

Scott Burke, the vice president of CMS (collectively, "defendants"). On November 5, 2004, after a stipulation and order that defendants had until November 11, 2004 to file a response to the complaint, defendants filed a motion to dismiss the action for lack of personal jurisdiction over the defendants. In the alternative, defendants' motion sought a transfer of venue under 28 U.S.C. § 1404(a). Plaintiff failed to file a response in opposition to the motion to dismiss, as is required by Local Rule of Civil Procedure 7.1(c). See Local R. Civ. P. 7.1(c) ("[A]ny party opposing [a] motion shall serve a brief in opposition, within fourteen (14) days after service of the motion and supporting brief.").

On December 23, 2004, the Court held a hearing on defendants' motion to dismiss and an initial pretrial conference. At the hearing, the Court reminded plaintiff's counsel of his obligation under Local Rule 7.1(c) to file a timely response to his opponent's motion. The Court then directed plaintiff's counsel to file a reply brief not later than January 2, 2005.

Also on December 23, 2004, the Court entered an Order that granted a continuance of the hearing and initial pretrial conference to January 3, 2005. The Order informed plaintiff's counsel that his failure to comply with Local Rule 7.1(c), i.e., his failure to file a timely response to defendants' motion to dismiss, may result in granting defendants' motion as

uncontested. Further, the Order required plaintiff's counsel to show cause why sanctions of up to \$250 should not be imposed upon him for failing to comply with Local Rule 7.1(c).

On December 27, 2004, plaintiff's counsel wrote to the Court, informing the Court that he had relocated to Rhode Island but that he intended to file a reply brief to defendants' motion to dismiss not later than January 2, 2005, as ordered by the Court at the December 23, 2004 hearing.²

On Monday, January 3, 2005, at 9:00 a.m., the Court reconvened the December 23, 2004 hearing on defendants' motion to dismiss and initial pretrial conference. Plaintiff's counsel failed, however, to appear at the hearing and, to the Court's knowledge, failed to file a reply brief. The Court later learned that plaintiff's counsel had faxed a copy of his reply brief to the Court at 6:44 p.m. on Saturday, January 1, 2005 (New Year's Day).³ Plaintiff accompanied his New Year's Day reply brief with a cover letter that contained the following statement addressed to the Court:

Please be advised that I am unable to attend the conference scheduled for Monday, January, [sic] 03, 2005 . . . and respectfully request that the conference and/or oral argument be

2. Plaintiff's counsel's December 27, 2004 letter informed the Court for the first time that counsel had relocated his law practice to Rhode Island.

3. Plaintiff's counsel also filed his reply brief with the Clerk's Office on January 1, 2005.

rescheduled no earlier than the week of
January 10, 2005.

Pl. Counsel's fax of Jan. 1, 2005.

II. DISPOSITION OF THE MOTION TO DISMISS

A. Local Rule 7.1(c)

Under Local Rule 7.1(c), a motion, other than a motion for summary judgment, may be granted as unopposed if the opposing party fails to file a timely response. See Fiore v. Giant Food Stores, NO. 98-517, 1998 U.S. Dist. LEXIS 5418 (E.D. Pa. Apr. 17, 1998). At the January 3, 2005 hearing, the Court granted defendant's motion to dismiss as uncontested and dismissed the instant matter under Local Rule 7.1(c). The Court's ruling was based on plaintiff counsel's initial failure to file a timely reply brief and plaintiff counsel's presumed second failure to file a reply brief after being given an additional opportunity to do so. As stated above, however, after the January 3, 2005 hearing, the Court learned that plaintiff's counsel had faxed a reply brief within the time provided by the Court's December 23, 2004 Order, albeit he filed the brief on New Year's Day. In light of plaintiff's counsel's technical compliance with the Court's December 23, 2004 Order, the Court will vacate its oral Order dismissing the case pursuant to Local Rule 7.1(c).

B. Lack of In Personam Jurisdiction

Although the Court has vacated its oral Order dismissing the case as uncontested, the Court has considered the merits of the New Year's Day reply brief and concludes that the instant matter should be dismissed for lack of in personam jurisdiction over the defendants. Under Federal Rule of Civil Procedure 4(e), a federal district court can assert personal jurisdiction over a non-resident defendant to the extent permitted by the law of the state in which it sits. See Mellon Bank (EAST) PSFS, N.A. v. DiVeronica Bros., Inc., 983 F.2d 551, 554 (3d Cir. 1993). Pennsylvania's long-arm statute provides that a court may exercise in personam jurisdiction over non-residents "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322(b).

