Opinion issued July 30, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00674-CV

GRIFFITH TECHNOLOGIES, INC., BENNETT W. GRIFFITH, JENNIFER GRIFFITH, BWJAG ENTERPRISES, LLC, PARTNERS N PRODUCTION, LLC, TONY LI, AND JIMMY LEGG, Appellants

V.

PACKERS PLUS ENERGY SERVICES, (USA), INC., Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2016-67543

MEMORANDUM OPINION

In this interlocutory appeal,[1] appellants, Griffith Technologies, Inc. ("GTI"), Bennett W. Griffith ("Bennett"), Jennifer Griffith ("Jennifer"), BWJAG Enterprises, LLC ("BWJAG"), and Jimmy Legg (collectively, the "Griffith Parties"), challenge the trial court's denial of their motion to dismiss the claims of appellee, Packers Plus Energy Services, (USA), Inc. ("Packers Plus"), under the Texas Citizens Participation Act ("TCPA").[2] In two issues, the Griffith Parties contend the trial court erred in denying their motion to dismiss.[3]

We affirm.

Background

In their first amended petition, GTI, a corporation operating in the oil-and-gas industry, and Bennett allege that GTI owned a fifty-percent interest in ReTek Energy Products, L.L.C. ("ReTek"), a vulcanized rubber and swellable tools manufacturer. In January 2014, GTI agreed to sell ReTek to Packers Plus for $2,856,750. As payment for its interest, GTI received a promissory note from Packers Plus. The

---

1 *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.008, 51.014(a)(12).

2 *See id.* §§ 27.001–.011. The Legislature amended the TCPA in June 2019, but the amendments apply only to an action filed on or after September 1, 2019. The 2019 amendments to the TCPA do not apply here, and the TCPA as it existed before September 1, 2019 is referenced in this memorandum opinion.

3 Partners N Production, LLC ("PNP") and Tony Li also appealed the trial court's denial of the motion to dismiss. During the pendency of the appeal, however, PNP and Li resolved their dispute with Packers Plus. On July 2, 2019, their appeal was dismissed on PNP and Li's motion in a separate order.

promissory note required Packers Plus to pay in installments. GTI and Bennett allege that Packers Plus breached its agreement with GTI by not completing its payment obligation.

GTI and Bennett also alleged that Bennett, in connection with the Packers Plus transaction, agreed to work for Packers Plus and signed an Employment Agreement and a Non-Solicitation and Non-Competition Agreement. Bennett's employment agreement was for a three-year-initial term, and it authorized a retention bonus at the end of that term. Bennett was fired on September 1, 2016, before the completion of his three-year-initial term on December 31, 2016. Packers Plus sent Bennett a letter stating that his employment had been terminated, it would not pay his retention bonus, and it would not make the final installment payment to GTI. Packers Plus also demanded the return of the portion of the purchase price it had already paid to GTI but stated that it intended to keep the interest in ReTek.

GTI and Bennett attached a copy of the letter to Bennett from Packers Plus. The letter states that Bennett's employment agreement required him to "faithfully and diligently serve [Packers Plus] to the best of [his] ability in a management capacity," to "devote [his] full working time and attention to the business and affairs of [Packers Plus]," and to "not engage in or associate [himself] with any other business or enterprise, either directly or indirectly, as an employee, contractor or consultant during [his] employment by Packers Plus." Also, the letter states that

Bennet's non-solicitation and non-competition agreement required him "to avoid carrying on or engaging in a 'competing business' . . . while employed by Packers Plus."

GTI and Bennett brought claims against Packers Plus[4] for "[a]ction on the Note and Guaranty," breach of contract, and a declaratory judgment.

Packers Plus answered, generally denying the allegations in GTI and Bennett's petition and asserting certain affirmative defenses. Packers Plus noted in its answer that it had contemporaneously filed suit against the Griffith Parties and that suit was pending in a separate Harris County district court. The parties had requested consolidation of the cases.

Packers Plus filed counterclaims[5] against the Griffith Parties.[6] Packers Plus alleged that it is a corporation operating in the oil-and-gas industry. The counterclaims allege that, in January 2014, Packers Plus agreed to purchase GTI's ownership interests in CMC Machine Works ("CMC"), a downhole equipment and tools manufacturer, and ReTek. Under the terms of the agreement, Packers Plus

---

4 GTI and Bennett also brought claims against Packers Plus Energy Services, Inc., which is not a party to this appeal.

5 *Counterclaim*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining counterclaim as "[a] claim for relief asserted against an opposing party after an original claim has been made; . . . a defendant's claim in opposition to or as a setoff against the plaintiff's claim").

