United States District Court
Northern District of Georgia

SCOTT ALAN MOULTON and
NETWORK INSTALLATION
COMPUTER SERVICES, INC.,
Plaintiffs,

V.

VC3,
Defendant.

CIVIL ACTION FILE
NO. 1:00-CV-434-TWT

ORDER

This is a diversity action in which the Plaintiffs seek damages for defamation, tortious interference with business relations, and injunctive relief. The Defendant counterclaimed for defamation and asserted claims for alleged violations of the Georgia Unfair Trade Practices Act, O.C.G.A Section 10-1-372, Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a), the Georgia Computer Systems Protection Act, O.C.G.A. Section 16-6-90 *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C. Section 1030. It is before the Court on Plaintiffs' Motion for Summary Judgment [Doc. 14] and Defendant's Motion for Summary Judgment [Doc. 15]. For the reasons set forth below, the Court grants both motions.

I. *BACKGROUND*

Plaintiff Network Installation Computer Services, Inc. ("NICS") is a Georgia corporation in the business of installing and servicing computer networks for corporate, business and governmental entities. Plaintiff Scott Alan Moulton is the president and principal owner of NICS. Defendant VC3 is a South Carolina corporation with its principal place of business in Columbia, South Carolina. Defendant provides similar computer services as Plaintiff NICS. From August 1998 to December 30, 1999, Plaintiff NICS had a continuing service contract with Cherokee County to perform computer-related work including network administration for the Cherokee County 911 Center. Defendant contracted with the City of Canton to perform certain services with respect to Canton's computer network. To date, Defendant continues to provide computer services for the City of Canton.

Plaintiffs and Defendant first came in contact with each other on December 17, 1999, when Plaintiff Moulton arrived at the new site of the City of Canton Police

Department. Chief Cantrell hired Plaintiff NICS to set up a router connecting the City of Canton Police Department with the Cherokee County 911 Center. During the course of the day, through conversations with Chief Cantrell and employees of Defendant, Plaintiff Moulton allegedly became concerned for the security of the server in the Cherokee County 911 Center.

As a result of his security concerns, it is undisputed that on December 21, 1999, Plaintiff Moulton performed a series of remote access tests on Defendant's servers. These tests included a port scan and a throughput test. A port scan is a method of checking a computer to see what ports are open by trying to establish a connection to each and every port on the target computer. If used by a network administrator on his own network, the scan is a method of determining any possible security weaknesses. If used by an outsider, the scan indicates whether a particular port is used and can be probed for weakness. A throughput test sends information across a network to test the speed with which a computer processes data.**1** Plaintiff Moulton continued the remote access port scan on the morning of December 22, 1999, when Steven Nance, a network administrator for Defendant, sent Plaintiff Moulton an e-mail questioning the reason for the port scan. Plaintiff Moulton terminated the port scan immediately and responded that he worked for Cherokee County 911 Center and was testing security. Ardalan Shokoohi, a representative of Defendant, then contacted Defendant's client, Chief Cantrell of the City of Canton Police Department, to notify him of "suspicious activity" on Defendant's network. Mr. Shokoohi inquired if Chief Cantrell had authorized Plaintiff Moulton to run such a test. After responding that he had not granted Plaintiff Moulton such authorization, Chief Cantrell then contacted officials from Cherokee County to determine whether Cherokee County had granted the authorization. Cherokee County in turn confirmed that it had not authorized Plaintiff Moulton to conduct the activity. Subsequently, the Georgia Bureau of Investigation was contacted to investigate Plaintiff Moulton's actions.

On December 30, 1999, a meeting was held at the Canton Police Department to discuss the activities that had taken place in the previous week. Attending the meeting were Ardalan Shokoohi and Alan Howard of Defendant VC3, Chief Cantrell, Plaintiff Moulton, various representatives of Cherokee County, the Chief of Police for Holly Springs, the Chief of Police for Woodstock, and GBI agent Eric Davis. At the meeting, a discussion ensued regarding the security of Defendant's network and Plaintiff Moulton's activities with respect to Defendant's network. At the conclusion of the meeting, Cherokee County terminated its business relationship with Plaintiffs Moulton and NICS. Several weeks later, Plaintiff Moulton was arrested pursuant to a State of Georgia arrest warrant and charged with criminal attempt to commit computing trespass against Defendant. Subsequent to the arrest, Plaintiffs filed this action claiming damages for defamation, tortious interference with business relations, and injunctive relief. Defendant filed a counterclaim claiming damages for defamation, unfair trade practices, violations of the Computer Fraud and Abuse Act and of the Georgia Computer Systems Protection Act, commercial disparagement in violation of the Lanham Act, and injunctive relief.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 158-159 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v, Catrett,* 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty- Lobby, Inc,* 477 U.S. 242, 257 (1986).

III. *DISCUSSION*

A. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. DEFAMATION

Defendant claims statements Plaintiff Moulton made concerning Defendant were defamatory. Three comments made by Plaintiff Moulton are at issue. First is a statement made by Plaintiff Moulton to C.J. Johns, information systems manager for the Cherokee County Sheriff’s Office, on or about December 19, 1999, that Defendant had created security risks and that Defendant's network employees were stupid. Second were statements made by Plaintiff Moulton to C.J. Johns, on or about December 20, 1999, that the way Defendant planned to connect the Police Department to two systems created a security risk from the Internet. Finally, Defendant claims statements made at a meeting held on December 30, 1999, to multiple persons from the City of Canton and Cherokee County, that Defendant's network had created a security risk, were also defamatory. Plaintiffs assert that these statements were opinion, not fact, and are not actionable.

"There is no wholesale defamation exemption for anything that might be labeled opinion... [and] [t]o say otherwise would ignore the fact that expressions of opinion may often imply an assertion of objective fact." *Eidson v. Berry,* 202 Ga. App. 587, 587-88 (1992)(citations and punctuation omitted); *Kendrick v. Jaeger*, 210 Ga. App. 376, 377 (1993). The pivotal question is whether the statement can reasonably be interpreted as stating or implying defamatory facts and, if so, whether the defamatory assertions are capable of being proved false. *Id.* Statements about which reasonable people might differ, however, and which cannot be proved to be true or false, are not actionable as defamation. *Kirsch v. Jones,* 219 Ga. App. 50, 51 (1996).

The statement allegedly made by Plaintiff Moulton that Defendant's employees were "stupid" falls into this category of nonactionable opinion or hyperbole. This statement reflects Plaintiff Moulton's subjective opinion of the relative intelligence of Defendant's employees. Reasonable people could differ as to whether or not these employees were intelligent. Therefore, this statement is not actionable defamation. The remaining statements deal primarily with the security of Defendant's network system. Computer security is also a subject on which reasonable people could differ. A network's

security is relative to the risks posed. A network might be secure for one risk, and insecure as to another. Plaintiff Moulton's blanket assertions that Defendant's network contained security risks were statements to which reasonable people might differ and that are not capable of being proved true or false. Consequently, Plaintiff Moulton's statements are not actionable and Plaintiffs' Motion for Summary Judgment is granted as to Defendant's defamation claim.

2. UNFAIR TRADE PRACTICES

Defendant also claims that Plaintiffs violated the Georgia Unfair Trade Practices Act[2] because Plaintiff Moulton's allegedly defamatory statements disparaged the business of Defendant through "false and misleading representations of fact." O.C.G.A. Section 10-1-372(a)(8). Specifically, Defendant claims that Plaintiff Moulton disparaged Defendant's business by stating to numerous people, both at and prior to the December 30, 1999 meeting, that Defendant's network was insecure.

Defendant's claims of unfair trade practices cannot survive summary judgment. The entire basis for this claim are the statements which the Court has already held are opinion and, therefore, not defamatory. The Georgia Court of Appeals has held that the presence of privilege combined with the absence of malice eliminates any claim a plaintiff may have under the Unfair Trade Practices Act when based on allegedly defamatory statements. *Dominy v. Shumpert,* 235 Ga. App. 500, 506 (1998). In other words, a statement that is not defamatory cannot support a claim under the Unfair Trade Practices Act. It follows then that statements which are not defamatory because they are mere opinion cannot be the basis of an unfair trade practices claim that Defendant made false and misleading representations *of fact.* Plaintiffs' Motion for Summary Judgment as to Defendant's unfair trade practices claim is granted.

3. SECTION 43(A) OF THE LANHAM ACT

Defendant also claims Plaintiffs violated Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a). Amendments to the Act in 1989 made actionable false statements by a defendant not only about his own products and services, but also about the plaintiff's products or services, if in the context of commercial advertising or promotion. Section 43(a) now provides, in relevant part:

> Any person who, on or in connection with any goods or services,...uses in commerce any...false or misleading representation of fact, which...(2) in commercial advertising or promotion, misrepresents the nature, characteristics [or] qualities...of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. Section 1125(a). In essence, Defendant is stating a claim for commercial defamation. To establish a commercial defamation claim under the Lanham Act, Defendant must show that (1) Plaintiff Moulton made false or misleading factual

representations about the nature, characteristics or qualities of Plaintiffs' services; (2) that Plaintiff Moulton used the false or misleading representations "in commerce", on or in connection with any services; (3) that Plaintiff Moulton made the false or misleading representations in the context of commercial advertising or commercial promotion; and (4) that Plaintiff Moulton's actions made Defendant believe that they were likely to be damaged by such false or misleading factual representations. *National Artists Management Co. v. Weaving*, 769 F.Supp. 1224, 1230 (S.D.N.Y. 1991). Plaintiffs cannot make out the first element of a commercial defamation claim because factual representations are required. This Court has already held that Plaintiff Moulton' s statements were opinion and not fact. No claim for commercial defamation pursuant to the Lanham Act can be made based on representations which are mere opinion.

Even if Plaintiff Moulton's statements were factual, however, Defendant would not survive summary judgment on its commercial defamation claim. The Lanham Act requires that allegedly false statements be made in "commercial advertising or promotion." *American Needle & Novelty, Inc. v. Drew Pearson marketing, Inc.,* 820 F.Supp. 1072, 1077 (N.D.Ill. 1993). A four part test determines whether a misrepresentation meets the "commercial advertising or promotion" requirement. The communication (1) must constitute commercial speech; (2) be made by a defendant in direct competition with plaintiff; (3) for the purposes of influencing the purchase of its goods and services; and (4) "[w]hile the representations need not be made in a 'classic advertising campaign,' but may consist of more informal types of 'promotion,' the representations ... must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." *Gordon and Breach Science Publishers S.A. v. American Institute of Physics,* 859 F.Supp. 1521, 1535-36 (S.D.N.Y. 1994); *Seven-Up Co. v. Coca-Cola Co.,* 86 F.3d 1379, 1384 (5th Cir. 1996); *Garland Co. v. Ecology Roof Sys. Corp.,* 895 F.Supp. 274, 277 (D.Kan. 1995); *Mobius Mgmt. Sys., Inc. v. Fourth Dimension Software, Inc.,* 880 F.Supp. 1005, 1019-20 (S.D.N.Y. 1994).

Generally, claims pursuant to Section 43 (a) meet this test because they involve paid advertisements by a competitor on television or radio, or in newspapers or magazines. Those statements not made in a traditional advertising campaign make for harder cases. The statute, however, is not meant to include all statements made by one competitor about its or another competitor's product. *Garland,* 895 F.Supp. at 279 (holding that "this court has found no indication that Congress, through its use of the language 'commercial advertising or promotion,' intended to extend Lanham Act coverage to every isolated alleged misrepresentation made to a potential customer by a business competitor"). In fact, it has been held that the "commercial advertising and promotion" requirement was to "ensure that...incidental representations were beyond the scope of the Act [and that] only promotional representations that are directed at the purchasing public can be reached by ?43(a)." *Mobius,* 880 F.Supp. at 1020.

In this case, the Court holds that the statements that are the subject of the present action do not meet the test of "commercial advertising or promotion." The statements made by Plaintiff Moulton were not commercial speech. In evaluating whether Plaintiff Moulton's statements fall within commercial speech, the Court holds that the meaning of

"commercial speech" in the context of ?43(a)(1)(b) of the Lanham Act tracks the First Amendment "commercial speech" doctrine. *Gordon & Breach,* 859 F.Supp. at 1536 (holding that "Congress intended Section 43(a) to extend only to false and misleading speech that is encompassed within the 'commercial speech' doctrine developed by the United States Supreme Court"). Commercial speech has been defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience" and "speech proposing a commercial transaction." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 561-62 (1980);United *States v. Edge Broadcasting,* 509 U.S. 418, 426 (1993); *see also., Fane v. Edenfield,* 945 F.2d 1514, 1517 (11th Cir. 1991) (holding that "[c]ommercial speech furthers the economic interests of the speaker while also assisting the consumer audience"). Plaintiff Moulton's statements do not fit this definition. Although Defendant argues that it was Plaintiffs' intention to replace Defendant on certain projects for the customer, Plaintiff Moulton's statements regarding the security of Defendant's network hardly proposed to Cherokee County or the City of Canton that they switch network administrators. Additionally, Plaintiff Moulton's statements cannot be considered sufficiently disseminated to the purchasing public or for the purpose of influencing the purchase of his services. Plaintiff Moulton's comments were made to only one customer, and then only in regard to his concern for the security of the Cherokee County 911 Center which was his responsibility. In *Garland,* the court held that the defendant's misrepresentation, that was directed only at one customer, did not disseminate the misrepresentation sufficiently to the public. *Garland,* 895 F.Supp. at 279. This court disagreed with the court in *Mobius,* which held that the term "commercial advertising or promotion" could include contact with only one customer. *Mobius,* 880 F.Supp. at 1020. This Court agrees with the decision in *Garland.* Isolated representations to a single customer do not fit into the idea of "commercial advertising and promotion" in the marketing context. Also, in *Mobius,* the communication was expressly designed to discourage the customer from buying the plaintiff's product and to purchase defendant's. *Mobius,* 880 F.Supp. at 1021. It cannot be said that Plaintiff Moulton's statements were an "explicit invitation to purchase [his] services over that of [Defendant]." *Mobius,* 880 F.Supp at 1020. Because Defendant cannot make out the elements of a commercial advertising or promotion, Plaintiffs' Motion for Summary Judgement on the Lanham Act claim should be granted.

4. GEORGIA COMPUTER SYSTEMS PROTECTION ACT

Defendant also brings a claim under the Georgia Computer Systems Protection Act. O.C.G.A. Section 16-6-90 *et seq.* This criminal statute makes illegal the use of a computer with the intention of "obstructing, interrupting, or in any way interfering with the use of a computer program or data; or altering, damaging or in any way causing the malfunction of a computer, computer network, or computer program, regardless of how long the alteration, damage, or malfunction persists." O.C.G.A. Section 16-9-93(b)(2) and (3). When damage results from the criminal activity, the section also authorizes a civil suit for monetary recovery. O.C.G.A. Section 16-9-93(g). According to the Court's research, no case construing the section exists. The Court holds that Defendant does not have a civil damages claim for violation of the Computer Systems Protection Act. Defendant argues that Plaintiff Moulton's activities constituted a violation of the

Computer Systems Protection Act because a throughput test and a ping flood can slow down a network. In this way, Defendant asserts, Plaintiff Moulton's actions "interfered" with Defendant's network. However, Defendant itself admits that any slow down was negligible at best and not noticeable to the company or its customers. (Dep. of Ardalan Shokoohi, p. 23-24; Dep. of Steven Nance, p. 95-96). No reasonable jury could conclude that this constituted interfering with Defendant's network. Additionally, Defendant argues that it does not matter that the slow down was not noticeable because the statute states that an activity in violation of the statute can be actionable no matter how long it persists. However, the language that allows a claim for actions that are not noticeable to the victim apply only to activities which alter, damage or malfunction a network. There is no evidence that Plaintiff Moulton's activities resulted in any alteration, damage or malfunction of Defendant's network. In fact, Mr. Shokoohi stated that the tests Plaintiff Moulton performed did not even allow Plaintiff Moulton to log on or access the network. (Dep. of Ardalan Shokoohi, p. 25, 27-28). Therefore, the Court holds that Plaintiff Moulton's actions do not warrant a civil recovery for violation of the Georgia Systems Protection Act. The Court grants Plaintiffs' Motion for Summary Judgment as to this claim notwithstanding the fact that Plaintiff Moulton may be subject to criminal prosecution under the Act.

5. COMPUTER FRAUD AND ABUSE ACT

Finally, Plaintiffs seek summary judgment on Defendant's claim for violation of the Computer Fraud and Abuse Act. The Act forbids the "intentional[] access[ing] [of] a protected computer without authorization, [that] as a result of such conduct, recklessly causes damage." 18 U.S.C. Section 1030(a)(5)(B). There is a dispute over whether the Defendant can make out the element of damage. Damage is defined in the Act as "any impairment to the integrity or availability of data, a program, a system, or information that causes loss aggregating at least $5000...or threatens public health or safety." 18 U.S.C. {} 1030(e)(8). Defendant claims that its damage reaches the jurisdictional amount because the company had to expend time and money through the use of its employees to investigate Plaintiff Moulton's activities. However, this damage does not fit the statutory definition of damage. Defendant agrees that no structural damage to their network resulted from Plaintiff's activities. (Dep. of Ardalan Shokoohi, p. 25, 27-28). The statute clearly states that the damage must be an impairment to the *integrity and availability* of the network. Defendant's network security was never actually compromised and no program or information was ever unavailable as a result of Plaintiff Moulton's activities. Defendant also makes the claim that it has met the damage threshold because Plaintiff Moulton's actions threatened the public health and safety due to the public data stored and managed through Defendant's network. This argument fails to persuade the Court. As stated earlier, the tests run by Plaintiff Moulton did not grant him access to Defendant's network. The public data stored on Defendant's network was never in jeopardy. Plaintiff Moulton actions never threatened the public health and safety. Therefore, Defendant can not make out the damage element for a claim pursuant to the Computer Fraud and Abuse Act. Plaintiff's Motion for Summary Judgment is granted as to this claim.

B. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. DEFAMATION

Plaintiffs claim that Defendant made defamatory comments concerning Plaintiffs both when Defendant contacted Chief Cantrell to inquire about Plaintiff Moulton's authorization to conduct the remote access tests, and during the December 30, 1999 meeting. Plaintiff Moulton argues that Defendant defamed him because statements were made against his trade, office or profession and imputed a criminal act to him. O.C.G.A. ?51-5-4. Words imputing a crime or making charges in reference to one's trade or profession constitute slander *per se,* and no special damages or malice need be shown. O.C.G.A. ?51-5-4(b); *Webster v. Wilkins,* 217 Ga. App. 194, 196 (1995). When the statements are conditionally privileged, however, malice can make them actionable by defeating the privilege. *Sparks v. Parks,* 172 Ga. App. 823,825-26 (1984).

Defendant claims that the statements made by its employees were not defamatory because they were privileged. Georgia law provides that the following communications are privileged: (1) statements made in good faith in the performance of a public duty; (2) statements made in good faith in the performance of a legal or moral private duty; and (3) statements made with a good faith intent on the part of the speaker to protect his interest in a matter in which it is concerned. O.C.G.A. Section 51-5-7(1)-(3). Defendant claims that the statements made by its employees were pursuant to the performance of a public duty. Specifically, the Defendant asserts that the statements were made in furtherance of an investigation by the police. Defendant is correct that statements made in the course of a police investigation are conditionally privileged and are not actionable absent actual malice. *Hardaway v. Sherman Enterprises, Inc.,* 133 Ga. App. 181 (1974). The statements made by Defendant's employees in the December 30, 1999 meeting were made in furtherance of a police investigation into possible criminal activity on the part of Plaintiff Moulton. A GBI agent, Eric Davis, was present for the meeting and Plaintiff was subsequently arrested in part due to information gained by Agent Davis. (Dep. of David King, p. 11-18). Consequently, the statements are not actionable defamation.

The statement made by Mr. Shokoohi to Chief Cantrell, questioning Plaintiff Moulton's authority to perform tests on Defendant's network, arguably does not fall into the police investigation category. Although Chief Cantrell is the Chief of Canton Police, and quite possibly the law enforcement official to whom a possible crime is to be reported, there is no doubt that the Chief was also a client and customer of Defendant. Therefore, there may be an issue as to whether the Defendant's employee was furthering a police investigation when making this statement. The performance of a public duty, however, is not the only form of privilege available to Defendant. A statement may also be privileged when there is "good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons." *Sheftall v. Ventral of Ga. Ry. Co.,* 123 Ga. 589, 593 (1905). All of these elements must appear to rely successfully on the privilege. *Sheftall,* 123 Ga. at 593. The statement made by Mr. Shokoohi to Chief Cantrell is protected as privileged. When he made the statement, it had been determined that Plaintiff Moulton had performed a port scan on Defendant's

network. An intrusion detection system on the network alerted the network administrator to suspicious activity taking place. (Dep. of Steven Nance, p. 32-34). Defendant had to communicate that it had observed suspicious activity on its network to Chief Cantrell in order to determine if he had authorized Plaintiff's activity. The statement appears to be made in good faith because Defendant was inquiring whether Plaintiff had authority, of which Defendant was unaware, to run the test. The statement was also properly limited in scope. Defendant did not even relay what type of test had been performed just that some "suspicious activity" had been detected. The publication was also made at a proper occasion and to the proper persons. Defendant did not contact Chief Cantrell until consulting Plaintiff Moulton and, when in response to Plaintiff Moulton's explanation that he was testing security, it only contacted the person who would have granted Plaintiff such authority. Defendant is allowed to rely on the privilege to refute Plaintiffs' allegation of defamation.

Plaintiffs also argue that even if Defendant's statements were covered by privilege, the privilege is negated because the statements were made with actual malice. The question of malice is generally decided by a jury, but it does not follow that no question of malice can be decided as a matter of law. *Cohen v. Hartlage*, 179 Ga. App. 847, 852 (1986) (holding that plaintiff failed to establish malice sufficient to defeat conditional privilege enjoyed by allegedly libelous statements). To support the allegation that Defendant made these statements with actual malice, Plaintiffs point to the fact that Defendant suspected Plaintiffs were trying to replace it as computer consultants for the City of Canton; that Plaintiffs had actually replaced Defendant on a job for the city after Defendant had been unable to complete the task of connecting a router; and that Plaintiff Moulton had criticized employees of Defendant for their inexperience. In addition, Plaintiffs claim, Defendant's employees made the statements with full knowledge that Plaintiff Moulton's actions had done no damage to Defendant's system, and were already aware that Plaintiffs worked for the City of Canton when Defendant phoned Chief Cantrell to determine Plaintiff Moulton's authority. These facts do not defeat Defendant's privilege in making the allegedly defamatory statements. Regardless of whether Defendant suspected Plaintiffs were trying to replace them as consultants or that Plaintiffs had actually replaced Defendant on one specific job, Defendant must still be allowed to confirm or deny Plaintiff Moulton's authority to run tests on its network. Even if Defendant was aware that Plaintiffs were employed by the City of Canton, it still had the right to determine if the City had given Plaintiff Moulton specific authority to run a port scan on Defendant's network. Taking all of Plaintiffs' allegations as true, these facts do not contradict the fact that Defendant was simply confirming Plaintiff Moulton's authority to perform the activities and to further a criminal investigation once lack of authority was confirmed. Plaintiffs have failed to raise a genuine issue of material fact that Defendant acted with actual malice and is not entitled to the defense of privilege. The Court should grant Defendant's Motion for Summary Judgment on Plaintiffs' defamation claim.

2. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

In order for Plaintiffs to succeed on a claim for tortious interference with contractual relations, they must show "(1) improper action or wrongful conduct by the defendant without privilege; (2) the defendant acted purposely and with malice with the intent to injure; (3) the defendant induced a breach of contractual obligations or caused a party or third parties to discontinue or fail to enter into an anticipated business relationship with the plaintiff; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff." *Witty v. McNeal Agency*, 239 Ga. App. 554, 561 (1999). Plaintiffs are unable to establish the first element of a claim for tortious interference with business relations. The improper statements which Plaintiffs claim Defendant made must not be privileged in order to be actionable pursuant to this tort. The Court has already held that the allegedly defamatory statements made by Defendant's employees are privileged. In addition, Defendant has produced an affidavit by Mr. Lamar Hamill, County Manager for Cherokee County, that it was Plaintiffs' own action that caused the termination of business relations between Cherokee County and Plaintiffs, rather than any statements made by Defendant. (Affidavit of Lamar Hamill, par. 6). Plaintiffs have not provided the Court with any evidence tending to show that Mr. Hamill's reason for terminating the business relationship at issue was, in reality, because of statements made by Defendant's employees. Because Plaintiffs have failed to raise a genuine issue of material fact that Defendant's statements were not privileged or that they were the proximate cause of the termination of Plaintiffs' business relationship, the Court should grant Defendant's Motion for Summary Judgment as to Plaintiffs' tortious interference with business relations claim.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Summary Judgment [Doc. 14] is GRANTED, and Defendant's Motion for Summary Judgment [Doc. 15] is GRANTED. The Clerk is directed to close this file.

SO ORDERED, this *6* day of November, 2000.

/s/ THOMAS W. THRASH, JR.
United States District Judge

Footnote

1 There is some dispute as to whether Plaintiff Moulton performed a throughput test or a ping flood. The tests are similar, although a ping flood carries a greater risk of slow down on the network. The distinction, however, does not affect the Court's decision and is, therefore, irrelevant.

2 In Defendant's Answer and Counterclaims, Defendant also asserts a violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. Section 16-16-10. Defendant does not address the South Carolina statute in its brief, and the Court holds that it does not apply in this case. Although Defendant is a citizen of South Carolina, both

Plaintiffs are citizens of Georgia and the factual basis of both parties' claims occurred in Georgia. As such, the Court holds that Georgia law controls.