Supreme Court, New York County, New York.
Jonathan DAVIDOFF, Plaintiff,
v.
Stanley Robert DAVIDOFF and Ila Davidoff-Feld, Defendants.
No. 101728/06.
May 10, 2006.

CAROL R. EDMEAD, J.
In this "website tampering" action, the defendants, Stanley Robert Davidoff ("Dr.Davidoff") and his wife, Ila Davidoff-Feld ("Mrs.Feld")[1] (collectively, "defendants"), move pursuant to CPLR 3211(a)(8) to dismiss the amended complaint[2] of the plaintiff, Jonathan Davidoff ("plaintiff") for lack of jurisdiction, and, pursuant to NYCRR 130-1.1, for sanctions, attorneys' fees and costs. The plaintiff opposes the motion in its entirety.

Factual Background

The plaintiff created and owns the contents of a website, www.JonathanDavidoff.com ("the Website"), which displays both personal and professional information of the plaintiff. On the Website, plaintiff displays photographs of himself and his family, his resume, and professional achievements. Plaintiff posted all of this content from his computer in New York. Plaintiff advertised his Website and instructed many people, including his New York clients, potential clients, and business contacts, to review his resume on the Website. Although plaintiff posted the contents of the Website from his computer in New York, it is undisputed that the Website's hosting service, Valueweb.com (the "Hosting Company"), is located in Florida.

On February 20, 2005, the defendants, his uncle and aunt, respectively, without permission or authority, allegedly entered the Website from their home computer in Florida, deleted all of the files on the Website, and placed their own picture of the plaintiff on the Website, with phrases such as "Pig of the Year," and "I'm going to eat everything in site," next to the plaintiff's picture. The plaintiff denies ever receiving such title or ever eating "everything in site." Plaintiff discovered these changes on February 24, 2005, and alleges that between February 20, 2005 and February 24, 2005, "people accessed [the][w]ebsite and saw the replaced content that [the] defendants ... placed on the website ." Consequently, plaintiff commenced this action for destruction of personal property, defamation, intentional infliction of emotional distress, tortious interference with a business, computer trespass, and computer tampering.

Jurisdictional Background

Plaintiff has resided in New York since 2003, and has been licensed to practice law in New York since 1999.

With respect to long arm jurisdiction, both defendants, Dr. Davidoff and Mrs. Feld, reside in Florida. Dr. Davidoff is a prothodontist, whose dentistry practice is located exclusively in Florida. He also holds inactive licenses to practice dentistry in New York and California. Mrs. Feld is an attorney admitted to practice law in Florida and New York. Mrs. Feld's practice is also located exclusively within Florida. Neither Dr. Davidoff nor

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[1] Mrs. Feld states that she has never been known as Ila Davidoff Feld. She claims that her maiden name is Feld, and that her social security card, income tax returns, and Florida driver's license bear the named Ila Feld Davidoff.

[2] In its opposition to the motion, the plaintiff submitted an amended complaint. In the defendants' reply thereto, defendants requested that their motion be applied to such complaint since the amended pleading did not significantly change the nature of the action. Thus, the court will apply the motion to the amended complaint.

Mrs. Feld conducts any business in New York, has any offices or employees in New York, or own property in New York. Neither of them has derived any substantial revenue within New York since 1990. Also, neither of them derives any substantial revenue from interstate or international commerce.

With respect to service of process, Charles Beneby ("Beneby"), a certified Florida process server, attests that on February 9, 2006, upon the direction of the plaintiff, he went to the defendants' home, rang the door bell, and, when a woman answered the door, identified himself as a process server. When the woman identified herself as Ila Feld-Davidoff, he stated that he was there to serve her and Dr. Davidoff with a lawsuit. Beneby then personally served Mrs. Feld.

After Beneby heard a man's voice from inside the house, Mrs. Feld told Beneby that the man was Dr. Davidoff. Beneby asserts that when Mrs. Feld told Dr. Davidoff that Beneby had papers for him, Beneby heard the man say to Mrs. Feld, "just take it." Beneby then asked Mrs. Feld if she was accepting service on Dr. Davidoff's behalf, and she responded in the affirmative. Beneby then served Dr. Davidoff by substituted service by providing Mrs. Feld with an additional copy of the summons and complaint. On February 14, 2006 the plaintiff claims to have mailed a copy of the summons and complaint to the defendants at their home in Florida via first-class mail.

