

Franklin County Legal Journal  
Volume 20, Issue 1, Pages 1-7  
Mar-Eco, Inc. v. T&R and Sons Towing, et al

MAR-ECO, INC., t/d/b/a KEYSTONE FORD, Plaintiff,  
v. T&R AND SONS TOWING AND RECOVERY, INC.;  
TAMARA SIEBERT HIGGS, AN INDIVIDUAL; and WALDORF FORD, INC., Defendants  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action - Law, No. 2001-2595

*Preliminary objections; Personal jurisdiction; Internet web site*

- 1) The court considers preliminary objections, including a challenge to personal jurisdiction, in the light most favorable to the nonmoving party; once defendant comes forward with support for his challenge to jurisdiction, the burden shifts to plaintiff to show by a preponderance of the evidence that there is statutory and constitutional support for the forum state's exercise of jurisdiction.
- 2) General personal jurisdiction occurs where defendant maintains continuous and systematic contacts with the forum state; defendant must have minimum contacts with the forum state such that it was reasonable for him to anticipate being called to defend himself there; random or attenuated contacts are insufficient; defendant must have purposefully directed his activities to the forum state and conducted himself in a manner indicating he has availed himself of the forum's benefits.
- 3) Specific personal jurisdiction is found in the particular actions of defendant which gave rise to the litigation; it arises where defendant's contacts with the forum state are infrequent but nevertheless related to plaintiff's claim.
- 4) Whether a web site forms the basis for personal jurisdiction over a non-resident defendant depends on a "sliding scale" analysis whereby the court examines the nature and quality of commercial activity which an entity conducts over the internet, specifically, the level of electronic interactivity or exchange between the entity and the residents of the forum state.
- 5) Where a non-resident defendant in the business of vehicle sales and service establishes a web site which encourages customers to use the site to apply for financing, order parts, schedule service appointments, and apply for employment, this exchange of information over the internet is sufficient for both general and specific personal jurisdiction; such a defendant displays a clear and deliberate intent to use this new technology to reach out beyond its traditional state boundaries and inject itself into the Pennsylvania vehicle sales and service market in order to secure its share of that market.

Appearances:

Barbara A. Darkes, Esq., *Counsel for Plaintiff*

Barry A. Kronthal, Esq., *Counsel for Defendants*

OPINION

Herman, J., June 28, 2002

Background

Before the court are preliminary objections filed by defendant Waldorf Ford, Inc. The defendant argues this court lacks personal jurisdiction over the defendant.

Defendant is a corporation in the business of buying and selling motor vehicles. Its principal place of business is in Waldorf, Maryland. Plaintiff is a Pennsylvania corporation which is also in the vehicle purchase and sales business. Plaintiff alleges defendant is liable under theories of negligence and unjust enrichment arising from a vehicle financing transaction.

The sale of the vehicle occurred in Maryland and the purchasers (the remaining defendants) were Maryland residents. Defendant allegedly failed to timely record plaintiff's security interest in the vehicle, resulting in the remaining defendants acquiring title free and clear of any liens. All documents necessary to complete the transaction were signed in Maryland and that State issued the title. Plaintiff nevertheless alleges Pennsylvania has personal jurisdiction over defendant because: "Waldorf regularly conducts business in Pennsylvania through advertising and at its world wide web site, www.waldorfford.net, where customers can order parts, schedule service, apply for financing, calculate payments, search Waldorf's new and used vehicle inventory and apply for employment." (Complaint, paragraph 8; Exhibit A consists of several pages downloaded and printed from the site in support of this averment.)[1] The issue is whether this web site provides sufficient basis for Pennsylvania to exercise personal jurisdiction over defendant.

### Discussion

The court considers preliminary objections, including a challenge to jurisdiction, in the light most favorable to the nonmoving party. *King v. Detroit Tool Co.*, 682 A.2d 313 (Pa.Super. 1996). Once the defendant comes forward with support for this challenge to jurisdiction, the burden shifts to the plaintiff to show by a preponderance of the evidence there is statutory and constitutional support for the forum state's exercise of jurisdiction. *GMAC v. Keller*, 737 A.2d 279 (Pa.Super. 1999).

