

AFFIRMED and Opinion Filed May 29, 2020



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

No. 05-19-00647-CV

**UNITED DEVELOPMENT FUNDING, L.P., UNITED DEVELOPMENT
FUNDING II, L.P., UNITED DEVELOPMENT FUNDING III, L.P.,
UNITED DEVELOPMENT FUNDING, IV, and UNITED DEVELOPMENT
FUNDING INCOME FUND V, Appellants**

V.

MEGATEL HOMES III, LLC, Appellee

**On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-04147**

MEMORANDUM OPINION

**Before Justices Schenck, Osborne, and Reichek
Opinion by Justice Reichek**

United Development Funding, L.P., United Development Funding II, L.P., United Development Funding III, L.P., United Development Funding IV, L.P., and United Development Funding Income Fund V (the “UDF Parties”) bring this interlocutory appeal of the trial court’s denial of their motion to dismiss filed under the Texas Citizen’s Participation Act (“TCPA”). The UDF Parties contend the trial court erred in refusing to dismiss certain claims brought against them by Megatel Homes III, LLC because (1) the claims are based on, related to, or in response to the

UDF Parties' exercise of their right to free speech, (2) Megatel's evidence of damages was wholly conclusory, and (3) the UDF Parties conclusively showed that Megatel's claims were barred by the statute of limitations. The UDF Parties further contend they are entitled to an award of attorney's fees under the TCPA. Because we conclude the UDF Parties failed to show the TCPA applies to the challenged claims, we affirm the trial court's order.

Background

For purposes of the TCPA, the basis of a legal action is determined by the plaintiff's allegations. *See Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). Accordingly, our factual background for this opinion is taken from Megatel's pleadings and the affidavits it filed in connection with the UDF Parties' motion to dismiss.

Megatel is a Dallas-area homebuilder founded by two brothers, Aaron and Zach Ipour. The UDF Parties are a group of related funds that provide financing for real estate development and the construction of single-family homes. The UDF Parties raise money through investor capital and bank loans and then lend that money to developers and builders.

In February 2014, Megatel entered into a contract with Shahan Prairie, LP, a land development entity controlled by Centurion American Development Group ("Centurion"). Under the terms of the contract, Shahan Prairie agreed to develop, and Megatel agreed to purchase, 110 lots in Oak Point, Texas. The contract was

later amended to add an additional 91 lots. The contract required Shahan Prairie to take certain steps to develop the lots, including leveling, paving, and installing operable utility systems, before the purchase would close. Shahan Prairie obtained the money to develop the property through loans from one of the UDF Parties.

Megatel entered into similar land development and purchase contracts with four entities owned or controlled by Buffington Land Group, Ltd. These entities were: PH SPMSL, LP (“SPMSL”); BHM Highpointe, Ltd. (“BHM”); BLD LAMP Section 3, LLC (“LAMP”); and BLD Scenic Loop, LLC (“Scenic Loop”) (collectively the “Buffington Entities”). As with the Shahan Prairie deal, BHM, LAMP, and Scenic Loop borrowed money from one or more of the UDF Parties to finance the development of the property being purchased by Megatel. Megatel asserts that neither Shahan Prairie nor the Buffington Entities took any significant steps to develop the land made the subject of their contracts. Megatel further asserts the UDF Parties did not provide BHM, LAMP, or Scenic Loop with sufficient funds to perform their development obligations.

In late 2015, wealth management company Hayman Capital Management, L.P., began publishing reports critical of the UDF Parties. Hayman outlined ways in which the UDF Parties allegedly operated in a manner similar to a Ponzi scheme by using money from new investors to repay existing investors. In February 2016, the Federal Bureau of Investigation raided the UDF Parties’ headquarters.

During this same time period, Jeff Shirley, chief financial officer for Centurion, went to Megatel's offices to speak with the Ipour brothers. According to Aaron Ipour, Shirley told him the UDF Parties wanted Shahan Prairie to terminate its contract with Megatel so that Shahan Prairie could sell the undeveloped land to D.R. Horton, another homebuilder, immediately for cash. The asset manager for the UDF Parties, Brandon Jester, also contacted the Ipours and demanded Megatel agree to terminate the Shahan Prairie contract. Jester stated that terminating the contract was important to Megatel's relationship with the UDF Parties on other, unrelated projects. The Ipours refused to comply with Jester's demand.

After the Ipours repeatedly refused to terminate the Shahan Prairie contract, Mehrdad Moayedi, founder and CEO of Centurion, contacted Megatel and told Aaron that Jester had asked him to push Megatel to terminate several contracts, including the Shahan Prairie contract and the contracts with the Buffington Entities. Moayedi said the UDF Parties would force Centurion and its affiliated companies to send notices of default to Megatel on other projects if Megatel did not agree. The UDF parties allegedly stated that, if Megatel did not agree to the terminations, Megatel was "playing with fire."

