

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ASSOCIATED BANK-CORP.,

Plaintiff,

MEMORANDUM AND ORDER

v.

05-C-0233-S

EARTHLINK, INC.,

Defendant.

Plaintiff Associated Bank-Corp. commenced this action against Defendant EarthLink, Inc. seeking monetary and injunctive relief. Plaintiff seeks damages pursuant to three theories of liability: Tortious Interference with Business Relations, Negligence and Fraudulent Representations in violation of Wis. Stat. § 100.18(1). Plaintiff also seeks injunctive relief alleging a violation of 15 U.S.C. § 1125(a), Injury to Business Reputation. Jurisdiction is based on 28 U.S.C. § 1331 and diversity of citizenship, 28 U.S.C. § 1332(a)(1). The matter is presently before the Court on Defendant's motion for summary judgment. Also before the Court is Plaintiff's Rule 56(e) motion. The following facts are those most favorable to Plaintiff.

BACKGROUND

Plaintiff Associated Bank-Corp. is a diversified multibank holding company headquartered in Green Bay Wisconsin. Associated Bank is the company's largest member bank with over 300 locations in Wisconsin, Illinois and Minnesota. Defendant EarthLink, Inc. is an internet service provider with its principal

place of business in Atlanta Georgia. However, Defendant has over five million subscribers throughout the United States including customers in Wisconsin, Illinois and Minnesota.

Defendant provides its customers with access to the internet. It also provides additional software and services designed to block spam electronic mail, alert customers of fraudulent websites and block pop-up windows. One of the services Defendant provides to its customers and other users of the internet is the use of its ScamBlocker™ tool. ScamBlocker™ is a free service that in part protects users from phisher scams.

Generally, a phisher site is a fraudulent web site that mimics the site of a legitimate business. The phisher site attempts to have internet users click on the link provided in the phisher's email. If the user clicks on the link he or she is taken to the phisher site. The phisher site then directs the user to enter personal or financial information. This information is then used for criminal purposes.

ScamBlocker™ works by redirecting users to a Scam Alert page. The page states the following pertinent information:

POTENTIALLY FRAUDULENT WEB SITE ALERT generated by
ScamBlocker from EarthLink

You have been redirected to this page by ScamBlocker
from EarthLink.

The Web address you requested is on our list of
potentially Dangerous and Fraudulent Web Sites.
Those who visit the site may be at high risk for
identity theft or other financial losses.

Please do not continue to this potentially risky site. Simply click your browser's back button.

Internet Scams and ScamBlocker

There has been a recent increase in Internet scams that use fraudulent emails. These emails often include links to fake Web sites, which look like real sites but are set up [to] steal personal information.

With ScamBlocker, any time you attempt to visit one of these addresses on the growing list of potentially fraudulent Web sites gathered by EarthLink and our partners, your browser will automatically redirect to a Scam Alert page (like this one). It's that simple!

Users can continue to the site they requested by disabling the ScamBlocker™ tool and clicking on a button labeled "[c]ontinue to this potentially dangerous or fraudulent site."

Plaintiff owns and operates an online banking web site located at www.associatedbank.com. Plaintiff's customers can use the web site to access checking and savings accounts, apply for personal and business loans, access retirement and investment accounts and transact other bank related business. Plaintiff's web site has been the target of phishing attacks.

On approximately April 12, 2005 ScamBlocker™ identified Plaintiff's web site as a potentially dangerous and fraudulent web site. However, this was an error because Plaintiff's web site was (and is) a legitimate web site. On April 13, 2005 Plaintiff contacted Defendant to report the error and at 11:49 p.m. that same day a customer (and employee) of Plaintiff reported he was able to visit the web site again without being redirected by ScamBlocker™. However, while Plaintiff's site was on the list of potentially

fraudulent websites any internet user that had installed ScamBlocker™ would have been redirected to the Scam Alert page when he or she tried to visit the site.

Plaintiff commenced this action on April 15, 2005 and Defendant filed its answer on May 16, 2005. Defendant's motion for summary judgment and Plaintiff's Rule 56(e) motion are presently before the court.

MEMORANDUM

Defendant argues it is entitled to summary judgment because it is immune from liability pursuant to 47 U.S.C. § 230(c)(1) which provides immunity for interactive computer services that publish information received from third party information content providers. Plaintiff argues summary judgment is not appropriate because Defendant acted as an information content provider when it created and developed the substance of the erroneous warning about Plaintiff's website. Accordingly, Plaintiff argues Defendant's conduct is not protected by the immunity granted in 47 U.S.C. § 230.

As a preliminary matter the Court has before it Plaintiff's motion to strike paragraphs 12, 14, 20, 21 and 24 of Scott Mecredy's declaration. Having reviewed the challenged portions the Court finds no merit in Plaintiff's motion. The Court considers these paragraphs in so far as they are made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the declarant is competent to testify

to the matters stated therein. Fed. R. Civ. P. 56(e).

