UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 13-13064-RWZ

SIOBHAN WALSH

v.

TELTECH SYSTEMS, INC.

MEMORANDUM OF DECISION

July 30, 2015

Plaintiff Siobhan Walsh was the victim of a prank gone horribly wrong. Two people who are not parties to this case called plaintiff and pretended to be her upstairs neighbor, allegedly making obscene comments that could be construed as rape threats. To make their hoax convincing, they "spoofed" their telephone number to make it appear as her neighbor's on her caller identification. Defendant Teltech Systems, Inc., sold the spoofing service, which is called SpoofCard. Having suffered economic and emotional damages, plaintiff brought this suit alleging that defendant violated the Massachusetts Consumer Protection Act both by providing the SpoofCard service and by advertising it for pranks and harassment. Defendant now moves for summary judgment contending that no reasonable jury could find that its actions caused plaintiff's alleged harms.

I. Motion to File a Surreply

As a preliminary matter, plaintiff moves for leave to file a surreply to defendant's

motion for summary judgment, along with additional documentary evidence to supplement the summary judgment record. See Docket # 39. As a general rule, the court disfavors surreplies. Plaintiff's motion gives the court no reason to deviate from that general rule. And, because of plaintiff's failure to comply with this court's local rule requiring submission of a proposed document with a motion for leave to file, the court is also unable to evaluate the proposed submission to decide whether it adds value to the existing briefing. See D. Mass. ECF R. R ("If a party electronically files a motion, pursuant to LR 7.1, for leave to file a document, or amend a previously filed document, the party shall attach a copy of the proposed document to the motion for leave to file or amend."). Plaintiff's motion for leave to file a surreply (Docket # 39) is therefore denied.

II. Background

Defendant is a privately held technology company that deals in software and mobile applications, particularly for the telecommunications industry. One of its products is SpoofCard,[1] which enables a user to select the phone number that will appear on the recipient's caller identification screen when the user places a telephone call. This process is called "caller ID spoofing." One can imagine many uses for this technology, representing varying degrees of legitimacy. For example, on the more legitimate side of the spectrum, a lawyer working from home may program SpoofCard to show her office number when she calls a client. Or, on the less legitimate side, a

[1] It is unclear whether SpoofCard is a physical device, service, or both. The distinction, however, is irrelevant to resolving this motion.

prankster may use SpoofCard to play a practical joke on a friend.

A prospective user may purchase SpoofCard either at a retailer (of which there are a limited number) or through plaintiff's website, http://www.spoofcard.com. During the relevant time period for this case (i.e., early 2009), the website included a home page with links to basic information about SpoofCard.[2] One of these links allowed users to purchase access to the service. Others took users to pages that described how to use the service, including a testimonials page.[3] The testimonials described various uses of SpoofCard, ranging from a private investigator stating how much he relied on the product for his business to a private individual stating that he used the product to catch his spouse in an affair. The testimonials also included descriptions of "pranks." For example, one said:

> I spoofed a friend into thinking he won a million dollars, sh*t hit the fan when he bought a 600 dollar bottle of champagne, he was trying to get hold of his boss to tell him to shove his job up you know where, so i enjoyed the champagne with him and then spoofed him again by telling him he had to answer a skill testing question to claim the million dollars and off course he got it wrong, was he pissed and he was happy he didn't

[2] Many of the so-called disputes in the parties' submissions (and, from the looks of it, throughout discovery) center around what was displayed on the SpoofCard website during the relevant time period. To solve this problem, the parties are advised to acquaint themselves with the Wayback Machine. See, e.g., James L. Quarles III & Richard A. Crudo, [Way]Back to the Future: Using the Wayback Machine in Patent Litigation, Landslide, Jan./Feb. 2014, at 16; Holly Andersen, Note, A Website Owner's Practical Guide to the Wayback Machine, 11 J. Telecomm. & High Tech. L. 251 (2013). Other courts have taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201; Erickson v. Neb. Mach. Co., No. 15-CV-01147-JD, 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015); Pond Guy, Inc. v. Aquascape Designs, Inc., No. 13-13229, 2014 WL 2863871, at *4 (E.D. Mich. June 24, 2014); In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., No. 1:00-1898, 2013 WL 6869410, at *4 (S.D.N.Y. Dec. 30, 2013). In an effort to cut through the many manufactured factual disputes here, I will follow that approach and do the same.

[3] Plaintiff also makes much of a "Features" web page describing SpoofCard's services that was available in September 2014, Docket # 35 at 7-8, but there is no indication in either the record or on the Wayback Machine that the "Features" page existed during the relevant time period.

> get a hold of his boss, well the champagne was good. I still won't tell him it was me hah hah.

Docket # 33-11 (all typographical errors in original); see also Real SpoofCard Customer Stories / Ideas, https://web.archive.org/web/20090125002142/http://www.spoofcard.com/stories (archived Jan. 25, 2009, at 00:21 UTC).[4]

Plaintiff is the recipient of a spoofed call—a prank, and a particularly nefarious one at that. In January 2009, plaintiff lived in a first-floor apartment in Quincy, Massachusetts. John Luciano and his wife lived in the apartment directly above her. Plaintiff and the Lucianos had been neighbors for nearly three years.

John Luciano grew up with one Michael DiLorenzo. Michael DiLorenzo's wife, Johnienne,[5] even worked with Luciano until just before the events that gave rise to this case unfolded. For reasons that the parties dispute (but that are not relevant to this motion), Johnienne and Luciano had a falling out around the time that they stopped working together. War, it seems, had been declared.

The DiLorenzos' weapon of choice was SpoofCard. Around the time of her falling out with Luciano, Johnienne's friends told her about SpoofCard. The details of how and what she learned about it are murky (the filings suggest that she learned about it during a night of drinking), but no one disputes that her introduction to the service came from her friends and not from defendant's advertising materials.

---

[4] Plaintiff also points to over 1500 additional comments about how customers used SpoofCard that defendant collected during a 2008 user survey. Docket # 35 at 8. Plaintiff, however, neither alleges nor offers evidence to suggest that these comments were ever made public.

[5] For simplicity, the court will refer to the DiLorenzos by their first names in this opinion.

Johnienne shared her discovery with Michael, and, on January 15, 2009, they purchased SpoofCard minutes from defendant's website. Nothing in the record suggests that they did anything other than purchase SpoofCard time on the website—there is no evidence that they read any other materials about the product or user testimonials.

Apparently knowing that plaintiff was Luciano's neighbor, the DiLorenzos made six spoofed phone calls to plaintiff's home number in the early morning of January 28, 2009. They used SpoofCard to make it appear as though Luciano was calling plaintiff. When plaintiff picked up, Johnienne used a voice modification feature on SpoofCard to impersonate Luciano. Johnienne employed what the parties agree was vulgar and threatening language, and she even threatened (still pretending to be Luciano) to perform sexual acts on plaintiff in her apartment building's laundry room. Plaintiff answered some of these calls, but, frightened and distraught, she let others go to voicemail. For those later calls, Johnienne left similarly harassing messages.

Believing that Luciano had been the one calling her, plaintiff reported him to the Quincy Police Department. Luciano was arrested and spent several days in jail. On February 2, 2009, the day Luciano was released, plaintiff received several additional voicemails, all from a "blocked number." This time, a male voice threatened to retaliate against plaintiff if she did not drop the charges. These calls did not involve SpoofCard, but did come from the DiLorenzos. Plaintiff, still not knowing of the DiLorenzos' involvement, again attributed the calls to Luciano. She alleges that she became so frightened of Luciano that she was forced to move out of her apartment, quit a second

job, and suffer severe emotional distress.

State authorities eventually sorted out the spoofing. They dropped the investigation against Luciano and shifted their focus to the DiLorenzos. Separately, plaintiff pursued this civil suit against Teltech. She filed her complaint in this court on December 2, 2013, generally alleging that defendant contravened the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, by offering the SpoofCard service and advertising its use for harassment and other illegal purposes. Plaintiff asserted federal jurisdiction under the diversity statute, 28 U.S.C. § 1332. Because she is a Massachusetts resident and defendant is a New Jersey corporation with its principal place of business in that state, Answer (Docket # 6) ¶ 3, and because plaintiff seeks $5 million in compensatory damages, this court has subject matter jurisdiction.

III. Legal Standard for Summary Judgment

Summary judgment will be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court must view the record in the light most favorable to the nonmovant and draw all justifiable inferences in that party's favor. Anderson, 477 U.S. at 255. The moving party initially bears the burden of demonstrating the absence of a genuine issue of material fact. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). If the moving party has carried its burden, to defeat the motion, the nonmovant must then "come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e) (emphasis omitted)). The "mere existence of some alleged factual dispute between the parties will not defeat

an otherwise properly supported motion for summary judgment." Anderson, 477 U.S. at 247-48. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007).