Dr. Davidoff, on the other hand, claims that he was never personally served with the complaint, nor did he authorize anyone to accept the complaint on his behalf. Dr. Davidoff and Mrs. Feld state that Dr. Davidoff was playing golf at a golf course located within his community at the time the process server alleges he came to the defendants' house. Mrs. Feld avers that she has never been authorized to accept service on Stanley's behalf, and she did not accept service on his behalf. Defendants also deny ever consenting to the jurisdiction of New York for this action.

Contentions of the Parties

The Defendants' Motion

The defendants contend that the Court lacks jurisdiction over them pursuant to CPLR 301 since defendants do not reside in New York, have not consented to service of process in New York, are not "doing business" in New York, and have no offices or employees in New York. Therefore, defendants argue, there is no showing that the defendants have engaged in a continuous and systematic course of doing business in New York so as to warrant a finding of presence in New York.

The defendants also contend that jurisdiction under CPLR 302(a)(1) is lacking, given that they have not transacted business in New York, and have had no contacts with New York sufficient to establish that they purposefully availed themselves of the privileges of conducting business in New York.

The defendants also maintain that a New York court may not exert personal jurisdiction over them under CPLR 302(a)(2) since the defendants have not committed a tortious act within the state. The defendants note that the amended complaint does not identify any act allegedly committed by the defendants that occurred in New York. Instead, the amended complaint alleges that defendants' conduct occurred from a Florida residence through a Florida internet server to a computer located in Florida.

In addition, the defendants contend that personal jurisdiction under CPLR 302(a)(3) is lacking, since plaintiff has not established that the alleged injury occurred in New York. The defendants submit that since the injury is considered to have taken place where the "critical events" related to the dispute took place, and such events took place in Florida, that the damages are felt in New York is insufficient for jurisdictional purposes. Also, the alleged injury was to the Website data, which was located on a computer located in Florida. Moreover, the defendants argue, they do not regularly solicit business in New York, engage in any persistent conduct in New York or derive substantial revenue from services rendered in New York, and could not have reasonably expected their alleged tortious activity outside of New York to have direct consequences in New York.

Alternatively, defendants argue that even if the requirements of CPLR 301 or 302 are met, the exercise of personal jurisdiction over them would violate due process. Since they do not have minimum contacts with New York, any exercise of personal jurisdiction over them would not comport with traditional notions of fair play and substantial justice.
The defendants also contend that in any event, the action must be dismissed as against Dr. Davidoff because service of process was improper. Defendants claim that plaintiff failed to mail the summons and complaint to either Dr. Davidoff's last known address or actual place of business as required for substituted service. The defendants also point out that the affidavits of service are not notarized. And, defendants' eventual receipt of the summons and complaint does not compel a different result.
Finally, the defendants assert that the plaintiff's action constitutes frivolous conduct pursuant to 22 NYCRR 130-1.1, and the court should impose sanctions on the plaintiff and direct that plaintiff pay the defendants' costs and legal fees.

The Plaintiff's Opposition
The plaintiff alleges that the Court has personal jurisdiction over the defendants pursuant to CPLR 302(a)(2). In support, the plaintiff points out that Courts have held that in this age of instant communications *via* telephone, facsimile and the internet, physical presence of the defendants in New York is not required for a finding of a tortious act within the state. The plaintiff notes that the court should place emphasis on the locus of the tort, not physical presence, when determining a jurisdictional issue. The plaintiff submits that New York was the locus of the alleged tortious act since the plaintiff's computer is located within New York, and the content of plaintiff's Website originated from plaintiff's computer in New York. Therefore, plaintiff argues, it is "wholly immaterial" that the plaintiff's Website was hosted by a Florida internet server. Also, 302(a)(2) jurisdiction exists since the defendants deliberately targeted the plaintiff's New York-based business and projected themselves into New York. Plaintiff argues that this is not an instance where the website is a passive site with customers scattered throughout the country. Further, in a cause of action arising from a posting on an internet website, personal jurisdiction will lie in the state where the cause of action is filed if the posting is intended to target internet users in the state where the action is filed.
Furthermore, the plaintiff contends, exerting personal jurisdiction over the defendants would not offend constitutional due process standards, since defendants deliberately projected themselves into New York in order to target the plaintiff. However, the plaintiff argues, it would offend due process to require him to seek recovery for his injuries in Florida, since such a pursuit would be unfair and an undue burden on the plaintiff, who did not ask for the alleged tortious acts to be taken against him.
With respect to service of process upon Dr. Davidoff, the plaintiff argues that a defendant who has a duty to accept service of process but refuses such service may be considered properly served if the summons and complaint are left in the defendant's general vicinity, which was done in this case. Further, Beneby left the papers with Mrs. Feld, a person of suitable age and discretion, who resides in Dr. Davidoff's home, and plaintiff mailed a copy of the summons and complaint to the defendants' residence. The plaintiff submits that such mailing rendered service effective. And, any delay in filing the proof of service "is not jurisdictional in nature," but merely a procedural irregularity that extends a defendant's time to appear. Also, the plaintiff notes that dismissal based on improper service would by erroneous because, at the very least, the plaintiff's affidavit creates an issue of fact as to whether the papers were mailed.
Finally, the plaintiff opposes sanctions, attorneys' fees, and costs, arguing that ample legal basis for personal jurisdiction over the defendants has been offered, and that his action was neither made in bad faith, nor frivolous.

