

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: 2013-18951-CA (01)

MARCOS AVELLAN, MMA CONSULTING
SERVICES, LLC and FREESTYLE FIGHTING
ACADEMY, INC.,

Plaintiffs,

v.

JUSTIN GARCIA, NAKAPAN PHUNGEPHORN,
BRANDON NUNLEY, JUNGLE GYM MARTIAL
ARTS, LLC, and BETA MARTIAL ARTS
ACADEMY, LLC,

Defendants.

**NAKAPAN PHUNGEPHORN AND BETA MARTIAL ARTS ACADEMY, LLC'S
MOTION TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION
-AND_
INCORPORATED MEMORANDUM OF LAW**

Defendants, Nakapan Phungephorn ("Nakapan") and Beta Martial Arts Academy, LLC ("Beta") (collectively, "Defendants"), move, pursuant to Fla. R. Civ. P. 1.140 to dismiss the Complaint for lack of *in personam* jurisdiction.¹ In support, Defendants state:

1. Plaintiffs, all citizens of Florida, wrongfully allege that this Court has *in personam* jurisdiction over the Defendants, who have no contacts with the State of Florida. However, as alleged, Defendants alleged comments and actions do not concern a citizen of Florida, but a citizen of Maryland and a corporation with no business dealings in Florida.

¹ Defendants expressly reserve their right to move to dismiss Plaintiffs' Complaint for Plaintiffs' lack of standing and failure to state a cause of action, should the Court determine it has jurisdiction over the Defendants.

2. Plaintiffs are seeking recovery against Defendants for alleged: (1) conspiracy to defame, (2) tortious interference with business relationships, (3) conspiracy to tortiously interfere with business relations, and (4) defamation, solely based upon alleged defamatory statements related to non-party, non-Florida citizens.

3. Therefore, as set forth in greater detail within the incorporated memorandum of law and affidavits, Plaintiffs fail to allege sufficient facts to bring this action against Nakapan and Beta in Florida. First, Defendant does not fall within the ambit of Florida's long-arm statute. Second, Defendants do not possess the minimum contacts necessary in Florida to comport with the constitutional norms of due process required to obtain personal jurisdiction. Accordingly, the claims against Nakapan and Beta should be dismissed for lack of *in personam* jurisdiction.

4. Because this motion is directed at the jurisdictional power of this Court over Defendants, Defendants reserve the right to move to dismiss Plaintiff's Complaint under all other grounds should this Court determine it has *in personam* jurisdiction over Defendants.

WHEREFORE, Nakapan and Beta request this Court enter an order dismissing the case for lack of *in personam* jurisdiction, reserves their right to seek dismissal on all other grounds and request any other relief this Court deems just and proper.

Incorporated Memorandum of Law

I. Legal Standards for Personal Jurisdiction

This Court may obtain *in personam* jurisdiction over Defendants only if a two part test is satisfied. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989). *First*, the defendant's conduct must fall within the ambit of Florida's long-arm statute (Fla. Stat. § 48.193). *Id.* at 502. "A court can exercise personal jurisdiction, *inter alia*, whenever a foreign corporation commits a 'tortious act' on Florida soil." *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1207 (Fla.

2010) (citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1257 (Fla. 2002) (quoting *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 584 (Fla. 2000))); *see also* Fla. Stat. § 48.193(1) (b).

Second, a Court must ensure the Defendants possess sufficient minimum contacts with the State to satisfy the due process requirements of the United States Constitution and not offend “traditional notions of fair play and substantial justice.” *Parthenais*, 554 So. 2d at 502. This second prong is a requirement since “[t]he mere proof of any one of the several circumstances enumerated in section 48.193 as the basis for obtaining jurisdiction of nonresidents does not automatically satisfy the due process requirement of minimum contacts.” *Id.*

