

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., et. al

Defendants.

**REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT PETSFORUM GROUP, INC.
OMNIBUS RULE 12(b), 12(e) AND RULE 19
MOTIONS TO DISMISS**

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ARGUMENT

I. **The Court lacks personal jurisdiction over Defendant PetsForum Group, Inc.**

Novak misleads the Court to contend that since PetsForum Group, Inc.¹ (Alabama corporation) has a contractual relationship with CompuServe Interactive Services, Inc., (CIS) (Delaware corporation with its principal office in Columbus, Ohio)² and that CIS has contractual status with Time-Wamer/AOL (based in New York state) that for jurisdictional purposes this means PGI has a relationship with New York. PGI has no direct relationship with Time Warner/AOL. PGI deals with CIS which is based in Columbus, Ohio.

Novak's next statement that he had a telephone conversation with "CompuServe's legal department" is hearsay and should not be considered. Even if the Court chooses to consider this hearsay statement, any derived income exists as the result of PGI's contract with CIS and not Time Warner/AOL.

Novak also asserts that PGI opened a Pay-Pal banking account. This is not correct. The Pay-Pal accounts were enabled to allow public contributions to a special Defense Fund set up for the various defendants Novak vexatiously sued in his numerous lawsuits. Any contributions to this Defense Fund are not processed through any web site operated by PGI. PGI has not collected any of the donations to the Defense Fund.

PGI also has never denied that it offers Internet advertising. As further detailed in the Supplemental Affidavit of Patricia Gatlin, PGI has investigated the Internet link provided to "Augies Dog House." PGI did previously have a business relationship with

¹ Hereinafter referred to as "PGI".

² Docket 101 Benn Aff. pg 2; Affidavit of Patricia Gatlin

"Augie's Dog House" that pre-dated Affidavit Gatlin's handling of PGI billings. This arrangement was for a link from PGI's home page to "Augie's Dog House" web page located on a different web server and service. For this link, "Augie's Dog House" paid PGI \$25 per month. For 1999 this resulted in \$75.00 in revenue, for 2000 the total was \$275.00, for 2001 the total was \$275 and for 2002 the total was \$100.00. These services were terminated in April, 2002. [Supplemental Affidavit Patricia Gatlin].

The Court has previously held that revenues of \$1,000 were not sufficient to trigger Section 302(a)(1) or 302(a)(3) jurisdiction as to named defendant Active Windows Productions in this case . [Docket 131, pg. 41]. In the case of PGI and "Augies Dog House", PGI did not initiate the contact about the mirror link. No contracts or agreements were signed in New York. No services were provided in New York. The only activity related in any way with New York was a monthly billing statement mailed to "Augies Dog House" at an address in New York. Most notable is that no claim presented by Novak in his Amended Complaint in any way involved the existence of a link from PGI to "Augies Dog House." There is a complete absence of anything that would constitute "regular," "persistent" or "substantial" relationship as a result of this single business contact. For the year in question - 2002 – business with "Augies Dog House" was limited to \$100. There also is no allegation by Novak that the limited relationship between PGI and "Augies Dog House" led to any actionable injury to his claimed trademark.

Novak stretches the characterization of his Exhibit N. This is merely a place any individual can contribute to the Defense Fund created to help indigent individuals Novak

has sought to sue in his several lawsuits.³ PGI derives no income from this item. Novak makes no claim in his Amended Complaint that his alleged trademark was ever affixed to any goods or services offered on this web page. Nothing is contained in Novak's Amended Complaint as to how his claimed trademark is commercially infringed by this web page. Indeed, Novak's only surmise is that his trademark for "Pets Warehouse" is somehow infringed by the meta-tags associated with this page.⁴ The specific meta-tags for this page are "<meta name="keywords" content="Robert, Novak, apd, List, lawsuit, PetsWarehouse, suite, US, District, Court".

Novak also attempts to draw a favorable comparison between the PGI web site and the web site for Robert Hudson previously discussed by the Court in its Memorandum & Order. [Docket #131]. Novak, however, misses an important point - PGI through its web site offers no goods for sale on its web site. PGI sells no pet or animal related products through its web site. While the PGI web site certainly has a level of interactivity, such interactivity does not include the online sale of any goods to consumers.

Novak's argument that using "Pets Warehouse" in meta-tags on some web pages within the PetsForum.com domain is legally deficient. In *Bihari v. Gross*, 119 F.Supp.2d 309 (S.D.N.Y. 2000) Judge Scheindlin rejected such a claim under the Landham Act noting:

³ Novak's Exhibit N can be fully viewed at URL <http://http://petsforum.com/psw/Fund.htm>.

⁴ The Court has previously noted that Novak claims that he is owner of the "petwarehouse.com" trademark. [Docket #131 at pg. 3]. This is incorrect. Novak claims "Pets Warehouse" as his trademark. [Docket 3 Amended Complaint at ¶ 13]]

Here, Gross has included "Bihari Interiors" in the metatags of his web sites because the websites provide information about Bihari Interiors and Marianne Bihari. Gross has not used the terms "Bihari Interiors" and "Bihari" in the metatags as a mark, but rather, to fairly identify the content of his web sites. In short, Gross uses the "Bihari Interiors" mark in its descriptive sense only.

Id. At 322. See also *Playboy Enters. Inc. v. Welles*, 7 F. Supp.2d 1098 (S.D. Cal. 1998)("With respect to the metatags, the court finds there to be no trademark infringement where defendant has used plaintiff's trademarks in good faith to index the content of her website.").

The exact situation is present in this case. Any occurrences of the expressive terms "Pets" and "Warehouse" are being used to identify the content of the web pages. It should be obvious to the Court that Novak is unable to point to any location where the metatags "Pets Warehouse" appear which could in any fashion be described as creating confusion between PGI (which sells no pet products) and Novak's web sites.

Novak's oblique reference to a "newsletter" is also misplaced. As evident by Novak's Exhibit S this newsletter is neither administered by PGI nor sent by it. Instead, the newsletter, which keeps interested individuals posted as the developments in all of Novak's lawsuits, is administered through "actwin.com."

II. Plaintiff's Amended Complaint should be dismissed for insufficiency of service on PetsForum Group, Inc.

Plaintiff Novak does not challenge the notable observation that he has chosen to separately name three (3) entities in his Amended Complaint - 1) John Benn, 2) John Benn d/b/a PetsForum.com and Forums.CompuServe.com, and 3) PetsForum Group, Inc. [Docket #72, Affidavit of John Benn, Tabs 2 & 3]. In Novak's original service efforts he submitted without a specific notation on the summons (or any attachment thereto)

which was not detailed as to which of three specifically named defendants to which it was directed. Further, as Novak notes in his "Exhibit C" the Return of Service was acknowledged by "Jan Benn." Nothing within the service set of the summons and complaint made it clear which entity was being served by this effort.

Since this was not the requisite personal service required by the Federal Rules of Civil Procedure upon an individual, a Pre-Motion letter raising various Rule 12 issues, including lack of personal service as to any action against "John Benn" or "John Benn d/b/a PetsForum.com and Forums.CompuServe.com" was filed. [Docket #4].

Novak next contends that "[i]n an effort to be 100% sure that PGI was served properly" he submitted another summons and complaint for service on October 10, 2002. Again, the summons failed to specify which of the several named defendants this service was being directed. While Novak now contends that there was a separate page attached to the generic summons, no such item was contained in the papers served on October 10, 2002. As previously noted, the words "PetsForum Group, Inc." which appear on the Return of Service were not on the document when Benn, or the Sheriff's Deputy, signed the form. [Docket #72, Benn Aff. pg. 2; Affidavit of Deputy Sheriff Steve Benson]. The words have been added by Novak to alter the document and mislead the Court. A copy of the altered document is available as Tab 6 to Docket #72. The summons served on October 10, 2002 also failed to clearly indicate the "To:" information required by the Federal Rules of Civil Procedure. The summons is available as Tab 5 to Docket Entry #72.

Absent the specification required for a Federal summons, Benn took the October 10, 2002 service effort to be Novak's attempt to correct the lack of personal service from

June 18, 2002. This challenge was raised by Benn under his Pre-Motion Letter. [Docket 4]. Since the October 10, 2002 service was "personal service", Benn subsequently dropped any challenge to the lack of personal service against him as an individually named defendant. [Docket 72].

Even a cursory review of Novak's service efforts in this case will reveal that any problems as to which issues are now before the Court were his responsibility. Novak failed to obtain and use separately designed summons as required under Rule 4(a). The papers Novak used to attempt service failed to contain (1) signature of the Clerk, (2) seal of the Court, and most importantly (3) a specific direction as to which defendant the summons was directed. The papers Novak had served did not include any such specification. Novak cannot now be allowed to complain as to how the present omnibus issues are presented to the Court. There has been no waiver of dismissal issues by PGI.

Novak's citation to *Willington Assoc. v. Vandee Enter. Corp.*, 75 Misc. 2d 330 (N.Y. 1967) as a non-Federal case has no bearing on the presented issue and is contrary to the express provisions of Rule 4(a). Since Novak chose to individually name three (3) defendants, Novak was required under Rule 4(a) to serve each separately with fully conforming summons. Novak failed to do this.

III. Plaintiff's Amended Complaint should be dismissed based upon judicial estoppel for Plaintiff's failure to list or claim intellectual property rights to "Pets Warehouse" in his bankruptcy proceedings.

