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12-22-2021

### **Greensky, LLC v. Wellness Program Services LLC et al., Order on Plaintiff's Motion for Summary Judgment on Defendants' Amended Counterclaim**

John J. Goger  
*Senior Judge, Fulton County Superior Court*

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

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GREENSKY, LLC,

Plaintiff,

v.

WELLNESS PROGRAM SERVICES, LLC  
d/b/a TRUSII, and JEFFREY TARADAY,

Defendants.

CIVIL ACTION NO.  
2019CV323886

Bus. Case Div. 4

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**ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON  
DEFENDANTS' AMENDED COUNTERCLAIM**

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Before the Court is Plaintiff's Motion for Summary Judgment on Defendants' Amended Counterclaims, filed August 26, 2021 ("Motion"). Having reviewed the record and heard oral argument on December 7, 2021, the Court enters the following order.

**I. BACKGROUND**

This factual and procedural history is outlined in the order on Plaintiff's first two motions for summary judgment, entered November 19, 2021 which the Court incorporates herein by reference ("Prior MSJ Order"). On July 26, 2021, Defendant Trusii filed an Amended Counterclaim that generally stated claims for defamation and breach of contract. The instant Motion seeks summary judgment on those two counterclaims as well as Trusii's claim for attorney's fees. In its December 1, 2021 response to the Motion, Trusii detailed the substance of its counterclaims. Trusii also filed documentary and audio evidence in support of its counterclaims. (Def's. 2<sup>nd</sup> Not. of Filing Exhibits and Defs. 2<sup>nd</sup> Not. of Manual Filing, filed Dec.

1, 2021.) GreenSky has objected to some of this evidence. (Pl. Obj. to Defs. Evid., filed Dec. 6, 2021.)

## **II. STANDARD OF REVIEW**

As the defendant in counterclaim, who will not bear the burden of proof at trial, GreenSky may demonstrate that it is entitled to summary judgment by pointing to an absence of evidence in the record by which Trusii might carry its burden. Morris v. Real Estate Expert Advisors, LLC, 355 Ga. App. 286, 291-292 (2020). GreenSky contends that the record is devoid of evidence to support a defamation or breach of contract claim. Accordingly, Trusii “cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue.” Id. at 292.

## **III. ANALYSIS**

### **A. Evidentiary Issues.**

At the outset, the Court grants Plaintiff’s objection to Defendants’ Exhibits E, G, H, I, J, and K as lacking foundation and offering inadmissible hearsay.

### **B. Defamation.**

Trusii’s defamation claims implicate both libel and slander.

#### *i. Libel*

Libel is the “false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule.” O.C.G.A. § 55-5-1. Defendants claim GreenSky made defamatory statements in an email survey it forwarded to Trusii customers and in a CNBC article that quoted a GreenSky executive. (Defs. Resp., pp. 5-8.)

GreenSky's Customer Satisfaction Email Survey. In March of 2019, after noticing an uptick in the number of Trusii customer complaints, GreenSky sent Trusii customers an email survey with the following questions.

- (1) Has Trusii provided you with all the product(s) you purchased using your GreenSky loan?
- (2) Did you know or have you been told when your product(s) are expected to arrive?
- (3) Did you sign up for the case study reimbursement offer?
- (4) What is the monthly amount of the case study reimbursement that Trusii committed to you?
- (5) What is the monthly amount of the case study reimbursement that you have actually received from Trusii?
- (6) Are you aware that you have a personal loan through the GreenSky Program to pay for your Trusii purchase?
- (7) If you have not received your product(s) from Trusii, you may be entitled to a refund. Would you like us to contact you to discuss your options? You can also call us at 855-849-0088.
- (8) Please provide us any additional feedback.

(Primeaux Dep., p. 38; Primeaux Aff. (Nov. 2019), ¶ 17.)

The Court finds none of the questions are defamatory. Further, it finds this communication is protected by the conditional privilege afforded in O.C.G.A. § 51-5-7 (2) for “[s]tatements made in the performance of a legal or moral private duty” and in (3) for “[s]tatements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned.” GreenSky administered the GreenSky Program by which these customers financed their Trusii products using funds obtained from GreenSky’s bank partners. In less than a year of doing business with Trusii, GreenSky had forwarded Trusii over \$4.5 million dollars in loan proceeds. The questions found on this customer survey demonstrate a good faith effort on behalf

of Trusii to investigate the nature and extent of the complaints thus allowing GreenSky to assess potential business concerns faced by it and/or its bank partners based upon the loans that had been extended to Trusii customers.

CNBC Article. Trusii's second assertion of GreenSky's libel is found in the CNBC article wherein a GreenSky executive is quoted as saying "under the GreenSky Program, consumers are not economically responsible for merchant fraud." (Defs. 2<sup>nd</sup> Not. of Filing, Ex. E.) As noted above, the Court finds the copy of the article Trusii has tendered is inadmissible.

Moreover, Defendants offer no evidence that GreenSky published this article or had control over its publication. See Bryant v. Cox Enterprises, Inc., 311 Ga. App. 230, 234 (2011)(one of the necessary elements to succeed in a libel action is proof that the respondent published a defamatory statement about the claimant); see also Matthew v. Mills, 357 Ga. App. 214, 216 (to recover for libel, "a [claimant] must prove that the defendant had control over the content of the offending writing").

*ii. Slander*

Pursuant to O.C.G.A. § 51-5-4 (a), oral defamation or slander may occur in four different categories: (1) imputing to another a crime punishable by law; (2) charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society; (3) making charges against another in reference to his trade, office, or profession, calculated to injure him therein; or (4) uttering any disparaging words productive of special damage which flows naturally therefrom.

Trusii contends GreenSky made slanderous comments as reflected in five customer emails that Trusii purportedly received from customers who had been contacted by GreenSky and five recordings of calls that GreenSky received from Trusii customers.

*1. Customer Emails.*

As noted above, the Court has granted GreenSky's objection that the five customer emails offered by Trusii – Exhibits G, H, I, J, and K -- are inadmissible. Moreover, the Court has reviewed all the comments attributed to GreenSky in those customer emails and does not find any of them to be slanderous.

*2. Customer Calls.*

The Court has considered all five of the customer calls and does not find the statements made by the GreenSky representatives were slanderous. Indeed, many of the comments at issue were either true statements or statements of pure opinion so as to preclude a claim of slander. See O.C.G.A. § 51-5-6 (truth is a complete defense to a claim of libel or slander); Cottrell v. Smith, 299 Ga. 517, 523 (2016) (generally, statements of subjective opinion as to which reasonable minds could differ cannot be proven false so as to support a defamation claim.)

**IV. BREACH OF CONTRACT**

It should be noted that Trusii's breach of contract claim was pled in the alternative as Trusii initial position in this litigation was that it had no contractual relationship with GreenSky and the Program Agreement was unenforceable. (Defs. 2<sup>nd</sup> Am. Ans. and Countercl., Count V.)

Trusii's response to the Motion names five different provisions of the Program Agreement it contends GreenSky breached, most of which concern GreenSky's decision to provide refunds to Trusii customers.

As the Court has previously determined, GreenSky became aware of noticeable increase in customer complaints in March of 2019, leading it to conduct a survey of Trusii customers which,

in turn, revealed a large number of additional customer complaints. (Prior MSJ Order, pp. 7-10.) GreenSky's 30(b)(6) witness testified that initially Trusii did send "a couple" of emails responsive to GreenSky's notice of customer complaints, but it "did not respond to the overall majority, and [Trusii] certainly stopped responding completely at some point." (Primeaux Dep., pp. 115-16.)

GreenSky started issuing large numbers of refunds to Trusii customers in June or July of 2019. (Primeaux Dep., pp. 96-97.) GreenSky's corporate representative repeatedly testified that Trusii's failure to assist in addressing these customer complaints prompted GreenSky to issue the refunds.

GreenSky: We'd refunded customers who either did not receive their product or received the product and it was not working as intended.

Q: Okay. And how do you know that to be true?

GreenSky: We relied upon the customer to inform us of that.

Q: So you just took the customers' word for it?

GreenSky: We attempted to confirm with Trusii, but Trusii was unresponsive to our requests . . .

Q: Why wouldn't you take other steps to verify complaints?

GreenSky: . . . we generally work with the merchant to hear their side of it and weigh both sides to assess the outcome and appropriate resolution. In this case, we only had one side of the story.

(Primeaux Dep., p. 40; 67 (objection omitted); see also pp. 93, 100-01, 100, 119.)

Trusii was contractually obligated to assist GreenSky in evaluating customer complaints, but failed to do so. (Program Agreement, §§ 2(x) and (ix); Prior MSJ Order, pp. 21-23.) As further detailed in the Court's Prior MSJ Order, Trusii breached the Program Agreement in other ways -- by not delivering merchandise, by delivering merchandise that was defective, and by failing to comply with GreenSky's request for certain Trusii financial information. (Prior MSJ Order, pp.

21-23.)

“Performance is a condition precedent to recovery on a contract.” Jet Air, Inc. v. Epps Air Service, Inc., 194 Ga. App. 829, 830 (1990). Here, the Court finds Trusii’s breach of contract counterclaim is foreclosed by Trusii’s failure to abide by its own obligations under the Program Agreement.

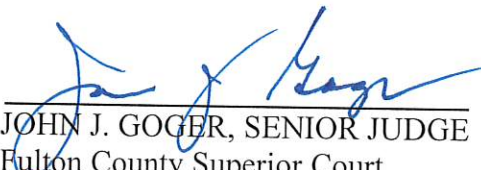
**V. ATTORNEY’S FEES**

Defendants seek to recover their attorney’s fees under § 13-6-11. This claim is derivative. D. Rose, Inc. v. City of Atlanta, 359 Ga. App. 533 (2) (2021). Accordingly, because Trusii has no surviving counterclaim, its claim for attorney’s fees under O.C.G.A. § 13-6-11 fails.

**VI. CONCLUSION**

In light of the foregoing, it is hereby ordered and adjudged that Plaintiff’s Motion for Summary Judgment on Defendants’ Amended Counterclaims is **GRANTED**.

**IT IS SO ORDERED this 22 day of December, 2021.**

  
JOHN J. GOGER, SENIOR JUDGE  
Fulton County Superior Court  
Atlanta Judicial Circuit

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