Once challenged by affidavit, the plaintiff bears the burden of proving facts that satisfy both elements of the personal jurisdiction test. *Venetian Salami*, 554 So. 2d at 502. Moreover, “[w]here the defendant has filed a one or more affidavits supporting a meritorious challenge, the plaintiff is required to rebut the affidavits with opposing affidavits, testimony or documents rather than simply allege facts which show only a ‘possibility of jurisdiction.’” *Viking Acoustical Corp v. Monco Sales Corp.*, 767 So. 2d 632, 634 (Fla. 5th DCA 2000) (internal citations omitted). If either prong of the jurisdictional test is not met, this Court has no jurisdiction over the Defendants and no ability to adjudicate the claims pending against them. *See, e.g., Steinhilber v. Lamoree*, 825 F. Supp. 1003, 1007 (S.D. Fla. 1992), *aff’d*, 15 F.3d 1097 (11th Cir. 1994) (motion to dismiss for lack of personal jurisdiction granted); *JB Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F. Supp. 2d 1363, 1368 (S.D. Fla. 1999) (motion to dismiss for lack of personal jurisdiction granted). Here, Plaintiffs have failed to establish and cannot establish in personam jurisdiction under either prong.

II. Florida’s Long-Arm Statute Does Not Reach Defendants Nakapan and Beta

The Plaintiffs cannot affirmatively allege sufficient acts by the non-resident defendant's to meet the requirements as set forth in Fla. Stat. § 48.193(1) since the comments were posted on a passive third party blog, Nakapan's personal Facebook page and Defendants: (1) have never engaged in solicitation in the state, (2) never performed service activities in the state, and (3) have not engaged in any business activity which has been used or consumed within the state in the ordinary course of commerce, trade or use.

Plaintiffs request this Court take jurisdiction under Fla. Stat. § 48.193(1), requiring specific personal jurisdiction under the Long-Arm Statute.² "Specific" personal jurisdiction involves claims that arise from the Defendants' forum-related contacts. *Alternate Energy Corp., v. Redstone*, 328 F.Supp.2d 1379, 1382 (S.D. Fla. 2004). Fla. Stat. § 48.193(1) enumerates certain acts through which a nonresident may be subjected to "specific" jurisdiction in a court of this State, including:

* * *

(b) Committing a tortious act within this state.

* * *

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or
2. Products, materials, or things processed, serviced or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade or use.³

In order for a Florida court to exercise personal jurisdiction over a non-resident defendant, the defendant or the defendant's conduct must satisfy one of the elements of the long-

² The second is for general personal jurisdiction.

³ The above sections of Fla. Stat. § 48.193 have been amended (effective June 14, 2013) to now be referenced as 48.193(1)(a)(2) and (6)(a)(b).

arm statute. *Garrett v. Garrett*, 668 So. 2d 991, 994 (Fla. 1996). Fla. Stat. § 48.193(1) requires that the defendant personally commit a tortious act within the state for specific jurisdictional purposes. *Two Worlds United v. Zylstra*, 46 So. 3d 1175, 1177 (Fla. 2d DCA 2010) (affirming order granting motion to dismiss for lack of jurisdiction); *see also Parthenais*, 554 So. 2d at 501 (“If the question is whether an individual’s contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party’s home forum, we believe the answer clearly is that it cannot.”). “By its terms, section 48.193(1) requires connexity between the defendant’s activities and the cause of action.” *Camp Illahee Investors, Inc. v. Blackman*, 870 So. 2d 80, 85 (Fla. 2d DCA 2003) (citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002)).

Courts applying the Florida long-arm statute have been declined to extend jurisdiction to out of state defendants with tangential connections to Florida. In *Camp Illahee Investors, Inc.* 870 So. 2d at 85, the Second District Court of Appeal found that annual week long visits by a defendant into the forum state for reunions and promotional video shows for his out of state business did not confer personal jurisdiction for any cause of action arising from conducting business in the forum state for tortious acts committed outside the state which allegedly affected Florida citizens. Moreover, in *Alternate Energy Corp. v. Redstone*, 328 F. Supp. 2d 1379, 1381 (S.D. Fla. 2004), the Southern District of Florida, applying Florida jurisprudence on long-arm statute, refused to apply the state’s long arm statute to confer jurisdiction on claims concerning alleged defamation of a non-Florida citizen of a non-Florida resident on a website where subscriptions were sold over the world wide web to several Florida citizens.

