UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

ALBERT SNYDER,	*	
Plaintiff	*	
v.	*	Civ. No.: 1:06-cv-01389-RDB
FRED W. PHELPS, SR., et al.	*	
Defendants.	*	

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DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Defendants Fred W. Phelps, Sr. ("Phelps") and Westboro Baptist Church, Inc. ("WBC") respectfully reply as follows to Plaintiff's opposition to Defendant's motion to dismiss.

I. **ARGUMENT**

A. Plaintiff has failed to establish diversity jurisdiction in this Court.

Plaintiff is long on arguments and short on the law in arguing that the Complaint alleges diversity of citizenship.

Plaintiff does not challenge the applicability of the following black letter state of the law, because Plaintiff is unable to do so:

> As the Supreme Court has consistently held, however, state citizenship for purposes of diversity jurisdiction depends not on residence, but on national citizenship and domicile, *see, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828, (1989).

> ("In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States and be domiciled within the State."), and the existence of such citizenship cannot be inferred from allegations of mere residence, standing alone. *See, e.g., Realty Holding Co. v. Donaldson*, 268 U.S. 398, 399, 69 L. Ed. 1014, 45 S. Ct. 521 (1925) ("The bill alleges that . . . appellee [is] a "resident" of Michigan. This is not a sufficient allegation of appellee's Michigan citizenship.")

Axel Johnson, Inc. v. Carroll Carolina Oil Co., 145 F.3d 660, 663 (4th Cir. 1998)(emphasis added).

Axel Johnson upheld the dismissal of several counts of a complaint based on the deficiency of the complaint itself. *Axel Johnson,* 145 F.3d 660, 663 (4th Cir. 1998). When Plaintiff filed its Complaint in 2006, *Axel Johnson* was already eight-years-old, and put Plaintiff on notice that in the Fourth Circuit, where, as here, the sole basis for jurisdiction is diversity jurisdiction, a complaint simply may not move forward without at least alleging the citizenship of each party. *Id.*

Plaintiff's counsel –- who claim to be sufficiently experienced in federal civil litigation to merit the attorney's fees they have sought as to their efforts to obtain alternative service of process -- have no excuse for not following *Axel Johnson's* simple roadmap for alleging diversity of citizenship.

In fact, *Axel Johnson* called to task the counsel in that case for his failure sufficiently to establish diversity jurisdiction:

> When, at oral argument, this court questioned Axel's counsel about the apparent lack of supplemental jurisdiction, counsel tentatively suggested that jurisdiction over the state-law counts could, perhaps, be sustained under 28 U.S.C. § 1332 (diversity jurisdiction), a statutory basis for jurisdiction that Axel had previously invoked neither in the district court nor before this court. An examination of the pleadings and record, however, revealed to counsel and this court that Axel had not only failed to plead diversity jurisdiction, but that it had also failed to plead facts from which the existence of such jurisdiction could properly be inferred. Although the pleadings set forth the residence of each of the natural persons who are parties to the litigation, they did not positively establish the citizenship of those persons. See, e.g., J.A. at 43 (amended complaint) (stating residence, but not citizenship or domicile of Carroll and Lanier); id. at 3-4 (initial complaint) (same). Nor was counsel able to refer the court to anything else in the record that clearly established the citizenship of those persons.

Axel Johnson, 145 F.3d at 663 (4th Cir. 1998) (emphasis added).

Regarding the foregoing law, the Complaint discusses residence and office locations, but is silent about the citizenship and domicile of the Plaintiff (the Complaint merely alleges Plaintiff is a “resident” of York, Pennsylvania), Defendant Fred W. Phelps, Sr. (the Complaint merely says he has an office in Topeka, Kansas), and the Doe defendants (the Complaint merely states a belief that they reside in or around Topeka, Kansas).

For this diversity of citizenship action, Plaintiff’s failure to allege citizenship calls for dismissal of the Complaint, *Axel Johnson,* 145 F.3d at 663(4th Cir. 1998). The

critical difference between citizenship and residence for diversity of citizenship is succinctly set out in the following passage from *Commissioner of Internal Revenue v. Nubar*, 185 F.2d 584, 587 (4th Cir. 1950), *cert. denied,* 341 U.S. 925 (1951), which is favorably cited in *Axel Johnson,* 145 F.3d at 663(4th Cir. 1998):

> "'Residence' means living in a particular locality, but 'domicile' means living in that locality with intent to make it a fixed and permanent home. 'Residence' simply requires bodily presence as an inhabitant in a given place, while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile.'"

Nubar, 185 F.2d at 587 (4th Cir. 1950) (favorably quoting *Newcomb's Estate*, 192 N.Y. 238, 250, 84 N.E. 950, 954 (1908).

Perhaps Plaintiff, between the lines, is actually asking that any dismissal be non-prejudicial in order to permit Plaintiff to move to file an amended complaint. However, on diversity of citizenship alone, the law does not enable the current Complaint to survive Defendants' dismissal motion.

B. Plaintiff has failed to meet its burden to show that the matter in controversy exceeds the sum or value of $75,000.

The "'mere allegation of the jurisdictional amount when challenged as it was here is not sufficient and [ ] the burden is upon the plaintiff to substantiate its allegation.'" *Powder Power Tool Corp. v. Powder Actuated Tool Co.,* 230 F.2d 409, 413-

14 (7th Cir. 1956) (quoting *Seslar v. Union Local 901, Inc.,* 186 F.2d 403, 406 (7th Cir. 1951)). Because the Complaint fails sufficiently even to allege a jurisdictional amount (the only place where the Complaint mentions any dollar figure is in paragraph 2 (the jurisdiction and venue section) while failing to list any dollar amount in any of the counts and the *ad damnum* clause) nor to put Defendants on notice thereof, the Complaint should be dismissed, just as *Powder Power Tool* determined that the complaint in that case should have been dismissed by the trial court for neither alleging nor proving the jurisdictional amount. *Powder Power Tool,* 230 F.2d at 413-14.

Moreover, in the Motion to Dismiss in this Reply, Defendants address why the Complaint does not show the presence of all essential elements necessary to prove liability and damages under each count of the Complaint, nor why the First Amendment should not preclude relief; these are important factors in considering whether Plaintiff has substantiated any good faith allegation of an amount in controversy of $75,000.[1] Furthermore, Defendants' alleged statements reasonably can be

[1] On several occasions, Plaintiff takes huge leaps in surmising that Defendants have conceded matters that they do not concede. For instance, Plaintiff claims surprise that Defendants contest the amount in controversy after defense counsel's motion for more time to answer the Complaint mentioned Defendants' financial exposure in this civil action. First, particularly here, the risk of financial exposure does not amount to a significant risk. Moreover, one of the reasons presented for more time to answer the complaint was defense counsel's recent entry into the case and need to review the Complaint. Therefore, it makes no sense for Plaintiff to

expected to be so universally despised and agreed with, as to garner widespread sympathy for Plaintiff, and certainly no defamation damages.

C. The Complaint Fails To Establish A Sufficient Claim Against Fred Phelps And WBC

Each time the Complaint refers to "defendants" (the Complaint lists the defendants as WBC, Fred Phelps and Doe defendants) without designating the extent to which Fred Phelps or WBC are included in the word "defendants", the Complaint has failed to plead against Defendants Phelps and WBC with sufficient specificity to put them on sufficient notice of the allegations against them. Fed. R. Civ. P. 8; *Gulf Coast Western Oil Co. v. Trapp*, 165 F.2d 343, 348 (10th Cir. 1947) (in affirming the dismissal of a complaint for lack of specificity, the Court confirmed that – emphasis added -- "[e]ven under the liberal rules of pleading now in force, a complaint must not only define the issue but must also particularize it sufficiently to enable the defendant to prepare his defense"). *See also Leavitt v. Cole,* 291 F. Supp. 2d 1338, 1346 (M.D. FL 2003) ("the remaining allegations in Count IV, however, fail to plead even a 'short and plain statement of *the claim* showing that the pleader is entitled to relief' … The masquerading described in paragraph (c), rather than reflecting on Dr. Cole's

reference, in this instance, the contents of the motion for more time to

personal reputation, appears to raise an incomplete claim for fraud").

D. **This Court Lacks Personal Jurisdiction Over Defendants.** *Dring v. Sullivan,* 423 F. Supp. 2d 540 (D. Md. 2006).

The Complaint fails to establish personal jurisdiction over Defendants where the Complaint fails to show that Fred Phelps, himself, has ever stepped foot in Maryland, nor any specific role that he played in having anybody protest Matthew Snyder's funeral, nor any specific role that WBC had in any person's involvement in such a protest.

While Defendants believe that Maryland's long arm statute, by itself, is sufficient to show no personal jurisdiction over Defendants, Defendants also maintain that the exercise of personal jurisdiction over Defendants does not comport with due process under the U.S. Constitution. *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 723 (E.D. Pa. 1999). Plaintiff simply has failed to establish sufficient minimum contacts in Maryland by Defendants to conclude otherwise. *Id.*

E. The Complaint Fails To State A Claim Upon Which Relief Can Be Granted.

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answer the Complaint.

The Complaint boils down to Plaintiff's wanting to do the impossible, which is to circumvent the First Amendment. The Complaint complains about Defendants' alleged communications on Internet sites and during the funeral of Plaintiff's son. However, at best for Plaintiff, aside from any statements about Plaintiff teaching his son to divorce and commit adultery (Plaintiff apparently did divorce prior to his son's death, and WBC apparently believes that it is adultery for re-married people to engage in sexual relations subsequent to divorce; this is certainly a First-Amendment protected view both as to speech and as to freedom of religion), the remaining alleged statements clearly constitute opinion that is squarely protected by the First Amendment, notwithstanding Plaintiff's erroneous wish to limit the *Falwell* case to plaintiffs who are public figures. In other words, it "'is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Hustler Magazine*, 485 U.S. 46, 56 (1988) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Consequently, opinion speech cannot amount to defamation.

Moreover, the Complaint makes much about protesting a funeral, even though "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Hustler Magazine*, 485 U.S. at 56

(quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Nor does the Complaint say where any of the Defendants even stood in relation to physical distance and time from the funeral of Plaintiff's son. The Complaint certainly does not claim that any Defendants were inside or on church grounds during the funeral of Plaintiff's son.

The fact of the matter is that the First Amendment protects ugly speech as much as it protects speech that is widely popular. *Street v. New York*, 394 U.S. at 592; *Knights of Ku Klux Klan v. Martin Luther King Jr. Worshippers,* 735 F. Supp. 745, 750 (M.D. Tenn. 1990) ("as the threat of violence could not be used to abridge the First Amendment rights of civil rights marchers in 1965, it may not be used to abridge the rights of the Ku Klux Klan in 1990").

G. The Same First Amendment that Precludes Plaintiff's Defamation Count also Precludes the Remaining Counts.

The Complaint's remaining counts are sufficiently countered by the First Amendment protections provided in *Hustler Magazine*, 485 U.S. at 56-57, and as further discussed above. Moreover, absent a specific statute – which does not exist here, and which surely would be violative of the First Amendment – there simply is no cause of action for protesting a funeral, particularly where the Complaint does not allege – nor can it – that any such

protests took place on or in the church grounds, nor the burial grounds, of the funeral of Plaintiff's son.

As to Plaintiff's invasion of privacy counts, Maryland law already treats such a claim as closely related to a complaint's defamation count. *Koren v. Capital--Gazette Newspapers, Inc.,* 22 Md. App. 576, 325 A.2d 140 (1974). Moreover, seeing that the Complaint makes allegations against WBC, a church, First Amendment freedom of religion protections apply in this civil action to WBC.

As to Plaintiff's emotional distress count, even though Maryland's Court of Appeals has recognized such a tort, *Harris v. Jones,* 281 Md. 560 (1977), that recognition is trumped by the higher and Supreme Court's subsequent confirmation of First Amendment protection for outrageous conduct. *Hustler Magazine*, 485 U.S. at 56.

Plaintiff's claim of a civil conspiracy is superfluous, in that Maryland does not recognize a separate tort of civil conspiracy. *Alleco Inc. v. Harry & Jeanette Weinberg Found.,* 340 Md. 176, 190 (1995).

H. **Defendants Challenge Service of Process.**

Defendants continue to allege that service of process was not sufficient, in part because Defendants allege that the alternative service of process order was improvidently granted. Furthermore, Plaintiff's alternative service motion alleged

Defendants had counsel, but failed to serve said counsel despite Plaintiff's claim that Defendants had counsel; this deprived Defendants or any of their attorneys to even know about the alternative process motion, nor to respond to it.

The Court apparently signed the alternative process draft order proposed by Plaintiff, which is not precise in defining who Defendants lawyers were. Consequently, in part based on Defendants' arguments against Plaintiff's attorney's fee motion for seeking alternative service of process, the counsel to whom Plaintiff claims, through its filings, to have mailed the Complaint and summons, do not fit within the definition of Defendants' attorneys for purposes of this litigation.

III. **CONCLUSION**

Among the reasons for dismissing the Complaint, Plaintiff simply has not satisfied the hurdles for proceeding in federal court in a diversity action, has not overcome the First Amendment hurdles, and has not sufficiently established personal jurisdiction even at this early stage. Defendant moves to dismiss the Complaint.

Respectfully submitted

MARKS & KATZ, L.L.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply was served by the CM/ECF filing system on October 19, 2006, to:

Paul W Minnich, Esquire
Craig Tod Trebilcock, Esquire
Rees Griffiths, Esquire
Sean E Summers, Esquire

___/s/ Jonathan L. Katz_____
Jonathan L. Katz