Ruling on Matter Under Submission

Judge Theresa M. Traber, Department 47

HEARING DATE: **August 24, 2021** TRIAL DATE: Not set.

CASE: **Christopher Avellone v. Karissa Barrows, et al.**

CASE NO.: **21STCV22573**

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(1) MOTION TO QUASH [SERVICE OF SUMMONS]
(2) MOTION TO DISMISS [BASED ON FORUM NON CONVENIENS]
(3) SPECIAL MOTION TO STRIKE (CCP § 425.16)

MOVING PARTY: (1)-(3) Defendants Karissa Barrows and Kelly Bristol

RESPONDING PARTY(S): (1)-(3) Plaintiff Christopher Avellone

CASE HISTORY:

- 06/16/21: Complaint filed.

STATEMENT OF MATERIAL FACTS AND/OR PROCEEDINGS:

This is a libel action. Plaintiff alleges that Defendants falsely tweeted, among other things, that he preyed on young women at Dragon Con, the comic book convention held in Atlanta.

Defendants bring a single motion in which they move to (1) quash service of the summons; (2) dismiss for inconvenient forum; and (3) strike the complaint pursuant to CCP § 425.16.

FINAL RULING:

Defendants' motion to quash is GRANTED as to Defendant Bristol and DENIED as to Defendant Barrows.

Defendant Bristol's motion to dismiss on the grounds of forum non conveniens is DENIED as moot, and Defendant Barrow's motion is DENIED on the merits.

Defendants' special motion to strike is CONTINUED to September 28, 2021, at 8:30 a.m. No further briefing allowed.

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DISCUSSION:

Three Motions in One

Defendants have combined three motions in one: (1) a motion to quash service of the summons for lack of personal jurisdiction, (2) a motion to dismiss based on forum non conveniens, and (3) a special motion to strike pursuant to CCP § 425.16.

Defendants were required to reserve three separate hearing dates and pay the fees for three separate motions. Instead, Defendants' initial reservation only indicated "1" motion: the motion to quash service of the summons. Combining multiple motions under the guise of one motion with one hearing reservation manipulates the Court Reservation System, disrupts the Court's calendar, and unfairly jumps ahead of other litigants. Moreover, combining motions to avoid payment of separate filing fees deprives the Court of filing fees it is otherwise entitled to collect.

Generally speaking, when a party improperly combines several motions in one, this Court will only consider the motion that was reserved and for which fees were paid, and the other motions will be taken off calendar or continued. Here, the Court continued the hearing and directed Defendants to remedy the situation by paying two additional filing fees. While Defendants have complied with this order, this does not ameliorate the problem of having three significant motions being heard in a single morning in one case.

Accordingly, the Court will consider both the motion to quash and the motion to dismiss – both of which would moot the special motion to strike if granted – but will CONTINUE the special motion to strike to September 28, 2021, at 8:30 a.m. No further briefing is allowed.

Motion to Quash Service of Summons

Plaintiff's Request for Judicial Notice

Plaintiff requests judicial notice of (1)-(4) various web pages and (5) an article on social media use in American counties.

Requests 1 to 4 are GRANTED as to the *existence* of these web pages, not the truth of their contents, per Evidence Code § 452(h) (matters not reasonably subject to dispute and capable of immediate and accurate determination).

Request No. 5 is DENIED. Plaintiff has not articulated any basis on which the contents of this article could be judicially noticed, and its existence alone is irrelevant to the issues herein.

Analysis

Defendants purport to move to quash service of the summonses issued to them. However, as Plaintiff notes, Defendants have made no separate argument in support of this purported

motion in their memorandum of points and authorities. Rather, they appear to view their special motion to strike as a proper vehicle through which to move to quash service of the summonses.

"The court may construe the absence of a memorandum as an admission that the motion . . . is not meritorious and cause for its denial." (CRC 3.1113(a).) Defendants' only passing reference to personal jurisdiction is in the context of their special motion to strike, not as a separate basis on which to quash service. Defendants attempt to make this type of argument in their reply, but arguments raised for the first time in reply generally are not considered absent a showing of good cause for not raising the arguments earlier, and Defendants have shown none here. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."].)

The Court finds, nonetheless, that Defendants' failure to frame their personal jurisdiction challenge in their legal memorandum is an outgrowth of their improper joinder of three motions in one pleading. Having permitted the motions to be heard, albeit with the issuance of some corrective orders, it would be inconsistent to eschew consideration of the personal jurisdiction argument that is at the core of the motion to quash, simply because of how it is framed in the improperly conjoined motion papers. Accordingly, the Court will address the personal jurisdiction issue raised in the notice of the motion to quash as though it were separately addressed in some fashion in the briefing.

