

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JEFFREY HAMMER,

Plaintiff,

-against-

ANTHONY L. TRENDL,

Defendant.
-----X

**MEMORANDUM OF
DECISION AND ORDER**
CV 02-2462 (ADS)

APPEARANCES:

JEFFREY HAMMER
Plaintiff Pro Se
102 East Cortland Avenue
Oceanside, NY 11572

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
Attorney for the Defendant
1633 Broadway
New York, NY 10019
By: Heather Windt, Esq., Of Counsel

Spatt, District Judge.

Jeffrey Hammer ("Hammer" or the "plaintiff"), proceeding pro se, filed this action against Anthony L. Trendl ("Trendl" or the "defendant") alleging that Trendl posted on an Internet website Amazon.com several unfavorable reviews of books written by the plaintiff in violation of federal copyright and state defamation laws. Presently before the Court are (1) Hammer's objections to the Report and Recommendation dated October 10, 2002 issued by United States Magistrate Judge

Michael L. Orenstein; (2) the defendant's motion to dismiss the complaint for lack of personal jurisdiction and failure to state a claim; (3) Hammer's motion for reconsideration of the Court's January 3, 2003 Order denying his motion for a default judgment; (4) Hammer's motion to have the defendant and David Zapolsky, an attorney at Amazon.com, arrested; (5) Hammer's motion to compel the defendant's counsel to disclose who is paying her legal fees; and (6) Hammer's motion for an order directing the defendant to pay for various postage. The Court notes that Hammer has filed more than 50 motions in this case in the form of formal motions and letter motions mostly repeating the same requests.

I. BACKGROUND

A. Factual Background

Hammer is a self-published author of several books, including Mind Reading in Written Form!: The Magic, Power, and Secrets of Handwriting Revealed! and An Advanced Guide to "Basic Hypnosis". According to the plaintiff, the defendant has posted numerous book reviews on an Internet website maintained by book retailer Amazon.com and is considered to be an Amazon.com "top 500 reviewer."

Hammer claims that the defendant posted several unfavorable reviews of the plaintiff's books on Amazon.com. In the reviews, the defendant (1) compared the plaintiff's book on hypnosis to "the dust under [the defendant's] couch;" (2) questioned the plaintiff's "spelling, grammar and teaching on the subject" of hypnosis; (3) entitled

the book reviews as a “Shallow Look at Hypnosis” and a “Disappointing Look at Graphology;” and (4) failed to recommend the plaintiff’s books.

Hammer claims that as a result of the reviews he has suffered an economic loss due to a decrease in sales of his books. In addition, he claims that these reviews have “ruined his reputation” and subjected him to “public humiliation.” According to the plaintiff, the defendant is “targeting [him] and his books out of over 2.2 million products on Amazon.com to prevent [the plaintiff] from selling [his] books.”

On April 23, 2002, the plaintiff commenced this action alleging that the defendant is in violation of federal copyright and state defamation laws. On September 4, 2002, the defendant filed a motion to dismiss the complaint for lack of personal jurisdiction and failure to state a claim pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”).

B. Procedural History

On August 16, 2002, the plaintiff filed a motion for a temporary restraining order seeking to: (1) enjoin the defendant from posting any additional unfavorable reviews of his books on the Internet; (2) enjoin Amazon.com from removing his books from its website; and (3) directing Amazon.com to remove the defendant’s unfavorable reviews of his books. On August 22, 2002, this Court referred the motion to Judge Orenstein to hold a hearing and to prepare a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Judge Orenstein did not conduct a hearing, but issued a Report and Recommendation dated October 10, 2002 finding that, (1) a temporary restraining order prohibiting the defendant from publishing any further reviews of the plaintiff's books in this case would be an impermissible prior restraint on expression; (2) the plaintiff failed to establish any irreparable injury; (3) the plaintiff failed to state a claim for defamation or copyright infringement; and (4) because Amazon.com was not a party named in this action, it could not be enjoined.

Hammer filed a series of objections to Judge Orenstein's Report, and on October 25, 2002, the Court directed the plaintiff to consolidate all of his objections in one motion. The plaintiff asserts, among other things, that, (1) Judge Orenstein failed to conduct a hearing before issuing his Report; (2) a temporary restraining order is warranted in this action; and (3) because Amazon.com provided the defendant with an attorney in this case and "is acting in concert" with the defendant, it is a party to this case and should therefore be enjoined. The plaintiff also requests that this Court alert the United States Attorney General's Office that the defendant is engaging in "internet fraud" and issue an order to have the defendant arrested.

II. DISCUSSION

A. Objections to Report and Recommendation

At the outset, the Court notes that "there is no hard and fast rule in this circuit that oral testimony must be taken on a motion for a preliminary injunction or that the

court can in no circumstances dispose of the motion on the papers before it.”

Maryland Casualty Co. v. Realty Advisory Board on Labor Relations, 107 F.3d 979, 984 (2d Cir. 1997) (quoting Redac Project 6426, Inc. v. Allstate Ins. Co., 402 F.2d 789, 790 (2d Cir. 1986)). A court may decide a motion for a preliminary injunction without a hearing where material facts are not in dispute. Id. Although the plaintiff vehemently argues that the Judge Orenstein was required to hold a hearing, he has failed to identify any material fact in dispute. In light of this, Judge Orenstein correctly determined that a hearing was not required on the plaintiff’s motion for temporary injunctive relief.

The award of an injunction is not something a plaintiff is entitled to as a matter of right. Rather, it is within the broad discretion of the district court to grant or deny such relief. Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 68 (2d Cir. 1999). A preliminary injunction is an “extraordinary” remedy and is not to be routinely granted. See JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, (80) (2d Cir. 1990); Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273 (2d Cir. 1986) (stating that a preliminary injunction is “one of the most drastic tools in the arsenal of judicial remedies”). To obtain a preliminary injunction, a plaintiff must establish: (1) irreparable harm; and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the

preliminary relief. Maryland Casualty Co. v. Realty Advisory Bd. On Labor Relations, 107 F.3d 979, 984 (2d Cir. 1997) (internal quotations and citations omitted).

The plaintiff claims that he is suffering irreparable harm due to the defendant's unfavorable reviews. In particular, Hammer argues that the defendant's reviews have (1) created an economic loss of sales and (2) harmed his reputation. The Second Circuit has determined that "when a party can be fully compensated for financial loss by a money judgment, there is simply no compelling reason why the extraordinary remedy of a preliminary injunction should be granted." Twentieth Century Fox Film Corp. v. Marvel Enters, 277 F.3d 253, 258 (2d Cir. 2002) (quoting Borey v. National Union Fir. Ins. Co., 934 F.2d 30, 34 (2d Cir. 1991)). Furthermore, it is well-settled that an injury to reputation is insufficient to justify the issuance of a preliminary injunction. See Stewart v. United States Immigration & Naturalization Serv., 762 F.2d 193, 199-200 (2d Cir. 1985). Accordingly, the Court agrees with Judge Orenstein that the plaintiff has failed to show that irreparable harm will result if the preliminary injunction is denied.

Nor has the plaintiff demonstrated a likelihood of success on the merits. To state a claim for defamation under New York law, the plaintiff must allege facts sufficient to support a "finding of a published statement concerning the plaintiff that is both false and defamatory." Belly Basics, Inc. v. Mothers Work, Inc., 95 F. Supp. 2d 144, 145 (S.D.N.Y. 2000) (citations omitted). It is well-settled that a statement of

pure opinion is not actionable. Id. In order to determine whether a statement is fact or opinion, courts consider, among other things, the context in which the statements are made and the circumstances surrounding the statements. See Carto v. Buckley, 649 F. Supp. 502, 507 (S.D.N.Y. 1986).

Here, the Court finds that the statements contained in the defendant's book reviews are expressions of pure opinion and are therefore protected. The defendant's statements appear in the context of a book review under the heading "Reviews." As such, the average person understands that such reviews are the reviewer's interpretation and not "objectively verifiable" false statements of facts. See Levin v. McPhee, 119 F.3d 189, 195 (2d Cir. 1997) (holding that "expressions of opinion are not actionable). Accordingly, because the defendant's reviews are merely his personal opinion about the plaintiff's books, the Court finds that the plaintiff fails to prove a likelihood of success on the merits with respect to his defamation claim.

In addition, to establish copyright infringement, the plaintiff must show both (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. Feist Pub'n, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361, 111 S. Ct. 1282, 1296 (1991). Here, the plaintiff fails to provide any allegations that the defendant actually copied the plaintiff's work. Therefore, the plaintiff also fails to demonstrate a likelihood of success on the merits with respect to his copyright claim.

Furthermore, Judge Orenstein correctly determined that the plaintiff's motion

for a temporary restraining order against Amazon.com be denied. The plaintiff argues that because Amazon.com provided the defendant with an attorney, it has become a party to this action and is therefore subject to an injunction. The Court finds this argument to be without merit. In general, courts “may not issue an order against a nonparty.” United States v. Paccione, 964 F.2d 1269, 1275 (2d Cir. 1992). There is no indication that Amazon.com was given notice of the motion for a temporary restraining order. Furthermore, the plaintiff provides no allegations tending to support that Amazon.com was in active participation in the writing of the alleged defamatory statements. The defendant is correct in stating that the plaintiff’s mere assertion that Amazon.com provided the defendant with an attorney does not demonstrate active participation. Accordingly, the plaintiff’s motion for a temporary restraining order against Amazon.com is denied.

Finally, the Court denies the plaintiff’s motions (1) for an order to have the defendant arrested and to alert the United States Attorney General’s Office of the defendant’s alleged internet fraud; (2) for an order to have David Zapolsky arrested; (3) to compel the defendant’s counsel to disclose who is paying her legal fees; and (4) for an order to direct the defendant to pay for various postage, as they are wholly unwarranted and completely nonsensical.

B. Motion to Dismiss

Trendl, a resident of Illinois, claims that the Court lacks personal jurisdiction

over him. In a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant. Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 208 (2d Cir. 2001). Where, as here, the parties have not yet conducted discovery, the plaintiff may defeat such a motion by “pleading in good faith . . . legally sufficient allegations of jurisdiction, *i.e.*, by making a ‘prima facie showing’ of jurisdiction.” Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184 (2d Cir. 1998) (quoting Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990)). The facts must be construed in the light most favorable to the plaintiff. Cooper, Robertson & Partners L.L.P. v. Vail, 143 F. Supp. 2d 367, 370 (S.D.N.Y. 2001) (citing Hoffritz for Cutlery Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985)).

To determine whether the Court may exercise personal jurisdiction over the defendant, an Illinois resident, the Court must engage in a two-part analysis: (1) whether jurisdiction exists under the law of the forum state, in this instance New York; (2) whether the exercise of jurisdiction under state law satisfies federal due process requirements. Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999).

The New York long-arm statute authorizes personal jurisdiction over non-domiciliaries under certain circumstances. Under N.Y. C.P.L.R. § 302(a)(1), the Court may exercise jurisdiction over the defendant if (1) the defendant transacts business

within New York, and (2) the claims against the defendant arises out of that business activity. N.Y. C.P.L.R. § 302(a)(1) (McKinney's 2001). A non-domiciliary "transacts business" within the state when he "purposely avails [himself] of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." Cutco Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986) (internal quotations omitted).

Here, the defendant, a resident of Illinois, wrote the book reviews in Illinois and sent them to Amazon.com from his computer in Illinois. The defendant claims that he does not transact business, or supply goods or services in New York. In addition, the defendant contends that he has been to New York only once in 1987 for a camping trip. The plaintiff does not dispute this. Rather, the plaintiff merely asserts that "the Court would have jurisdiction over defendant precisely under 'New York's Long Arm Statute!,'" but offers no facts indicating how the Court has jurisdiction under the long-arm statute.

The Amazon.com website can be accessed through the Internet from a computer anywhere in the world, including New York. The defendant is correct in stating that "[in] order to exercise personal jurisdiction over a non-resident defendant, something more than the mere posting of information on a passive web site is required to indicate that the defendant purposefully directed his activities at the forum state." K.C.P.L., Inc. v. Nash, No. 98-3773, 1998 U.S. Dist. LEXIS 18464, at *20 (S.D.N.Y.

Nov. 23, 1998) (citation omitted).

Simply posting book reviews on a website that can be read by New York Internet users does not demonstrate the type of purposeful activity in New York sufficient to support the exercise of personal jurisdiction. See Edberg v. Neogen Corp., 17 F. Supp. 2d 104, 114 (D. Conn. 1998) (holding that the exercise of personal jurisdiction is appropriate only where defendants are actively conducting business over the Internet so that they are “intentionally reached beyond their own state to engage in a business with residents in a forum state”). Hammer does not allege that the defendant made any sales to New York; entered into any contracts with the parties in New York; provided any services or products to sell in New York; or received any income from New York. Indeed, the plaintiff provides no facts to support that the defendant directed his activities at New York. Accordingly, the Court lacks personal jurisdiction over the defendant.

The Court notes that even if Hammer sufficiently demonstrated personal jurisdiction under 302(a)(1), the exercise of jurisdiction would not comport with due process because the defendant lacks minimum contacts with New York. Accordingly, the defendant’s motion to dismiss the complaint for lack of personal jurisdiction is granted. Because the Court lacks personal jurisdiction over the defendant, it need not address the defendant’s motion to dismiss for failure to state a claim.

C. Motion for Reconsideration

On January 3, 2003, the Court denied the plaintiff's motion for a default judgment. On January 9, 2003, Hammer acknowledged the Court's Order, but insisted in his letter that the defendant is in default. The Court will treat his letter as a motion for reconsideration of the Court's January 3, 2003 Order.

To succeed on a motion for reconsideration, Hammer must show that "the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion." Local Civil Rule 6.3. Here, the Court finds that the plaintiff fails to raise "controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 256-57 (2d Cir. 1995). Instead, Hammer merely regurgitates his argument previously rejected by the Court. Therefore, his motion for reconsideration of the Court's January 3, 2003 Order is denied.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the plaintiff's motion requesting a hearing for a temporary restraining order is **DENIED**; and it is further

ORDERED, that the plaintiff's objections to Judge Orenstein's Report are all **DENIED**; and it is further

ORDERED, that the Court adopts Judge Orenstein's Report in its entirety; and

it is further

ORDERED, that the plaintiff's motion for a preliminary injunction is **DENIED**; and it is further

ORDERED, that the plaintiff's motion for an order to have the defendant arrested and to alert the United States Attorney General's Office of the defendant's alleged internet fraud is **DENIED**, and it is further

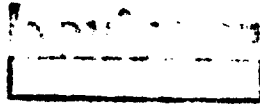
ORDERED, that the plaintiff's motion for an order to have David Zapolsky arrested is **DENIED**, and it is further

ORDERED, that the plaintiff's motion to compel the defendant's counsel to disclose who is paying her legal fees is **DENIED**, and it is further

ORDERED, that the plaintiff's motion for an order directing the defendant to pay for various postage is **DENIED**; and it is further

ORDERED, that the defendant's motion to dismiss the complaint for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) is **GRANTED**; and it is further

ORDERED, that, as a result of the more than 50 motions made in this case some of which were repetitive and frivolous, Jeffrey Hammer shall not file any papers in connection with this case unless prior to any such submission: (1) he files a one-page written application to the Court for permission to file papers in this case; (2) in that one-page written application, he explains why the case should be reopened and



why he seeks permission to file papers; (3) the Court grants his application in a written order; and (4) Hammer submits a copy of the Court's order granting him permission to file papers with the papers he has been allowed to file; and it is further

ORDERED, that the Court will not accept any papers filed by Hammer in this case unless he complies with the procedures set forth in the preceding paragraph; and it is further

ORDERED, that Hammer's failure to comply with the foregoing procedures may result in monetary sanctions including, but not limited to, the defendant's attorney's fees; and it is further

ORDERED, that Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Central Islip, New York
January 18, 2003

ARTHUR D. SPATT
United States District Judge