UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL EHRENFELD,	)	
	)	**04 Civ. 9641 (RCC)**
Plaintiff,	)	
	)	
- against -	)	**MEMORANDUM & ORDER**
KHALID SALIM A BIN MAHFOUZ,	)	
	)	
Defendant.	)	
	)	

RICHARD CONWAY CASEY, United States District Judge:

This declaratory-judgment action arises out of a defamation lawsuit brought in England ("English Case") by Khalid Salim a Bin Mahfouz ("Bin Mahfouz") against the author Dr. Rachel Ehrenfeld ("Ehrenfeld"). Ehrenfeld seeks a declaration from this Court that the judgment in the English case is not enforceable in the United States based on the protections of the First Amendment. Bin Mahfouz moves to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction, claiming Ehrenfeld has failed to meet the requirements of the Declaratory Judgment Act, and under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. The Court finds that it lacks personal jurisdiction over Bin Mahfouz under New York law and finds that there exists no need for additional jurisdictional discovery. Accordingly, the Court does not reach the issue of subject-matter jurisdiction. The motion to dismiss is **GRANTED**.

I. BACKGROUND

Ehrenfeld is the author of the book Funding Evil: How Terrorism is Financed and How to Stop It. The book was published in the United States in 2003 by Bonus Books. Bin Mahfouz is

a citizen of Saudi Arabia and was formerly the chairman and general manager of The National Commercial Bank of Saudi Arabia. In her book, Funding Evil, Ehrenfeld alleges that Bin Mahfouz financially supported international terrorism directly and through various charities that the book identifies as terrorist fronts. Bin Mahfouz has had similar accusations made against him in the past and has threatened or actually brought defamation suits in England at least 29 times. (Compl. ¶¶ 23-24.) Many of these defamation suits have led to judgments, settlements, and retractions that favor of Bin Mahfouz. See Bin Mahfouz Information, http://www.binmahfouz.info (last visited Mar. 24, 2006).

Bin Mahfouz and his sons brought an action on June 30, 2004 against Ehrenfeld and Bonus Books in the High Court of Justice in London ("English Court"), which granted Bin Mahfouz a default judgment against both Ehrenfeld and Bonus Books on December 7, 2004 ("English Judgment"). Though she was properly served on October 22, 2004, she claims she did not appear in the English Case because she "lacked the financial resources to defend [herself] in the English Courts far from [her] home, because of the formidable procedural burdens a libel defendant faces in the U.K., and because [she] disagree[d] in principle with [Bin Mahfouz's] tactic." (Ehrenfeld Aff. ¶ 7.)

In her affidavit, Ehrenfeld documents Bin Mahfouz's contacts with her on or about the time of the English Case. On January 23, 2004, Bin Mahfouz's attorneys sent, by e-mail and letter to Ehrenfeld's home, a document which could be characterized as a cease and desist letter, though it is not so-named. The document contained language insisting Ehrenfeld take "immediate action" to correct the allegedly defamatory statements about Bin Mahfouz and threatening litigation and a "substantial award of damages" if she did not agree to a "final

settlement," which required Ehrenfeld to: (1) make "an undertaking to the High Court in England not to repeat the same (or similar) offending allegations"; (2) withdraw from circulation and destroy and/or "deliver up" all unsold copies of the Book immediately; (3) issue a letter of apology to Bin Mahfouz and his sons to be published at Ehrenfeld's cost; (4) donate an unstated amount of money to a charity; and (5) pay Bin Mahfouz's legal costs. (Ehrenfeld Aff. Ex. A at 5.)

On at least six occasions, Bin Mahfouz's counsel sent letters and emails to Ehrenfeld's home pertaining to details of the English Case. (Ehrenfeld Aff. ¶ 14; id. Exs. B-H.) Of note is the December 9, 2004 letter that informed Ehrenfeld of the December 7, 2004 English Judgment, which ordered an assessment of damages and costs and an injunction restraining Ehrenfeld and Bonus Books from publishing or causing or authorizing the publication of the allegedly defamatory portions of Funding Evil in the United Kingdom. The letter further stated that Ehrenfeld could be subject to contempt-of-court charges if she failed to take "every measure to prevent [Funding Evil] from leaking into the jurisdiction" through U.S. online retail websites. (Id. Ex. C.)

