

Reverse and Remand and Opinion Filed November 6, 2017



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01163-CV

ROBERT DUCHOUQUETTE AND MICHELLE DUCHOUQUETTE, Appellants
V.
PRESTIGIOUS PETS, LLC, Appellee

On Appeal from the County Court at Law No. 3
Dallas County, Texas
Trial Court Cause No. CC-16-02381-C

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

This case arises out of defamation, fraud, and breach of contract claims Prestigious Pets (Pets) asserted against Robert and Michele Duchouquette (the Duchouquettes) after Ms. Duchouquette posted an unfavorable internet review about Pets' care of their pet beta fish. The underlying dispute has navigated a justice court, a county court at law, a district court, and now this court.

The pivotal question before us is whether the county court had jurisdiction over the Duchouquettes TCPA request for attorney's fees and sanctions in an appeal from the justice court's dismissal order that followed Pets' voluntary nonsuit of its claims.¹

¹ The TCPA is the Texas Citizens Participation Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) *et. seq.*

We conclude that the county court erred by dismissing the case for want of jurisdiction because a nonsuit does not affect another party's outstanding claims for relief. We reverse the trial court's order granting the plea to the jurisdiction and remand for further proceedings on the TCPA motion's merits.

I. BACKGROUND

In October 2015, the Duchouquettes hired Pets to care for their two dogs and a fish while they were away. Mr. Duchouquette signed Pets' contract, which included a clause forbidding "any action that negatively impacts [Pets]."

While they were away, watching their fish webcam, the Duchouquettes saw the Pets representative overfeeding the fish. But they were unable to contact the Pets representative because of Pets' policy against direct communication between clients and pet sitters. When they returned from vacation, Ms. Duchouquette posted an unfavorable Yelp review of Pets' services.

Pets responded with a letter demanding modification of the review and threatening legal action for breach of the contract's non-disparagement clause. Although Ms. Duchouquette made changes to her review, Pets sued both Duchouquettes in the justice court. The petition claimed, *inter alia*, breach of the non-disparagement clause, libel and slander, intentional misrepresentation, and fraud by omission. Pets requested \$6,766 in damages, and an injunction ordering compliance with the non-disparagement clause.

On February 11, 2016, the Duchouquettes filed a TCPA motion to dismiss claiming that the Yelp review was an exercise of free speech and requesting attorneys' fees and sanctions. *See* TEX. CIV. PRAC. & REM. CODE §27.006 (a). The motion was set for hearing on April 4, 2016.

Pets did not respond to the motion. Instead, two weeks before the hearing, Pets filed a notice of nonsuit and request for dismissal without prejudice. The justice court granted the

nonsuit that day, dismissed the case, and denied all outstanding motions. Consequently, the Duchouquettes did not get to pursue their request for attorneys' fees or sanctions.²

The Duchouquettes appealed the justice court judgment to the county court. Pets then filed another nonsuit of its claims and a plea to the jurisdiction. Pets' plea to the jurisdiction argued that the county court lacked jurisdiction because (i) the justice court nonsuit mooted the entire case and (ii) no judgment was rendered by the justice court, so there was nothing to appeal.³ The Duchouquettes responded, arguing that (i) a motion for attorneys' fees and sanctions under the TCPA is an independent claim for affirmative relief that survives a plaintiffs' nonsuit and (ii) they properly perfected the appeal.

The county court conducted a hearing, granted Pets' plea to the jurisdiction, and dismissed the case without prejudice.⁴ The dismissal order makes no reference to the TCPA motion and does not identify the grounds for granting the plea. This appeal from that dismissal order followed.

II. ANALYSIS

A. Did the trial court err by granting Pets' plea to the jurisdiction?

1. Introduction

The Duchouquettes argue that the county court erred by granting the plea to the jurisdiction because Pets' justice court nonsuit had no effect on their pending TCPA motion to dismiss and for attorney's fees and sanctions. They further argue that while the justice court may not have had jurisdiction over Pets' defamation claims, it had jurisdiction over some of Pets'

² Pets filed a new suit in district court and the Duchouquettes filed another TCPA motion. The district court granted the motion, denied the Duchouquettes' request for \$10,415 in attorneys' fees incurred at the district court level, and awarded the Duchouquettes \$7,000 in sanctions and costs. That action is not the subject of this appeal.

³ Pets does not advance its "no judgment" argument on appeal.

⁴ Our record does not include a hearing transcript.

other claims (such as contract and misrepresentation based claims), and their TCPA motion therefore provided an independent ground for continued jurisdiction.

Pets argues that the county court lacked jurisdiction because: (i) the justice court lacked jurisdiction over the defamation claim, (ii) the nonsuit disposed of the case, and (iii) the county court could not consider the Duchouquettes' TCPA motion because it was a de novo appeal and they failed to re-file the motion in county court.

Because the existence of subject matter jurisdiction is a question of law, we review a trial court's ruling on a plea to the jurisdiction de novo. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016).

2. Did the justice court have jurisdiction over the Duchouquettes' TCPA motion?

A county court's appellate jurisdiction is confined to the justice court's jurisdictional limits; thus, the county court has no jurisdiction over an appeal unless the justice court had jurisdiction. *See* TEX. GOV'T CODE § 26.042(e); *A-1 Parts Stop, Inc. v. Sims*, No. 05-14-01292-CV, 2016 WL 792390, at *3 (Tex. App.—Dallas Mar. 1, 2016, pet. denied) (mem. op. not designated for publication). Pets argues that, because the justice court case included defamation claims and justice courts lack jurisdiction over such claims, neither the justice court nor the county court had subject matter jurisdiction.

It is well-established that justice courts have no jurisdiction over “a suit to recover damages for slander or defamation of character.” TEX. GOV'T CODE § 27.031(b) (3). So our inquiry would end there if the justice court case had been solely based on defamation.

But the justice court case did not exclusively involve defamation; there were also misrepresentation tort and breach of contract claims over which a justice court has jurisdiction if the damages sought are less than \$10,000. TEX. R. CIV. P. 500.3(a). A court may “dismiss claims over which it does not have subject matter jurisdiction, but retain claims in the same case

over which it has jurisdiction.” *Thomas v. Long*, 207 S.W.3d 334, 338 (Tex. 2006). Thus, the justice court, and by extension, the county court, had jurisdiction over Pets’ non-defamation claims, each of which sought damages less than \$10,000. It follows that the justice court also had jurisdiction over the Duchouquettes’ TCPA motion at least to the extent it addressed Pets’ non-defamation claims.

3. Did the TCPA motion survive the nonsuit?

Pets argues that its nonsuit disposed of the entire case. We disagree because, although the nonsuit disposed of Pets’ claims, the Duchouquettes’ TCPA motion nonetheless remained pending and was a claim for affirmative relief.

A TCPA motion seeks dismissal of a “legal action” that is “based on, relates to, or is in response to a party’s exercise of, the right of free speech.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a). If the trial court dismisses an action, the statute provides for the movant’s recovery of court costs, reasonable attorneys’ fees, other expenses, and sanctions. *Id.* §27.009(a).

Generally, a plaintiff may dismiss a case or take a nonsuit at any time before it introduces all of its evidence, excluding rebuttal evidence. TEX. R. CIV. P. 162. Such a dismissal, however, “shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief” And a defendant’s TCPA motion to dismiss is a claim for affirmative relief. *Rauhauser v. McGibney*, 508 S.W.3d 377, 380 (Tex. App.—Austin 2014, no pet.) (*overruled on other grounds by Hersh v. Tatum*, 2017 WL 2839873, at *6 (Tex. 2017)); *see also Walker v. Hartman*, 516 S.W.3d 71, 80 (Tex. App.—Beaumont 2017, pet. filed).

In *Rauhauser*, a website operator sued various defendants, including Rauhauser, for defamation, business disparagement, intentional infliction of emotional distress, and other torts related to defendants’ posting of allegedly threatening and damaging statements on various websites. When the operator decided to nonsuit certain claims, Rauhauser argued that his TCPA

motion to dismiss survived the nonsuit, and our sister court agreed. The court noted that a defendant's motion to dismiss may afford more relief to the defendant than does a nonsuit, including dismissal with prejudice, attorneys' fees, and sanctions. Accordingly, the court concluded that such a motion is a claim for affirmative relief that survives a nonsuit. 508 S.W.3d at 382.

As discussed below, we are not persuaded by Pets' argument that the nature of the de novo justice court appeal distinguishes this case from *Rauhauser*. The Duchouquettes' TCPA motion requested affirmative relief greater than what Pet's nonsuit dismissal allowed. Therefore, the TCPA motion survived Pets' nonsuit of its claims.

4. Were the Duchouquettes required to re-file the TCPA motion in the county court appeal?

Pets nonetheless argues that there was nothing for the county court to consider regarding the TCPA motion because a county court appeal from justice court is de novo and the Duchouquettes failed to re-file the justice court TCPA motion. This argument misconstrues the mechanics of a de novo appeal.

An appeal from a justice court is de novo in the county court. TEX. R. CIV. P. 506.3. "A trial de novo is a new trial in which the entire case is presented as though there had been no previous trial." *Id.* Thus, once a county court appeal is perfected, the county court can either (i) try the case de novo, or (ii) dismiss the case for want of prosecution. The court has no option to affirm or reverse the justice court's judgment. *See Villalon v. Bank One*, 176 S.W.3d 66, 69–70 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

That the county court does not evaluate the justice court's judgment, however, does not mean that an entirely new case is filed and presented. Additional pleadings are not necessary for a trial de novo in the county court where the justice court pleadings are in writing. *See e.g., Withrow v. Schou*, 13 S.W.3d 37, 39 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

Specifically, rule 506.2 provides that when an appeal is perfected from the justice court, that court must send the county court clerk “a certified copy of all docket entries, a certified copy of the bill of costs, and the original papers in the case.” TEX. R. CIV. P. 506.2. Thus, the rules provide for the de novo trial in county court to be based on what was filed in the justice court. Here, the TCPA motion was filed in the justice court case, so there was no need to re-file it in the subsequent county court appeal.

Because the justice court had jurisdiction over some of Pets’ claims and the TCPA motion to dismiss to those claims was an affirmative claim for relief pending in the county court, the county court erred in concluding that it lacked jurisdiction. Accordingly, we sustain the Duchouquettes’ first issue.

B. Are Duchouquettes entitled to relief on the merits of their TCPA motion?

The Duchouquettes second issue argues that their uncontroverted motion establishes that the lawsuit is based on the exercise of free speech, and Pets did not establish the essential elements of their claims by clear and specific evidence. Accordingly, they seek a rendition judgment that they are entitled to recover court costs, reasonable attorney’s fees and expenses, and a remand for the trial court’s calculation of those amounts.⁵

Pets, however, did not respond to the TCPA motion and there was no hearing. Instead, the trial court concluded that it lacked jurisdiction and dismissed the case.

There is no indication that the trial court considered the TCPA motion, by formal hearing or otherwise, and the case was dismissed for want of jurisdiction before Pets could respond. The Duchouquettes claim they are entitled to attorneys’ fees, but there is no evidence supporting the amount claimed.

⁵ There is no proof in this record that Appellants’ have actually incurred the attorneys’ fees they claim, or that such fees are reasonable.

Having concluded that the trial court has jurisdiction to consider the motion, we remand to the trial court for consideration of the motion on the merits.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ROBERT DUCHOUQUETTE AND
MICHELLE DUCHOUQUETTE,
Appellants

No. 05-16-01163-CV V.

On Appeal from the County Court at Law
No. 3, Dallas County, Texas
Trial Court Cause No. CC-16-02381-C.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

PRESTIGIOUS PETS, LLC, Appellee

In accordance with this Court's opinion of this date, the order of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion}.

It is **ORDERED** that appellant ROBERT DUCHOUQUETTE AND MICHELLE DUCHOUQUETTE recover their costs of this appeal from appellee PRESTIGIOUS PETS, LLC.

Judgment entered November 6, 2017.