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 55 (c).

A fact is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Disputes over unnecessary or irrelevant facts will not preclude summary judgment. Id. Further, a factual issue is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. Id.

To determine whether there is a genuine issue of material fact courts construe all facts in the light most favorable to the non-moving party. Heft v. Moore, 351 F.3d 278, 282 (7th Cir. 2003) (citations omitted). Additionally, a court draws all reasonable inferences in favor of that party. Id. However, the non-movant must set forth "specific facts showing that there is a genuine issue for trial" which requires more than "just speculation or conclusory statements." Id. at 283 (citations omitted).

Section 230(c) of the Communications Decency Act of 1996 provides in relevant part: "[n]o provider ...of an interactive computer service shall be treated as the publisher or speaker of

any information provided by another information content provider.”
47 U.S.C. § 230(c) (1).

Section 230(f) (2) defines the term “Interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”

47 U.S.C. § 230(f) (2). Accordingly, § 230 creates immunity for any cause of action that would make Interactive computer services liable for information originating from a third-party. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

The statute goes on to define the term “Information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f) (3). The actions of Information content providers are not immune from liability under § 230. Optinrealbig.com, LLC v. Ironport Sys., Inc., 323 F.Supp.2d 1037, 1045 (N.D. Cal. 2004) (citations omitted).

Courts have treated § 230 immunity as “quite robust, adopting a relatively expansive definition of “interactive computer service” and a relatively restrictive definition of “information content provider”.” Carafano v. Metrosplash.com, Inc., 339 F.3d

1119, 1123 (9th Cir. 2003).

Accordingly, Section 230 effectively immunizes providers of interactive computer services from "civil liability in tort with respect to material disseminated by them but created by others." Blumenthal v. Drudge, 992 F.Supp. 44, 49 (D.D.C. 1998).

The Court concludes that a reasonable trier of fact could not infer that Defendant acted as an information content provider. In support of its motion for summary judgment Defendant submitted the declaration of Scott Mecredy. Mr. Mecredy is the Project Manager for the ScamBlocker™ tool and accordingly knows how the tool operates. He indicated one of Defendant's third-party vendors identified Plaintiff's web site as a potentially fraudulent site. He also indicated this list of phisher sites was directly input into Defendant's database without any alteration of content on Defendant's part. Further, Exhibit 1 to the Mecredy declaration demonstrates the information was imported from another party. Because the evidence indicates the information came from another provider Defendant cannot be held liable for the republication of the statements under § 230. Optinrealbig.com, at 1044.

Plaintiff argues because Defendant did not disclose the identity of the third-party provider (the name was redacted on Exhibit 1 to the Mecredy declaration) Defendant itself authored the erroneous warning or in the alternative controls the entity. However, there is no evidence supporting that assertion in the

record. Further, had Defendant edited the list of phisher sites it received from the third-party vendor Congress enacted § 230 “to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions. Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000) (citations omitted).

Imposing liability on Defendant for the inaccurate information provided by a third-party content provider would treat Defendant as the publisher, a result § 230 specifically proscribes. Accordingly, Defendant is immune from suit pursuant to § 230.

Defendant asserts it is entitled to attorneys’ fees because Plaintiff did not have standing to bring an action under the Lanham Act, 15 U.S.C. § 1125. Under the Lanham Act a court may award reasonable attorney’s fees to the prevailing party in exceptional cases. 15 U.S.C. § 1117(a). The party needs to prove an exceptional case exists by clear and convincing evidence. Finance Inv. Co. (Bermuda) Ltd. v. Geberit, 165 F.3d 526, 533 (7th Cir. 1998) (citations omitted). Further, when a defendant is the prevailing party in an action the standard is not whether plaintiff filed the action in good faith but rather whether the action was oppressive. S Industries, Inc. v. Centra 2000, Inc., 249 F.3d 625, 627 (7th Cir. 2001) *citing* (Door Sys., Inc. v. Pro-Line Door Sys., Inc., 126 F.3d 1028, 1031 (7th Cir. 1997)). An action is oppressive if it lacked merit, had elements of an abuse

of process claim and plaintiff's conduct unreasonably increased the cost of defending against the suit. Id.

Defendant cannot meet its burden of proving Plaintiff's action was oppressive. The Court has not reached the merits of Plaintiff's Lanham Act claim. Accordingly, Defendant did not have to defend against the merits of that action and it cannot prove that the Lanham Act claim unreasonably increased the cost of defending against the suit as a whole.

ORDER

IT IS ORDERED that Defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Rule 56(e) motion is DENIED.

IT IS FURTHER ORDERED that Defendant's motion for attorneys' fees under the Lanham Act is DENIED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant against plaintiff dismissing the action and all claims contained therein with prejudice and costs.

Entered this 13th day of September, 2005.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge