

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

JEFFREY PAUL GRUTKOWSKI, et al.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
STEAMBOAT LAKE GUIDES & OUTFITTERS, INC., et al.	:	NO. 98-1453
	:	

MEMORANDUM AND ORDER

YOHN, J. December , 1998

This wrongful death action was brought by Jeffrey and Mark Grutkowski as co-administrators of the estate of Steven R. Grutkowski (“Grutkowski”), who died on March 20, 1996 in a snowmobiling accident in Routt National Forest in Colorado. The defendants are Steamboat Lake Guides & Outfitters, Inc. (“SLO”), a tour operator and outfitter which conducted the snowmobiling tour on which Grutkowski was killed, and Polaris Industries, Inc. (“Polaris”), which manufactured the snowmobile Grutkowski was riding when he died. SLO filed a motion to dismiss this complaint under Fed. R. Civ. P. 12 (b)(2), asserting that this court does not have personal jurisdiction over it. Polaris has consented to jurisdiction in this court.¹ Plaintiffs contend that SLO is subject to personal jurisdiction in the Eastern District of Pennsylvania, but in the alternative, ask this court to transfer the case to the District of Colorado rather than dismiss it. For the reasons described below, the case will be transferred to the District of Colorado, as SLO

¹ There is no evidence of record to suggest that Polaris would not be subject to personal jurisdiction in either the Eastern District of Pennsylvania or the District of Colorado.

is not subject to the personal jurisdiction of this court.

FACTUAL BACKGROUND

On March 20, 1996, Grutkowski and several companions embarked on a two-hour snowmobile tour of Colorado's Routt National Forest which was led by a SLO guide. See Complaint, at ¶¶ 19-20. Shortly after 4 p.m., Grutkowski, while riding the Polaris snowmobile supplied by SLO, collided with a tree and suffered severe head and upper body injuries. See Complaint, at ¶ 22. Grutkowski's injuries were so severe that he died before he was evacuated from the scene of his accident. See Complaint, at ¶ 26. Grutkowski's representatives filed suit on March 19, 1998, asserting that SLO's negligence and Polaris' defective snowmobile caused Grutkowski's death and his parents' resulting emotional distress. See Complaint, Counts I-X.

SLO is a Colorado corporation with its principal place of business at 61070 Routt County Road 129, in Clark, Colorado. See Complaint, at ¶ 5. SLO contends, and plaintiffs do not contest, that it is "not authorized or registered to conduct business in the Commonwealth of Pennsylvania," that it maintains no offices or outfitter licenses in Pennsylvania, that it does not own property in Pennsylvania, and that it does not organize or operate tours within Pennsylvania. See Affidavit of Donald Markley, at ¶¶ 5-10 (attached to Motion to Dismiss as Exhibit D).

SLO has, however, since March 1998, maintained a web site on the Internet which is accessible to all Internet users, including those in Pennsylvania.² See Steamboat Lake Outfitters, Inc. Home Page (visited Dec. 15, 1998) <<http://www.steamboatoutfitters.com>>. Information

² Plaintiffs incorrectly assert that SLO's web site is located at <<http://www.toski.com/slo>>. See Opposition, at 7. This web site, however, is actually operated by Colorado Resort Net, as is evident from Colorado Resort Net copyright information on its pages. Colorado Resort Net's site does, however, contain information about SLO's tours and activities.

about SLO is also available on Internet sites maintained by other organizations, including Colorado Resort Net, TravelFacts, Pocket Guide, and the Steamboat Ski & Resort Corp. See Steamboat Lake Outfitters Page (attached to Plaintiff's Opposition to Motion to Dismiss ("Opposition") as Exhibits A, B) <<http://www.toski.com/slo>>; Steamboat Lake Outfitters Page (attached to Opposition as Exhibit C) <<http://www.travelfacts.com>>; Steamboat Springs Page (attached to Opposition as Exhibit D) <<http://www.pocketguide.com/SS-ski>>; Official Steamboat Web Site (attached to Opposition as Exhibit E) <<http://www.steamboat-ski.com>>.

