

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MARK CHRISTOPHER TRACY,
Plaintiff and Appellant,

v.

COHNE KINGHORN PC, SIMPLIFI
COMPANY, JEREMY RAND COOK,
ERIC HAWKES, JENNIFER HAWKES,
MICHAEL SCOTT HUGHES, DAVID
BRADFORD, KEM CROSBY GARDNER,
DAVID BENNION, PAUL HANDY
BROWN and GARY A. BOWEN,
Defendants and Respondents.

Court of Appeals No. H052028

Superior Court of California, County of Santa Clara
Case. No. 23CV423435
Honorable Judge Evette D. Pennypacker

APPELLANT'S OPENING BRIEF

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Plaintiff-Appellant
In propria persona

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF THE CASE..... 5

STATEMENT OF APPEALABILITY 6

STATEMENT OF FACTS 6

ARGUMENT 14

 I. JURISDICTIONAL FACTS OF THE VERIFIED
 COMPLAINT ARE UNDISPUTED 14

 A. Standard of Review 14

 B. The Trial Court Improperly Permitted Attorney Brown
 and Defendant Bowen to Amend Impermissible
 Hearsay Evidence 14

 II. PLAINTIFF MUST NOT PROVE UNDISPUTED
 JURISDICTIONAL FACTS OF A VERIFIED
 COMPLAINT 15

 A. Standard of Review 15

 B. The Trial Court Erred in Ruling that Plaintiff Failed to
 Provide Evidence that Defendants’ Actions Occurred
 Within and Were Directed at California Citizens and
 Residents..... 15

 III. THE COURT HAS PERSONAL JURISDICTION FOR
 TORTIOUS CONDUCT OCCURING WITHIN AND
 DIRECTED TOWARDS CALIFORNIA CITIZENS
 AND RESIDENTS..... 16

 IV. THE TRAIL COURT IMPROPERLY DISALLOWED
 DISCOVERY TO CLARIFY CONTESTED
 JURISDICTIONAL FACTS 17

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 20

TABLE OF AUTHORITIES

CASES

Albertson v. Raboff
(1960) 185 Cal.App.2d 372 16

Atkins, Kroll & Co. v. Broadway Lbr. Co.
(1963) 222 Cal.App.2d 646 16

Elkman v. National States Ins. Co.
(2009) 173 Cal.App.4th 1305 16

Felix v. Bomoro Kommanditgesellschaft
(1987) 196 Cal.App.3d 106 14

Great-West Life Assurance Co. v. Guarantee Co. of North America
(1988) 205 Cal.App.3d 199 15

Greenwell v. Auto-Owners Ins. Company
(2015) 233 Cal.App.4th 783 16

HealthMarkets, Inc. v. Superior Court
(2009) 171 Cal.App.4th 1160 18

Hoffman v. City of Palm Springs
(1957) 169 Cal.App.2d 645 16

In re Automobile Antitrust Cases I & II
(2005) 135 Cal.App.4th 100 18

Jay v. Mahaffey
(2013) 218 Cal.App.4th 1522 15

Jewish Defense Organization, Inc. v. Sup. Ct. of Los Angeles County
(1999) 72 Cal.App.4th 1045 17

Keeton v. Hustler Magazine, Inc.
(1984) 465 U.S. 770 5

Kulshrestha v. First Union Commercial Corp.
(2004) 33 Cal.App.4th 601 14

Wolfe v. City of Alexandria
(1990) 217 Cal.App.3d 541 14

RULES

Code of Civ. P. § 2015.5 14
Code of Civ. P. § 904.1(a)(3) 6

STATEMENT OF THE CASE

Mr. Tracy filed a Complaint against Defendants in September 2023, alleging liable, liable per se, false light and intentional infliction of emotional distress for statements published on a Utah governmental entity's website via a server located in San José, California. As alleged, Defendants' tortious conduct occurring both within and regarding a resident of the forum state were an integral part of a fraudulent scheme to secure payment of monies from California citizens and residents.

Although Defendants failed to contest any allegation of the verified complaint, the Superior Court granted Defendants' motions to quash summons for lack of personal jurisdiction finding: (1) the United States Supreme Court's ruling in *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 775, would "entirely swallow" rules of general and specific jurisdiction for defamatory statements published on the internet; (2) Defendants may freely amend inadmissible hearsay evidence without notice or allowing Plaintiff an opportunity to be heard; (3) contrary to the court record and unsubstantiated by Defendants' own declarations, other than Defendant Gary A. Bowen ("Defendant Bowen"), no Defendant conducted business in the forum state; (4) Mr. Tracy failed to satisfy his burden of proving undisputed jurisdictional facts; and (5) discovery of contested facts would be "futile."

Although no Defendant had advanced arguments nos. 1, 4 and 5, the court denied Mr. Tracy's request for reconsideration to address these issues.

STATEMENT OF APPEALABILITY

This appeal is from an order of the Santa Clara Superior Court granting motions to quash service of summons and is authorized under Code of Civ. P., § 904.1(a)(3).

STATEMENT OF FACTS

Mr. Tracy is a California resident and federal whistleblower in what has alleged to be the longest and most lucrative water-grabs in the history of Utah, perpetuated as an ongoing fraud against citizens and residents of the State of California. (AA008-9.) The environmental and economic damage caused by willful groundwater depletion and drinking-water contamination is a matter of public record. (*Id.*, AA107, AA109, AA224-5.)

The verified Complaint alleges that for the past 40 years, and continuing to the present day unabated, a Salt Lake City law firm acting on behalf of a special service water district and for the economic benefit of politically influential private land-developers, including the business partner of United States Senator, President pro Tempore, and Chairman of the Senate Judiciary Committee Orin G. Hatch (AA011), perpetuated a fraudulent scheme to retire senior perfected water rights vis-a-vis duplicitous water claims removed from the only active federal military cemetery created by an Act of Congress, signed into law by United States President Ulysses S. Grant in 1874, subject to the reversionary interest to be “forever used for the burial of the dead,” but however misappropriated for the construction and massive

expansion of a luxurious private urban development marketed and sold to unsuspecting citizens and residents of the State of California as the “Bel Air of Salt Lake City” during and immediately following the 2002 Olympic Winter Games. (AA009.)

In furtherance of this ongoing fraud, and to secure continued payment of monies from property owners residing in Venice, Rancho Cucamonga, Corona Del Mar, Coto de Caza, Mountain View, San Rafael, Bayside, Loomis, San Diego and Davis California, Defendants miscited and then withheld hydrology reports expressly warning against continued aquifer depletion, while simultaneously concealing government records evidencing extensive lead contamination of culinary drinking-water sources, and grossly inadequate emergency-fire protection in a small mountain community especially prone to wild-fire fatalities. (AA009, AA159-63, AA165-77.)

However, when suppression of expert studies and public records proved futile, Defendants resorted to a concerted smear campaign against Mr. Tracy publishing false and defamatory statements on a Utah governmental entity’s website via a server located in San José, California under the slogan “STAY INFORMED – GET THE FACTS!” (emphasis in original). (AA009, AA213-17.)

Defendants failed to dispute any allegation of the verified complaint. (AA029-30, AA031-2, AA38-9, AA47-9, AA038, AA050-1, AA052-4, AA055-6, AA060-1, AA062-3, AA064-5, AA067-9.)

However, in support of his motion to quash service of summons, Defendant Kem Crosby Gardner (“Defendant Gardner”) submitted sworn declarations, “I do not conduct business on behalf of myself in California”, and “I do not pay taxes in California” (AA048), but failed to inform the Court of his extensive and continuing businesses in the forum state through the companies “The Boyer Company L.C.,” “The Gardner Group,” and “rPlus Energies,” partial ownership of a radio station in Mountain Press, California, and payment of property taxes in Carlsbad, California two months prior to execution of his sworn declaration. (AA120, AA179-203, AA235.)

Contrary to the disputed facts of the court record, and unsupported by the declaration, the Superior Court ruled that Defendant Gardner does not conduct business in the State of California (AA142), jurisdictional discovery is futile (AA145), and denied Plaintiff’s request for rehearing (AA236-7), although a \$460 million dollar renewable energy project lead by Los Angeles, California attorney Jeffery Atkins on behalf of Defendant Gardner through rPlus Energies was announced two days after the court’s ruling. (AA194-5, AA235.)

In support of his motion to quash service of summons, Defendant Paul Handy Brown, Esq., (“Attorney Brown”) executed a declaration and amended declaration the following day in Salt Lake City without submitting to the perjury laws of the State of California. (AA030, AA032.) Plaintiff objected to inadmissible hearsay evidence. (AA036.)

Forty-three (43) days after Mr. Tracy’s hearsay objection, and five (5) days before issuance of a tentative ruling, Attorney Brown submitted a “[Second] Amended Declaration” under California perjury laws (AA065) but refused to deny that he resides (or did reside) at 8214 Quoitte St, Downey, California 90242 (AA233), refused to produce any jurisdictional discovery document, and failed to appear for a properly noticed deposition. (AA097-101.)

