IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENNEDY INDUSTRIES, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
BRIAN APARO, et al.	:	NO. 04-5967

MEMORANDUM

Bartle, C.J. March 6, 2006

Plaintiff Kennedy Industries, Inc., a seller of hygienic products, including a skin application for wrestlers, sued defendants Driving Force, Inc. ("Driving Force") and its president Brian Aparo, as well as Roy Fisher, Helen Fisher, Advanced Chemical Technology, Inc. ("ACT"), and others for unfair competition, specifically, false advertising, under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Plaintiff has also brought various related claims under state law. Before the court is the motion of defendants Roy Fisher, Helen Fisher, and ACT (collectively "Movants") to dismiss for lack of personal jurisdiction.

I.

For several years plaintiff sold an over-the-counter spray or foam known as KS Skin Protection[1] to be used by school and college wrestlers before a match to protect their skin from

1. KS Skin Protection was previously known as Kenshield Skin Protection.

chafing. In February, 2002, defendant Driving Force introduced its product variously known as 99 Athletic Instant Skin Sanitizer and 99 Antimicrobial Instant Skin Sanitizer and Protectant (collectively "99"). It was sold to wrestlers as a leave-on, no-rinse product for the entire body and directly competed with KS Skin Protection. Driving Force, which is located in New Hampshire, originally sold "99" directly to customers, but since 2004 it has done so exclusively through distributors in a number of states, including Pennsylvania.

Movants produced, packaged, and sold "Germinal" over the internet. Germinal is the trade name for the antiseptic application that the Fishers developed. In 2004, Movants agreed to sell Germinal to Driving Force for the latter to sell as its own product, that is "99." Driving Force sent the labels it developed to Florida where the Fishers affixed them to containers of Germinal. The Movants then shipped "99" to Driving Force which marketed and sold the product through its distribution network in every state, including Pennsylvania, as listed on the company's website. In short, "99" is Germinal relabeled for Driving Force. On December 29, 2004, Driving Force's website listed nine Pennsylvania "Driving Force Dealers" through which individuals could purchase "99" and any other Driving Force product.

After a hearing we permanently enjoined Driving Force and other defendants from labeling or selling "99" with false advertising and ordered them to recall any containers of the

product in the possession of their distributers. Kennedy v. Aparo, Civ. A. No. 04-5967, 2005 WL 3752270, *6-7 (E.D. Pa. July 22, 2005). We found that there was no medical or scientific justification for any of Driving Force's claims about "99." In addition we held that certain federal regulations demonstrated that the active ingredient in "99" had not been established as safe and effective for the uses Driving Force advertised. See id. at *3; 21 C.F.R. §§ 310.545(a)(18)(ii), 310.545(a)(22)(ii).

On August 25, 2005 plaintiff filed an Amended Complaint naming additional defendants, including Movants. The Fishers and ACT filed this motion to dismiss the Amended Complaint, claiming this court lacks personal jurisdiction over them.

II.

Rule 4(e) of the Federal Rules of Civil Procedure allows a district court to "assert personal jurisdiction over a non-resident to the extent allowed by the law of the forum state." Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984). Pennsylvania has enacted an expansive "long-arm" statute. See 42 Pa. Cons. Stat. Ann. § 5322. In addition to enumerating examples of specific acts subjecting persons to the jurisdiction of Pennsylvania courts, the statute provides that a court may exercise personal jurisdiction over non-residents "to the fullest extent allowed under the Constitution of the United States." Id. § 5322(b); Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217,

1221 (3d Cir. 1992). Thus, we may validly exercise jurisdiction over a non-resident defendant under Pennsylvania's long-arm statute if doing so is consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution. See id. at 1221.

Therefore, we must determine whether the defendant's contacts with Pennsylvania are sufficient to support either general or specific jurisdiction. Id.; Pennzoil Products Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 200 (3d Cir. 1998). A court may exercise either general or specific personal jurisdiction over a defendant. Remick v. Manfredy, 238 F.3d 248, 255 (3d Cir. 2001). General jurisdiction applies when the cause of action does not arise out of and is not related to the defendant's contacts with the forum. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n.9 (1984). "[T]he plaintiff must show significantly more than mere minimum contacts to establish general jurisdiction. The nonresident's contacts to the forum must be continuous and substantial." Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987) (citations omitted).

To make a finding of specific jurisdiction, however, our Court of Appeals has explained that we "appl[y] two standards, the first mandatory and the second discretionary." Pennzoil, 149 F.3d at 201. First, we must determine whether the defendant has sufficient minimum contacts with the forum "necessary for the defendant to have reasonably anticipate[d]

being haled into court there" to litigate a "cause of action arising out of [the] defendant's forum-related activities." Id.; Remick, 238 F.3d at 255; see also World-Wide Volkswagen Corp. v. World Wide Volkswagen, 444 U.S. 286, 297 (1980) (internal citation omitted). The minimum contacts must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); Mesalic v. Fiberfloat Corp., 897 F.2d 696 (3d Cir. 1990). If this court determines that the defendant has adequate contacts with the forum to satisfy the Constitution, we "may inquire whether the assertion of personal jurisdiction would comport with fair play and substantial justice." Pennzoil, 149 F.3d at 201. Our Court of Appeals has "generally chosen to engage in this second tier of analysis." Id.

