

e-LYNXX CORPORATION, Plaintiff, v. JDM GRAPHIX, INC., Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action - Law, No. 2003-1839

*Personal jurisdiction, legal insufficiency of a pleading (demurrer) and insufficient specificity in a pleading*

1. General jurisdiction is a type of personal jurisdiction which is founded upon a defendant's general activities within the forum as evidenced by continuous and systematic contacts with the state. 42 Pa.C.S.A. § 5301(a)(2)(iii).

2. A preliminary objection in the nature of a demurrer tests the legal sufficiency of the complaint. The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. When considering preliminary objections, all material facts set forth in the complaint, as well as all inferences reasonably deducible therefrom, are accepted as true. Pa.R.C.P. 1028(a)(3), (4).

Appearances:

Thomas J. Finucane, Esq., *Counsel for Plaintiff*

Anthony W. Hawks, Esq., *General Counsel for Plaintiff*

Robert M. Einhorn, Esq., *Counsel for Defendant*

K. Brian Roller, Esq., *Counsel for Defendant*

OPINION

Walsh, J., October 13, 2006

Before us for decision is JDM Graphix, Inc.'s (hereinafter "Defendant" or "JDM") Preliminary Objections to Second Amended Complaint. In reaching its decision, the Court took evidence and heard argument regarding the Objections on September 18, 2006; the Court further relied on e-Lynxx Corp.'s (hereinafter "Plaintiff" or "e-Lynxx") Second Amended Complaint, Defendant's Preliminary Objections to Second Amended Complaint, the briefs of the parties, and the applicable law.

Background

On July 30, 2003, e-Lynxx Corp. filed its original Complaint against Defendants, JDM, Magdelnis Gongora, David Gongora, and Jose Rodriguez, alleging six (6) counts of tortious interference with a contract, one (1) count of false designation of origin and unfair competition in violation of the Lanham Act, 15 U.S.C. §1125(a)[1], and one (1) count of unfair competition, a common law claim, against Defendants. Based on the federal claims asserted by the Plaintiffs, Defendants filed a Notice of Removal to the United States District Court for the Middle District of Pennsylvania on September 8, 2003. On September 11, 2003, the Defendants filed a Motion to Dismiss Plaintiff's Complaint. Plaintiff voluntarily dismissed three Defendants and counts VII and VIII of the Complaint, which were the claims under the Lanham Act and the unfair competition claim. On December 31, 2003, Plaintiff filed a motion to remand the action to state court.

On May 14, 2004, the United States District Court for the Middle District of Pennsylvania remanded the case to this Court after determining it no longer had subject matter jurisdiction and deciding not to exercise supplemental jurisdiction.

On June 14, 2004, Defendant filed Preliminary Objections to the Complaint. Plaintiff filed a First Amended Complaint alleging seven (7) counts of tortious interference with a contract. Defendant then filed Preliminary Objections to First Amended Complaint on July 21, 2004, which Plaintiff answered on August 9, 2004, attaching a Memorandum of Law in Support of Defendant's Preliminary Objections to First Amended Complaint. The matter was placed on the Court's schedule for February 7, 2005, but later continued till April 5, 2005.

On April 5, 2005, the Court held argument. On August 18, 2005, this Court entered an Opinion and Order sustaining Defendant's Preliminary Objections based on lack of personal jurisdiction pursuant to Pa.R.C.P. 1028(a)(1) and lack of specificity based on Pa.R.C.P. 1028(a)(3)(4). The Court granted Plaintiff twenty (20) days from service of the August 18, 2005 Order by the Prothonotary in which to file a Second Amended Complaint consistent with the August 18, 2005 Opinion.

Plaintiff served its Second Amended Complaint on Defendant on September 7, 2005.

a. On September 27, 2005, Defendant filed Preliminary Objections to Second Amended Complaint and a Memorandum of Law in Support of Defendant's Preliminary Objections to Second Amended Complaint.

b. On April 10, 2006, Plaintiff filed a Memorandum of Law in Opposition to Defendant's Preliminary Objections to Second Amended Complaint. Defendant then filed a Memorandum of Law in Further Support of Defendant's Preliminary Objections to Second Amended Complaint on April 25, 2006.

c. On August 3, 2006, Plaintiff filed a Supplemental Memorandum of Law in Opposition to Defendant's Preliminary Objection to Second Amended Complaint.

d. On August 17, 2006, Defendant filed a Supplemental Memorandum of Law in Further Support of Defendant's Preliminary Objections to Plaintiff's Second Amended Complaint.

e. On September 1, 2006, Plaintiff filed a Reply Memorandum of Law in Opposition to Defendant's Preliminary Objections to Second Amended Complaint.

The matter is now ready to be decided.

#### Discussion

Defendant raises the following Preliminary Objections:

1. lack of personal jurisdiction pursuant to Pa.R.C.P. 1028(a)(1);
2. legal insufficiency of a pleading (demurrer) and insufficient specificity in a pleading pursuant to Pa.R.C.P. 1028(a)(3), (4).

We will review each Preliminary Objection in turn.

#### **Lack of Personal Jurisdiction**

In the Second Amended Complaint, Plaintiff asserts that:

"Personal jurisdiction is founded on both the Pennsylvania general jurisdiction statute 42 Pa.C.S.A. §5301(a)(2)(iii) in that Defendant is carrying on a continuous and systematic part of its general business within Pennsylvania, and the Pennsylvania Long-Arm Statute, 42 Pa.Cons.Stat. Ann. §5322(a)(4) in that the matter in controversy arises from the Defendant having caused tortious injury in Pennsylvania by acts outside Pennsylvania."

Plaintiff's Second Amended Complaint ¶ 4

While supplying more facts and authority, the Plaintiff essentially asserts the same basis for jurisdiction that they raised in the First Amended Complaint. Taking into account the additional facts and

authority, this Court will review Defendant's Preliminary Objection to personal jurisdiction under the same analytical framework that we used in our August 18, 2005 Opinion when we sustained Defendant's Preliminary Objections to Plaintiff's First Amended Complaint.

A court must review preliminary objections, including challenges to personal jurisdiction, in the light most favorable to the non-moving party. King v. Detroit Tool Co., 682 A.2d 313 (Pa.Super. 1996). Once a party challenging the trial court's jurisdiction has supported its jurisdictional objection, the burden shifts to the party asserting jurisdiction to prove that there is statutory and constitutional support for the trial court's exercise of *in personam* jurisdiction. Efford v. The Jockey Club, 796 A2d. 370 (Pa.Super. 2002); GMAC v. Keller, 737 A.2d 279 (Pa.Super. 1999).

"Pursuant to the Judiciary Act, 42 Pa.C.S.A. §§5301 *et seq.*, our courts may exercise two types of *in personam* jurisdiction over a non-resident defendant. One type of personal jurisdiction is general jurisdiction, which is founded upon a defendant's general activities within the forum as evidenced by continuous and systematic contacts with the state." *Id.* at 372 (citing Hall-Woolford Tank Co. v. R.F. Kilns, 698 A.2d 80, 82 (Pa.Super.1997)). The other type is specific jurisdiction, which has a more defined scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action. *Id.*

Plaintiff first asserts a claim of general jurisdiction,<sup>[2]</sup> which is based on Defendant's continuous and systematic contacts with the Commonwealth and exists regardless of the location of Defendant's act or omission serving as a basis for Plaintiff's claim. See Mar-Eco, Inc. v. T&R and Sons Towing and Recovery, Inc. et al., 837 A.2d 512 (Pa.Super. 2003).

In order for there to be general jurisdiction, a 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. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); Insulations, Inc. v. Journeyman 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 he may reasonably anticipate being haled into court there; random, fortuitous and attenuated contacts are not enough. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

As both counsel have indicated in their very comprehensive memoranda, Pennsylvania courts have addressed the issue of Internet jurisdiction by dividing websites into three categories. These categories were formed when Courts addressing the relationship between personal jurisdiction and the Internet websites established a "sliding scale" of jurisdiction based largely on the degree and type of interactivity on the website. Efford v. The Jockey Club, 796 A2d. 370 (Pa.Super. 2002).