Without providing Mr. Tracy notice or any opportunity to be heard, the Superior Court permitted Attorney Brown’s Second Amended declaration (AA142), ruled that jurisdictional discovery is futile (AA145), and denied Plaintiff’s request for rehearing. (AA236-7).

Likewise, in support of his motion to quash service of summons, Defendant Bowen executed a declaration in Salt Lake City without submitting to the perjury laws of the State of California. (AA39.) Mr. Tracy objected to inadmissible hearsay evidence. (AA043.) Defendant Bowen submitted a First and Second “Amended Declaration” (AA042-3, AA064-5), but refused to produce any jurisdictional discovery document, and failed to appear for a properly noticed deposition. (AA092-5.)

Without providing Mr. Tracy notice or any opportunity to be heard, the Superior Court permitted Defendant Bowen’s Second Amended Declaration (AA142), ruled that jurisdictional discovery is futile (AA145), and denied Plaintiff’s request for rehearing. (AA236-7.)

In support of his motion to quash service of summons, Defendant Michael Scott Hughes (“Defendant Hughes”) filed a sworn declaration, “I do not have a residence in California and do not have an office in California” (AA051) but failed to inform the Court of his extensive and continuing business in the forum state through the company “PureAG” (AA89, AA205), and refused to deny that he resides (or did reside) at 968 Village Square S, Palm Springs, CA, 92262. (AA233.)

Contrary to the disputed facts of the court record, and unsupported by the sworn declaration, the Superior Court ruled that Defendant Hughes does not conduct business in the State of California (AA142), jurisdictional discovery is futile, (AA145), and denied Plaintiff’s request for rehearing. (AA236-7.)

In support of his motion to quash service of summons, Defendant David Bradford (“Defendant Bradford”) filed a sworn declaration, “I do not conduct business in California” (AA061), but failed to inform the Court of his extensive and continuing business in the forum state as founder and shareholder of the company “Pegus Research, Inc,” which maintains an office in Los Angeles, and employs California resident Kim Johnson. (AA090, AA207-11.)

Contrary to the disputed facts of the court record, the Superior Court ruled that Defendant Bradford does not conduct business in the forum state

(AA142), jurisdictional discovery is futile, (AA145), and denied Plaintiff's request for rehearing. (AA236-7.)

In support of the motion to quash service of summons, on behalf of the Salt Lake City law firm Defendant Cohen Kinghorn P.C. ("Defendant Kinghorn"), shareholder Defendant Jeremy R. Cook, Esq., ("Attorney Cook") filed a sworn declaration stating, "Cohne Kinghorn's only office is located in Salt Lake City, Utah" (AA053), but failed to inform the court of Defendant Kinghorn's extensive and continuing business in the forum state. (AA089, AA154.)

Contrary to the disputed facts of the court record, and unsupported by the declaration, the Superior Court ruled that Defendant Kinghorn does not conduct business in the State of California (AA142), jurisdictional discovery is futile, (AA145), and denied Plaintiff's request for rehearing (AA236-7).

In support of his motion to quash service of summons, Attorney Cook and shareholder of Defendant Kinghorn submitted a sworn affidavit, "I do not have a residence or own any property in California." (AA053.)

Contrary to the disputed facts of the court record, and unsupported by the sworn declaration, the Superior Court ruled that Attorney Cook does not conduct business in the State of California (AA142), jurisdictional discovery is futile, (AA145), and denied Plaintiff's request for rehearing. (AA236-7.)

In support of his motion to quash the summons, Defendant David Bennion, Esq., ("Attorney Bennion") filed a sworn declaration, "[...] I do

not conduct any business in California” (AA053), but failed to inform the court that he had practiced law in the forum state. (AA190, AA154.)

Contrary to the disputed facts of the court record, the Superior Court ruled that Attorney Bennion does not conduct business in the forum state (AA142), jurisdictional discovery is futile (AA145), and denied Plaintiff’s request for rehearing. (AA236-7.)

In support of a motion to quash the summons, on behalf of Defendant Simplifi Company (“Defendant Simplifi”) shareholder Defendant Eric Hawkes filed a sworn declaration, “Simplifi Company does not have an office in California” (AA053), but failed to inform the court of Simplifi’s billing and collection of monies from forum residents including Davis, California resident Patrica Sheya. (AA166-8.)