The Defendants' Reply

The defendants contend that plaintiff's sole basis for personal jurisdictional, CPLR 302(a)(2), specifically excludes claims for defamation and libel, thereby warranting dismissal of the second cause of action.

The defendants also contend that the plaintiff's new allegations that both defendants have New York professional licenses are without merit, and such licenses are irrelevant to the jurisdictional issue herein.

Furthermore, the plaintiff's contention that the defendants "deliberately and maliciously" targeted the plaintiff's New York-based business, is insufficient to establish New York as the locus of the alleged tortious acts. To the contrary, the defendants argue, caselaw associated with CPLR 302(a)(2) holds that personal jurisdiction will only attach when the perpetrator of the alleged misconduct commits the tortious acts while physically present in New York. In addition, the defendants assert that plaintiff's citations to caselaw to support his position that jurisdiction attaches in the state where the target of an internet posting is located, are inaccurate and inapplicable. Instead, caselaw holds that personal jurisdiction cannot be conferred by CPLR 302(a)(2) when a person physically present outside New York makes a tortious internet posting that can be viewed by persons within New York. Furthermore, the defendants assert that the locus of the tort is the place where the postings occur, not where the harm was felt or directed.

Additionally, the defendants contend that they could not have "deliberately and maliciously" targeted the plaintiff's New York-based "business" because the Website is a "personal website with no specific connection to New York or [the][p]laintiff's business."

Finally, the defendants contend that Dr. Davidoff was not properly served because he was not present at home at the time of the process server's appearance. Also, the defendants claim that the plaintiff only served Mrs. Feld at the defendants' home, and service on one resident of a home does not count as service on all the residents of that home.

Analysis

Personal Jurisdiction

The burden of proving jurisdiction is upon the party asserting it, and when challenged on jurisdiction, such party must sustain that burden by preponderating proof (*Saratoga Harness Racing Assn. v. Moss,* 20 N.Y.2d 733, 283 N.Y.S.2d 55 [1967]; *Jacobs v. Zurich Ins. Co.,* 53 A.D.2d 524, 384 N.Y.S.2d 452 [1st Dept 1976]).

The extent to which a court may exercise personal jurisdiction over a nondomiciliary without violating the Due Process Clause of the Constitution was defined in the Supreme Court's opinion in *International Shoe Co. v. Washington* (326 U.S. 310 [1945]). In order to subject a defendant to a judgment *in personam,* "if he be not present within the territory of the forum, he [must] have certain minimum contacts" with the forum state such that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice" (*International Shoe Co. v. State of Wash., supra* at 615; *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 [1980]; *see also Indosuez International Finance B.V. v. National Resrve Bank,* 98 N.Y.2d 238, 746 N.Y.S.2d 631 [2002]). However, New York has not seen fit to permit its courts to exercise the full range of personal jurisdiction permitted by the Constitution (*Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L.,* 174 F Supp 2d 170 [SDNY 2001]). Rather than codifying the *International Shoe* minimum contacts test, New York enacted CPLR 302, a narrower long arm statute, which requires that a defendant's minimum contacts with New York meet one of the additional enumerated factors before a New York court will be permitted to exercise specific personal jurisdiction over that defendant (*Mario Valente Collezioni, Ltd., id*).

Based on the submissions, only CPLR § 302(a)(2) is relevant in this instant motion.

CPLR 302(a)(2) provides that

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through

an agent:
* * *
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; ...
At the outset, the Court determines that to the extent plaintiff's complaint alleges a cause of action for defamation (second cause of action), such claim does not give rise to personal jurisdiction over an out-of-state defendant (*see Pontarelli v. Shapero,* 231 A.D.2d 407, 647 N.Y.S.2d 185 [1st Dept 1996] [finding no basis to exercise "long-arm" jurisdiction over the nondomiciliary defendants under CPLR § 302(a)(2) where the only tort alleged to have been committed was defamation of character]).

