IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT

WILL COUNTY, ILLINOIS

LAW DIVISION

JOHN F. TAMBURO d/b/a MAN'S BEST FRIEND SOFTWARE,	)	
Plaintiff,	)	
v.	)	Case No. 06 L 51
JAMES ANDREWS d/b/a K9PED,	)	
Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

NOW COMES the Defendant, James Andrews d/b/a K9Ped ("Andrews" or "Defendant"), and respectfully submits this Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiff's First Amended Complaint ("Plaintiff's Opposition").[1] In support of his Reply, the Defendant states as follows:[2]

I. Plaintiff's Section 2-619.1 and Section 2-301 Arguments Lack Merit

Plaintiff Tamburo contends that Defendant's Motion to Dismiss ("Defendant's Motion") does not comply with Section 2-619.1 of the Illinois Rules of Civil Procedure. Pl.'s Mem. p. 3. This argument lacks merit. In his motion, Defendant identifies his arguments and bases for

[1] Without waiving any further objection and argument against Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiff's First Amended Complaint ("Plaintiff's Opposition"), Defendant has limited his reply to those novel issues raised by Plaintiff in his Opposition.

[2] Defendant also incorporates herein the arguments made in Defendant's Motion to Dismiss and Defendant's Amended Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's First Amended Complaint.

dismissal in three brief, distinct paragraphs. Def.'s Mot., pp. 1-2. The first such paragraph specifically refers to this Court's lack of personal jurisdiction over the Defendant and the corollary basis for dismissal pursuant to Section 2-619 of the Illinois Rules of Civil Procedure (the "Illinois Rules"). The second paragraph identifies additional arguments relating to improper service by the Plaintiff, improper forum, and the expiration of certain claims under the statue of limitations. The final paragraph refers specifically to Defendant's argument that Plaintiff has failed to state a claim upon which relief may be granted under Section 2-615 of the Illinois Rules. Id. Moreover, the Defendant's Motion specifically incorporates and references the arguments in the accompanying memorandum in support thereof. The memorandum and amended memorandum in support of Defendant's Motion specifically addressed arguments related to Section 2-619 and Section 2-615 in distinct parts in compliance with Section 2-619.1 of the Illinois Rules. See 735 ILCS § 5/2-619.1. Consequently, the Plaintiff's argument to the contrary is erroneous.[3]

Similarly, Plaintiff erroneously contends that a motion to dismiss for lack of personal jurisdiction must be filed separately under § 2-301 of the Illinois Rules and that the Defendant has waived his jurisdictional argument by purportedly failing to do so. Pl.'s Opp., pp. 2-4. A party no longer needs to file a special appearance under Section 2-301 to challenge personal jurisdiction. In re Marriage of Hoover, 314 Ill. App. 3d 707, 710, 732 N.E.2d 145, 147 (Ill. App. 2000); see also KSAC Corp. v. Recycle Free, Inc., No. 2-05-0926, p. 2 (Ill. App. April 13, 2006) (attached hereto as Exhibit A). In essence, the 2000 amendments to § 2-301 have eliminated the distinction between general and special appearances. Id. In addition, a "defendant [may]

[3] Should the Plaintiff actually be arguing that the Defendant's Motion should be denied based solely on the technical omission of headings for each of the three paragraphs in the Defendant's Motion (as opposed to the Memorandum containing the arguments in support thereof), the Defendant contends that denial on such basis alone would not comport with due process, the Illinois Rules of Civil Procedure, or judicial economy.

combine a motion challenging jurisdiction with other motions seeking relief on different grounds." KSAC Corp., p. 2; see also In re Marriage of Hoover, 314 Ill. App. 3d. at 710, 732 N.E.2d at 147. Finally, Illinois courts have consistently addressed motions to dismiss for lack of personal jurisdiction pursuant to Section 2-619. In re Marriage of Hoover, 314 Ill.App.3d. at 710, 732 N.E.2d at 147; W. Va. Laborers Pension Trust Fund v. Caspersen, 357 Ill.App.3d 673, 675, 829 N.E.2d 843, 845 (Ill. App. 2005). Consequently, Defendant properly brought his motion to dismiss for lack of personal jurisdiction pursuant to Section 2-619 in combination with additional bases for dismissal. See KSAC Corp., p. 2; In re Marriage of Hoover, 314 Ill.App.3d at 710, 732 N.E.2d at 147; 735 ILCS §§ 5/2-301, 2-619, and 2-619.1. Therefore, Defendant's Motion to Dismiss must not be denied on this basis. Id.

II. Plaintiff Fails to Properly Plead an Identifiable Class of Third Parties

With respect to his claim for tortious interference with prospective business relations, Plaintiff argues that he properly pled an expectancy to do business with an "identifiable class" of third parties, more specifically with "dog, cat and horse breeders, and the exhibitors thereof." See Pl.'s Opp., p. 12. In so doing, Plaintiff misguidedly relies on O'Brien v. State Street Bank & Trust Co., 82 Ill.App.3d 83, 85, 401 N.E.2d 1356, 1358 (Ill. App. 1980). In O'Brien, the plaintiff's identifiable class of third parties constituting the prospective business relations at issue arose from expectancies arising from the plaintiff's *existing business relationships* that included "contracts, accounts and obligations" among his customers and suppliers. Id. Consequently, unlike Plaintiff Tamburo, the plaintiff in O'Brien did not merely allege an ambiguous, general expectation of future business. Id. Here, Plaintiff's allegations do not involve existing business relationships. See generally 1st Am. Compl. Plaintiff attempts to construct an identifiable class out of all potential "dog, cat and horse breeders, and the exhibitors thereof." See Pl.'s Opp., p. 12.

This does not meet the "identifiable class" required under O'Brien. See O'Brien, 82 Ill.App.3d at 85, 401 N.E.2d at 1358. Indeed, Plaintiff has not and cannot cite to any Illinois authority holding that ambiguous allegations of general, hopeful expectations of future business suffice. Thus, Plaintiff fails to plead an identifiable class of third parties. O'Brien, 82 Ill.App.3d at 85, 401 N.E.2d at 1358. Therefore, Plaintiff's claim for tortious interference with prospective business relations must be dismissed. See id.

III. The "Substantial Truth" Defense Is Alive, Well, and Applicable

In defending his defamation claims, Plaintiff has confused the substantial truth defense with the incremental-harm defense. See Pl.'s Opp., pp. 19-20. Plaintiff cites Myers v. The Telegraph, 332 Ill.App.3d 917, 924, 773 N.E.2d 192, 199-200 (Ill. App. 2002). In Myers, the Court examined Lemons v. Chronicle Publ. Co., 253 Ill.App.3d 888, 925, 625 N.E.2d 789 (Ill. App. 1993). In so doing, the Myers Court concluded that the Lemon Court had used subjective language in analyzing the truth of statements at issue such that it "moved [its] analysis *from* the focus of the defense of substantial truth *to* the incremental-harm realm of comparative reputation damage." Myers, 332 Ill.App.3d at 924, 773 N.E.2d at 200(emphasis added). As such, Myers recognized a distinction between these two defenses. Id. In this, Myers is not alone. See Tepper v. Copley Press, Inc., 308 Ill.App.3d 713, 716, 721 N.E.2d 669, 672 (Ill. App. 1999). Consequently, Plaintiff misinterprets Myers as somehow barring the substantial truth defense. See id.; Myers, 332 Ill.App.3d at 924, 773 N.E.2d at 200. For, a court's decision to decline adoption of the incremental-harm defense does not mean that the court also declines to adopt the well-established substantial truth defense. Id. As a thorough review of Illinois jurisprudence reveals, Illinois courts have consistently recognized the validity of the substantial truth defense. See, *e.g.,* American Int'l Hosp. v. Chicago Tribune Co., 136 Ill.App.3d 1019, 1022-23, 483

N.E.2d 965, 968 (Ill. App. 1985); Parker v. House O'Lite Corp., 324 Ill.App.3d 1014, 1026, 756 N.E.2d 286, 296 (Ill. App. 2001); Lemons v. Chronicle Publishing Co., 253 Ill.App.3d 888, 890, 625 N.E.2d 789, 791 (Ill. App. 1993); Farnsworth v. Tribune Co., 43 Ill.2d 286, 293-94, 253 N.E.2d 408, 412 (Ill. 1969); Kilbane v. Sabonjian, 38 Ill.App.3d 172, 175, 347 N.E.2d 757, 761 (Ill. App. 1976). Here, the Defendant argues that the statements at issue constitute substantial truth. The Defendant does not invoke the incremental-harm defense. Consequently, the Plaintiff's confusion on the law must not bar the Court's consideration of the quite applicable substantial truth defense. See id.; Tepper, 308 Ill.App.3d at 716, 721 N.E.2d at 672; Myers, 332 Ill.App.3d at 924, 773 N.E.2d at 200. Therefore, for these reasons and those in Defendant's Amended Memorandum, the Plaintiff's defamation claims should be dismissed based upon the substantial truth of the statements at issue.[4] See Def.'s Mem., pp. 22-23.

IV. Plaintiff Misconstrues Unfair Competition Law

Finally, Plaintiff misconstrues law in Illinois relating to unfair competition. Plaintiff cites the Restatement (Third) of Unfair Competition ("Restatement"). Pl.'s Opp., pp. 21-22. Yet, he cites no Illinois authority adopting the Restatement. Id. In fact, a search for case law among Illinois state court opinions that references the Restatement at all found only one case citing § 42 of the Restatement in the context of trade secrets. See Abel v. Fox, 274 Ill.App.3d 811, 820, 654 N.E.2d 591, 597 (Ill. App. 1995). Consequently, as Plaintiff has provided no authority even suggesting the Restatement governs his common law claims and he rests his entire basis for such claims on the Restatement, the claims must be dismissed. Assuming, *arguendo*, the Restatement has been adopted in Illinois, Plaintiff cites sections that are inapplicable to the instant action. Specifically, the sections cited by the Plaintiff relate to representations made by a defendant

[4] Plaintiff also contends Defendant imputed that Plaintiff violated specific criminal statutes. Pl.'s Opp., pp. 20-21. Plaintiff has chosen to construe his conduct as criminal. Defendant did not impute such violations. Consequently, Defendant clearly should not be liable for Plaintiff's construction.

about the defendant's *own* products or services, not a *plaintiff's* products or services. Pl.'s Opp., p. 21. Here, the alleged statements by Defendant Andrews of which Plaintiff Tamburo complains were made about Plaintiff Tamburo's products. Consequently, §§ 2 and 3 of the Restatement have no application to the allegations in Plaintiff's Amended Complaint.[5] See REST. (3RD) UNFAIR COMPETITION §§ 2-3. As Plaintiff has cited no authority supporting his claims for unfair competition, the claims must be dismissed in their entirety. Pl.'s Opp., pp. 21-22.

V. Plaintiff Misstates Facts and Mischaracterizes Defendant's Arguments

Finally, Plaintiff consistently throughout his Opposition misstates facts and mischaracterizes Defendant's arguments. Most of these misstatements and mischaracterizations appear on their face and need not be addressed specifically. Nonetheless, a few examples are worth noting. In his Opposition, Plaintiff attempts to sidestep the truth of the statements posted on the Defendant's website. For example, Plaintiff claims his statement made to the United States Bankruptcy Court in which he explicitly stated he "lacked the funds required to complete the programs [CompuPed millennium] [sic]" has been "misinterpreted." See Pl.'s Opp., p. 14. Plaintiff admits that he made this statement "in an effort to cause the court to grant [Plaintiff's] pending motion to convert [sic] from Chapter 7 to Chapter 13." Id. Here, in a different venue and for a different purpose, Plaintiff attempts to qualify the statement by suggesting that he did not entirely mean what he said. Indeed, he now contends that he then meant only that "if the conversion were not granted, [Plaintiff] would not be able to afford to complete [the program]." See Pl.'s Opp., p. 14. Plaintiff cannot now attempt to modify the clear meaning of a prior

[5] Although Plaintiff cites Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6 (7th Cir. 1992) and Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272 (2nd Cir. 1981), neither case is applicable to the case at bar. Abbott Laboratories involved an appeal from the Southern District of Indiana relating to the denial of a preliminary injunction motion and the Lanham Act. Vidal Sassoon, Inc. involved an appeal from the Southern District of New York relating to the denial of a preliminary injunction motion and the Lanham Act.

statement to construct an alleged defamatory meaning for purposes of this litigation.

Additionally, Plaintiff mischaracterizes Defendant's argument on the application of Plaintiff's arbitration clause. Pl.'s Opp., pp. 8-9. Plaintiff's arbitration clause applies regardless of whether "related to the described transactions" and whether one disputes the enforceability of the arbitration clause. See Def.'s Am. Mem., p. 15. Consequently, by its own terms, the arbitration clause applies regardless whether Defendant disputes the enforceability thereof and applies to all claims even remotely related to Plaintiff's website – as the Plaintiff's instant claims happen to be. Id. These represent examples of the persistent misstatements and mischaracterizations throughout Plaintiff's Opposition.

CONCLUSION

For the foregoing reasons, Defendant respectfully moves this Court to dismiss Plaintiff's First Amended Complaint in its entirety.

Dated: Chicago, Illinois
April 20, 2006

Respectfully submitted,

DEFENDANT,
JAMES ANDREWS d/b/a K9PED.

By: 

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT has been sent by electronic mail and First Class Mail, postage prepaid, this 20th day of April 2006, to *pro se* Plaintiff, to wit:

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Dated: April 20, 2006
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