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IN THE DISTRICT COURT OF APPEAL
SECOND JUDICIAL DISTRICT
STATE OF FLORIDA

LAWRENCE FELDMAN,

Appellant,
v.

Lower Tribunal No. 2014-CA-0162-NC
Appeal No. 2D14-3157

PAUL ARCHER,

Appellee.
___________________________________/

ANSWER BRIEF

On Appeal from the Circuit Court of the Twelfth Judicial Circuit
in and for Sarasota County, Florida.

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I. PRELIMINARY STATEMENT

Appellee Paul Archer (hereinafter "Archer") hereby answers the Initial Brief filed by Appellant, Lawrence Feldman (hereinafter "Feldman"), who appeals an Order, rendered on June 3, 2014, dismissing Feldman's Complaint against Archer for Lack of Personal Jurisdiction.

References to the pages in Feldman's Initial Brief will be designated (IB ___). References to the single-volume Record will be by page as follows: (R ___). References to the Transcript of the May 22, 2014 Proceedings on Archer's Motion to Dismiss will be made to the pages (page 59-88) in the Record as follows: (Trans. R ___).

II. STATEMENT OF THE FACTS

A. Feldman's Complaint.

Feldman's Complaint purports to allege defamation based on two emails sent by Archer, who resides in South Carolina, to Feldman, who resides in Florida. (R 1-2.) According to the Complaint, Archer is the general counsel for Byram Realty Company ("BRC"), a partnership whose interests have descended to the heirs of the now-deceased original partners (hereinafter, the "BRC Heirs"). (R 1.) Feldman, the husband of one of the BRC Heirs, Carole Feldman, received an email from Archer on February 13, 2013, which was addressed to Feldman and copied to the BRC Heirs. (R 2 and 5.) Feldman alleges that Archer's February 13, 2013

email contained defamatory statements. (Id.) Feldman also alleges that earlier, on February 7, 2013, he received an email addressed to Feldman and copied to "Bill Bernfeld", which also allegedly contained defamatory statements (R 2-3 and 6.)

Feldman alleges in his Complaint that Archer's emails (hereinafter the "Archer Emails"), which contained allegedly defamatory statements, were sent to Feldman after Feldman requested to review the books and records of BRC on behalf of his wife. (R 3.) Based on the foregoing, Feldman alleges in his Complaint that the Court has personal jurisdiction over Archer, as a non-resident defendant, pursuant to "Fla. Stat. §48.193 (1) (a) 2 for Archer's commission of tortious acts of libel per se in various emails published to residents of Florida and elsewhere." (R 2.)

B. Archer's Motion to Dismiss and Feldman's Response.

Archer timely filed a Motion to Dismiss Complaint for Lack of Personal Jurisdiction and for Failure to State a Cause of Action and to Quash Service of Process (the "Motion"), alleging that Feldman has failed to allege sufficient facts to bring this action within the ambit of Florida's long arm statute and has failed to allege the minimum contacts with the State of Florida to satisfy constitutional due process requirements and thus the action should be dismissed for lack of *in personam* jurisdiction and service of process should be quashed. (R 12.)

Specifically, Archer's Motion pointed out that Feldman's Complaint fails on Florida's long-arm statute since the Complaint does not allege who in Florida (if anyone) received the Archer Emails. (R 14-15.) The Motion also pointed out that the statements in the Archer Emails were speculative and were not, as a matter of law, defamatory. (R 14 and 16.) The Motion also argued that two emails sent to Feldman in Florida and copied to others outside of Florida containing speculation about Feldman's financial condition or intentions did not constitute the minimum contacts with the State of Florida required to satisfy the Constitutional requirements. (R 15-16.) Archer filed an Affidavit in support of the Motion, averring that he has no ties with the State of Florida and did not know any of the email recipients resided in Florida, only Feldman. (R 18-19.)

Feldman filed a Response to Motion to Dismiss ("Response"), an Affidavit executed by Feldman and an Affidavit executed by Carole Feldman. In the Response, for the first time, Feldman alleges that his wife, Carole Feldman, was the Florida recipient. (R 22, 24, 26.) In Feldman's Affidavit, he avers that on January 9, 2013 he sent a request to William Bernfeld, BRC's Business Manager in Delaware ("Bernfeld"), seeking copies of financial and other partnership documents. (R 30 and 33-34.) Feldman further avers that Bernfeld forwarded to Archer Feldman's January 9, 2013 letter seeking the documents, (R 31 and 35), which resulted in an exchange of emails over several months between Feldman and

Archer, of which the Archer Emails were only two out of several. (R 31, see also Trans. R 74-75.)

Although Carole Feldman, in her Affidavit, avers that she received three emails from Archer (R 48), the three emails attached to her Affidavit show that Carole Feldman was merely copied on three emails Archer addressed and sent to Feldman. (R 50-52.) Moreover, only one of the three emails attached to her Affidavit –the February 13, 2013 email– is at issue in the Complaint. (R 51.) Notably, Carole Feldman's Affidavit clarifies that of the two Archer Emails upon which Feldman's Complaint is based, Carole Feldman, the only Florida recipient, received only one of those two Archer Emails, the February 13, 2013 email.

C. The *Venetian Salami* Proceeding and Sworn Proof Presented.

At the hearing, Archer represented, and Feldman did not dispute, that the parties agreed that the facts were not in dispute and thus the judge could rule without further evidentiary hearing. (Trans. R 62.) Archer argued that the Complaint failed to sufficiently plead jurisdiction under Florida's long-arm statute, failed to meet the minimum contacts requirement of Constitutional due process, and in any event, the Archer Emails are not actionable as defamatory statements. (Trans. R 61-71.) Archer presented the sworn proof in the form of Archer's Affidavit that Archer did not realize he was sending emails to Florida residents other than Feldman, Archer has no ties to Florida, does no business in Florida, and

has not availed himself of any of Florida's laws. (Id.) Feldman admitted at the hearing that no other BRC Heirs resided or opened Archer's February 13, 2013 email in Florida. (Trans. R 72:8-13.)

In response to certain questions by the Court, Feldman clarified that one of the emails was published to Carole Feldman, (Trans. R 71), and that one email is sufficient under Florida's long-arm statute because the Restatement of Torts states that "Communication to one spouse of a matter defamatory of another spouse is publication." (Trans. R 73.) Feldman confirmed to the Court that there were no cases in Florida supporting the Restatement of Torts proposition of law. (Trans. R 72-73.) Feldman argued for the first time that Carole Feldman's receipt of an email "would be more damaging to [Feldman's] marital relationship than perhaps his reputation or business". (Trans. R 74. See also 81.) In response to the Court's question about whether that one email constituted sufficient minimum contacts, Feldman argued that it did. (Trans. R 78-79.)

After taking the matter under consideration, the Court entered the Order on Defendant Paul Archer's Motion to Dismiss Complaint for Lack of Personal Jurisdiction and for Failure to State a Cause of Action and to Quash Service of Process (the "Dismissal Order"), which granted Archer's Motion to Dismiss and quashed service of process. (R 55.) This appeal followed.

III. SUMMARY OF THE ARGUMENT

The trial court correctly applied the proper jurisdictional inquiry, correctly considered the unrefuted jurisdictional facts, and correctly determined that it had no personal jurisdiction over Archer in Florida. Feldman's Complaint does not sufficiently allege jurisdiction under Florida's long-arm statute, and does not sufficiently alleged a tort occurred in Florida. Since Archer's only contact with Florida was including Feldman's wife in the "copy" field on an allegedly defamatory email that was addressed only to Feldman, Feldman also failed to establish that that Archer had that requisite minimum contacts with Florida such that haling Archer into Court here comports with traditional notions of fair play and substantial justice under the due process clause of the United States Constitution. Feldman's remaining miscellaneous arguments do not warrant reversal of the Trial Court's order.

IV. ARGUMENT

A. FELDMAN FAILED TO MEET THE REQUIREMENTS FOR PERSONAL JURISDICTION UNDER FLORIDA'S LONG-ARM STATUTE AND THUS THE TRIAL COURT'S ORDER MUST BE AFFIRMED.

Archer agrees with Feldman that *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989) articulated the two inquiries that must be made in determining whether long-arm jurisdiction is appropriate in a given case: (1) whether the complaint alleges sufficient jurisdictional facts to bring the action

within one of the substantive provisions of the long-arm statute, section 48.193, Florida Statutes (2013) (hereinafter, "Section 48.193"); and (2) whether the court can constitutionally exercise jurisdiction over the defendant. *Id*. at 502.

If the plaintiff has met this first-prong requirement either by pleading facts or, alternatively, by pleading the language of the long-arm statute, Section 48.193, the court must then, under the second prong, determine whether the plaintiff has demonstrated that the defendant has sufficient minimum contacts with Florida to satisfy constitutional due process requirements. *Vance v. Tire Engineering and Distribution, LLC*, 32 So.3d 774, 776 (Fla. 2d DCA 2010). If the complaint does not allege a sufficient basis to assert long-arm jurisdiction over the defendant, the court need not reach the issue of whether the defendant has the requisite minimum contacts with the state. *Id*. As detailed below, Feldman failed to meet his burden on both prongs.

Citing to *Venetian Salami*, this Court explained in detail the procedure to determine personal jurisdiction over a non-resident defendant in *Hilltopper Holding Corp. v. Estate of Cutchin ex rel.,* 955 So.2d 598 (Fla. 2d DCA 2007). Initially, the plaintiff bears the burden of pleading a basis for jurisdiction by either tracking the language of the long-arm statute, Section 48.193, or by alleging specific facts that show that defendant's actions fit one or more subsections of Section 48.193. *Id*. at 601.

This Court in *Hilltopper* explained that if the plaintiff meets the pleading burden, the burden shifts to the defendant to file a legally sufficient affidavit or other sworn proof that contests the essential jurisdictional facts of the plaintiff's complaint. *Id*. If the defendant's affidavit fully disputes the jurisdictional allegations in the plaintiff's complaint, the burden shifts back to the plaintiff to prove by affidavit or other sworn proof that a basis for long-arm jurisdiction exists. *Id*. at 602.

In the instant case, Feldman's Complaint alleges, *inter alia*, as follows:

> 7. This Court has personal jurisdiction over the non-resident defendant pursuant to Fla. Stat. §48.193 (1) (a) 2 [sic] for Archer's commission of tortious acts of libel per se in various emails published to residents of Florida and elsewhere.
>
> 8. The cause of action alleged herein accrued in Sarasota County, Florida. All of the defamatory statements made by the Defendants [sic] and published to third parties were directed at Feldman in Sarasota County, Florida.

(R 2.)

Feldman's Complaint fails to state what other Florida resident, besides Feldman, received any one of the two Archer Emails. Reading paragraphs 7 and 8 of the Complaint *in pari materia,* it appears that Feldman is alleging that personal jurisdiction is grounded in the fact that Archer sent to Feldman in Florida the allegedly defamatory emails attached to the Complaint. This is not a sufficient basis for jurisdiction for the tort of defamation.

After Archer filed his Affidavit averring that he has no ties whatsoever to Florida and that he directed the emails to Feldman, who was the only Florida resident to whom Archer knowingly sent the emails, Feldman and his wife filed affidavits that served only to render even more attenuated the alleged jurisdictional basis.

Feldman's Affidavit and its attachments established that the Archer Emails were two in a series of ongoing exchanges between Archer and Feldman over several months that began when Feldman sought copies of the financial records from Bernfeld, BRC's business manager, and that request was forwarded to Archer, who up to that point had never heard of Lawrence Feldman. (R 30-47. See also 46.) Feldman's Affidavit also established that Bernfeld resides in Delaware (R 34 and 35). In Feldman's Complaint, Feldman bases his defamation claim on two emails from Archer, the earlier of which, dated February 7, 2013, was sent to only Feldman and copied to Bernfeld, in Delaware. (R 2-3, 6.) Accordingly, Feldman's Affidavit reveals that there exists no basis for jurisdiction with respect to at least the earlier email attached to the Complaint as Exhibit "B". (R 6.)

Moreover, Carole Feldman's Affidavit and its attachments established only that she received copies of some of the emails between General Counsel for the partnership in which she has an interest and a person (her husband, as it would appear) who was requesting copies of all the financial documents for that

partnership. (R 48-52.) The February 13, 2013 email attached to the Complaint (R 5) and Carole Feldman's Affidavit (R 51) indicates that the email was not directed to Carole Feldman in Florida, but was, as Feldman's Complaint states, directed to Feldman in Florida: the header indicates that the recipient in the "To:" field is "Larry"; and the email begins with "Dear Larry". (Id.) In other words, Archer's February 13, 2013 email, like nearly **every** email Archer sent to Feldman and Feldman sent to Archer during this time, was copied to the BRC Heirs. (See e.g. R 36-37, 40-43, 50, and 52.) There is no indication in Carole Feldman's email address that she resides in Florida. (R 5.)

Accordingly, although Feldman is correct when he argues that in order to commit a tortious act in Florida, a defendant's physical presence is not required if there was "some sort of communication directed into Florida for the purpose of fraud, slander, or other intentional tort" (IB 18, citing to *Wiggins v. Tigrent, Inc*., 147 So.3d 76, 86 (Fla. 2d DCA 2014)), the above facts set forth in the Feldmans' Affidavits show that Archer's February 13, 2013 email was not directed to Florida for the purpose of slander.

Similarly misplaced is Feldman's reliance on *Price v. Kronenberger*, 24 So. 3d 775, 777 (Fla. 5th DCA 2009), a case Feldman claims has "almost identical facts" in which the court found personal jurisdiction. (IB 22.) In *Price*, the non-resident defendant, Kronenberger, sent an email to various members of the Korean

War Veteran's Association (hereinafter "KWVA"), alerting the members that Price, a KWVA member and Florida resident, essentially bought his law degree from a correspondence school. *Id*. at 776. Several recipients of the email lived in Florida. *Id.* The *Price* court found personal jurisdiction over Kronenberger because he specifically targeted Florida residents as recipients: "Kronenberger specifically sent his defamatory e-mail to certain members of KWVA, some of whom live in Florida. By doing so, he directed his electronic activity into Florida." *Id.* at 777.

By contrast, Archer's February 13, 2013 email was one of a series of emails between Archer as General Counsel of a partnership and a stranger to the partnership who demanded to inspect the partnership's financial records. Both Archer and Feldman copied the emails they sent to one another to the BRC Heirs. That the emails exchanged between Feldman and Archer grew uglier and more spiteful on both sides (see e.g. 40-43) places Archer's February 13, 2013 email outside of the definition of a communication directed into Florida for the purpose of slander. Unlike the Kronenberger email, the Archer email was addressed and directed to Feldman.

As such, neither *Wiggins* nor *Price* support a finding of personal jurisdiction in this case, no more than the other cases Feldman cites to for the proposition that "where a defendant makes defamatory statements in telephonic, electronic or written communications originating from outside of Florida, but directed to a

resident in Florida, the defendant subjects himself to specific personal jurisdiction in Florida under the long-arm statute." (IB 21.) In this case, the email was not expressly aimed or directly aimed at Carole Feldman in Florida but rather directed only to Feldman in Florida, which is not an actionable offense. Archer, as he averred in his Affidavit, was not even aware that Feldman's wife was residing in Florida at the time he copied her on all these exchanges regarding the BRC partnership. Accordingly, Archer is not subject to personal jurisdiction under the long-arm statute and the Trial Court's order should be affirmed.

Feldman incorrectly sets forth Archer's argument below, limiting the same to (1) a failure on the part of Feldman to allege harm or injury; and (2) that the Trial Court should not seriously consider that the harm was between Feldman and his wife. (IB 20.) Feldman misapprehends Archer's argument.

Archer's argument was more fundamental: that Feldman had not alleged sufficient facts to bring the Complaint within the ambit of the long arm statute. (See Archer's Motion, R 14, 15, and Trans. R 63-67.) Aside from the fact that Archer's February 13, 2013 email does not appear, on its face, to be actionable under a claim of defamation, Feldman alleged for the first time in his Response and Affidavit that his wife was the recipient of Archer's February 13, 2013 email. Archer's argument was that at no time in Feldman's Complaint does he allege that

his wife was the recipient of the email and that his wife's receipt of the email caused the harm to Feldman. (R 14-15; Trans. R. 63, 65-66.)

To the contrary, Feldman's Complaint alleges that Feldman has a "good name and reputation in Sarasota County and enjoys the esteem and good opinion of his business associates, clients, neighbors and others in Florida, Colorado and in other places that Feldman does business in the United States." (R 1, Paragraph 3.) Feldman further alleges that Archer published the allegedly defamatory statements to Sonya Bernfeld, William Bernfeld, Ruth Cohen, Barbara Bosses, Carole Feldman, Jane Wein, and Judy Wein. (R 3, Paragraph 14.) Feldman goes on to allege that Archer's statements are "aimed at discrediting Feldman with third parties [and made] for the purpose of destroying his credibility and preventing other partners in the BRC partnership and BRC's independent CPA from believing in Feldman's honesty." (R 3, Paragraph 12.) With respect to injury suffered, Feldman averred that Archer's allegedly defamatory statements "caused injury to the good name and reputation of Feldman and damaged his business." (R 3, Paragraph 13.)

Accordingly, in his Complaint, not only did Feldman fail to specify that only one of the Archer Emails –the February 13, 2013 email– was sent to someone other than Feldman in Florida, but Feldman also failed to allege that the other someone was Feldman's wife, who was the only recipient (besides Feldman) in

Florida of that email. Feldman also neglected to mention that the injuries specified in reference to Feldman's business, reputation and credibility with third parties were actually injuries that allegedly flowed **only** from Feldman's wife's receipt of Archer's February 13, 2013 email and concerned **only** his reputation and relationship with his wife. Moreover, Feldman conspicuously omitted any mention of those harms in his Response, in his Affidavit, and in Feldman's wife's Affidavit.

Under Florida law, the plaintiff bears the initial burden of alleging sufficient facts to support personal jurisdiction under the long-arm statute and, if the defendant disputes the jurisdictional facts, the plaintiff bears the second burden to refute defendant's disputations of the jurisdictional allegations. In the instant case, Feldman failed to meet both burdens, and the Trial Court correctly determined that it had no jurisdiction over Archer under the long-arm statute.

B. FELDMAN FAILED TO MEET THE CONSTITUTIONAL DUE PROCESS REQUIREMENTS FOR PERSONAL JURISDICTION AND THUS THE TRIAL COURT PROPERLY FOUND THAT IT HAD NO PERSONAL JURISDICTION OVER ARCHER.

1. Feldman Failed to Establish that Archer had Minimum Contacts with Florida.

Even if Feldman carried his burden to establish that the Court has jurisdiction over Archer under Florida's long-arm statute, Feldman failed to meet the Constitutional requirements for personal jurisdiction over Archer. Under the *Venetian Salami* second prong, a court can exercise personal jurisdiction only if

defendant maintains certain minimum contacts with the State of Florida and if maintenance of the suit does not offend “traditional notions of fair play and substantial justice”. *Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd.,* 752 So.2d 582, 584 (Fla. 2000); *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

The minimum contacts analysis focuses on the relationship among the defendant, the forum, and the litigation. *Emerson v. Cole,* 847 So.2d 606, 608 (Fla. 2d DCA 2003). The constitutional touchstone remains whether the defendant **purposefully established** minimum contacts in the forum State. *Id*. (Emphasis added.) The foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. *Id*.

As noted by the Supreme Court of Florida, the second step in the analysis of a claim for *in personam* jurisdiction, whether the minimum contacts requirements of the due process clause of the U.S. Constitution are satisfied, is a “more restrictive” analysis. *Internet Solutions v. Marshall*, 39 So.3d 1201, 1216 (Fla. 2010). In *Alecca v. AMG Managing Partners, LLC.*, 2014 WL 2987702 (M.D. Fla. 2014), cited by Feldman in his Initial Brief, (IB 27-28), the United States District Court for the Middle District of Florida noted in its opinion that “the requisite

minimum contacts to satisfy due process are not built into Florida's long-arm statute". *Id.* at *5.

"It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Sun Bank, N.A. v. E.F. Hutton & Company, Inc.*, 926 F.2d 1030, 1034 (11th Cir. 1991) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958)). This "'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts". *Id*. (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985)).

In Feldman's Initial Brief, Feldman cites to the following three-part test in *Posner v. Essex Ins. Co. Ltd.*, 178 F.3d 1209 (11th Cir. 1999) to determine whether minimum contacts exist (IB 23): (1) the contacts must be related to the plaintiff's cause of action; (2) the contacts must involve some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum; and (3) the defendant's contacts with the forum must be such that the defendant should reasonably anticipate being haled into court there. *Id*. at 1220.

As detailed above, the only contact Archer had with the State of Florida that allegedly gave rise to Feldman's claim is that Feldman's wife was copied on an

email Archer directed to Feldman in Florida. Inasmuch as Archer averred in his Affidavit that he did not know any of the recipients besides Feldman resided in Florida, Archer could not have –and did not– purposefully avail himself of the privilege of conducting activities within Florida. Archer's email to Feldman, which was copied to Feldman's wife who opened the email in Florida is not activity in Florida that would cause Archer to reasonably anticipate being haled into court here. Accordingly, Archer does not have minimum contacts with the State of Florida.

In his Initial Brief, Feldman, when analyzing the second and third *Posner* factors, argues that "Archer purposely directed his conduct towards Feldman, a Florida resident. He should have reasonably anticipated being haled into court here." (IB 24.) Although Feldman's argument is consistent with the allegations in his Complaint –that Archer sent an allegedly defamatory email to Feldman in Florida– Feldman's receipt of the February 13, 2013 email does not give rise to any cause of action for defamation against Feldman. Feldman again conflates Archer's directing the email to Feldman with Feldman's wife's receipt of the email on which she was merely copied.

Moreover, Florida cases have recognized the importance of who initiated the contact resulting in the alleged defamatory statement being published in Florida. In the instant case, the record reflects that Archer responded to an inquiry by

Feldman about the partnership, BRC. Thus, in a number of cases, Florida Courts have held that where the plaintiff initiates the contacts and the defendant responds, the defendant has not purposely availed himself of the privilege of conducting activities in the forum state and cannot be held to have specifically targeted a Florida resident. Under such circumstances, the contacts are considered more fortuitous than purposeful. *See e.g. Sun Bank, N.A. v. E.F. Hutton & Company, Inc.*, 926 F.2d 1030 (11th Cir. 1991); *Swanky Apps, LLC v. Roony Invest & Finance, S.A.*, 126 So.3d 336 (3d DCA 2013); and *Hou v. United Airlines Corporation*, 2006 WL 2884963 (M.D. Fla. 2006).

In *Sun Bank, N.A. v. E.F. Hutton & Company, Inc.*, 926 F.2d 1030 (11th Cir. 1991), Sun Bank sued Hutton and its broker Bunstein alleging that they misrepresented creditworthiness of Stevens, one of the firm's clients, and their misrepresentations induced Sun Bank to loan funds to Stevens, to their detriment. *Id.* at 1032. Bunstein, based in Massachusetts, received a telephone call from Sun Bank regarding Stevens, during which Bunstein allegedly falsely represented Stevens' creditworthiness to Sun Bank. *Id.*

In reversing the trial court's finding of jurisdiction, the Eleventh Circuit noted that both parties agree that the contact between Sun Bank and Bunstein was initiated by Sun Bank. *Id*. at 1034. There were several calls and, the Eleventh Circuit Court of Appeals noted that although it was not clear who initiated the call

in which the representations were made, the Court concluded that the Bunstein's contacts with Florida, if not attenuated, were certainly fortuitous, stating: "That the calls originated from Florida rather than from Indiana or Idaho was purely a matter of chance." *Id*.

Similar to *Sun Bank v. Hutton*, in *Swanky Apps, LLC v. Roony Invest & Finance, S.A.*, 126 So.3d 336 (3d DCA 2013), the Plaintiff Roony alleged that Swanky and its manager/CEO, Hornig, made misrepresentations that induced Roony to invest in Swanky to Roony's detriment. *Id*. at 338. The misrepresentations were made in a telephone call Hornig, a New York resident, accepted from Roony, who was in Florida at the time he placed the call. *Id*. Hornig and Roony also exchanged emails while Hornig was in New York and Roony was in Florida. *Id.*

The Third District Court of Appeal found it significant that Hornig **accepted** from Roony the one telephone call at issue in the case, rather than initiating the call to Roony and, in any event, the Third District Court of Appeal noted that there was no indication in the affidavits that Hornig knew that Roony was in Florida during the telephonic and email communications. *Id*. at 339. Based on the foregoing and citing to *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), the Third District Court of Appeal concluded that the non-resident defendants could not have reasonably anticipated being haled into a

Florida court where the contacts they had with Florida "were not purposefully directed into Florida, and the contacts were nothing more than random and fortuitous." *Id*. at 339-340.

In *Hou v. United Airlines Corporation*, 2006 WL 2884963 (M.D. Fla. 2006), Hou sued United Airlines for employment discrimination and then added two other defendants for fraudulently misrepresenting Hou's claim during the airline's bankruptcy proceeding. *Id*. at *1. Defendant Sprayregen resides in Illinois and the alleged fraudulent statements occurred in a telephone call initiated by Hou from Florida to Sprayregen in Illinois. *Id*. at *2. The Federal District Court for the Middle District of Florida found that the complaint fails on the Constitutional prong since accepting a single telephone call from Florida does not demonstrate defendants' "purposeful availment of the law of Florida nor [under these circumstance would defendants] have any expectation of being haled into a Florida court...". *Id.* at *3.

Like the *Sun Bank, Swanky,* and *Hou* cases above, in the instant case, Archer was responding to Feldman's inquiry. Archer's February 13, 2013 email was one of a series of exchanges between Feldman and Archer, which exchanges were initiated by Feldman's request to inspect partnership documents, according to Feldman's Affidavit. (R 30-31.) In fact, although Feldman carefully omitted the email he sent immediately prior to Archer's February 13, 2013 email, Archer's

email is clearly responding to a communication received by Archer from Feldman during their three-month long email interaction regarding Feldman's request to inspect the partnership documents. As in the *Sun Bank, Swanky,* and *Hou* cases, by responding to Feldman's inquiry and responding to Feldman's subsequent emails, Archer did not purposefully avail himself of the laws of Florida such that Archer should expect to be haled into court here.

Also like in the *Sun Bank, Swanky,* and *Hou* cases, the mere fact that Feldman's wife opened a copy of the February 13, 2013 email in Florida is also "purely a matter of chance". See *Sun Bank v Hutton* at 1034. Like in the *Swanky* case, Archer's Affidavit demonstrates –and the Feldmans' Affidavits do not refute– that Archer had no idea that Carole Feldman was in Florida on February 13, 2013. There is nothing in Carole Feldman's email address that indicates she is based in Florida. Many email applications are web-based and can be accessed in any location through any Internet connection or even through a cellular telephone in any location.

Had Feldman's wife been vacationing in Anchorage when she opened and read the February 13, 2013 email that was merely copied to her, then under Feldman's theory, Alaska would have personal jurisdiction over Archer because publication occurred in Alaska. Such attenuated and fortuitous contacts do not comport with the due process requirements of the United States Constitution.

Feldman cites to *Ileyac Shipping, Ltd. v. Riera-Gomez*, 899 So. 2d 1230, 1232 (Fla. 3d DCA 2005), *Silver v. Levinson*, 648 So. 2d 240 (Fla. 4th DCA 1994); *Krilich v. Wolcott*, 717 So. 2d 582, 584 (Fla. 4th DCA 1998); and the *Price* case, *supra,* as cases that have "answered in the affirmative" the question of "whether one or two defamatory emails directed at a Florida resident and published in Florida to a third party are sufficient minimum contacts to support specific personal jurisdiction over the nonresident." (IB 25.) Notably, Feldman has his own question wrong: there was only one email, not two, that was received in Florida by Feldman's wife. Furthermore, Feldman's conclusion that courts have answered the question in the affirmative is simply untrue since the "United States Supreme Court has rejected any 'talismanic jurisdictional formula' to determine the requisite minimum contact." *Silver v. Levinson, supra*, at *243.* Feldman's own cited cases reveal a careful case-by-case analysis of the number and the nature of the contacts.

In *Ileyac Shipping*, the plaintiff alleged that he was injured as a result of a tortious act committed by Ileyac within the State of Florida, specifically the Port of Miami, while servicing a ship owned by Ileyac. *Id*. at 1231. The *Ileyac Shipping* court found that the single tort committed in Florida was sufficient minimum contacts. *Id*. at 1232. The *Ileyac Shipping* court also noted as follows:

> Additionally, we find that based on the numerous contacts that Ileyac has had with Florida, the due process, minimum contacts requirement has been satisfied. Ileyac time-chartered one of its ships to CMA-CGM (Caribbean), Inc. As part of the agreement, Ileyac agreed to

> allow its ship to operate within a certain range, including the Port of Miami. Ileyac was responsible for supplying, training, and paying the ship's captain and crewmembers. Additionally, Ileyac was responsible for maintaining insurance, maintaining power and light during the loading and unloading of cargo, and for providing lighting for the deck area and in the holds. Moreover, the undisputed facts demonstrate that the ship docked at the Port of Miami approximately every two weeks and that repairs to the ship were completed at the Port of Miami.

Id. at 1232. These contacts are not analogous in any way to one allegedly defamatory email that was received in Florida by Feldman's wife but directed only to Feldman.

Silver v. Levinson, 648 So. 2d 240 (Fla. 4th DCA 1994) did involve a defamatory letter, but the defendant (Silver) addressed his letter to various officers and directors of a company in which plaintiff owned stock, accusing plaintiff of selling stock options at an artificially low price in order to fraudulently deprive his ex-wife of her share of the proceeds from a dissolution settlement agreement, including accusations of criminal conduct. *Id.* at 241. Rather than automatically subjecting Silver to personal jurisdiction on the basis of this one letter which was addressed to several persons in Florida, the *Silver* Court noted:

> Subjecting a defendant to *in personam* jurisdiction based on a single, isolated transaction by the nonresident defendant does not necessarily offend due process. . . .. The analysis must focus on the nature of the act. When dealing with isolated acts of a defendant, rather than centering on continuous economic activity within the state, a key focus is the quality and nature of the interstate transaction. The court must inquire into whether the conduct is so random, fortuitous or attenuated that it cannot fairly be said that the potential defendant

> should reasonably anticipate being haled into court in another jurisdiction. *Burger King*, 471 U.S. at 486, 105 S.Ct. at 2189.

Id. at 243 (some internal citations omitted.) Based on the above, the *Silver* Court found that Silver, whose mailing was directed to six separate Broward County residents, committed an intentional act directly aimed at Florida and made accusations targeted at a Florida resident by purposefully directing his activities at Florida, where all of the recipients of the letters and participants in the alleged scheme to commit fraud and violate the federal securities law reside. *Id*. Accordingly, the *Silver* Court concluded that the actions of Silver were not random, fortuitous or attenuated.

Similarly, in *Krilich v. Wolcott*, 717 So. 2d 582 (Fla. 4th DCA 1998), the defendants physically entered the State of Florida and made certain representations to plaintiffs, which representations plaintiffs allege were fraudulent. *Id*. at 583. The appellate Court noted that an intentional tort can satisfy the minimum contacts tests but recognized that "circumstances exist in which the connection with the forum state is so fortuitous and minimal as to fail this prong of the test". *Id*. at 583-84 (citing to *Sun Bank, N.A. v. E.F. Hutton & Co*., 926 F.2d 1030 (11th Cir. 1991). The Court found that since plaintiffs swore that defendants physically entered Florida and committed an intentional tort within the state, defendants' "contacts with this jurisdiction are more than attenuated or fortuitous; they have purposefully

availed themselves of this state and should reasonably expect to be haled into court here." *Id.* at 584.

Price v. Kronenberger, 24 So. 3d 775 (Fla. 5th DCA 2009), analyzed in the previous section, is similar to the *Silver v. Levinson* case, in which the defendant specifically aimed his communication, which allegedly contained defamatory statements, to several people in the State of Florida about a Florida resident. *Id.* at 776-777. Again, these are not the facts alleged in Feldman's Complaint or established through any Affidavits filed in this case.

By stark contrast to the multiple representations or multiple recipients of communications made by Silver, Wollcott, and Kronenberger in their respective cases, and purposefully directed into the State of Florida for the purpose of committing a tort, Archer's act of copying Feldman's wife on an email she read in Florida is so fortuitous, attenuated, random, and minimal as to fail this prong of the test. Accordingly, under the case-by-case analysis that must be conducted to determine whether our Court has personal jurisdiction on the basis of minimum contacts, Feldman has not established that minimum contacts exist and thus, the application of due process of law mandates the affirmance of the Trial Court's Order.

2. The U.S. Supreme Court Standard of Traditional Notions of Fair Play and Substantial Justice Requires That the Trial Court Order in the Instant Case be Affirmed.

Even if, *arguendo,* the Court finds that minimum contacts exist in this case (which they do not), exercising personal jurisdiction over Archer in this case would offend traditional notions of fair play and substantial justice. "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these 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 v. Rudzewicz*, 471 U.S. 462, 476-77, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985) (citing to *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

To determine whether Archer purposely availed himself of the privilege of conducting activities in the forum state and whether the exercise of jurisdiction comports with traditional notions of fair play and substantial justice requires an analysis of the following five (5) factors set forth by the United States Supreme Court in *Burger King v. Rudzewicz*, *supra*:

> (1) The defendant's burden in defending the case in the forum state; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judicial system's interest in resolving disputes in the most efficient way; and (5) the shared interest of the states in furthering fundamental substantive social policies.

Id. at 477 (hereinafter, the "*Burger King* factors"). Feldman cites to *Alecca v. AMG Managing Partners*, LLC, Slip Copy, 2014 WL 2987702 (M.D. Fla. 2014) for the proposition that "even where one factor disfavors jurisdiction, if the

remaining factors heavily favor it, exercising personal jurisdiction will not offend due process". (IB 27.) However, unlike in *Alecca*, where only one of the *Burger King* factors favored the defendant's motion to dismiss, and the remaining factors **heavily** favored the exercise of *in personam* jurisdiction over the defendant, in the instant case, most of the *Burger King* factors militate **against** the exercise of *in personam* jurisdiction over Archer in Florida.

The first *Burger King* factor, Archer's hearsay burden of defending the case in the forum state, is clear. The only witnesses in Florida are Feldman and his wife, all other witnesses being located in other states, including, obviously, Archer. As to the second *Burger King* factor, the forum state's interest in resolving the dispute, the emails reflect that the instant case is a "spite" case, derived from an almost ludicrous exchange of emails, with the likely result that there are no damages sustained by Feldman occasioned by his wife reading the one allegedly defamatory email. Florida has no interest in providing its courts to entertain and adjudicate this particular matter, nor is there any shared interest between Florida and other states in furthering fundamental substantive social policies, which is *Burger King* factor number five. Furthermore, litigating the case in Florida under these facts and circumstances does not further the judicial system's interest in resolving disputes in a most efficient way, which is *Burger King* factor number four. The only *Burger King* factor weighing in favor of Feldman in the instant

case is Feldman's interest in obtaining more convenient relief where he resides. This is not sufficient under *Burger King Corp. v. Rudzewicz*.

Thus, under the facts and circumstances presented herein, where the sole contact relating to the alleged tort is an email of a copy of a letter directed to Feldman which was copied to Feldman's wife in response to an inquiry made by Feldman, it is not reasonable for Archer, a citizen of South Carolina who had no other contact with Florida, to be haled into court in Florida to respond to these allegations. Doing so offends traditional notions of fair play and substantial justice, thereby violating the due process clause of the Constitution.

C. FELDMAN'S "OTHER CONSIDERATIONS" IN HIS INITIAL BRIEF DO NOT WARRANT A REVERSAL OF THE TRIAL COURT'S DECISION.

1. An Evidentiary Hearing Was Neither Requested Nor Required Since the Affidavits Did Not Conflict.

At the hearing, Archer represented, and Feldman did not dispute, that the parties agreed that the facts were not in dispute and thus the judge could rule without further evidentiary hearing. (Trans. R 62.) At no time below did Feldman argue that an evidentiary hearing was required. At no time below did Feldman argue that the affidavits conflicted. At best, Feldman argued only that Archer had knowledge of where Carole Feldman resided, a fact not established in any of Feldmans' Affidavits. (Trans. R. 78.) Accordingly, Feldman has waived the argument that the lower court erred by failing to hold an evidentiary hearing and

cannot raise this argument for the first time on appeal. *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier,* 67 So.3d 315, 318 n2 (Fla. 2d DCA 2011) (failure to raise an issue before the trial court constitutes waiver and precludes the party from raising the issue for the first time on appeal).

In any event, an evidentiary hearing is only necessary if the jurisdictional facts in the affidavits conflict. In Archer's Affidavit, paragraph 9, he averred as follows:

> To my knowledge, plaintiff is the only Florida resident to whom I sent the emails described in the complaint. According to partnership records, all of the other recipients of those emails reside outside of Florida. I never purposefully published any of those emails to anyone in Florida other than the plaintiff. (R 19.)

Feldman did not directly refute the above assertion in his Affidavit. Feldman averred in his Affidavit at paragraph 4 that **Bernfeld**, BRC's Business Manager, was aware that Carole Feldman resided in Sarasota, Florida. (R 30.) Feldman also averred at paragraph 11 that Feldman sent Carole Feldman a bill on March 6, 2013 to her address in Sarasota, Florida. (R 31, 47.) Accordingly, Feldman's averments do not conflict with Archer's averment that, on February 13, 2013, he was not aware that Carole Feldman resided in Florida. The Trial Court could, and did, reconcile the affidavits and sworn proof to correctly determine it did not have jurisdiction over Archer.

2. There is No Law in Florida That Supports Feldman's Theory That a Publication to a Spouse is Sufficient to Meet the Requirements for a Defamation Action.

In order to state a cause of action for defamation, there must be publication. *Silver v. Levinson*, 648 So. 2d 240, 242 (Fla. 4th DCA 1994). In the instant case the sole contact with the State of Florida with regard to publication reflected in the record is that Archer included Feldman's spouse in the "cc" field of an email Archer sent to Feldman.

Feldman suggests that the Restatement of Torts section 577, comment (J) holds that publication to a spouse is sufficient publication to support a claim for defamation. (IB 30.) There are no reported Florida cases adopting Restatement of Torts section 577, comment (J) for defamation purposes. Moreover, there are no reported Florida defamation cases with facts akin to the facts in the instant case, where the sole contact by a Defendant in the State of Florida relating to the alleged tort committed within the state is an email directed to the Plaintiff and copied to the Plaintiff's wife.

The contact with the State of Florida in the instant case is so thin and attenuated, that Feldman is suggesting that this Court take an extreme, and somewhat dangerous position. If a Plaintiff can utilize the receipt of an email by his or her spouse on which email they were copied, without any other contacts, as the sole basis for jurisdiction over a non-resident defendant who is simply

responding to an inquiry made by the Plaintiff, litigants will be encouraged to bait non-residents into sending emails that they allege are defamatory as a basis for initiating litigation over a non-resident defendant in any case where the Plaintiff feels slighted or offended by the Defendant's opinions or exercise of his or her First Amendment rights.

Further, if the Plaintiff's wife were copied by the Plaintiff in the "bait" email to the Defendant, the Defendant's jurisdictional subjectability can turn on whether he simply selected "reply", which would send the response to the sender only, or "reply all", which would send the response to the sender and anyone copied by the sender.

The basis for jurisdiction asserted by Feldman is not only too thin to pass the constitutional requirements of due process, but adopting Feldman's position would result in bad judicial and public policy, encouraging and favoring the type of suit we see in the instant case. Accordingly, this case is not an appropriate case for this Court to adopt the Restatement of Torts section 577, comment (J) as Florida law, for the first time in the history of Florida's jurisprudence. The Trial Court's Order should be affirmed.

V. CONCLUSION

Based on the foregoing, this Court must affirm the Trial Court's Order determining that it cannot exercise personal jurisdiction over Archer under these circumstances. Feldman's Complaint fails to sufficiently allege jurisdiction under Florida's long-arm statute, and, even if Feldman has properly alleged such jurisdiction, Feldman has failed to establish that Archer had minimum contacts and failed to establish that haling Archer into Florida under these circumstances comports with traditional notions of fair play and substantial justice under the United States Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2, 2014, a true and correct copy of the foregoing was electronically filed with the Second District Court of Appeal using the Florida Courts E-Filing Portal, and furnished via the Portal to the following counsel of record by electronic mail: David Wallace, Esq., and M. Lewis Hall, III, Esq., Williams Parker Harrison Dietz & Getzen, 200 S. Orange Ave., Sarasota, FL 34236, dwallace@williamsparker.com, dfernandez@williamsparker.com, counsel for Appellant, Lawrence Feldman.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing is submitted in Times New Roman 14-point font, which satisfies the requirements of Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(2).

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