Here, a review of the Complaint clearly establishes neither Nakapan nor Beta have committed any act to confer specific jurisdiction, as alleged, under Florida’s long-arm statute.

Plaintiffs' Complaint alleges that this Court has jurisdiction over Defendants "pursuant to Fla. Stat. § 48.193(1)(b) and (f) because they committed tortious acts within Florida and/or caused injury to persons or entities within Florida arising out of tortious acts committed outside Florida while engaged in solicitation or service activities in Florida." Complaint, ¶ 10.

Additionally, Plaintiffs allege jurisdiction pursuant to Fla. Stat. § 48.193(1)(b) as a result of purported "defamatory statements about citizens of Florida which were published and read by persons in Florida and because the Defendants conspired to commit unlawful acts which were directed at persons in Florida and which caused damage to persons in Florida." *Id.* at ¶ 11.

However, a review of the statements allegedly made by Defendants clearly and directly identifies the statements as being **related only to Lloyd Irvin and MMA Millionaires, both non-Florida citizens and who have not brought forth any causes of action, joined in the lawsuit or appear to have any legal standing whatsoever based on the allegations of the Complaint.**

Specifically, the only alleged defamatory statements attributable to Nakapan are:

- a. "I am not pointing this out to boasters but rather to illustrate what a perfect poster boy I was – and became – for **this** amoral **organization**."
- b. "For this 'prestigious position' I agreed to pay **Lloyd Irvin** more than \$35,000 a year for 'Business coaching advise' and, in exchange, I was granted the privilege of selling information products to **his followers**. What people don't realize is that under **this agreement**, I lost more money than I actually made. This only begins to scratch the surface when I comes to uncovering the complex, pre-meditated web of manipulation that this cartel employs."

Id. at ¶ 48 (emphasis added). These statements were related directly to **Lloyd Irvin** and the **Mastermind Group**. *See id.* at ¶ 56. Moreover, Plaintiffs allege that Nakapan had a telephone conversation with **a member of the martial arts community** accusing **MMA Millionaires** and the **Mastermind Group** of being corrupt, dishonest and a scam. *See id.* at ¶ 55.

Plaintiffs' Complaint fails to allege that any of the alleged published defamatory statements attributable to Nakapan took place or occurred in Florida. Moreover, no comments are attributed to Beta other than an assertion Beta is owned by Nakapan. More importantly, none of the alleged defamatory statements made by Nakapan were about Florida citizens, which were published and read by persons in Florida. Rather, an individual and his companies, of which no comments were made by Defendants, is attempting to assert a claim against Defendants. From the plain reading of the Complaint it is clear these comments, if made, did not concern the Plaintiffs or their business dealings. Rather, the comments concern Lloyd Irvin, a citizen of Maryland, and his Maryland area businesses. *See* judgment entered against Lloyd E. Irvin Jr. in the Circuit Court for Prince George County, Maryland, attached as Exhibit "A;" *see also* Profile from website www.lloydirvin.org attached as exhibit "B." Accordingly, this case is more akin to that of *Alternate* and as such, the comments made on a Facebook page and blog, where no services, products or business solicitation was directed at Florida by Defendants is insufficient to confer long-arm jurisdiction.

Furthermore, as set forth in the attached Affidavits of Nakapan and Beta, **Exhibit "C" and "D"** respectively, *inter alia*, neither Defendant: (1) has ever engaged in solicitation or service activities within this state (Ex. C at ¶ 16, Ex. D ¶ 17); (2) has ever had products, materials, or things processed, serviced or manufactured anywhere which have been used or consumed within this state in the ordinary course of commerce, trade or use (Ex. C at ¶ 17, Ex. D ¶ 18). Moreover, Nakapan: (1) has no contacts whatsoever with the State of Florida (Ex. C at ¶ 6); (2) does not and has not resided in Florida at any time (Ex. C at ¶ 7); (3) does not and has not maintained an office in Florida (Ex. C at ¶ 8); (4) does not and has not owned, held, used, possessed, or leased any real estate in Florida (Ex. C at ¶ 9); (5) does not and has not targeted

