[Cite as *Maddox Defense, Inc. v. GeoData Sys. Mgt., Inc.*, 2019-Ohio-1778.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MADDOX DEFENSE, INC., :

Plaintiff-Appellee, :

No. 107559

v. :

GEODATA SYSTEMS
MANGAGEMENT, INC., :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 9, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-892096

Appearances:

Michael P. Harvey, Co. L.P.A., Michael P. Harvey, *for appellant*.

Keith M. Herbers, *for appellee*.

PATRICIA ANN BLACKMON, J.:

{¶ 1} GeoData Systems Management, Inc., ("GeoData") appeals from the trial court's granting summary judgment in favor of Maddox Defense, Inc.,

("Maddox") regarding Maddox's breach of contract claim and GeoData's various counterclaims. GeoData has assigned ten errors for our review.[1]

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's judgment. The apposite facts follow.

I. Facts and Procedural History

{¶ 3} Maddox is a company that "specializes in designing, manufacturing and selling * * * products [to] the military * * *." GeoData is a company that "specializes in manufacturing products for the military." On January 16, 2015, Maddox submitted a purchase order to GeoData for 21 "Killer Tomato" naval gunnery targets ("the Targets"). The Targets were to be resold to and used by the 15th Marine Expeditionary Unit ("MEU"). GeoData accepted the order and required Maddox to pay the entire purchase price of $15,650 in advance. In turn, GeoData promised to deliver the Targets by April 15, 2015. GeoData failed to meet this deadline, MEU cancelled its order with Maddox, and Maddox cancelled its order with GeoData and requested its money back. GeoData never delivered the Targets and failed to refund Maddox's money.[2]

{¶ 4} In September 2017, Maddox filed a breach of contract claim in the Berea Municipal Court. GeoData filed counterclaims against Maddox, and on January 25, 2018, this case was transferred to the Cuyahoga County Court of

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[1] *See* appendix.

[2] This statement of facts is taken from Maddox's appellate brief and is undisputed on appeal.

Common Pleas. On July 16, 2018, the court granted summary judgment in favor of Maddox and against GeoData on the following GeoData counterclaims: tortious interference with contract; tortious interference with business relationship; civil conspiracy; and deceptive trade practices. On August 13, 2018, the court granted summary judgment in favor of Maddox and against GeoData on GeoData's remaining counterclaims for breach of contract and defamation, as well as on Maddox's breach of contract claim. It is from these orders, as well as various interlocutory orders, that GeoData appeals.

II. Complaint and Counterclaim

{¶ 5} Maddox's complaint for breach of contract states, in part, as follows: "On January 16, 2015, [Maddox] sent [GeoData] its Purchase Order for 21 practice targets. * * * On January 21, 2015, [GeoData] accepted [Maddox's] Purchase Order and acknowledged in writing receipt of the purchase price of [$15,650] for the practice targets * * *. [GeoData] agreed in its receipt to ship the practice targets to [Maddox] within 8 to 12 weeks * * *. [Maddox] never received the practice targets. * * * [GeoData] failed and/or refused to return the purchase price to [Maddox]."

{¶ 6} Maddox attached the referenced purchase order and payment receipt to its complaint.

{¶ 7} GeoData alleges the following pertinent facts in its counterclaims: "The [Targets] were completed March 31, 2015 and were ready to ship." However, GeoData alleges that on the same day, March 31, 2015, Geodata was contacted by Neva Lundy ("Lundy"), the director of operations at Maddox, who "requested that

GeoData hold shipment and not ship" the Targets. According to GeoData, "[n]o reason was given."

{¶ 8} Based on these allegations, GeoData filed the following counterclaims: 1) Tortious interference with contract — Maddox "knew the existence of the contract and * * * intentionally procured the contract's breach by its actions and inactions * * *." 2) Interference with business relations — Maddox "was aware of a contractual business relationship with the federal government and its branches [and] prevented the formation of at least two contracts with the federal government or procured a breach of the contract or terminat[ed] the business relationship with the contract [sic]." 3) Civil conspiracy — "this * * * was done intentionally to cause damage to [GeoData] by causing interference with its relationship in the federal government * * *." 4) Commercial defamation and commercial disparagement — "GeoData was made aware by a third party of various slanderous postings on a website called Ripoff Report made by * * * Maddox." 5) Ohio Deceptive Trade Practices Act — Maddox "has made false and misleading statements of fact concerning [GeoData's] product, product availability, product deliverance and other related matters" with the intent to deceive. 6) Breach of contract — Maddox "failed to honor [its] contractual obligations * * *."

{¶ 9} GeoData did not attach any documentary evidence to its pleadings in support of these counterclaims.

