

STATE OF ILLINOIS



3-06-0347

Tamburo v. Andrews

APPELLATE COURT

THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the year of our Lord  
Two thousand seven, within and for the Third District of  
Illinois:

Present -

HONORABLE TOM M. LYTTON, Presiding Justice

HONORABLE MARY W. McDADE, Justice

X

HONORABLE MARY K. O'BRIEN, Justice

HONORABLE WILLIAM E. HOLDRIDGE, Justice

X

HONORABLE ROBERT L. CARTER, Justice

HONORABLE DANIEL L. SCHMIDT, Justice

X

HONORABLE VICKI R. WRIGHT, Justice

GIST FLESHMAN, Clerk

BE IT REMEMBERED, that afterwards on

June 15, 2007 the Order of the Court was filed  
in the Clerk's Office of said Court, in the words and figures  
following viz:

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 3--06--0347

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2007

JOHN F. TAMBURO, d/b/a	)	Appeal from the Circuit Court
MAN'S BEST FRIEND SOFTWARE,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellant,	)	
	)	
v.	)	No. 06--L--51
	)	
JAMES ANDREWS, d/b/a	)	
K9PED,	)	Honorable
	)	Herman Haase,
Defendant-Appellee.	)	Judge, Presiding.

ORDER

The plaintiff, John F. Tamburo, d/b/a Man's Best Friend Software, sued the defendant, James Andrews, d/b/a K9Ped, to recover damages from numerous alleged tortious acts. The defendant filed a motion to dismiss, alleging, inter alia, a lack of personal jurisdiction. The circuit court granted the defendant's motion. On appeal, the plaintiff argues that the circuit court erred when it dismissed the suit for lack of personal jurisdiction, and that the complaint stated claims upon which relief could be granted. We affirm.

FACTS

The plaintiff's first amended complaint alleged that he has operated his business in Will County for the past six years. He creates and sells software used by people who groom, breed, and

show pure bred dogs, cats, and horses. One of his software programs is named "CompuPed Millennium." The defendant operates his business in Oregon. The defendant maintains a website that advertises his K9Ped software, which is a competitor product to CompuPed Millennium.

The plaintiff alleged that the defendant posted a document and commented on his website regarding the plaintiff's federal bankruptcy case. The defendant cautioned consumers to avoid the plaintiff's CompuPed Millennium software because the plaintiff lacked the funds to complete the program.

The complaint also alleged that the defendant made several other disparaging comments on his website about the plaintiff. These comments included: (1) a caution that consumers forfeit their consumer protection rights when purchasing CompuPed Millennium; (2) a statement that upgrades to CompuPed Millennium are expensive; and (3) statements that implied the plaintiff's software is linked to "puppy mills," or commercial breeding facilities that their clientele despise. The plaintiff also alleged that the defendant told numerous current and potential CompuPed Millennium customers that the plaintiff was about to be liquidated, and that product support for CompuPed Millennium would soon be discontinued or difficult to obtain. The defendant responded to the complaint by filing a motion to dismiss, alleging a lack of personal jurisdiction.

The court heard arguments on the defendant's motion on May 2, 2006. In support of his motion, the defendant stated that

only one customer with an Illinois address has purchased his K9Ped software, and that his website was not purposefully directed toward Illinois. The plaintiff argued that the defendant's website was sufficient to establish contacts with Illinois, and that the defendant was subject to tortious act jurisdiction (735 ILCS 5/2--209(a)(1)(2) (West 2004)) because he committed tortious acts against an Illinois citizen, with the intent to affect an Illinois interest.

At the close of the hearing, the circuit court found that the defendant did not have contacts with Illinois sufficient to bring him within Illinois jurisdiction. The plaintiff appealed.

#### ANALYSIS

First, the plaintiff argues that the circuit erred when it dismissed the suit for lack of personal jurisdiction.

Initially, the plaintiff argues that the defendant has waived any objection to personal jurisdiction because he filed a motion that did not comply with section 2--301(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2--301(a) (West 2004)).

