

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Robert F. Kennedy, Jr.,
Plaintiff

v.

Case No. 23-cv-487-SM-TSM
Opinion No. 2024 DNH 004

David Vickrey,
Defendant

O R D E R

Plaintiff, Robert F. Kennedy, Jr., brought this defamation action in the New Hampshire Superior Court. Defendant, David Vickrey, then removed it to this court and now seeks to dismiss the case for lack of personal jurisdiction. Kennedy objects and asks for preliminary discovery and an evidentiary hearing on the jurisdictional issue. For the reasons given, Vickrey's motion to dismiss is granted and Kennedy's motion is denied.

Standard of Review

When personal jurisdiction is contested, the plaintiff bears the burden of establishing the court's jurisdiction. See Sawtelle v. Farrell, 70 F.3d 1381, 1387 (1st Cir. 1995); Kowalski v. Doherty, Wallace, Pillsbury & Murphy, 787 F.2d 7, 8 (1st Cir. 1986). Allegations of jurisdictional facts are

construed in the plaintiff's favor and if, as here, the court proceeds based upon the written submissions of the parties without an evidentiary hearing, the plaintiff need only make a prima facie showing that jurisdiction exists. See Kowalski, 787 F.2d at 8; Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 674-75 (1st Cir. 1992).

Nevertheless, the plaintiff's demonstration of personal jurisdiction must be based on specific facts set forth in the record in order to defeat a defendant's motion to dismiss. See Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994). See also Jet Wine & Spirits, Inc. v. Bacardi & Co., 298 F.3d 1, 8 (1st Cir. 2002) ("Although the burden of proof is light, [the plaintiff] may not rely on the mere allegations of its complaint, but must point to specific facts in the record that support those allegations.") (emphasis supplied). And, "in reviewing the record before it, a court 'may consider pleadings, affidavits, and other evidentiary materials without converting the motion to dismiss to a motion for summary judgment.'" VDI Technologies v. Price, 781 F. Supp. 85, 87 (D.N.H. 1991) (quoting Lex Computer & Management Corp. v. Eslinger & Pelton, P.C., 676 F. Supp. 399, 402 (D.N.H. 1987)).

The constitutional requirements for exercising personal jurisdiction over a foreign defendant have been reviewed many times and need not be repeated in detail here. See, e.g., Douglas Co., Inc. v. My Brittany's LLC, No. 19-CV-1234-SM, 2020 WL 2768973 (D.N.H. May 28, 2020); D'Jamoos v. Atlas Aircraft Ctr., Inc., 669 F. Supp. 2d 167 (D.N.H. 2009). It is sufficient to note that Kennedy asserts that the court may exercise "specific" (as opposed to "general") personal jurisdiction over Vickrey. See generally Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (U.S. 2011) (noting that "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.") (citation and internal punctuation omitted).¹

For this court to exercise specific personal jurisdiction over Vickrey, Kennedy must show that:

- (1) [the defamation] claim directly arises out of or relates to the defendant's forum-state activities;
- (2) the defendant's contacts with the forum state

¹ To be clear, Kennedy does urge the court to assert "general" personal jurisdiction over Vickrey. But, his argument lacks both legal and factual support and, for that reason, warrants no discussion. Among other things, it is plain that Vickrey lacks continuous and systematic contacts with New Hampshire. See generally Daimler AG v. Bauman, 571 U.S. 117, 127 (2014); Bluetarp Fin., Inc. v. Matrix Const. Co., 709 F.3d 72, 79 (1st Cir. 2013). Accordingly, the court will focus exclusively on whether it may properly exercise "specific" jurisdiction over Vickrey.

represent a purposeful availment of the privilege of conducting activities in that state, thus invoking the benefits and protections of that state's laws and rendering the defendant's involuntary presence in that state's courts foreseeable; and (3) the exercise of jurisdiction is ultimately reasonable. Failure to make any one of these showings dooms any effort to establish specific personal jurisdiction.

Scottsdale Cap. Advisors Corp. v. The Deal, LLC, 887 F.3d 17, 20 (1st Cir. 2018) (citations omitted; emphasis supplied). See also Cambridge Literary Props. v. W. Goebel Porzellanfabrik, 295 F.3d 59, 63 (1st Cir. 2002); Sawtelle, 70 F.3d at 1389-95 (describing the three essential jurisdictional elements as "relatedness," "purposeful availment," and the so-called "Gestalt factors").