IV. Analysis

Defendant's motion contends that plaintiff's 93A claim must fail because no reasonable jury could find that its actions caused plaintiff's alleged harms, as causation is understood under Chapter 93A. The Supreme Judicial Court has held that "causation is a required element of a successful [Chapter] 93A claim." Aspinall v. Philip Morris Co., Inc., 813 N.E.2d 476, 491 (Mass. 2004). To establish causation, a plaintiff must "prove that the defendant's unfair or deceptive act caused an adverse consequence or loss." Rhodes v. AIG Domestic Claims, Inc., 961 N.E.2d 1067, 1076 (Mass. 2012); see also Smith v. Jenkins, 818 F. Supp. 2d 336, 340 (D. Mass. 2011) (stating that a Chapter 93A plaintiff must show "that a defendant's deceptive conduct caused him some appreciable loss or injury"). The absence of proof of causation is fatal to consumer's Chapter 93A claim. See, e.g., Hershenow v. Enterprise Rent-A-Car Co. of Bos., Inc., 840 N.E.2d 526, 535 (Mass. 2006) (affirming summary judgment for failure to establish causation); see also RSA Media, Inc. v. AK Media Grp., Inc., 260 F.3d 10, 16 (1st Cir. 2001) (same).

Assuming, without deciding, that defendant's alleged misconduct could otherwise support a claim under Chapter 93A (i.e., that defendant did promote the use

of the SpoofCard for illegal or harassing purposes), plaintiff cannot prevail because she cannot establish the requisite causation element. Plaintiff has adduced no evidence linking defendant's advertising or promotional materials to her claimed injury. Discovery has shown that the DiLorenzos had no knowledge of SpoofCard before Johnienne heard about it from friends at a party. There is no evidence that the friends who told Johnienne about SpoofCard viewed any of defendant's advertisements or testimonials. Likewise, there is no evidence that the DiLorenzos saw any promotional materials for SpoofCard other than what was on defendant's website when they visited it to purchase time on the SpoofCard system.

Although some parts of the SpoofCard website may have contained promotional materials encouraging users to engage in pranks, there is no evidence that the DiLorenzos ever visited or read those sections, or that those sections informed the DiLorenzos' decision to call plaintiff. There is no evidence that the specific web pages that a user had to visit to purchase access to the service (i.e., the web pages that the DiLorenzos visited on Jan. 15, 2009) included statements encouraging harassment. Although many of the statements that were on the website's testimonials page may be construed to encourage illicit uses of SpoofCard, there is no evidence that defendant ever read the testimonials or visited the testimonials web page.[6] Put simply, there is no

[6] The testimonials appeared on a completely separate web page from the SpoofCard home page and purchase page. Again, the court takes notice of how the website appeared at the relevant time from the Wayback Machine's archive. See SpoofCard Home Page, https://web.archive.org/web/20090115013044/http://www.spoofcard.com (archived Jan. 15, 2009, at 1:30 UTC) (home page); Real SpoofCard Customer Stories / Ideas, https://web.archive.org/web/20090125002142/http://www.spoofcard.com/stories (archived Jan. 25, 2009, at 00:21 UTC) (testimonials page).

evidence that the DiLorenzos ever saw defendant's promotional materials. In light of that, no reasonable jury could find that defendant's promotional statements caused plaintiff's injuries.

Plaintiff attempts to sidestep its lack of causation evidence contending that her "claim is based on the use of the SpoofCard itself." Docket # 35 at 17. In other words, plaintiff contends that the SpoofCard service has no lawful uses, so the causation element must always be satisfied. This theory fails both as a matter of law and fact. As for the law, plaintiff points to no authority waiving the causation requirement for 93A claims based on providing an illegal service, and the court has found none. As for the facts, no reasonable jury could conclude that spoofing has no legitimate purposes, such that merely offering SpoofCard would necessarily cause plaintiff's injuries. See, e.g., Teltech Sys., Inc. v. Bryant, 702 F.3d 232, 238 (5th Cir. 2012) (describing S. Rep. 111-96 (2009), which "noted spoofing's legitimate importance for domestic-violence victims, or for consumers who wish to provide a temporary call-back number that differs from their actual telephone number").

Because no reasonable jury could conclude that defendant's conduct caused plaintiff's injuries, defendant's motion for summary judgment on plaintiff's 93A claim is allowed.

V. Conclusion

Plaintiff's motion for leave to file a surreply (Docket # 39) is DENIED, and defendant's motion for summary judgment on the sole count of the complaint (Docket # 27) is ALLOWED. Judgment may enter for defendant.

The DiLorenzos' motion for a protective order and hearing (Docket # 17) is DENIED AS MOOT.

July 30, 2015
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE