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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JOAN A. MADDEN

J.S.C. _____ PART _____

Justice

Index Number : 110632/2009

HENDERSON, DOUGLAS JR.

VS.

PHILLIPS, LEE

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 110632-09

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED

JUL 02 2010

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: June 28, 2010

HON. JOAN A. MADDEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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DOUGLAS HENDERSON JR.,

Plaintiff,

INDEX NO. 110632/09

-against-

LEE PHILLIPS,

Defendant.

----------X

JOAN A. MADDEN, J.:

In this action for defamation based on internet communications, defendant Lee Phillips moves for an order pursuant to CPLR 3212(a)(5), (7) and (8) dismissing the complaint for lack of personal jurisdiction, for failure to state a cause of action and as time-barred by the statute of limitations.

Plaintiff Douglas Henderson Jr., pro se, commenced this action on July 27, 2009; Henderson is the "Director of Operations" for Garry Null & Associates, Inc.[1] The complaint alleges that defendant Phillips "is a resident of Washington, D.C.," and assets a first cause of action for defamation, seeking $2,000,000 in damages; a second cause of action for "false light" invasion of privacy, seeking $1,000,000 in damages; and a third cause of action for "injunctive

[1]On July 24, 2009, Garry Null & Associates, Inc. commenced a similar action for defamation against the same defendant in this action, Lee Phillips, Garry Null & Associates, Inc. v. Lee Phillips, Index No. 110508/09 (Sup Ct, NY Co). Phillips made a motion to dismiss the complaint in that action, on the identical grounds as in the instant motion. The court is issuing a decision and order granting that motion, simultaneously with the decision and order in the instant action.

relief directing defendant Phillips "to immediately and permanently take the aforementioned articles off of the Internet."

The first cause of action for defamation alleges that Phillips published false statements about Henderson on the internet, which caused "special harm to Henderson and his reputation," and "amount to defamation per se." As to the specific allegedly defamatory statements, the complaint alleges that on or about April 21, 2008, Phillips "wrote and placed an open letter on the Internet entitled 'My Response to Gary Null's Organization,'" stating "'I'll leave it to you to guess whether the review was written by Mr Henderson or Mr. Null himself. You will also find some very embarrassing and personal things about dhender499 in your Google search, but I'll resist the temptation to bring those up, as they are not relevant to the issue of Gary Null's radio show. The details are there for anyone to see, and provide an effective remainder to use the internet with care." The complaint also alleges that "[s]hortly after Phillips published the letter cited above, Henderson began receiving phone calls and emails asking why he would go to a house of prostitution in Nevada," but he did not know what the phone calls and e-mail were about until "a caller" told him about "the aforementioned letter by Phillips and he looked up dHender499 on the Internet," and found the following:

> NVBrothels.net Forum – Members List
> **dhender499**. Registered User. O dhavid. Registered User. O. DHaven. Registered User. O. dhampste. Registered User. O. dh1. Registered User . . .

The complaint alleges that the foregoing letter, "impugned my [Henderson's] reputation and defamed me by strongly suggesting that I was a member of a Nevada house of prostitution. For the record, I have never been to Nevada, nor am I a member of any house of prostitution." The complaint further alleges that on or about April 21, 2008, Phillips "made another false

statement, . . . by placing another article . . . openly on the Internet, which was entitled 'Garry Null's Goons Threaten to Sue Me: My Response."[2] The complaint alleges that Phillips' "placement of these articles on the Internet was with fault amounting to, at the very least, negligence."

The second cause of action for "false light" invasion of privacy alleges that by "publishing the above-cited letter and leading countless Internet users to believe that Plaintiff was a member of a Nevada brothel, [Defendant] cast the Plaintiff in a false light," and that as a "non-public person, Plaintiff is entitled to the right of privacy from publicity which puts him in a false light to the public." The "false light" cause of action further alleges that Henderson's "mental and emotional well-being were severely harmed by the Defendant's statement in his letter published on the Internet on April 21, 2008," which "gave the impression that Plaintiff was a member of a Nevada house of prostitution," and that "[s]uch a letter, from a professional researcher with a doctorate degree is not only misleading, but intentionally misleading."

