

Thai Face News v Petchpornprapas

2020 NY Slip Op 30787(U)

February 25, 2020

Supreme Court, Queens County

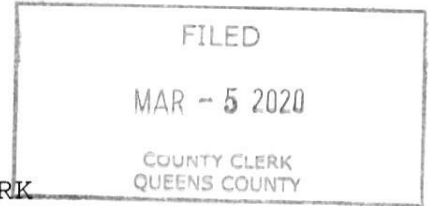
Docket Number: 720471/2019

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

[* 1]



SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
 CIVIL TERM - IAS PART 34 - QUEENS COUNTY
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
 Justice

- - - - - x

Thai Face News and Jason Poolpol,	Index No.:	720471/2019
Plaintiff,	Motion Date:	02/20/2020
- against -	Motion No.:	38
Nipon Petchpornprapas and Royal Thai Consulate General New York	Motion Seq.:	1
Defendant.		

- - - - - x

The following electronically filed documents read on this motion by defendants for an order pursuant to CPLR 3211(a)(2), (a)(7) and (a)(8) dismissing plaintiffs' complaint against NIPON PETCHPORNPRAPAS and ROYAL THAI CONSULATE GENERAL NEW YORK in its entirety based upon this Court's lack of jurisdiction over the defendants:

	<u>Papers</u>
	<u>Numbered</u>
Notice of Motion-Affirmation-Memorandum of Law- Exhibits.....	EF 3-11
Affidavit in Opposition.....	EF 13
Affirmation in Reply.....	EF 14-18

On December 6, 2019, plaintiffs commenced the instant action through the filing of a summons and complaint against Mr. Petchpornprapas and the Thai Consulate. At all relevant times to this action, Mr. Petchpornprapas was serving as Consul General to the Thai Consulate and the Thai Consulate was a subdivision of the Kingdom of Thailand, a sovereign nation. The complaint appears to be alleging causes of action for assault, defamation, and harassment pertaining to a group chat in the application Line.

Defendants move to dismiss based on lack of subject matter jurisdiction, personal jurisdiction, and failure to state a cause of action.

In support, defendants submit an affidavit of the defendant

Nipon Petchpornprapas who states that he is the former Counsel General of the Royal Thai Consulate General of New York, having vacated the position on December 28, 2019. He was the Consul General for all times relevant to the instant matter. He currently serves as the Ambassador of Thailand to Senegal. He and the Thai Consulate only learned of this action after receipt of the certified mail of the plaintiffs containing the summons and complaint sent to the Thai Consulate's New York City Office. Neither he, nor anyone from the Thai Consulate was personally served with the complaint. The Line chat group alleged by the plaintiffs in their complaint was started by the Thai Consulate staff as a forum for the members of the Thai community to exchange useful information and discuss upcoming consular events and festivals. The Line chat group was created as part of the consular functions of the Thai Consulate, specifically the furthering of the development of cultural relations between the Kingdom of Thailand and the United States of America. It also helped to promote friendly relations between them. The Thai Consulate derived no monetary or non-monetary remuneration from its creation of the Line chat group chat. Any member of the Line chat group was able to invite other individuals to join the chat. While the Thai Consulate were the custodians of the Line chat group, no member of the Thai Consulate or Mr. Petchpornprapas ever posted any defamatory comments about the plaintiffs. Mr. Petchpornprapas was also not personally involved in the creation or custodianship of the Line chat group. The Thai consulate staff never had any part of the interaction between the plaintiffs and other members of the group, nor could they control what was said. For reasons including learning of the defamatory statements alleged by the plaintiffs, the defendants decided to permanently close the group chat.

In opposition, plaintiffs submit an affidavit of service which states that defendants, and their attorney Thomas Scappaticci Esq. were personally served with the summons and complaint.

Subject Matter Jurisdiction

Under CPLR 3211(a)(2), the court may dismiss an action based on lack of subject-matter jurisdiction over a defendant.

"A consular officer is not immune from all legal process, but must respond to any process and plead and prove immunity on the ground that the act or omission underlying the process was in the performance of his official functions" (Koepfel & Koepfel v. Federal Republic of Nigeria, 704 F.Supp. 521, 522 [S.D.N.Y.1989][internal quotations omitted]).

Pursuant to the Vienna Convention on Consular Relations, to which the United States is a party, consular officers and employees are immune from the judicial jurisdiction of the judicial authorities of the Foreign State they are in while performing consular functions (See Vienna Convention on Consular Relations and Optional Protocol on Disputes, Art. 43, TIAS No 6820 [Dec. 14, 1969]).

Consular functions consist of in part: "furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention; helping and assisting nationals, both individuals and bodies corporate, of the sending State" (Vienna Convention on Consular Relations and Optional Protocol on Disputes, Art. 5, TIAS No 6820 [Dec. 14, 1969]).

28 USCA Section 1604 provides "that subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States."

Here, it is clear that the Court lacks subject matter jurisdiction to hear any suits involving Mr. Petchpornprapas or the Thai Consulate.

Defendant Petchpornprapas did not personally create and was not personally involved in the custodianship of the Line chat group. His involvement was limited to the fact that the Thai Consulate, to which he served as Consul General, was the custodian of the Line chat group. Thus, his involvement was purely due to his duties as Consul General of the Thai Consulate. The Line chat group was started by the Thai Consulate staff as a forum for the members of the Thai community to, among other things, exchange useful information and discuss coming consular events and festivals, to further the development of cultural relations between the Kingdom of Thailand and the United States of America and otherwise promoting friendly relations between them. Additionally, notwithstanding the foregoing "[t]he [federal] district courts shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against consuls or vice consuls of foreign states" 28 U.S.C. § 1351.

Here, the Thai Consulate which as an entity of a foreign

state is immune from actions in U.S. Courts. Certain exceptions exist under Chapter 97 of 28 U.S. Code, however plaintiffs fail to provide which, if any, are applicable to the instant proceedings.

Accordingly, this matter shall be dismissed due to a lack of subject matter jurisdiction.

Personal Jurisdiction

"Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308" (Washington Mut. Bank v Murphy, 127 AD3d 1167, 1174 [2d Dept 2015] [internal quotations omitted]). CPLR 308 requires that service be attempted by personal delivery of the summons "to the person to be served" CPLR 308 (1), or by delivery "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode" CPLR 308(2). Service pursuant to CPLR 308 (4), commonly known as "nail and mail" service, may be used only where service under CPLR 308 (1) or (2) cannot be made with "due diligence" (See Feinstein v Bergner, 48 NY2d 234, 239 [1979]).

28 U.S.C.A. Section 1608 (a)(3) governs service on a foreign nation such as Thailand, since it is not a party to the Hague Convention on Service of Process, and because no agreement exists between the plaintiffs and Thailand (See Convention Done at the Hague November 15, 1965, TIAS No 6638 [Feb. 10, 1969]). The United States Supreme Court has held that in order for a Foreign State to be served by mail under 28 U.S. Code § 1608(a)(3), such mailing must be made to the foreign minister at the minister's office in the foreign state (See Republic of Sudan v Harrison, 139 S Ct 1048, 1054, [2019]).

Here, service was never properly effectuated upon the defendants in accordance with the CPLR and Federal Law. Plaintiffs initially had sent defendants a copy of the summons and complaint by certified mail. Additionally, in opposition plaintiffs attempt to cure the defects of service by submitting an affidavit of personal service upon both defendants and their counsel dated January 25, 2020. Defendant Petchpornprapas' affidavit dated January 14, 2020 states that he is currently in the nation of Senegal serving as the Thai Ambassador. Therefore, personal service of him at the listed address in New York City is impossible. Additionally, service upon a foreign nation such as Thailand must be mailed to the Foreign Minister at the Foreign Minister's office in Thailand. Lastly, service upon a parties' attorney does not meet the requirements of the CPLR.

Therefore, the matter is dismissed due to a lack of personal jurisdiction over the defendants.

Accordingly, the motion is granted in its entirety; and it is further

ORDERED, all claims made by plaintiffs, Thai Face News and Jason Poolpol, against defendants, Nipon Petchpornprapas and Royal Thai Consulate General New York in this action are hereby dismissed.

Dated: February 25, 2020
Long Island City, NY



ROBERT J. McDONALD
J.S.C.

FILED
MAR - 5 2020
COUNTY CLERK
QUEENS COUNTY