Unsupported by the sworn declaration and contrary to the disputed facts of the court record, the Superior Court ruled that Defendant Simplifi does not conduct business in the forum state (AA142), jurisdictional discovery is futile (AA145), and denied Plaintiff’s request for rehearing. (AA236-7.)

In support of his motion to dismiss, Defendant Eric Hawkes filed a sworn declaration, “[...] I do not conduct business in California (AA053), but failed to inform the court that he is a principal and shareholder of Simplifi, which collects payment of monies from property owners residing in Venice, Rancho Cucamonga, Corona Del Mar, Coto de Caza, Mountain

View, San Rafael, Bayside, Loomis, Davis, and San Diego, California.
(AA002, AA166-8.)

Contrary to the disputed court record, the Superior Court ruled that Defendant Eric Hawkes does not conduct business in the forum state (AA142), jurisdictional discovery is futile (AA145), and denied Plaintiff's request for rehearing. (AA236-7.)

In support of his motion to dismiss, Defendant Jennifer Hawkes filed a sworn declaration, "[...] I do not conduct business in California" (AA056), but failed to inform the court that she is a principal and shareholder of Simplifi, which collects payment of monies from property owners residing in Venice, Rancho Cucamonga, Corona Del Mar, Coto de Caza, Mountain View, San Rafael, Bayside, Loomis, Davis, and San Diego, California.
(AA002, AA166-8.)

Contrary to the disputed court record, the Superior Court ruled that Defendant Jennifer Hawkes does not conduct business in the State of California (AA142), jurisdictional discovery is futile (AA145), and denied Plaintiff's request for rehearing. (AA236-7.)

Mr. Tracy filed timely appeal.

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ARGUMENT

I. JURISDICTIONAL FACTS OF THE VERIFIED COMPLAINT ARE UNDISPUTED

A. Standard of Review. The applicable standard of appellate review is the substantial evidence rule whereby when there is conflicting evidence, the trial court's factual determinations are not disturbed on appeal if supported by substantial evidence, and if there is no conflict in the relevant evidence, the question is one of law as to which the court will exercise independent judgment. *Felix v. Bomoro Kommanditgesellschaft* (1987) 196 Cal.App.3d 106, 111; *Wolfe v. City of Alexandria* (1990) 217 Cal.App.3d 541, 546.

B. The Trial Court Improperly Permitted of Attorney Brown and Defendant Bowen to Amend Impermissible Hearsay Evidence.

To enhance the reliability of declarations used as hearsay evidence, Code of Civ. P. § 2015.5 requires that the document must either reveal a “place of execution” within California or recite that it is made “under the laws of the State of California” by disclosing the criminal sanction for dishonesty. Factual representations that fail to meet these requirements must be excluded as hearsay and cannot be used as evidence. *Kulshrestha v. First Union Commercial Corp.*, (2004) 33 Cal.App.4th 601, 610.

The general rule of motion practice is that new evidence is not permitted with reply papers and “the inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case ...” and

if permitted, the other party should be given the opportunity to respond. *Jay v. Mahaffey* (2013) 218 Ca1.App.4th 1522, 1537-8.

In the present case, Attorney Brown and Defendant Bowen submitted “amended” declarations to the court after Plaintiff filed hearsay objections, and although the court postponed its decision to consolidate similarly filed motions, it failed give Plaintiff no notice that it would permit Attorney Brown and Defendant Bowen to correct previously inadmissible hearsay evidence. (AA066.)

As Attorney Brown and Defendant Bowen submitted no admissible evidence to the court and the court failed to identify any “exceptional circumstance” to justify allowing the introduction of evidence in the Reply Memoranda, the declarations cannot be used as evidence in support of a motion to quash service of summons.

II. PLAINTIFF MUST NOT PROVE UNDISPUTED JURISDICTIONAL FACTS OF A VERIFIED COMPLAINT

A. Standard of Review. As no Defendant contested jurisdictional allegations of the Complaint, the question of personal jurisdiction is a matter of law as to which the court will exercise independent judgment. *Great-West Life Assurance Co. v. Guarantee Co. of North America* (1988) 205 Cal.App.3d 199, 204.

B. The Trial Court Erred in Ruling that Plaintiff Failed to Provide Evidence that Defendants’ Actions Occurred Within and Were Directed at California Citizens and Residents.

It is long recognized that a verified petition should be treated as a counter affidavit on a motion to quash service of process and, where the defendant's affidavits did not deny or otherwise meet the essential allegations in the complaint as related to the issue at hand, it is insufficient to warrant the granting of a motion if the complaint addressed jurisdiction, even if unverified. *Atkins, Kroll & Co. v. Broadway Lbr. Co.* (1963) 222 Cal.App.2d 646, 653-654 (citing *Albertson v. Raboff* (1960) 185 Cal.App.2d 372, 388; *Hoffman v. City of Palm Springs* (1957) 169 Cal.App.2d 645, 648)).

In the present case, no Defendant denied any verified allegation of the complaint, and as such, Mr. Tracy had no evidentiary burden.

III. THE COURT HAS PERSONAL JURISDICTION FOR TORTIOUS CONDUCT OCCURING WITHIN AND DIRECTED TOWARDS CALIFORNIA CITIZENS AND RESIDENTS

C. Standard of Review. Where the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law. *Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1312-1313; *see also Greenwell v. Auto-Owners Ins. Company* (2015) 233 Cal.App.4th 783, 789 (citing *Elkman*).

In the present case, the admissible sworn declarations submitted to the Court by Defendants Kem Crosby Gardner, Jeremy Rand Cook, David Bennion, Michael Scott Hughes, David Bradford, Eric and Jennifer Hawkes did not contest Plaintiff's verified allegations that defamatory statement were

knowingly posted on a website hosted in San José, California at the behest of Defendant Eric Hawkes by Network Solutions, Inc. under the IP address 185.230.63.186 were of an related to Plaintiff as a resident of the forum state, knowing it would be read by California residents, the postings were read by property owners residing in California, and as the result, California property owners paid monies to the moving Defendants, thereby establishing agency or a conspiratorial relationship among Defendants to defame and defraud citizens and residents of the State of California (AA150).

As defamatory statement were of and related to a resident of the State of California and Plaintiff suffered reputation harm and economic damage in the forum state as a result of Defendants intentional and tortious activities, the court's exercise of personal jurisdiction is permitted. *Jewish Defense Organization, Inc. v. Sup. Ct. of Los Angeles County (Rambam)* (1999) 72 Cal.App.4th 1045, 1054.

Likewise, as Defendant Simplifi through Defendant Eric Hawkes entered into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. *Id.*

IV. THE TRAIL COURT IMPROPERLY DISALLOWED DISCOVERY OF CONTESTED JURISDICTIONAL FACTS

A. Standard of Review. Assuming arguendo that the court lacks personal jurisdiction for tortious conduct occurring within and directed toward

California residents established in *Rambam*, as only Attorney Bennion and Defendants Bradford, Eric and Jennifer Hawkes submitted sworn declarations that they do not conduct business in the forum state, the trial court erred by not permitting discovery of disputed jurisdictional facts.

It is long established that a trial court has discretion to continue the hearing on a motion to quash service of summons for lack of personal jurisdiction to allow plaintiff sufficient time to conduct discovery on jurisdictional issues. *HealthMarkets, Inc. v. Superior Court* (2009) 171 Cal.App.4th 1160, 1173.

In order to prevail on a motion for a continuance for jurisdictional discovery, “the plaintiff should demonstrate that discovery is likely to lead to the production of evidence of facts establishing jurisdiction.” *In re Automobile Antitrust Cases I & II* (2005)135 Cal.App.4th 100, 127.

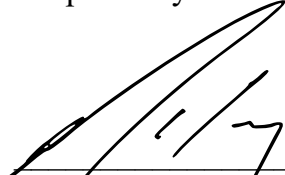
In the present case, following similar attempts to defeat of the court’s jurisdiction by Attorney Brown and Defendant Bowen, Mr. Tracy served Notice of Disposition and Request for Production of Documents on January 17, and January 19 reasonably calculated to evidence minimum contact with the forum state.

Contrary to the numerous disputed jurisdictional facts established in the court record, and non-compliance with a properly noticed request for discovery records and deposition, the trial court’s ruling that jurisdictional discovery would be “futile,” is without basis in fact or law

CONCLUSION

For the foregoing reasons, this Court should vacate the trial court's order quashing service of process, award attorney fees and costs, and remand for further proceedings consistent with its opinion.

Respectfully Submitted,

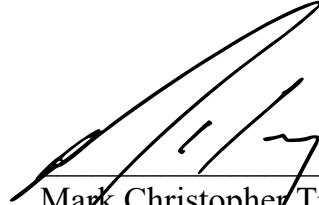


Mark Christopher Tracy
Plaintiff-Appellant

DATED: September 3, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 3,041 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.



Mark Christopher Tracy
Plaintiff-Appellant