SLO also uses the booking services of Steamboat Central Reservations ("Central Reservations"), an agency located in Steamboat Springs, Colorado which books reservations for lodging and activities around the Steamboat Springs resort area . See Responses to Plaintiffs' Interrogatories No. 3 (a) (attached to Opposition as Exhibit J). Plaintiffs contend that SLO sends its seasonal activity schedules to Central Reservations, which receives a commission on each SLO booking.³ Plaintiffs further contend that when customers call Central Reservations to make reservations in the Steamboat area, Central Reservations will normally forward to them brochures describing other regional activities, including SLO's tours. Finally, plaintiffs assert that Central Reservations includes advertisements for discount travel packages in the monthly billing statements of American Express cardholders. In sum, plaintiffs contend that SLO's

³ The assertions described in this, and the following sentences, are contained in an affidavit by one of plaintiffs' attorneys which claims to report the substance of his conversation with the Director of Central Reservations. See Affidavit of Jeffrey Miceli (attached to Opposition as an unmarked exhibit). Because they do not change this court's conclusions, the assertions in this affidavit will be considered for purposes of this motion alone. These assertions, however, consisting of blatant hearsay, are not admissible evidence on which plaintiffs could rely to sustain their burden of proof, and plaintiffs' attorneys' attempt to rely on them as such is not approved.

Internet presence, and SLO's use of Central Reservations as a booking agent provide an adequate basis for asserting jurisdiction over SLO in Pennsylvania. See Opposition, at 3-4.

STANDARD OF REVIEW

Once a defendant has raised a jurisdictional defense, the burden shifts to the plaintiff to prove that the relevant jurisdictional requirements are met. See Mellon Bank (East) PSFS v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992); Gehling v. St. George's Sch. of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985). The plaintiff must support this burden through "sworn affidavits or other competent evidence." North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (3d Cir.), cert. denied, 498 U.S. 847 (1990) (citations omitted). Where the complaint and affidavits are relied upon to satisfy its burden, the plaintiff succeeds by making a prima facie showing that jurisdiction exists. See Friedman v. Israel Labour Party, 957 F. Supp. 701, 706 (E.D. Pa. 1997). "Factual discrepancies created by affidavits are generally resolved in favor of the non-moving party." Id.; see also Carteret Savings Bank v. Shushan, 954 F.2d 141, 142 n. 1 (3d Cir.), cert. denied, 506 U.S. 817 (1992). In resolving jurisdictional disputes under Rule 12 (b)(2), the standards under Rule 12 (c) do not apply simply because the court considers affidavits concerning jurisdictional facts. See K.C.P.L., Inc. v. Nash, No. 98-3773, 1998 WL 823657, at *3 (S.D.N.Y. Nov. 24, 1998).

DISCUSSION

I. Personal Jurisdiction

When, as here, a federal court has subject matter jurisdiction over a matter because of the diversity of the parties' citizenship, the court's personal jurisdiction over a nonresident of the state in which it sits is controlled by the laws of that state. See Fed. R. Civ. P. 4 (e); Imo Indus.,

Inc. v. Kiekert AG, 155 F.3d 254, 259 (3d Cir. 1998). If the long-arm jurisdictional statute of its forum state permits a court to exercise personal jurisdiction, the court must next determine whether the Due Process Clause of the Fourteenth Amendment limits the exercise of jurisdiction. See id.; Vetrotex Certaineed Corp. v. Consolidated Fiber Glass Prod. Co., 75 F.3d 147, 150 (3d Cir. 1996).

Personal jurisdiction may be either specific or general. Specific jurisdiction is present when the cause of action arises from the defendant's forum related activities; while general jurisdiction is present when the defendant engages in such "continuous and systematic" contacts with the forum state that jurisdiction exists for all causes of action against that defendant, even for claims which do not arise from the defendant's forum related activities. See Heliocopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n. 8-9 (1984); Imo, 155 F.3d at 259. In their brief opposing the motion to dismiss, plaintiffs concede that there is no specific jurisdiction over SLO under the facts of this case. See Opposition, at 5. This court, therefore, will only consider whether it has general personal jurisdiction over SLO.