On March 29, 2016, Centurion sent Megatel a signed notice of cancellation of the Shahan Prairie contract. The notice was backdated to June 3, 2014, and stated the contract had been terminated at Shahan Prairie's discretion.

Shortly thereafter, the UDF Parties began emailing the Buffington Entities about terminating their contracts with Megatel. Megatel alleged that, upon information and belief, the UDF Parties wanted the Buffington Entities to prematurely repay their loans, thereby giving the UDF Parties additional cash reserves. In September 2016, Jester contacted Aaron and demanded that Megatel agree to terminate the contracts with the Buffington Entities so the undeveloped land could be sold immediately to D.R. Horton or another buyer. Jester sent Aaron an email on September 30 asking him to confirm Megatel's agreement to terminate the Buffington contracts.

On October 13, 2016, Jester and Todd Etter, chairman of the UDF Parties' holding company, went to Megatel's offices to meet with the Ipours. Etter indicated the UDF Parties were attempting to resolve proceedings brought against them by the SEC following the allegations of financial mismanagement made by Hayman. Etter repeated the demand that Megatel terminate its agreements with the Buffington Entities. According to the Ipours, they ultimately agreed to terminate the Buffington contracts due to the pressure put on them by the UDF Parties. The Ipours further stated that all the discussions regarding termination of the Buffington contracts were conducted with Jester and Etter, and they never spoke with anyone at Buffington directly.

Megatel filed this lawsuit against the UDF Parties in March 2018, alleging claims for tortious interference with the Shahan Prairie contract. Megatel later added

claims for tortious interference with the Buffington contracts. The UDF Parties filed a motion to dismiss under the TCPA directed solely Megatel’s claims related to the Buffington contracts. The UDF Parties contended those claims were based on, related to, or in response to the UDF Parties’ exercise of their right to free speech. They further contended Megatel could not present clear and specific evidence of each element of the Buffington contract claims. Megatel responded arguing, among other things, the TCPA did not apply because any communications associated with the Buffington contract claims were not made in connection with a matter of public concern. The trial court denied the UDF Parties’ motion to dismiss, and this appeal followed.

Analysis

The TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them. *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). Under the TCPA, a party may file a motion to dismiss a legal action that is based on, related to, or is in response to that party’s exercise of its right of free speech. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a)¹; *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 131 (Tex. 2019). A “legal action” can consist of an

¹ The Texas Legislature amended the TCPA effective September 1, 2019. Those amendments apply to “an action filed on or after” that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687. Because this lawsuit was filed before September 1, 2019, the amendments do not apply to this case. *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. All citations to the TCPA are to the version before the 2019 amendments took effect.

entire lawsuit or a subsidiary part. *Creative Oil & Gas*, 591 S.W.3d at 131. To be entitled to dismissal, the movant must first show the TCPA applies by demonstrating the legal action is based on, related to, or is in response to the movant's exercise of a first amendment right. *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 469 (Tex. App.—Houston [1st Dist.] 2020, pet. filed). As stated above, the basis of a legal action is determined solely by the plaintiff's allegations. *See Hersh*, 526 S.W.3d at 467.

We review de novo the trial court's ruling on a motion to dismiss under the TCPA. *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 424 (Tex. App.—Dallas 2019, pet. denied). In conducting this review, we consider, in the light most favorable to the non-movant, the pleadings and any supporting and opposing affidavits stating the facts on which the claims or defenses are based. *Fishman v. C.O.D. Capital Corp.*, No. 05-16-00581-CV, 2017 WL 3033314, at *5 (Tex. App.—Dallas July 18, 2017, no pet.) (mem. op.); *see also* TEX. CIV. PRAC. & REM. § 27.006(a). In other words, we read both the petition and the affidavits in the manner most sympathetic to the TCPA's non-applicability. *Riggs & Ray, P.C. v. State*, No. 05-17-00973-CV, 2019 WL 4200009, at *6 (Tex. App.—Dallas Sept. 5, 2019, no pet.) (mem. op).

For purposes of the TCPA, the “exercise of the right of free speech” means a communication made in connection with a “matter of public concern.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). Section 27.001(7) of the TCPA defines a

“matter of public concern” to include issues related to health or safety; environmental, economic, or community well-being; the government, a public official or public figure; or a good, product, or service in the marketplace. *Id.* § 27.001(7). The UDF Parties contend that Megatel’s claims regarding the Buffington contracts are based on, related to, or in response to the UDF Parties’ alleged communications pressuring the Buffington Entities and Megatel to terminate the contracts between them. The UDF Parties argue these communications were made in connection with a matter of public concern because they relate to the economic well-being of the UDF Parties and their investors, as well as to goods or services in the marketplace.