III. Summary Judgment

{¶ 10} In GeoData's first, second, fifth, sixth, eighth, and ninth assigned errors, it essentially argues that the trial court erred in granting summary judgment in favor of Maddox and against GeoData on Maddox's claim and GeoData's counterclaims.

{¶ 11} Appellate review of granting summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that (1) there is no genuine issue of material fact; (2) they are entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶ 12} "[I]f the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.* at 293.

{¶ 13} In ruling on a motion for summary judgment, courts may look to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact * * *" that are part of the record. Civ.R. 56(C). Additionally, courts construe the evidence most strongly in favor of the party against whom the motion is made. *Id.* Pursuant to Civ.R. 56(E), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall

set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Furthermore, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.*

A. Maddox's Breach of Contract Claim

{¶ 14} To succeed on a breach of contract claim, a plaintiff must show "the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach." *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 108, 661 N.E.2d 218 (8th Dist.1995).

{¶ 15} Maddox alleged that it submitted a purchase order to GeoData for the Targets and paid the entire contract price of $15,650 in advance. GeoData sent a payment receipt showing a delivery date of 8 to 12 weeks. GeoData never delivered the Targets and refused to return Maddox's money. According to Maddox, "[t]he overriding issue in this case is whether GeoData completed the Targets in time to ship them by the delivery deadline of April 15, 2015." In support of its summary judgment motion, Maddox attached: the affidavit of company chief executive officer and owner Jason Maddox ("Jason"); the purchase order and receipt at issue; 17

emails between the parties; three emails sent to the Ripoff Report website; the affidavit of Lundy; and the affidavit of Jenny Mique, a former Maddox employee.

{¶ 16} Maddox's evidentiary support in favor of summary judgment includes an April 16, 2015 email Lundy sent to GeoData, stating "we're going to have to cancel this order. The end user has stated that the product won't be able to meet their needed delivery date. Please give me a call as soon as possible so that we can arrange to transfer prepayment back." Lundy forwarded to GeoData an email from MEU stating that the delayed delivery is "not suitable for our deployment timeline" and cancelling the order.

{¶ 17} That same day, Bruce Jackim ("Bruce"), the president of GeoData, sent an email to MEU, as well as to Lundy, stating that "[y]our [Targets] are being made, and will be delivered. * * * Cancellation is not an option." However, despite GeoData's assurance that the Targets "will be delivered," it is undisputed that GeoData never shipped the Targets and fulfilled Maddox's order.

{¶ 18} Subsequent to the cancellation, the parties attempted to satisfy their agreement by filling other military target orders. For example, on April 22, 2015, GeoData emailed Lundy about a lead for targets to be sold to "USMC, MAG12 at Iwakuni, Japan. * * * Please see what you can do to get us a completed [target] sale." Additionally, GeoData sent an email proposal dated October 30, 2015, to Maddox concerning the potential sale of 150 targets, in which GeoData agreed to only charge Maddox for 129 targets: "We owe you (21) [targets] from the deal for 15MEU / USS Essex canceled by 15MEU the day of shipment. * * * This is a one[-]time

arrangement for this solicitation only, which we offer to clear the debt from the deal with 15MEU and for us to obtain funds now for production materials." It does not appear from the record that any of these sales were completed.

{¶ 19} Maddox further includes documents attached to its summary judgment motion evidencing multiple attempts to get its money back from GeoData, including emails on June 10, 2015, June 15, 2015, February 17, 2016, March 12, 2016, June 6, 2016, and August 16, 2016.

{¶ 20} Lundy's affidavit states, in part, as follows: Lundy was employed by Maddox during the time frame at issue in this case. Lundy "kept in contact" with GeoData in the spring of 2015 regarding "when the targets ordered by [Maddox] would be ready for GeoData to ship." According to Lundy, "At no time did [GeoData] tell me that the Targets were completed and ready for shipment." Concerning GeoData's allegation that, on March 31, 2015, Lundy contacted GeoData and requested that it "hold delivery" of the targets, Lundy stated, "At no time did I make such a request to GeoData or any of its employees."

{¶ 21} The affidavit of Jenny Mique states in part as follows:

> In December of 2014 I found out from a contact at [MEU] that [MEU] had attempted to purchase naval practice targets from GeoData * * *, but the deal failed because the purchase price of GeoData's targets exceeded the limit of [MEU's] military purchase card.
>
> I then called GeoData and talked to Bruce Jackim, its president, because I thought that Maddox * * * could purchase the targets required by * * * MEU from GeoData with its own funds, and then sell them to * * * MEU and receive payment from another source of military funds after delivery of the targets to * * * MEU.

> GeoData sent me an email on December 19, 2014, thanking me for my help.
>
> I then referred this matter to Neva Lundy, the director of operations of Maddox * * * and ceased to be involved in the transaction.

