Dismissed; Opinion Filed September 26, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00176-CV

MOLLY BRAUN, Appellant
V.
MARK GORDON, Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-07660

MEMORANDUM OPINION

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

Molly Braun brings this interlocutory appeal of the trial court's denial of her motion to dismiss this suit under the Texas Citizens Participation Act (TCPA). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.008, 51.014(a)(12) (West 2015 & Supp. 2016). Braun brings three issues on appeal. We conclude we lack jurisdiction over this appeal because there is no appealable order. Accordingly, we dismiss this appeal.

BACKGROUND

Gordon sued Braun for defamation and other causes of action. On October 18, 2016, Braun filed a motion to dismiss the suit under the TCPA. The trial court did not hold a hearing on Braun's motion to dismiss and did not expressly rule on the motion. Braun filed her notice of appeal on February 26, 2017, 131 days after she filed her motion to dismiss.

INTERLOCUTORY APPEAL UNDER THE TCPA

In her first issue, Braun asserts this Court has jurisdiction over this interlocutory appeal.[1] Generally, appellate courts have jurisdiction to review only a trial court's rulings following a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). This Court does not have jurisdiction to hear appeals from interlocutory orders unless a statute expressly provides such jurisdiction. *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). Statutes authorizing appeals from interlocutory orders are strictly construed. *Art Inst. of Chi. v. Integral Hedging, L.P.*, 129 S.W.3d 564, 570 (Tex. App.—Dallas 2003, no pet.). "Where statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result." *Hebner v. Reddy*, 498 S.W.3d 37, 41 (Tex. 2016).

Section 51.014(a)(12) provides, "A person may appeal from an interlocutory order of a district court . . . that denies a motion to dismiss filed under Section 27.003." CIV. PRAC. § 51.014(a)(12). Therefore, whether we have jurisdiction over this appeal depends on whether there is an order denying a motion to dismiss filed under section 27.003.

The purpose of the TCPA is to encourage and safeguard the constitutional rights of persons, including the right to speak freely, while at the same time protecting the rights of a person to file meritorious lawsuits for demonstrable injury. *Id.* § 27.002. The TCPA provides an expedited procedure for dismissing a legal action that implicates the defendant's right of free speech when the plaintiff cannot establish the statute's threshold requirement of a prima facie case. *Sullivan v. Abraham*, 488 S.W.3d 294, 295 (Tex. 2016). A defendant seeking the TCPA's protections must comply with the requirements of timely moving for dismissal and obtaining a

[1] We notified the parties of the jurisdictional issue and, after initial letter briefing, we directed the parties to address the jurisdictional question in their appellate briefs.

hearing on the motion for dismissal. CIV. PRAC. §§ 27.003(b), .004(a); *see also Enriquez v. Livingston*, 400 S.W.3d 610, 619 (Tex. App.—Austin 2013, pet. denied) (generally, movant has burden to set hearing on motion because motions are usually handled by court clerk and trial court will probably be unaware that motion was filed). If the defendant complies with these requirements and the trial court denies the motion to dismiss, the defendant may bring an immediate appeal of the order. CIV. PRAC. § 51.014(a)(12). If the defendant complies with the TCPA's requirements but the trial court does not rule on the motion to dismiss within thirty days after the hearing on the motion to dismiss, "the motion is considered to have been denied by operation of law and the moving party may appeal." *Id.* § 27.008(a). Thus, the date of the hearing triggers the date when a motion to dismiss under chapter 27 will be considered to have been denied by operation of law.

Braun timely moved for dismissal of Gordon's suit under the TCPA. The act requires that a hearing on the motion "be set not later than the 60th day after the date of service of the motion . . . but in no event shall the hearing occur more than 90 days after service of the motion . . . ."[2] *Id.* § 27.004(a). Braun served Gordon with the motion on October 18, 2016. Therefore, the hearing had to occur no later than January 16, 2017. The docket sheet for this case shows the motion was set for a hearing on March 10, 2017, almost two months after the deadline for holding the hearing. Braun filed her notice of appeal on February 26, 2017, which stayed all further proceedings in the trial court pending resolution of this appeal. *See id.* § 51.014(b). Thus, there was no hearing on the motion to dismiss, and the trial court never expressly ruled on the motion.[3]

[2] There is an exception to the 90-day limit for holding the hearing: if the trial court grants discovery relevant to the motion to dismiss, then the hearing must be held within 120 days of service of the motion to dismiss. CIV. PRAC. § 27.004(c). The trial court did not grant discovery relevant to the motion to dismiss, so this exception does not apply.

