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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DOMAIN TOOLS, LLC,

Plaintiff,

v.

RUSS SMITH, pro se, and
CONSUMER.NET, LLC,

Defendant.

CASE NO. C12-498MJP

DISMISSAL ORDER

This matter comes before the Court on Defendant Russ Smith’s motion to dismiss. (Dkt. No. 13.) Having reviewed the motion, Plaintiff’s opposition (Dkt. No. 17), Defendant’s reply (Dkt. No. 21), and all related filings, the Court GRANTS Defendant’s motion and DISMISSES this action with prejudice for lack of personal jurisdiction and improper venue.

Background

This case has its roots in a dispute over Defendant’s website content. Defendant Russ Smith, who at one point owned hundreds of websites through his company, Consumer.net, LLC, noticed that Plaintiff DomainTools, LLC, ran a website that archived some of his websites,

1 displaying “full sized, high resolution images of [his] web sites with [DomainTool’s] logo
2 superimposed.” (Dkt. No. 1 at 18.) Smith also noticed and objected to the fact that DomainTools
3 ran a website, www.domaintools.com, used a name similar to his website, www.domain-
4 tools.com. (Dkt. No. 17 at 7.)

5 In March 2012, Smith sent a series of messages to DomainTools asking for his content to
6 be taken down. He did not send these messages by email; instead, he used the “Submit a Ticket”
7 feature on the DomainTools website. (Id.) After receiving no response, Smith sent DomainTools
8 a letter threatening to sue for copyright infringement. (Dkt. No. 1 at 8.) His letter included a
9 vaguely worded three-page draft complaint. He also mailed Plaintiff a draft petition asking the
10 U.S. Patent and Trademark Office to cancel DomainTools’ trademark claiming that it was
11 obtained fraudulently. (Id.) DomainTools does not allege that Smith ever actually filed the
12 complaint or sent the petition to the USPTO. (Id.)

13 Rather than responding directly to any of Smith’s messages or letters, DomainTools
14 chose to respond by filing this lawsuit. This decision did not take long. Smith sent his letters to
15 DomainTools on March 11, 2012. (Dkt. No. 17 at 8.) On March 22, 2012, DomainTools filed its
16 complaint in this Court seeking a declaratory judgment stating that its use of Smith’s images is
17 lawful. (Dkt. No. 1 at 3-4.) DomainTools also asks the Court to assess its costs and attorneys’
18 fees against Smith. (Dkt. No. 1 at 14.)

19 DomainTools argues that “Smith created an actual controversy, and DomainTools is
20 entitled to judicial resolution.” (Dkt. No. 17 at 4.) Proceeding pro se, Smith asks the Court to
21 dismiss this case under Federal Rules 12(b)(2) for lack of personal jurisdiction, 12(b)(3) for
22 improper venue, and 12(b)(6) for failure to adequately state any substantive claims. (Dkt. No.
23 13.) He also states that service was not proper. (Id.)
24

Discussion

A. Legal Standards

Federal Rule 12(b)(2) provides that a party may assert the affirmative defense of lack of personal jurisdiction. Once the defendant has challenged the exercise of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction. Butcher's Union Local No. 498 v. SDC Invest., Inc., 788 F.2d 535 538 (9th Cir. 1986).

Challenges to the propriety of a plaintiff's chosen venue may be raised by a motion to dismiss under Federal Rule 12(b)(3). The substantive standards for determining whether venue is proper are provided by the general venue statute, 28 U.S.C. § 1391. Pursuant to the statute, a civil action may be brought in "a judicial district in which any defendant resides" or "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b).

In considering a motion to dismiss under Federal Rule 12(b)(6), a court must accept all plaintiff's well-pled factual allegations as true and must draw all reasonable inferences in plaintiff's favor. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). However, Rule 12(b)(6) requires a court to dismiss a claim when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A plaintiff must plead "more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

B. Personal Jurisdiction

This Court does not have personal jurisdiction over Defendant. Plaintiff does not allege that general jurisdiction exists. (Dkt. No. 17 at 10.) To have minimum contacts to be susceptible to specific jurisdiction: (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof, or perform some act by which

1 he purposefully avails himself of the privilege of conducting activities in the forum, thereby
2 invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or
3 relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must
4 comport with fair play and substantial justice, i.e., it must be reasonable. Schwarzenegger v. Fred
5 Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004).

6 Here, Plaintiff fails to show that the present claim "arises out of" Defendant's forum-
7 related activities. The Ninth Circuit applies a "but for" causation standard to this analysis.
8 Bancroft & Masters v. Augusta Nat'l, 223 F.3d 1082, 1088 (9th Cir. 2000). In Bancroft &
9 Masters, the parties were both subject to a dispute resolution regime, no longer in place, where
10 the filing of a challenge to an Internet domain name automatically triggered the freezing of the
11 domain, unless the domain holder filed suit to establish its right. Id. at 1085. In that context, the
12 court held that "but for the letter to [the domain registry] . . . , it is clear that [plaintiff] would
13 have no need for a judicial declaration of its right to use [the website]." Id. at 1088. The situation
14 here is different because Plaintiffs do not allege that Smith ever sent his letters to the domain
15 registry. (Dkt. No. 1 at 8.) Neither does DomainTools allege that it faced automatic freezing of
16 its domain unless it filed suit. (Id.) Unlike in Bancroft & Masters, DomainTools' decision to
17 bring this suit was discretionary, so Plaintiff cannot argue that "but for" Defendant sending the
18 letters, the claim would not have arisen.

19 Plaintiff also fails to show that the exercise of jurisdiction comports with fair play and
20 substantial justice. Schwarzenegger, 374 F.3d at 802. The Ninth Circuit considers seven factors
21 in this evaluation: (1) the extent of the purposeful interjection; (2) the burden on the defendant to
22 defend in the chosen forum; (3) the extent of the conflict with the sovereignty of defendant's
23 state; (4) the forum state's interest in the dispute; (5) the most efficient forum for judicial
24

1 resolution of the dispute; (6) the importance of the chosen forum to the plaintiff's interest in
2 convenient and effective relief; and (7) the existence of an alternative forum. CE Distrib., LLC v.
3 New Sensor Corp., 380 F.3d 1107, 1112 (9th Cir. 2004).

4 Factors one, two, and seven weigh against finding personal jurisdiction here. Smith's
5 interjection into Washington—sending a two letters addressed to Plaintiff in Seattle—is minimal.
6 Second, the fact that Smith is proceeding pro se and asserts he is “unable to travel to Washington
7 State due to responsibilities of work, family, and pets” suggests he would face a heavy burden in
8 litigating in Washington State. (Dkt. No. 12 at 1.) The availability of other forums, such as New
9 Jersey, where Smith resides, weighs against an exercise of jurisdiction here. Additionally,
10 Plaintiff's argument that “the interest of the forum state . . . strongly indicates this dispute should
11 proceed in Washington” is weakened because Plaintiff DomainTools is registered in Delaware,
12 not Washington. (Dkt. No. 17 at 14.) The other factors do not weigh strongly in either direction,
13 so the Court concludes that the exercise of jurisdiction here would not comport with fair play and
14 substantial justice.

15 C. Venue

16 Venue is also improper in the Western District of Washington because no Defendant
17 resides in this district and because a “substantial part” of events giving rise to this claim did not
18 occur in this district. 28 U.S.C. § 1391(b). A majority of the events associated with this case
19 occurred not in Washington, but in New Jersey, where Smith was using the Internet. That is
20 where Defendant Smith noticed that DomainTools had used his images and where he submitted
21 his initial comments to DomainTools. (Dkt. No. 17 at 7-8.) While Defendant did mail two letters
22 to Washington, this is the sum total of his activities related to this state.

23 Further, the acts that occurred in Washington are not “substantial” for the purpose of
24 determining proper venue. The substantiality of the operative events is determined by assessment

1 of their ramifications for efficient conduct of the suit. Myers v. Bennett Law Offices, 238 F.3d
2 1068, 1076 (9th Cir. 2001) (citations omitted). While Defendant has identified a potential
3 witness, John Berryhill, who lives in Delaware, Plaintiff does not identify any witnesses or
4 evidence in Washington. (Dkt. No. 21 at 5.)

5 Plaintiff’s argument that venue is proper here because of a forum-selection clause on its
6 website also fails. Plaintiff points to the terms of service on its website, which states, “By
7 accessing, browsing, and/or using the website . . . [y]ou expressly agree to submit to the
8 exclusive personal jurisdiction of the state and federal courts in the city of Seattle, Washington.”
9 (Dkt. No. 17 at 6-7.) However, Plaintiffs offer no evidence that Defendant ever actually agreed
10 to this dubious contractual language. In fact, Plaintiff’s declaration shows that Defendant
11 explicitly objected, stating, “I do not agree to those terms as I am visiting the web site to stop the
12 unauthorized distribution of my intellectual property.” (Dkt. No. 18-4 at 2.) Even if this contract
13 was enforceable, a doubtful proposition given the lack of consideration, Defendant never agreed.
14 Pursuant to 28 U.S.C. § 1391(b), venue is proper where Defendant resides: the District of New
15 Jersey.

16 **Conclusion**

17 Because this Court does not have personal jurisdiction over Defendant and because venue
18 is improper, the Court DISMISSES this action with prejudice. Because jurisdiction does not
19 exist, the Court need not reach the sufficiency of Plaintiff’s complaint.

20 The clerk is ordered to provide copies of this order to Defendant and to all counsel.

21 Dated this 18th day of July, 2012.

22 
23 Marsha J. Pechman
24 United States District Judge