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RECENT DEVELOPMENT

BEYOND SYS., INC. v. REALTIME GAMING HOLDING CO.: A MARYLAND COURT CANNOT EXERCISE PERSONAL JURISDICTION OVER AN OUT-OF-STATE DEFENDANT BASED SOLELY ON THE EXISTENCE OF DEFENDANT'S INTERNET WEBSITE OR LINK

By: David Schaffer

The Court of Appeals of Maryland held that the mere presence of an Internet site, or a hyperlink to that site, cannot form the basis for exercising personal jurisdiction over a nonresident defendant, absent further compelling evidence. *Beyond Sys., Inc. v. Realtime Gaming Holding Co.*, 388 Md. 1, 878 A.2d 567 (2005). In so holding, the Court affirmed the judgment of the circuit court, which granted Respondents' motion to dismiss due to a lack of jurisdiction. *Id.* at 4, 878 A.2d at 569. By precluding the case from proceeding to trial, the Court of Appeals asserted that while a website represents a continuous presence everywhere, that presence alone is nonetheless insufficient to establish the minimum contacts with a state necessary to invoke general or specific personal jurisdiction over the website's operator. *Id.*

In 2003, Beyond Systems, Inc. ("BSI"), a Maryland corporation, filed a complaint against KDMS International, LLC ("KDMS") and Realtime Gaming Holding Company, LLC ("Realtime Gaming"), alleging violations of MD. CODE ANN., COMMERCIAL LAW, § 14-3002 (2005), the state's statute outlawing unsolicited electronic mail advertisements or "spam." The "spammer," or sender of the unsolicited messages, Travis Thom ("Thom"), a New Mexico resident, sent hundreds of e-mails to BSI employees to advertise his Internet casino, which users could not access without downloading software designed and owned by KDMS and Realtime Gaming. KDMS, a Delaware corporation that develops interactive online gaming software, and its holding company, Realtime Gaming, a Georgia corporation, successfully argued that their relationship with Thom was limited to licensing the software used by Thom's online casino.

To market KDMS software, Realtime Gaming entered into a licensing agreement with Montana Overseas, a Panamanian corporation, which used KDMS' software for its online casino, windowcasino.com. In March 2003, Thom, became an "affiliate" of windowcasino.com to create his own online casino. To gamble at Thom's online casino or at windowcasino.com, players had to download KDMS software from an Internet Protocol ("IP") address registered to KDMS, links to which appeared on Thom's site and on windowcasino.com. In April 2003, Thom contracted with a bulk e-mail solicitation service to send 2.5 million unsolicited e-mail advertisements with links to his webpage and instructions to download KDMS software.

On December 31, 2003, after its employees received unsolicited e-mails from Thom, BSI filed a complaint against KDMS and Realtime Gaming with the Circuit Court for Montgomery County, alleging violations of § 14-3002 (2005), which prohibits conspiring to transmit unsolicited commercial e-mail. Arguing that KDMS does not purposefully conduct business in Maryland, KDMS and Realtime Gaming filed a motion to dismiss BSI's complaint for lack of personal jurisdiction. BSI contended that an agency relationship existed between KDMS, Realtime Gaming, and windowcasino.com, thus creating the necessary nexus for Maryland courts to exercise personal jurisdiction over Realtime Gaming and KDMS.

The trial court dismissed BSI's complaint for lack of personal jurisdiction, ruling that BSI did not present sufficient evidence to establish personal jurisdiction over the Respondents. BSI filed a motion for reconsideration, attaching an amended complaint that detailed its argument that KDMS and Realtime Gaming were sufficiently connected to each other and to the forum state to allow for the exercise of personal jurisdiction. In an attempt to prove that personal jurisdiction existed, BSI filed a request to take discovery as to the extent of the parties' relationship. The circuit court denied BSI's request for discovery, and granted KDMS' and Realtime Gaming's motion to strike the amended complaint. On December 17, 2004, the Court of Appeals granted BSI's petition for writ of *certiorari* to determine if the trial court erred in dismissing BSI's claims for lack of personal jurisdiction, denying BSI's request for discovery, and striking the amended complaint.

The Court determined that the trial court was correct in ruling that there was insufficient evidence to establish either general or specific personal jurisdiction over KDMS and Realtime Gaming. *Id.* at 25-6,

878 A.2d at 582. General personal jurisdiction arises from defendants' general, persistent contacts with the state when those contacts do not form the basis for the suit. *Id.* at 22, 878 A.2d at 580. Defendants must exhibit "continuous and systematic" activities in the state to establish general jurisdiction. *Id.* (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)).

The Court rejected BSI's argument that it had established a *prima facie* case for general jurisdiction based on the sliding scale of interactivity of websites, first articulated in the U.S. District Court's *Zippo* case. *Id.* at 25, 878 A.2d at 582 (See *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)). According to *Zippo*'s sliding scale, if a website is clearly doing business over the Internet, it is an "active" site. *Id.* at 25, 878 A.2d at 582. General personal jurisdiction exists for active websites because the courts have deemed those sites to have obvious contacts with the forum state, regardless of whether those contacts are the basis for the suit. *Id.* If, however, the website merely makes information available on the Internet, then it is a "passive" site and is not subject to a state's general personal jurisdiction. *Id.* Because BSI offered no evidence other than the mere existence of KDMS' and Realtime Gaming's website to demonstrate substantial and continuous contacts with Maryland, the Court of Appeals affirmed the trial court's decision that state courts lacked general jurisdiction over the Respondents. *Id.*

In addition to finding no basis for general personal jurisdiction over KDMS and Realtime Gaming, the Court also affirmed the lower court's ruling that Maryland courts lacked specific personal jurisdiction over KDMS and Realtime Gaming. *Id.* at 28, 878 A.2d at 583. If a court finds that the defendants' contacts with the state forms the basis for the suit, the court may decide if specific jurisdiction exists. *Id.* at 26, 878 A.2d at 582 (citing *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 397 (4th Cir. 2003)). Specific jurisdiction exists primarily if the defendant purposefully availed itself to conducting business in the state. *Id.* BSI contended that specific jurisdiction over the Respondents existed, arguing that KDMS and Realtime Gaming own or control windowcasino.com, which clearly availed itself to the forum state, forming an agency relationship sufficient to establish specific jurisdiction. *Id.* Since BSI based this assertion solely on the fact that windowcasino.com's webpage displayed a link to an IP address registered to KDMS, the Court ruled that neither an agency relationship nor specific jurisdiction existed. *Id.*

The Court of Appeals affirmed the circuit court's decision to deny BSI's motion for reconsideration and to strike the amended complaint. *Id.* at 29, 878 A.2d at 584. Additionally, the Court held that the trial court properly denied BSI's request for discovery to uncover any connections between KDMS, Realtime Gaming, Montana Overseas, and windowcasino.com. *Id.* In so holding, the Court sided with KDMS and Realtime Gaming that BSI's discovery request was a "fishing expedition," seeking nonexistent evidence to prove that the Respondents operated a deceitful business dependent on unsolicited e-mail advertising. *Id.* at 36, 878 A.2d at 588.

In *Beyond Sys., Inc. v. Realtime Gaming*, the Court of Appeals of Maryland increased the burden on the plaintiff in litigating a nonresident defendant involved in electronic commercial activities, however unjustly prevented this case's plaintiff from meeting that burden. The Court wisely ruled that, although a website's presence on the Internet is ubiquitous, that presence does not represent a purposeful availment to the laws of the forum state. The Court of Appeals, therefore, requires compelling evidence to verify the minimum contacts necessary to establish personal jurisdiction over a website. Nevertheless, by barring adequate discovery in this case, the Court prevented the Petitioner from acquiring evidence that could have exposed a direct agency relationship between the Respondents and their sub-licensees. Despite the Court's judicious rationale as to personal jurisdiction, its holding is troublesome as the Respondents' business operations remain uninvestigated. If Maryland seeks to protect its citizens who communicate via e-mail by enforcing its anti-spamming legislation, then the Court of Appeals should more vigilantly examine accusations of orchestrated plans to violate its law.