

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

M & L OF DELAWARE, INC., a Delaware corporation,)
)
)
 Plaintiff,)
)
 v.) Civil Action No. 03-521-KAJ
)
 BENJAMIN WALLACE and JOSEPH MALONE, DVM,)
)
)
 Defendants.)

MEMORANDUM ORDER

I. INTRODUCTION

M & L of Delaware, Inc., a Delaware corporation (“M&L” or “Plaintiff”) filed suit against Benjamin Wallace (“Wallace”) and Joseph Malone, D.V.M. (“Malone”) alleging breach of contract, negligence, and trespass to chattels in connection with the castration of Plaintiff’s horse known as “Mr. Commander.” Subject Matter Jurisdiction is invoked under 28 U.S.C. § 1331.

On October 2, 2003, Malone filed a motion to dismiss M&L’s complaint for lack of personal jurisdiction. (Docket Item “D.I.” 5.) On December 3, 2003, Wallace filed a motion to dismiss M&L’s complaint for lack of personal jurisdiction and insufficient service of process. For the reasons set forth below, Malone’s motion to dismiss is granted and Wallace’s motion to dismiss is denied.

II. BACKGROUND

Plaintiff is a corporation involved with the breeding and racing of standardbred horses. (D.I. 22, Ex. A at 1.) Wallace is a horse trainer who has previously traveled to

Delaware to race horses and has sent here horses he has trained. (D.I. 24 at 2.)

Having seen Wallace's horses in Delaware on one of those occasions, representatives of the Plaintiff contacted Wallace by telephone on May 28, 2002 to discuss the possibility of Wallace training Mr. Commander. (D.I. 22, Ex A at 2.) Shortly thereafter, the parties arranged to have Mr. Commander shipped to Ontario, Canada for training with Wallace. (*Id.*) After the horse arrived in Ontario, Wallace decided that, in order to improve the horse's performance, it should be castrated. (D.I. 19, Ex. A at 2.) He then called Malone, a veterinary doctor, and engaged his services to castrate Mr. Commander. (*Id.*) Malone performed the surgery in Ontario on June 6, 2002. (*Id.*) After learning of Mr. Commander's castration M&L, had the horse transferred to another trainer. (D.I. 22, Ex. A at 2.)

Wallace does not have a place of business in Delaware, nor does he advertise in Delaware or maintain a website. (D.I. 24 at 1, 5-6.) From 1999 through 2002, horses trained by Wallace raced in Delaware on six occasions. (D.I. 22, Ex. E.) Wallace personally attended two races in 1999; he did not attend the other above-mentioned races. (D.I. 24 at 2.) Horses trained by Wallace have won \$62,397 in Delaware. (D.I. 22, Ex. E.) From at least 1999 through 2002, Wallace had a license to train horses in Delaware and has been listed as the trainer of record for horses he has sent here. (D.I. 24, Ex. A; D.I. 22, Ex. F at 41; D.I. 22, Ex. E.) Delaware law prohibits trainers from taking part in races without first obtaining a permit. (D.I. 22, Ex. F at 41.)

While Malone has performed work for the Plaintiff and at one time was licensed as a Veterinarian in Delaware, that license lapsed in 2000, and, at the time he performed the surgery at issue, he had no ties to Delaware. (D.I. 11 at 4-5; D.I. 6, Ex.

1.) Malone maintains a website that is accessible in Delaware. (D.I. 11, Ex D.) With respect to the surgery, Malone had no contact with the Plaintiff or anyone else in Delaware.

On May 30, 2003, Plaintiff filed a complaint against Wallace and Malone to recover damages it allegedly suffered as a result of Mr. Commander's castration. (D.I. 1.) In August of that year, Plaintiff attempted to serve Wallace in Ontario, however, this attempt did not satisfy the requirements for service under the Hague Convention for service in Canada. See *infra* at 7. Plaintiff maintains that it is now in the process of serving Wallace under the Hague Convention. (D.I. 22 at 9-20.)

III. DISCUSSION

The plaintiff bears the burden of making a *prima facie* showing that the court has personal jurisdiction over the defendants. *Intel Corp. v. Broadcom Corp.*, 167 F. Supp. 2d 692, 699 (D. Del. 2001). When personal jurisdiction is contested without the benefit of discovery, the plaintiff need only establish a *prima facie* case, with the record viewed in the light most favorable to the plaintiff. *American Bio Medica Corp. v. Peninsula Drug Analysis Co., Inc. et al.*, 1999 U.S. Dist. LEXIS 12455 at *5-6 (D. Del. Aug. 3, 1999); *Siemens Aktiengesellschaft v. LG Semicon Co., Ltd.*, 69 F. Supp. 2d 622, 624 (D. Del. 1999).

The determination of whether a defendant is subject to personal jurisdiction requires a two-part analysis. *Broadcom*, 167 F. Supp. 2d at 700; *Siemens*, 69 F. Supp. 2d at 624; *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 293 (3d Cir. 1985). First, the court must determine whether the language of the Delaware long-arm statute, 10 Del. C. § 3104(c), reaches the defendant. *Broadcom*, 167 F. Supp. 2d at 700. Second,

if the court finds that the defendant's conduct gives rise to personal jurisdiction under the long-arm statute, the court must then determine whether subjecting the defendant to jurisdiction in Delaware would comport with the Due Process Clause of the Fourteenth Amendment. *Id.* (citing *Intel Corp. v. Silicon Storage Tech., Inc.*, 20 F. Supp. 2d 690, 694 (D. Del. 1998)).

The Delaware long-arm statute has been construed "broadly...to confer jurisdiction to the maximum extent possible under the due process clause." *LaNuova D&B S.P.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986). Nevertheless, the Court begins its analysis with the Delaware long-arm statute.