{¶ 22} In challenging summary judgment, GeoData does not dispute that the delivery deadline was April 15, 2015. Rather, GeoData argues that the Targets were ready to ship on March 31, 2015, but that Lundy "contacted" GeoData and "requested that GeoData hold shipment" on the Targets. GeoData does not dispute that the Targets were never delivered or that Maddox's money was never refunded.

{¶ 23} GeoData argues that its "Counterclaims essentially state the opposite of the Complaint. So, obviously, the facts are controverted." However, it is long-standing law in Ohio that a party opposing summary judgment may not rest upon mere allegations in its pleadings. Civ.R. 56(E). This court has held that "a nonmovant's own self-serving assertions, whether made in affidavit, deposition, or interrogatory responses, cannot defeat a well-supported summary judgment motion when not corroborated by any outside evidence." *Lucas v. Perciak*, 8th Dist. Cuyahoga No. 96962, 2012-Ohio-88, ¶ 16. The party opposing summary judgment "must do more than supply evidence of a possible inference that a material issue of fact exists." *Carroll v. Alliant Techsystems, Inc.*, 10th Dist. Franklin No. 06AP-519, 2006-Ohio-5521, ¶ 17.

{¶ 24} In support of its opposition to summary judgment, GeoData submitted two affidavits, one from Bruce and one from his wife Nina Jackim ("Nina"). Of interest is that Bruce's and Nina's affidavits are identical to each other

and word-for-word taken from GeoData's pleadings. GeoData did not attach any other documents or exhibits to its brief in opposition to summary judgment.

{¶ 25} On July 14, 2018, the court found that GeoData's affidavits were deficient, specifically concluding that the affidavits were identical and "simply verified versions of [GeoData's] counterclaims." The court also concluded that the affiants failed to state that they had personal knowledge of the affidavits' contents and that "in a material part of both state the critical fact in the passive voice * * *." The court gave GeoData the opportunity to "produce competent Civ.R. 56(E) evidence concerning this issue; [GeoData] has 7 days from the entry of this order to supplement the present motion with evidence competent under Civ.R. 56(E)."

{¶ 26} On July 18, 2018, GeoData submitted supplemental affidavits from Bruce and Nina. Bruce's supplemental affidavit states in its entirety as follows:

> This Affidavit supplements the Affidavit that I gave in Opposition to the Maddox Defense Inc. summary judgment.
>
> This Affidavit is made based upon my personal knowledge, which knowledge arise[s] from my discussions with, contacts with, and interactions with Maddox Defense Inc. and its agents over time.
>
> This information is also the basis for GeoData['s] Counterclaims because it is information in my personal knowledge, information that has been gleaned in my work for GeoData * * * and both myself and Nina have had direct interactions with and connections with this matter and this company since the beginning.
>
> The Rule 56(E) does require just Affidavits produced to support or oppose summary judgments. We submitted the pleadings as well.
>
> Additionally, in looking at the Court's Order, I note that the Court mentions the passive voice as being a concern. All that has occurred happened in the past.

> This Affidavit supplements the Affidavits already made and should be considered in conjunction with the already filed Opposition to the summary judgment which we believe created many genuine issues of material fact in dispute.

{¶ 27} Nina's supplemental affidavit is identical to Bruce's with one change in paragraph three: "myself and Nina" is replaced with "myself and Bruce."

{¶ 28} Upon the court's further order, on July 23, 2018, Nina and Bruce submitted "second supplemental affidavits," which state in their entirety that

> Our contacts with Neva Lundy and Jenny Mique of [Maddox] were by phone.
>
> When she would call or we would call her, we would typically be on the phone together.
>
> The Counterclaim allegations regarding what went back and forth should have indicated that we had our contacts with Neva Lundy and others by phone.

{¶ 29} On July 31, 2018, the court issued a journal entry finding that the "supplemental affidavit[s] did not establish personal knowledge of a communication from Neva Lundy instructing [GeoData] not to ship the gunnery targets." The court ordered GeoData to supplement the affidavits again, to establish "that an affiant has personal knowledge of a phone call from Neva Lundy directing GeoData to not ship the naval gunnery targets." The court noted that the existing affidavits and supplemental affidavits "fail to aver that each affiant 1. Was on a phone call with Neva Lundy during the term of the contract; and 2. * * * heard Neva Lundy direct [GeoData] to not ship the gunnery targets."

{¶ 30} GeoData did not file additional supplemental affidavits. The court granted summary judgment to Maddox on its breach of contract claim on August 14,

2018. Specifically, the court found that there was no Civ.R. 56(E) evidence that GeoData "had personal knowledge that an employee of [Maddox] called [GeoData] and directed [GeoData] not to ship the ordered gunnery targets." The court then determined that Maddox put forth evidence establishing all the elements of a breach of contract claim.

{¶ 31} Upon review, we find that the undisputed evidence shows the following regarding Maddox's breach of contract claim: the existence of a contract; that Maddox performed it obligations by paying GeoData the contract price in full; and that GeoData breached the contract by not delivering the product and not refunding the money. Furthermore, it is undisputed that Maddox was damaged in the amount of $15,650. These facts satisfy Maddox's initial burden regarding summary judgment.

{¶ 32} The burden then shifts to the nonmoving party, and GeoData attempts to create a disputed issue of material fact regarding Maddox's breach of contract claim by arguing that GeoData had a "legal excuse" for its breach. Specifically, GeoData alleges that its failure to deliver the products on time was justified, which turns on whether Lundy requested that GeoData hold the shipment. To support this allegation, GeoData relies on Bruce's and Nina's affidavits and its pleadings. As stated, all three of these documents are virtually indistinguishable, and the pertinent parts state as follows: "The [Targets] were completed March 31, 2015 and were ready to ship. On March 31, 2015, GeoData was contacted by Neva

Lundy at Maddox * * * and she requested that GeoData hold shipment and not to ship the [targets] to * * * MEU."

{¶ 33} GeoData did not present evidence, or even allege, that it informed Maddox, or anyone else for that matter, that the Targets were ready to ship on March 31, 2015. In fact, GeoData did not take this position until October 2017, when it filed its counterclaim. GeoData also alleged for the first time in its counterclaim that Lundy told GeoData to hold the shipment. It is long-standing law that a party opposing summary judgment must not rest on mere allegations in its pleadings. Civ.R. 56(E).

{¶ 34} Indeed, there is no evidence other than Bruce's and Nina's after-the-fact affidavits that the Targets were ready for shipment on March 31, 2015, or that Maddox requested the shipment be held. Significantly, none of the emails that Maddox submitted in support of its motions reference the allegedly disputed facts raised by GeoData; namely, that the Targets were ready to ship on March 31, 2015, or that Lundy contacted GeoData that same day to "hold shipment."

{¶ 35} The trial court found that Bruce's and Nina's affidavits — the only evidence that GeoData submitted to support its position — did not comply with Civ.R. 56(E). Therefore, the court concluded that "there is no genuine issue of material fact but that [GeoData] was in breach of contract by failing to ship the naval targets before April 16, 2015, when the ultimate user cancelled the contract."

{¶ 36} Upon review, we disagree with the trial court that the affidavits at issue are noncompliant. However, they are self-serving, unsupported by the record, and insufficient to create a genuine issue of material fact for trial.

> [A] nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit that simply contradicts the evidence offered by the moving party. Permitting a nonmoving party to avoid summary judgment by asserting nothing more than "bald contradictions of the evidence offered by the moving party" would render the summary judgment exercise meaningless. * * * [A] self-serving affidavit standing alone, without corroborating materials contemplated by Civ.R. 56, is simply insufficient to overcome a properly supported motion for summary judgment.

FIA Card Servs., N.A. v. Pfundstein, 8th Dist. Cuyahoga No. 101808, 2015-Ohio-2514, ¶ 15-16.

{¶ 37} The trial court gave GeoData multiple opportunities to supplement its affidavits or produce other evidence to support its argument. GeoData failed to file anything further and failed to meet its reciprocal burden. There are no genuine issues of material fact for trial regarding Maddox's breach of contract claim, Maddox is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion and that conclusion is adverse to GeoData. Accordingly, the court did not err in granting summary judgment in favor of Maddox and against GeoData on Maddox's breach of contract claim.

B. GeoData's Breach of Contract Counterclaim

{¶ 38} In this counterclaim, GeoData makes an untenable allegation that Maddox breached the contract. As stated previously, it is undisputed that a contract existed, Maddox fulfilled its obligations under this contract, and GeoData kept

Maddox's money and never delivered the Targets. GeoData fails to allege, let alone produce evidence of, how Maddox breached this contract. In fact, GeoData admitted in an email that it "owed" Maddox 21 targets. GeoData's allegation of damages states as follows in Bruce's affidavit: "The cost estimates by GeoData were approximately $22,000.00 for double shifts despite product value of $15,650.00 for a loss of $6,350.00 to GeoData." GeoData did not attach any evidence to support this allegation of damages. In short, GeoData simply offers no evidence to show that Maddox breached the contract or that GeoData suffered damages, and Maddox is entitled to judgment as a matter of law.

C. Tortious Interference with Contract

{¶ 39} In this counterclaim, GeoData alleges that Maddox "knew the existence of the contract and * * * intentionally procured the contract's breach by its actions and inactions * * *." GeoData fails to identify the contract in question, although we assume that GeoData is referring to the January 2015 contract with Maddox for the Targets, because it is the only contract referred to in the record.

{¶ 40} To succeed on a tortious interference with a contract claim, a plaintiff must show "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 707 N.E.2d 853 (1999). "It is axiomatic that the wrongdoer must be a non-party to the contract." *Castle Hill Holdings, L.L.C., v. Al Hut, Inc.*, 8th Dist. Cuyahoga No. 86442, 2006-Ohio-1353, ¶ 47.

{¶ 41} In the instant case, it is undisputed that Maddox is a party to the contract at issue; therefore, GeoData cannot succeed on this counterclaim, and Maddox is entitled to judgment as a matter of law.

D. Tortious Interference with Business Relationship

{¶ 42} In this counterclaim, GeoData alleges that Maddox "was aware of a contractual business relationship with the federal government and its branches [and by its] intentional and improper actions, it prevented the formation of at least two contracts with the federal government or procured a breach of the contract or terminat[ed] the business relationship with the contract."

{¶ 43} Tortious interference with a business relationship occurs when "a person, without privilege, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship, or perform a contract with another." *Castle* at ¶ 47. Ohio courts have explained that "[t]he main difference between a tortious interference with a contract and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract." *Walter v. ADT Sec. Sys.*, 10th Dist. Franklin No. 06AP-115, 2007-Ohio-3324, ¶ 31.

{¶ 44} It is unclear from GeoData's pleadings what "business relationship" or "lost contract" it is alleging that Maddox interfered with. In its motion for summary judgment, Maddox speculates that GeoData may be referring to an "opportunity to sell Targets * * * in Japan" and "a bid * * submitted * * * for an opportunity to sell 150 Targets to the military." These are two of the leads

mentioned previously in this opinion that the parties attempted to bid to satisfy the contract dispute at issue in this case. Assuming for argument's sake that these are the "business relationships" upon which GeoData is basing this claim, GeoData failed to allege, argue, or produce evidence of "intentional interference" on the part of Maddox.

{¶ 45} Upon review, we find that GeoData failed to set forth any disputed facts regarding tortious interference with a business relationship, and Maddox is entitled to judgment as a matter of law.

E. Civil Conspiracy

{¶ 46} In this counterclaim, GeoData alleges that Maddox "interfered with [GeoData's] business and contracts causing damage." GeoData also alleges that Maddox and an unidentified entity GeoData calls "non-party APPF" intentionally interfered "with its relationship in the federal government and agencies as well as the interference with its contracts and businesses."

{¶ 47} Civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 126, 512 N.E.2d 640 (1987). "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998).

{¶ 48} In support of summary judgment, Maddox submitted Jason's affidavit, which states, in part, that he "never heard of APPF until [he] read

GeoData's counterclaim in November of 2017." This affidavit further states that Maddox had no contact with APPF until its counsel contacted APPF in December 2017, after this case was initially filed.

{¶ 49} Maddox also submitted an affidavit from Arthur Hochschild III, the president of American Pacific Plastic Fabricators, Inc., a company known by the name "APPF." This affidavit states that from 2014 to 2016, APPF was involved in a trademark infringement lawsuit with GeoData. Hochschild also states that in December 2o17, he was contacted by the attorney for Maddox regarding the case at hand, and "[t]here was no contact whatsoever by any officer, employee or agent of APPF with any officer, employee or agent of [Maddox] at any time prior to last month, December, 2017."

{¶ 50} GeoData submitted nothing to dispute Maddox's evidence that there was no "malicious combination" between APPF and Maddox; rather, GeoData rests on the allegations in its pleadings. Accordingly, we find that Maddox is entitled to judgment as a matter of law on GeoData's civil conspiracy claim.

F. Defamation

{¶ 51} In this counterclaim, GeoData alleges that Maddox "went out of its way to publish false and defamatory statements concerning" GeoData, and because Maddox has "done this directed towards [GeoData's] means of livelihood in existence for being in Ohio no need for special harm is needed to be proven in this matter." GeoData made blanket allegations mirroring the elements of a defamation claim; however, GeoData did not attach a copy of the allegedly defamatory

statements to its pleadings, nor did it identify the statements in question other than to refer to them as "various slanderous postings on a website called Ripoff Report made by Jason Maddox that were submitted on March 28, 2017."

{¶ 52} The elements of a defamation claim are: "(1) that a false statement of fact was made; (2) that the statement was defamatory; (3) that the statement was published; (4) that the plaintiff suffered injury as a proximate result of the publication; and (5) that the defendant acted with the requisite degree of fault in publishing the statement." *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1st Dist. 1996). Furthermore, if a statement is defamatory per se, in that it tends to injure a person in his or her trade or occupation, damages are generally presumed. *Sullins v. Raycom Media, Inc.*, 8th Dist. Cuyahoga No. 99235, 2013-Ohio-3530, ¶ 17.

{¶ 53} However, truth is an absolute defense to defamation. *Stohlmann v. WJW TV, Inc.,* 8th Dist. Cuyahoga No. 86491, 2006-Ohio-6408. Additionally, "expressions of opinion are generally protected under Section 11, Article I of the Ohio Constitution as a valid exercise of freedom of the press." *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995). This court has held that "whether a statement is fact or opinion is a question of law to be determined by the court." *Sikora v. Plain Dealer Publishing Co.*, 8th Dist. Cuyahoga No. 81465, 2003-Ohio-3218, ¶ 16. In making this determination, courts "consider the totality of the circumstances, including (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader

context in which the statement appeared." *Id.* at ¶ 15. "[T]he law charges the author of an allegedly defamatory statement with the meaning that the reasonable reader attaches to that statement." *McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 145, 729 N.E.2d 364 (2000).

{¶ 54} In its summary judgment motion, Maddox graciously supplies the court with the statements alleged to be defamatory and argues the affirmative defense of truth. Maddox submitted an affidavit from Jason stating that, on March 28, 2017 and May 8, 2017, he sent emails to the website "Ripoff Report," which "explained the facts of [Maddox's] complaint against GeoData which constitute the acts of a thief and a scam artist." Again, GeoData produced no evidence in terms of what it alleges is defamatory within these emails. However, for the purpose of appellate review, we note the following:

{¶ 55} The March 28, 2017 email states in part that "Mr. Jackim and [GeoData] are SCAM Artists." Additionally, the May 8, 2017 email states in part that "money was stolen"; "Jackim simply ran away with our money"; and "If we do not receive * * * a return of our money * * * then we will pursue all legal * * * ramifications against * * * Jackim and make sure that he will not be able to steal anyone else's money or fraud another person or company." This second email lists the "legal ramifications" against GeoData as theft, embezzlement, [tortious] interference with government contracts, wire fraud, and slander.

{¶ 56} Our review of these emails shows that, for the most part, they tell Maddox's version of how this business deal went wrong. Given the court's findings

that GeoData breached the contract, much of Maddox's email is true, and truth as a defense applies. To the extent that truth as a defense does not apply to portions of Maddox's statements, the trial court found that "the more accusatory statements are well within the norm for negotiations" of two companies "attempting to resolve their differences albeit in a public forum." The court concluded that

> in context, these statements amount to nothing more than the opinions of Mr. Maddox. * * * [T]hese statements are pure expressions of Mr. Maddox's opinion that [GeoData's] conduct constitutes theft. * * * [G]iven the expressed willingness of [Maddox] to withdraw all accusations upon refund of the $15,650 payment, as stated in the Ripoff Report, the greater portion of these statements would appear to a reasonable reader as little more than hyperbole or puffery by a party seeking to negotiate the return of a downpayment.

{¶ 57} The United States Supreme Court has further explained that context of the publication plays a critical role in determining whether allegedly defamatory statements are actionable. *Greenbelt Cooperative Public Assn. v. Bresler,* 398 U.S. 6, 14, 90 S.Ct. 1539, 26 L.Ed.2d 6 (1970). In reviewing whether the word "blackmail" was defamatory, the court stated that

> it was [the defendant's] public and wholly legal negotiating proposals that were being criticized. No reader could have thought that [the] words were charging [the defendant] with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the defendant's] negotiating position extremely unreasonable.

Id.

{¶ 58} Other courts have expanded on the difference between fact and opinion for the purposes of defamation:

> The distinction frequently is a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.

Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 601, 552 P.2d 425 (1976).

{¶ 59} Ohio case law is sparse on whether complaints or reviews published on the internet may be the basis for actionable defamation claims. In *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, the Ohio Supreme Court addressed whether the long-arm statute conferred personal jurisdiction over a nonresident defendant who published allegedly defamatory statements on the internet. However, the case did not discuss the merits of the defamation claims.

{¶ 60} Although unrelated to statements published online, Ohio courts have spoken about statements made in a "public forum," such as letters to the editor of a newspaper. In *Wampler v. Higgins*, 93 Ohio St.3d 111, 752 N.E.2d 962 (2001), the court concluded that statements made in a letter to the editor of the Circleville Herald were nonactionable expressions of opinion. The court characterized a letter to the editor as "a common forum for citizens of the community to express viewpoints on a wide variety of subjects" and concluded that these letters "are integral to the 'robust and uninhibited commentary on public issues that is part of

our national heritage.'" *Id.* at 131 (*quoting Kotlikoff v. Community News*, 89 N.J. 62, 73, 444 A.2d 1086 (1982)).

{¶ 61} Accordingly, we turn to our sister courts in other states for guidance.

{¶ 62} In *Chaker v. Mateo*, 209 Cal.App.4th 1138, 1149, 147 Cal. Rptr.3d 496 (2012), the allegedly defamatory statements were published on an internet message board. The court concluded as follows:

> the statements about Chaker were made in the context of the paternity and child support litigation going on between Chaker and Wendy's daughter and all were made on Internet Web sites which plainly invited the sort of exaggerated and insulting criticisms of businesses and individuals which occurred here. The overall thrust of the comments attributed is that Chaker is a dishonest and scary person. This overall appraisal of Chaker is on its face, nothing more than a negative, but nonactionable opinion.

But see Stavropoulos v. Patton, 2015 U.S. Dist. LEXIS 149729, at 7, E.D. Wisc. No. 15-cv-811 (Nov. 5, 2105) (finding that statements that the defendant "disappeared with my money and will not return calls, texts or emails" and references to "filing a grand larceny complaint" published on Ripoff Report "contain all the elements of a defamatory communication").

{¶ 63} The Ripoff Report website has been described by courts as follows: "The website is a consumer reporting website where third party consumers can document complaints about companies or individuals." *Asia Econ. Inst. v. Xcentric Ventures*, L.L.C., 2010 U.S. Dist. LEXIS 133370, at 6, C.D. Cal. No. CV 10-1360 SVW (PJWx) (July 19, 2010).

{¶ 64} Upon review, we find that reasonable readers would assume the statements made on the Ripoff Report website are opinions. *Compare Seaton v. TripAdvisor,* L.L.C., 725 F.3d 592, 598, 2013 U.S. App. LEXIS 17936 (6th Cir.2013) (defendant's placement of plaintiff's hotel "on the '2011 Dirtiest Hotels' list constitutes nonactionable opinion" because readers of the online travel review website "understand the list to be communicating subjective opinions of travelers who use TripAdvisor"); *Loftus v. Nazari*, 21 F.Supp.3d 849, 852-853, 2014 U.S. Dist. LEXIS 65502 (6th Cir. 2014) (online reviews posted on opinion websites alleging that a plaintiff plastic surgeon left a defendant patient with "horrible scars and disfigurement on both breasts * * * as a result of her mistakes" not actionable as defamation — "The reader of the postings may decide for himself or herself whether the opinions should be accepted or are an example of the logical fallacy known as post hoc ergo propter hoc") .

{¶ 65} Accordingly, we find that the court did not err by granting summary judgment to Maddox on GeoData's defamation counterclaim.

G. Deceptive Trade Practices Act

{¶ 66} In this counterclaim, GeoData alleges that Maddox "has made false and misleading statements of fact concerning [GeoData's] product, product availability, product deliverance and other related matters." GeoData further alleges that these statements were material in nature and intended to deceive third parties. At no time does GeoData identify what these alleged statements are. Ohio's Deceptive Trade Practices Act is codified in R.C. Chapter 4165, and GeoData fails to

cite which of the 13 provisions of this act Maddox allegedly violated. Maddox met its burden of showing on summary judgment an absence of a factual dispute regarding this claim. Under the burden-shifting analysis, GeoData fails to set forth a disputed material fact regarding this counterclaim, and Maddox is entitled to judgment as a matter of law.

H. Disposition of Summary Judgment

{¶ 67} Upon review of Maddox's summary judgment motions, we find that Maddox set forth evidence that there is no genuine issue of material fact for trial on its claim for breach of contract and on GeoData's counterclaims. GeoData failed to meet its reciprocal burden of showing a genuine issue for trial regarding any claim or counterclaim in this case. Accordingly, Maddox is entitled to judgment as a matter of law, and GeoData's first, second, fifth, sixth, eighth, and ninth assigned errors are overruled.

IV. Motion for Enlargement of Time

{¶ 68} In GeoData's third assigned error, it argues that "the trial court erred in denying [GeoData's] motion for enlargement of time as moot based on the trial orders." Our review of the trial court's docket shows that, on July 18, 2018, the court issued the following journal entry: "The court denies [GeoData's] motion for enlargement of time as moot based on the trial order entered on 2/16/2018." The only order the court issued on February 16, 2018 was a case management order setting dates for discovery and motion practice. GeoData's only motion for an

enlargement of time was filed on January 31, 2018, and it requested additional "time to respond to discovery and dispositive motions."

{¶ 69} Based on the record and the parties' briefing on appeal, we find no error in the trial court's order, and GeoData's third assigned error is overruled.

V. Motion to Partially Strike

{¶ 70} In GeoData's fourth assigned error, it argues that the trial court erred in denying GeoData's "motion to partially strike [Maddox's] reply brief filed on June 25, 2018." GeoData offers no facts, argument, or law to support this assigned error. Our review of the record fails to show that the court erred by denying GeoData's motion to partially strike.

{¶ 71} Accordingly, GeoData's fourth assigned error is overruled.

VI. Motion for Reconsideration

{¶ 72} In GeoData's seventh assigned error, it argues that "[t]he trial court erred in denying [GeoData's] motion for reconsideration of its journal entry of July 30, 2018."

{¶ 73} According to the docket, on July 18, 2018, GeoData filed a "motion for reconsideration of the court's order on [GeoData's] counterclaims and supplemental affidavits." On July 31, 2018, the court denied this motion. GeoData's motion for reconsideration "respectfully requests [the trial court] reconsider the decision to grant summary judgment to [Maddox] on [GeoData's] tortious interference with contract, tortious interference with a business relationship, civil conspiracy and Deceptive Trade Practices Act claims because we believe there are

genuine issues of material fact in dispute to create issues for trial." However, this motion for reconsideration does not identify any of those alleged issues. Rather, GeoData attached to this motion the first set of supplemental affidavits from Bruce and Nina that are quoted earlier in this opinion. These affidavits do nothing more than state that the initial affidavits were "made based upon * * * personal knowledge," a clause that was missing from the original affidavits.

{¶ 74} Pursuant to Civ.R. 54(B), a trial court's order or decision is "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Accordingly, an interlocutory order, such as granting partial summary judgment, is subject to a motion for reconsideration. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 423 N.E.2d 1105 (1981). We review a trial court's ruling on a motion for reconsideration under an abuse of discretion standard. *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 535, 706 N.E.2d 825 (1997). "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 75} The trial court was presented with no additional evidence in GeoData's motion for reconsideration of the court's granting partial summary judgment in favor of Maddox on four of GeoData's six counterclaims. Accordingly, we find that the trial court acted within its discretion when denying reconsideration, and GeoData's seventh assigned error is overruled.

VII. Civ.R. 54(D) Court Costs

{¶ 76} In GeoData's tenth and final assigned error, it argues that the "trial court erred in finding that [Maddox] is the prevailing party pursuant to Civil Rule 54(D) and assessing Court costs to [GeoData]." On August 15, 2018, the court issued a journal entry stating that "this court's entries of 07/16/2018 and 08/14/2018 have disposed of all pending claims in this action" and the granting of summary judgment on all claims and counterclaims is "the final judgment in this action." The court further found that Maddox was the "prevailing party pursuant to Civ.R. 54(D)" and assessed "court cost" [sic] against GeoData.

{¶ 77} Civ.R. 54(D) states that "[e]xcept when express provision therefore is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." Ohio courts have held that "costs may be taxed under Civ.R. 54(D) in actions decided on summary judgment." *Boomershine v. Lifetime Capital, Inc.*, 182 Ohio App.3d 495, 2009-Ohio-2736, 913 N.E.2d 520, ¶ 13 (2d Dist.). *See also Haller v. Borror*, 107 Ohio App.3d 432, 669 N.E.2d 17 (10th Dist. 1995).

{¶ 78} Upon review, we find no error in the court's decision to assess costs against GeoData, because Maddox is the prevailing party on all claims and counterclaims in this case. Accordingly, GeoData's tenth assigned error is overruled.

{¶ 79} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

____
PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, A.J., and
SEAN C. GALLAGHER, J., CONCUR

APPENDIX

Assignments of Error

I. The trial court erred by improperly weigh[ing] affidavit evidence set forth in the Affidavits of Bruce and Nina Jackim in its Journal Entry of July 14, 2018.

II. The trial court erred in granting part of Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims in its Journal Entry of July 16, 2014.

III. The trial court erred in denying Defendant's Motion for Enlargement of Time as moot based on the Trial Orders.

IV. The trial court erred in denying Defendant's Motion to Partially Strike the Plaintiff's Reply Brief filed on June 25, 2018.

V. The trial court erred in improperly assessing and weighing the affidavit testimony at the summary judgment stage of Affidavits in support of the denial of summary judgment in its Journal Entry of July 30, 2018.

VI. The trial court erred in its Journal Entry of July 30, 2018 in deciding on summary judgment whether an allegedly defamatory statement is one of fact or opinion that could be decided on a summary judgment as a matter of law.

VII. The trial court erred in denying Defendant's Motion for Reconsideration in its Journal Entry of July 30, 2018.

VIII. The trial court erred in its Journal Entry of August 14, 2018 granting the Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims.

IX. The trial court erred in granting the Plaintiff's summary judgment motion on the breach of contract in its Journal Entry of August 14, 2018 and improperly applied summary judgment standards to its analysis, thereby depriving the Defendant of a trial on the merits.

X. The trial court erred in finding that the Plaintiff is the prevailing party pursuant to Civil Rule 54(D) and assessing Court costs to the Defendant.