any customers in Florida (Ex. C at ¶ 10); (6) does not and has not entered into any contract in Florida (Ex. C at ¶ 11); (7) does not and has not sold any products or performed any services in Florida (Ex. C ¶ 12; (8) does not and has not published, nor been involved with, the publishing of any statements with regard to the Plaintiffs in Florida (Ex. C at ¶ 15); and (9) has not committed any tortious act within Florida (Ex. C at ¶ 14). Likewise, Beta: (1) does not and has not had any contacts whatsoever with the State of Florida (Ex. D at ¶ 7); (2) does not and has not had a principal place of business in Florida (Ex. D at ¶ 8); (3) does not and has not maintained an office in Florida (Ex. D at ¶ 9); (4) does not and has not owned, held, used, possessed, or leased any real estate in Florida (Ex. D at ¶ 10); (5) does not and has not targeted any customers in Florida (Ex. D at ¶ 11); (6) does not and has not entered into any contract in Florida (Ex. D at ¶ 12); (7) does not and has not sold any products or performed any services in Florida (Ex. D at ¶ 13); (8) does not and has not published, nor been involved with, the publishing of any statements with regard to the Plaintiffs in Florida (Ex. D at ¶ 16); and (9) has not committed any tortious act within Florida (Ex. D at ¶ 15).

Accordingly, and on its face, Plaintiffs' Complaint fails to place either Nakapan or Beta within the ambit of Florida's long-arm statute for specific jurisdictional purposes. Rather, the Complaint makes it clear neither Defendant had any dealings in Florida that would confer specific long arm jurisdiction on the Court. Nakapan and Beta have had no involvement with the state of Florida. Without having satisfied the first prong of the two-part test required to establish jurisdiction, Plaintiffs' Complaint should be dismissed for want of *in personam* jurisdiction.

III. Defendants Lack the Requisite Contacts with Florida to Meet the Due Process Minimum Contacts Requirements

Even assuming, *arguendo*, this court were to find sufficient contacts to assert specific jurisdiction pursuant to Florida's long-arm statute, Defendants possess insufficient contacts with the State of Florida to satisfy the Constitutional due process requirement.

The due process clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations. *Maschinenfabrik Seydelmann v. Altman*, 468 So. 2d 286, 288 (Fla. 2d DCA 1985). A plaintiff's residence in the forum, and suffering of alleged harm there, will not alone support jurisdiction.⁴ *Bioheart, Inc. v. Peschong*, 13-60304-CIV, 2013 WL 1729278 (S.D. Fla. April 22, 2013).

Rather, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, (1958)). The test prevents a defendant from being haled into a foreign forum, as a result of "random," "fortuitous," or "attenuated" contacts, or because of the unilateral activity of a third person. *Segal v. Russell*, 553 So. 2d 346, 348 (Fla. 4th DCA 1989); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

Therefore, to establish sufficient minimum contacts with Florida, the Courts must examine three factors to comport with the Fourteenth Amendment's due process requirement: (1) whether the defendant has purposefully availed itself of the benefits of doing business in

⁴ Additionally, Plaintiff cannot create jurisdiction through conclusory allegations of Defendants participation in a conspiracy. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997). "Bald Speculation or a conclusory statement that individuals are coconspirators is insufficient to establish personal jurisdiction under a conspiracy theory." *Id.* (internal citations and quotations omitted). "Instead, the Plaintiff must plead with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy." *Id.* Plaintiffs have not done so, alleging only conclusory statements concerning the conspirators, none of which are Florida citizens or any of which appear to have themselves minimum contacts with the state.

the forum state; (2) whether the cause of action arose out of the activities through which the defendant did so; and (3) whether the defendant could have reasonably anticipated being haled into court in the forum state. *Alternate*, 328 F.Supp.2d at 1382. As to defamation actions, Personal jurisdiction is proper only when the alleged defamatory publication was “expressly aimed” at the forum state. *Id.* at 1383.

