Opinion issued May 22, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00992-CV

DELORES QUIROGA, Appellant

V.

AMERICAN LAMPRECHT TRANSPORT, INC., Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2019-30408

MEMORANDUM OPINION

Jeannine Carnes brought a breach of contract suit against American Lamprecht Transport, Inc. ("ALT") relating to the sale of Senrac Transportation, Ltd. ("Senrac") to ALT. ALT filed a third-party complaint against appellant Delores Quiroga, a former employee of both Senrac and ALT, alleging that she

breached her employment agreement by engaging in a conspiracy with Carnes to divert ALT's customers and business opportunities.

Quiroga filed a motion to dismiss under the Texas Citizens Participation Act ("TCPA"), which was denied by operation of law. On appeal, she raises four issues arguing that the trial court erred by denying her motion to dismiss because (1) the motion was timely, (2) the TCPA applies to ALT's third-party claim against her, (3) the commercial speech exemption does not apply, (4) ALT lacks prima facie evidence of its claim, and (5) she has a defense to ALT's claim. Because we conclude that the TCPA does not apply, we affirm the denial of the motion to dismiss.[*]

Background

Senrac Transportation Ltd. ("Senrac") was a limited partnership engaged in the business of freight forwarding, trucking, and ancillary services. CNC Ltd, a Texas corporation, was the general partner, and Jeannine Carnes was the president of CNC and the limited partner of Senrac. ALT is in the business of freight forwarding, customs house brokerage, trucking, and ancillary services. Carnes wished to retire, and, in 2015, ALT purchased Senrac. The purchase agreement provided for the sale of Senrac's assets: (1) customers and other business contacts,

[*] This TCPA case is decided under the version of the statute in effect before the September 1, 2019 amendments.

(2) incomplete transactions, (3) website, (4) business files, (5) operating systems and related information, and (6) the trade name "Senrac Transportation." Carnes agreed to discontinue the business of Senrac and not to compete with ALT. The purchase agreement included "Performance Guaranties": "Seller believes that buyer will achieve a minimum gross profit of Nine Hundred Thousand Dollars ($900,000.00) from transactions with Seller's Customers within twelve (12) quarterly periods following the Closing based upon previous years' gross profits and agrees to the adjust the Purchase Price accordingly . . . ."

In consideration for Senrac's assets, ALT agreed to a maximum purchase price of $500,000 to be paid as a combination of an initial payment of $50,000 due at closing and twelve quarterly payments. ALT agreed to maintain for twelve consecutive quarters a sales division in its Houston office to account for all transactions with Senrac's customers. The twelve quarterly payments were based on a percentage of Senrac's gross profits and benchmark estimates of future performance derived from the performance guaranties in the purchase agreement.

Quiroga was Carnes's administrative assistant at Senrac before ALT purchased the business. In that role, she answered phones, prepared invoices, and used accounting software. She did not prepare quotes or estimates for customers, and she rarely attended business networking events, which typically were handled by Carnes.

After ALT acquired Senrac's assets, it hired Quiroga to work with Senrac customers. Carnes worked in an advisory or mentoring capacity, helping Quiroga learn the facets of the business that Carnes had previously handled, such as preparing estimates for customers. For a while, Quiroga had both Senrac and ALT email addresses, and she used both to transact business. In a deposition, she testified that it was her practice to delete emails frequently. After working for ALT for about 18 months, Quiroga resigned and went to work for National Heavy Haul ("NHH"), a trucking and transportation company. In her deposition, Quiroga testified that she left because she was being treated poorly by supervisors at ALT, citing racism and favoritism. She denied deleting anything from the company computers, aside from her regular practice of deleting emails, and she denied taking any customer information when she left. Rather, she testified that she was recruited by NHH for a customer service position. In that role, she attended Ritchie Bros. auctions and networked with customers. She also testified that NHH was in a different line of business than ALT because it did not do international freight forwarding or work with customs. Yet, in an affidavit, the chief operating officer of ALT averred that NHH was a competitor because both "provide transportation services for heavy equipment." Quiroga said that she had not seen Carnes since she left ALT, and her only communication with Carnes in that time period was

personal: she called to inquire about Carnes's well-being after Carnes's town was struck by tornadoes.

After Quiroga's departure, ALT failed to realize the expected revenues from Senrac, and upon forensic investigation, it learned that customer emails had been deleted from the computers used by Quiroga. ALT sued her for breaching the nondisclosure provisions of her employment agreement with ALT by disclosing ALT's trade secret information to her new employer. After conducting discovery, including Quiroga's deposition, ALT nonsuited its claims against her.

More than two years after ALT took a nonsuit in its case against Quiroga, Carnes sued ALT for breach of contract relating to the Senrac asset purchase agreement. ALT answered and filed a counterclaim against Carnes and third-party claim against Quiroga in which it alleged: "In collusion with [Carnes], Quiroga exploited her position of trust in order to divert business to competitors of [ALT] for the benefit of herself and [Carnes]."

Quiroga filed a motion to dismiss under the Texas Citizens Participation Act ("TCPA"). Relying on this court's prior opinion in *Gaskamp v. WSP USA, Inc.*, No. 01-18-00079-CV, 2018 WL 6695810, at *1 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018) (*Gaskamp I*), *withdrawn and superseded on reconsideration en banc*, 596 S.W.3d 457 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (*Gaskamp II*), Quiroga argued that ALT's claims impinged on her protected rights of

communication and association. ALT argued, among other things, that the kind of communications alleged in its conspiracy claim were not protected under the TCPA. The motion was denied by operation of law, and Quiroga appealed.

Analysis

We review de novo the denial of a TCPA motion to dismiss. *Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). In doing so, we view the pleadings and the evidence in the light most favorable to the nonmovant. *Schimmel v. McGregor*, 438 S.W.3d 847, 855–56 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Whether the TCPA applies is an issue of statutory interpretation that we also review de novo. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018).

The TCPA "is a bulwark against retaliatory lawsuits meant to intimidate or silence citizens on matters of public concern." *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019); *see In re Lipsky*, 460 S.W.3d 579, 584–86 (Tex. 2015). It is intended "to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipsky*, 460 S.W.3d at 589.

A defendant invoking the TCPA's protections by filing a motion to dismiss must show by a preponderance of the evidence that the TCPA applies. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.003, 27.005(b). The TCPA applies if the plaintiff's

legal action is based on, relates to, or is in response to the defendant's exercise of (1) the right of free speech; (2) the right to petition; or (3) the right of association. *See id.* 27.005(b); *Lipsky*, 460 S.W.3d at 586–87.

The TCPA defines the "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 27.001(3). When this suit was filed, the TCPA defined "matter of public concern" to include "an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." FORMER TEX. CIV. PRAC. & REM. CODE § 27.001(7). "[N]ot every communication related somehow to one of the broad categories set out in section 27.001(7) always regards a matter of public concern." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. 2019). "A private contract dispute affecting only the fortunes of the private parties involved is simply not a 'matter of public concern' under any tenable understanding of those words." *Id.*; *see Gaskamp II*, 596 S.W.3d at 467 (holding that internal communications among the defendants "through which they allegedly misappropriated, shared, and used WSP's trade secrets, breached their fiduciary duties, and conspired to further their business venture" were not matters of public concern).

When this suit was filed, the TCPA defined the "exercise of the right of association" as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." FORMER TEX. CIV. PRAC. & REM. CODE § 27.001(2). In *Gaskamp II*, we held that "with respect to the pre-amendment version of the TCPA, the proper definition of 'common' in the phrase 'common interests' is 'of or relating to a community at large: public.'" *Gaskamp II*, 596 S.W.3d at 467. In *Gaskamp II*, the plaintiff alleged that former employees had jointly formed a new business venture, misappropriated trade secrets, and conspired to commit related torts to enrich themselves. *See id.* Because their interests were private, not common as in the definition accepted by this court, we held that they did not show by a preponderance of the evidence that the suit was based on, related to, or in response to their exercise of the right of association. *See id.*

Quiroga asserts that ALT's allegations of conspiracy to misappropriate business opportunities impinged on her rights to exercise free speech and of free association. But she relies on this court's original opinion, *Gaskamp I*, to support her argument. *See* 2018 WL 6695810, at *1. While her appeal has been pending, however, an en banc panel of this court withdrew the original opinion, *Gaskamp I*, and issued *Gaskamp II* in its stead. *See Gaskamp II*, 596 S.W.3d at 457.

Quiroga argues that ALT's claims impinge on her right to exercise free speech. But ALT's factual allegations that Quiroga conspired and worked with Carnes to divert business to its competitors implicates only private communications between Quiroga and Carnes meant to affect their private fortunes. *See Creative Oil & Gas*, 591 S.W.3d at 137; *Gaskamp II*, 596 S.W.3d at 467. As stated in ALT's live pleading, Quiroga's alleged communications are not matters of public concern. *See Gaskamp II*, 596 S.W.3d at 467. Similarly, as alleged by ALT, Quiroga's and Carnes's interests in associating, allegedly to divert business to ALT's competitors, are private not public because they do not relate to the community at large. *See id.*

We conclude that Quiroga did not show that the TCPA applies to ALT's claims. We overrule her second issue. Considering this conclusion, we do not reach her remaining issues. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the judgment of the trial court.

/s/ Peter Kelly

Peter Kelly
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.