Waiver is a limitation on the parties, not the jurisdiction of the court. In re Estate of Funk, 211 Ill. 2d 30, 97, 849 N.E.2d 366, 403 (2006) ("We may look beyond considerations of waiver \*\*\* where the interests of justice so require."). In this case, the defendant's motion to dismiss complied with the Code, except for the fact that he did not specifically cite section 2--301(a) in his personal jurisdiction argument. We are unwilling to preclude the defendant from making his personal jurisdiction

argument based on a mere procedural technicality. See Funk, 211 Ill. 2d 30, 849 N.E.2d 366; Murphy v. Crawford, Murphy & Tilly, Inc., 101 Ill. 2d 547, 557, 463 N.E.2d 730, 731 (1984) (Simon, J., dissenting) (it is a maxim of appellate review that "reviewing courts should attempt to decide cases on the merits rather than disposing of them on procedural technicalities or inadvertent omissions."), citing Stauffer v. Held, 16 Ill. App. 3d 750, 306 N.E.2d 877 (1974)). Accordingly, we will address the issue of whether the circuit court properly dismissed the action for want of personal jurisdiction.

Determining whether personal jurisdiction exists requires a three-part analysis of whether exercising jurisdiction comports with (1) the due process guarantee of the United States Constitution; (2) the due process guarantee of the Illinois Constitution; and (3) Illinois' long-arm statute (735 ILCS 5/2--209 (West 2004)). Viktron Ltd. Partnership v. Program Data Inc., 326 Ill. App. 3d 111, 759 N.E.2d 186 (2001). We will first consider whether the assertion of personal jurisdiction in this case would violate federal due process.

The plaintiff's sole argument on appeal is that the defendant is subject to specific personal jurisdiction. A court can assert specific jurisdiction when the action "arises out of or is connected to the defendant's purportedly wrongful activities within the forum state." Rosier v. Cascade Mountain, Inc., 367 Ill. App. 3d 559, 562, 855 N.E.2d 243, 247 (2006). Because this case comes to us based on the pleadings and

supporting documents, we review this issue de novo. Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 824 N.E.2d 1175 (2005).

An assertion of specific personal jurisdiction comports with federal due process when: (1) the nonresident defendant has sufficient minimum contacts with Illinois; (2) the cause of action arises from the defendant's contacts with Illinois; and (3) it is reasonable to require the defendant to litigate in Illinois. See Bombliss, 355 Ill. App. 3d 1107, 824 N.E.2d 1175; Burger King Corp. v. Rudzewicz, 471 U.S. 462, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). The defendant has sufficient "minimum contacts" with the forum state when maintaining the action comports with "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945). These "minimum contacts" must involve acts through which the defendant intentionally avails himself of the privilege of conducting activities in the forum state, thereby invoking the protections and benefits of the forum state's laws. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987); Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). The defendant's conduct must reflect a connection to the forum state such that the defendant would reasonably anticipate being haled into the forum state's court. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980).

In this case, the plaintiff argues that the totality of the defendant's contacts with Illinois show that an exercise of personal jurisdiction would not offend federal due process. In support of his argument, the plaintiff points out that the defendant (1) operates a fully interactive website; (2) "entered" Illinois when he visited an Illinois court website to obtain the bankruptcy court document; (3) used his website to publish libelous statements about the plaintiff; and (4) derived profit from Illinois citizens.

Initially, we note that there is no support in law for the plaintiff's argument that visiting an Illinois court website constitutes "entering" Illinois for the purposes of establishing personal jurisdiction. Accordingly, the fact that the defendant visited an Illinois court website to obtain a bankruptcy document does not relate to whether the defendant has had sufficient minimum contacts with Illinois.

Furthermore, our review of the record reveals that the defendant's website is not fully interactive. In Bombliss, this court adopted the "sliding scale" approach from Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), which evaluates different levels of Internet activity as they relate to personal jurisdiction. Bombliss, 355 Ill. App. 3d 1107, 824 N.E.2d 1175. On one end, jurisdiction attaches when a defendant uses his website to enter into contracts with residents of a foreign jurisdiction, and the contracts "involve the knowing and repeated transmission of computer files over the

Internet." Zippo, 952 F. Supp. at 1124. At the other end, jurisdiction does not attach when a defendant maintains a passive website that merely provides information to those who may be interested. Zippo, 952 F. Supp. 1119. Between these two ends is an interactive website that allows customers from a foreign jurisdiction to communicate regarding the defendant's products. Bombliss, 355 Ill. App. 3d 1107, 824 N.E.2d 1175. In this category, an exercise of jurisdiction depends on the level of interactivity and the commercial nature of the information exchanged. Bombliss, 355 Ill. App. 3d 1107, 824 N.E.2d 1175. The defendant's website falls within this middle category.