In the instant suit, Plaintiffs’ allegation that the alleged defamatory statements were simply allegedly published to an unknown person and on passive websites is insufficient to invoke jurisdiction against Defendants. *See id.* Moreover, as set forth above, the alleged defamatory statements concerned a non-Florida citizen, negating any argument the comments were “expressly aimed” at the forum state. Plaintiffs’ Complaint against Defendants fails to allege the most basic principle, that the Defendants purposefully availed themselves of the benefits of doing business in the state. Therefore, the cause of action could not have arisen from non-existent activities. Defendants specifically have attested in their Affidavit to have no business contacts or ties to Florida and have not used www.bloodyelbow.com or their facebook page to target any activity to the instant forum. *See* Exhibit “C.” Accordingly, there is no possibility Defendants could have reasonably anticipated being hauled into court in Florida.

Moreover, Nakapan and Beta’s extremely passive Facebook page, and the fan community blog website of www.bloodyelbow.com cannot be said to assert the minimum contacts sufficient to confer jurisdiction. The United States District Court for the Middle District of Florida has already held that even an interactive commercial website is not enough to satisfy the traditional concepts of minimum contacts with Florida for the purpose of personal jurisdiction. *See Instabook Corp. v. Instantpublisher.com*, 469 F. Supp. 2d 1120 (M.D. Fla. Orlando Div. 2006); *see also Shamsuddin v. Vitamin Research Products*, 346 F. Supp. 2d 804 (D. Md. 2004). If

interactive commercial websites such as that at issue in *Instabook Corp.* are not sufficient to establish minimum contacts with Florida, then certainly a Facebook page does not satisfy the test for personal jurisdiction nor a fan community blog website run by an independent third party.

Consequently, allowing the maintenance of this suit would offend traditional notions of fair play and substantial justice. Nakapan and Beta's Affidavit confirms Defendants' lack of contacts with the State of Florida necessary to satisfy due process requirements. *See* Exhibit "C." Accordingly, Plaintiffs' Complaint should be dismissed as Defendants do not have the requisite minimum contacts to support this Court's exercise of personal jurisdiction.

IV. Conclusion

Because Plaintiffs have failed to assert Defendants have sufficient contacts with the forum state to meet either the specific jurisdiction requirements of Florida's long-arm statute, and because Plaintiffs cannot assert sufficient contacts with Florida that would allow Defendants reasonable notice of the possibility of being haled into court in Florida, Plaintiffs' Complaint must be dismissed for want of *in personam* jurisdiction.

Dates this 29th day of July, 2013

Respectfully Submitted,

LYDECKER | DIAZ
Attorneys for Defendants
NAKAPAN PHUNGEPHORN and
BETA MARTIAL ARTS ACADEMY, LLC
1221 Brickell Avenue, 19th Floor
Miami, Florida 33131
(305) 416-3180 - Telephone
(305) 416-3190 – Facsimile

By: /s/Roland Potts -
ALAN S. FELDMAN
FBN: 797251

af@lydeckerdiaz.com
ROLAND POTTS
FBN: 087072
af@lydeckerdiaz.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Filing was served via Electronic this 16th day of July, 2013 upon: David H. Pollack, Esq., Law Office of David H. Pollack, LLC, 540 Brickell Key Drive, Suite C-1, Miami, Florida 33131, david@davidpollacklaw.com, Wesley Alan Lauer, Akerman, Senterfitt & Eidson, PA, 222 Lakeview Avenue, Suite 400, West Palm Beach, Florida 33401, Wesley.lauer@akerman.com.

LYDECKER | DIAZ
1221 Brickell Avenue
19th Floor
Miami, Florida 33131
Tel.: (305) 416-3180/Fax: (305) 416-3190

By: /s/Alan S. Feldman
ALAN S. FELDMAN, ESQ.
FLORIDA BAR.: 797251
ROLAND POTTS, ESQ.
FLORIDA BAR NO. 087072