Under the due process clause of the Fourteenth Amendment to the United States Constitution, a state can exercise personal jurisdiction over a non-resident defendant on two bases. The first, general jurisdiction, occurs where the defendant maintains continuous and systematic contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Kubik v. Letteri*, 614 A.2d 1110 (Pa. 1992). The defendant must have certain minimum contacts with the forum state such that its exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945); *Insulations, Inc. v. Journeymen Welding & Fab*, 700 A.2d 530 (Pa.Super. 1997). Minimum contacts exist where a defendant's conduct and his connection with the forum state are such that it was reasonable for him to anticipate being called to defend himself there. Random, fortuitous and attenuated contacts are not enough, nor is unilateral activity in the forum by others who claim some relationship with the defendant. Rather the defendant must have purposefully directed his activities to the forum state and its residents and conducted himself in a manner indicating he has availed himself of the privileges and benefits of that forum's laws such that he should be subject to those laws. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Kubik*. A second, narrower basis for jurisdiction, specific jurisdiction, is found in the particular actions of the defendant which gave rise to the litigation. *Helicopteros v. Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Hall-Woolford Tank Co., Inc. v. R.F. Kilns, Inc.*, 698 A.2d 80 (Pa.Super. 1997). Specific jurisdiction may arise where the defendant's contacts with the forum state are infrequent but nevertheless related to the plaintiff's claim.

Pennsylvania's Long-Arm statute allows the exercise of personal jurisdiction where a defendant carries on a "continuous and systematic part of its general business within this Commonwealth." 42 Pa.C.S.A. section 5301(a)(2)(iii) ("contracting to supply services or things in this Commonwealth."). Under section 5322(b), jurisdiction may be exercised over a non-resident defendant "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contacts with this Commonwealth allowed under the Constitution of the United States."

In sum, a Pennsylvania court may exercise personal jurisdiction over a non-resident defendant based on the relationship between the defendant, the Commonwealth and the facts underlying the litigation, and also where the defendant has sufficient minimum contacts to satisfy federal due process. In other words, even where jurisdiction cannot be based on a relationship between the defendant, the forum state and the particular conduct or activities underlying the cause of action, Pennsylvania courts may nevertheless exercise jurisdiction if the defendant's general activities within the Commonwealth are sufficiently continuous and substantial under federal constitutional standards. *Resnick v. Manfredy*, 52 F.Supp.2d 462 (E.D.Pa. 1999).

The issue of whether an internet site can form the basis for personal jurisdiction over a non-resident defendant has recently been addressed by our Superior Court. *Efford v. The Jockey Club*, 796 A.2d 370 (Pa.Super. 2002), a case of first impression in our state courts decided after argument in the case at bar, draws upon federal cases from the Third Circuit for guidance.[2] In *Efford* a foreign non-profit association solicited registrations of thoroughbred horses for a fee via the mail and its web site. The plaintiff did not pursue a claim of specific jurisdiction, so the question was whether Pennsylvania had general jurisdiction - whether the defendant's general activities in Pennsylvania were continuous and systematic/substantial.

The *Efford* court adopted the "sliding scale" analysis with regard to internet commercial activity articulated in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997). At one end of the scale is the defendant who clearly does business over the internet, as when, for example, it enters into contracts with residents of a foreign jurisdiction involving the knowing and repeated transmission of computer files via the internet. At the other end is a web site posting information or advertising which amounts to simply a passive display for the user's perusal. In the middle of the scale is a transaction in which a certain amount of interactivity occurs on-line, but not as much as in the first type of transaction. An example is the user exchanging information with a host computer. Particularly with regard to web sites in this middle range, the court examines the level of interactivity taking place via the internet. "[T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles." *Efford* at 373, citing *Zippo* at 1123.[3]

In *Zippo* the defendant was a California corporation operating a web site in relation to its internet news service. The plaintiff was a Pennsylvania tobacco lighter manufacturer suing under federal and state trademark laws with regard to the defendant's use of the word "zippo." The site featured information about the defendant, advertisements and an application for its news service. A potential subscriber could fill out an on-line application and pay on-line by credit card. Once the application was processed, the subscriber received a password allowing him to view and download messages

stored on the defendant's server in California. The internet was the defendant's only point of contact with Pennsylvania. The plaintiff, conceding there was no general jurisdiction, argued that specific jurisdiction was appropriate.

The Zippo court found that the defendant's web site was not simply a passive display of information accessible to anyone who was hooked up to the internet. Rather the defendant purposefully directed its marketing efforts at Pennsylvania by selling passwords to 3,000 Pennsylvania residents and by contracting with seven internet access providers to furnish its services to their Pennsylvania customers whereby electronic messages from the internet news service would be downloaded into Pennsylvania residents' computers. These contacts were not random, fortuitous or attenuated but were the result of a clear intent to actively reach out beyond California to establish permanent electronic commerce with Pennsylvania residents. It was reasonably foreseeable to such a business entity that it might be hauled into court in Pennsylvania. "[The defendant] was under no obligation to sell its services to Pennsylvania residents. It freely chose to do so, presumably in order to profit from those transactions. If a corporation determines that the risk of being subject to personal jurisdiction in a particular forum is too great, it can choose to sever its connection to the state." *Id.* at 1126.

The Efford court used this sliding scale to conclude that general jurisdiction could not be exercised by Pennsylvania. The web site solicited horse breeders from all over the world to register their horses on-line. However, according to the factual record before the court, registration forms had to be forwarded and returned through the mail. Although the site was more than a passive display of information insofar as it provided the convenience of an on-line registry and therefore fell within the middle of the scale, the defendant did not actively solicit or target Pennsylvania residents in particular. The site was more akin to national advertising efforts than to a place of active electronic information exchange. The court concluded that this level of on-line interactivity was not sufficiently continuous and systematic/substantial to justify the exercise of general jurisdiction.

Another case featuring a "middle ground" web site is *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F.Supp.2d 537 (E.D.Pa. 1999). Customers could order and pay for a promotional video and communicate with the company through an email link. The customer could also download a lease application form, though the form had to be submitted to the company by non-internet means. The court found the level of commercial information exchange taking place over the internet to be insufficiently interactive to justify the exercise of personal jurisdiction over the non-resident defendant.

It is undisputed that a Waldorf customer can use the web site to search the vehicle inventory, apply for financing, calculate payment schedules, order parts, and schedule service appointments. Waldorf also accepts applications for employment on-line. Certainly the aspect of the site which allows a user to search the inventory amounts to no more than a passive display of information, whereas the other features allow the exchange of information between the user and defendant's host computer. Defendant contends that this level of interactivity is insufficient for personal jurisdiction because the sale cannot be finalized electronically but instead requires the purchaser to appear at Waldorf's Maryland office to sign the necessary paperwork. Similarly, though defendant has not firmly established this in the record, the customer would need to appear at defendant's office to pick up and pay for parts ordered on-line. Defendant therefore argues that its web site is merely a point of information exchange as was the site in *Morantz*, rather than a place where transactions can be consummated as in *Zippo*.

We cannot agree with defendant that only the consummation or finalization of a transaction on-line satisfies personal jurisdiction requirements. There is no authority for such a bright-line conclusion. Also, the level of information exchange or interactivity occurring exclusively via the internet between site users and defendant's host computer is far greater here than it was in *Morantz*.

The particular features of this site indicate that defendant was deliberately reaching out beyond its traditional boundaries in Maryland and injecting itself into Pennsylvania in order to secure its share of Pennsylvania's automotive sales and service market. Defendant could reasonably foresee that residents living in the south-central part of the Commonwealth would search for automobile establishments within a certain radius encompassing Maryland for vehicle purchase and service, as well as employment opportunities. Indeed it is clear that defendant was counting on the proximity of the two States to cement its market share in the Commonwealth and designed its web site accordingly. Therefore any on-line contact with Pennsylvania residents cannot be considered random, fortuitous or attenuated but an integral part of defendant's overall marketing strategy in this Commonwealth.

Further support for Pennsylvania exercising specific personal jurisdiction can be found in section 5322(a)(4) of the Long-Arm statute which is invoked when a non-resident defendant is alleged to have caused harm or tortious injury within the Commonwealth by an act or omission occurring outside the Commonwealth. This is precisely plaintiff's allegation here. In light of the foregoing we find that defendant has intentionally subjected itself to specific personal jurisdiction in Pennsylvania.

We also find that this court has general jurisdiction over defendant insofar as defendant through its web site conducts a continuous and systematic part of its general business in Pennsylvania. Section 5301(a)(2)(iii). The site is available to Pennsylvania residents on a continuous basis via the world wide web. Its highly interactive features, though not as all-encompassing as the web site in *Zippo*, encourage customers to use the site at all stages of the sales and service process and as such indicates an intent to use this new technology to establish a market presence and conduct business in this Commonwealth in a systematic manner. In this way the site justifies this court's exercise of general personal jurisdiction as opposed to *Efford* where the defendant's web site was more akin to nationwide advertising than a concerted effort at detailed information exchange.

For the foregoing reasons, we find Pennsylvania has personal jurisdiction over defendant Waldorf and we will therefore overrule defendant's preliminary objections to jurisdiction.

## ORDER OF COURT

Now this 28th day of June 2002, the court overrules the defendant's preliminary objections to personal jurisdiction.

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plaintiff asserts in its brief that these pages do not represent the web site as it currently exists. However, as correctly noted by the court, a defendant's pleadings do not fail merely because a defendant changes its practice once a claim is filed against it. The court must refer to the web site as it existed at the time the complaint was filed. 42 Pa.C.S.A. section 5301(b).

When a case involves a federal question, federal district court decisions are not binding on Pennsylvania courts. Nevertheless, they are persuasive authority for instruction and comparison, as did the Efford court.

In Waldorf, another prominent case in this developing area of the law, a web site user could download merchandise order forms but not purchase them through the mail. The site otherwise was simply a display of personal information about the defendant who was a professional photographer. It is undisputed that Waldorf's web site is more than this kind of passive display.