

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00360-CV

David Seibert, Appellant

v.

Lori Bauserman-Trammel, Appellee

**FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-17-002154, THE HONORABLE TIM SULAK, JUDGE PRESIDING**

MEMORANDUM OPINION

David Seibert appeals the district court's interlocutory order denying his motion to dismiss Lori Bauserman-Trammel's civil conspiracy claim under the Texas Citizens Participation Act (TCPA). Bauserman-Trammel contends that the TCPA does not apply to her conspiracy claim. We will affirm the district court's order.

BACKGROUND

Bauserman-Trammel wired Seibert a total of \$100,000 in 2014. In the underlying dispute, Bauserman-Trammel claims that she agreed to loan Seibert the money with the expectation that Seibert would repay the principal plus interest, while Seibert contends that Bauserman-Trammel agreed to invest in two commercial properties and that the money was not a loan. In 2016, Bauserman-Trammel sought repayment of the money, and Seibert paid her \$95,000. Alleging that she remains entitled to \$5,000 for repayment of the principal and an

additional amount for interest, Bauserman-Trammel sued Seibert in 2017 for breach of contract, negligent misrepresentation, fraud, and fraudulent inducement. In January 2019, Bauserman-Trammel amended her petition to add Ram Kunwar (an alleged guarantor on a promissory note) as an additional defendant and asserted that Seibert and Kunwar conspired to defraud her.¹ Although Seibert did not move to dismiss the claims asserted in the original petition, he filed a motion to dismiss the civil conspiracy claim under the TCPA, citing his rights to free speech and association. *See* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011.² The trial court denied Seibert's motion, and Seibert filed this interlocutory appeal.

ANALYSIS

On appeal, Seibert asserts that the district court erred in denying his motion to dismiss for three reasons: (1) the TCPA applies to Bauserman-Trammel's civil conspiracy claim because the claim relates to his right of free speech; (2) Bauserman-Trammel failed to establish a prima facie case for civil conspiracy; and (3) even if she had established a prima facie civil conspiracy case, Seibert established each essential element of a valid defense to the claim. "Reviewing a TCPA motion to dismiss requires a three-step analysis." *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). First, the party moving for dismissal must show by a preponderance of the evidence that the TCPA applies to the legal action against it. Tex. Civ. Prac. & Rem. Code § 27.005(b). If the movant meets that burden, the nonmovant must establish

¹ Kunwar is not a party to this appeal although he remains a defendant in the underlying suit.

² The TCPA was amended in the 2019 legislative session, but those amendments do not apply to this lawsuit, which was filed before the amendments' effective date. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 11, 12, 2019 Tex. Gen. Laws 684, 687 (amendments to TCPA apply "only to an action filed on or after" September 1, 2019).

by clear and specific evidence a prima facie case for each essential element of its claim. *Id.* § 27.005(c). “In determining whether a legal action should be dismissed under [the TCPA], the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.” *Id.* § 27.006(a) (“Evidence”). Collectively, these elements require that the “plaintiff must provide enough detail to show the factual basis for its claim.” *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017) (per curiam). If the nonmovant satisfies that requirement, the burden shifts back to the movant to prove each essential element of any valid defenses by a preponderance of the evidence. Tex. Civ. Prac. & Rem. Code § 27.005(d).

We begin by addressing whether the TCPA applies to Bauserman-Trammel’s claim that Seibert and Kunwar conspired to defraud her. Seibert contends the TCPA applies to the conspiracy claim based on fraud because it implicates his right to free speech since any conspiring would necessarily involve a “communication” within the meaning of the TCPA. *See id.* § 27.001(1). In support of his contention, Seibert cites this Court’s opinion in *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287 (Tex. App.—Austin 2018, pet. denied). In *Craig*, we held that a common-law “conspiracy to misappropriate trade secrets” claim implicated the right of free association and thus fell within TCPA’s purview. *Id.* at 296. In analyzing the conspiracy claim, the *Craig* court considered whether the TCPA applied to the underlying allegation of misappropriation of trade secrets and concluded it did. *Id.* (noting the claimed “communication” was disclosure of information regarding plaintiff’s assets and business structure). Analyzing the underlying claim was required because “civil conspiracy is a theory of vicarious liability, not an independent tort.” *Agar Corp., Inc. v. Electro Circuits Int’l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019) (determining that the statute of limitations for a conspiracy claim is identical to that of the

underlying tort). In this case, Seibert did not timely seek to dismiss the fraud claim against him from which Bauserman-Trammel's conspiracy claim derives. *See Montoya v. San Angelo Cmty. Med. Ctr.*, No. 03-16-00510-CV, 2018 Tex. App. LEXIS 3868, at *30 (Tex. App.—Austin May 31, 2018, pet. denied) (mem. op.) (determining that “an appellate court does not analyze a trial court’s dismissal of a plaintiff’s conspiracy claims separately from the trial court’s dismissal of the plaintiff’s other claims” (citing *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (orig. proceeding))); *accord Jones v. Pozner*, No. 03-18-00603-CV, 2019 Tex. App. LEXIS 9641, at *2 n.2 (Tex. App.—Austin Nov. 5, 2019, pet. filed) (mem. op.) (declining to analyze a conspiracy claim separately from the refusal to dismiss the underlying defamation claim); *Infowars, LLC v. Fontaine*, No. 03-18-00614-CV, 2019 Tex. App. LEXIS 9303, at *15 (Tex. App.—Austin Oct. 24, 2019, pet. filed) (mem. op.) (same); *Warner Bros. Entm’t, Inc. v. Jones*, 538 S.W.3d 781, 813-14 (Tex. App.—Austin 2017), *aff’d*, No. 18-0068, ___ S.W.3d ___, 2020 Tex. LEXIS 397 (Tex. May 8, 2020) (stating in a case with an underlying defamation claim that courts “do not analyze the trial court’s refusal to dismiss plaintiffs’ causes of action for conspiracy separately from its refusal to dismiss their other causes of action”). Assuming the TCPA could separately apply to a civil conspiracy claim where the underlying claim is unchallenged, we consider whether Seibert has carried his burden to show that the conspiracy claim relates to his exercise of the right of free speech. *See* Tex. Civ. Prac. & Rem. Code §27.001(3) (“‘Exercise of the right of free speech’ means a communication made in connection with a matter of public concern.”); *Sloat v. Rathbun*, 513 S.W.3d 500, 504 (Tex. App.—Austin 2015, pet. dism’d) (in determining the factual basis for a claim, we view the evidence in the light most favorable to the nonmovant). Seibert states that the conspiracy claim “necessarily relates” to a protected communication “as it states that Kunwar and Seibert had a ‘meeting of the minds,’” and he concludes that such a

“meeting of the minds would be impossible without some form of communication between Seibert and Kunwar.” He does not explain what that communication might have involved. Although the TCPA’s definition of the exercise of the right of free speech is broad, we decline to hold that *any* communication between co-conspirators is communication made in connection with a matter of public concern. *See Mulcahy v. Cielo Prop. Grp., LLC*, No. 03-19-00117-CV, 2019 Tex. App. LEXIS 8310, at *8-9 (Tex. App.—Austin Sept. 13, 2019, pet. denied) (mem. op.) (declining to hold that “*any* exchange of information owned by a real-estate enterprise is a matter of public concern” and holding appellant failed to show TCPA applied where he did not show the nature of information allegedly supporting the TCPA’s applicability); *Sloat*, 513 S.W.3d at 504 (“[W]e view the pleadings in the light most favorable to [nonmovant]; i.e., favoring the conclusion that her claims are not predicated on protected expression.”). Because Seibert did not identify or describe any actual communication, he has not shown that the TCPA applies based on an allegedly protected communication culminating in a “meeting of the minds.” Seibert also argues that the assertion that he “lied to [appellee] about projects that were to be collateral for [appellee’s] Loan” relates to his right to free speech because it “would also necessarily require a communication.” The assertion that Seibert lied goes to the element of conspiracy that the conspirators engaged in “one or more unlawful, overt acts,” which in this case repeats Bauserman-Trammel’s fraud claim, which Seibert did not timely move to dismiss. *See Agar Corp.*, 580 S.W.3d at 141 (listing the elements of civil conspiracy), 142 (“Because civil conspiracy is a theory of vicarious liability, a lawsuit alleging a civil conspiracy that committed some intentional tort is still a ‘suit for’ that tort.”). In elaborating on how the alleged lie might fall under the TCPA for purposes of civil conspiracy, Seibert asserts that it relates to a matter of public concern because “Appellee alleges that Appellant and Kunwar lied to her regarding an

effort to ‘receive loans from . . . [appellee] to use Loans for their personal needs.’” However, what Bauserman-Trammel specifically pleaded was that Kunwar and Seibert “conspired to receive loans from . . . [appellee] to use Loans for their personal needs.” The “lie” she asserts, and that Seibert alleges relates to his right to free speech, is distinct: “they . . . lied to [appellee] about projects that were to be collateral for [appellee’s] Loan.” Seibert does not explain how the lie “about projects” alleged by Bauserman-Trammel constitutes a communication relating to a matter of public concern. Thus, he has not carried his burden to show by a preponderance of the evidence that the conspiracy claim was based on, related to, or in response to a communication made in connection with a matter of public concern.

Under the circumstances, we hold that Seibert has not met his burden to show that the TCPA applies to Bauserman-Trammel’s derivative civil conspiracy claim. Having so determined, we need not address whether Bauserman-Trammel has established a prima facie case for her claim or whether Seibert has established a valid defense. We conclude that the district court did not err in denying Seibert’s motion to dismiss.

CONCLUSION

For the foregoing reasons, we affirm the district court’s order denying Seibert’s motion to dismiss.

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Triana and Smith

Affirmed

Filed: July 10, 2020