

Dismissed and Memorandum Opinion filed November 14, 2017.



In The

Fourteenth Court of Appeals

NO. 14-17-00358-CV

LOUIS F. PUIG AND CASSIE CURLIN, Appellants

V.

KELLY HEJTMANCIK, Appellee

**On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2017-11223**

M E M O R A N D U M O P I N I O N

Appellee Kelly Hejtmancik filed a petition to take the pre-suit depositions of appellants Louis F. Puig and Cassie Curlin. *See* Tex. R. Civ. P. 202. Appellants filed a motion to dismiss Hejtmancik's petition under the Texas Citizens Participation Act ("TCPA"). *See* Tex. Civ. Prac. & Rem. Code § 27.003 (West 2015).¹ Asserting that the trial court heard the motion to dismiss and the motion was

¹ "If a legal action is based on, relates to, or is in response to a party's exercise of the right

overruled by operation of law, appellants bring this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 27.008(a) (West 2015); Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(12) (West Supp. 2016).

BACKGROUND

Hejtmancik filed a verified petition to take the pre-suit depositions of appellants. Appellants were served a few weeks later. Hejtmancik set the petition for pre-suit deposition for a hearing. Three days before the date set for the hearing, appellants filed a TCPA motion to dismiss Hejtmancik's petition. Appellants served a notice of hearing on the motion to dismiss, which set the hearing date on the dismissal motion more than a month after the pre-suit-deposition hearing. The trial court conducted an oral hearing on Hejtmancik's petition for pre-suit discovery on the scheduled date and signed an order granting the requested depositions.

Appellants contend their TCPA motion to dismiss was denied by operation of law. Tex. Civ. Prac. & Rem Code Ann. § 27.008(a). They purport to appeal that denial, attacking the trial court's failure to grant relief under the TCPA on the merits. Appellants' presented issues presuppose that the trial court actually denied appellants' motion to dismiss. We do not agree with that premise.

JURISDICTIONAL ANALYSIS

Because any order denying appellants' TCPA motion would be interlocutory, we would have jurisdiction over any such order only if a statute explicitly provides for an appeal from such an order. *See Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998) (per curiam). Subsection (a)(12) of section 51.014 of the Civil Practice and Remedies Code explicitly authorizes an interlocutory appeal from an order in

of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.” Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a).

which a district court denies a motion to dismiss under section 27.003 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(12). If a trial court does not rule on a motion to dismiss under section 27.003 by the thirtieth day following the date of the hearing on the motion, courts consider the motion to have been denied by operation of law, and the moving party may pursue an interlocutory appeal under section 51.014(a)(12). *See* Tex. Civ. Prac. & Rem Code Ann. § 27.005(a), § 27.008(a), § 51.014(a)(12); *Deuell v. Tex. Right to Life Comm., Inc.*, No. 01-15-00011-CV, 2015 WL 778367, at *1 (Tex. App.—Houston [1st Dist.] Feb. 24, 2015, no pet.) (mem. op., per curiam). A motion to dismiss under section 27.003—the TCPA—may be denied in one of two ways: (1) an express denial of the motion by the trial court or (2) the failure of the trial court to rule on the motion by the thirtieth day following the date of the hearing on the motion, in which case courts consider the motion to have been denied by operation of law. *See* Tex. Civ. Prac. & Rem. Code § 27.008(a); *Deuell*, 2015 WL 778367, at *1.

For purposes of today’s analysis, we presume without deciding that a petition seeking a pre-suit deposition is a “legal action” as defined in the TCPA and, accordingly, that the TCPA applies. *See* Tex. Civ. Prac. & Rem. Code § 27.001(6); *In re Elliott*, 504 S.W.3d 455, 464, 466–67 (Tex. App.—Austin 2016, orig. proceeding).

The clerk’s record contains no order denying the motion to dismiss. There is no reporter’s record in this appeal, and thus nothing in the record reflects that the trial court stated in open court that the court denied the motion to dismiss. Our record does not reflect that the trial court has expressly denied the motion to dismiss. Thus, appellants’ right to an interlocutory appeal turns on whether the trial court failed to rule on the motion by the thirtieth day following the date of the hearing on the motion.

Although appellants served a notice setting a hearing date of May 1, 2017, for the motion to dismiss, no hearing on the motion to dismiss occurred on that day. Appellants passed that hearing date and, in fact, filed their notice of appeal before May 1, 2017. Appellants assert that the hearing on their motion to dismiss occurred on March 27, 2017, during the same hearing at which the court considered Hejtmancik's pre-suit deposition petition. Hejtmancik disputes that assertion, and the appellate record contains no reporter's record of the March 27, 2017 hearing. Further, no party filed a formal bill of exception in the trial court as an alternative means of showing that the trial court conducted a hearing on the motion to dismiss on March 27, 2017 or on any other date. *See* Tex. R. App. P. 33.2. Similarly, the clerk's record does not indicate that appellants set their motion to dismiss for oral hearing on March 27, 2017, nor does the record show that Hejtmancik agreed to proceed with a hearing on the motion to dismiss while waiving the notice requirement. In their notice of appeal, appellants state in a conclusory manner that a hearing on their motion to dismiss was held on March 27, 2017, but we cannot base our appellate jurisdiction on appellants' ipse dixit in a notice of appeal. *See Res. Health Servs. v. Acucare Health Strategies*, No. 14-06-00849-CV, 2007 WL 4200587, at *1–2 (Tex. App.—Houston [14th Dist.] Nov. 29, 2007, no pet.) (mem. op.).

In short, the appellate record does not show that the trial court held a hearing on appellants' motion to dismiss on March 27, 2017, or on any other date. Thus, the record does not reflect that the trial court failed to rule on the motion to dismiss by the thirtieth day following the date of the hearing on the motion, and we have no basis on which to consider the motion to have been denied by operation of law. *See* Tex. Civ. Prac. & Rem. Code § 27.008(a); *Deuell*, 2015 WL 778367, at *1.

Because the appellate record does not reflect any denial of the motion to

dismiss, the purported ruling from which appellants seek to appeal, we lack jurisdiction over this appeal. *See Res. Health Servs.*, 2007 WL 4200587, at *1–2 (dismissing appeal for lack of jurisdiction because record did not reflect a judgment or order from which an appeal could be taken). Accordingly, we dismiss this appeal for lack of jurisdiction.

/s/ Kem Thompson Frost
 Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Jewell.