

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

CASE NUMBER

CV-02-2978 (DRH) (WDW)

ROBERT NOVAK,

Plaintiff,

v.

PETSFORUM GROUP, INC.

Defendants.

**MEMORANDUM OF PETSFORUM GROUP, INC.,
IN RESPONSE TO COURT'S ORDER
CONCERNING 28 U.S.C. § 1391 (b)**

John R. Benn
Attorney for PetsForum Group, Inc.
104 W. Third St.
Sheffield, AL 35660
256-386-7685

TABLE OF CONTENTS

Table of Contents.....	2
Introduction.....	3
Preliminary Statement.....	3
Argument	
I. This case should be dismissed as improper venue.....	5
Certificate of Service.....	10

INTRODUCTION

The Court in its November 24, 2003 Order noted that all of the remaining defendants in this case are domiciled outside of New York. With this situation, the Court ordered that the remaining defendants should file reply papers on or before December 30, 2003.

On December 16, 2003 I received a copy of Plaintiff Novak's meager submission on the issue involved in the Show Cause Order. Novak failed to cite any case law in his submission. Novak's submission was postmarked December 13, 2003 and addressed to my residence. Despite my repeated notices to Novak indicating that his service copies of Court submissions should be sent to my law office business address, Novak continues to mail items to my residence address.

The following response is submitted on behalf of PetsForum Group, Inc., (hereinafter referred to as "PGI"), which is one of the remaining defendants noted in Novak's submission. Defendant PGI trusts that the Court will still entertain this legal memorandum as originally requested by the Court's November 24, 2003 Order and that the matter is not entirely moot by the Court's more recent December 17, 2003 Order.

PRELIMINARY STATEMENT

There are four (4) defendants remaining in this litigation after the Court's recent decision granting dismissals for lack of personal jurisdiction. The four (4) remaining defendants are: 1) Vince Chan, 2) Thomas Barr, 3) Robert Hudson, and 4) PetsForum Group, Inc.

Defendant Chan was served, according to the docket in this case, on 10/1/02. Docket Entry #16. No responsive pleading has been filed in this case by Chan. Novak has not filed any pleading seeking entry of default against Defendant Chan.

Defendant Barr was served, according to the docket in this case, on 10/21/02. Docket Entry # 28. On November 18, 2002 Duane Menting filed a letter indicating that the purported service Plaintiff Novak claims was made on 10/21/03 was left at his home. Mr. Menting further indicated that Defendant Thomas Barr does not live at this location and is currently residing in another state. Plaintiff Novak has not filed any pleading seeking entry of default against Barr. No action has been taken with respect to the obvious problem concerning the adequacy of service on Defendant Barr. The Court gave Plaintiff Novak until October 17, 2002 to effect service on all parties. Docket Entry #11. On April 14, 2003 the Clerk docketed an Affidavit from Thomas Barr with respect to the lack of personal service. Docket Entry # 61. In this Affidavit Barr, appearing *pro se*, details that the service reported by Plaintiff Novak was not the necessary personal service required under the FRCP. Further, Barr listed his actual mail address in the State of Florida. Despite being provided with this information, Plaintiff Novak has not sought to perfect service on Defendant Barr.

Defendant Hudson has been served in this case. The Court is its recent dismissal Order overruled Hudson's Motion to Dismiss Based Upon Lack of Personal Jurisdiction. At this point the lawsuit remains active against Hudson.

Defendant PetsForum Group, Inc. has pending a request for a Pre-Motion Conference with respect to intended Rule 12(b) motions. Docket Entry #132. In prior proceedings Plaintiff Novak has sought a default against PetsForum Group, Inc. Docket

Entry # 57. PetsForum Group, Inc. opposed entry of default by contesting the adequacy of service. Docket Entries #70, #71. The Court in its recent Memorandum Opinion dealt with the default issue assuming that the proceedings had been sought against Defendant "John Benn d/b/a PetsForum and Forums.compuserve.com." Plaintiff Novak did not seek a default against this entity, but instead sought a default against PetsForum Group, Inc. The issue is otherwise now moot since PetsForum Group, Inc. is now seeking a Pre-Motion Conference on dispositive dismissal motions.

ARGUMENT

I. This case should be dismissed for improper venue.

The Court in its November 24, 2003 Memorandum indicated that the parties should specifically address the issue of proper venue under 28 U.S.C. § 1391(b). In relevant language the Court stated:

As it stands, certain Defendants remain in this action. However, as noted, all of the Defendants are domiciled outside of New York. Also, as discussed more fully above, all of the alleged torts occurred outside of the state. Therefore, the Court has grave doubts regarding propriety of venue in this action. For this reason, Plaintiff is ORDERED TO SHOW CAUSE why this action should not be dismissed as improper venue. See 28 U.S.C. § 1391(b). Plaintiff shall file a responsive brief on or before December 12, 2003. Plaintiff's response should address the factors listed in Section 1391(b). Plaintiff's response also should not solely rely upon paragraph 11 of the Amended Complaint.

Court Memorandum # at p. 47.