[3] Braun states in her brief that she made numerous attempts to secure a timely hearing date, but the trial court was unable to provide a hearing date within the statutory period and was unwilling to refer the motion to an associate judge. However, these statements are not supported

The text of sections 27.008(a) and 51.014(a)(12) is clear. A movant for dismissal under section 27.003 may bring an interlocutory appeal from the express denial of the motion to dismiss or from the denial by operation of law resulting from the trial court's failure to rule on the motion within thirty days after the hearing. *Id.* §§ 27.008(a), 51.014(a)(12). If the trial court does not expressly deny the motion to dismiss and the motion to dismiss is not denied by operation of law because there was no hearing, then there is no order subject to an interlocutory appeal. *See Cuba v. Pylant*, 814 F.3d 701, 707 (5th Cir. 2016) ("[U]nder the TCPA framework, the 30-day deadline before a motion is deemed denied by operation of law runs only from the date of the hearing on the motion. But, because no such hearing was held in these cases, the TCPA motion was not denied by operation of law.").

Braun acknowledges that "a literal construction of [the] statute indicates that this court lacks jurisdiction to entertain an interlocutory appeal." Braun asks that we not apply the literal interpretation and instead read a provision into the statute that the motion is denied by operation of law if the trial court does not hold a hearing within the required time. Braun asserts that applying the literal interpretation will have absurd results.

The "absurd result" Braun asserts is that the trial court can deny a defendant the right to an early dismissal of a meritless and retaliatory suit by refusing to set the motion for a hearing or refer the case to a judge or associate judge to hear the motion. In support of this argument, Braun quotes from a Houston appellate case:

> The entire Act is directed toward the expeditious dismissal and appeal of suits that are brought to punish or prevent the exercise of certain constitutional rights. The distinction drawn by the legislature between extendable deadlines and firm deadlines—and more particularly, the mandatory deadline that applies to the trial

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by the record, and we cannot consider them. "[W]e do not consider factual assertions that appear solely in briefs and are not supported by the record." *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797 (Tex. 2008), (per curiam) (quoting *Marshall v. Hous. Auth. of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006)). Furthermore, Gordon stated in his appellee's brief that the record did not reflect that Braun requested a hearing within the required period. *See* TEX. R. APP. P. 38.1 ("In a civil case, the court will accept as true the facts stated unless another party contradicts them.").

> court's authority to rule on a motion to dismiss—would be meaningless if the trial court, acting sua sponte, could reverse the consequences imposed by statute for the failure to timely act.

Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC, 407 S.W.3d 398, 401 (Tex. App.—Houston [14th Dist.] 2013, no pet.). That case concerned a situation where the trial court signed an order purporting to grant the motion to dismiss when the motion had previously been denied by operation of law because the trial court did not rule on the motion within thirty days of the hearing. *Id.* at 399–400. The court of appeals concluded the trial court could not disregard the mandatory deadlines for ruling on the motion and issue an order granting the motion to dismiss after it was denied by operation of law. *Id.* at 402. The case did not involve a question of whether a literal interpretation of a statute leads to an absurd result.

We disagree with Braun's argument that the trial court's failure to have a hearing on the motion, which bars the trial court from ruling on the motion to dismiss, is an absurd result. The failure of a judge to follow a statute may be error, but it is not an absurd result of the literal interpretation of the statute. The statute requires a defendant seeking its protections to move for dismissal and obtain a hearing on the motion within certain clearly defined periods. The failure to meet these requirements results in the defendant forfeiting the statute's protections. *Cf. Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 312 (Tex. App.—Fort Worth 1988, writ denied) (party impliedly waived motion to transfer venue by failing to obtain timely hearing and ruling on motion, and trial court had jurisdiction to render summary judgment even though it had not ruled on venue motion). This result is consistent with the TCPA's second purpose, to "protect the rights of a person to file meritorious lawsuits for demonstrable injury." If the defendant fails in its responsibility to obtain a timely hearing on the motion to dismiss,[4]

[4] Whether a defendant is entitled to a writ of mandamus ordering the trial court to schedule a timely hearing if the trial court refuses to do so is not before us.

then the case can proceed to trial on the plaintiff's claims without the delay of an interlocutory appeal.

Braun also argues that the failure to deem a denial of the motion to dismiss from the trial court's failure to hold a hearing will have the absurd result that Gordon will be unable to pursue discovery on his claims before trial. Section 27.003 provides, "on the filing of a motion [to dismiss] under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss." CIV. PRAC. § 27.003(c). We agree with Braun that it would be absurd for a defendant to be able to bar a plaintiff from seeking discovery in the lawsuit simply by filing a motion to dismiss and not obtaining a timely hearing on the motion. However, we need not read into the statute a provision that the court's failure to hold a timely hearing on the motion to dismiss constitutes a denial of the motion by operation of law. Because the movant has the burden of obtaining a timely setting on the motion to dismiss, the more appropriate interpretation is to conclude that the movant's failure to have the case set for a timely hearing results in the movant forfeiting the TCPA's protections, and the case should continue as if the motion to dismiss was never filed.[5] *Cf. Grozier*, 744 S.W.2d at 312.

Braun requests in her brief that we convert the interlocutory appeal to a petition for writ of mandamus if we decline jurisdiction over the appeal. However, Braun did not state what relief she seeks. During oral argument, Braun's counsel stated that Braun does not want us to order the trial court to set the case for a hearing or to rule on the motion to dismiss. Instead, Braun wants us to rule on the motion to dismiss. A writ of mandamus is "[a] writ issued by a court to compel performance of a particular act by a lower court . . . [usually] to correct a prior action or failure to act." *Mandamus* BLACK'S LAW DICTIONARY (10th ed. 2014). Braun's

[5] In that situation, the trial court could still consider whether the motion to dismiss was frivolous or filed solely for delay and award costs and reasonable attorney's fees to a party responding to the motion to dismiss. *See* CIV. PRAC. § 27.009(b).

request that we rule on the motion to dismiss that was never ruled on by the trial court is not a proper matter for a writ of mandamus. *See Axelson v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (orig. proceeding) (noting that, as a general rule, mandamus is not available to compel an action that has not first been demanded and refused in the trial court).

Braun cites *In re Lipsky*, 411 S.W.3d 530 (Tex. App.—Fort Worth 2013, orig. proceeding), *mand. denied*, 460 S.W.3d 579 (Tex. 2015), in support of her argument that mandamus is appropriate in this case. In *Lipsky*, the court of appeals reviewed by mandamus the trial court's express, written denial of a motion to dismiss because, under the law at that time, the Fort Worth court had held it had jurisdiction to review an interlocutory order from a denial by operation of law of a motion to dismiss but did not have jurisdiction to review a written order denying a motion to dismiss. *See id.* at 538; *Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519, 524–25 (Tex. App.—Fort Worth 2012, pet. denied). In *Lipsky*, the court of appeals ruled on the trial court's express denial of the motion to dismiss, while in this case, there was no denial of the motion to dismiss. Moreover, the subsequent passage of section 51.014(a)(12) expressly provided for an interlocutory appeal of written orders denying a motion to dismiss under the TCPA, and defendants now have an adequate remedy at law under the facts of *Lipsky*. *See Bedford v. Spassoff*, 485 S.W.3d 641, 645 (Tex. App.—Fort Worth 2016), *rev'd on other grounds*, 520 S.W.3d 901 (Tex. 2017). Nothing in *Lipsky* or other cases indicates that review through a petition for writ of mandamus of the merits of a motion to dismiss is appropriate when the movant fails to obtain a written order or a timely hearing on the motion. Accordingly, we decline to convert the appeal into a petition for writ of mandamus.

We conclude there is no order subject to an interlocutory appeal and we lack jurisdiction over this appeal. We overrule Braun's first issue, and we do not reach her remaining issues.

CONCLUSION

We dismiss this appeal for want of jurisdiction.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MOLLY BRAUN, Appellant

No. 05-17-00176-CV V.

MARK GORDON, Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-07660.
Opinion delivered by Justice Myers. Justices Francis and Whitehill participating.

In accordance with this Court's opinion of this date, the appeal is **DISMISSED** for want of jurisdiction.

It is **ORDERED** that appellee MARK GORDON recover his costs of this appeal from appellant MOLLY BRAUN.

Judgment entered this 26th day of September, 2017.