

**David Werner Intl. Corp. v Gray**

2011 NY Slip Op 30275(U)

January 19, 2011

Sup Ct, NY County

Docket Number: 102547/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE  
J.S.C.  
Index Number : 102547/2009

PART 10

DAVID WERNER INTERNATIONAL  
vs  
GRAY, ALEXANDER  
Sequence Number : 003  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**  
JAN 20 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: JAN 19 2011

  
HON. JUDITH J. GISCHE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
DAVID WERNER INTERNATIONAL CORPORATION  
a New York Corporation, and DAVID WERNER,  
an individual,

Plaintiffs,

-against-

ALEXANDER GRAY, "JOHN DOE" 1-100 and  
"JANE DOE" 1-100, also names being fictitious and  
unknown to plaintiffs despite diligent inquiry, it being  
intended to designate those individuals, entities and  
others involved, individual and jointly, in posting and/or  
advertising for sale confidential information belonging  
to plaintiffs including, without limitation, client  
agreements on the internet, *et al.*,

Defendants.  
-----X

**DECISION / ORDER**  
Index No.: 102547/09  
Seq. Nos. : 003

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
JAN 20 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this  
(these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def's n/m (3211, 3212) w/ EJG affirm, exhs .....	1
Pltfs' opp w/GIH affirm, DW affid, exhs .....	2,3

*Upon the foregoing papers, the decision and order of the court is as follows:*

Defendant, Alexander Gray ("Gray"), moves to dismiss the complaint pursuant to  
CPLR § 3211(a)(8) and for summary judgment dismissing the complaint pursuant to  
CPLR § 3212. Plaintiffs, David Werner International Corporation ("DWIC") and David  
Werner ("Werner"), oppose the motion. In this court's prior decision and order, the  
court referred the issue of whether defendant was properly served with the summons  
and complaint to a Special Referee, and the remaining aspects of Gray's motion were

held in abeyance until that matter was fully resolved. Plaintiffs, thereafter, stipulated to withdraw their objection to service of the summons and complaint, thereby waiving any objection to personal jurisdiction. The court will now consider Gray's motion to dismiss for failure to obtain long arm jurisdiction<sup>1</sup> over him (CPLR § 3211[a][8]) and summary judgment (CPLR § 3212). Since the facts as alleged in plaintiffs' complaint were already set forth in this court's prior decision, they will not be restated, and are incorporated by reference herein.

Plaintiffs commenced this action alleging that Gray breached a Settlement Agreement entered into between Gray and DWIC (the "Settlement Agreement"); misappropriated DWIC's trade secrets; and made defamatory statements on various websites (along with other unnamed defendants). Gray moves to dismiss the complaint for: [1] failure to obtain long-arm jurisdiction; and [2] immunity based on Section 230 of the Communications Decency Act, 47 U.S.C. § 230.

In a prior action, plaintiffs commenced a lawsuit against Gray, alleging, *inter alia*, claims for defamation (David Werner and David Werner International v. Gray, Supreme Court, New York County, Index No. 112099/08). That action was ultimately settled between the parties pursuant to a Settlement Agreement. The Settlement Agreement provided, in relevant part:

14. Governing Law. This Settlement Agreement shall in all respects be governed by the laws of the State of New York. Any action or proceeding concerning enforcement of this Settlement Agreement or any term hereof shall be brought

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<sup>1</sup>Although defendant moves to dismiss based on failure to obtain "personal jurisdiction," defendant has already consented to personal jurisdiction and is actually arguing that plaintiffs do not have long-arm jurisdiction over defendant.

\* 4]

in the Supreme Court of the State of New York, New York County. All parties specifically consent to the jurisdiction of the Supreme Court of the State of New York, with the venue in New York County, as the exclusive forum for any action or proceeding concerning enforcement of this Settlement Agreement or any term hereof, and expressly waive all objections to jurisdiction, venue or that any such action commenced in any such court has been brought in an inconvenient forum.

Plaintiffs currently assert claims for breach of the Settlement Agreement; misappropriation of DWIC's trade secrets; and making defamatory statements on various websites.

Gray argues that plaintiffs' claims are unrelated and not subject to the Settlement Agreement, and are therefore, his jurisdictional objection to this case being improperly venued in New York should be decided by the court. Gray argues that the waiver in the Settlement Agreement pertains to an unrelated matter having nothing to do with the case presently before the court and that it was in no way foreseeable that the Settlement Agreement would result in dragging the defendant across state lines.

Plaintiffs oppose the motion arguing that defendant consented to jurisdiction in the Settlement Agreement.

#### **Applicable Law**

Jurisdiction may be waived by stipulation, agreement, or consent. Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l., 78 A.D.3d 137, 910 N.Y.S.2d 418 (1st Dept. 2010); Blener v. Hystron Fibers, Inc., 78 A.D.2d 162 (1st Dept. 1980).

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

\* 5]

eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 (1<sup>st</sup> Dept 2003).

On a motion for summary judgment, it is for the court to decide any issues of law that are raised. Hindes v. Weisz, 303 A.D.2d 459 (2d Dept 2003).

## Discussion

### A. Jurisdiction

Having consented to having any dispute under the Settlement Agreement, adjudicated in New York, defendant has waived his right to object to this forum, whether on the basis of long-arm jurisdiction or otherwise. Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l., *supra*; Biener v. Hystron Fibers, Inc., *supra*. Furthermore, plaintiffs' claims against defendant are directly and primarily related to the enforcement of the Settlement Agreement, since plaintiff is claiming that defendant posted a copy of DWIC's client agreement online. Therefore, defendant's motion to dismiss this case based the court not having long-arm jurisdiction, is denied.

### B. Communications Decency Act

Defendant also moves for partial summary judgment on the basis that he is immune from defamation based on Section 230 of the Communications Decency Act,

\* 6]

47 U.S.C. § 230 ("CDA" or "Section 230").

Section 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," (CDA § 230(c)(1)), and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." "Interactive computer service" is defined as "any information service, system or access software provider that provides or enables computer access by multiple users to a computer server . . ." CDA § 230(f)(2).

Internet services are immune from liability for publishing false or defamatory material, so long as the information is provided by another party. Immunity applies only where the information has been provided by another information content provider, meaning "any person or entity that is responsible, in whole or part, for the creation or development of information provided through the Internet or any other interactive computer service." CDA § 230(f)(3); *see also Shiamili v. Real Estate Group of New York, Inc.*, 68 A.D.3d 581 (1st Dept. 2009); *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411 (N.Y.Sup. 2010).

Conversely, an interactive computer service provider will be liable for its *own* speech (*Universal Communication Sys. v. Lycos*, 478 F.3d 413, 419-420 [1st Cir.2007]), or for its material contribution to the content of a third party's statement (*see Fair Hous. Council of San Fernando Val. v. Roommates.Com*, 521 F.3d 1157 [9th Cir.2008]). *Shiamili v. Real Estate Group of New York, Inc.*, *supra*.

Here, plaintiffs' complaint alleges that Gray, himself, created the Ebay page and that Gray, himself, either authored or co-authored (along with other unnamed

[\* 7]  
defendants) the content in the other links available on his Ebay page. This, therefore, falls outside the ambit of Section 230, since Gray allegedly authored the speech in question.

Accordingly, the court finds that Gray is not immune from liability under the CDA and Gray's motion for summary judgment is denied.

**Conclusion**

In accordance with the foregoing,

*IT IS HEREBY:*

**ORDERED** that defendant ALEXANDER GRAY's motion for is denied in its entirety; and it is further


**ORDERED** that this case is scheduled for a **preliminary conference on March 10, 2011 at 9:30 a.m.**, at 60 Centre Street, New York, NY, Room 232; and it is further

**ORDERED** that any relief not specifically addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
January 19, 2011

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

JAN 20 2011

NEW YORK  
COUNTY CLERK'S OFFICE