In seeking to dismiss the first cause of action for defamation, Phillips contends that no basis exists for exercising long-arm jurisdiction over him with respect to that claim, since he resides in Virginia, works in Washington, D.C., and he wrote the statements at issue on his personal computer at his home in Virginia, and did not send the statements to any person or entity in New York. In seeking to dismiss the second cause of action for "false light" invasion of privacy, Phillips asserts that no such tort exists under New York law.

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[2]The complaint does not include any specific allegedly defamatory statements from such article.

Henderson's opposition papers address only the defamation claim, and are silent as to the second cause of action for "false light." Henderson does not dispute that Phillips resides in Virginia and works in Washington, D.C., but argues that the court has personal jurisdiction over Phillips, based his "internet postings [which] reach New Yorkers, and show that he "has taken his business to New York."

As an out-of-state resident, Phillips cannot be subject to personal jurisdiction in New York unless Henderson proves that New York's long-arm statute confers jurisdiction over him by reasons of his contacts within the state. See Copp v. Ramirez, 62 AD3d 23, 28 (1st Dept), lv app den 12 NY3d 711 (2009). The burden rests on Henderson, as the party asserting jurisdiction. See id. New York long-arm jurisdiction is governed by CPLR 302, which provides in relevant part, as follows:

> (a) Acts which are the basis of jurisdiction. 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, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state, *except as to a cause of action for defamation of character* arising from the act; or
>
> 3. commits a tortious action without the state causing injury to person or property within the state, *except as to a cause of action for defamation of character* arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent courts of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the states, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state, and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

(emphasis added).

By its terms, the long-arm statute as quoted above, has limited applicability in defamation cases, since it is intended "to avoid unnecessary inhibitions on freedom of speech or the press." Legros v. Irving, 38 AD2d 53, 55 (1st Dept 1971), app dism 30 NY2d 653 (1972); accord SPCA of Upstate New York, Inc. v. American Working Collie Association, ___ AD3d ___, 2010 WL 2196087 (3rd Dept 2010). Defamation actions are expressly exempted from CPLR 302(a)(2) and (3), so the only provision at issue with respect to plaintiff's first cause of action is CPLR 302(a)(1), which requires defendant Phillips to transact business within the state, and the defamation claim to arise from his transaction of that business. See Ehrenfeld v. Bin Mahfouz, 9 NY3d 501 (2007). "If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR 302(a)(1)." Johnson v. Ward, 4 NY3d 516, 519 (2005); accord Copp v. Ramirez, supra at 28. In determining whether a defendant has transacted business within the meaning of CPLR 302(a)(1), courts look to the totality of the defendant's activities within the state, to decide if he has transacted business in such a way that it constitutes "purposeful activity," which is defined as "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." McKee Electric Co. Inc. v. Rauland-Borg Corp, 20 NY2d 377, 382 (1967) (quoting Hanson v. Denckla, 357 US 235, 253 [1958]); accord Fischbarg v. Doucet, 9 NY3d 375, 380 (2007).

The case at bar involves developing issues of New York long-arm jurisdiction in a defamation action based on statements appearing on an internet website. As the Second Circuit noted in 2007, "[w]hile no New York appellate court has yet explicitly analyzed a case of

website defamation under the 'transact[ing] business' provision of section 302(a)(1), several federal district courts in New York have . . . [and] concluded that the posting of defamatory material on a website accessible in New York does not, without more, constitute 'transact[ing] business' in New York for the purposes of New York's long-arm statutes." Best Van Lines, Inc. v. Walker, 490 F3d 239, 250 (2nd Cir 2007) (citing Realuyo v. Villa Abrille, 2003 WL 21537754 [SDNY 2003], aff'd 93 Fed Appx 297 [2nd Cir 2004]; Starmedia Network, Inc. v. Star Media, Inc., 2001 WL 417118 [S.D.N.Y. 2001; Competitive Technologies, Inc. v. Pross, 14 Misc3d 1224(A) (Sup Ct, Suffolk Co 2007]).

