliation, shame, disgrace, and harm to his reputation, as well as unspecified “economic harm.” In asserting the propriety of jurisdiction Plaintiff may not rely on these bare allegations alone; rather, he must produce evidence supporting his claims,<sup>8</sup> which he has failed to do. Accordingly, this second prong weighs against a finding of jurisdiction. Had Plaintiff come forward with appropriate evidence, he could reasonably contend that he suffered the brunt of the harm in Pennsylvania where

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<sup>6</sup> See 42 Pa. Cons. Stat. Ann. § 5322(a)(4).

<sup>7</sup> Remick, 238 F.3d at 258 (quoting Imo Indus., Inc. v. Kierkert AG, 155 F.3d 254, 265-66 (3d Cir. 1998)).

<sup>8</sup> Time Share Vacation Club, 735 F.2d at 66 n.9 (“Once the [lack of personal jurisdiction] defense has been raised, then the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence.”).

he resides.<sup>9</sup>

In any event, Plaintiff cannot satisfy the third prong of the Calder test because Pennsylvania was not the focal point of the tortious conduct. “The defendant must manifest behavior intentionally targeted at and focused on the forum for Calder to be satisfied. In the typical case, this will require some type of ‘entry’ into the forum state by the defendant.”<sup>10</sup> In defamation cases, the defendant “enters” the forum state by broadcasting or publishing the defamatory statement there.<sup>11</sup>

Here, Defendant published the alleged defamatory statement solely to Mr. Thoman in New Jersey. As alleged by Plaintiff, Defendant’s purpose in defaming Plaintiff was “to prevent Plaintiff . . . from obtaining financing for the purchase of” the Tennessee property. Accordingly, it is evident even from Plaintiff’s allegations that the focus of the intentional tort was Mr. Thoman in New Jersey and no one else. Moreover, the conversation concerned (at least tangentially) property in Tennessee, further lessening the connection between Defendant and Pennsylvania. Absent evidence that the defamatory statement was published to or targeted anyone in Pennsylvania besides Plaintiff, the Court may not exercise personal jurisdiction over Defendants.<sup>12</sup> Without such evidence, the Court is left with nothing more than Plaintiff’s contention that he suffered injury in

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<sup>9</sup> See Remick, 238 F.3d at 258 (concluding that brunt of harm may be suffered in Pennsylvania when defamatory letters targeted the plaintiff’s professional activities, which were centered in Pennsylvania).

<sup>10</sup> Id. at 265 (internal quotations and citation omitted).

<sup>11</sup> Bank Express, Int’l v. Kang, 265 F. Supp. 2d 497, 506 (E.D. Pa. 2003).

<sup>12</sup> Remick, 238 F.3d at 259 (where defamatory letter attacked professional abilities of a Pennsylvania attorney, letter was faxed to attorney’s office and read by two members of attorney’s staff while it sat on the fax machine, court found no basis for personal jurisdiction because “[t]here is no indication that the letter was targeted at [the two staff members] or at anyone in Pennsylvania other than [plaintiff].”).

Pennsylvania, which is plainly insufficient under Third Circuit precedent.<sup>13</sup> Accordingly, the third prong of the Calder test is not satisfied.

In light of the foregoing, the Court may not permissibly exercise personal jurisdiction over Defendants. The Motion to Dismiss is granted. An appropriate Order follows.

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<sup>13</sup> Imo Indus., Inc. v. Kierkert AG, 155 F.3d 254, 263 (3d Cir. 1998) (“[M]ere allegation that the plaintiff feels the effect of the defendant’s tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy Calder.”).

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**ORDER**

**AND NOW**, this 18th day of August, 2004, upon consideration of Defendants' Motion to Dismiss [Doc. # 2], Plaintiff's Answer thereto [Doc. # 3] and Defendants' Reply Memorandum [Doc. # 4], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendants' Motion is **GRANTED** and the Complaint is **DISMISSED WITHOUT PREJUDICE** for lack of personal jurisdiction over Defendants.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**