The remaining causes of action require a more detailed, yet straightforward application of principles garnered from a variety of cases analyzing personal jurisdiction under CPLR § 302(a)(2) over nondomicilliaries. The issue is whether under the facts herein, this Court may exercise personal jurisdiction over the defendants under CPLR § 302(a)(2) where defendants, though not physically present in New York, allegedly commit tortious acts on an internet website created by plaintiff, thereby injuring plaintiff in New York. Relying on a few lower federal court cases, the plaintiff maintains that the defendants need not be physically present in New York when committing their alleged tortious acts in order to be subject to personal jurisdiction in New York under CPLR 302(a)(2). Citing to other lower federal and state cases, the defendants maintain otherwise. New York law is unsettled as to whether defendants' physical presence in New York while committing the tortious act is a prerequisite to jurisdiction under CPLR § 302(a)(2).
The Court's attention must first be given to the seminal Court of Appeals case, *Feathers v. McLucas* (15 N.Y.2d 443, 261 N.Y.S.2d 8 [1965]). In *Feathers,* a personal injury case, the Court of Appeals declined to exercise personal jurisdiction over a Kansas corporation that allegedly negligently designed and constructed a tractor-drawn steel tank in Kansas, which subsequently exploded on a New York highway. In finding that CPLR § 302(a)(2) did not apply, the New York Court of Appeals reasoned:
The language of paragraph 2 conferring personal jurisdiction over a nondomiciliary "if, in person or through an agent, he ... commits a tortious act within the state" is too plain and precise to permit it to be read ... as if it were synonymous with "commits a tortious act without the state which causes injury within the state." The mere occurrence of the injury in this State certainly cannot serve to transmute an out-of-state tortious act into one committed here within the sense of the statutory wording. Any possible doubt on this score is dispelled by the fact that the draftsmen of section 302 pointedly announced that their purpose was to confer on the court personal jurisdiction over a non-domiciliary whose *act in the state* gives rise to a cause of action....
(emphasis added) (15 N.Y.2d at 460).
A year later, the Court of Appeals in *Platt Corp. v. Platt,* (17 N.Y.2d 234, 270 N.Y.S.2d 408 [1966]), addressed jurisdiction under 302(a)(2) again. In *Platt,* the plaintiff sued the defendant in tort for a failure to attend directors' meetings in New York and in neglecting to perform in New York any of his duties as director, resulting in loss to the corporation. Plaintiff claimed that "failing to leave Florida and come to New York to attend the meetings or to do anything about the management of the corporation constituted tortious acts or omissions committed in New York, the place for the proper performance of his duties." ' However, in declining to find jurisdiction under CPLR § 302(a)(2), the Court of Appeals reasoned that the "failure of a man to do anything at all when he is physically in one State is not an act' done or committed' in another State." The Court of Appeals continued: The defendant's decision not to act and his not acting are both personal events occurring in the physical situs. That they may have consequences elsewhere does not alter their personal localization as acts. According to the Court, both the plain words of the statute and *Feathers* (citations omitted) demonstrate that "no tortious act was, under the stipulated facts, committed in New York by defendant" (*see also, Twine v. Levy,* 746 F Supp 1202 [EDNY 1990] [legal malpractice premised on failure to object in defense of plaintiff's case during trial in

Washington does not constitute an act within this State; "the alleged tortious act occurred in Washington where defendant Levy failed to object to the presentence report"]).

