3-19-2019

Drummond Financial Serivces, LLC et al., Order on Summary Judgment Motions

John J. Goger
Fulton County Superior Court Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

DRUMMOND FINANCIAL SERVICES, LLC, et al.,[1] Plaintiffs, v. TMX FINANCE HOLDINGS, INC., et al.,[2] Defendants.	CIVIL ACTION FILE NO. 2014CV253677 Business Case Div. 4

ORDER ON SUMMARY JUDGMENT MOTIONS

The above styled matter is before the Court on: (1) Defendant-Counterclaim Plaintiff TitleMax of Georgia, Inc.'s ("TitleMax Georgia") Motion for Partial Summary Judgment ("TitleMax Georgia's Motion for Partial Summary Judgment"); and (2) Plaintiffs North American Title Loans, LLC ("NATL") and Cash Loans of Marietta, Inc.'s ("CLM") Motion for Summary Judgment on Defendant TitleMax of Georgia, Inc.'s Twenty-Third Defense and Counterclaim for Unfair Competition ("NATL and CLM's Motion for Partial Summary

[1] The named Plaintiffs and Counterclaim Defendants are: Drummond Financial Services, LLC; North American Title Loans, LLC, a Georgia limited liability company; North American Title Loans, LLC, a South Carolina limited liability company; North American Title Loans, LLC, a New Mexico limited liability company; North American Title Loans, LLC, a Utah limited liability company; Anderson Financial Services, LLC; LoanSmart, LLC; Kipling Financial Services, LLC; Huffman Title Pawn, Inc.; LoanMax, LLC; Mid-American Title Loans, LLC; Fairfax Financial Services, LLC; Wellshire Financial Services, LLC; Cash Loans of Marietta, Inc.; Meadowwood Financial Services, LLC; Select Management Funding, LLC; Andr, Inc.; Atlanta Title Loans, Inc.; Aycox, Inc.; Aycox & Aycox, Clayton, Inc.; Aycox & Martin Enterprises, Inc.; Aycox Enterprises, Ltd.; Cash Loans of Stone Mountain, Inc.; Instant Cash Loans on Car Titles, Inc.; LoanMax Title Loans, LLC; and Mableton Car Title Loans, Inc. Plaintiffs are referred to collectively herein as "Plaintiffs" or "Drummond."

[2] The named Defendants and Counterclaimants are: TMX Finance Holdings, Inc.; TMX Finance, LLC; TMX Credit, Inc.; TitleMax of Ohio, Inc.; TitleMax of Utah, Inc.; TMX Finance of Virginia, Inc.; TitleMax of Virginia, Inc.; TitleMax of Alabama, Inc.; TitleMax of Georgia, Inc.; TMX Credit of New Mexico, LLC; TitleMax of Arizona, Inc.; TitleMax of Missouri, Inc.; TMX Finance of Texas, Inc.; TitleMax of Texas, Inc.; TitleMax of South Carolina, Inc.; and Does 1 through 10. Defendants are referred to collectively herein as "Defendants" or "TitleMax".

Judgment"). Having considered the entire record and argument of counsel at a March 12, 2019 hearing held in this matter, the Court orders as follows:

SUMMARY

This case concerns a dispute between businesses which compete in the title pawn industry. Plaintiffs are companies affiliated by a common ownership and control engaged in the business of making loans to consumers secured by motor vehicles (*i.e.* title pawns or loans). Plaintiffs include both loan brokers and direct lenders. Plaintiffs Drummond Financial Services, Inc. and LoanStar[3] act as loan brokers in that they assist customers seeking to obtain title loans from third-party lenders.[4] The remaining Plaintiffs are direct lenders who specialize in making title loans directly to consumers. The various TitleMax Defendants are part of a conglomerate of related companies also engaged in the title loan business, including brokers and direct lenders. Defendants are direct competitors of Plaintiffs and operate stores across the United States.

Plaintiffs assert Defendants have committed various tortious acts while engaged in a nationwide campaign to systematically steal their customers. Plaintiffs allege, *inter alia*, that Defendants: (1) improperly accessed Department of Motor Vehicle ("DMV") records in violation of federal and state laws to obtain information regarding Plaintiffs' current and prospective customers and then used that information to solicit and divert Plaintiffs' customers to the Defendants; (2) improperly entered Plaintiffs' premises in order to solicit Plaintiffs' customers; and (3) offered Plaintiffs' employees monetary compensation for diverting Plaintiffs' current and prospective customers away from Plaintiffs to Defendants. Plaintiffs have asserted six claims against the Defendants including misappropriation of trade secrets, unfair competition,

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[3] "LoanStar" collectively refers to Plaintiffs Wellshire Financial Services LLC and Meadowwood Financial Services, LLC.

[4] LoanMax Title Loans was added as a Counterclaim Defendant by Court order but according to Plaintiffs it has never operated any of Plaintiffs' stores in Georgia and has never engaged in title lending. Second Amended Complaint ("SAC"), p. 10 n. 1.

two counts of tortious interference with prospective contracts and business relationships, trespass and civil conspiracy.

TitleMax Georgia asserts a counterclaim against North American Title Loans, LLC, a Georgia limited liability company ("NATL") and Cash Loans of Marietta, Inc. ("CLM") (and other Counterclaim Defendants), alleging they have violated the Georgia Pawnshop Act, O.C.G.A. §44-12-130 *et seq.*, through their use of the word "loan" in their names and advertising ("First Counterclaim").[5] Based on the foregoing, TitleMax Georgia has asserted claims against NATL and CLM for : (1) unfair competition in violation of the Lanham Act; (2) unfair competition in violation of the Uniform Deceptive Trade Practices Act; and (3) civil conspiracy.

Additionally, certain TitleMax Claimants have asserted a second counterclaim alleging certain Drummond parties instructed employees to visit TitleMax stores falsely claiming to be customers looking for a title loan or posing as a potential recovery vendor, who then allegedly lied about needing to use the restroom to gain access to restricted, non-public areas of TitleMax's stores in order to photograph their trade secret financial information (contained on "goal boards"), information which is then allegedly shared throughout Plaintiffs' corporate structure. Based on the foregoing, the TitleMax Claimants have brought claims alleging: (1) trespass; (2) misappropriation and theft of trade secrets; (3) violation of the Georgia Racketeer Influenced and Corrupt Organizations Act; (4) conversion (in the alternative); (5) civil conspiracy; and (6) entitlement to litigation expenses.

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[5] This counterclaim was titled "Twenty-Third Defense and Counterclaim of Defendant TitleMax of Georgia, Inc. Against Plaintiffs North American Title Loans, LLC, a Georgia limited liability company, and Cash Loans of Marietta, Inc." in Defendants' Answer, Affirmative Defenses and Counterclaim filed on December 29, 2014 as well as in amended pleadings filed on August 17, 2017 and October 19, 2017. In Defendants' Answer and Affirmative Defenses to Second Amended Complaint and Defendants' Amended Counterclaims, filed on April 26, 2018, it is referred to as "First Counterclaim by Defendant TitleMax of Georgia, Inc. – Against Plaintiffs – Andr, Inc.; Atlanta Title Loans, Inc.; Aycox, Inc.; Aycox & Aycox, Clayton, Inc.; Aycox & Martin Enterprises, Ltd.; Aycox Enterprises, Ltd.; Cash Loans of Marietta, Inc.; Cash Loans of Stone Mountain, Inc.; Instant Cash Loans on Car Titles, Inc.; LoanMax Title Loans, LLC; Mableton Car Title Loans, Inc.; and North American Title Loans, LLC."

ANALYSIS

I. Standard on Summary Judgment

Summary judgment should be granted only when the movant shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56(c). "A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case." Scarbrough v. Hallam, 240 Ga. App. 829, 830, 525 S.E.2d 377, 378 (1999) (quoting Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474, 475–76 (1991). To avoid summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [O.C.G.A. §9-11-56], must set forth specific facts showing that there is a genuine issue for trial." O.C.G.A. §9-11-56(e).

"[A]t the summary judgment stage, courts are required to construe the evidence most favorably towards the nonmoving party, who is given the benefit of all reasonable doubts and possible inferences." Smith v. Tenet Health Sys. Spalding, Inc., 327 Ga. App. 878, 879, 761 S.E.2d 409, 411 (2014) (citations and punctuation omitted). *See* Word v. Henderson, 220 Ga. 846, 848, 142 S.E.2d 244, 246 (1965) ("Where the evidence on motion for summary judgment is ambiguous or doubtful, the party opposing the motion must be given the benefit of all reasonable doubts and of all favorable inferences and such evidence construed most favorably to the opposing party opposing the motion"). However, "[m]ere speculation, conjecture, or possibility [are] insufficient to preclude summary judgment." State v. Rozier, 288 Ga. 767, 768 (2011) (quoting Rosales v. Davis, 260 Ga. App. 709, 712, 580 S.E.2d 662, 665 (2003)).

II. TitleMax Georgia's Motion for Partial Summary Judgment

TitleMax Georgia moves for summary judgment as to liability only on its First Counterclaim against NATL and CLM for false advertising under the Lanham Act. NATL was formed on August 10, 2001 and previously operated a store named "Cash Loans on Car Titles" located at 3122 Deans Bridge Road, Augusta, Georgia. CLM was formed on July 16, 1996 and previously operated a store named "Atlanta Title Loans" located at 2089 South Cobb Drive, Marietta, Georgia. However, in May 2015, CLM transferred the operation of its store to AndR, Inc., while NATL transferred the operation of its store to Instant Cash Loans on Car Title, Inc. Nevertheless, insofar as NATL and CLM engaged in "pawn transactions", TitleMax Georgia alleges their use of the term "loans" in their advertising during the period of December 29, 2010 through May 2015 (before they transferred the operation of their stores to different entities) violates the Georgia Pawnshop Act, O.C.G.A. §§ 44-12-130 *et seq.*,[6] and constitutes false advertising under the federal Lanham Act as a matter of law.

A. Georgia Pawnshop Act

"Pawn transactions are governed by the statutory scheme laid out with considerable specificity in the Georgia Pawnshop Act." Mack v. Georgia Auto Pawn, Inc., 262 Ga. App. 277, 278, 585 S.E.2d 661, 662 (2003) (citing Glinton v. And R, Inc., 271 Ga. 864, 867, 524 S.E.2d 481 (1999)). *See* Hooks v. Cobb Ctr. Pawn & Jewelry Brokers, Inc., 241 Ga. App. 305, 309, 527 S.E.2d 566, 570 (1999) ("[T]he pawnbroker statute, O.C.G.A. § 44-12-130 *et seq.*, comprehensively and specifically regulates the subject of pawnshop transactions"). Under the Act, "pawn transactions" means "any loan on the security of pledged goods or any purchase of pledged goods on the condition that the pledged goods may be redeemed or repurchased by the pledgor or seller for a fixed price within a fixed period of time." O.C.G.A. §44-12-130(3).

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[6] Herein "Georgia Pawnshop Act" or "Act."

Further, "pawnbroker" is defined as:

> any person engaged in whole or in part in the business of lending money on the security of pledged goods, or in the business of purchasing tangible personal property on the condition that it may be redeemed or repurchased by the seller for a fixed price within a fixed period of time, or in the business of purchasing tangible personal property from persons or sources other than manufacturers or licensed dealers as a part of or in conjunction with the business activities described in this paragraph.

O.C.G.A. §44-12-130(2).

In 1992, the Georgia Pawnshop Act was amended extensively to, *inter alia*, address issues involving motor vehicle pawn transactions. *See* 1992 Ga. Laws 1426. *See also* J. Anthony Love, Pawnbrokers: Provide Comprehensive Legislation Regulating Loans on Motor Vehicle Titles, 9 Ga. St. U. L. Rev. 323 (1992). It has been said that the legislative purpose behind these changes was "a desire to bring uniformity to the pawnbroker industry and to reduce abusive and unconscionable agreements arising from motor vehicle title loans" and to "protect consumers." Id. at 326, 328. Most relevant to this litigation, the 1992 amendment added a provision which regulates advertising by pawnbrokers:

> Any pawnbroker as defined in paragraph (2) of Code Section 44-12-130 shall include most prominently in any and all types of advertisements the word "pawn" or the words "pawn transaction." ***A pawnbroker shall not use the term "loan" in any advertisements or in connection with any advertising of the business of the pawnbroker***; provided, however, that ***the provisions of this sentence shall not apply to a pawnbroker in business on March 1, 1992***, which uses the term "loan" in connection with the name of the business or with advertising of the business.

O.C.G.A. §44-12-138(a)(1) (emphasis added). This provision was "designed to eliminate confusion on the part of consumers as to what type of transaction is offered by a particular business such as a pawnbroker." Love, *supra*, at 327. *See also* State of Georgia ex rel. Christopher M. Carr, Attorney General of the State of Georgia v. First American Title Lending of Georgia, LLC, Superior Court of Fulton County, No. 2017CV297877 (lawsuit brought by the

Georgia Attorney General against a pawnbroker for using the term "loan" in advertising and not using "pawn" or "pawn transactions", taking the position that such conduct violates O.C.G.A. §44-12-138(a)(1) as well as the Georgia Fair Business Practices Act, O.C.G.A. §10-1-393(a)).

B. Lanham Act

Here, TitleMax Georgia alleges NATL and CLM's use of the term "loans" in their advertising not only violated the Georgia Pawnshop Act but also violated the Lanham Act. Section 43(a) of the Lanham Act (codified at 15 U.S.C. § 1125(a)) creates a "federal cause of action for unfair competition." Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc., 496 F.3d 1231, 1247 (11th Cir. 2007) (quoting Univ. of Fla. v. KPB, Inc., 89 F.3d 773, 775 (11th Cir. 1996)). It provides in relevant part:

> Any person who, on or in connection with any goods or services…***uses in commerce any word***, term, name, symbol, or device, or any combination thereof, or any false designation of origin, ***false or misleading description of fact, or false or misleading representation of fact, which…in commercial advertising or promotion, misrepresents the nature, characteristics, qualities***, or geographic origin ***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.A. § 1125(a)(1)(B).

"The intent of this provision is to protect "commercial interests [that] have been harmed by a competitor's false advertising, and [to secure] to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not." Natural Answers, Inc. v. SmithKline Beecham Corp., 529 F.3d 1325, 1330–31 (11th Cir. 2008) (quoting Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1168 (11th Cir.2007).[7]

[7] Section 45 of the Lanham Act, codified at 15 U.S.C. §1127 provides:

To succeed on a false advertising claim under 15 U.S.C.A. § 1125(a)(1)(B), a plaintiff must establish that:

> (1) the advertisements of the opposing party were false or misleading; (2) the advertisements deceived, or had the capacity to deceive, consumers; (3) the deception had a material effect on purchasing decisions; (4) the misrepresented product or service affects interstate commerce; and (5) the movant has been—or is likely to be—injured as a result of the false advertising.

Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004).

The first element of the test above requires a plaintiff to show that the advertisements at issue were either "(1) commercial claims that are literally false as a factual matter" or "(2) claims that may be literally true or ambiguous but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers." Id. at 1261 (quoting United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998)). *See* Schering Corp. v. Pfizer Inc., 189 F.3d 218, 229 (2d Cir. 1999), as amended on reh'g (Sept. 29, 1999) ("There are two types of actionable false advertising: (1) advertising which makes claims which are literally false on their face, and (2) advertising which, although literally true on its face, is perceived by a significant proportion of the relevant market as making 'subliminal' or 'implicit' claims which are provably false. With regard to the second type of false advertising, the courts sometimes say that the advertising has a tendency to 'mislead, confuse or deceive'") (citation omitted).

> The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

"Most of the enumerated purposes are relevant to false-association cases; a typical false-advertising case will implicate only the Act's goal of 'protect [ing] persons engaged in [commerce within the control of Congress] against unfair competition.'" Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 131, 134 S. Ct. 1377, 1389, 188 L. Ed. 2d 392 (2014).

> [P]laintiffs alleging a literal falsehood are claiming that a statement, on its face, conflicts with reality, a claim that is best supported by comparing the statement itself with the reality it purports to describe. By contrast, plaintiffs alleging an implied falsehood are claiming that a statement, whatever its literal truth, has left an impression on the listener that conflicts with reality. This latter claim invites a comparison of the impression, rather than the statement, with the truth.

Schering Corp., 189 F.3d at 229 (citing *Survey Evidence in Deceptive Advertising Cases Under the Lanham Act: An Historical Review of Comments from the Bench*, 954 PLI/Corp. 83, 87–88 (1996)).

"A plaintiff attempting to establish the second kind of falsehood, that an advertisement is literally true but misleading, must "present evidence of deception" in the form of consumer surveys, market research, expert testimony, or other evidence. Consumer survey research often is a key part of a Lanham Act claim alleging that an advertisement is misleading or deceptive." Hickson Corp., 357 F.3d at 1261 (citations omitted). *See, e.g.*, Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 298 (2d Cir. 1992) ("[T]he success of a plaintiff's implied falsity claim usually turns on the persuasiveness of a consumer survey…[W]here the plaintiff cannot demonstrate that a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement, the plaintiff cannot establish that it suffered any injury as a result of the advertisement's message"); Coca-Cola Co. v. Tropicana Prod., Inc., 690 F.2d 312, 317 (2d Cir. 1982) ("When the challenged advertisement is implicitly rather than explicitly false, its tendency to violate the Lanham Act by misleading, confusing or deceiving should be tested by public reaction").

To succeed on a claim of false advertising the plaintiff must also establish "materiality", *i.e.* that "the defendant's deception is likely to influence the [consumer's] purchasing decision."

Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1250 (11th Cir. 2002) (quoting Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 311 (1st Cir.2002) (internal quotations omitted). The materiality requirement, which must be established even when an advertisement is literally false, is based on the premise that not all deceptions affect consumer decisions." Id. at 1250. "A plaintiff may establish this materiality requirement by proving that 'the defendants misrepresented an inherent quality or characteristic of the product.'" Id. (quoting National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir.1997)); Osmose, Inc. v. Viance, LLC, 612 F.3d 1298, 1319 (11th Cir. 2010) (same).

Further,

> in order for representations to constitute "commercial advertising or promotion" under Section [1125(a)], they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Suntree Techs., Inc., 693 F.3d at 1349 (quoting Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics, 859 F.Supp. 1521 (S.D.N.Y.1994)). *See also* Shatel Corp. v. Mao Ta Lumber & Yacht Corp., 697 F.2d 1352, 1356 (11th Cir. 1983) ("Advertising that affects interstate commerce and solicitation of sales across state lines or between citizens of the United States and citizens and subjects of a foreign nation is...commerce within the meaning of the Lanham Act").

Moreover, "[a] party seeking monetary damages for false advertising in violation of 15 U.S.C. § 1125(a) of the Lanham Act must establish that it has been injured by the false advertising." Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 1320 (N.D. Ga. 2008). *See, e.g.*, Cashmere & Camel Hair Mfrs. Inst., 284 F.3d at 311 ("[W]hereas a showing

that the defendant's activities are likely to cause confusion or to deceive customers is sufficient to warrant injunctive relief, a plaintiff seeking damages must show actual harm to its business"); Keg Techs., Inc. v. Laimer, 436 F. Supp. 2d 1364, 1372 (N.D. Ga. 2006) ("Compared to the showing necessary to obtain an injunction, a higher standard of proof is required to recover damages" for a Lanham Act violation); Practice Perfect, Inc. v. Hamilton Cty. Pharm. Ass'n, 732 F. Supp. 798, 804 (S.D. Ohio 1989) ("Section 43(a) was not intended to provide a windfall for plaintiffs, and therefore the plaintiff must show that it sustained actual harm to its business as a result of the defendant's misrepresentations"). Thus, "to recover money damages under the [Lanham] Act, a "[p]laintiff must prove both actual damages and a causal link between [the] defendant's violation and those damages." United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998) (quoting Rhone-Poulenc Rorer Pharm., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 515 (8th Cir. 1996)). *See also* 15 U.S.C. §1117(a).

C. Conclusions of Law

TitleMax Georgia contends record evidence establishes NATL and CLM's use of the word "loan" in their advertising satisfies each element to show liability for false adverting under the Lanham Act: use of the word "loan" rather than "pawn" or "pawn transaction" constitutes a false or misleading description of fact or representation of fact as established under the Georgia Pawnshop Act; it was used in interstate commerce given that NATL and CLM advertise on the internet; the term "loan" was used in connection with commercial advertising regarding NATL and CLM's services, pawn transactions; the description of a "pawn" as a "loan" misrepresents the nature of the pawn transaction; and TitleMax Georgia, as a direct competitor of NATL and CLM in the title pawn business, has been or is likely to be damaged by NATL and CLM's acts.

NATL and CLM note the parties are competitors in the title lending industry. Insofar as their business is to lend money to borrowers who use their car titles as collateral for the debt, they urge any reasonable person would understand that the products being offered are "loans" under any reasonable definition. They argue TitleMax Georgia essentially asks the Court to find that an alleged violation of the Georgia Pawnshop Act constitutes a *per se* violation of the Lanham Act. Although TitleMax Georgia takes the position that a "title pawn" and a "title loan" are not the same things, the Georgia Pawnshop Act itself defines a "pawn transaction" as a type of "loan." Additionally, NATL and CLM assert the motion fails because TitleMax Georgia has not pointed to record evidence establishing as a matter of law that any consumers have actually been deceived or that TitleMax has been or is likely to be damaged by NATL and CLM's use of the word "loan" in their advertising.

Having considered the record, the Court finds that questions of material fact preclude summary judgment. This is not a case of literally false advertising. The Georgia Pawnshop Act requires pawnbrokers to include in their advertising the words "pawn" and "pawn transaction" and prohibits their use of the term "loan" in advertising their business. However, the Act itself defines a "pawnbroker" as "any person engaged in whole or in part in the business of ***lending*** money on the security of pledged goods" and defines "pawn transaction" to include "any ***loan*** on the security of pledged goods." *See* O.C.G.A. §44-12-130(2) and (3), *supra*. *See also* Black's Law Dictionary (10th ed. 2014) (defining "loan" as "[a]n act of lending; a grant of something for temporary use…esp., a sum of money lent at interest"; defining "secured loan" as a "loan that is secured by property or securities"; defining "title loan" as "[a] short-term high-interest loan secured by the borrower's car or other motor vehicle").

Although there may be material distinctions between title pawns and traditional loans, NATL and CLM's use of the word "loan" in advertising is not literally false on its face and whether it is misleading or likely to deceive consumers remains a jury question. In supplemental briefing, TitleMax cites to two double-blind consumer surveys (one online and one by telephone) of more than 300 Georgians that was implemented by Nicholas M. Didow, Ph.D. The surveys were designed to measure "Georgia consumers' attitudes, behavioral intentions, and preferences for a title loan company offering title loans versus a title pawn company offering title pawns" to enable Dr. Didow "to offer a research-based professional opinion as to whether LoanMax was and is likely advantaged in the Georgia marketplace by positioning and marketing itself as a title loan company offering title loans rather than as a title pawn company offering title pawns."[8]

Based on the results Dr. Didow opines, *inter alia*, that: the surveys provide "strong compelling evidence that a company like LoanMax would be viewed more favorably in the Georgia marketplace and would be more advantaged in the Georgia marketplace as a title loan company offering title loan products, rather than as a title pawn company offering title pawn products"; Georgia consumers vary considerably as to whether they think "title loans" and "title pawns" are the same thing or different things, with the largest percentage of respondents indicating they "don't know"; however, title "loan" companies offering title "loan" products are consistently rated more favorably than title "pawn" companies offering title "pawns" and respondents strongly preferred title "loan" companies when presented with a choice between the two.[9]

Although these results may generally support TitleMax's allegations and claims, they are not dispositive. In the final analysis, how compelling the survey results are and the weight to be

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[8] Supplement to Defendant-Counterclaim Plaintiff TitleMax of Georgia, Inc.'s Motion for Partial Summary Judgment, Ex. A (Affidavit of Nicholas Didow) at Ex. 1 ("Didow Report") at p. 3.

[9] Didow Report at pp. 8, 14-15, 19.

given to them remain important jury questions. Relatedly, whether Plaintiffs' use of the word "loan" in advertising is "misleading in context" or is "likely to deceive" or confuse consumers, whether it is likely to influence consumer's purchasing decisions, and whether TitleMax Georgia has been injured as a result present genuine disputes of material fact (among others) that cannot be determined as a matter of law based on the record of this action. TitleMax Georgia's Motion for Partial Summary Judgment is DENIED.

III. NATL and CLM's Motion for Partial Summary Judgment

NATL and CLM move for summary judgment on all claims asserted in TitleMax Georgia's First Counterclaim, *i.e.* (1) unfair competition in violation of the Lanham Act; (2) unfair competition in violation of the Uniform Deceptive Trade Practices Act; and (3) civil conspiracy.

A. Lanham Act claim

NATL and CLM assert they are entitled to summary judgment on TitleMax Georgia false advertising claim under the Lanham Act for the same reasons set forth in their opposition to TitleMax Georgia's Motion for Partial Summary Judgment. However, for the reasons summarized above, the Court finds material questions of fact preclude summary judgment on this claim. To the extent NATL and CLM assert their use of the word "loan" in advertising is not false or misleading to a reasonable consumer as a matter of law, it appears the State has taken the position that such conduct constitutes an "unfair or deceptive" practice "in the conduct of consumer transactions" such that it violates the Georgia Fair Business Practices Act, O.C.G.A. §10-1-393(a). *See* State of Georgia ex rel. Christopher M. Carr, Attorney General of the State of Georgia v. First American Title Lending of Georgia, LLC, Superior Court of Fulton County, No. 2017CV297877 (lawsuit brought by the Georgia Attorney General against a pawnbroker for

using the term "loan" in advertising and not using "pawn" or "pawn transactions", taking the position that such conduct violates O.C.G.A. §44-12-138(a)(1) as well as the Georgia Fair Business Practices Act, O.C.G.A. §10-1-393(a)). Construing the evidence most favorably to TitleMax Georgia as the non-movant and giving it the benefit of all reasonable doubts and possible inferences, whether NATL and CLM's prior use of the word "loan" in their advertising constitutes actionable false advertising under the Lanham Act presents a jury question. NATL and CLM's Motion for Partial Summary Judgment is DENIED with respect to this claim.

B. Uniform Deceptive Trade Practice Act claim

TitleMax Georgia alleges NATL and CLM (and the other Counterclaim-Defendants) have engaged in a deceptive trade practice by representing that services provided by them have characteristics that they do not have; namely that the pawns they offer are loans.[10] TitleMax Georgia seeks injunctive relief, enjoining the Counterclaim Defendants from further use of the term "loan" in their names and advertising.[11]

Under Georgia's Uniform Deceptive Trade Practice Act ("UDTPA"), "[a] person engages in a deceptive trade practice when, in the course of his business...he...[r]epresents that goods or services have...characteristics...that he does not have" or "advertises goods or services with intent not to sell them as advertised." O.C.G.A.§10-1-372(a)(5) and (9). "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable." O.C.G.A. §10-1-373(a). However, only injunctive relief is available as "[i]t is well established that monetary relief is not authorized under the [UDTPA]." Akron Pest Control v. Radar Exterminating Co.,

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[10] Defendants' Answer and Affirmative Defenses to Second Amended Complaint and Defendants' Amended Counterclaims, First Counterclaim, ¶37.

[11] Defendants' Answer and Affirmative Defenses to Second Amended Complaint and Defendants' Amended Counterclaims, First Counterclaim, ¶41.

216 Ga. App. 495, 498, 455 S.E.2d 601, 603 (1995) (citation omitted). Further, "[t]he UDTPA does not address past harm....To state a claim and to establish standing under the UDTPA, [the] [p]laintiffs must allege that they are likely to be damaged in the future by an unfair trade practice." Collins v. Athens Orthopedic Clinic, 347 Ga. App. 13, 20, 815 S.E.2d 639, 646 (2018), reconsideration denied (July 16, 2018).

Here, pretermitting whether use of the word "loan" in pawn transaction advertising constitutes a deceptive trade practice under the UDTPA, currently NATL and CLM "[do]not operate any stores in Georgia" nor do they "broker, refinance, or advertise title loans."[12] Insofar as NATL and CLM are no longer engaged in any title lending business or advertising in Georgia, TitleMax Georgia cannot show that it is likely to be damaged in the future" by NATL and CLM's conduct. Thus, TitleMax Georgia's request for injunctive relief under the UDTPA specifically against NATL and CLM is moot. *See* Goodrich v. Bank of Am., N.A., 329 Ga. App. 41, 42, 762 S.E.2d 628, 630 (2014) ("A case is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights").[13] Accordingly, NATL and CLM's Motion for Partial Summary Judgment is GRANTED with respect to TitleMax Georgia's UDTPA claim against them.

C. Civil conspiracy claim

TitleMax Georgia alleges NATL and CLM "have conspired with each other to engage in deceptive trade practices by representing to the public that they are allowed to use the term 'loan' in their names and advertising."

> A conspiracy upon which a civil action for damages may be founded is a combination between two or more persons either to do some act which is a tort, or else to do some lawful act by methods which constitute a tort.

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12 Kenneth Wayco Aff. (October 12, 2017), ¶¶ 6-7.

13 The viability of TitleMax Georgia's UDTPA claim against the entities currently operating "Cash Loans on Car Titles" and "Atlanta Title Loans" is not before the Court in the instant motions.

> Where civil liability for a conspiracy is sought to be imposed, the conspiracy itself furnishes no cause of action. The gist of the action, if a cause of action exists, is not the conspiracy alleged, but the tort committed against the plaintiff and the resulting damage.

Cook v. Robinson, 216 Ga. 328, 328–29, 116 S.E.2d 742, 744–45 (1960) (citing Martha Mills v. Moseley, 50 Ga. App. 536, 179 S.E. 159, 161 (1935)). Thus, "[a]bsent the underlying tort, there can be no liability for civil conspiracy." Hartsock v. Rich's Employees Credit Union, 279 Ga. App. 724, 726, 632 S.E.2d 476, 478 (2006) (citation omitted).

NATL and CLM urge that because as a matter of law they are not liable for any violation of the Lanham Act or Georgia's UDTPA, TitleMax Georgia's claim for civil conspiracy also fails as a matter of law. However, insofar as TitleMax Georgia's Lanham Act claim survives, its conspiracy claim predicated on that Act survives as well. Accordingly, NATL and CLM's Motion for Partial Summary Judgment is DENIED with respect to the civil conspiracy claim premised on the Lanham Act claim and is GRANTED with respect to the civil conspiracy claim predicated on the failed UDTPA claim.

CONCLUSION

Given all of the above, the Court hereby: DENIES TitleMax Georgia's Motion for Partial Summary Judgment; and GRANTS IN PART and DENIES IN PART NATL and CLM's Motion for Partial Summary Judgment as set forth above.

SO ORDERED this 12 day of March, 2019.

JOHN J. GOGER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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