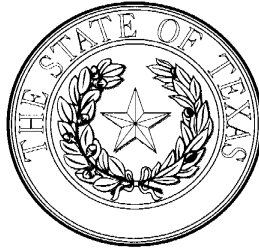


Opinion issued August 13, 2020



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-20-00098-CV

**ALI CHOUDHRI, Appellant
V.
GEORGE M. LEE, Appellee**

**On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2019-77250**

MEMORANDUM OPINION

Appellee George M. Lee filed the underlying suit for declaratory judgment, seeking to construe the rights and obligations of the parties under a stand-alone arbitration agreement he entered into with appellant, Ali Choudhri. Choudhri filed a motion to dismiss Lee's declaratory-judgment claim pursuant to the Texas Citizens

Participation Act (TCPA). The motion was denied by operation of law, and Choudhri now appeals, arguing in his sole issue that the trial court erred in denying the motion to dismiss. Because we conclude that Choudhri failed to establish that the TCPA applies to Lee’s claim, and because Lee nevertheless established a prima facie case for his claim, we affirm.

Background

In 2016, Lee (on behalf of the business entity JPG Waco Heritage, LLC) and Choudhri (on behalf of the business entity Jetall Companies, Inc.) entered into a letter of intent regarding the sale of certain property located in McClennan County, Texas (the Property). The letter of intent memorialized the parties’ agreement that, if JPG’s then-existing buyer for the Property fell through, JPG would sell the Property to Jetall. This arrangement subsequently generated ongoing conflict and litigation among the parties.

Recognizing the expense and difficulty of the ongoing litigation, Choudhri and Lee entered into a dispute resolution agreement (Agreement) in 2018. By its terms, this Agreement was executed “relating to one or more real estate and/or investment transactions” between Lee and Choudhri. The parties agreed to resolve any future disputes between them through mandatory mediation and, if mediation was unsuccessful, by submitting to binding arbitration on the terms set out in the Agreement. The Agreement further stated that it bound the “Lee Parties”—defined

as Lee himself “and any entity that he owns or controls”—and the “Choudhri Parties”—defined as Choudhri and “and any entity he owns or controls—and it served as an amendment to each and every agreement “heretofore made” by the parties. Finally, the Agreement stated that “nothing in this Agreement shall be construed or interpreted as precluding either Party from initially exercising any ‘self-help’ remedies, including, without limitation, the right of foreclosure under any other agreement the Parties have with one another,” and the Agreement expressly did not preclude either Party from “initially seeking injunctive relief.” The Agreement became effective May 14, 2018.

In October 2018, in connection with a divorce proceeding, Choudhri filed a notice of lis pendens, asserting that an interest in the Property, owned in part by Lee through JPG, was at issue in the divorce. JPG moved to expunge the lis pendens, and Choudhri voluntarily agreed to release it. However, more litigation between the two parties ensued.

While the litigation over the October 2018 lis pendens was ongoing, Lee filed a lawsuit against Choudhri and some business entities in which Choudhri has an interest. Again, neither Lee nor Choudhri sought to enforce the Agreement, nor did either party attempt to compel the case to arbitration. Choudhri himself filed another lawsuit involving Lee and JPG, asserting that JPG had entered into a contract for the sale of the Property with him. This petition was accompanied by a second notice of

lis pendens. It was only after this second lis pendens that Choudhri sought to invoke the terms of the Agreement as to his own claims, asking the trial court in that case to compel arbitration. More litigation ensued between Choudhri and Lee, including other notices of lis pendens regarding the Property.

On October 22, 2019, Lee filed the underlying suit against Choudhri, seeking a declaratory judgment of the rights and responsibilities of the parties under the Agreement. Lee cited the recurrent litigation between himself and Choudhri and sought “a judicial determination: (1) clarifying the scope of the [A]greement; (2) finding that [Choudhri] waived his right to enforce the Alleged Agreement; and/or (3) that [Choudhri] has . . . repudiated the Alleged Agreement.”

Choudhri filed a motion to dismiss Lee’s declaratory judgment action pursuant to the TCPA. Choudhri asserted that Lee’s declaratory judgment action was based on or in response to Choudhri’s exercise of his right to petition, stating that “there is no question that the Claim is based on and/or in response to multiple pieces of litigation and the communications made therein by [Choudhri]. The entirety of [Lee’s] lawsuit is a catalogue of complaints regarding what [Choudhri] allegedly did and did not communicate in various judicial proceedings.” He further asserted that Lee could not establish a prima facie case on his declaratory judgment claim.

Lee responded, asserting that the TCPA did not apply to his declaratory judgment claim and that he had successfully asserted a prima facie case. The motion was overruled by operation of law, and this interlocutory appeal followed.

TCPA Motion to Dismiss

In his sole issue, Choudhri asserts that the trial court erred in denying his TCPA motion by operation of law.

A. Standard of Review

The stated purpose of the TCPA “is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” TEX. CIV. PRAC. & REM. CODE § 27.002; *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017). The primary vehicle for accomplishing this purpose is a motion-to-dismiss procedure that allows defendants who claim that a plaintiff has filed a meritless suit in response to the defendant’s proper exercise of a constitutionally protected right to seek dismissal of the underlying action at an early stage in the litigation. *See* TEX. CIV. PRAC. & REM. CODE § 27.003(a); *Dolcefino v. Cypress Creek EMS*, 540 S.W.3d 194, 198 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

First, the defendant moving for dismissal pursuant to the TCPA must show by a preponderance of evidence that the claim he is seeking to dismiss “is based on or is in response to the [movant’s] exercise of: (A) the right of free speech; (B) the right to petition; or (C) the right of association.” TEX. CIV. PRAC. & REM. CODE § 27.005(b)(1); *Coleman*, 512 S.W.3d at 898. The TCPA defines “exercise of the right to petition” as including “a communication in or pertaining to . . . a judicial proceeding.” TEX. CIV. PRAC. & REM. CODE § 27.001(4)(A)(i).

Even if the movant satisfies its burden of proving that the TCPA applies to the particular claims it seeks to dismiss, the court may not dismiss the underlying action “if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question”—here, the elements of a declaratory judgment action. TEX. CIV. PRAC. & REM. CODE § 27.005(c); *see Coleman*, 512 S.W.3d at 899.

We review de novo the denial of a TCPA motion to dismiss. *Dolcefino*, 540 S.W.3d at 199. In determining whether to grant or deny a motion to dismiss, the court must consider “the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.” TEX. CIV. PRAC. & REM. CODE § 27.006(a); *Dolcefino*, 540 S.W.3d at 199. We view the evidence in the light most favorable to the nonmovant. *Dolcefino*, 540 S.W.3d at 199.

B. Analysis

Choudhri first argues that he satisfied his initial burden of proving that the TCPA applies to Lee's declaratory judgment claim because he demonstrated that Lee's claim was based on, related to, or in response to Choudhri exercise of his right to petition. We disagree.

Lee filed his declaratory judgment action seeking "a judicial determination: (1) clarifying the scope of the [A]greement; (2) finding that [Choudhri] waived his right to enforce the Alleged Agreement; and/or (3) that [Choudhri] has . . . repudiated the Alleged Agreement." Although Lee's pleadings reference the filing of various legal actions by both parties as factual background, the declaration sought by Lee does not implicate "a communication in or pertaining to . . . a judicial proceeding." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(4)(A)(i). Rather, it involves the legal rights and obligations of the parties under the Agreement in connection with the various litigation involving the Property and the parties' other interests. Lee does not seek to prohibit Choudhri from petitioning the courts, but instead to obtain a declaration of the effect of the parties' prior Agreement on the ongoing litigation. *See Dolcefino*, 540 S.W.3d at 200 (holding that TCPA did not apply to claim seeking declaration from court concerning party's statutory duties and obligations, and noting that plaintiff's requested relief "did not seek to prohibit any conduct or speech by [the defendant]," it did not "allege that [the defendants'

purported communications] contained any tortious communications, nor did it seek any damages related to [the defendant's] requests”).

Choudhri argues that *Dolcefino* is distinguishable because Lee is seeking to affect Choudhri's legal rights, stating, “Lee is arguing that Choudhri's exercise of his right of petition—as evidenced by multiple pleadings and filings referenced and attached to Lee's petition—has resulted in a waiver or repudiation of Choudhri's contract rights, which Lee seeks to declare through an order of the trial court.” Choudhri argues, “[U]nlike in *Dolcefino*, Lee seeks a declaration not of his own rights, but that Choudhri's invocation of the judicial process has limited Choudhri's rights.”

Choudhri's construction of Lee's pleadings, however, takes them out of context. We must examine the pleadings in the light most favorable to Lee as the nonmovant. *See id.* at 199. Taken in context, Lee's declaratory judgment claim is not based on or relating to Choudhri's right to petition; rather, it seeks a determination of the legal principles that the parties should apply in resolving their various legal disputes. Furthermore, Choudhri's argument that the TCPA is implicated because Lee's claim affects his legal rights is a non sequitur—all claims filed in court seek to affect a party's legal rights.

The TCPA's express purpose “is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and

otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.” See TEX. CIV. PRAC. & REM. CODE § 27.002; *Dolcefino*, 540 S.W.3d at 200. Similar to *Dolcefino*, nothing in Lee’s petition, here, seeks to directly limit Choudhri’s right to petition or to otherwise participate in government to the maximum extent permitted by law. See 540 S.W.3d at 200; see also *Coleman*, 512 S.W.3d at 898 (holding that TCPA’s “procedure to expedite the dismissal of claims brought to intimidate or to silence a defendant’s exercise of these First Amendment rights” was enacted to effectuate statute’s purpose). And, as we concluded in *Dolcefino*, to interpret the TCPA as essentially forbidding Lee from seeking a declaration of the parties’ rights and obligations under the Agreement would “undermine the clear directive that the TCPA ‘does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions,’ such as the Declaratory Judgment Act.” See 540 S.W.3d at 200–01 (quoting TEX. CIV. PRAC. & REM. CODE § 27.011).

We further conclude that Lee’s pleadings and other supporting evidence demonstrate a prima facie case for his declaratory judgment claim. See TEX. CIV. PRAC. & REM. CODE § 27.005(c) (“The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.”); *In*

re Lipsky, 460 S.W.3d 579, 590 (Tex. 2015) (holding that “clear and specific evidence” establishing “prima facie case” “refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted” or “the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true”). The Uniform Declaratory Judgment Act (UDJA) generally permits a person whose rights, status, or other legal relations are affected by a statute or contract to obtain a declaration of the rights, status, or other legal relations thereunder. TEX. CIV. PRAC. & REM. CODE § 37.004(a). The purpose of the UDJA is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.” *Id.* § 37.002(b). A declaratory judgment is appropriate when a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought. *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 685 (Tex. 2020) (citing *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995)); *Dolcefino*, 540 S.W.3d at 201.

Lee’s pleadings and the evidence attached to his response to the motion to dismiss establish that a justiciable controversy exists as to whether the Agreement should apply to the parties’ various legal disputes. Lee provided a copy of the Agreement and identified the ongoing legal disputes that call into question his and Choudhri’s rights and obligations pursuant to that Agreement. *See In re Lipsky*, 460

S.W.3d at 590 (holding that TCPA nonmovant is only required to adduce evidence to support rational inference that allegations of fact are true). The dispute about the Agreement's validity and enforceability could be resolved by a declaration construing the Agreement in light of Choudhri's and Lee's other litigation conduct. Thus, Lee has established a prima facie case for his declaratory judgment claim. *See Dolcefino*, 540 S.W.3d at 201; *see also ETX Successor Tyler v. Pridgeon*, 570 S.W.3d 392, 399–400 (Tex. App.—Tyler 2019, no pet.); *Perez v. Quintanilla*, No. 13-17-00143-CV, 2018 WL 6219627, at *4 (Tex. App.—Corpus Christi Nov. 29, 2018, no pet.) (mem. op.); *Cosmopolitan Condo. Owners Ass'n v. Class A Inv'rs Post Oak, LP*, No. 01-16-00769-CV, 2017 WL 1520448, at *4–5 (Tex. App.—Houston [1st Dist.] April 27, 2017, pet. denied) (mem. op.).

Choudhri argues that Lee failed to establish a prima facie case because Lee identified a justiciable controversy only between their non-party business entities. This argument, however, disregards Lee's pleadings and evidence indicating that Choudhri and Lee, for themselves and on behalf of entities they owned or controlled, entered into the Agreement at issue and that the subsequent conflict and legal proceedings involved Choudhri's and Lee's rights pursuant to that Agreement. And, contrary to Choudhri's assertion that Lee did not produce any evidence of Choudhri's repudiation or waiver of the Agreement, Lee provided copies of Choudhri's pleadings and other invocations of the litigation process without raising

the Agreement to arbitrate. *See, e.g., Perry Homes v. Cull*, 258 S.W.3d 580, 589–90 (Tex. 2008) (“[A] party waives an arbitration clause by substantially invoking the judicial process to the other party’s detriment or prejudice” before moving to compel arbitration). The fact that Lee’s evidence might be contradicted or rebutted in subsequent litigation does not mean that it is insufficient to establish a prime facie case. *See Lipsky*, 460 S.W.3d at 590 (“prima facie case” refers to evidence sufficient as matter of law to establish given fact *if it is not rebutted or contradicted*).

We overrule Choudhri’s sole issue on appeal.¹

¹ Lee filed a motion to dismiss Choudhri’s appeal, arguing that dismissal of the appeal was proper because this Court lacks jurisdiction due to Choudhri’s failure to establish that he was entitled to relief under the TCPA. We note that, when a TCPA motion to dismiss is denied by operation of law, the moving party may appeal. *See* TEX. CIV. PRAC. & REM. CODE § 27.008(a); *see also id.* § 51.014(a)(12) (permitting appeals from interlocutory order denying TCPA motion to dismiss). Furthermore, we have concluded, based on the merits of the arguments asserted in the parties’ briefing on appeal, that the trial court’s denial by operation of law should be affirmed. The motion to dismiss the appeal is thus dismissed as moot.

Conclusion

We affirm the trial court denial of the TCPA motion to dismiss.

Richard Hightower
Justice

Panel consists of Justices Goodman, Landau, and Hightower.