The defendant's website serves two functions; namely, to contract with customers to purchase his software, and to provide information about his software. The defendant's website does not target customers in any particular jurisdiction. The defendant published the allegedly libelous statements on his website to communicate information and to advertise his product. The statements were not specific to Illinois, much less to any other particular state, and did not target the plaintiff as an Illinois citizen. Additionally, the statements were not used to transact any business in Illinois. In fact, the defendant has had only one Illinois customer, and that transaction certainly did not give rise to the instant action. Based on these facts, we cannot say that the defendant has sufficient minimum contacts with the forum state such that maintaining the action comports with traditional notions of fair play and substantial justice. See



Bombliss, 355 Ill. App. 3d 1107, 824 N.E.2d 1175; Barrett v. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999); Zippo, 952 F. Supp. 1119. Because asserting personal jurisdiction over the defendant runs afoul of federal due process guarantees, we hold that the circuit court correctly dismissed the case for a lack of personal jurisdiction.

Our ruling on the personal jurisdiction issue obviates the need to address the plaintiff's second argument that his complaint stated claims upon which relief could be granted.

The judgment of the circuit court of Will County is affirmed.

Affirmed.

HOLDRIDGE, J., with SCHMIDT, J., concurring, and MCDADE, J., dissenting.

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 3--06--0347

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A.D., 2007

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v.	)	No. 06--L--51
	)	
JAMES ANDREWS, d/b/a	)	
K9PED,	)	Honorable
	)	Herman Haase,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McDADE, dissenting:

The majority has found that the circuit court correctly dismissed the case for a lack of personal jurisdiction because the statements at issue "were not specific to Illinois" and "did not target the plaintiff as an Illinois citizen." Slip order at 7. The majority, applying the test this court utilized in *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 824 N.E.2d 1175 (2005), concludes that asserting personal jurisdiction over the defendant runs afoul of federal due process guarantees because "defendant's website is not fully interactive" (slip order at 6) and merely serves to "contract with customers to purchase software, and to provide information about his software" (slip order at 7). I find that *Bombliss* is distinguishable from the instant case and does not control the determination of whether the defendant had sufficient minimum contacts with Illinois such that

the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice. Accordingly, I dissent.

In *Bombliss*, we concluded that "the *totality* of defendants' activities in Illinois, including (1) the contract negotiations and follow-up AKC registration of Mohanna, (2) maintenance of a commercial interactive website, and (3) use of Tibetan mastiff chat rooms to reach potential customers of Tibetan mastiff breeders, including plaintiffs, were of sufficient quantity and quality to constitute minimum contacts in Illinois under federal due process analysis." (Emphasis added.) *Bombliss*, 355 Ill. App. 3d at 1115, 824 N.E.2d at 1181. Thus, the holding in *Bombliss* was not solely based on the nature of the defendants' website.

The majority's focus on the defendant's website in this case demonstrates that it has read *Bombliss* too broadly. Specifically, the majority appears to believe that we must apply the *Bombliss* "sliding scale" test whenever the defendant's contact with Illinois is via the internet. I disagree. The inquiry into whether the defendant had sufficient minimum contacts does not begin with whether those contacts came via the internet and proceed from there. But the majority's holding in this case could lead to that conclusion. Rather, we must first examine the nature of the defendant's contact with Illinois to determine whether he should reasonably anticipate being haled into an Illinois court. Slip order at 5, citing *World-Wide Volkswagen Corp. V. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980). That inquiry remains constant regardless of how contact with Illinois is made.

