Opinion filed May 29, 2020

In The

Eleventh Court of Appeals

No. 11-19-00339-CV

JULIA NORWICH, Appellant

V.

JACK N. MOUSA, LTD.; DONALD S. BELT; AND PERMIAN HOSPITALITY GROUP, LLC, Appellees

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On Appeal from the 244th District Court
Ector County, Texas
Trial Court Cause No. C-16-02-0106-CV

M E M O R A N D U M O P I N I O N

Brett Norwich, who is married to Appellant, Julia Norwich, and Appellees Jack N. Mousa, Ltd. and Donald S. Belt agreed to build a hotel in Odessa. Brett owned Appellee Permian Hospitality Group, LLC, which was to be the owner of the hotel. In exchange for $1,250,000 and real property valued at $2,250,000, Brett

transferred a total of 50% of the membership interest in Permian to Mousa, Ltd. and Belt.

The hotel venture failed, and Appellees sued Brett. As relevant to this appeal, Appellees alleged that Brett diverted Permian's funds to himself and to companies that he controlled. In their third amended petition, Appellees named Julia as a defendant and alleged that she participated in the conversion of the funds.

Julia filed a motion to dismiss Appellees' claims pursuant to the Texas Citizens Participation Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West 2015) (the TCPA).[1] Julia specifically argued (1) that Appellees' claims were based on, related to, or in response to the exercise of her right to associate with Brett in their marriage and the exercise of her right of free speech, (2) that Appellees could not produce clear and specific evidence of a prima facie case for each essential element of their claims, and (3) that she had established that Appellees' claims were barred by the statute of limitations. The trial court denied Julia's motion to dismiss.

In six issues, Julia asserts that the trial court erred when it considered factual allegations in Appellees' "responses and filings" and conclusory allegations in Appellees' "responses and pleadings"; when it ordered limited discovery; and when it found that the TCPA did not apply, that Appellees established a prima facie case for each essential element of their claims, and that Julia failed to establish an affirmative defense on which she was entitled to judgment. We affirm the trial

[1]The Texas legislature amended the TCPA effective September 1, 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1–9, 12 (H.B. 2730) (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001, .003, .005–.007, .0075, .009–.010). Because the underlying lawsuit was filed prior to September 1, 2019, the law in effect before September 1 applies. *See id.* §§ 11–12. For convenience, all citations to the TCPA in this opinion are to the version of the statute prior to September 1, 2019. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961–64, amended by Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500.

court's order because Julia failed to carry her burden to establish that the TCPA applies to Appellees' claims.

Background Facts[2]

On June 10, 2013, Brett signed a Franchise Agreement with Baymont Franchise Systems, Inc. (BFS) to develop a 90-room hotel in Odessa. The Franchise Agreement was for a term of twenty years.

Under the Franchise Agreement, Brett was eligible to participate in BFS's development incentive financing program. If he met the conditions of the program and signed a development incentive note, Brett would receive $225,000 from BFS after the hotel officially opened. Although the development incentive was a loan, it was not subject to repayment unless the franchise terminated before the end of the twenty-year period. At each anniversary of the opening day of the hotel, the amount of the development incentive was reduced by one-twentieth of the original amount.

Brett formed Permian for the purpose of building and operating the hotel. Mousa, Ltd. and Belt owned the property on which the hotel was to be built. Mousa, Ltd. and Belt paid Brett $1,250,000 and transferred land valued at $2,250,000 to Brett. In return, Mousa, Ltd. received a 45% ownership interest in Permian and Belt received a 5% ownership interest in Permian. Brett contributed a portion of the land to Permian.

Brett assumed responsibility for the management of Permian, and obtained a loan from Vista Bank to finance the construction of the hotel. Appellees allege that, without soliciting or receiving any competitive bids, Brett hired H&N Construction,

[2]The following facts are taken from (1) Appellees' petitions and the attachments to those petitions, (2) the two declarations of Jack Mousa and the attachments to those declarations, and (3) Julia's affidavit and the attachments to that affidavit. *See* CIV. PRAC. & REM. § 27.006(a) (requiring the court to consider "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based" when it determines whether a legal action should be dismissed pursuant to the TCPA).

LLC to construct the hotel. Brett did not disclose to Appellees that he owned 51% of H&N.

Brett transferred his 50% ownership in Permian to Global Resources Management, LLC. Brett, as the sole owner of Global, transferred ownership of Global to Julia in December 2013. In January 2014, Julia transferred ownership of Global to Wicker Park, LLC, a Cook Islands entity owned by Julia. Appellees allege that Brett's interests in Norwich Family Properties, LLC; Norwich Conophy, LLC; and H&N were also transferred to Wicker Park "via a series of transfers" that involved Julia.

Julia contributed Wicker Park to the Fountain Trust, which was formed in the Cook Islands. Julia was the beneficiary of the Fountain Trust. Appellees allege that the Fountain Trust was a "sham trust" set up by Brett and Julia to defraud Appellees and to conceal assets from creditors.

Brett and BFS signed an amendment to the Franchise Agreement on July 29, 2014. The amendment reduced the number of rooms at the hotel to seventy-one and the amount of the development incentive to $177,500. Brett and Julia signed a guaranty that Brett's obligations under the Franchise Agreement would be "punctually paid and performed." Brett, as the "maker," and Julia, as the "co-maker," also signed a development incentive note in the amount of $177,500. The note provided that one-twentieth of the original principal amount would be "completely forgiven without payment" on each anniversary of the opening date of the hotel. However, under certain conditions, the note would be accelerated and the outstanding principal would be "immediately due and payable."

Appellees allege that, in 2015, Brett fraudulently diverted over $300,000 of Permian's funds to himself; to entities that he owned or controlled, including Global and Conophy; and to other ventures unrelated to the operation of the hotel.

Appellees sued Brett, Global, Conophy, H&N, and Family Properties on February 8, 2016, and requested an accounting, injunctive relief, and damages.

Brett relinquished control of the hotel to Vista Bank on June 7, 2016, and filed for bankruptcy in September 2016. Appellees assert that they did not learn about Julia's involvement in the diversion of Permian's funds until Brett responded to discovery in an adversary proceeding filed in the bankruptcy.

On May 4, 2018, BFS sued Julia in New Jersey to recover the outstanding balance on the development incentive note. BFS alleged that Julia guaranteed Brett's performance under the Franchise Agreement, that Brett terminated the Franchise Agreement when he relinquished control of the hotel to Vista Bank, and that Julia was liable for the principal balance of $168,625 due on the development incentive note as well as fees owed under the Franchise Agreement. Julia filed a pro se third-party claim against Jack N. Mousa; Barbara Mousa; Belt; Mousa, Ltd; and JB Mousa Family, Ltd. Julia requested damages as well as a judgment that the third-party defendants interfered with and caused the foreclosure of the hotel. Appellees allege that they did not have knowledge of the $177,500 development incentive payment from BFS to Brett and Julia before Appellees received Julia's third-party claim.

On November 20, 2018, Appellees filed a third amended petition in which they named Julia as a defendant. Julia, however, was not served with citation until April 15, 2019, after Appellees had filed a fifth amended petition. Appellees filed a sixth amended petition on May 10, 2019.

Julia filed a motion to dismiss pursuant to the TCPA on June 14, 2019. Julia asserted that the basis of Appellees' claims was "her association (*i.e.* marriage) to" Brett and her communications with Brett that related to a matter of public concern. Julia also alleged that Appellees could not establish by clear and specific evidence a

prima facie case for each essential element of their claims and that, even if Appellees met that burden, she had established that Appellees' claims were barred by limitations.

Appellees filed a seventh amended petition in which they clarified that their claims against Julia were based only on the conversion of funds that belonged to Permian. Appellees specifically alleged that Julia converted the development incentive funds, that Brett and Julia diverted Permian funds to entities that were owned and controlled by Julia, and that Julia "received and secreted funds in the Cook Islands which rightfully belonged to Permian and were wrongfully diverted and converted" by Brett.

Appellees also filed a response to Julia's motion to dismiss and a motion for limited discovery. The trial court granted the request for limited discovery, in part, and ordered Julia to respond to requests for production and interrogatories. Appellees also filed a number of supplemental responses to the motion to dismiss as well as briefs on the applicable law.

Julia filed a "motion to strike factual allegations and exhibits in [Appellees'] responses." Julia noted that Appellees had filed "multiple 'responses'" and "multiple 'Declarations'" and that each of Appellees' responses "contain[ed] a multitude of factual allegations, misrepresentations, and opinions." Although Julia did not point to any specific statement that was objectionable, she asserted that Appellees' responses (1) included statements and attachments that were unauthenticated and contained hearsay or were deposition transcripts from other litigation where Julia's counsel did not have an opportunity to cross-examine; (2) contained factual allegations, misrepresentations, opinions, and exhibits that were unsupported by affidavit; (3) contained declarations from Appellees' counsel as a fact witness; and (4) omitted "any verifying and authenticating statements as to

any exhibit attached to the various Responses." Julia requested that the trial court "strike the unsupported factual allegations, misrepresentations, and opinions asserted in [Appellees'] Responses and then strike each Declaration" of Appellees' attorney and "any Exhibits attached to [Appellees'] Responses that has [sic] failed to meet the requirements of Texas Rule of Civil Procedure 251."