Where the defendant has raised a jurisdictional defense, the plaintiff bears the burden of establishing, through sworn affidavits or other competent evidence, that either general or specific jurisdiction can be exercised. Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros. Inc., 983 F.2d 551, 554 (3d Cir. 1993); Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984).

III.

We first consider whether we may exercise general jurisdiction over the Fishers and ACT. Roy and Helen Fisher are residents of Florida. They have never worked in or paid taxes to the Commonwealth of Pennsylvania nor have they ever owned real property or bank accounts here. They have never employed workers or agents in Pennsylvania and have not maintained an office in the state. ACT, a corporation registered in Florida, has never stationed its employees in the Commonwealth, registered with the Pennsylvania Department of State to do business, or owned property or paid taxes in this state. Between 2000 and 2004, defendants have sold seventeen products over their website in the amount of $1,065 to residents of Pennsylvania. Only two of these sales involved Germinal; the rest were for aviation products. Finally, the Fishers and ACT have received no orders in 2004 or 2005 from Pennsylvania residents for any of their products and have not shipped any goods into the Commonwealth during that time.

It is well established that "mere operation of a commercially interactive web site" is not by itself a sufficient basis for jurisdiction anywhere the site can be viewed. Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 454 (3d Cir. 2003); see also ALS Scan v. Digital Service Consultants, Inc., 293 F.3d 707 (4th Cir. 2002). Rather, operating a website is akin to

advertising in a national publication which is generally insufficient, without more, to establish personal jurisdiction. See Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 106 (3d Cir. 2004). For a court to exercise jurisdiction on the basis of internet sales, there must be "evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state, by directly targeting its web site to the state, [or] knowingly interacting with residents of the forum state via its web site..." Step Two, 318 F.3d at 454.

The record does not support the conclusion that the Fishers or ACT purposefully targeted residents of Pennsylvania on any website either owns and maintains. The sales over the internet to residents of Pennsylvania are isolated, few in number, and comparatively low in value. The seventeen product transactions for a total of $1,065, spread across more than five years, are certainly not "continuous and substantial" contacts sufficient to support our exercise of general jurisdiction. See Helicopteros, 466 U.S. 416-19; Provident, 819 F.2d at 437. There is no indication that the Fishers and ACT targeted their website to Pennsylvania residents. Step Two, 318 F.3d at 452. Accordingly, we do not have general jurisdiction over the Fishers and ACT.

We next turn to the question of specific jurisdiction. We must determine whether the Fishers and ACT have sufficient minimum contacts with Pennsylvania necessary for them to have

reasonably anticipated being haled into court here to litigate matters arising out of those contacts. As noted, they have made only two sales of Germinal to Pennsylvania residents over the last five years. These two transactions, which did not involve Driving Force, clearly do not rise to a level that would put them on reasonable notice that they might be called into a Pennsylvania court to defend a suit regarding how Driving Force labeled "99."

Plaintiff alleges that misrepresentations on the "99" labels and the false advertising and promoting of the product has caused and continues to cause damage to its business and products. It further maintains, relying on deposition testimony from Brian Aparo, that the Fishers and ACT played a role in the development of the "99" label. Roy Fisher counters in his affidavit that ACT does not create labels for "99" or advertise, promote, or market the product. In his deposition Fisher stated he had "no input at all" into the "99" label. Fisher stated that at the outset of his business relationship with Driving Force, he had provided it some of the test results that purported to show the effectiveness of "99." As we noted above, in order to have specific jurisdiction over the Fishers and ACT, the plaintiff's claims must arise out of the contacts between these defendants and the Commonwealth, and the plaintiff bears the burden to prove jurisdiction is proper over the Fishers and ACT. DiVeronica Bros., 983 F.2d at 554.

The plaintiff has not offered evidence sufficient to meet its burden. It has not demonstrated that the Fishers and ACT had more than minimal input into or were responsible for the design or content of the "99" label. Furthermore, the record clearly establishes that the Fishers and ACT were not involved in creating advertisements and promotions of "99" that were targeted to or reached Pennsylvania residents. Mr. Fisher denies any involvement in the development of the "99" label in his deposition and affidavit. Driving Force approved the content and design of the labels that were then shipped to Florida where the Fishers applied them to containers of Germinal. After the "99" labels had been applied, the containers were then shipped to New Hampshire for sale by Driving Force. The Fishers and ACT were never employed by nor had any control over the actions of Driving Force, which made the "99" labeling decisions. The act of labeling containers of Germinal is not alleged to be the source of plaintiff's injuries and, assuming it was, the labeling took place outside Pennsylvania. Even if the Fishers and ACT did play a role in the development of the "99" label's content, the record does not demonstrate such activity took place in, was intentionally directed to, or arose out of their few, isolated contacts with Pennsylvania. The plaintiff has not shown the Fishers and ACT purposefully availed themselves of the markets of this Commonwealth by submitting Germinal test results or saying "what needs to be on the label." Therefore, because the plaintiff has not demonstrated that its legal claims arise out of

the few, isolated contacts between the Fishers and ACT and Pennsylvania, we do not have specific jurisdiction.

