

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LANDS' END, INC.,

OPINION AND ORDER

Plaintiff,

05-C-368-C

v.

ERIC REMY, JOHN SANSONE, DANIEL GRIGOR,
KEVIN DASTE, JOEL DASTE, DASTE AND
ASSOCIATES, INC., DASTE TURNAROUND
GROUP, INC., GULF NATIONAL, LLC, TIHAN SEALE,
SHAWNA FREEMAN, THINKSPIN, INC., IAN HEWITT,
KIP SEALE, BRADERAX, INC., RICHARD A. SEALE,
and MICHAEL SEALE,

Defendants.

Plaintiff Lands' End, Inc. sells over 1.5 billion dollars a year in apparel through catalogs, the internet and retail stores. In this civil action for declaratory, injunctive and monetary relief, plaintiff contends that defendants are wrongfully collecting commissions from plaintiff through a practice called "typosquatting." Plaintiff claims that defendants have engaged in fraud, breach of contract, false and deceptive advertising, cybersquatting and unfair trade practices.

This case is before the court on motions to dismiss filed by three defendants pursuant to Fed. R. Civ. P. 12(b)(2). Defendants Tihan Seale, Kip Seale and Richard Seale contend that they are not subject to personal jurisdiction in Wisconsin.

For the sole purpose of deciding these motions, I accept as true the following allegations, which are drawn from the complaint and the exhibits attached to the parties' briefs. Purdue Research Foundation v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 782 (7th Cir. 2003) (court accepts all well-pleaded allegations in complaint as true, unless controverted by challenging party's affidavits; any conflicts concerning relevant facts are to be decided in favor of party asserting jurisdiction).

ALLEGATIONS OF FACT

A. Parties

Plaintiff Lands' End, Inc., is a Delaware corporation with its principal place of business in Dodgeville, Wisconsin.

Defendant Tihan Seale is a resident of Texas. Defendant Kip Seale is a resident of Colorado. Defendant Richard Seale is a resident of North Carolina.

B. Background

Plaintiff is a well-known retailer of apparel. A substantial amount of plaintiff's

resources has been devoted to the development and maintenance of a website where buyers can purchase most of plaintiff's products.

To increase the number of internet users who visit its website, plaintiff operates an affiliate website program, which is administered by LinkShare Networks. Websites participating in the affiliate program post a link on their website to plaintiff's website, www.landsend.com. When an internet user on the affiliate website clicks on the link to www.landsend.com and makes a purchase from plaintiff, the affiliate website earns a commission. LinkShare Networks maintains information about the participating affiliate websites, receives the commission payments from plaintiff and distributes the payments to the affiliate websites.

Websites participating in plaintiff's affiliate website program are subject to the "Lands' End Operating Agreement for Affiliate Network." The term of the agreement is indefinite and the agreement may be terminated by either party without cause. Paragraph 17 of the agreement states

This Agreement will be governed by the laws of the United States and state of Wisconsin, without reference to rules governing choice of laws. Any action relating to this Agreement must be brought in the federal or state courts located in Wisconsin and you irrevocably consent to the jurisdiction of such courts.

The owners of some affiliate websites have created a system whereby they receive commissions from plaintiff even when users do not access www.landsend.com by clicking on

the link on their website. These owners identified common typos for “landsend,” such as “landswend,” and registered these typos as domain names, such as www.landswend.com. The website owners then devised a computer scheme so that a user who types “www.landswend.com” into his internet browser is automatically directed to www.landswend.com. At the same time, a message is sent to plaintiff and LinkShare that the user clicked on the link to www.landsend.com on the affiliate website, even though that did not actually occur. If that user makes a purchase from www.landsend.com, plaintiff pays a commission to the owner of the affiliate website. This scheme is referred to as typosquatting.

C. Defendant Tihan Seale

Defendant Tihan Seale is a resident of Texas and has never been to Wisconsin. He is the owner and president of ThinkSpin, Inc., a Nevada corporation, another defendant in this lawsuit. ThinkSpin is the owner of the domain name www.savingsfinder.com. It has a contract with plaintiff to participate in the affiliate website program.

LinkShare maintains registration data for each affiliate website. Its registration log for www.savingsfinder.com lists a username of “ThinkSpin” and a name of “Tihan Seale.” The contact name provided for ThinkSpin is Tihan Seale. When LinkShare asked ThinkSpin about plaintiff’s allegations of typosquatting, defendant Tihan Seale personally

responded to the query.

Defendant Tihan Seale is connected to certain domain names that are registered at iHoldings. Records from iHoldings show defendant Tihan Seale's name under the account "NETSequential, Inc." This account includes various domain names such as www.klandsend.com, www.landdend.com, www.landsenc.com and www.landsennd.com. These domain names are referred to collectively as the "malaysia domain names." Payment records show that certain payments pertaining to the malaysia domain names were made with defendant Tihan Seale's personal credit card.