On four occasions—October 22, 2004, December 30, 2004, March 3, 2005, and May 19, 2005—Bin Mahfouz sent representatives to Ehrenfeld's New York apartment to personally deliver papers relating to the English Case. (Ehrenfeld Aff. ¶ 12.) On the March 3 transaction, Bin Mahfouz's representative allegedly said to Ehrenfeld, as he handed her papers related to the case, "You had better respond, Sheik [B]in Mahfouz is a very important person, and you ought to take very good care of yourself." (Id. ¶ 13.) Bin Mahfouz denies that this interaction occurred. (Reply at 8.)

In a May 3, 2005 final judgment, the English Court awarded Bin Mahfouz and his two sons the maximum damages allowed in an action on default (UK £10,000 each) as well as attorneys fees and costs; issued a "declaration of falsity" (which discussed and declared false all claims that Bin Mahfouz and his sons supported or assisted terrorism); ordered that Ehrenfeld and Bonus Books publish a correction and apology; and continued the December 7, 2004 injunction restraining Ehrenfeld and Bonus Books from publishing or causing or authorizing the publication of the defamatory portions of Funding Evil in the United Kingdom. (Ehrenfeld Aff. Ex. H.) The judgment is reported on Bin Mahfouz's web site, which is accessible in New York. See Bin Mahfouz Information, http://www.binmahfouz.info/news_20050503.html (last visited Mar. 24, 2006). On May 9, 2005, Ehrenfeld received an e-mail with a letter attached containing the English Court's May 3, 2005 Order. (Ehrenfeld Aff. Ex. H.)

Bin Mahfouz has other past contacts with New York. In 1991, he was indicted for bank fraud in New York in connection with the collapse of the Bank of Credit and Commerce International, of which he was Chief Operating Officer. (Id. ¶ 17.) He settled those charges and paid fines and restitution totaling $255 million in 1992. (Id.) In addition, Bin Mahfouz owned two apartments in New York City. (Id.) He sold one on August 25, 2004 and the other on August 29, 2004. (Id.)

Ehrenfeld filed this action for declaratory judgment on December 8, 2004, seeking a declaration that the statements in Funding Evil do not give rise to liability for defamation under the laws of the United States or New York State and that in fact under these laws the default judgment obtained from the English Court is unenforceable in the United States. She claims that Bin Mahfouz is determined to silence authors who report negatively about him or his family.

Ehrenfeld claims that the English Judgment, in particular the English Court's "declaration of falsity" and injunctive relief, has had a negative impact on her reputation, has hurt her ability to attract publishers and will have a chilling effect on her work as an investigative journalist. Specifically, she claims in her affidavit that at least two publications that have consistently published her work in the past declined to publish a "well-researched" article on a Saudi company and were "uncharacteristically evasive in giving reasons for their refusal." (Ehrenfeld Aff. ¶ 25.) She claims that she has found herself "increasingly concerned" about liability under English law, claims she has removed information that might subject her to liability, and has found "the pressure toward self-censorship [ ] formidable." (Id.) Ehrenfeld cites to other authors who have, after completing books on terrorism, removed references to Bin Mahfouz based on their fear of a lawsuit in England, and cites a newspaper article which states that "Mr. Mahfouz's litigiousness is seen by people familiar with the discussions around [another author's] book as a chief reason why Seckler & Warberg decided not to publish it" and that this "may be yet another example of how wealthy Saudis are increasingly using British laws to intimidate critics." (Id. Ex. K.) The article also reported that Ehrenfeld had a "British deal" to distribute Funding Evil cancelled because of a legal threat by an unnamed Saudi named her book.[1] (Id.)

[1] Amazon.com, American Society of Newspaper Editors, Article 19, Association of Alternative Newsweeklies, Association of American Publishers, Inc., Authors Guild, Inc., Electronic Frontier Foundation, European Publishers Council, John Fairfax Holdings, Ltd., Newspaper Association Of America, Online News Association, NYP Holdings, Inc., Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, Times Newspapers Limited, and World Press Freedom Committee (collectively "Amici") also argue that the chill reaches U.S. (and other) publishers, based on the fact that liability can attach in courts all over the world based on de minimis availability of the works abroad. They argue that a "chill" on the First Amendment in this case is particularly damaging because our national security relies in part on the "efforts, courage, and credibility of journalists investigating the causes, participants and funding of international terrorism." (Amici Mem. at 1.)