In addition, exercising specific jurisdiction over the Fishers and ACT would not comport with notions of "fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945); see also Pennzoil, 149 F.3d at 207-08. The Fishers and ACT, a small operation, would bear a significant burden if compelled to travel between Philadelphia and Florida to litigate this matter. In addition, dismissing the Fishers and ACT will not leave the plaintiff without convenient and effective relief. It has sued an extensive list of other defendants, including Driving Force, for the damages it sustained. Last, the interests of the judicial system in obtaining efficient resolution of this case and the several states in furthering fundamental social policies are not adversely affected by our decision. Pennzoil, 149 F.3d at 207-08. Accordingly, we cannot exercise personal jurisdiction over the Fishers and ACT because to do so would be inconsistent with traditional notions of fairness and justice.

The plaintiff also argues that by selling Germinal, relabeled as "99," to Driving Force, the Fishers and ACT placed their product in the "stream of commerce" and, therefore, could have anticipated being sued in any jurisdiction where Driving Force sold "99" over its website. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Asahi Metal Indus.

Co., Ltd. v. Superior Court of California, Solano Cty., 480 U.S. 102 (1987); Pennzoil, 149 F.3d at 203-05.

Under the stream of commerce theory, a state may exercise personal jurisdiction over a nonresident defendant if the defendant places a product into the marketplace that causes injury or damage in that state, provided the defendant has taken other purposeful action which established some other connection with the forum. See generally Asahi, 480 U.S. 102; Black's Law Dictionary 1434 (7th ed. 1999). Indeed, the Supreme Court articulated the stream of commerce theory specifically to remedy jurisdictional challenges in personal injury products liability cases. This is not such a case. Our Court of Appeals confronted the application of the stream of commerce theory outside the products liability context in Max Daetwyler Corp. v. Meyer, 762 F.2d 290 (3d Cir. 1985). A New York corporation initiated a patent infringement action against a West German citizen doing business as a sole proprietor. The district court found that the defendant lacked minimum contacts with Pennsylvania but had sufficient national contacts to justify jurisdiction. Nevertheless, the district court certified the personal jurisdiction question to the Court of Appeals.

In Daetwyler, the Court of Appeals found that the defendant's contacts with Pennsylvania were inadequate to satisfy the Due Process Clause. In doing so, our Court of Appeals rejected Daetwyler's "expansive" stream of commerce argument that jurisdiction existed simply because the defendant "participated

in a distributive chain which might reasonably anticipate sales of [defendant's] products in major industrial markets, which should include Pennsylvania." Id. at 298. The court explained that the stream of commerce theory

> evolved to sustain jurisdiction in products liability cases in which the product had traveled through an extensive chain of distribution before reaching the ultimate consumer. [I]t was felt the presence of a distributor should not shield a manufacturer, whose products had caused harm to residents of the forum state, from the reach of the forum state's long-arm rule.

Id. at 298-99. Outside of this context, the Court of Appeals noted that it was debatable whether similar public policies were at stake in the patent infringement framework presented in Daetwyler. Id. at 299. The court further commented that the stream of commerce theory had been used to exercise jurisdiction over a foreign manufacturer of a defective product only where those defendants had "made deliberate decisions to market their products in the forum state" and "either indirectly derived substantial benefit from the forum state or had a reasonable expectation of doing so." Id. at 299, 300 (collecting cases).

The Fishers and ACT are not before us because of any personal injury caused by "99" or Germinal. There is no allegation that wrestlers or other persons suffered bodily harm by using "99" or Germinal. Instead, the tortious acts alleged are of an economic and business nature. This type of injury

distinguishes this action from the products liability context of the stream of commerce theory announced in World Wide Volkswagen and reaffirmed in Asahi. Therefore, the stream of commerce cases do not provide a basis for specific jurisdiction.

IV.

Accordingly, we will grant the motion of defendants Roy Fisher, Helen Fisher, and Advanced Chemical Technology, Inc., to dismiss for lack of personal jurisdiction.

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ORDER

AND NOW, this 6th day of March, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendants Roy Fisher, Helen Fisher, and Advanced Chemical Technology, Inc. to dismiss for lack of personal jurisdiction is GRANTED.

BY THE COURT:

/s/ Harvey Bartle III
C.J.