When an internet user types one of the malaysia domain names into his web browser he is automatically redirected to plaintiff's website. If he makes a purchase at www.landsend.com, ThinkSpin is paid a commission.

D. Defendant Kip Seale

Defendant Kip Seale is a resident of Colorado and has never been to Wisconsin. He is the owner and president of Braderax, Inc., a Delaware corporation that is also a defendant in this lawsuit. Braderax is the owner of the domain name www.poshshops.com and participates in plaintiff's affiliate website program.

The LinkShare registration log for www.poshshops.com lists the name "Partner Development" and includes defendant Kip Seale's email address. When LinkShare asked

Braderax about plaintiff's allegations of typosquatting, defendant Kip Seale personally responded to the query via email. He signed the email as "Kip Seale, Partner Development, Braderax, Inc."

E. Defendant Richard Seale

Defendant Richard Seale is a resident of North Carolina. He has never been to Wisconsin. He registered the domain name www.landswend.com. He is an employee of Braderax, Inc., which owns the domain www.landswend.com. _____
_____ When an internet user types www.landswend.com into his web browser he is automatically redirected to plaintiff's website. If he makes a purchase at www.landsend.com, Braderax is paid a commission. ____

DISCUSSION

A. Standard of Review

On a motion to dismiss for lack of personal jurisdiction, the burden of proof rests on the party asserting jurisdiction. Nelson v. Park Industries, Inc., 717 F.2d 1120, 1123 (7th Cir. 1983). That party must make a prima facie showing that personal jurisdiction exists. Id. In deciding whether the party has made the necessary showing, the court may rely on the allegations of the complaint and also may receive and weigh affidavits submitted by the

parties. Id.

B. Personal Jurisdiction

A federal court has personal jurisdiction over a non-consenting, nonresident defendant if a court of the state in which that federal court sits would have jurisdiction. Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 664 (7th Cir. 1986). Under Wisconsin law, the jurisdictional question has two components. First, the plaintiff must establish that the defendants come within the grasp of the Wisconsin long-arm statute. Logan Productions, Inc. v. Optibase, Inc., 103 F.3d 49, 52 (7th Cir. 1996); Lincoln v. Seawright, 104 Wis. 2d 4, 6, 310 N.W.2d 596, 599 (1981); Marsh v. Farm Bureau Mut. Ins. Co., 179 Wis. 2d 42, 51, 505 N.W.2d 162, 165 (Ct. App. 1993). If the plaintiff is successful, the burden switches to the defendants to show that jurisdiction would violate due process. Logan Productions, 103 F.3d at 52; Lincoln, 104 Wis. 2d at 6, 310 N.W.2d at 599.

Wisconsin's long-arm statute, Wis. Stat. § 801.05, is to be liberally construed in favor of the exercise of personal jurisdiction. Federated Rural Electric Ins. v. Inland Power & Light, 18 F.3d 389, 391 (7th Cir. 1994) (citations omitted).

Plaintiff claims jurisdiction under subsection (4) of § 801.05, which subjects out-of-state residents to jurisdiction within Wisconsin in “any action claiming injury to person or property within this state arising out of an act or omission outside this state by the

defendant, provided that at the time of injury, either” (a) the defendant also conducted solicitation or service activities in Wisconsin or (b) products, materials or things that were processed or serviced by the defendant were used or consumed in Wisconsin. Clearly, the corporations with which the Seale defendants are affiliated are covered under this section. The question is whether the Seale defendants themselves are covered.

It is well established that neither the officers nor directors of a corporation are personally liable to third parties merely because they are officers or directors. William E. Knepper & Dan A. Bailey, Liability of Corporate Officers and Directors § 6-1 (2004). However, such officers or directors may be liable as individuals for participating in or agreeing to torts committed by them or their corporation. Id. at 6-15-6-19. See also Restatement (Second) of Torts, §§ 523, 549; Oxmans’ Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 693, 273 N.W.2d. 285, 289 (1979) (“A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation may also be liable, but the individual is not thereby relieved of his own responsibility.”)

Plaintiff has alleged that the Seale defendants engaged in fraud, false and deceptive advertising, cybersquatting and unfair trade practices, all of which are tortious acts. It has alleged also that the individual defendants acted in ways that facilitated the improper diversion of commissions to the corporations with which they are affiliated. For example,

defendant Tihan Seale registered the malaysia domain names and paid for them with his personal credit card; defendant Richard Seale registered a domain name intended to divert commissions to defendant Braderax, Inc. Defendant Kip Seale is alleged to have done nothing more than reply to plaintiff's allegations of typosquatting; however, he could not have answered these questions without knowing about the typosquatting. To the extent that plaintiff can prove that the typosquatting is tortious conduct, defendant Kip Seale can be held to have had knowledge of the acts and to have agreed to them. Sanction of a wrongful act or omission can generate individual liability. Liability of Directors and Officers § 6-15 (citing Lobato v. Pay Less Drug Stores, 261 F.2d 406, 408-09 (10th Cir. 1958)).