Under Pennsylvania's long-arm statute, its courts have general jurisdiction over a foreign corporation if the corporation conducts "a continuous and systematic part of its general business within this Commonwealth." 42 Pa. Cons. Stat. Ann. § 5301 (a) (2) (iii) (West 1981 & Rev. Supp. 1998). Reading this statutory provision in conjunction with the Fourteenth Amendment's due process requirements, it is clear that this court may only exercise jurisdiction over SLO if it has "certain minimum contacts with [Pennsylvania] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

SLO's contacts with Pennsylvania must suggest that it could "reasonably anticipate being haled into court" here. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The "continuous and systematic" test is rigorous, and is "not an easy one to meet." Surgical Laser Tech., Inc. v. C.R. Bard, Inc., 921 F. Supp. 281, 284 (E.D. Pa. 1996). To meet their burden of demonstrating general personal jurisdiction, plaintiffs must prove that SLO's Pennsylvania contacts are more than "minimal;" those contacts must be "extensive and pervasive." Reliance Steel Prod. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 589 (3d Cir. 1982).

Plaintiffs contend that SLO does maintain "continuous and systematic" contacts with Pennsylvania because its web sites, and web sites containing information about its services, are continuously available in Pennsylvania. See Opposition, at 7. If the web sites alone are insufficient to create personal jurisdiction, plaintiffs next argue, the web sites combined with SLO's use of Central Reservations' booking and advertising services establish the required contacts with Pennsylvania. See Opposition, at 11.

A. SLO's Internet Presence Does Not Provide A Basis for the Exercise of General Jurisdiction

Though widespread usage of the Internet is a recent development in communications technology, a growing body of case law from this and other circuits has delineated the circumstances under which an entity may be subjected to personal jurisdiction based solely on the accessibility of its web sites to Internet users in that forum. The likelihood that such an exercise of jurisdiction is constitutionally permissible is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F. Supp. 636, 638 (E.D. Pa. 1998) (quoting Zippo Mfg. Co. v.

Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)); see also Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997). Courts have established three categories of Internet contacts, each with its own standards governing the propriety of personal jurisdiction based on those contacts. See K.C.P.L., 1998 WL 823657, at *5; Patriot Sys., Inc. v. C-Cubed Corp., 21 F. Supp. 2d 1318, 1324 (D. Utah, 1998); Blumenthal v. Drudge, 992 F. Supp. 44, 55 (D.D.C. 1998); Blackburn, 999 F. Supp. at 638 (citing Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997)). As the Blackburn court succinctly explained:

The first type of contact is when the defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. The second type of contact occurs when a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Website. The third type of contact involves the posting of information or advertisements on an Internet Web Site which is accessible to users in foreign jurisdictions. Personal jurisdiction is not exercised for this type of contact because a finding of jurisdiction . . . based on an Internet web site would mean that there would be nationwide (indeed worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with personal jurisdiction case law.

Blackburn, 999 F. Supp. at 638-39 (citations and quotations omitted). These categories provide a useful application of traditional personal jurisdiction principals to the Internet context.

Plaintiffs, not surprisingly, contend that SLO's web page, and the web pages containing information about SLO, are interactive solicitations for customers that fall within the second category of Internet contacts described above, and that exercising personal jurisdiction over SLO based on those contacts is permissible because of the purely commercial nature of SLO's speech. See Opposition, at 8. SLO contends, to the contrary, that its Internet contacts are passive

advertisements which are far from the continuous or systematic contacts necessary to establish general personal jurisdiction. See Defendant's Reply, at 6.

SLO's web site contains information and photographs describing the various tours and services it offers. It also contains a map showing SLO's general location, and a screen which allows an interested reader to send an e-mail message to SLO. See <<http://www.steamboatoutfitters.com>>. This site does not permit a reader to purchase or reserve tours over the Internet and thus, does not permit SLO to "transact business" over the Internet. Cf. Zippo, 952 F. Supp. at 1126 (jurisdiction exists when Internet news service enters into on-line contracts with Pennsylvania subscribers and contracts with Pennsylvania Internet service providers to furnish services to its customers). The site specifically directs readers to call SLO, at a Colorado phone number, for information, reservations and specific directions to its office. See id. The Colorado Resort Net site offers, in addition, a coupon worth \$5.00 off a SLO snowmobile rental, which the reader must print and present to SLO at the time of the rental. See <<http://www.toski.com/coupons/04050801.html>>. Finally, plaintiffs emphasize that the Colorado Resort Net site includes an "Information Request Form" which permits a reader to e-mail her name, address, telephone number, fax number, e-mail address and comments directly to SLO. See <<http://www.toski.com/cgi-bin/req.pl?sloemail@cmn.net>>.

These web sites amount to no more than passive advertisements, and though commercial in nature, fail to establish that SLO has maintained either systematic or continuous contacts with Pennsylvania through their maintenance. The e-mail links which permit readers to send questions to SLO are the only interactive elements of these pages, and these links, the electronic equivalents of advertisements' response cards, are insufficient to make these pages more than

advertisements. On strikingly similar facts, Blackburn held that a web site which permitted a reader to send e-mail to the site's sponsor did not establish jurisdiction over the site's sponsor in the reader's forum. See Blackburn, 999 F. Supp. at 639; see also Cybersell, 130 F.3d at 419 (web site which permitted reader to e-mail her name, address and area of interest to the defendant did not create jurisdiction in reader's forum). Weber also held that because advertising on the Internet is similar to advertising in national publications, and advertising in national publications is not a basis for asserting personal jurisdiction over a foreign corporation, that an Italian hotel which maintained a web site showing pictures of its rooms and listing contact information was not subject to personal jurisdiction in New Jersey on the basis of that site. See Weber, 977 F. Supp. at 333; see also Santana Prod., Inc. v. Bobrick Washroom Equip., 14 F. Supp. 2d 710, 714 (M.D. Pa. 1998) (inclusion of defendant "on a passive web page, i.e., a web page that merely provides information but through which no business is transacted, will not provide a sufficient basis upon which to base general jurisdiction"). On the basis of these cases and the Third Circuit's holding in Gehling, that advertising in national publications "does not constitute 'continuous and substantial' contacts with the forum state," it is evident that SLO's Internet advertisements do not subject it to general personal jurisdiction in Pennsylvania. See Gehling, 773 F.2d at 542.

B. SLO's Relationship with Central Reservations Does Not Provide a Basis for the Exercise of General Jurisdiction

Plaintiffs next contend that SLO is subject to general jurisdiction in Pennsylvania because its booking agent, Central Reservations, maintains continuous and systematic contacts with Pennsylvania through its advertising here. See Opposition, at 9-10. Plaintiffs, however, fail to

offer any evidence that Central Reservations advertises in Pennsylvania, much less advertises on either a continuous or systematic basis. Their only evidence that Central Reservations has ever conducted business with a Pennsylvania resident is a single page from Central Reservations' computer booking system which shows that one Pennsylvania resident booked an SLO tour through Central Reservations in January, 1997.⁴ See Opposition, Exhibit G.

Even if Central Reservations does send brochures describing the Steamboat resort's activities, including SLO's tours, to customers who call Central Reservations for information, as the plaintiffs contend, such activity would not subject SLO to jurisdiction in the customers' states because that contact was not initiated by Central Reservations. It is a well-established principle of jurisdictional doctrine that a party cannot be subject to jurisdiction in a forum based solely on the actions of forum residents. See Reliance Steel, 675 F.2d at 589 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state."). Central Reservations' alleged actions are thus responses to customers' inquiries and are not advertisements purposefully directed at the forum state. Moreover, it is doubtful that Central Reservations' provision of information to its Pennsylvania customers would subject it to personal jurisdiction here. See Vetrotex, 75 F.3d at 152 (quotations omitted) ("informational communications in furtherance of [a contract between a resident and a nonresident] does [sic] not establish the purposeful activity necessary for a valid

⁴ Plaintiffs' claim that Central Reservations systematically advertises in Pennsylvania because it includes advertisements in American Express statements that are received by American Express card holders in Pennsylvania is without merit. Assuming that the plaintiffs' claim is factually correct, see supra note 3, Central Reservations has only chosen to advertise in a national forum, which is an insufficient reason for it to be subject to Pennsylvania's general jurisdiction. See Gehling, 773 F.2d at 542.

assertion of personal jurisdiction over [the nonresident defendant]”).

Though plaintiffs are correct in their assertion that substantial advertising campaigns directed toward Pennsylvania may establish jurisdiction over the advertiser in Pennsylvania, plaintiffs have failed to demonstrate that Central Reservations has conducted even a minimal advertising campaign directed toward Pennsylvania. Cf. Gavigan v. Walt Disney World, Inc., 646 F. Supp. 786, 788 (E.D. Pa. 1986) (Florida resort had “continuous and substantial” contacts with Pennsylvania when resort conducted intense promotional activities in Philadelphia, entered into joint ventures with Pennsylvania entities and advertised in local media); Johnson v. Summa Corp., 632 F. Supp. 122, 124 (E.D. Pa. 1985) (Pennsylvania had no personal jurisdiction over Nevada hotel which maintained a toll-free telephone number in the Philadelphia Yellow Pages, and sent promotional materials to former guest residing in Pennsylvania, and whose brochures were available in a Pennsylvania travel agency); Garfield v. Homowack Lodge, Inc., 378 A.2d 351, 354 (Pa. Super. Ct. 1977) (New York hotel was subject to jurisdiction in Pennsylvania when it routinely advertised in local Pennsylvania newspaper, maintained toll-free telephone number in Pennsylvania and paid commission to Pennsylvania-based travel agents). Thus, as plaintiffs have failed to demonstrate that Central Reservations advertises systematically in Pennsylvania on behalf of SLO, SLO’s use of Central Reservations as a booking agent cannot subject it to personal jurisdiction here. Moreover, because neither SLO’s Internet presence nor its relationship with Central Reservations establishes a “continuous and systematic” relationship between SLO and Pennsylvania, and because these asserted links to Pennsylvania are tenuous at best, this court finds that the sum of these two considerations is inadequate to create general personal jurisdiction over SLO in Pennsylvania.

II. Transfer to the District of Colorado

Plaintiffs ask this court to transfer the case to the District of Colorado if SLO is not subject to personal jurisdiction in Pennsylvania. See Opposition, at 14. SLO has not opposed such a transfer. Plaintiffs argue that, as the applicable two-year statute of limitations has already expired, they will lose all possible remedies against SLO if this action is dismissed rather than transferred. See Opposition, at 15.

If a court finds that it does not have jurisdiction over a civil case, it may “in the interest of justice, transfer such action . . . to any other court in which the action . . . could have been brought at the time it was filed.” 28 U.S.C. § 1631; see also Gehling, 773 F.2d at 544; Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F. Supp. 1048, 1055-56 (E.D. Pa. 1994). The interests of justice would best be served by allowing plaintiffs to pursue their claims in a jurisdiction with personal jurisdiction over all defendants. Because the District of Colorado would have both subject matter and personal jurisdiction over this case, the case will be transferred there.

CONCLUSION

Plaintiffs have not made a prima facie showing that this court may exercise personal jurisdiction over SLO. Rather than grant SLO’s motion to dismiss, however, the interests of justice require this court to transfer this case to the District of Colorado.

An appropriate order follows.

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	:	
v.	:	
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STEAMBOAT LAKE GUIDES &	:	
OUTFITTERS, INC., et al.	:	NO. 98-1453

ORDER

AND NOW, this 21st day of December, 1998, after consideration of Defendant Steamboat Lake Guides & Outfitters Inc.'s motion to dismiss for lack of personal jurisdiction, the Plaintiffs' reply, and the response thereto, IT IS ORDERED that this action is TRANSFERRED to the United States District Court for the District of Colorado, as this court lacks personal jurisdiction over Defendant Steamboat Lake Guides & Outfitters, Inc.

William H. Yohn, Jr., J.