Novak fails to address the legal citations provided by PGI which clearly state that in bankruptcy proceedings, debtors must disclose interest in items such as trademarks. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 n. 9, 103 S.Ct. 2309 (1983);

In re S.I. Acquisition, Inc., 817 F.2d 1142 (5th Cir. 1987). In this case Novak concealed his claim to ownership to trademark "Pets Warehouse". A debtor may not conceal assets and then, upon termination of the bankruptcy case, utilize the asset for his own benefit. See *Rosenshein v. Kleban*, 918 F.Supp. 98, 102 (S.D.N.Y. 1996); *Murray v. Board of Education of City of New York*, 248 B.R. 484, 487 (Bnkkr. S.D.N.Y. 2000). As even the Supreme Court in *First Nat'l Bank of Jacksboro v. Lasater*, 196 U.S. 115, 119, 25 S.Ct. 206 (1905) has noted:

It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee has never taken any action with respect to it.

Id. 119.

Novak is also incorrect that all \$800,000 in debts originally listed in his original Chapter 7 bankruptcy were paid. Most of these creditors received nothing from Novak's bankruptcy and would continue to have a specific interest in undisclosed property. Moreover, Novak has previously been held to have hid other assets in his bankruptcy proceedings. [JES-TX-1].⁵

IV. Plaintiff's Amended Complaint should be dismissed for failure to join the bankruptcy trustee as holder of any of Plaintiff's intellectual property.

Novak is incorrect in his claim that he acquired legal ownership status as a reorganized debtor. What Novak fails to accept, is that any ownership to the trademark "Pets Warehouse" which was not formally scheduled in his various Chapter 7 and Chapter 11 proceedings in bankruptcy remains property of the bankruptcy estate. *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 53 (Bnkcty S.D.N.Y. 1999). Had Novak

⁵ References in this Memorandum to "JES-Tab-Page" are to the Joint Evidentiary Submissions in Support of Motions filing which has appear at Docket #100.

disclosed his claim to ownership rights in this Chapter 7 and Chapter 11 petitions, then his might have a valid argument. Novak, however, failed on August 24, 1993, December 4, 1995, January 30, 1996 and May 23, 1996 failed to ever claim ownership of the trademark "Pets Warehouse." Interestingly, Novak claims to have been using the trademark "Pets Warehouse" since 1974. The Court should order the bankruptcy trustee to be added as a necessary part in this case.

V. Plaintiff's Amended Complaint should be dismissed for failure to join corporate entities.

There is ample documentation presented in the evidentiary record before the Court to confirm the necessity of joining a variety of other entities who have claimed rights to the trademark "Pets Warehouse." Novak does not deny that between 1974 and September 2002 a variety of corporate entities operated the "Petswarehouse.com" web site and claimed copyright to its content. [JES-TZ-2; JES-TE-1; JES-TW-3; JES-TH-1]. In fact, Novak did not obtain any business license for Suffolk County, New York until September 3, 2002. [JES-TS-1].

Over the many years since Novak initially filed bankruptcy in the 1990s, he has engaged in a clever shell game concerning the operation of "Pets Warehouse" businesses. Each of these businesses flaunted "Pets Warehouse" at the online entity. Most of these corporations were terminated by the State of New York for non-payment of corporate franchise taxes. While Novak now claims that each of these defunct corporations "were all parties in the past of a license agreement" Novak has only produced a single, questionable licensing agreement in the related litigation in CV-01-03566.

VI. Plaintiff's Amended Complaint should require a more definite statement of claims against Defendant PetsForum Group, Inc.

Novak offers no substantive response to this aspect of PGI's Omnibus Motion. As the caselaw cited by PGI indicates, the myriad of conflicting uses of "defendant," "defendants," "defendant's" and "defendants" by Novak in his Amended Complaint is a "type of pleading [which] completely disregards Rule 10(b)'s requirement..." *Magluta v. Samples*, 256 F.3d 1281, 1284 (11th Cir. 2001).

PGI's Motion for a more definite statement is well supported. Just because no other defendant chose to raise this issue is not a sufficient indicator that the motion lacks merit. It is doubtful that any of the previously dismissed defendants actually understood Novak's Amended Complaint. Even this Court has noted that the "causes of action are muddled and often contain several subpart." [Docket 131 pg 3].

CONCLUSION

Based upon the opposing factual record and the authorities cited, Defendant PetsForum Group, Inc. respectfully requests that the Court dismiss Plaintiff's Complaint or, the alternative, to require that the Bankruptcy Trustee and other corporate entities to be made party to this lawsuit.

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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:

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

Thomas Barr
(via email)

Date: _____

John R. Benn