

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CASE NUMBER

CV-02-2978 (DRH)(WDW)

ROBERT NOVAK,

Plaintiff,

vs.

JOHN BENN, et als.,

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANT "JOHN
R. BENN D/B/A PETSFORUM.COM AND
FORUMS.COMPUSERVE.COM"'S 12(b)(6) MOTION TO
DISMISS FOR FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED**

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INTRODUCTION

The Court has before it Defendant John R. Benn d/b/a PetsForum.com and Forums.CompuServe.com Motion to Dismiss Under Rule 12(b) for failure to state a claim against this non-existent named defendant.

EVIDENTIARY RECORD IN SUPPORT OF MOTION

In support of the present Motion Defendant has filed a Second Affidavit of John R. Benn which demonstrates that there is no such entity as "John R. Benn d/b/a PetsForum.com and Forums.CompuServe.com."

ARGUMENT

I. The Court lacks personal jurisdiction over Defendant John Benn.

Plaintiff Novak is his Amended Complaint named as separate entities 1) John Benn and 2) John R. Benn d/b/a PetsForum.com and Forums.CompuServe.com. With respect to the named entity "John R. Benn d/b/a PetsForum.com and Forums.CompuServe.com" such an entity does not exist and as such is not a properly named defendant with a capacity to be sued.

In this instance the nomenclature "PetsForum.com" is simply an Internet domain name given to a web site. This web site is operated by a corporate entity - PetsForum Group, Inc. (Benn 2d Affidavit at ¶ 2) Likewise, the nomenclature "Forums.CompuServe.com" is an Internet domain name given to a gateway leading to the Animals Forum, Aquaria/Fish Forum, Cats Forum and Dogs Forum again operated by the corporate entity PetsForum Group, Inc. (Benn 2d Affidavit at ¶ 4)

New York statutes allow service to be made on (1) an individual, (2) an infant, (3) a corporation or governmental subdivision, (4) a limited liability company, (5) a court, board or commission, (6) a partnership, (7) a limited partnership, (8) the state, and (9)

an unincorporated association. Plaintiff's complaint does not allege that "John R. Benn d/b/a PetsForum.com and Forums.CompuServe.com" is any one of these entities. The New York statues do not provide a provision for suing a name or a web site location.

The New York provisions are consistent with the Federal Rules of Civil Procedure. The capacity to sue or be sued is discussed in Rule 9(a). The proper method to challenge capacity while not specifically set forth in the Rules, is generally accepted to be by motion to dismiss for failure to state a claim. Wright and Miller, Federal Practice and Procedure, Section 1294. See *Cooper v. Wal-Mart Stores, Inc.*, 959 F.Supp. 964,k 966 n. 2 (C.D. Ill. 1997).

The absence of capacity for "John R. Benn d/b/a PetsForum.com and Forums.CompuServe.com" to be sued since such entity does not exist and merely reflects an Internet web location means that the present motion should be granted.

CONCLUSION

Based upon the opposing factual record and the authorities cited, Defendant John R. Benn respectfully requests that the Court dismiss the action against "John Benn d/b/a PetsForum.com and Forums.CompuServe.com."

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to or immediately after filing the foregoing with the Court, I mailed U.S. Mail, postage prepaid, or mailed by email a copy to:

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John R. Benn