Plaintiff does not claim that there is general jurisdiction over Defendants, who are Illinois and Oklahoma residents. The question is, therefore, whether Plaintiff has met his burden to show that exercising specific jurisdiction over these Defendants comports with due process.

"Specific jurisdiction may be asserted where the defendant has purposefully availed himself of forum benefits and the controversy is related to or arises out of the defendant's contacts with the forum." (*Hall v. Laronde* (1997) 56 Cal.App.4th 1342, 1346.) (Citation omitted.) Sufficient minimum contacts for specific jurisdiction exist when a nonresident "'deliberately' has engaged in significant activities within a [s]tate . . . or has created 'continuing obligations' between himself and residents of the forum." (*Ibid.*) The exercise of specific jurisdiction must also be fair and reasonable. (*Anglo Irish Bank Corp., PLC v. Superior Court* (2008) 165 Cal.App.4th 969, 980.)

> When determining whether specific jurisdiction exists, courts consider the "relationship among the defendant, the forum, and the litigation." . . . A court may exercise specific jurisdiction over a nonresident defendant only if: (1) "the defendant has purposefully availed himself or herself of forum benefits" . . . ; (2) the "controversy is related to or 'arises out of' [the] defendant's contacts with the forum" . . . ; and (3) "the assertion of personal jurisdiction would comport with 'fair play and substantial justice'" . . . .

(*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062.)

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The "'purposeful availment' requirement ensures that a defendant will not be hailed into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 474.)

Once it has been determined that a defendant purposefully established minimum contacts, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." (*Id.* at 476.) Factors to consider are "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." (*Asahi Metal Industry Co., Ltd., v. Superior Court of California, Solano County* (1987) 480 U.S. 102, 113.) A court must "also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of the controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'" (*Ibid.* [citing *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 292].)

Here, Defendant asserts that "Courts consistently hold that posting on social media about a California resident by itself does not establish personal jurisdiction in California." However, the case that Defendant relies on for this proposition, *Burdick v. Superior Court* (2015) 233 Cal.App.4th 8, is distinguishable. In the Facebook post at issue in that case, the plaintiffs were not mentioned by name. (*Id.* at 16.) Here, in contrast, the tweets specifically mention Plaintiff by name.

The *Burdick* court applied the test laid out in *Calder v. Jones* (1984) 465 U.S. 783, to conclude that specific jurisdiction was not appropriate based on the facts of that case. Here, however, the facts compel the opposite conclusion, at least with respect to Defendant Barrows. As described in *Burdick*, the *Calder* effects test requires a plaintiff to show "(1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm caused by that tort in the forum state such that the forum state was the focal point of the plaintiff's injury; and (3) the defendant expressly aimed the tortious conduct at the forum state such that the forum state was the focal point of the tortious activity." (*Burdick, supra*, 233 Cal.App.4th at 20.) The latter requirement is interpreted to mean that the "defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum." (*Ibid.*)

Here, Plaintiff has come forward with evidence to satisfy this showing as to Defendant Barrows. To the extent that he relies on allegations in his unverified complaint, he has not presented admissible evidence. An "unverified complaint has no evidentiary value in determination of personal jurisdiction." (*Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 710.) Plaintiff has submitted evidence, however, that Plaintiff has felt the brunt of the harm in California, where he resides and works. (Declaration of Christopher Avellone ¶¶ 27-29.) Plaintiff also presents evidence that Defendant Barrows knew that Plaintiff would suffer the brunt of the harm in California and specifically aimed conduct at California and Plaintiff's colleagues in the California gaming industry, by launching an accusation against Plaintiff in response to a tweet from a California-based entertainment website promoting an interview with Plaintiff, which predictably provoked responses from several of Plaintiff's former colleagues at Electronic Arts, Inc., which is based in California (Avellone Decl. ¶¶ 25-26 & Exhs. 11-12.) In addition, as noted

above, Defendant Barrows' tweets referred to Plaintiff by name, knowing that he resides and works in California and would suffer the brunt of the harm there. (Avellone Decl. ¶¶ 25, 26.)

Plaintiff's evidence regarding Defendant Bristol's ties with California does not satisfy the standard for exercising personal jurisdiction, however. Unlike with Defendant Barrows, Plaintiff does not submit evidence that Defendant Bristol knew that Plaintiff lived and worked in California gaming industry. (Avellone Decl., ¶ 25 and Exh. 11 [evidence relates solely to Defendant Barrows].) Further, Defendant Bristol's charges against Plaintiff were not made in the context of promotional press issued on a California-based website to an audience that predictably including Plaintiff's co-workers from Electronic Arts. Plaintiff's evidence of aggressive outreach from Defendant Bristol to Californian targets or of any aimed attacks is lacking. Instead, the communications between Defendant Bristol and members of the gaming industry relate to pet cats, donating blood, and another disgraced gaming industry employee. (Exh. 13.)

Accordingly, the motion to quash is DENIED as to Defendant Barrows and GRANTED as to Defendant Bristol.

Motion to Dismiss for Forum Non Conveniens

Defendants also move to dismiss the complaint based on the doctrine of forum non conveniens. While Defendant Bristol's motion has been mooted by the order granting her motion to quash, the Court addresses the forum non conveniens arguments raised on behalf of Defendant Barrows, who resides in Illinois.

CCP § Section 410.30(a), which codifies the doctrine of forum non conveniens,[1] states: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." "On a motion for forum non conveniens, **the defendant, as the moving party, bears the burden of proof**. The granting or denial of such a motion is within the trial court's discretion, and substantial deference is accorded its determination in this regard." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751, bold emphasis added.)

> In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest

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[1] "Code of Civil Procedure section 410.30, subdivision (a), is a statutory codification of the doctrine of forum non conveniens. . . ." (*Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493 n.1.)

factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. (Citations omitted.)

(*Stangvik, supra*, 54 Cal.3d 744, 751.)

The balancing of private and public interests is a task squarely within the trial court's discretion. (Citation omitted.) . . . As noted in *Stangvik*, the analysis is twofold. "In determining whether to grant a motion based on forum non conveniens, the court first must make a threshold determination whether the alternate forum is a suitable place for trial. [Citations.] This is a nondiscretionary determination. [Citation.]" (Citations omitted.) Indeed, in *Stangvik* the Supreme Court expressly rejected defendants' suggestion that the suitability of the alternative forum is part of the discretionary determination of the balance of conveniences. (Citation omitted.) Only if it finds the alternative forum suitable does the court proceed to the discretionary exercise of balancing the private interests of the litigants and the interests of the public in retaining the action in California. (Citation omitted.) In assessing suitability, however, "There is no balancing of interests in this decision, nor any discretion to be exercised." (Citation omitted.) . . . .

(*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 436.)

Here, Defendant Barrows has not demonstrated that Illinois will provide a more suitable venue for trial. She has not shown, for example, that any witness or evidence outside of California will be needed at trial; nor has she shown that a trial in Illinois would be any more convenient for witnesses or on any other basis.

Moreover, because Plaintiff is a California resident, his choice of forum is presumed to be convenient.

Next we consider **the effect of the residence of the parties in deciding a motion based on forum non conveniens**. Many cases hold that **the plaintiff's choice of a forum should rarely be disturbed unless the balance is strongly in favor of the defendant**. . . . **But the reasons advanced for this frequently reiterated rule apply only to residents of the forum state: (1) if the plaintiff is a resident of the jurisdiction in which the suit is filed, the plaintiff's choice of forum is presumed to be convenient . . . ; and (2) a state has a strong interest in assuring its own residents an adequate forum for the redress of grievances** . . . . Indeed, until the recent amendment of section 410.30, dismissal of an action (as opposed to a stay) was ordinarily not permitted on the basis of inconvenient forum if the plaintiff was a California resident.

. . .

> **Before deciding whether the private convenience of the parties weighs in favor of plaintiffs or defendants, we consider the interests of the California public in retaining the trial of the actions in this state.** *Piper* held that **the jurisdiction with the greater interest should bear the burden of entertaining the litigation**. . . .

(*Stangvik, supra*, 54 Cal.3d at 754-756, bold emphasis and underlining added.)

Here, California unquestionably has a greater interest in this action than Illinois would. Defendants have not met their burden of demonstrating that the balance of private and public interests favors an action in Illinois; indeed, Defendants did not devote any discussion to the public interest factors, and very little to the public factors.

> The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation.

(*Id.* at 751.)

As noted above, "[o]n a motion for forum non conveniens, **the defendant, as the moving party, bears the burden of proof**. The granting or denial of such a motion is within the trial court's discretion, and substantial deference is accorded its determination in this regard." (*Ibid.*) Here, Defendant Barrows has not met her burden.

Accordingly, the motion to dismiss on the ground of forum non conveniens is DENIED.

Defendants' special motion to strike is CONTINUED to September 28, 2021, at 8:30 a.m. No further briefing allowed.

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IT IS SO ORDERED.

Dated: September 16, 2021

Theresa M. Traber
Judge of the Superior Court