Although it is unlikely that Kennedy has made a sufficient showing of "relatedness," the court will, in the interest of brevity, focus on the second element of the jurisdictional test: "purposeful availment." That element has been described as a "rough quid pro quo" - that is, "when a defendant deliberately targets its behavior toward the society or economy of a particular forum, the forum should have the power to subject the defendant to judgment regarding that behavior." Carreras v. PMG Collins, LLC, 660 F.3d 549, 555 (1st Cir. 2011). A federal court's exercise of personal jurisdiction over a foreign defendant "must be based on intentional conduct by the defendant

that creates the necessary contacts with the forum.” Walden v. Fiore, 571 U.S. 277, 286 (2014). “Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State.” Id. at 290. Consequently, the “proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.” Id. (emphasis supplied).

Background

On August 29, 2020, the website “Daily Kos” published a brief article or “blog post” authored by the defendant under the pseudonym “Downeast Dem.” The article provided, in its entirety, as follows:

Anti-Vaxxer RFK JR. joins neo-Nazis in massive Berlin ‘Anti-Corona’ Protest. Tens of thousands ‘Corona-Truthers’ descended on Berlin today to protest the measures implemented by Angela Merkel and her government to prevent the coronavirus spread. What is ironic is that the preventative measures have been largely effective and life in Germany has largely returned to normal. Compared to the United States there have been fewer than 10,000 fatalities from COVID-19 in a population of 85 million. The protest was organized by right-wing extremist organizations - including the AfD party and various anti-Semitic conspiracy groups as well as the neo-Nazi NPD party.

Among the speakers was Robert F. Kennedy Jr. who warned against the “totalitarianism” of Angela Merkel.

He sounded the alarm concerning the 5G mobile network and Microsoft founder Bill Gates. Referring to the famous Berlin speech of his uncle JFK he said "Today Berlin is is [sic] once again the front against totalitarianism."

Protester[s] were seen carrying poster[s] urging "Trump, Please Help" with the QAnon logo.

Exhibit 1 to Defendant's Motion to Dismiss (document no. 5-2).

See also <https://www.dailykos.com/stories/2020/8/29/1973395/->

[Anti-Vaxxer-RFK-JR-joins-neo-Nazis-in-massive-Berlin-Anti-](#)

[Corona-Protest](#) (site accessed on Jan 12, 2024). Within the

article was a link to a story published on the website for the German daily newspaper Tagesspiegel, which also discussed the rally in Berlin.

Two-and-one-half years later, on April 19, 2023, Kennedy announced his candidacy for President of the United States. The following month, Kennedy sent Vickrey a letter claiming the article on the Daily Kos website defamed him. Kennedy threatened to sue in the Southern District of New York if Vickrey failed to provide a monetary settlement of Kennedy's claim. When Kennedy received no response to that demand letter, he filed suit in this district (likely after realizing that New York's statute of limitations had run and New Hampshire provided a longer period within which to file). He filed his defamation claim on the three-year anniversary of the article's publication

and the last day before the relevant statute of limitations would have expired. See generally N.H. Rev. Stat. Ann. 508:4.

Neither Kennedy nor Vickrey has any meaningful connection to New Hampshire. The plaintiff, Kennedy, is a resident of New York, with a mailing address in San Diego. The defendant, Vickrey, is a resident of Maine, where he has lived for nearly thirty years. He has never resided in New Hampshire, nor does he own any property in this state. He wrote and published the allegedly defamatory article from his home computer in Cape Elizabeth, Maine. The article itself does not reference New Hampshire and Vickrey did not rely upon any New Hampshire sources nor did he travel to New Hampshire to write or research the article. Vickrey has never engaged in any business on behalf of, or related to, the Daily Kos website in New Hampshire. All of Vickrey's conduct relevant to this suit occurred in Maine.

The sole claimed contact between Vickrey and New Hampshire is Kennedy's assertion that Vickrey "worked for many years in Nashua, New Hampshire, as the Vice President for SkillSoft." Complaint (document no. 3-1) at para. 7. But, the undisputed facts of record reveal that Vickrey terminated his relationship with Skillsoft more than 15 years ago and has "done no business

with any residents of New Hampshire for over 10 years.”

Supplemental Declaration of David Vickrey (document no. 15-1) at para. Vickrey currently acts as Managing Principal of Seabridge Advisors and has testified that, in that role, he has never conducted business in New Hampshire or with residents of New Hampshire. Id. at paras. 18-19. See also Id., at paras. 20-22 (“Under FINRA regulations and in my role as Managing Principal of Seabridge Advisors, I must be licensed in every state in which I conduct business. As of the date of the Supplemental Declaration, I am licensed to conduct business in Maine, Pennsylvania, California, New Jersey, Oregon and Georgia. I am not licensed to conduct business in New Hampshire.”).

Discussion

I. Personal Jurisdiction.

Despite the apparent lack of any connection between New Hampshire and Kennedy’s defamation claim, Kennedy asserts that this court may nevertheless exercise personal jurisdiction over Vickrey. To carry his burden, Kennedy must show, among other things, that Vickrey has “purposefully availed” himself of the privilege of conducting activities in this forum, thus invoking the benefits and protections of New Hampshire’s laws and rendering his involuntary presence in this state’s courts foreseeable. In cases involving the online publication of

allegedly defamatory statements, courts in this circuit apply the so-called "Calder effects test" to determine whether the purposeful availment prong of the jurisdictional analysis has been met. See generally Calder v. Jones, 465 U.S. 783 (1984); see also United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 623 (1st Cir. 2001) ("we have previously recognized that Calder's 'effects' test was adopted for determining purposeful availment in the context of defamation cases.") (citation omitted); Sig Sauer, Inc. v. Jeffrey S. Bagnell, Esq., LLC, 615 F. Supp. 3d 39, 44 (D.N.H. 2022) ("In the context of defamation claims, the court applies the 'effects' test derived from Calder v. Jones to determine whether a defendant's contacts are sufficient to make the exercise of jurisdiction fair, just, and reasonable.").

To meet the requirements of the Calder "effects" test, Kennedy must show that Vickrey intentionally directed his allegedly defamatory article at this state, that he knew the article was likely to have a significant impact on Kennedy, and that he understood the brunt of that impact would be felt in New Hampshire. See generally Hugel v. McNell, 886 F.2d 1, 4 (1st Cir. 1989) ("The knowledge that the major impact of the injury would be felt in the forum State constitutes a purposeful contact or substantial connection whereby the intentional

tortfeasor could reasonably expect to be haled into the forum State's courts to defend his actions.") (citing Calder, 465 U.S. at 789-90).

In support of his position, Kennedy says that despite residing elsewhere, he suffered injury in New Hampshire because at least one person in New Hampshire likely read the allegedly defamatory article. More consequentially, perhaps, Kennedy says Vickrey "specifically targeted voting residents of New Hampshire, in order to derail Mr. Kennedy's Presidential campaign." Defendant's Opposition Memorandum (document no. 13) at 6.

Kennedy has not met his burden to show that Vickrey purposefully availed himself of the privileges and protections of New Hampshire law. Vickrey does not live or work in New Hampshire, he has no meaningful contacts with this state, he did not consult any New Hampshire sources when writing the article, he did not mention New Hampshire in the article or otherwise "direct" the article to this state, and he had no reason to anticipate that the "brunt" of the (alleged) injury to Kennedy's reputation would be felt in New Hampshire - particularly since Kennedy is not a resident of New Hampshire and his connections to New Hampshire are, at best, attenuated. The impact Kennedy

felt in New Hampshire as a result of Vickrey's article - at least when the allegedly defamatory article was published - was minimal (while someone in New Hampshire may have read the article, it was published long before Kennedy announced his presidential run).

Kennedy's assertion that, when he published the article, Vickrey "specifically targeted voting residents of New Hampshire, in order to derail Mr. Kennedy's Presidential campaign" is plainly false. Vickrey published that article in August of 2020 - more than two years before Kennedy announced his intent to run for President. Consequently, the article could not have been intended to adversely impact Kennedy's standing as a presidential candidate or, more specifically, his performance in New Hampshire's 2024 presidential primary election. Perhaps recognizing the timing problem he faces, Kennedy asserts that "as soon as Mr. Kennedy announced his primary challenge, Vickrey reshared and republished his defamatory article." Plaintiff's Objection (document no. 13) at 5 (emphasis supplied). See also Plaintiff's Memorandum in Support of Evidentiary Hearing (document no. 19-1) at 5 (same). Importantly, however, there is no evidence to support that claim. The citations upon which Kennedy relies merely refer to the original publication of the article on August 29, 2020 - not

to any alleged “resharing” or “republication.” See Id. at 5 (citing the complaint at para. 11 and Vickrey’s first affidavit (document no. 5-2) at para. 7 – neither of which supports Kennedy’s factual claim).

Parenthetically, the court notes that there are several factual claims made in Kennedy’s various memoranda that are entirely unsupported by the citations he provides. For example, Kennedy repeatedly asserts that Vickrey’s allegedly defamatory article “spawn[ed] the launch of current President Biden’s write-in campaign for the State of New Hampshire Democratic primary election.” Plaintiff’s Opposition Memorandum at 6-7; Memorandum in Support of Evidentiary Hearing at 6-7. However, the Daily Kos article Kennedy cites in support of that claim says nothing of the sort and makes no connection between Vickrey’s 2020 article and the current write-in campaign related to President Biden. Another example can be found in Kennedy’s repeated (but entirely unsupported) assertion that Vickrey’s allegedly defamatory article “prompted the Daily Kos to actively solicit New Hampshire residents to fund Mr. Vickrey’s legal defense of the instant action due to this New Hampshire focus.” Opposition Memorandum at 7; Memorandum in Support of Evidentiary Hearing at 7. Again, the citations upon which Kennedy relies

simply do not support that factual claim. See generally Fed. R. Civ. P. 11(b)(3).

Returning to Kennedy's assertion that Vickrey "republished" the allegedly defamatory article after Kennedy announced his candidacy for president, it is conceivable, though entirely unclear, that Kennedy relies upon the complaint's allegation that, "the article has not been corrected nor retracted, and still is present for New Hampshire readers to this very day." Complaint at para. 11. But, of course, that the article remains accessible to readers does not mean that the defendant "republished" it. See generally Restatement (Second) of Torts § 577A, Single and Multiple Publications (1977); 1 Law of Defamation § 4:93.60, Liability for Republication – Single Publication Rule – Hyperlinks to Previously Published Defamatory Material, (2d ed.). See also In re Philadelphia Newspapers, LLC, 690 F.3d 161, 174-75 (3d Cir. 2012), as corrected (Oct. 25, 2012) ("The single publication rule advances the statute of limitations' policy of ensuring that defamation suits are brought within a specific time after the initial publication. Websites are constantly linked and updated. If each link or technical change were an act of republication, the statute of limitations would be retrIGGERED endlessly and its effectiveness essentially eliminated. A publisher would remain subject to

suit for statements made many years prior, and ultimately could be sued repeatedly for a single tortious act the prohibition of which was the genesis of the single publication rule.”).

Finally, it is, perhaps, worth noting that the judicial opinions upon which Kennedy relies in support of his argument in favor of exercising personal jurisdiction over Vickrey are plainly distinguishable. For example, in de Laire v. Voris, No. 21-CV-131-JD, 2021 WL 1227087, at *1 (D.N.H. Apr. 1, 2021), this court was presented with a defamatory article published online that was directed to this forum and concerned a resident of New Hampshire. Additionally, when preparing that article, the author traveled to and interviewed residents of New Hampshire. Those critical facts linking the author’s conduct to the forum state are noticeably absent in this case. The same is true for several other cases upon which Kennedy relies, including Calder.

In short, Kennedy has not pointed to any precedent (binding or persuasive) in which a court sustainably found it could exercise personal jurisdiction over a party with such de minimus contacts with the forum state as those of Vickrey. Indeed, virtually none of the facts upon which the Calder court rested its jurisdictional determination are present in this case - perhaps the most significant of which was that the plaintiff in

Calder was a resident of the forum state and, therefore, suffered significant reputational injury there. See generally Calder, 465 U.S. at 789-90 (“[Petitioners’] intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must ‘reasonably anticipate being haled into court there’ to answer for the truth of the statements made in their article.”) (emphasis supplied).

Given the facts and arguments presented, it is plain that Kennedy has not shown that Vickrey’s contacts with New Hampshire represent a purposeful availment of the privilege of conducting activities in this state. Consequently, the exercise of specific personal jurisdiction over Vickrey in this forum would not comport with constitutional requirements of due process.

II. Jurisdictional Discovery.

In support of his motion for jurisdictional discovery, Kennedy has shown neither a “colorable claim of jurisdiction,” nor a “non-frivolous dispute about facts that may yield a

sufficient predicate for in personam jurisdiction.” Motus, LLC v. CarData Consultants, Inc., 23 F.4th 115, 128 (1st Cir. 2022). See also Nordica USA Corp. v. Ole Sorensen, 475 F. Supp. 2d 128, 134 (D.N.H. 2007) (“The motion [for jurisdictional discovery] must be timely and properly supported, must proffer a colorable claim for jurisdiction, and must present facts to the court which show why jurisdiction would be found if discovery were permitted. Plaintiffs must specify the type of evidence they think they will find and provide detailed descriptions of any additional pertinent avenues of inquiry that they hope to pursue.”) (citations and internal punctuation omitted). See generally Multiple Energy Techs. v. Kymira, Ltd., No. 22-CV-209-SM, 2022 WL 16797377 (D.N.H. Nov. 8, 2022) (granting plaintiff’s request for jurisdictional discovery).

Accordingly, in the exercise of its discretion, the court denies Kennedy’s motion for an evidentiary hearing and jurisdictional discovery.

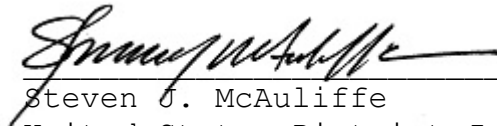
Conclusion

For the foregoing reasons, as well as those set forth in defendant’s legal memoranda (documents no. 5 and 15), defendant’s Motion to Dismiss (**document no. 4**) is granted.

Plaintiff's Motion for Evidentiary Hearing and Jurisdictional Discovery (**document no. 19**) is denied.

The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.



Steven J. McAuliffe
United States District Judge

January 22, 2024

cc: Counsel of Record