As the Texas Supreme Court has noted, not every communication related to one of the broad categories set out in section 27.001(7) always regards a matter of public concern. *Creative Oil & Gas*, 591 S.W.3d at 137. Communications with a limited business audience concerning a private contract dispute do not relate to a matter of public concern under the TCPA. *Id.* at 136.

The UDF Parties assert that Megatel’s pleadings and evidence show “the UDF Parties’ motivation in encouraging the termination of the Megatel-Buffington contracts was to quell investor fears in the face of incredible public scrutiny from the media, on the internet, and by federal law enforcement agencies.” But while the alleged communications may have been motivated by a climate of public scrutiny created by criticisms of the UDF Parties’ business practices, the communications at

issue did not in any way address the substance of either those criticisms or the resulting public scrutiny. Instead, they addressed only the termination of contracts between Megatel and the Buffington Entities as a means for the UDF Parties to achieve liquidity which is not a matter “of political, social, or other concern to the community.” *See id.* at 135. To be entitled to protection, the communication itself must address a subject of legitimate news interest; that is a subject of general interest and of value and concern to the public. *Gardner v. Tuskey*, No. 01-19-00599-CV, 2020 WL 2069809, at *4 (Tex. App.—Houston [1st Dist.], April 30, 2020, no pet. h.) (mem. op.); *Erdner v. Highland Park Emergency Ctr.*, 580 S.W.3d 269, 276 (Tex. App.—Dallas 2019, pet. denied) (communication itself must relate to matter of public concern). The fact that the UDF Parties were the subject of public scrutiny does not somehow transform their communications concerning private business matters into an exercise of free speech.

As for the UDF Parties’ argument that their alleged communications related to goods or services in the marketplace, the supreme court recently explained that the TCPA’s reference to a “good, product, or service” does not swallow up every contract dispute arising from a communication about the contract.” *Creative Oil & Gas*, 591 S.W.3d at 134. The UDF Parties contend they “had a right to allegedly communicate to Megatel and to the Buffington Entities that they allegedly needed the Buffington Entities to repay its loans and that they allegedly needed the Buffington Entities to terminate the Megatel-Buffington Contracts in order to do so.”

They argue these communications are entitled to protection because they generally relate to the UDF Parties’ and the Buffington Entities’ ability to provide services in the marketplace. This Court has repeatedly stated, however, that construing the TCPA to denote all private business discussions as a “matter of public concern” if the business offers a good, service, or product in the marketplace is a potentially absurd result that was not contemplated by the Legislature. *See Erdner*, 580 S.W.3d at 277. Every contractual dispute has the potential to affect a party’s economic circumstances and, consequently, its ability to provide goods, products, or services in the marketplace. That does not mean communications about a private contract are a matter of public concern. *See Creative Oil & Gas*, 591 S.W.3d at 137.

We conclude the UDF Parties failed to demonstrate that Megatel’s claims are based on, related to, or in response to the UDF Parties’ exercise of their right of free speech. Accordingly, the trial court did not err in denying their motion to dismiss under the TCPA. Because of our resolution of this issue, it is unnecessary for us to address the UDF Parties’ remaining issues and arguments.

We affirm the trial court’s order.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE



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

JUDGMENT

UNITED DEVELOPMENT
FUNDING, L.P. ET AL, Appellants

No. 05-19-00647-CV V.

MEGATEL HOMES III, LLC,
Appellee

On Appeal from the 298th Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-18-04147.

Opinion delivered by Justice
Reichek. Justices Schenck and
Osborne participating.

In accordance with this Court's opinion of this date, the order of the trial court denying the motion to dismiss filed by appellants UNITED DEVELOPMENT FUNDING, L.P., UNITED DEVELOPMENT FUNDING II, L.P., UNITED DEVELOPMENT FUNDING III, L.P., UNITED DEVELOPMENT FUNDING, IV, and UNITED DEVELOPMENT FUNDING INCOME FUND V pursuant to the Texas Citizen's Participation Act is **AFFIRMED**.

It is **ORDERED** that appellee MEGATEL HOMES III, LLC recover its costs of this appeal from appellants UNITED DEVELOPMENT FUNDING, L.P., UNITED DEVELOPMENT FUNDING II, L.P., UNITED DEVELOPMENT FUNDING III, L.P., UNITED DEVELOPMENT FUNDING, IV, and UNITED DEVELOPMENT FUNDING INCOME FUND V.

Judgment entered May 29, 2020