Bin Mahfouz counters that Ehrenfeld has shown no objective chill, particularly in light of the fact that she flaunted the English case to publicize the revised paperback edition of her book. (Def.'s Mem. at 5.)

Bin Mahfouz now moves to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction—arguing that no "actual controversy" exists under the Declaratory Judgment Act—and under Rule 12(b)(2) for lack of personal jurisdiction.

II. DISCUSSION

Generally speaking, when a court is faced with a motion to dismiss that challenges both subject-matter and personal jurisdiction, it addresses the subject matter question first. Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 404 (S.D.N.Y. 2002). However, this does not reflect an "unyielding judicial hierarchy." Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999). Indeed, where, as here, a court faces a straightforward personal-jurisdiction issue presenting no complex question of state law and where the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court may turn directly to personal jurisdiction. Id. at 588.

A. Personal Jurisdiction

Where a motion to dismiss for lack of personal jurisdiction is made prior to discovery, a plaintiff need only establish a prima facie case for personal jurisdiction over a defendant to avoid dismissal under Rule 12(b)(2). Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999); PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997). A plaintiff may rely entirely on factual allegations, Jazini v. Nissan Motor Co., 148 F.3d 181, 184 (2d Cir. 1998), and will prevail even if the defendant makes contrary arguments, A.I.

Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 79 (2d Cir. 1993). In resolving the motion, the Court reads the complaint and affidavits in a light most favorable to the plaintiff. PDK Labs, 103 F.3d at 1108. It will not, however, accept legally conclusory assertions or draw "argumentative inferences." Mende v. Milestone Tech., Inc., 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003) (citing Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994)).

A federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure. Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 124 (2d Cir. 2002). In such cases, courts must determine if New York law would confer jurisdiction and then decide if the exercise of such jurisdiction comports with the requisites of due process under the Fourteenth Amendment. Id. (citing Bank Brussels, 171 F.3d at 784); Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997). Because the Court finds no basis for jurisdiction under New York's long-arm provisions,[2] the Court does not reach the Due Process analysis.

1. Jurisdiction Under N.Y. C.P.L.R. Section 302(a)(1)

Ehrenfeld argues that Bin Mahfouz is subject to jurisdiction under N.Y. C.P.L.R. section 302(a)(1), which confers jurisdiction over a non-domiciliary defendant who "in person or through an agent . . . transacts any business within the state" so long as the cause of action arises

[2] To the extent Ehrenfeld, in addition to the English Case–related communications, relies on Bin Mahfouz's indictment in New York and ownership of real property to find general jurisdiction, the Court finds these contacts do not constitute "doing business" under C.P.L.R. section 301. Further, the Court may only consider a defendant's contacts with the forum state "at the time the lawsuit was filed" when deciding a motion to dismiss for lack of personal jurisdiction. See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 570 (2d Cir. 1996). This action was filed on December 8, 2004, nearly a decade after the criminal proceedings and four months after Bin Mahfouz sold his last (known) New York real estate.

out of defendant's New York transactions. Ehrenfeld must make a prima facie showing that (1) Bin Mahfouz is "transacting business" in New York and (2) that this declaratory judgment action arises out of those business transactions. PDK Labs, 103 F.3d at 1109. It is settled that "[p]roof of one transaction in New York is sufficient to invoke jurisdiction under 302(a)(1), even though the defendant never entered New York, so long the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." Id. at 1109 (citing Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 527 (1988)). Ehrenfeld argues that the cease-and-desist letter, the e-mails and letters regarding the status of the English Case, the communication informing Ehrenfeld of the judgment in the English Case, and the Bin Mahfouz's New York–accessible website announcing the judgment in the English Case all combine to constitute purposeful transactions of business in New York with substantial relationship to the cause of action here such that personal jurisdiction is proper under C.P.L.R. section 302(a)(1). The Court does not agree.

A nondomicilliary transacts business in New York when he purposefully avails himself of the privilege of conducting activities within New York and thus invokes the benefits and protections of its laws. CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986). Courts in New York have consistently refused to sustain personal jurisdiction under C.P.L.R. section 302(a)(1) solely on the basis of a defendant's communication, by telephone or letter, from outside New York into the jurisdiction. See Beacon, 715 F.2d at 766 (citing cases). For instance, in Beacon, a single cease-and-desist letter sent into New York could not sustain personal jurisdiction, id., nor could the multiple cease-and-desist letters support such jurisdiction in Fort Knox Music, Inc. v. Baptiste, 139 F. Supp. 2d 505, 511 (S.D.N.Y. 2001), nor could the

three telephone calls and one mailing sent by defendant in Fiedler v. First City Nat'l Bank of Houston, 807 F.2d 315, 316-18 (2d Cir. 1986). On the other hand, in PDK Labs, a cease-and-desist letter (and subsequent communication) used not only to seek settlement of legal claims, but to secure further New York investments, was sufficient to show that the defendant "transacted business" and to find personal jurisdiction. PDK Labs stands for the proposition that where "persistent, vexing communications" are used towards non-settlement, business or investment objectives, a defendant is transacting business for the purposes of section 302(a)(1). PDK Labs does not help Ehrenfeld here because Bin Mahfouz's communications (the cease-and-desist letter, other letters and judgment), however persistent, vexing or otherwise meant to coerce, do not appear to support any business objective. Absent such a showing, Ehrenfeld's claim to jurisdiction under section 302(a)(1) must fail.[3]

2. Jurisdiction Under N.Y. C.P.L.R. Section 302(a)(3)

Ehrenfeld also claims jurisdiction under N.Y. C.P.L.R. section 302(a)(3) arguing in essence that Bin Mahfouz committed a tortious act in filing and carrying the English case to judgment. The Court does not so find.

Section 302(a)(3) has been interpreted to allow the exercise of personal jurisdiction over a non-domicilliary when (1) a defendant commits a tortious act outside of New York state; (2) the plaintiff's cause of action arises from that act; (3) the act caused injury to a person or property within New York state; (4) the defendant expected or reasonably could have expected

[3] Under the second prong of the 302(a)(1) test, courts require the cause of action to be "sufficiently related" to the defendant's transactions, Hoffritz Cutlery, Inc. v. Amajac Ltd., 763 F.2d 55, 59 (2d Cir. 1985), or, put differently, that a "substantial nexus," Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 31 (2d Cir. 1996), or a "strong nexus," Beacon Enters., Inc. v. Menzies, 715 F.2d 757, 764 (2d Cir. 1983), exist between the cause of action and defendant's contacts. The Court need not reach the second prong.

the act to have consequences in New York state; and (5) the defendant derived substantial revenue from interstate or international commerce. This argument fails under the first prong. Ehrenfeld has not pleaded a tort and it is unlikely that she could. Though she contends that the English case is "akin to malicious prosecution or prima facie tort, that is, the intentional infliction of harm by superficially lawful means," she does not allege the commission of either tort (this suit is exclusively for declaratory judgment) nor does she assert that the elements of either tort have been satisfied, see Kulas v. Adachi, No. 90 Civ. 6674 (MBM), 1997 WL 256957, at *8 (S.D.N.Y. 1997) (finding that section 302(a)(3) requires defendant commit a tort), and Bin Mahfouz makes a strong argument that such tort claims, if asserted, would not succeed (see, e.g., Reply at 8-9 (noting that malicious prosecution requires the action have terminated in favor of the plaintiff)); see also Modern Computer Corp. v. Ma, 862 F. Supp. 938, 944-45 (E.D.N.Y. 1994) (finding that plaintiff established prima facie case for personal jurisdiction over nondomicilliary under C.P.L.R. section 302(a)(3) in an action for declaratory judgment and tortious interference where a cease and desist letter allegedly caused, in part, the claimed tort); PDK Labs, 103 F.3d at 1109-10 (finding certain "vexing" communications employed to garner investments within New York satisfied section 302(a)(1), but declining to decide whether such conduct should be characterized as "tortious" for 302(a)(3) purposes). Ehrenfeld cites no authority that Bin Mahfouz's conduct constitutes a tort as defined under section 302(a)(3). As such, Ehrenfeld's claim to jurisdiction over Bin Mahfouz under section 302(a)(3) cannot be sustained.

3. The Ninth Circuit Opinion in Yahoo!

With little New York law on her side, Ehrenfeld points to a recently decided Ninth Circuit case with facts quite similar to those here. In Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc), the Ninth Circuit sitting en banc found personal jurisdiction over two defendant French organizations in a California declaratory-judgment action where the defendants' only contacts with California were in connection with their French suit against Yahoo!, the plaintiff in the California case. In Yahoo!, the defendants' contacts included "sending a cease and desist letter to Yahoo! at its headquarters in Santa Clara, California; serving process on Yahoo! in Santa Clara to commence the French suit; obtaining two interim orders from the French court; and serving the two orders on Yahoo! in Santa Clara." Id. at 1205. The French orders required Yahoo! to limit French citizens' access to certain material prohibited in France, and Yahoo! alleged that compliance with the orders would require it to make changes to its servers in France and California. In addition to the cease-and-desist letter and the service of process, the mailing of the French court orders into California was the key to finding jurisdiction for the Yahoo! court; while the effect desired by the French court would be felt only in France, it did not change the fact that, to comply with the order, Yahoo! would have to perform significant acts in California. Id. at 1209. This California impact was sufficient even though the French organizations stated that they had no intention to enforce the judgment in the United States. Id. at 1210. Just as Yahoo! would have to make changes to its servers in California if it wished to comply with the French orders, so too Ehrenfeld claims she would have to take actions in New York to satisfy the English Judgment, which was sent into New York. She would have to make payments to Bin Mahfouz and his sons

from New York, issue a correction and apology from New York, and take actions to prevent Funding Evil from be published or otherwise entering the United Kingdom. In addition, Ehrenfeld claims the English Judgment (and its advertisement on Bin Mahfouz's website) had a real and continuing impact on Ehrenfeld in New York, even if she chose not to obey the judgment on its terms. Under Yahoo!, Ehrenfeld argues, the Court should assert jurisdiction over Bin Mahfouz.

This argument, however, overlooks the fundamental differences between the New York and the California long-arm statutes. It is generally recognized that, in enacting N.Y. C.P.L.R. section 302, the New York legislature did not seek to exercise all of the jurisdictional power constitutionally available under the Supreme Court's due process jurisprudence, Mayes v. Leipziger, 674 F.2d 178, 183 (2d Cir. 1982), whereas the Yahoo! court expressly notes that California long-arm jurisdiction is coextensive with Federal Due Process, Yahoo!, 433 F.3d at 1205. Ehrenfeld claims the California test is somewhat similar. It requires (1) the non-resident to have purposefully directed his activities or consummated his transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim to arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction to be reasonable. Id. at 1205-06. But in California, the first prong can be satisfied by "purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof." Id. at 1206. This language—which tracks the federal Due Process standards—allowed the Ninth Circuit to conclude that in "purposeful direction" cases the court need not only consider "wrongful" or tortious acts, but all

contacts that cause harm within the jurisdiction. Id. at 1207-08. The language and compartmentalization of C.P.L.R. section 302 allows no such conclusion; section 302(a)(1) deals only with purposeful transactions of business that invoke the benefits and protections of New York laws, CutCo, 806 F.2d at 365, whereas section 302(a)(3) deals only with conduct that is actually tortious, Kulas, 1997 WL 256957 at *8. These differences are fatal to Ehrenfeld's claim.

B. Request for Jurisdictional Discovery

Ehrenfeld has given no valid reason to allow for jurisdictional discovery here. The Second Circuit has disallowed jurisdictional discovery where a plaintiff has failed to establish a prima facie case and where there is a foreign defendant because such logic would require all foreign defendants to submit to discovery on this issue. See Jazini, 148 F.3d at 185-86 (denying jurisdictional discovery over Japanese company where plaintiff had not established a prima facie case). Ehrenfeld's request for additional jurisdictional discovery is therefore denied.

C. Subject-Matter Jurisdiction

Having concluded that the Court lacks personal jurisdiction over Bin Mahfouz, it need not reach the close and somewhat novel question of whether subject-matter jurisdiction exists here under the Declaratory Judgment Act.

III. CONCLUSION

Because Ehrenfeld has not established a prima facie case for personal jurisdiction over Bin Mahfouz the motion to dismiss is **GRANTED.** The Clerk of the Court is ordered to close this case and remove it from the Court's active docket.

So Ordered: New York, New York
April 25, 2006

Richard Conway Casey, U.S.D.J.