Where a defendant asserts a personal-jurisdiction defense, the plaintiff bears the burden of establishing either general or specific personal jurisdiction. See BP Chem. Ltd. V. Formosa Chem. & Fibre Corp., 229 F.3d 254, 259 (3d. Cir. 2000). To prove general personal jurisdiction, the plaintiff must demonstrate that "the defendant's contacts with the forum, whether or not related to the litigation, are 'continuous and

systematic.'"⁴ Id. (quoting Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 416 (1984)). To prove specific personal jurisdiction, the plaintiff must satisfy a two-part test. See IMO Indus. v. Kiekert AG, 155 F.3d 254, 259 (3d Cir. 1998). One, "the plaintiff must show that the defendant has constitutionally sufficient 'minimum contacts' with the forum." Id. (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)). Id. (quoting Burger King, 471 U.S. at 472). To this end, the plaintiff must show that the defendant has "purposefully directed his activities at residents of the forum and [that] the litigation results from alleged injuries that arise out of or relate to those activities."⁵ Miller Yacht Sales, Inc. v. Smith

4. Put differently, "the minimum contacts analysis is inappropriate when the defendant's forum activities do not give rise to the claim. In instances of general jurisdiction, a plaintiff must demonstrate that the defendant maintained continuous and substantial forum affiliations." Dollar Sav. Bank v. First Sec. Bank of Utah, N.A., 746 F.2d 208, 212 (3d Cir. 1984) (internal citation omitted).

5. In the specific jurisdiction analysis, therefore, a conclusion that a defendant has minimum contacts with the forum is synonymous with concluding that the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of [the forum state's] laws." Burger King, 471 U.S. at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). When a defendant purposely avails itself of the privilege of conducting activities within the forum state, "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Burger King, 471 U.S. at 475 (citations omitted). "[T]his purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random,

384 F.3d 93, 96 (3d. Cir. 2004) (quoting Burger King, 471 U.S. at 472). Two, if the plaintiff establishes that the defendant has minimum contacts with the forum state, the Court may, in its discretion, assert in personam jurisdiction over the non-resident defendant if doing so is reasonable under the circumstances, i.e., if the assertion of jurisdiction "would comport with 'traditional notions of fair play and substantial justice.'" Id. (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)) (internal citation omitted). As to this fairness inquiry, the defendant must "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Miller Yacht Sales, 384 F.3d at 97 (quoting Burger King, 471 U.S. at 477). In addressing this fairness question, the Court may consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." Id. (quoting Burger King, 471 U.S. at 477).

In the present case, although given an opportunity to do so at a hearing, plaintiff has failed to satisfy its burden of proving that this Court has authority to assert either general or

fortuitous, or attenuated contacts." Id. (citations and internal quotation marks omitted).

specific personal jurisdiction over the two non-resident defendants.⁶ As already stated, the instant lawsuit arises out of defendants' operation of an allegedly infringing web site, which defendants host in Denver, Colorado. Because this lawsuit arises out of and is related to defendants' actions in Colorado, and not in Pennsylvania, any exercise of jurisdiction over the defendants by this Court would be under the Court's general, as opposed to specific, personal jurisdiction. See Helicopteros, 466 U.S. at 415 n.9; Mellon Bank (East), 983 F.2d at 554.

Applying the general jurisdiction analysis here, defendants clearly do not have such a longstanding business presence in Pennsylvania which would rise to the level of continuous and systematic contacts. See, e.g., BP Chem. Ltd., 229 F.3d at 254 (concluding that a foreign corporation that exported products to the United States for more than a decade, but had no personnel or facilities here and did not advertise or solicit business here, did not have continuous and systematic contacts with the United States). First, plaintiff does not dispute that CMS has had five or fewer sales in Pennsylvania since 1998, and that those sales reflect less than one percent of its annual sales. Second, neither CMS nor Scott Burke employs or

6. Plaintiff relied solely on the assertions in the complaint, which, although styled as a verified complaint, lacked an accompanying affidavit. Defendants, on the other hand, provided an affidavit setting forth facts upon which they relied for their conclusions.

maintains any agents or employees in Pennsylvania. Third, neither has directed any advertising or products to residents of Pennsylvania. Finally, defendants do not own or rent any property in Pennsylvania. Because the defendants lack continuous and systematic contacts with Pennsylvania, the Court cannot constitutionally assert jurisdiction over them.

In any event, even if the defendants had sufficient contacts with Pennsylvania, the Court concludes that the exercise of personal jurisdiction would be unreasonable under the circumstances. This matter involves a controversy over operation of an allegedly infringing web site hosted in Colorado. In addition, the plaintiff is a resident of North Carolina, and his "company," which hosts an allegedly copyright-protected web site in North Carolina, allegedly suffered injury in North Carolina. Thus, to require the non-resident defendants to litigate this matter in Pennsylvania, a forum which has absolutely no interest in adjudicating the dispute, when there is an alternative forum where plaintiff can obtain effective relief, i.e., Colorado, would offend "traditional notions of fair play and substantial justice." Int'l Shoe, 326 U.S. at 316; see also Burger King, 471 U.S. at 477.

Lastly, because this case arises out of defendants' operation of an allegedly infringing web site, which defendants host in Denver, Colorado, the Court acknowledges the following

principle set forth by the Third Circuit in Toys "R" Us, Inc. v.

Step Two, S.A.:

[T]he mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant "purposefully availed" itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.

318 F.3d 446, 451 (3d Cir. 2003). In the present case, plaintiff has failed to show that the defendants purposefully availed themselves of conducting activity in Pennsylvania by either targeting their web site to Pennsylvania residents, knowingly interacting with Pennsylvania residents via their web site, or otherwise having sufficient contacts with Pennsylvania. See id.

C. Improper Venue

Alternatively, the Court notes that the instant matter should be dismissed for improper venue. Under 28 U.S.C. § 1406, "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss . . . such case" The propriety of venue for copyright claims is governed by 28 U.S.C. § 1400, the specific venue provision for copyright claims. That section provides:

Civil actions, suits, or proceedings arising under any Act of Congress relating to

copyrights or exclusive rights in mask works or designs may be instituted in the district in which the defendant or his agent resides or may be found.

Id. The defendants "may be found" in any district in which they are subject to personal jurisdiction. See Testa v. Janssen, 482 F. Supp. 1195, 1197 (E.D. Pa. 1980) ("[T]he reference in section 1400(a) to 'may be found' does not impose a greater finding of presence than is required to obtain jurisdiction over a corporate defendant."). Under Section 1400, then, venue is not properly laid in this judicial district because, as discussed above, this Court cannot exercise in personam jurisdiction over the defendants.

All plaintiff's other claims are governed by 28 U.S.C. § 1391, the general venue statute. Section 1391 provides, in pertinent part:

(b) A civil action wherein jurisdiction is not founded solely 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 may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). Section 1391(b) applies here because the

Court's jurisdiction is based, in part, on 28 U.S.C. § 1338, which confers original jurisdiction to the district courts over copyright and unfair competition suits. Under Section 1391(b), this action may only be brought in a judicial district in Colorado, the state where both defendants reside, see § 1391(b)(1), or where a substantial part of the events giving rise to the claim occurred, see § 1391(b)(2), i.e., not in Pennsylvania.⁷ Section 1391(b)(3), the fall-back venue provision, does not apply because there is a judicial district where plaintiff may otherwise bring the case: Colorado. Venue is thus not properly laid in this judicial district. Accordingly, the action is should be dismissed under 28 U.S.C. § 1406.

III. CONCLUSION

In light of the foregoing, plaintiff's complaint should be dismissed on two alternative grounds: lack of in personam jurisdiction over the non-resident defendants and improper venue. Accordingly, defendants' motion to dismiss will be granted. An appropriate order follows.

7. As already stated, it is noteworthy that not even the plaintiff in this action resides in Pennsylvania; he resides in North Carolina. Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, at 5.

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

JACK KIMBALL d/b/a	:	CIVIL ACTION
CARDSERVICE OF RALEIGH	:	NO. 04-3466
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
	:	
COUNTRYWIDE MERCHANT SERVS.	:	
& SCOTT BURKE	:	
	:	
	:	
Defendants.	:	

ORDER

AND NOW, this **8th** day of **February, 2005**, upon consideration of the Motion to Dismiss filed by Defendants Scott Burke and Countrywide Merchant Services (doc. no. 5), and Plaintiff's response thereto, it is hereby **ORDERED** that the Motion to Dismiss is **GRANTED** for lack of personal jurisdiction and improper venue.

IT IS FURTHER ORDERED that the case shall be marked **CLOSED**.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.