Feathers and CPLR 302(a)(2) have therefore been construed, by both lower federal and state courts, as tantamount to requiring that defendant be physically present within the state while coming the tort (*see Northrop Grumman Overseas Serv. Corp. v. Banco Weise Sudameris,* 2004 U.S. dist Lexis 19614 [SDNY 2004] [though requiring that defendant be physically present in New York to commit the alleged tort, the Court looked to where the telexes containing the fraudulent demand for payment originated, and noting that the telexes were allegedly sent from Peru]; *see also, Bensusan Rest. Corp. v. King,* 126 F 3d 25 [2d Cir1997] ["*Feathers* adopted the view that CPLR § 302(a)(2) reaches only tortious acts performed by a defendant who was physically present in New York when he performed the act"], citing, *Bialek v. Racal-Milgo, Inc.,* 545 F .Supp. 25, 35 [SDNY1982][defendant must have been present in New York when making the misrepresentation] and *Beckett v. Prudential Ins. Co.,* 893 F Supp 234, 239 [SDNY1995]; *Kinetic Instruments, Inc. v.. Lares,* 802 F Supp 976, 982-83 [SDNY1992]; *Department of Economic Dev. v. Arthur Andersen & Co.,* 747 F Supp 922, 929 [SDNY1990]; *Van Essche v. Leroy,* 692 F Supp 320, 324 [SDNY1988]; *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.,* 657 FSupp 1040, 1052-53 [SDNY1987]; *Bulk Oil (USA) Inc. v. Sun Oil Trading Co.,* 584 FSupp 36, 40-41 [SDNY1983]; *Paul v. Premier Elec. Constr. Co.,* 576 F Supp 384, 389 [SDNY1983]; *Selman v. Harvard Medical Sch.,* 494 F Supp 603, 612-13 [SDNY], *aff'd mem.,* 636 F.2d 1204 [2d Cir1980]; *Marine Midland Bank v. Keplinger & Assocs., Inc.,* 488 FSupp 699 [SDNY1980]; *Lynn v. Cohen,* 359 F Supp 565, 568 [SDNY1973]; *Bauer Indus. Inc. v. Shannon Luminous Materials Co.,* 52 A.D.2d 897, 897-98 [2d Dept 1976] (mem.); *Glucoft v. Northside Sav. Bank,* 86 Misc.2d 1007, 1008-09, 382 N.Y.S.2d 690 [NY Civ Ct 1976]; *Gluck v. Fasig Tipton Co.,* 63 Misc.2d 82, 84, 310 N.Y.S.2d 809 [NY Sup Ct 1970]; *Balogh v. Rayner-Smith,* 51 Misc.2d 1089, 1092, 274 N.Y.S.2d 920 [NY Sup Ct 1966]; *see also, Alexander, Practice Commentaries, McKinney's Cons Laws of NY,* Book 7B, CPLR C302:10 [supposing that "if a New Jersey domiciliary were to lob a bazooka shell across the Hudson River at Grant's tomb, *Feathers* would appear to bar the New York courts from asserting personal jurisdiction over the New Jersey domiciliary under § 302(a)(2) in an action by an injured New York plaintiff"]).

For example, in *Bensusan,* the plaintiff, Bensusan Restaurant Corporation, creator and owner of "The Blue Note," a renowned jazz club in New York City, brought an action against a Missouri resident, Richard King, who operated a small cabaret club in Missouri also called "The Blue Note," for among other things, trademark infringement. Defendant allegedly created a website on the internet describing his cabaret and its events. The Second Circuit affirmed the District Court's dismissal of the plaintiff's case, partly due to the lack of personal jurisdiction over the defendant under CPLR § 302(a)(2). The Second Circuit found that since the acts giving rise to the plaintiff's lawsuit "were performed by persons physically present in Missouri and not in New York ... [,][e]ven if [the plaintiff] suffered injury in New York, ..." such acts do not "establish a tortious act in the state of New York within the meaning of CPLR 302(a)(2)." The *Bensusan* court further stated that "[i]n the absence of some indication by the New York Court of Appeals that its decision[ ] in *Feathers* no longer represents the law of New York, we believe it would be impolitic for this Court to hold otherwise" (*Bensusan,* 126 F3d 25, *supra*).

However, upon this Court's further study of *Feathers* and *Platt,* and the statute at bar, it becomes apparent to this Court that the *Feathers* court sought to mainly distinguish those torts committed out-of-state but producing in-state consequences (CPLR § 302(a)*(3)*) from those *torts that are actually committed in state* (*see Pilates, Inc. v. Pilates Inst., Inc.,* 891 F Supp 175 [1995] [stating that the *Feathers* court was "simply noting that the place of injury is not necessarily the place where the tort is deemed to have occurred for legal purposes"]). As articulated by the United States District Court in *Pilates, Inc. v. Pilates Institute, Inc.,* (891 F Supp 175 [1995]) "the more accurate interpretation of both the language of § 302(a)(2) and of the Court of Appeals in

Feathers is that they require, as a prerequisite to the exercise of personal jurisdiction, that the tort that is the subject of the dispute have been committed in the state." Examination of CPLR § 302(a)(2) and study of the caselaw cited by commentary and defendants reveal that defendants' actual presence within New York is not necessarily a prerequisite to jurisdiction under CPLR § 302(a)(2), provided the tortious act itself, committed by defendant, occurs within New York State. While some torts, by their nature, such as assault and battery, would ordinarily occur *while* the defendant is physically present in the State, not all tortious acts that occur within the State of New York need be committed while the defendant is physically present within New York boundaries for purposes of CPLR § 302(a)(2). In other words, depending on the nature of the tort, the tortious act of defendant could occur in New York while defendant is physically present outside the boundaries of New York, and jurisdiction under 302(a)(2) may lie.

This view was adopted and applied in *Banco Nacional Ultramarino v. Chan,* 169 Misc.2d 182 [Supreme Court New York County 1996], unanimously affirmed for the reasons stated by the Supreme Court, 240 A.D.2d 253 [1st Dept 1997]), where jurisdiction was found based on the locus of the tort. In *Banco,* personal jurisdiction under CPLR § 302(a)(2) was sought over non-resident investment companies for their alleged acts of conversion. The defendants in *Banco* allegedly directed a conspiracy from outside the physical boundaries of New York to convert and launder funds from the plaintiff. The court found *Feathers* "inappropriate and inapplicable," and reasoned that

to allow a defendant to conspire and direct tortious activities in New York, in furtherance of that conspiracy, and then avoid jurisdiction because it directs those activities from outside the State ..., is to ignore the reality of modern banking and computer technology in the end of the 20th century! A defendant with access to computers, fax machines, etc., no longer has to physically enter New York to perform a financial transaction which may be ... tortious, i.e., conversion....[T]he emphasis should be on the locus of the tort, not whether defendant was physically here when the tortious act occurred. Once the court finds that the tort occurred *within* the State, it should look at the totality of the circumstances, to determine if jurisdiction should be exercised under CPLR 302(a)(2).[3]

Similarly, in *Citigroup Inc. v. City Holding Co.* (97 F Supp 549 [SDNY 2000]), a trademark infringement case, in which jurisdiction under CPLR § 302(a)(2) was found over a West Virginia company which sent mailings to New York residents to solicit their business. The mailings sent to New York displayed the allegedly infringing marks. In determining whether jurisdiction may be found under 302(a)(2), the Court first noted that *"trademark infringement occurs where the attempted passing off of an infringing mark occurred"* (emphasis added). The Court then concluded that the "attempt to pass off the allegedly infringing marks, which is allegedly tortious conduct, occurred within New York because that is where the marks were received and viewed by the direct mailing recipients." With respect to defendants' display of the infringing mark on its website, the Court held that, to the extent that defendant's "on-line chat' " involve the "transmission of messages that contain allegedly infringing marks to New York residents," such defendant should be deemed to have attempted to pass of the mark within New York rather than outside it" *(see also Morgenthau v. A.J. Travis Ltd.,* 184 Misc.2d 835, 708 N.Y.S.2d 827 [Supreme Court New York County 2000] [a cause of action for fraudulent conveyance is a species of tort; most of the proceeds of defendant's alleged criminal enterprise were earned in New York, deposited in his New

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[3] *Cf. Northrop Grumman Overseas Service Corp. v. Banco Weise Sudameris,* 2004 U.S. Dist LEXIS 19614 [SDNY 2004] [rejecting *Banco's* holding as it relates to CPLR 302(a)(2), noting that the "Court of Appeals decided *Bensusan* ... after ... *Banco* ... and nevertheless held that physical presence is required]).

York banking accounts and then fraudulently conveyed to the defendants; since New York was intimately involved *in the conveyance,* the alleged tort may be said to have been committed in this State; for jurisdiction to be so acquired, it is not necessary that the defendant be physically present in the State]) (emphasis added); *see Polish v. Threshold Tech. Inc.,* 72 Misc.2d 610 [Supreme Court New York County 1972][in a negligent misrepresentation case, the tort occurred when plaintiff received the letter in New York sent by defendant in New Jersey and read their representations, and relied on said representations to his detriment; defendant's tortious act occurred in New York where the contents of defendants' letter were perused and from where plaintiff parted with his stock certificates. "If the letter had never reached plaintiff, no tort would have been committed"]).

This Court adopts the view that physical presence of the defendant in New York is not a prerequisite to CPLR 302(a)(2), but instead, requires that the tortious act committed by defendant be one deemed to have been committed in New York. As such, the analysis therefore requires an initial determination as to where the alleged tortious act of defendant is deemed to have taken place.

To dispose of the purported requirement that CPLR 302(a)(2) jurisdiction be based on the physical presence of defendant in New York while the tortious act is committed, is not inconsistent with its reading of the Court of Appeals holdings in *Feathers, supra* or *Kramer v. Vogl* (17 N.Y.2d 27, 31, 267 N.Y.S.2d 900 [1966]). In this regard, it bears noting that the Court in *Feathers* stated that "The tortious act charged against the appellant that it improperly designed and assembled the tank indisputably occurred in the out-of-state manufacturing process in Kansas." In other words, the defective design occurred in Kansas. A year later, the Court of Appeals in *Kramer* declined to find jurisdiction under 302(a)(2) over Austrian defendants in a case alleging fraud. Plaintiff's complaint alleged damages resulting from defendants' "willful fraud and deceit ... when appointing plaintiff as defendants' exclusive United States agent to import and distribute defendants' leather products, [and] made intentionally false representations." The Court held that the allegation that the last act of the fraud was committed in New York when defendants sent merchandise to codefendants and that the damage to plaintiff was done in New York was insufficient. Noting that *Feathers* requires that "a defendant's act of omission occur within the State," and finding that everything defendants did "was done in Europe," jurisdiction was not found. In other words, the alleged misrepresentations and fraudulent activity occurred in Europe.

Nor does this Court's reading render CPLR 302(a)(3) superfluous or meaningless. Conceivably, a major toaster manufacturer which designs and manufactures toasters out-of-state, who then markets and sells its toasters in New York, one of which explodes in a New York kitchen, could be subject to jurisdiction under (a)(3) for the specific tort of negligent manufacture and design, and not be subject to jurisdiction under (a)(2), since the specific tort was not committed in New York, where the damages are felt, but was committed in the out-of-state manufacturing plant (of course provided that one of the subsections of (a)(3) are satisfied).

While this Court agrees with plaintiff's position that defendants' physical presence in New York during the commission of the tortious act is not a prerequisite to 302(a)(2) jurisdiction, this conclusion is of no avail to plaintiff under the particular facts herein.

Turning to the remaining torts at issue, the Court determines that personal jurisdiction over the defendants does not lie for plaintiff's claims for intentional infliction of emotional distress ("IIED") (third cause of action) and tortious interference with business opportunity (fourth cause of action). The tort of IIED occurs when the defendant engages in extreme and outrageous conduct, with the intent to cause, or with disregard of a substantial probability of causing, severe emotional distress, and there is a causal connection between defendant's conduct and plaintiff's severe emotional distress (*Howell v. New York Post Co., Inc.,* 81 N.Y.2d 115, 612 N.E.2d 699 [1993]). A claim for tortious interference with business opportunity (fourth cause of action) occurs when a defendant acts with the sole purpose of harming plaintiffs or employs "wrongful means," and such acts prevent plaintiff from entering into a specific business

relationship (*see Schoettle v. Taylor,* 282 A.D.2d 411, 723 N.Y.S.2d 665 [1st Dept 2001]). Defendants' tortious conduct, that is, the alleged extreme and outrageous conduct of defendants occurred in Florida, where they were located when they accessed the Website's Hosting Company and typed in the allegedly offensive materials onto plaintiff's Website.

Plaintiff's remaining claims for destruction of personal property (first cause of action), computer trespass (fifth cause of action), and computer tampering (fifth cause of action) are essentially claims for trespass to chattels. Generally, trespass includes an impingement on the right to possession, and has been applied to claims regarding interference with information stored on computers (*see School of Visual Arts v. Kuprewicz* (3 Misc.3d 278, 771 N.Y.S.2d 804 [2003]) [plaintiffs' complaint alleged that defendant caused "large volumes" of unsolicited job applications and pornographic e-mails to be sent to plaintiff by way of plaintiff's computer system, without their consent, these unsolicited e-mails have "depleted hard disk space, drained processing power, and adversely affected other system resources on plaintiffs' computer system"]). Defendants' alleged tortious conduct, that is, sending to plaintiff's Website unsolicited content, and causing a depletion or deletion of information therein, thereby adversely affecting the effectiveness of his website, constitutes a claim for trespass of chattel (*see also, CompuServe, Inc. v. Cyber Promotions, Inc.,* 962 F Supp 1015 [SD Ohio 1997][sending unsolicited commercial bulk e-mail states claim for trespass to chattels where it was shown that processing power and disk space were adversely affected]; *Hotmail Corp. v. Van$ Money Pie, Inc.,* 1998 WL 388389, 1998 U.S. Dist. LEXIS 10729 [ND Cal 1998][plaintiff may prevail on trespass to chattels claim upon proof that defendant's unsolicited e-mails filled up plaintiff's computer storage space]; *America Online, Inc. v. IMS,* 24 F Supp2d 548 [ED Va 1998]; *America Online, Inc. v. LCGM, Inc.,* 46 F Supp 2d 444 [ED Va 1998]).

A claim for trespass to chattels occurs when defendant intentionally, and without justification or consent, physically interferes with the use and enjoyment of plaintiff's personal property in plaintiff's possession, thereby causing harm to plaintiff (PJI 3:9). Although the alleged damage to plaintiff's information on the Website and/or plaintiff's Website itself was "felt" by plaintiff in New York, it is insufficient that the damages were felt by plaintiff in New York. The relevant inquiry is whether a tortious act occurred in New York by the defendants. The act of damaging the Website at best, occurred in Florida, where defendants were located when they typed on their computer and accessed the Website's Hosting Company in Florida. In the context of the internet, the content of plaintiff's Website cannot be deemed to be located wherever the content may be *viewed,* for jurisdictional purposes, as it has been held that the mere fact that the posting appears on the website in every state will not give rise to jurisdiction in every state (emphasis added) (*see Seldon v. Direct Response Tech.,* 2004 U.S. Dis Ct Lexis 5344 [SDNY 2004]).

However, that the contents of the Website and the Website itself was *maintained* in a server located in Florida is of particular relevance to plaintiff's property damage case, especially since, by this Court's estimation, such "property" is not located in New York. Thus, any "tortious act" of damaging plaintiff's property could not have occurred within New York. This case is unlike the trademark infringement cases, where the tort occurs upon the passing of the infringing mark and view of the infringement mark, or the conversion case where the tort occurs upon the occurrence of the improper banking transaction. Here, none of the tortious acts of the defendants occurred in New York. The result may have been different if the defendants tapped into and interfered with plaintiff's information located on a server or inside a computer physically situated in New York. However, the server here is located in Florida, and the alleged acts of the defendants never reached beyond the bounds of Florida into New York.

Furthermore, plaintiff's reliance on *Robert Diaz Assoc. Enterprises, Inc. v. Elete, Inc.,*

2004 U.S. Dist LEXIS 8620 (SDNY 2004), and *Lenahan Law Offices v. Hibbs,* 2004 WL 2966926 (WDNY 2004) is misplaced. In *Robert Diaz,* plaintiff alleged that defendants accessed plaintiff's internet service provider[4] where plaintiff's information was stored, copied all of plaintiff's designs and proprietary information it had completed for another entity, and used the stolen information to create a website. Although the Court noted that defendants arguably stole plaintiff's property from the server in Georgia, the Court found, as plaintiff points out, that the defendants' alleged conduct "was clearly aimed at a victim located in New York." However, this factor was appropriately considered by the Court under the second requirement of CPLR § 302(a)(3) (tortious act *outside* the state), as to whether defendants should have expected that their actions would harm plaintiff in New York. Thus, although defendants' alleged conduct herein was clearly aimed at plaintiff in New York, this fact has no relevance in CPLR 302(a)(2) analysis. Likewise, *Lenahan* offers no guidance on the issue at hand, since such case discussed jurisdiction under CPLR § 301.

Therefore, the plaintiff has failed to sustain his burden of establishing that this Court has personal jurisdiction over the defendants under CPLR 302(a)(2), and the action is dismissed in its entirety.[5]

Sanctions

The defendants' application for sanctions is denied. 22 NYCRR § 130-1.1 permits a court, in its discretion, to award sanctions for frivolous conduct. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party (22 NYCRR § 130-1.1). In light of the novel issues presented, it cannot be said that plaintiff's conduct was wilful, intentional, or frivolous, so as to warrant the drastic remedy of sanctions, attorneys' fees or costs.

Accordingly, it is hereby

ORDERED that the motion by the defendants, Stanley Davidoff and Ila Davidoff-Feld to dismiss plaintiff's amended complaint for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8), is granted. It is further

ORDERED that the defendants' request for sanctions, pursuant to 22 NYCRR § 130-1.1, and attorneys' fees and costs is denied. It is further

ORDERED that counsel for the defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

The foregoing constitutes the decision and order of the court.

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[4] An internet service provider is a company which provides other companies or individuals with access to, or presence on, the Internet. Most ISPs are also "Internet Access Providers," and provide extra services including "help with design, creation and administration of World-Wide Web sites, training and administration of intranets and domain name registration" (Dictionary.com)

[5] In light of this determination, the Court does not reach the merits of defendant Stanley's claim that service of process was improper.