The two-page submission made by Plaintiff Novak fails to meet the requirements imposed by the Court. First, Novak's submission does not specifically address the three (3) factors set forth in Section 1391(b). Second, Novak's submission relies singularly on paragraph 11 of the Amended Complaint. Third, Novak's submission fails to cite any caselaw to supportive of venue in the Eastern District of New York.

Section 1391(b) provides:

A civil action where jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

To properly apply Section 1391(b) to this action, the Court should in the first instance evaluate the status of the remaining defendants in this action. As more fully discussed above, Defendant Chan is not active in this case. He has not filed any responsive pleading. Moreover, Plaintiff Novak has not sought any default proceeding against him.

For Defendant Barr it would appear from the docketed items that Plaintiff Novak has failed to secure personal service on him. The time for Novak to effectuate service ran out on October 17, 2002. Docket Entry #11.

This leaves only Defendants Hudson and PetsForum Group, Inc. as entities to be considered under Section 1391(b). The pending Pre-Motion Conference request of PetsForum Group, Inc. in which substantive Rule 12(b) dismissal is being sought may well leave this case only pending against Robert Hudson in which case the single defendant should require the action to be venued in U.S. District Court in Oklahoma - the judicial district in which Defendant Hudson resides.

Until the Court rules on the proposed Rule 12(b) motions to be filed on behalf of PetsForum Group, Inc., the Court is currently faced with a situation in which Section

1391(b)(1) does not apply as all remaining, served defendants do not reside in the same State.¹

Plaintiff's Amended Complaint also fails to measure up to the requirements of Section 1391(b)(2). As noted in this provision, a "substantial part of the events or omissions giving rise to the claim" must have occurred in New York. As the Court has previously noted "all of the alleged torts occurred outside of the state." Court Memorandum at p. 47. Plaintiff Novak can not meet the requirements for venue under Section 1391(b)(2).

The language of Section 1391(b)(2) differs considerably from the language of the New York long arm statute. While the New York statute requires a defendant to "purposefully avail itself of the privileges of conducting activities within New York" Section 1391(b)(2) requires a further showing that a "substantial part of the events giving rise to the claim" must have occurred in New York. No such finding can be made based upon the scant allegations of Plaintiff's Amended Complaint.

The Court is certainly aware that one the venue issue has been raised, the burden is on Plaintiff Novak to prove that venue is proper. *Bassili v. Chu*, 242 F.Supp.2d 223, 231 (W.D.N.Y. 2002). Plaintiff Novak offers no such proof in his responsive submission.

As the Court has noted, *Hsin Ten Enterprise USA, Inc. v. Clark Enterprises*, 138 F.Supp.2d 449 (S.D.N.Y. 2000) provides some guidance in resolving the venue issue in this case. In *Hsin Ten* Judge Scheindlin acknowledged the requirement that there had

¹ For purposes of this argument PetsForum Group, Inc. will be considered a defendant residing in the State of Alabama where the corporation is chartered.

to be showing of a "substantial amount" of the infringement to have occurred in New York. *Id.* at 460. Further, Judge Scheindlin noted that "[t]he guiding principle is that creation of a website - which, by its nature can be viewed anywhere - should not permit suit in every judicial district in the United States." *Id.* at 460. In essence Judge Scheindlin held that to satisfy the venue requirements of Section 1391(b)(2) that there needed to be specific interaction with New York residents on the web site or some "purposeful" advertising directed toward the forum state.

As previously noted, in addressing the venue issue the Court has in this case a situation in which Defendant Chan has not elected to file any responsive pleading. Defendant Barr, appearing pro se, has seemingly filed a challenge to the adequacy of service upon him in this case. Defendant PetsForum Group, Inc. has pending a request for a Pre-Motion Conference with respect to an intended Rule 12(b) dismissal motion. This leaves only Defendant Hudson open to the venue analysis.

Defendant Hudson does not reside in this judicial district. With respect to his web site, the Court while confirming personal jurisdiction noted that the actionable wrong was limited to "meta-tags in the 'banner link'" as providing the basis for personal jurisdiction. Nowhere in the Court's analysis is there any finding that this constitutes a finding that these meta-tagged items constitute a "substantial part of the events" taking place in New York. Unlike *Hsin Ten* there are no sales transactions relating to the banner links. In fact if the Court will look more closely the banner links alleged by Novak do not even involve his claimed common-law trademark "Pets Warehouse." ²

² The Court in its November 24, 2003 Memorandum and Order incorrectly held that Plaintiff Novak was claiming "petswarehouse.com" as a trademark. Instead, it is the text

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:

Mr. Robert Novak
1550 Sunrise Highway
Copaigue, New York 11726
FAX: 1-631-789-9340
(via FAX & US Postal Mail)

Ms. Cynthia Kouril
(attorney for Mark Rosenstein)
Robert L. Folks & Associates, LLP
Attorneys at Law
510 Broad Hollow Road, Ste. 305
Melville, New York 11747
FAX: 1-631-845-8779
(via FAX & US Postal Mail)

Robert Hudson
(via email)

Cynthia Powers
(via email)

Thomas Barr
(via email)

Vince Chan
(via email)

Ann Hahn
(via email)

Erik Olson
(via email)

Mark Rosenstein
(via email)

Date: _____

John R. Benn