Although the Seale defendants are subject to suit for their own alleged torts, they cannot be sued in a court sitting in Wisconsin unless plaintiff can show that they are subject to jurisdiction in this state under some provision of § 801.05. Section § 801.05(4) authorizes the exercise of jurisdiction over persons who commit a tort outside the state that harms a person in Wisconsin, but only if the alleged tortfeasor was soliciting services or providing them in the state at the time of the injuries to plaintiff.

In Pavlic v. Woodrum, 169 Wis. 2d 585, 486 N.W.2d 533 (Ct. App. 1992), for example, the Wisconsin Court of Appeals held that a plaintiff could not justify the exercise of personal jurisdiction over an individual employee of a corporation simply by showing that another officer of a corporation had solicited an investment from the plaintiff in Wisconsin,

by way of telephone calls and letters from Florida directed to the plaintiff; the other officer had undertaken no solicitation activities directed to the plaintiff. The Wisconsin Court of Appeals held the first officer subject to jurisdiction in Wisconsin, holding that officers who promote a business contract in Wisconsin, sanction the activity and benefit from it financially should not be able to claim immunity on the basis of jurisdiction for actions involving fraud or misrepresentation. Id. at 593. On the other hand, officers who do nothing in Wisconsin to promote a contract cannot be subjected to personal jurisdiction.

In reaching this conclusion, the court of appeals relied on State v. Advance Marketing Consultants, Inc., 66 Wis. 2d 706, 225 N.W.2d 887 (1975), and Oxmans' Erwin Meat Co. 86 Wis. 2d 683, 273 N.W.2d 285, noting that in both cases, the officer over whom jurisdiction was asserted had come to Wisconsin in connection with the solicitation of a Wisconsin resident. In Advance Marketing, the officer had met in Wisconsin with a resident for almost a full day to discuss the disputed distributorship contract; in Oxmans' Erwin Meat Co., the officer came to Wisconsin a number of times over a substantial time period, the misrepresentations were alleged to have been made while the officer was physically present within the state and the cause of action arose from the misrepresentations. Pavlic, 169 Wis. 2d at 594, 486 N.W.2d at 536.

It is clear that ThinkSpin, Inc. and Braderax, Inc. were providing services to plaintiff at the time of the injury; they had entered into contracts with plaintiff to do so. The

question is whether plaintiff has shown that the Seale defendants were engaging in any such solicitation or provision of services as individuals. Plaintiff has made no such showing. It has not adduced any evidence to show that any or all of the individual defendants solicited the affiliate contracts from plaintiff or that they were providing services to plaintiff themselves, rather than through the corporations with which they are affiliated.

Plaintiff reads Advance Marketing as authorizing a court to impute the acts of the corporation to the corporate employee or officer if it can be shown that the officer controlled the corporation. From this, it argues that Tihan Seale and Kip Seale controlled the corporations they own and head. However, plaintiff has failed to adduce facts from which I can find that the two individuals controlled the corporations they own. It has not shown that either individual is the sole owner of his corporation or is otherwise in a position to control the acts of the corporation. Serving as a contact person and answering inquiries personally do not add up to a showing of control, even when the person is the owner and president of a corporation. Plaintiff's argument to the contrary is grounded on unsupported inferences. For example, it argues that defendant Tihan Seale was the contact person for ThinkSpin and must be the person who entered into the affiliate program contract with plaintiff on ThinkSpin's behalf because "no other individual has appeared to speak for ThinkSpin in any of LinkShare's or Lands' End's records." Plt.'s Br., dkt. #31, at 6.

Alternatively, plaintiff turns to Wis. Stat. § 801.05(5)(c), which provides that a court

has specific personal jurisdiction over a defendant in any action which

Arises out of a promise, made anywhere to the plaintiff or to some 3rd party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value.

Plaintiff has not shown that any of the Seale defendants made a promise to plaintiff or to a third party for the plaintiff's benefit. Thus, it cannot establish that it can meet the requirements of Wis. Stat. § 801.05(5)(c).

Third, plaintiff cites Wis. Stat. § 801.05(5)(e), which provides that a court has jurisdiction over a defendant

In any action which . . . Relates to goods, documents of title, or other things of value received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

Plaintiff did not receive any goods or other things of value from any of the Seale defendants — therefore the requirements of Wis. Stat. § 801.05(5)(e) are not met.

Because I find that the Seale defendants' activities do not come within the reach of Wisconsin's long-arm statute I do not need to inquire whether exercising jurisdiction over them would violate due process. Defendants' motions to dismiss will be granted.

ORDER

IT IS ORDERED that

1. Defendant Tihan Seale's motion to dismiss is GRANTED;
2. Defendant Kip Seale's motion to dismiss is GRANTED;
3. Defendant Richard Seale's motion to dismiss is GRANTED.

Entered this 4th day of November, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge
