Opinion issued August 25, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00736-CV

EUGENE SCOTT CRIST, VENTURE PUBLIC PARTNERS, LLP, AND ATV III GP, LLC, Appellants

V.

RICK C. SPUNG, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2020-21192

MEMORANDUM OPINION

Eugene Scott Crist ("Crist"), Venture Public Partners, LLP ("VPP"), and ATV III GP, LLC ("ATV") (collectively, "appellants") appeal the trial court's denial of their motions to dismiss certain of Rick C. Spung's claims against them under the

Texas Citizens Participation Act ("TCPA").[1] Because appellants failed to show that the TCPA applies to the claims in question, we affirm.

Background[2]

In April 2020, Spung filed suit against appellants for damages arising from appellants' alleged misconduct in marketing and managing an investment opportunity.[3] According to Spung's petition, Spung received an unsolicited email from Crist in April 2013 seeking investments in VPP and inviting him to an "overview" meeting the next month to discuss the investment opportunity. Crist—a member and manager of ATV (VPP's general partner) and a limited partner in VPP—sought to position VPP to acquire interests in other companies using the invested funds.

Attached to Crist's email was a PowerPoint presentation enumerating the benefits of investing in VPP and VPP's proposed strategy. Among other things, the PowerPoint presentation stated that VPP was "formed to continue the investment

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1 *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011 (TCPA); *id.* § 51.014(a)(12) (permitting interlocutory appeal of order denying TCPA motion to dismiss).

2 The recitation of the facts in this opinion is based on the pleadings and evidence as they have been developed at this early stage of litigation. We recognize the parties have not yet completed discovery.

3 The Texas Legislature amended certain provisions of the TCPA in 2019. *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, 2019 Tex. Gen. Laws 684. The amendments became effective September 1, 2019. *Id.* §§ 11–12, 2019 Tex. Gen. Laws 687. Because Spung filed his original petition after the effective date of the amendments, this case is governed by the current statute.

strategy" of Texas Ventures, another company with which Crist was previously affiliated, but "with the benefit of investing through a public vehicle." Described generally by Spung, VPP planned to make "bridge loans" so that privately held companies seeking to become publicly traded could complete vital accounting, legal, and compliance work. The "bridge loans" would be secured by stock options in "holding" companies, which would be offered for public trading later. If they became publicly traded, the privately held companies that received the "bridge loans" would "reverse merge" into the "holding" companies.

In describing VPP's strategy, the PowerPoint presentation stated:

- VPP was planning to participate in Venture Public Offerings ("VPO"), described as "combination transactions involving an earlier-stage company, a publically-reporting [sic] entity, and a convertible bridge loan."

- The investments would be in companies with a "dynamic growth profile to access the capital necessary to grow while also benefitting from a public stock[.]"

- The companies invested in would have "revenue, net income[,] and good growth prospects[.]"

- The VPOs are enabled through a bridge loan that would pay for "legal and accounting work necessary for the company[ies] to become . . . publically [sic] trading company[ies] [.]"

- The risk of loss was relatively low because the "VPO bridge loan is secured [with] shares of the public listing vehicle and thus is provided downside protection through the value of the publically [sic] trading shares of that vehicle[.]"

- The process "should take between 6 months and one year to move from a private company to a public company that has completed its first P[rivate] I[nvestment] [in] P[ublic] E[quity] funding[.]"

The PowerPoint presentation also identified four companies for "pending initial" investments. These companies included (1) a "leading publisher of financial newsletters and online content with numerous proprietary titles"; (2) a "top ranked and profitable local election consulting firm in Texas with an 80% + win rate across 200 + elections in eight years"; (3) an "integrated developer and manufacturer of waste water [sic] treatment and waste to energy systems"; and (4) a "company targeting the onshore and offshore E&P industry."

Based on these representations, Spung invested $200,000 in VPP in June 2013. Throughout 2013 and 2014, appellants sent emails informing Spung that nearly 60% of the funds received from him were invested in three companies: (1) TransMessis Columbia Plateau, LLC ("TransMessis"); (2) Riverside Energy a/k/a Waterside Energy, LLC ("Riverside"); and (3) OilStone Energy Services, LLC ("OilStone") (collectively, the "Companies"). Spung alleges that each of these companies encountered operational failures, which VPP never disclosed to Spung. Instead, after three years passed without distributions, Crist informed Spung in a December 17, 2017 email of VPP's decision to "exit the investment," stating: "[T]he investment didn't materialize as we had originally planned." None of the companies involved—VPP, TransMessis, Riverside, or OilStone—ever became publicly traded

or publicly owned companies. Crist reported that VPP had a "cash balance of approximately 3.5% [($7,000)] of [Spung's] original investment," and recommended that the "best approach" was for VPP "to purchase [Spung's] ownership interest in return for this balance." Spung agreed.

Based on these allegations, Spung asserted claims against appellants for statutory fraud under the Texas Securities Act, common law fraud, fraudulent inducement, and negligent misrepresentation. Spung sought actual damages, exemplary damages, and attorney's fees.

Appellants jointly answered and asserted general denials as wells as defenses, alleging that Spung knew of the alleged "untruth[s] or omission[s]" and that his claims are barred by the statute of limitations. They also filed a motion under the TCPA ("TCPA Motion 1"), arguing that Spung's "SLAPP Claims"—securities fraud and negligent misrepresentation—should be dismissed because (1) they were based on or were in response to appellants' exercise of the right of free speech; (2) Spung could not establish a prima facie case of each essential element of the claims in question; and (3) appellants could establish their affirmative defenses based on Spung's knowledge of the alleged "untruth or omission" and limitations for the securities fraud claim. In support of their motion, appellants submitted Crist's affidavit authenticating four exhibits: copies of the PowerPoint presentation, the VPP Private Placement Memorandum ("PPM") received by Spung, email

correspondence between Crist and Spung, and Spung's subscription agreement to buy shares in VPP.

Spung responded to TCPA Motion 1. Before TCPA Motion 1 was submitted to the trial court, Spung filed his first amended petition on August 13, 2020. Among other things, the first amended petition abandoned certain securities fraud allegations and the negligent misrepresentation claim that were the subject of TCPA Motion 1 and asserted new causes of action for violations of the Deceptive Trade Practices Act, breach of contract, and breach of fiduciary duty.[4] Relevant here, Spung alleged that VPP and Crist breached the partnership and subscription agreements by failing "to conduct due diligence regarding the TransMessis, Riverside, and OilStone investments because each of them had no historical financial statements, operating margin or growth at the time of the investments," and by failing to "carefully evaluate the 'exit' opportunities" for investors. Spung further alleged that he became

[4] Although Spung's first amended petition effectively nonsuited his securities fraud and negligent misrepresentation claims that were the subject of TCPA Motion 1, appellants' TCPA Motion 1, which requested attorney's fees and sanctions in addition to the dismissal of Spung's securities fraud and negligent misrepresentation claims, constituted a request for affirmative relief. *See Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 475–77 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd) (en banc). Because appellants' TCPA Motion 1 requested affirmative relief, Spung's first amended petition did not moot appellants' pending TCPA Motion 1, and we address it on appeal. *See id.*; *see also Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at *14 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) ("TCPA motions to dismiss survive nonsuit because, unlike a nonsuit, the TCPA motion to dismiss might also allow the movant to obtain a dismissal with prejudice, attorney's fees, and sanctions.").

a limited partner of VPP through his investment and that ATV, as VPP's general partner, breached the accompanying fiduciary duties owed to him.

Following Spung's pleading amendment, appellants supplemented TCPA Motion 1 and submitted an additional affidavit from Crist responding to Spung's factual allegations regarding the failed investments. Among other things, Crist averred:

- Specifically, in the cases of TransMessis and OilStone, the management and controlling shareholders of both of these companies were very interested in a near-term public offering. Although they were early stage, both companies had decent revenues at the start and were operating at or near "break even." The idea of being able to merge into a corporate entity that was optimized for a public listing was very important because they were both looking to do a quick (within a year) public listing so they could raise additional capital and, more importantly, have public stock that they could do acquisitions with.

- Equally important in this process was the fact that VPP had been set up specifically to make these types of investments and that it's [sic] manager—myself—had a great reputation as a former CEO of a public company that also went public through a shell merger and then had great success on NASDAQ. These facts helped TransMessis and OilStone raise significant capital after the VPP capital raise ($6,000,000 in the case of TransMessis and about $2,400,000 in the case of OilStone).

- Also important to note is that approximately $600,000.00 of the capital that went into TransMessis and probably $500,000.00 or so of the money that went into OilStone came from investors who had seen this expedited "go public" process work previously and were investing specifically because of this structure as laid out in the PPM and other materials provided to VPP investors[.]"

- Finally, the fact that the Companies were going down the "VPP Path" to going public quickly was instrumental for both companies to help them secure board members with strong public company backgrounds so that the stage could be set for their eventual listing and trading. If these companies had simply raised early[-]stage money from "friends and family" as opposed to VPP, this would not have been possible.

- As a result, the investing public—particularly initial stage capital investors—were interested in reviewing VPP's structure, PPM, and other materials . . . as part of their due diligence process in choosing to invest in the Companies, which were all publicly-listed and also doing some limited reporting to the regulations set forth by the Securities and Exchange Commission ("SEC").

- These documents—the same ones provided to VPP investors and which [Spung] claims contain misrepresentations—were also documents relied on by the investing public. I know this because myself/VPP were contacted by third-party investors who requested copies of the PPM prior to their investments in TransMessis and OilStone, which to my recollection was provided to them.

Appellants also filed a second motion to dismiss under the TCPA ("TCPA Motion 2") on October 12, 2020, challenging the new causes of action for breach of contract and breach of fiduciary duty. Appellants again argued that (1) the TCPA applied because the contract and fiduciary claims in Spung's first amended petition were also based on or were in response to appellants' exercise of the right of free speech and (2) Spung could not establish a prima facie case of each essential element of these claims.

TCPA Motion 1 was denied by operation of law in October 2020. Appellants filed a timely notice of interlocutory appeal, which had the effect of staying the

proceedings in the trial court. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12), (b). TCPA Motion 2 was subsequently denied by operation of law, and appellants timely filed a second notice of interlocutory appeal for TCPA Motion 2.[5]

Standard of Review

We review de novo the denial of a TCPA motion to dismiss. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). In deciding if a legal action should be dismissed under the TCPA, we consider "the pleadings, evidence a court could consider under [Texas] Rule [of Civil Procedure] 166a, . . . and supporting and opposing affidavits stating the facts on which the liability or defense is based." TEX. CIV. PRAC. & REM. CODE § 27.006(a). The plaintiff's allegations, and not the defendant's admissions or denials, constitute the basis of a legal action. *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). We review the pleadings and evidence in the light most favorable to the nonmovant. *Schimmel v. McGregor*, 438 S.W.3d 847, 855–56 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Whether the TCPA applies is an issue of statutory interpretation that we also review de novo. *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018).

[5] Because the appeals from TCPA Motion 1 and TCPA Motion 2 were docketed under the same appellate case number in this Court, we decide them together.

TCPA Motion to Dismiss

In their first issue in both the TCPA Motion 1 appeal and the TCPA Motion 2 appeal, appellants contend they satisfied their initial burden to show that the TCPA applies to Spung's claims in question, i.e., his claims for securities fraud, negligent misrepresentation, breach of contract, and breach of fiduciary duty based on the failed VPP investment strategy.

A. Statutory Framework

Codified in Chapter 27 of the Civil Practice and Remedies Code, the TCPA protects citizens from retaliatory lawsuits that seek to silence or intimidate them on matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding); *see generally* TEX. CIV. PRAC. & REM. CODE § 27.002. The statute's purpose is 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 at 589; *see also* TEX. CIV. PRAC. & REM. CODE § 27.002.

To effectuate its purpose, the TCPA provides a multi-step process for determining whether a lawsuit or claim should be dismissed under the statute. *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019). First, the trial court must dismiss the action if the moving party shows that the legal action is based on or is in response to the movant's exercise of (1) the right of free speech, (2) the right to petition, or (3) the right of association. TEX. CIV.

PRAC. & REM. CODE § 27.005(b); *Creative Oil*, 591 S.W.3d at 132; *In re Lipsky*, 460 S.W.3d at 586–87. Under the next step, the nonmovant may avoid dismissal by establishing "by clear and specific evidence a prima facie case for each essential element of the claim in question." TEX. CIV. PRAC. & REM. CODE § 27.005(c). Finally, the movant can still win dismissal if it establishes an affirmative defense or other grounds on which it is "entitled to judgment as a matter of law." *Id.* § 27.005(d).

Intertwined with and overlying this multi-step dismissal process is the TCPA provision exempting certain actions from its application. *See id.* § 27.010; *Morrison v. Profanchik*, 578 S.W.3d 676, 680 (Tex. App.—Austin 2019, no pet.). When invoked, the court must consider an exemption's applicability after and in the context of the movant having met its initial burden under the first step of the dismissal process. *See Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018); *Morrison*, 578 S.W.3d at 680.

B. Application

As the TCPA movants, appellants had the burden to show that Spung asserted "legal action[s]" based on or in response to their exercise of one of three rights enumerated in the statute. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b). There is no dispute that Spung's claims in question are "legal action[s]" as defined under the TCPA. *See id.* § 27.001(6) (defining legal action as "lawsuit, cause of action,

petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief," with certain exceptions not at issue here). The question is whether the claims in question were based on or were in response to appellants' exercise of one of the statutorily enumerated rights. *Id.* § 27.005(b). Appellants identify the right at issue as the right of free speech.[6]

The TCPA defines the "exercise of the right of free speech" as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A "communication" includes "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1).

Appellants contend the right of free speech is implicated because their communications related to "a matter of public concern." A matter of public concern means a statement or activity regarding:

> (A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;
>
> (B) a matter of political, social, or other interest to the community; or
>
> (C) a subject of concern to the public.

[6] Appellants admit the right to petition and the right of assembly are not at issue.

Id. § 27.001(7). "Taken together, these three provisions broadly define what constitutes a matter of public concern." *Morris v. Daniel*, 615 S.W.3d 571, 576 (Tex. App.—Houston [1st Dist.] 2020, no pet.). "But the reach of these broad provisions is not without limit. To be a matter of public concern, a claim must have public relevance beyond the interests of the parties." *Id.* (citing *Creative Oil*, 591 S.W.3d at 136). Private disputes that merely affect the litigants' fortunes are not matters of public concern. *Creative Oil*, 591 S.W.3d at 134–37; *Morris*, 615 S.W.3d at 576–77; *see also Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 475–77 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd) (en banc) (tort claims with no potential impact on wider community or public audience are not TCPA matters of public concern).

Here, in TCPA Motion 1 and TCPA Motion 2, appellants made identical arguments about why Spung's claims were based on or were in response to appellants' communications made in connection with a matter of public concern. They argued:

> These communications [in the PowerPoint presentation, emails, and other documents related to the solicitation and subscription of Spung's investment] are certainly "a subject of concern to the public" because they refer to: (1) publicly traded securities; (2) public companies; and (3) SEC regulations and reporting. . . . Clearly, communications regarding companies in which the investing public may invest . . . or . . . which the SEC will regulate and be reported to are a "subject of concern to the public" and the communications are "in connection" with those subjects.

(Quoting TEX. CIV. PRAC. & REM. CODE § 27.001(3), (7).)

Spung, however, argues that the TCPA does not apply because the communications at issue have no public relevance beyond these parties' private financial dispute. In support, Spung cites the Texas Supreme Court's opinion in *Creative Oil*, wherein a ranch sued to terminate an oil and gas lease. 591 S.W.3d at 130. The operator and lessee counterclaimed, alleging the ranch had misrepresented the status of the lease to third-party purchasers of production and urged these third-party purchasers to stop making payments. *Id.* The ranch responded by filing a TCPA motion to dismiss, arguing that its statements to third parties were an exercise of the right of free speech because these communications addressed a matter of public concern. *Id.* The ranch maintained that its speech addressed a matter of public concern because, among other things, the speech related to goods, products, or services offered in the marketplace. *Id.* at 134 (relying on prior version of TCPA that explicitly included marketplace goods, products, and services in definition of "matter of public concern").

The Court rejected the ranch's position. *Id.* at 134–36. It observed that almost all contracts involve a marketplace good, product, or service, but that this is not enough to make every communication about these contracts a matter of public concern. *Id.* at 134. The Court reasoned that for the ranch's statements to be on a matter of public concern, the statements had to be relevant to the wider marketplace—the public audience of potential buyers and sellers—rather than just

the contracting parties and the third-party purchasers to whom the ranch made the statements. *Id.* at 134–36. The Court observed:

> The record is devoid of allegations or evidence that the dispute had any relevance to the broader marketplace or otherwise could reasonably be characterized as involving public concerns. On the contrary, the alleged communications were made to two private parties concerning modest production at a single [oil and gas] well.

Id. at 136. The Court went on to explain that although it had "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." *Id.* Such cases involved matters of public concern expressly defined in the prior version of the statute to include issues related to "health or safety," and "environmental, economic, or community well-being," concerns not implicated in *Creative Oil*. *See id.* Ultimately, the Court held that a private contract dispute affecting only the fortunes of the litigants necessarily is not a "matter of public concern" under any definition of these words. *Id.* at 137.[7]

We do not read *Creative Oil* as entirely foreclosing private business disputes from the TCPA's scope, and note the Court left open the possibility that such cases

[7] Although *Creative Oil* considered a former version of the TCPA, this Court and others continue to apply its discussion of "matter[s] of public concern" in considering the applicability of the current version of the TCPA. *See, e.g.*, *Kirby, Mathews & Walrath, PLLC v. Kuiper Law Firm, PLLC*, No. 06-21-00040-CV, 2021 WL 4268291, at *3 (Tex. App.—Tyler Sept. 21, 2021, no pet.) (mem. op.); *Morris v. Daniel*, 615 S.W.3d 571, 576 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

may still implicate the TCPA as a matter of public concern if its subject matter otherwise falls with the TCPA's definitional scope or when it has public relevance beyond the purely private interests of the parties involved in the dispute. *See id.* at 137. But we agree with Spung that this is not such a case.

That none of the securities at issue here ever became publicly traded or publicly owned companies is fatal to appellants' contention that their communications involved a "matter of public concern" because they regarded "(1) publicly traded securities; (2) public companies; and (3) SEC regulations and reporting[.]" Indeed, the gist of Spung's claims is that the Companies failed to go public as appellants promised they would. As argued by Spung, appellants' communications "about companies that *might* become publicly traded tomorrow [do] not raise a 'matter of public concern' today—and could not, since [a]ppellants' companies never *went* public." *Cf. Erdner v. Highland Park Emergency Ctr., LLC*, 580 S.W.3d 269, 276–77 (Tex. App.—Dallas 2019, pet. denied) ("A communication cannot have a 'tangential relationship' to a matter of public concern that does not yet exist.").

Appellants urge that despite the Companies' lack of success in achieving public offerings, the communications were still made in connection with a matter of public concern because other members of the public (not just Spung) received the communications and relied on them in making investment decisions. But that alone

does not transform the communications into matters of public concern. Assuming for purposes of this opinion that, in some cases, communications related to the investment worthiness of a private company could be communications on a matter of public concern, the communications alleged in this case were not. The communications underpinning Spung's claims were made in connection with allegedly inducing Spung's investment in VPP through tortious or other wrongful conduct or VPP's failure to perform in the manner promised. Likewise, the only interest of the investing public in appellants' communications was to use those materials in choosing to invest in companies *through* VPP. In other words, the audience is limited. *See Creative Oil*, 591 S.W.3d at 136 ("These communications, with a limited business audience concerning a private contract dispute, do not relate to a matter of public concern.").

Moreover, the alleged communications were not made in connection with any "public official, public figure, or other person who has drawn substantial public attention due to [their] official acts, fame, notoriety, or celebrity," nor any "matter of public, social, or other interest to the community." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(7)(A), (B); *cf. Ngo v. Ass'n of Woodwind Lakes Homeowners, Inc.*, No. 01-18-00919-CV, 2020 WL 7391696, at *5 (Tex. App.—Houston [1st Dist.] Dec. 17, 2020, no pet.) (private communications on private contract dispute were not matters of public concern because interests of wider public beyond parties who

had tangible interest in subdivision's diminished property value not affected); *Anders v. Oates*, No. 02-19-00188-CV, 2020 WL 1809654, at *7 (Tex. App.—Fort Worth Apr. 9, 2020, no pet.) (mem. op.) (communications made as part of plan to fraudulently purchase and damage company and communications made by co-conspirators to further their own economic well-being did not fall within TCPA's right of free speech).

In short, we conclude that appellants' communications made as part of a plan to solicit and make investments in private enterprises—which though intended to become public never do—are not matters of public concern under the TCPA. Consequently, we hold appellants failed to meet their initial burden to show that the TCPA applies to Spung's claims. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b) ("[A] court shall dismiss a legal action against the moving party if the moving party demonstrates that the legal action is based on or is in response to . . . the party's exercise of[] the right of free speech[.]"); *see also id.* § 27.001(3) (defining "[e]xercise of the right of free speech" to mean "a communication made in connection with a matter of public concern").

C. Summary

Because appellants failed to meet their initial burden under the TCPA to establish that Spung's claims in question were based on or were in response to their exercise of the right of free speech, we overrule the first issue in the appeal from

TCPA Motion 1 and the first issue in the appeal from TCPA Motion 2. *See id.* § 27.005(b). Because our holding on these issues is dispositive of both appeals, we do not address appellants' remaining issues. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the trial court's orders denying appellants' TCPA Motion 1 and TCPA Motion 2.

Amparo Guerra
Justice

Panel consists of Justices Landau, Guerra, and Farris.