In Efford the Pennsylvania Superior Court adopted the "sliding scale" test first articulated in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D.Pa.1997).

The Efford court quoted Zippo when it stated:

"[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. At one end of the spectrum are situations where a 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. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where 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 Web site."

Efford v. The Jockey Club, 796 A2d. 370 (Pa.Super. 2002).

While this "sliding scale" test was originally developed in the context of special jurisdiction, it has now been adopted and applied in general jurisdiction cases where there is a showing of "continuous and systematic" contacts under 42 Pa.C.S. §5301(a)(2)(iii). See Mar-Eco, Inc. v. T&R and Sons Towing and Recovery, Inc., 837 a.2d 512, 518 (Pa.Super. 2003). The Superior Court has also stated "we have compared this 'sliding scale' to our principles of personal jurisdiction and find that it is consistent with our well-established concepts of general personal jurisdiction." Efford v. The Jockey Club, 796 A2d. 370

(Pa.Super. 2002). Accordingly, we will use the sliding scale test to determine the issue before us.

In the Second Amended Complaint (¶ 12), the Plaintiff alleges, and this Court finds that the nature of Defendant's website is such that customers register on the website to receive a continuous stream of contract solicitations, bid results, and other services. Once a customer registers on the Defendant's website the services that Defendant provides are delivered each day on an ongoing basis through the Defendant's website itself. The question is whether this is sufficient to show continuing and systematic contacts. This Court believes that it is.

When any customer who has a contract with JDM enters its username and password in the appropriate fields of Defendant's ABSBids public website, that customer is granted entry to a customized screen that allows the customer to download or print out information according to the particular preferences of that client. Additionally, customers may further sort and manipulate the information on their screen by using a filtering function provided by Defendant's website.

On the sliding scale of interactivity discussed above, Defendant's website is a middle category site. While it is not a highly interactive site, the facts show that there are interactive features on the site, including a sorting/filtering option that operates to tailor the Defendant's website to meet the needs of its customers. While it may be true that contracts and sales are not consummated through the website, and the contracts are formed prior to the customer receiving a username and password, the Defendant does provide large volumes of specialized information to its customers through its website. Most importantly, the information that the Defendant is providing is not advertising material or general information; rather the information that Defendant provides is the product in and of itself.

We find that Defendant had a total of twelve (12) customers located in Pennsylvania who receive or have received the Defendant's product through the customer-only portion of the website by utilizing their prescribed usernames and passwords. 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. These contacts are not random, fortuitous or attenuated but are the result of contracts between the Defendant and its customers to provide a username and password whereby valuable information would be downloaded into and printed from Pennsylvania resident's computers. It should be reasonably foreseeable to such a business entity that it may be haled into court in Pennsylvania. Therefore, the Court finds that the Defendant knowingly entered into contracts with residents of Pennsylvania with the intention of regularly sending personalized information to its customers via the Internet and that these transactions constitute continuous and systematic contacts with Pennsylvania. Accordingly, this Court does have personal jurisdiction over the Defendant.

Since this Court has found a showing of general jurisdiction over the Defendant it is unnecessary for us to consider whether or not there is specific jurisdiction in this case.

### **Legal Insufficiency of a Pleading (Demurrer) and Insufficient Specificity in a Pleading**

A preliminary objection in the nature of a demurrer tests the legal sufficiency of the complaint. Constantino v. University of Pittsburgh, 766 A.2d 1265, 1268 (Pa. Super. 2001). The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Viglione v. Pennsylvania Dept. of Corrs., 781 A.2d 248, 250 n.3 (Pa. Cmwlth. 2001). When considering preliminary objections, all material facts set forth in the complaint, as well as all inferences reasonably deducible therefrom, are accepted as true. Tyler v. Motorist Mut. Ins. Co., 779 A.2d 528, 530 (Pa. Super. 2001). Conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion need not be regarded as such. Wagner v. Waitlevertch, 774 A.2d 1247, 1250 (Pa. Super. 2001).

To set forth a viable claim for tortious interference with a contract, a plaintiff must plead the following elements: (1) existence of a contractual or prospective contractual relationship between the plaintiff and a third party; (2) purposeful action by the defendant, specifically intended to harm the existing relationship or to prevent a prospective relationship from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of defendant's conduct. See Small v. Juniata College, et al., 682 A.2d 350 (Pa. Super. 1996).

As to elements (1) existence of a contractual or prospective contractual relationship between the Plaintiff and a third party; (2) purposeful action by the defendant, specifically intended to harm the existing relationship or to prevent a prospective relationship from occurring; and (4) the occasioning of actual legal damage as a result of defendant's conduct, we find that the Plaintiff has alleged specific facts which would put Defendant on notice as to how it caused or induced third parties to breach a known contract with Plaintiff and the legal damages resulting from this conduct. See specifically the facts alleged in ¶¶ 22, 23, 24, and 27 of Count I [3] of Plaintiff's Second Amended Complaint.

As to element (3) the absence of privilege or justification on the part of the defendant, Plaintiff fails to describe with specificity how Defendant's actions are not privileged. In ¶ 26 of Count I [4] of Plaintiff's Second Amended Complaint, Plaintiff uses vague and conclusory language when alleging that Defendant's action was not privileged.[5] Plaintiff merely concludes that since Defendant had no prior contractual relations with the third party prior to entering the current contract that there was no justification for entering such contract. While the Court must accept the Plaintiff's factual allegations as true, we need not accept Plaintiff's legal conclusion as true. Hydair Inc. v. Nat'l Environmental Balancing Bureau, (Not reported in A.2d) 2001 WL 1855055 (Pa.Com.Pl. 2001). While the Court is permitted to make reasonable deductions from the facts alleged we are not willing to make unreasonable assumptions based on one party's legal conclusions. The Complaint must specifically allege that the Defendant's actions were not privileged and the Plaintiff's Second Amended Complaint simply does not do that. Therefore, we conclude that Plaintiff's Second Amended Complaint lacks the requisite specificity to support a claim for tortious interference with a contract.

### Conclusion

Defendant's First Preliminary Objection is denied for the reasons stated above. Plaintiff is given twenty (20) days in which to amend the Second Amended Complaint in order to sufficiently and specifically plead tortious interference.

### ORDER OF COURT

Now this 13th day of October, 2006, the Court having reviewed e-LYNXX Corp.'s Second Amended Complaint, Defendant J.D.M. Graphix, Inc.'s Preliminary Objections to Second Amended Complaint, the multiple briefs and memoranda of the parties, and the applicable law, it is hereby ordered that

1. Defendant's First Preliminary Objection pursuant to Pa.R.C.P. 1029(a)(1) asserting that the Plaintiff lacks personal jurisdiction over the Defendant is denied.
2. Defendant's Second Preliminary Objection pursuant to Pa.R.C.P. 1028(a)(3)(4) demurring for lack of specificity is sustained.

It is further ordered that Plaintiff is given twenty (20) days from service of this Order by the Prothonotary in which to file a Second Amended Complaint consistent with the foregoing opinion.

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[1] 15 U.S.C. § 1125(a) provides in part:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

[2] Plaintiff founds this claim on 42 Pa.C.S.A. § 5301(a)(2)(iii), which provides:

(a) General rule.--The existence of any of the following relationships between a person and this

Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

(2) Corporations.--

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

[3] Counts II, III, IV, V, VI, and VII included the exact same language, except that the name of the third party is changed.

[4] See fn. 3.

[5] ¶ 26 reads as follows:

"The Defendant had no financial interest involving EU Services prior to the acts of interference alleged herein and, consequently, there was no legal justification for such acts of interference on the part of the Defendant."