6 Packers Plus titled its counterclaims filing as its First Amended Petition.

agreed to pay GTI about $4,500,000. Packers Plus paid part of the purchase price at the closing of the transaction and delivered a promissory note securing its obligation to pay GTI the remainder of the purchase price in two installments. The promissory note was guaranteed by a Packers Plus affiliate.

In connection with this transaction, Bennett and Jennifer, who were both employed by ReTek and involved with the operation of CMC and ReTek, entered into employment agreements with Packers Plus. Bennett's Employment Agreement was for a specified term, and Bennett was to serve as the "Manager of Manufacturing Operations (Swellables)" for Packers Plus. In that role, he "agreed to observe a duty of loyalty to Packers Plus . . . and to devote [his] full time and energy to working at and promoting exclusively the interests of Packers Plus." Bennett also executed a Non-Competition and Non-Solicitation Agreement providing that during the time of his employment with Packers Plus and for a specified time after the end of his employment, he would not compete with Packers Plus or solicit its customers. According to Packers Plus, the non-competition and non-solicitation agreement was intended to protect Packers Plus's investment in CMC and ReTek.

Jennifer's employment agreement was also for a specified term, and Jennifer was to serve as the "Supply Chain Manager (Swellables)" for Packers Plus. Jennifer also "agreed to observe a duty of loyalty to Packers Plus . . . and to devote [her] full

time and energy to working at and promoting exclusively the interests of Packers Plus."

Packers Plus alleged that it made all but the last payment to GTI for its purchase of ownership interests in CMC and ReTek. According to Packers Plus, while Bennett and Jennifer were its employees in 2014, they began working with Jimmy Legg and Tony Li on a start-up coupling manufacturing company, Partners N Production ("PNP"), and formed another entity, BWJAG, for the purpose of holding an interest in PNP. Packers Plus alleged that PNP holds "itself out as engaging in business activities that are competitive with at least one of the two entities" Packers Plus purchased.

In 2015, Jennifer went to work for PNP. Bennett did not resign from his job with Packers Plus, but according to Packers Plus, he was busy "promoting the interests of PNP, including helping it to establish a website" and securing a commercial office space. Packers Plus alleged that while Bennett was still in its employ, he received compensation from PNP and used a Packers Plus computer to access PNP files. It is further alleged that:

> [Bennett] attended a lunch on July 22, 2016 (while employed by Packers Plus [ ]) . . . and wore clothing featuring the PNP logo. While at that restaurant, [Bennett] met with individuals dressed in business suits to discuss promotion of PNP's business. . . . Li (90% owner of PNP) and [an investor] were at this lunch meeting. Soon after this incident, Packers Plus . . . discovered that [Bennett]'s picture was on PNP's website.

Concluding that these actions violated Bennett's agreements with Packers Plus, Packers Plus terminated Bennett's employment and advised that it would not pay his retention bonus or make the final purchase price installment payment to GTI.

Packers Plus brought counterclaims against the Griffith Parties as well as PNP and Li for breach of contract, breach of covenant not to compete, fraud, fraudulent inducement, breach of fiduciary duty, tortious interference with a contract, civil conspiracy, inducement of breach of fiduciary duty, and aiding and abetting.

Within sixty days of Packers Plus's filing its counterclaims, the Griffith Parties moved to dismiss Packers Plus's claims against them under the TCPA.[7] The Griffith Parties argued that Packers Plus's counterclaims were a "legal action" subject to dismissal because they were based on, related to, or are in response to the Griffith Parties' exercise of their right of association and their right of free speech.[8] More specifically, the Griffith Parties asserted that a "business enterprise involving multiple people qualifies under the definition of a right of association in the TCPA" and "[c]ommunications among [them] within a business enterprise or in furtherance of a business enterprise constitute communications under the TCPA."

---

7 *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011. PNP and Li joined the Griffith Parties' motion to dismiss.

8 *See id.* § 27.003(a).

In response, Packers Plus argued that the trial court should deny the Griffith Parties' motion to dismiss because they had missed their deadline to file the motion as more than sixty days had passed between the filing of Packers Plus's original pleading (in the original separate lawsuit) and the filing of the Griffith Parties' motion. Packers Plus also asserted that the Griffith Parties had failed to meet their burden to show that the TCPA applies to its counterclaims, its counterclaims were not subject to dismissal because they fell within the statutory exemption for commercial speech,[9] and applying the TCPA would be unconstitutional.

After a hearing, the trial court denied the Griffith Parties' motion to dismiss. The trial court concluded, as to GTI, Bennett, Jennifer, and BWJAG, that their motion was untimely and, as to Legg, that he had not shown by a preponderance of the evidence that the TCPA applied to Packers Plus's counterclaims.

Standard of Review

We review de novo the denial of a TCPA motion to dismiss. *Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Whether the TCPA applies is an issue of statutory interpretation that we also review de novo. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018).

---

9 *See id.* § 27.010(b).

Dismissal under the TCPA

In their first and second issues, the Griffith Parties argue that the trial court erred in denying their motion to dismiss Packers Plus's counterclaims because their motion to dismiss was timely filed and they satisfied their initial burden to show that the TCPA applies.[10]

The TCPA "is a bulwark against retaliatory lawsuits meant to intimidate or silence citizens on matters of public concern." *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019). It is intended "to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *In re Lipsky*, 460 S.W.3d 584, 589 (Tex. 2015).

A party invoking the TCPA's protections by filing a motion to dismiss must show by a preponderance of the evidence that the TCPA applies. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003; *see also id.* § 27.005(b). The version of the TCPA that applies here, mandates the dismissal of a legal action that is based on, related to, or is in response to the moving party's exercise of (1) the right of free speech; (2) the right to petition; or (3) the right of association. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b); *In re Lipsky*, 460 S.W.3d at 586–87.

---

[10] Though not labeled as "Issues Presented," the Griffith Parties' brief also includes an argument against the application of the commercial-speech exemption and against this Court's consideration of Packers Plus's constitutional challenge to the TCPA. We need not reach these arguments given our disposition of the Griffith Parties' second issue. *See* TEX. R. APP. P. 47.1.

Upon this initial showing, the burden shifts to the non-movant to establish "by clear and specific evidence a prima facie case for each essential element" of its claim. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c). The non-movant can avoid the burden-shifting requirements, however, by showing that one of the TCPA's exceptions applies, such as the commercial-speech exemption. *See id.* § 27.010(b).

If the trial court dismisses the legal action under the TCPA, the court "shall award" to the moving party:

> (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and
>
> (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

Id. § 27.009(a).

In their second issue, the Griffith Parties assert that they satisfied their initial burden to show, by a preponderance of the evidence, that Packers Plus's counterclaims are based on, related to, or are in response to the Griffith Parties' exercise of their right of association and their right of free speech.[11] Applying this Court's en banc decision in *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457 (Tex. App.—Houston [1st Dist.] 2020, pet. filed), we disagree.

---

[11] The Griffith Parties do not assert that Packers Plus's counterclaims are based on, related to, or are in response to the Griffith Parties' right to petition.

A. Right of Association

When this suit was filed, the TCPA defined the "exercise of the right of association" as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2). In their motion to dismiss, the Griffith Parties asserted that Packers Plus's counterclaims are based on, related to, or are in response to their various alleged communications about the establishment and promotion of another business enterprise, PNP; and, the counterclaims, therefore, implicated the right of association. More specifically, the Griffith Parties asserted that Packers Plus's allegations of "illicit competition through helping establish a website, receiving emails and other files, preparing building plans, and meeting to further the business interests of the enterprise [PNP] all involve communication, as defined in the TCPA, which took place as part of [the Griffith Parties'] right of association, as defined in the TCPA." (Internal footnotes omitted.) According to the Griffith Parties, these alleged communications "within a business enterprise or in furtherance of a business enterprise" implicate the right of association.

The Griffith Parties rely on four decisions from our sister appellate courts in Houston and Austin to support their position. *See Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op.); *Toth v. Sears Home*

Improvement Prods., 557 S.W.3d 142 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dism'd); *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.). We do not find these cases instructive on the issue of whether Packers Plus's counterclaims are based on, related to, or are in response to the Griffith Parties' exercise of the right of association. Two of the cited cases—*Toth* and *Kinney*—concern the TCPA's definition of the right of free speech and the application of the commercial-speech exemption. *See Toth*, 557 S.W.3d at 150–56; *Kinney*, 2014 WL 1432012 at *4–8. They are not decisions addressing the right of association. *See Toth*, 557 S.W.3d at 150–56; *Kinney*, 2014 WL 1432012 at *4–7. The other cases—*Abatecola* and *Elite Auto Body*—are right-of-association cases, but this Court recently disagreed with their holdings in *Gaskamp*. *See* 596 S.W.3d at 471–75.

Citing *Abatecola*, *Elite Auto Body*, and additional right-of-association cases, this Court acknowledged other courts' holdings that "the TCPA's right of association protects alleged conduct by tortfeasors accused of . . . conspiring together to advance tortious conduct in furtherance of their own business interests." *Id.* at 471. We observed: "The courts indicated—without in-depth discussion—that the 'common interests' element of the exercise of the right of association was

satisfied by the private business interests being advanced through the tortfeasors' tortious conduct." *Id.* at 472 (citing *Abatecola*, 2018 WL 3118601, at *8; *Elite Auto Body*, 520 S.W.3d at 205). But we declined to adopt such an expansive reading of the "common interest" element of the right of association. *Id.* at 473–76.

After considering the ordinary meaning of the word "common," the purpose of the TCPA's statutory scheme, and recent amendments to the TCPA that defined "common interests" as those "relating to a governmental proceeding or matter of public concern," this Court concluded that, "with respect to the pre-amendment version of the TCPA, the proper definition of 'common' in the phrase 'common interests' is 'of or relating to a community at large: public.'" *Id.* at 476. Because the allegations in *Gaskamp* "involved misappropriating . . . trade secrets and conspiring to commit related torts, benefit[ing] only the five alleged tortfeasors," and the non-movant's pleading did not allege any "public or community interests," the movants did not meet their burden of showing, by a preponderance of the evidence, that the non-movant's suit was based on, related to, or was in response to the movants' exercise of the right of association. *Id.*

The same is true in this case. Packers Plus's counterclaims are all based on alleged breaches of promises made and duties incurred in connection with the sale of CMC and ReTek through the Griffith Parties' joint conduct in developing and promoting a competing business enterprise. No "public or community interests" is

alleged. We thus conclude that the Griffith Parties did not meet their burden of showing, by a preponderance of the evidence, that Packers Plus's counterclaims are based on, related to, or are in response to an exercise of the Griffith Parties' right of association.

B. Right of Free Speech

The Griffith Parties also assert that Packers Plus's counterclaims are based on the exercise of their right of free speech. The TCPA defines the "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). When this suit was filed, the TCPA defined "matter of public concern" to include "an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7).

In their motion to dismiss, the Griffith Parties argued that the TCPA applies to Packers Plus's counterclaims because Packers Plus seeks to recover for the Griffith Parties' "activities in building a website, or [Bennett], and others', efforts to provide a good or service in the marketplace," and "[c]ommunications and statements made between [the Griffith Parties], even if never published, in their effort to do so are protected free speech under the TCPA." The Griffith Parties acknowledged that "[a]lthough the content of the website is arguably directed to

potential customers, the allegedly tortious and improper conduct did not arise out of the subject/content of any statement on the website but, instead, the allegedly tortious and improper conduct arose as a result of [Bennett]'s supposed association with creating the website with other PNP representatives."

This Court also addressed this issue in *Gaskamp*, in which we stated:

> Contrary to [the movants'] reading of the statute, "not every communication related somehow to one of the broad categories set out in section 27.001(7) always regards a matter of public concern." "The words 'good, product, or service in the marketplace' . . . do not paradoxically enlarge the concept of 'matters of public concern' to include matters of purely private concern." "[T]he 'in the marketplace' modifier suggests that the communication must have some relevance to a public audience of potential buyers or sellers." Although the Supreme Court of Texas has "previously held that private communications are sometimes covered by the TCPA[,] . . . [t]hese prior cases involved environmental, health, or safety concerns that had public relevance beyond the pecuniary interests of the private parties involved."

596 S.W.3d at 476 (internal citations omitted). Because "the internal communications among [the movants] and the other tortfeasors—through which they allegedly misappropriated, shared, and used [the nonmovant's trade secrets], breached their fiduciary duties, and conspired to further their business venture—had no potential impact on the wider community or a public audience of potential buyers or sellers," the Court concluded in *Gaskamp* that the movants did not carry their burden of showing their internal communications were "made in connection with a matter of public concern." *Id.* at 477. The communications had "no public relevance beyond the pecuniary interests of the private parties." *Id.*; *see also Creative Oil &*

Gas, LLC v. Lona Hills Ranch, LLC, 591 S.W.3d 127, 137 (Tex. 2019) ("A private contract dispute affecting only the fortunes of the private parties involved is simply not a 'matter of public concern' under any tenable understanding of those words.").

The same is true in this case. While the internal or private communications between the Griffith Parties regarding the development and promotion of PNP might be protected by the TCPA, *see ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901 (Tex. 2017), those communications must nonetheless relate to a matter of public concern. *See Gaskamp*, 596 S.W.3d at 476–77. The record does not indicate that the communications had any public relevance "beyond the pecuniary interest of the private parties." *See id.* at 477. As such, the communications do not involve "a matter of public concern" as required by Texas Civil Practices and Remedies Code section 27.001(7)(E). We thus conclude that the Griffith Parties did not meet their burden of showing, by a preponderance of the evidence, that Packers Plus's counterclaims are based on, related to, or are in response to an exercise of the Griffith Parties' right of free speech.

We hold that the trial court did not err in denying the Griffith Parties' motion to dismiss.

We overrule the Griffith Parties' second issue. We need not address the Griffith Parties' first issue. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the trial court's order denying the Griffith Parties' TCPA motion to dismiss.

Julie Countiss
Justice

Panel consists of Justices Goodman, Hightower, and Countiss.