This court's research reveals a recent appellate case from the Third Department, SPCA of Upstate New York, Inc. v. American Working Collie Association, supra, which relies on the Second Circuit's reasoning in Best Van Lines, Inc. v. Walker, to conclude that defendants were not subject to long-arm jurisdiction in a defamation action based on writings posted on their website. Notably, the Third Department agreed with the Second Circuit's "apt" observation that "New York Courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation." SPCA of Upstate New York, Inc. v. American Working Collie Association, supra (quoting Best Van Lines, Inc. v. Walker, supra at 248).[3]

[3]At least one New York trial court recently considered the issue, and found that long-arm jurisdiction existed over a defamation action based on internet communications. See Intellect Art Multimedia, Inc. v. Milewski, 24 Misc3d 1248(A) (Sup Ct, NY Co 2009) (holding that plaintiff alleged sufficient facts to show that defendant transacts business in New York through its "Ripoff Report" website, "given the high level of interactivity of the website, the undisputed fact that information is freely exchanged between website users," defendants' "alleged role in manipulating user's information and data," and defendant's "solicitation of companies and individuals to 'resolve' the complaints levied against them on the Ripoff Report").

Other recent cases have considered the issue of long-arm jurisdiction and the internet, but

Here, the issue is whether the conduct out of which Henderson's defamation claim arose was a "transact[ion] of business" under CPLR 302(a)(1), which requires Henderson to establish that Phillips conducted purposeful activity within the state, and that a substantial relationship exists between that activity and the defamation claim asserted against him. See Ehrenfeld v. Bin Mahfouz, supra. In other words, were Phillips' internet postings and writings the kind of activity by which he "purposefully availed himself of the privilege of conducting activities" within New York, thus invoking the benefits and protections of New York laws. Best Van Lines, Inc. v. Walker, supra at 253 (quoting McKee Electric Co. Inc. v. Rauland-Borg Corp., supra at 382); accord Kreutter v. McFadden Oil Corp., 71 NY2d 460, 467 (1988).

As noted above, the posting of defamatory material on a website accessible in New York does not, without more, constitute "transacting business" in New York for the purposes of CPLR 302(a)(1), and an out-of-state resident does not subject himself to jurisdiction in New York by simply maintaining a website visited by New Yorkers. See Best Van Lines, Inc. v. Walker, supra at 250. Henderson essentially contends that this case involves more than mere business transactions incident to establishing a website, because Phillips' "writings" on the website of a

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do not involve defamation claims. See e.g. Grimaldi v. Guinn, 72 AD3d 37 (2nd Dept 2010) (in breach of contract action, defendant's passive website alone did not provide basis for long arm jurisdiction, but defendant had other contacts with New York that were sufficient to confer jurisdiction); Zottola v. AGI Group, Inc., 63 AD3d 1052 (2nd Dept 2009) (in breach of contract action, Florida defendant who sold boat to New York plaintiff, had sufficient minimum contacts with New York for long-arm jurisdiction); CRT Investments v. Merkin, NYLJ, May 11, 2010, p 40, col 3 (Sup Ct, NY Co) (in fraud action, court considered defendant's e-mails and website, in determining that the totality of defendant's contacts with New York did not support any finding that it projected itself into New York to indicate the transaction of business under CPLR 302 [a][1]); LB International Inc. v. Rainmaker Liquidators Inc., NYLJ, May 4, 2010, p 28 col 1 (Sup Ct, Suffolk Co) (in breach of contract action, defendant's website alone, which provided information about its products but did not permit consumer to order products online, was insufficient to confer long-arm jurisdiction under CPLR 302 [a][1]).

New York radio program known as the Leonard Lopate show, "were purposeful, as were his other attacks against Gary Null and me, which appear on numerous websites – all of which New Yorkers have access to . . . [and that] all of his attacks refer the reader back to his original defamatory statements which are published on his website." Henderson also contends that Phillips "admits to having been contacted [by] Gary Null's office for a debate," and that Phillips "has done enough research to know that his show is heard all over the world on the internet with an extremely high percentage of listeners coming from the New York metropolitan area."

Henderson's contentions are without merit, as neither the presence of Phillips' comments on the Leonard Lopate Show website, nor Phillips' appearance on Gary Null's radio show, is sufficient to constitute the "transaction of business" in New York within the meaning of CPLR 302(a)(1). Phillips submits an affidavit, stating that WPFW is a local radio station in the Washington, D.C. area, which he "occasionally" listens to, and on April 18, 2008, "I emailed the Program Director and General Manager of WPFW to complain about statements that Gary Null had made during a recent broadcast of his radio program." Phillips states that on the same day, "I posted the email as an 'open letter' on my website, lee-phillips.org," and soon afterwards, "WPFW forwarded a response from someone named 'Doug,' with the email address 'dhender499@aol.com.'" After conducting a Google search for "dhender499," Phillips "concluded that the email had been sent by Doug Henderson, who appeared to work for Gary Null."

Phillips states that on April 21, 2008, he wrote "a second email to WPFW, and posted both the forwarded letter I had received and my response on my website under the heading, 'Gary

Null's Goons Threaten to Sue Me: My Response.'" Phillips states that he received an email response from Doug Henderson, inviting him to appear on Gary Null's radio program "to debate him on a number of issues," and in "my April 21, 2008 letter, I accepted the invitation." According to Phillips, on April 29, 2009, "I did 'appear' on Gary Null's show by telephone," when "someone from WPRW called me at home at a predetermined time." Phillips also states that his "April 21, 2008 web posting, which is the subject of this action, was written on my personal computer in my home in McLean, Virginia. I have never sent it (whether in physical or electronic form) to any person or entity in New York."

Phillips submits an reply affidavit stating that in August 2008, "when searching for information about Gary Null on my home computer, in Virginia, I came across a radio broadcast and related comments on the website of the Leonard Lopate Show," and "placed a comment on the comment section expressing my views on Gary Null's academic credentials." Phillips states that he "did not appear on the Leonard Lopate program" and he did not "travel to New York at any time to conduct 'research' about Gary Null." Phillips also states that he has "never said, either orally or in print, that Doug Henderson visited a house of prostitution in Nevada, or that he has had sex with prostitutes there or anywhere else."

Based on the foregoing, it is clear that Phillips did not engage in any activity indicating that he "purposefully directed" his activities toward New York. The nature of Phillips' comments about Henderson on his personal website does not suggest that they were specifically targeted to New York viewers, as opposed to a nationwide audience. See Best Van Lines, Inc. v. Walker, supra at 253. Moreover, Phillips merely appeared by telephone from his home on Gary

Null's radio show, and merely used his home computer to post a comment on the website of the Leonard Lopate show. Notably, Henderson does not allege that he was defamed by comments Phillips made during his appearance on Gary Null's radio show, or by comments Phillips posted on the Leonard Lopate show's website. In any event, the making of allegedly defamatory statements outside New York about a New York resident, does not without more, provide a basis for personal jurisdiction under CPLR 302(1)(a), even if those statements are posted on a website originating from New York and accessible to New York readers. See Best Van Lines, Inc., supra at 253; Competitive Technologies, Inc. v. Pross, supra. The fact that Phillips' statements are accessible from other websites does establish that they were posted in connection with some business activity. As with the report in Best Van Lines, Inc. v. Walker, supra and the column in Realuyo v. Villa Abrille, supra, the accessibility of Phillips statements from other websites, "arises solely from the aspect of the website from which anyone – in New York or throughout the world – could view and download the allegedly defamatory" material. Best Van Lines, Inc. v. Walker, supra at 253 (quoting Realuyo v. Villa Abrille, supra).

Thus, since Henderson has failed to establish a basis under CPLR 302(a)(1) for exercising personal jurisdiction over Phillips in connection with the defamation claim, the first cause of action must be dismissed. The second cause of action for "false light" invasion of privacy is also dismissed, in the absence of opposition, and based on New York law, which does not recognize a common law right to privacy. See Messenger v. Gruner + Jahr Printing & Publishing, 94 NY2d 436, 441 (2000); Howell v. New York Post Co., 81 NY2d 115 (1993); Arrington v. New York Times Co., 55 NY2d 433 (1982). In light of this determination, the court need not consider the additional grounds for dismissal raised in Phillips' motion papers.

Accordingly, it is hereby

ORDERED that defendant Lee Phillips' motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

DATED: June 28, 2010

ENTER:

J.S.C.