Moreover, *Bombliss* is factually distinguishable from the case at bar. The level and type of contact with Illinois, via the internet, demonstrated in *Bombliss*, is distinguishable from that demonstrated here. In *Bombliss*, the plaintiffs claimed that "defendants knowingly published false

statements *about Mohanna's genetic line* to retaliate against Eichhorn, and that, as a consequence, negotiations with several potential puppy customers had fallen through. The plaintiffs also claimed that they were denied membership in Internet discussion groups, and that defendants' comments impeached their integrity and impaired their good reputations." (Emphasis added.) *Bombliss*, 355 Ill. App. 3d at 1111, 824 N.E.2d at 1178. In support of finding personal jurisdiction, the plaintiffs pointed out to the court that "defendants had used YAHOO! chat rooms and discussion groups accessible worldwide to spread unfounded rumors of a genetic defect *in Mohanna*." (Emphasis added.) *Bombliss*, 355 Ill. App. 3d at 1111, 824 N.E.2d at 1178.

In *Bombliss*, the defendants directed their internet commentary at Mohanna, one of the allegedly sick puppies the defendant sold to the plaintiffs. That commentary, not directly aimed at the plaintiffs but nonetheless related to the plaintiffs' business, allegedly damaged them. Turning to the defendant's activities in this case, by contrast, the defendant directed his internet commentary directly at an Illinois resident and an Illinois business. First, the defendant made disparaging comments about the plaintiff's business, which the defendant knew is based in Illinois, and the plaintiff, whom he knew or should have known to be an Illinois resident. Second, the defendant, in making those comments, intended to affect Illinois interests. The defendant specifically stated that consumers should not purchase the CompuPed Millennium software, a product created and sold in Illinois by an Illinois resident.

In this case the defendant participated in an allegedly tortious act intentionally directed at an Illinois resident, as in *Calder v. Jones*, 465 U.S. 783, 789-90, 79 L. Ed. 2d 804, 812-13, 104 S. Ct. 1482, 1487 (1984), which I find controlling. In *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 761 N.E.2d 256 (2001), the First District undertook "[a] review of the case law involving

\*\*\* allegedly false communications" as they relate to exercising personal jurisdiction over a foreign defendant. *Zazove*, 326 Ill. App. 3d at 806, 761 N.E.2d at 262. The court cited *Calder v. Jones*, 465 U.S. 783, 789-90, 79 L. Ed. 2d 804, 812-13, 104 S. Ct. 1482, 1487 (1984). In *Calder*, the Supreme Court of the United States

"determined in a libel case that a California court could exercise personal jurisdiction over Florida journalists, despite the fact that they did not directly circulate the allegedly defamatory article in California, reasoning that by participating in an allegedly tortious act intentionally directed at California and a California resident, the author and editor of the article must reasonably anticipate being haled into court in California, based on the effects of their conduct in Florida." *Zazove*, 326 Ill. App. 3d at 806, 761 N.E.2d at 262, citing *Calder* 465 U.S. at 789-90, 79 L. Ed. 2d at 812-13, 104 S. Ct. at 1487.

Based on *Calder*, the *Zazove* court concluded that "allegedly false communications to Illinois residents with an intent to affect Illinois interests is a sufficient basis for exercising personal jurisdiction over a nonresident defendant, regardless of how such acts are characterized." *Zazove*, 326 Ill. App. 3d at 807, 761 N.E.2d at 263.

It is of no consequence that the defendant made the allegedly tortious comments on the internet (or that the defendants in *Zazove* and *Calder* did not). The controlling fact in this case is that the defendant directed the allegedly tortious comments at an Illinois resident and business. Unlike the majority, I find it notable that the defendant accessed an Illinois website to obtain

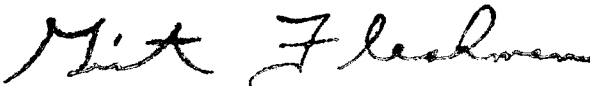
information about the plaintiff. That fact is notable not as it relates to whether visiting the Illinois website "constitutes 'entering' Illinois for the purposes of establishing personal jurisdiction" (slip order at 6). However, it is indicative that the defendant should reasonably anticipate being haled into an Illinois court if he used information obtained from an Illinois website to disparage an Illinois resident.

I would find that exercising personal jurisdiction does not violate the defendant's due process rights, and would reverse the circuit court's order dismissing the suit for lack of personal jurisdiction. I, therefore, dissent from the majority's contrary decision.

STATE OF ILLINOIS, )  
APPELLATE COURT, ) ss.  
THIRD DISTRICT )

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 15th day of June in the year of our Lord two thousand seven.



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Clerk of the Appellate Court