Pertinent portions of the Delaware long-arm statute provide:

(c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:

(1) Transacts any business or performs any character of work or service in the State;

10 *Del. C.* §§ 3104(c)(1), (c)(3) & (c)(4). Delaware state courts have interpreted the "transacting business" provision of § 3104(c)(1) as a specific jurisdiction provision that requires a nexus between the cause of action and the conduct used as a basis for jurisdiction. *See LaNuova*, 513 A.2d at 768.

Once it is determined that there is personal jurisdiction under the state long-arm statute, the court must look to ensure that the granting of specific personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment. *Broadcom*, 167 F. Supp. 2d at 700. The Third Circuit has held that foreseeability that the defendant's conduct would cause him to be hauled into court in the forum state is critical to the due

process analysis. *Id.* In particular, a “defendant's deliberate attempt to enter, advertise and promote itself” can be sufficient to confer specific personal jurisdiction over defendant. *United States Golf Assn. v. U.S. Amateur Golf Assn.*, 690 F. Supp. 317, 320 (D.N.J. 1988) (holding that where a defendant has no connections to the state in question, a direct mail solicitation to the plaintiff was adequate to confer personal jurisdiction.) Even minimal marketing efforts have been held sufficient to confer personal jurisdiction. See *Clay v. Hopperton Nursery, Inc.*, 533 F. Supp. 476, 478 (D. Ky. 1982) (holding that where a defendant advertised in a trade journal that had 152 subscribers in the state in question, and the plaintiff only vaguely recalled seeing the ad, the exercise of personal jurisdiction was nevertheless appropriate.)

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, those contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (U.S. 1985) (internal citations omitted). The Third Circuit has held that cases are “rare . . . in which minimum requirements in the concept of fair play and substantial justice . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.” *Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 207 (3d Cir. 1998) (internal citations omitted).

A. Personal Jurisdiction of Wallace

Of note in this case, Wallace’s horses took part in six races over a two and a half year period within Delaware. (D.I. 22, Ex. E.) As the trainer of record for these races, Wallace was prominently listed as the trainer of the horses in the U.S. Trotting

Association Literature. (D.I. 22, Ex C-E.) For the privilege of training horses that competed in Delaware, Wallace had to, and did, obtain a racing license in Delaware. (D.I. 24, Ex. A at 1.) As Wallace is a seasoned horse trainer it is reasonable to assume that he was aware that his name would be listed and accessible by people watching races in Delaware. Consequently, it was foreseeable that people involved in the horse racing industry would watch the races in Delaware and contact Wallace, based, at least partially, on the performance of the horses he trained. In fact, from watching Wallace's trained horses excel at such races, Plaintiff decided to contact him and contract for his services. (D.I. 22, Ex A.) Wallace's efforts in Delaware can properly be viewed as a kind of marketing, and because Wallace's actions in Delaware led Plaintiff to contract with him and the alleged injury resulted from that contract, the necessary nexus is present under Delaware's long-arm statute section 3104(c)(1).

Notions of fair play and substantial justice will not be offended by requiring Wallace to defend himself here. He has trained horses that have won a more than *de minimis* sum in Delaware (D.I. 22, Ex. E), and as the trainer of record his compensation is derived from the horses winnings in Delaware. Additionally, as earlier noted, Wallace was listed as the trainer of the horses that raced here and acquired name recognition among race enthusiasts, including Plaintiff. Consequently, Wallace can fairly be haled into court in Delaware. I therefore hold that this court has personal jurisdiction over Wallace.

B. Personal Jurisdiction of Dr. Malone

With respect to Dr. Malone, at the time of the incident there were absolutely no contacts between him and Delaware. The Plaintiff argues that Dr. Malone's

professional relationship with Plaintiff, maintenance of his website, and his professional obligation to obtain informed consent before castrating Mr. Commander constitute the minimum contacts necessary to support a finding of personal jurisdiction over Dr. Malone. (D.I. 11 at 8-9.) None of these acts are fairly seen as having occurred in Delaware or having arisen from acts occurring in Delaware, and as such, none of them can be used to establish personal jurisdiction.¹ See *LaNuova*, 513 A.2d at 768. Therefore, I hold that the court lacks personal jurisdiction over Malone.

C. Wallace's Service of Process

Lastly, Wallace argues that he was not properly served under the Hague Convention and that the complaint against him should therefore be dismissed. (D.I. 19 at 12.) On October 21, 2003, a process server delivered the Summons, Complaint and Civil Coversheet to Wallace, who signed that he had received the documents. (D.I. 22, Ex. J.) This service is insufficient under the Hague Convention.² (D.I. 24 Ex. I.) Federal Rule of Civil Procedure 4(m), however, does not contain a time limit for serving foreign defendants. Additionally, Wallace is aware of this litigation, as he has submitted briefs to this court opposing personal jurisdiction. Therefore, I find that Wallace is not unduly harmed by allowing Plaintiff additional time to properly effect service of process.

¹The website is not alleged to be interactive or to otherwise be a vehicle for transacting business in Delaware. See *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454-55 (3d Cir. 2003) (holding that the operator of a commercially interactive website, without specifically directing its selling towards the residents of the forum in question, is not subject to jurisdiction there.)

²The Hague Convention requires that all documents be forwarded to Canada's central process server. See HAGUE CONVENTION ON SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS, LEXIS 20 U.S.T. 361, 16-18 (1969). In this case the documents were not delivered through the central process server, and, consequently, service was not effective.

IV. CONCLUSION

Therefore, it is hereby ORDERED that Defendant Benjamin Wallace's Motion to Dismiss (D.I. 18) is DENIED, and Defendant Joseph Malone, D.V.M.'s Motion to Dismiss (D.I. 5) is GRANTED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

October 18, 2004
Wilmington, Delaware