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Trials&TRIBULATIONS

Using a website as basis for long-arm jurisdiction

Most of us remember the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny from our law school days, and muddling through the principles espoused for determining whether a forum state has personal jurisdiction over a defendant: a defendant must have sufficient “minimum contacts” such that retaining personal jurisdiction over that defendant does not “offend traditional notions of fair play and substantial justice,” *Id.* at 316.

Those time-honored principles are still with us today, and have been adapted to apply to cases the 1945 U.S. Supreme Court could never have imagined. Indeed, in the recent decision of *Mrs. United States National Pageant, Inc. v. Miss United States of America Organization, LLC, et al.*, __ F.Supp.2d __, 2012 WL 2870218 (WDNY July 13, 2012), District Judge David G. Larimer found that these “basic governing principles are no different in Internet cases.”

Now, the *International Shoe* parameters for obtaining personal jurisdiction (and those espoused in its progeny) have been met, at least in part, by the level of interactivity of a defendant’s website and whether the website specifically targeted residents of a particular state. Both the Western District of New York, in *Mrs. United States*, and the Supreme Court of New York County, in *Deer Consumer Products, Inc. v. Little*, 35 Misc 3d 374 (Jan. 27), recently grappled with these issues, reaching different results.

In *Mrs. United States*, defendants, who reside in North Carolina, set up a competing pageant, utilizing various monikers that were very similar to those trademarked and already used by plaintiff, a New York corporation. The court undertook an in-depth analysis and ultimately determined that it did have personal jurisdiction over the defendants based solely upon a website they had created to attract pageant contestants.

In that case, defendants moved to dismiss the complaint for lack of personal jurisdiction because “they have never transacted business in New York, [] they have no office or residence in this state, and they have not consented to jurisdiction here . .

[and] there is no evidence that the website has been purposefully aimed at New York residents,” *Id.* at *3.

In deciding that it could exercise personal jurisdiction over the defendants, the court pointed out that there is a “sliding scale” with respect to the degree that a defendant can utilize the Internet to aid in its commercial activities. At one end of that scale is the “passive” website, which provides static information and has little or no interactivity.

On the opposite end of the scale are websites where parties enter into contracts and engage in “the knowing and repeated transmission of computer files over the Internet.” Finally, the court addressed websites that fall into the so-called “middle ground.” This includes websites where there is some level of interactivity, like those where parties sell products online, or where Internet users can create and maintain some type of account, communicate with the owners or representatives of a site, or download documents, such as order forms, *Mrs. United States*, at *7.

The court found that the *Mrs. United States* defendants maintained a website that fell in the middle of the sliding scale. On that website, a pageant hopeful could (1) download an application to become a contestant; (2) contact defendants through the website for information; (3) submit their names to the website to become part of the national e-mailing list; and (4) pay for their applications through the website. In addition, the defendants’ website had a link to a store through which Internet users could purchase pageant merchandise, *Id.* at *8.

While the analysis of the level of interactivity of the defendants’ website is consistent with other decisions, the court’s reasoning for its decision that defendants actually “targeted” New York residents is particularly interesting.

The court first distinguished the website in *Mrs. United States* from a website that any Internet user can access, which does not aim its solicitation at any particular state. By definition, a

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nationwide pageant means that defendants were seeking contestants from each of the 50 states. The court reasoned that this fact “reinforces the conclusion that defendants have not simply solicited business nationwide, in a general sense, but that they have ‘targeted’ every state,” *Id.* at *10. By this logic, New York was specifically targeted by defendants, justifying the exercise of personal jurisdiction over them.

The court’s second reason for finding that the defendants targeted New York residents turned on the legal basis for plaintiff’s claims — i.e., based upon whether the defendants were actually found to have infringed upon plaintiff’s trademarks as alleged.

To understand this second conclusion, it is necessary to know some basic facts of the case. The plaintiff, Mrs. United States National Pageant Inc., is a New York corporation that had registered various trademarks, including “Mrs. United States,” “Miss United States,” etc.

The defendants (one of which had previously participated in one of plaintiff’s pageants) subsequently decided to create their own pageant organization. In doing so, the defendants registered trademarks that essentially appended the words “of America” onto the New York plaintiff’s already existing trademarks — for example, “Miss United States of America.”

The court utilized this potential trademark infringement to bolster its justification of maintaining personal jurisdiction over the defendants by reasoning that the defendants targeted New York “by misusing [plaintiff’s] intellectual property on the [defendants’] website for the purpose of competing with [plaintiff] in the forum,” *Id.* at *11.

Adding fodder to the fire was the fact that the defendants were promoting the sale of their merchandise brandishing the disputed trademarks. In sum, defendants’ “middle ground” interactive website, coupled with their specific targeting of New York residents, was sufficient to confer personal jurisdiction.

The *Deer* case provides another example of a New York court grappling with the issue of website interactivity and the question of whether a website targets residents of New York such that the exercise of personal jurisdiction is appropriate.

In *Deer*, the plaintiff commenced a suit in New York against defendant for allegedly posting defamatory material on a website, which was operated not by the defendant but by an Israeli company. The plaintiff asserted that the court had jurisdiction because the defendant indicated in his LinkedIn profile that he resides in New York and Shanghai, and indicated the same in the

alleged defamatory material or, in the alternative, that the court had long-arm jurisdiction, in part, because defendant “transacted business” in New York via an “interactive website” (a blog) maintained by the defendant.

More specifically, the plaintiff claimed that the defendant transacted business through this website by responding to questions, email and comments of other Internet users, by enabling users to post comments to articles the defendant added to his blog, and by allowing users to post their own articles.

The defendant moved to dismiss the suit based upon lack of personal jurisdiction, claiming that he did not reside in New York and had not visited the U.S. in the past 12 months. The defendant further claimed that there was no long-arm jurisdiction for myriad reasons, including his claim that he did not purposefully transact business in New York that was in any way connected to the alleged defamation.

The court in *Deer* found that further discovery was needed with respect to whether the defendant was domiciled in New York, but also held that there as no long-arm jurisdiction. Similar to the court in *Mrs. United States*, the *Deer* court found that the defendant’s website fell in the middle ground of the interactive spectrum because an Internet user could exchange information with the defendant, *Id.* at 385.

However, in *Deer*, the court concluded that there was no evidence that defendant’s postings on either the Israeli-owned website or his own blog “which are merely accessible to anyone — in New York and in the entire world — were expressly targeted to anyone in New York,” *Id.* at 386.

It is necessary to keep in mind that the applicability of New York’s long-arm statute is limited in defamation cases to avoid violating freedom of speech. Therefore, it is possible that the strict applicability of that statute in the *Deer* case can account for the different outcomes in the two cases.

Even so, although in both the *Mrs. United States* and *Deer* cases, defendants’ websites fell in the middle ground of interactivity, whether a court has personal jurisdiction over the defendants hinged, at least in part, on a targeting analysis.

In other words, it appears that evidence of targeting demonstrates that a defendant is intentionally transacting with people in New York, such that the exercise of personal jurisdiction is appropriate — which is consistent with the general thrust of the time-tested principles of *International Shoe* and its progeny.

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