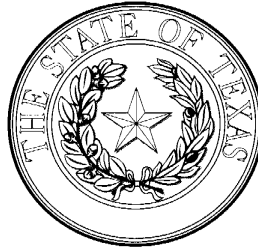


Opinion issued April 28, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00145-CV

DAVID ZARAGOZA CASILLAS, Appellant
V.
M & S CONCRETE, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2018-75269

MEMORANDUM OPINION

In this interlocutory appeal,¹ appellant, David Zaragoza Casillas, challenges the trial court's denial of his motion to dismiss² the claims of appellee, M & S

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

² See *id.* § 27.003(a); see also *id.* § 27.005.

Concrete, pursuant to the Texas Citizens Participation Act (“TCPA”).³ In three issues, Casillas contends that the trial court erred in denying his motion to dismiss.

We dismiss the appeal for lack of jurisdiction.⁴

Background

In its first amended petition, M & S Concrete, a contractor providing services related to the preparation and installation of concrete work, alleged that pursuant to an employment contract dated January 1, 2018, it employed Casillas as a superintendent. The employment contract contained a provision which stated that Casillas could not:

directly or indirectly, disclose or communicate to any person, corporation, firm, or entity, any information of any kind, nature or description concerning any matter reflecting on or relating to the business of [M & S Concrete], including, but not limited to, the business of preparation and installation of concrete work, the names of any of [M & S Concrete’s] customers, the prices [M & S Concrete] obtains or has obtained or the prices it has quoted for its services, or any other information concerning the business of [M & S Concrete], its operations, plans, processes, trade secrets or any other data of any kind, nature or description [(the “confidential information”)].

³ *See id.* §§ 27.001–.011.

⁴ In accordance with Texas Rule of Appellate Procedure 42.3, we provided Casillas notice of our intention to dismiss his appeal for lack of jurisdiction. *See* TEX. R. APP. P. 42.3(a). On March 10, 2020, Casillas filed his “Response to Court Notice and Restatement of Appellate Jurisdiction,” asserting that this Court “has jurisdiction to hear this case under Tex. Civ. Prac. & Rem. Code § 27.008(a), Tex. Civ. Prac. & Rem. Code § 51.014(a)(12), and Tex. R. App. P. 26.1(b).” We have reviewed and considered Casillas’s response in connection with his appeal.

Later, Casillas resigned from M & S Concrete and “took a similar position” with Tealstone Residential Concrete, Inc. (“Tealstone Residential”), a purported direct competitor of M & S Concrete. Casillas then used M & S Concrete’s confidential information to assist Tealstone Residential to “compete wrongfully” with M & S Concrete. According to M & S Concrete, Casillas appropriated its confidential information and solicited its customers and employees. It brought claims against him for breach of contract and breach of fiduciary duty and sought injunctive relief.

Casillas answered, generally denying the allegations in M & S Concrete’s petition and asserting various affirmative defenses. Casillas moved to dismiss M & S Concrete’s claims against him pursuant to the TCPA,⁵ arguing that M & S Concrete’s claims should be dismissed because they were “based on, related to, or in response to [Casillas’s] exercise of his right to free speech and[] his right of association,” M & S Concrete could not “establish by clear and specific evidence a prima facie case for each essential element of its claims,” and “even if [M & S Concrete] could establish by clear and specific evidence a prima facie case for its . . . claims[,] . . . [Casillas] [could] establish[] by a preponderance of the evidence all of the elements of its affirmative defense of lack of consideration.”

⁵ See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a).

At the conclusion of a hearing on Casillas’s TCPA motion to dismiss,⁶ the trial court orally denied the motion.

Jurisdiction

“[C]ourts always have jurisdiction to determine their own jurisdiction.” *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 146 n.14 (Tex. 2012) (internal quotations omitted); *see also Royal Indep. Sch. Dist. v. Ragsdale*, 273 S.W.3d 759, 763 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (jurisdiction fundamental in nature and cannot be ignored). An appellate court must determine, even sua sponte, the question of its jurisdiction; the lack of jurisdiction cannot be ignored simply because the parties do not raise the issue. *Walker Sand, Inc. v. Baytown Asphalt Materials, Ltd.*, 95 S.W.3d 511, 514 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Whether we have jurisdiction is a question of law, which we review de novo. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). If this is an appeal over which we have no jurisdiction, it must be dismissed. *Ragsdale*, 273 S.W.3d at 763.

Generally, appeals may be taken only from final judgments. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). That said, interlocutory orders may be appealed if permitted by statute. *Koseoglu*, 233 S.W.3d at 840; *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001). We must “strictly apply statutes

⁶ *See id.* § 27.004.

granting interlocutory appeals because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable.” *CMH Homes v. Perez*, 340 S.W.3d 444, 447–48 (Tex. 2011); *see also Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 886 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

The TCPA allows a party to “file a motion to dismiss [a] legal action” if it is “based on or in response to [the] party’s exercise of the right of free speech, right to petition, or right of association.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a); *In re Estate of Calkins*, 580 S.W.3d 287, 293–94 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (“Section 27.003 provides a mechanism for the 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, right to petition, or right of association.’”); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). Pursuant to Texas Civil Practice and Remedies Code section 27.008(a), when a trial court fails to timely rule on a TCPA motion to dismiss, the motion is considered to have been denied by operation of law and the moving party may file an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(a); *Clark v. Paddington British Private Sch., Inc.*, No. 09-16-00056-CV, 2016 WL 4247963, at *1 (Tex. App.—Beaumont Aug. 11, 2016, no pet.) (mem. op.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(a) (“The court must rule on a motion under [s]ection 27.003 not later than the 30th day following the date the hearing on the motion concludes.”). And Texas Civil Practice

and Remedies Code section 51.014(a)(12) allows an interlocutory appeal from a trial court's written order denying a TCPA motion to dismiss filed pursuant to Texas Civil Practice and Remedies Code section 27.003. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12); *Clark*, 2016 WL 4247963, at *1–3 (interlocutory appeal under section 51.014(a) requires written order); *Rutherford*, 472 S.W.3d at 886–87; *see also KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 687–88 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (“[A]n interlocutory appeal from the trial court’s written order denying a motion to dismiss under the TCPA [is permitted].”).

A. Denied by Operation of Law

In his brief, Casillas asserts that at the conclusion of the hearing on his TCPA motion to dismiss, the trial court “orally pronounced it would deny [his] motion, but it did not sign an order or enter findings of fact or conclusions of law following the hearing.” Thus, Casillas asserts that his motion was denied by operation of law. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(a).

Here, the record reveals that the trial court intended to and did “rule” on Casillas’s TCPA motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(a) (“The court must rule on a motion under [s]ection 27.003 not later than the 30th day following the date the hearing on the motion concludes.”); *see also S & A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 857 (Tex. 1995) (“Judgment is

rendered when the trial court officially announces its decision in open court”).

At the conclusion of the hearing on Casillas’s motion and after hearing arguments from both parties, the trial court stated: “I’m going to deny your motion.” *See Clark*, 2016 WL 4247963, at *2. The trial court then asked the parties to “send” it a written order reflecting its ruling denying the motion as well as findings of fact and conclusions of law. *See id.* Although the trial court used the phrase, “I’m going to,” the trial court’s comment was not made as an indication of a future ruling on Casillas’s motion. *See id.* (“While the trial [court] used the phrase” “I am going to deny the motion to dismiss under what I’m calling the anti-[SLAPP] statute,” “this [was] not a situation in which the trial court’s comment was made as an indication of a future ruling on the motion.” (internal quotations omitted)); *United Oil & Minerals, Inc. v. Costilla Energy, Inc.*, 1 S.W.3d 840, 845 (Tex. App.—Corpus Christi—Edinburg 1999, pet. dism’d) (where trial court stated, “I am going to grant the plea in abatement,” determining trial court did not express “an intent to deny or grant sometime in the future, but used the present tense” (internal quotations omitted)); *cf. Inwood Forest Cmty. Improvements Ass’n v. Arce*, 485 S.W.3d 65, 71–72 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (trial court’s statement that it was “going to grant” motion reflected future intention to rule when it also refused to sign order and indicated its order would not be final for thirty days (internal quotations and emphasis omitted)). And the trial court in no way deferred its

decision on Casillas’s motion to dismiss. *See Clark*, 2016 WL 4247963, at *2. Instead, the trial court announced its ruling, stating that it was not “going to” declare the TCPA “unconstitutional . . . today,” but it was “going to deny” Casillas’s motion. *See Clark*, 2016 WL 4247963, at *2; *Baize v. Baize*, 93 S.W.3d 197, 200 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (trial court’s statement, “I’ll grant your divorce today” “expressed a present intention to render a divorce decree” (internal quotations omitted)); *Skidmore v. Glenn*, 781 S.W.2d 672, 674–75 (Tex. App.—Dallas 1989, no writ) (context showed trial court rendered judgment when it stated, “I’ll enter an order approving the agreement” (internal quotations omitted)); *see also S & A Restaurant*, 892 S.W.2d at 857–58 (“Judgment is rendered when the trial court officially announces its decision in open court”); *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970) (rendition of judgment is “the judicial act by which the court settles and declares the decision of the law upon [t]he matters at issue” (internal quotations omitted)); *Rule*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[R]ule” means “[t]o decide a legal point”). In fact, in his notice of appeal, Casillas states that he is appealing “the [t]rial [c]ourt’s denial of [his] . . . Motion to Dismiss [M & S Concrete’s] Claims Pursuant to Chapter 27 of the Texas Civil Practice and Remedies Code” and that “[s]uch denial was announced from the bench by [the trial court] on February 4, 2019”—the date of the trial court’s hearing on Casillas’s motion. (Internal quotations omitted.)

A TCPA motion to dismiss is only considered to have been “denied by operation of law” if the trial court does not “rule” on the motion by “the 30th day following the date the hearing on the motion concludes.” See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.005(a), 27.008(a); *Kinney v. BCG Attorney Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *7–8 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.). Here, the trial court timely ruled on Casillas’s motion to dismiss at the conclusion of its hearing on the motion. Thus, Casillas’s TCPA motion to dismiss could not have been “denied by operation of law” as contemplated by Texas Civil Practice and Remedies Code section 27.008(a). See TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(a) (“If a court does not *rule* on a motion to dismiss under [s]ection 27.003 in the time prescribed by [s]ection 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.” (emphasis added)); *Clark*, 2016 WL 4247963, at *2 (under similar circumstances, concluding trial court ruled on TCPA motion to dismiss and motion not denied by operation of law); *Kinney*, 2014 WL 1432012, at *7–8 (“Under sections 27.005(a) and 27.008(a), the court need only ‘rule’ within 30 days of the hearing. . . . If the legislature had intended to require the trial court to sign an order within 30 days, it could have done so”); see also *Rule*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[R]ule” means “[t]o decide a legal point”).

Thus, we hold, contrary to Casillas’s assertion, that Texas Civil Practice and Remedies Code section 27.008(a) does not provide statutory authority for our jurisdiction over this interlocutory appeal. *See Clark*, 2016 WL 4247963, at *2; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.008(a).

B. Denied by Written Order

We next consider whether Texas Civil Practice and Remedies Code section 51.014 provides statutory authority for our jurisdiction over Casillas’s appeal.

As noted, Texas Civil Practice and Remedies Code section 51.014(a)(12)-allows an interlocutory appeal from a trial court’s written order denying a TCPA motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12); *Clark*, 2016 WL 4247963, at *1–3 (interlocutory appeal under section 51.014(a) requires written order); *Rutherford*, 472 S.W.3d at 886–87; *see also Robinson*, 409 S.W.3d at 687–88. Section 51.014(a)(12) provides:

A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that . . . denies a motion to dismiss filed under [Texas Civil Practice and Remedies Code] [s]ection 27.003[.]

See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12); *see also id.* § 27.003 (party may “file a motion to dismiss [a] legal action” if it is “based on or in response to [the] party’s exercise of the right of free speech, right to petition, or right of association”).

To be entitled to an interlocutory appeal under this provision, the trial court must have signed a written order denying the moving party's TCPA motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12); *Clark*, 2016 WL 4247963, at *1–3; *see also* TEX. R. APP. P. 26.1(b) (“[I]n an accelerated appeal, the notice of appeal must be filed within 20 days *after the judgment or order is signed*[.]” (emphasis added)); *Archer v. Tunnell*, No. 05-15-00459-CV, 2016 WL 519632, at *3–4 (Tex. App.—Dallas Feb. 9, 2016, no pet.) (mem. op.) (“The court of appeals lacks jurisdiction over an interlocutory appeal authorized by statute when the trial court has not signed a written order.”); *City of Beaumont v. Jackson*, No. 09-14-00412-CV, 2014 WL 5776202, at *1 (Tex. App.—Beaumont Nov. 6, 2014, no pet.) (mem. op.); *Cordova v. Harkins*, No. 01-05-00495-CV, 2006 WL 1428857, at *1 (Tex. App.—Houston [1st Dist.] May 25, 2006, no pet.) (mem. op.) (“A signed, written judgment or order is . . . an absolute prerequisite to this Court’s exercise of appellate jurisdiction.”); *cf. Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 352 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Robinson*, 409 S.W.3d at 688. Thus, an interlocutory appeal under section 51.014(a)(12) may be perfected only from a written order, not an oral ruling.

Casillas states in his brief that the trial court did not “sign an order” denying his TCPA motion to dismiss. Additionally, in his notice of appeal, Casillas states that the trial court “announced” the denial of his TCPA motion to dismiss “from the

bench . . . on February 4, 2019”—the date of the trial court’s hearing on Casillas’s motion—but “no formal order denying the motion [was] signed by the [t]rial [c]ourt.” Because the trial court ruled on Casillas’s motion to dismiss but did not sign a written order reflecting its ruling, we hold that Texas Civil Practice and Remedies Code section § 51.014(a)(12) does not provide statutory authority for our jurisdiction over this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12).

Because the trial court has not signed an appealable order, we dismiss this appeal for lack of jurisdiction. *See* TEX. R. APP. P. 42.3(a), 43.2(f); *see also Clark*, 2016 WL 4247963, at *3; *Deuell v. Tex. Right to Life Comm., Inc.*, No. 01-15-00011-CV, 2015 WL 778367, at *2 (Tex. App.—Houston [1st Dist.] Feb. 24, 2015, no pet.) (mem. op.).

Conclusion

We dismiss the appeal for lack of jurisdiction.

Julie Countiss
Justice

Panel consists of Justices Kelly, Landau, and Countiss.