At the hearing on the motion to dismiss, Julia stated that she was limiting her motion to strike to the declarations of Appellees' counsel. Julia specifically argued about counsel's statements as to when Appellees learned about the alleged diversion and conversion of funds and about a "summary" of the transfers of the ownership interests in the various companies. The trial court denied the motion to strike the declarations and stated that it would "consider them for what they are."

The trial court denied Julia's motion to dismiss and found that Julia failed to establish that Appellees' legal action was based on, related to, or in response to Julia's exercise of her right of free speech or right of association; that Appellees had established by clear and specific evidence a prima facie case for each essential element of their claims; and that Julia failed to establish an affirmative defense that entitled her to judgment as a matter of law.

Analysis

The TCPA protects citizens from retaliatory lawsuits meant to intimidate or silence them on matters of public concern. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019); *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). The stated purpose of the TCPA is to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." CIV. PRAC. & REM. § 27.002; *see also ExxonMobil Pipeline*

Co. v. Coleman, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam). We construe the TCPA "liberally to effectuate its purpose and intent fully." CIV. PRAC. & REM. § 27.011(b); *see also State ex rel. Best v. Harper*, 562 S.W.3d 1, 11 (Tex. 2018).

The TCPA provides for an expedited dismissal procedure when a legal action is based on, related to, or in response to a party's exercise of the right of free speech, right to petition, or right of association. CIV. PRAC. & REM. § 27.003(a); *Youngkin v. Hines* 546 S.W.3d 675, 679 (Tex. 2018). The movant has the initial burden to demonstrate by a preponderance of the evidence that the legal action is based on, related to, or in response to the movant's exercise of one of the rights protected by the statute. CIV. PRAC. & REM. § 27.005(b); *Youngkin*, 546 S.W.3d at 679. If the movant makes this showing, the burden shifts to the nonmovant to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. CIV. PRAC. & REM. § 27.005(c); *Youngkin*, 546 S.W.3d at 679. Even when the nonmovant satisfies that burden, the trial court must dismiss the legal action if the movant "establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." CIV. PRAC. & REM. § 27.005(d); *see also Youngkin*, 546 S.W.3d at 679–80. We review de novo the trial court's denial of a TCPA motion to dismiss and the question of whether the parties satisfied their respective burdens. *Hall*, 579 S.W.3d at 377.

We first consider Julia's fourth issue in which she contends that the trial court erred when it determined that the TCPA does not apply to Appellees' claims. Julia specifically argues that her marriage constitutes the exercise of the right of association and that Appellees' claims against her are based on, related to, or in response to her relationship with Brett.[3]

[3]Julia does not challenge the trial court's determination that Appellees' claims are not based on, related to, or in response to Julia's exercise of the right of free speech.

Julia had the burden to establish that Appellees' claims fall within the scope of the TCPA. *See* CIV. PRAC. & REM. § 27.005(b); *Youngkin*, 546 S.W.3d at 679. When we determine whether Julia carried that burden, we consider the pleadings and affidavits that state the facts on which liability is based. CIV. PRAC. & REM. § 27.006(a). A legal action's basis is determined by the plaintiff's allegations rather than by the defendant's admissions or denials. *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). The plaintiff's pleading is "the 'best and all-sufficient evidence of the nature of the action.'" *Id.* (quoting *Stockyards Nat'l Bank v. Maples*, 95 S.W.2d 1300, 1302 (Tex. 1936)).

Pursuant to the TCPA, a "communication" includes "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." CIV. PRAC. & REM. § 27.001(1). The "exercise of the right of association" is "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." CIV. PRAC. & REM. § 27.001(2). This "common interest" "means something more than allegedly tortious communications between individuals in the pursuit of a private business endeavor." *Blue Gold Energy Barstow, LLC v. Precision Frac, LLC*, No. 11-19-00238-CV, 2020 WL 1809193, at *6 (Tex. App.—Eastland Apr. 9, 2020, no pet. h.) (mem. op.). Rather, there must be a citizen or public component to the "common interest" in order to constitute the "right of association" as defined by the TCPA. *Id.*

As pleaded, Appellees' claims against Julia implicate Brett's misappropriation of funds that belonged to Permian and communications between Julia and Brett about (1) the transfer of the ownership of the companies that received the funds to Julia's company, Wicker Park; (2) the formation of the Fountain Trust; and (3) Julia's transfer of ownership of Wicker Park to the Fountain Trust. The only common interest alleged by these communications was that Brett and Julia joined

together to conceal the location of Permian's funds for their own pecuniary benefit. The fact that Brett and Julia are married does not convert these communications into a matter of public or community interest. *See id.*; *Gaskamp v. WSP USA Inc.*, 596 S.W.3d 457, 476 (Tex. App.—Houston [1st Dist.] 2020, pet. filed) (en banc) (concluding that conduct and communications that "benefitted only the five alleged tortfeasors" did not constitute the exercise of the right of association under the TCPA where there were "no allegations that the tortfeasors 'join[ed] together to collectively express, promote, pursue, or defend' any public or community interests").

Borrowing from the definition of "public concern" used in the TCPA's definition of "exercise of the right of free speech," Julia argues that the alleged communications "addressed a matter of public concern and a service in the marketplace, particularly the construction and operation of a hotel and business venture among multiple parties in a particular economic market." However, even if a communication about a "matter of public concern" is sufficient to establish a "common interest" that constitutes the exercise of the right of association under the statute, the communications implicated by Appellees' pleadings did not relate to the construction or the operation of the hotel. Rather, the complained-about communications related to the allegedly improper transfer of Permian's money to entities owned or controlled by Brett and to Brett's and Julia's efforts to hide that money through Brett's transfer of those entities to Julia or to a company owned by her and through Julia's contribution of that company to a Cook Islands trust of which she was the beneficiary. These communications related only to Brett's and Julia's private pecuniary interests and did not relate to a matter of public concern for purposes of the TCPA. *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 136 (Tex. 2019) (holding that, to be a matter of public concern under

the TCPA, the matter must involve more than the private pecuniary interests of the parties).

We hold that Julia failed to establish that Appellees' claims are based on, related to, or in response to her exercise of the right of association. Therefore, the trial court did not err when it determined that the TCPA does not apply to Appellees' claims. We overrule Julia's fourth issue.

Based on our resolution of that issue, we need not consider Julia's fifth and sixth issues in which she challenges the trial court's rulings on the second and third prongs of the TCPA analysis. *See* TEX. R. APP. P. 47.1. Further, because we have considered only the facts as set out in Appellees' petitions, Julia's affidavit, and Jack Mousa's two declarations in our analysis, we need not address Julia's first or second issues in which she complains that the trial court erred when it considered factual allegations asserted in Appellees' responses to the motion to dismiss and conclusory statements in Appellees' pleadings and responses.[4] *See id.*

In her third issue, Julia argues that the trial court erred when it granted Appellees' request for limited discovery. Julia contends that the trial court impermissibly allowed discovery as to entities that were not parties to the motion to dismiss and that that was "beyond the scope of the TCPA Motion to Dismiss and elements of the Appellees' claims."

"[A]ll discovery in the legal action" is generally suspended when a party files a motion to dismiss. CIV. PRAC. & REM. § 27.003(c). However, "Section 27.006(b) gives the trial court discretion, on a showing of good cause, to 'allow specified and limited discovery relevant to the motion.'" *Brown Sims P.C. v. L.W. Matteson, Inc.*,

[4]We note that, in the trial court, Julia limited her motion to strike to Appellees' counsel's declarations and obtained an adverse ruling from the trial court only as to those declarations. To the extent that Julia attempts to expand her arguments to include other pleadings and evidence, those arguments have not been preserved for our review. *See* TEX. R. APP. P. 33.1(a).

594 S.W.3d 573, 588 (Tex. App.—San Antonio 2019, no pet.) (quoting CIV. PRAC. & REM. § 27.006(b)).

Discovery is relevant to a motion to dismiss if it seeks information related to the allegations asserted in the motion. *See In re SSCP Mgmt., Inc.*, 573 S.W.3d 464, 471–72 (Tex. App.—Fort Worth 2019, orig. proceeding). Merits-based discovery may be relevant "to the extent it seeks information to assist the non-movant to meet its burden to present a prima facie case for each element of the non-movant's claims to defeat the motion to dismiss." *Id.* at 472 (quoting *In re SPEX Grp. US LLC*, No. 05-18-00208-CV, 2018 WL 1312407, at *4 (Tex. App.—Dallas Mar. 14, 2018, orig. proceeding [mand. dism'd]) (mem. op.)).

In their motion for limited discovery, Appellees requested (1) that Global, Family Properties, Conophy, and H&N be required to answer discovery that was propounded in August 2016, (2) that Julia be required to submit to a deposition, and (3) that Julia be required to respond to requests for production and interrogatories. Appellees asserted that there was good cause to allow the discovery because Julia had exclusive custody and control of essential relevant documents and evidence.

The trial court denied Appellees' request that Global, Family Properties, Conophy, and H&N be required to respond to discovery and denied Appellees' request to take Julia's deposition. The trial court also limited the scope of the written discovery to requests related to Julia's possible involvement in the concealment of Permian's funds in the Fountain Trust and in the conversion of the development incentive funds. The discovery ordered by the trial court comported with the TCPA's requirement for "specific" and "limited" discovery.

On this record, we hold that the trial court did not abuse its discretion when it granted Appellees' motion to conduct limited discovery. We overrule Julia's third issue.

This Court's Ruling

We affirm the trial court's order.

KEITH STRETCHER
JUSTICE

May 29, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[5]

Willson, J., not participating.

[5]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.