Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-19-00868-CV

Sam **YOUNGBLOOD**; Daniel P. Diepenhorst; Citrus Holdings, LLC; John William Hayes; Bob Warshawer; Jay McAnnelly; Ehrenberg Chesler Capital Partners, LLC; Ernest T. Wakabayashi, Individually and as Trustee of the Wakabayashi Trust; Gil Hodge; Patricia Hodge; Carter Speer; and Kai Wakabayashi,
Appellants

v.

Phil **ZACCARIA** and Pioneer C-Stores Management, Inc.,
Appellees

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2019CI19312
Honorable Cathy Stryker, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Luz Elena D. Chapa, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: August 12, 2020

AFFIRMED

Appellants ("the Youngblood Parties") appeal from the trial court's interlocutory order denying their motion to dismiss under the Texas Citizens' Participation Act ("TCPA"). Because the Youngblood Parties did not demonstrate that the TCPA applied in this case, we affirm the trial court's order.

BACKGROUND

The Youngblood Parties are investors and limited partners of businesses that were managed by Appellee Phil Zaccaria. Zaccaria is the owner and manager of Appellee Pioneer C-Stores Management, Inc., which served as the general partner of the following partnerships: (1) Pioneer C-Stores Western Holdings, LP, a convenience store wholesaler; (2) Western Alta Holdings, LP, an entity that owns convenience stores; and (3) Western Kwik Stop Holdings, LP, an entity that also owns convenience stores. The Youngblood Parties are the limited partners of these partnerships.

In the underlying action, Zaccaria and Pioneer C-Stores Management, Inc. ("Pioneer") filed a petition for declaratory judgment, requesting that the trial court declare a settlement agreement between them and the Youngblood Parties void and unenforceable. Their petition, which was filed on September 13, 2019, alleged the following facts:

- In 2018, the Youngblood Parties accused Zaccaria of mismanagement, including overcharging management fees, taking unauthorized or excessive distributions from the partnerships, and making improper loans from the partnerships. Zaccaria denied any wrongdoing.

- In May 2018, the Youngblood Parties and Zaccaria agreed to conduct a pre-suit mediation of their dispute, which resulted in a settlement agreement dated May 10, 2018.

- Under the agreement, Zaccaria agreed that Pioneer would resign as general partner of the partnerships and that Zaccaria would assign his 70% general and limited partnership interest in Western C-Store Holdings, LP and Western C-Store Holding II, LP to an entity controlled by the Youngblood Parties. Zaccaria agreed to relinquish "a 15% back-in in the profits of the limited partnerships upon sale." "Pending payoff of partnership debts, Zaccaria remained liable as guarantor of [the Youngblood Parties'] partnership debts for which he was to receive a monthly payment of 1/2% of the amount being guaranteed, which was never paid." The "primary and fundamental consideration bargained for by Zaccaria in exchange for the very substantial and valuable concessions and transfers Zaccaria made to the [Youngblood Parties] was to be released by [them] from any claims or liability for the fees, distributions and loans which they alleged, but Zaccaria denied, had occurred."

- The Youngblood Parties interpreted the settlement agreement to mean that none of their claims against him were released.

The petition sought a judgment "declaring that the purported [settlement agreement] is void as a binding or enforceable agreement and that the parties are entitled to restoration of their respective positions prior to its execution and attempted partial performance."

After the Youngblood Parties answered the declaratory action, Zaccaria and Pioneer moved for summary judgment, seeking a declaration that the settlement agreement "is void for uncertainty and indefiniteness, or voidable for lack of mutuality of obligation and consideration."[1] The Youngblood Parties responded by filing a motion to dismiss pursuant to the TCPA, arguing that Zaccaria and Pioneer "filed this lawsuit based solely on statements [the Youngblood Parties] made in connection with a contractually required pre-suit mediation." In their motion to dismiss, the Youngblood Parties stated that the parties have participated in two pre-suit mediations. The first mediation occurred on May 10, 2018, which resulted in the settlement agreement. A second mediation occurred on August 29, 2019. The Youngblood Parties argued that "the only communications Zaccaria could possibly be basing his allegations on would have had to come during or in connection with the second mediation." The Youngblood Parties argued in their motion to dismiss that "[s]tatements allegedly made during the parties' second pre-suit mediation or that otherwise related to attempts to resolve any dispute short of litigation fall 'within the protection of the right to petition government under the Constitution of the United States.'" In their response to the motion to dismiss, Zaccaria and Pioneer agreed that a second mediation was conducted on August 29, 2019, and was "unsuccessful and reached no agreement because the

[1]"While sometimes termed a 'cause of action' colloquially, declaratory relief under the UDJA [Uniform Declaratory Judgments Act] is more precisely a type of remedy that may be obtained with respect to a cause of action or other substantive right—'[a] court of record within its jurisdiction has power to declare rights, status, and other legal relations,' which 'may be either affirmative or negative in form,' and such a 'declaration has the force and effect of a final judgment or decree.'" *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 297-98 (Tex. App.—Austin 2018, pet. denied) (quoting TEX. CIV. PRAC. & REM. CODE § 37.003(a), (b)). "The permissible subjects of UDJA declarations expressly include 'question[s] of construction or validity' and 'rights, status, or other legal relations' under contracts . . . ." *Id*. at 298.

parties did not agree upon the meaning or understanding of essential terms of the May 10, 2018" settlement agreement. However, Zaccaria and Pioneer argued that the TCPA did not apply to their declaratory action and that the Youngblood Parties' motion to dismiss under the TCPA was frivolous. Zaccaria and Pioneer requested reasonable attorney's fees and costs for responding to the motion. After holding a hearing, the trial court denied the Youngblood Parties' motion to dismiss. It also denied Zaccaria and Pioneer's request for attorney's fees and costs. The Youngblood Parties then appealed.

MOTION TO DISMISS UNDER THE TEXAS CITIZENS PARTICIPATION ACT

The TCPA's stated 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." TEX. CIV. PRAC. & REM. CODE § 27.002. In an aim to fulfill this purpose, the TCPA provides for dismissal of a "legal action" "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, right to petition, or right of association unless "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." *Id.* §§ 27.003(a), 27.005(b), (c). If the moving party meets its burden of demonstrating the TCPA applies and the party bringing the legal action responds by establishing a prima facie case, the trial court will still dismiss the legal action "if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law." *Id*. § 27.005(d). "Legal action" is defined as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." *Id*. § 27.001(6).

In determining whether the parties have met their respective burdens, the trial court "consider[s] the pleadings, evidence a court should 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).

An appellate court reviews issues regarding interpretation of the TCPA de novo. *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). We review a trial court's denial of a TCPA motion to dismiss de novo. *Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 603 (Tex. App.—San Antonio 2018, pet. denied). In reviewing a ruling on a TCPA motion, "[w]e view the pleadings and evidence in the light most favorable to the nonmovant." *Id*.

The parties dispute whether the TCPA applies to the underlying declaratory action brought by Zaccaria and Pioneer against the Youngblood Parties. The Youngblood Parties argue the TCPA applies because the declaratory action[2] "was both based on and in response to pre-suit negotiations or statements made at or in connection with a pre-suit mediation" and "such statements fell" within TCPA's definition of the right to petition. The Youngblood Parties rely in particular on section 27.001(4)(E)'s definition of "exercise of the right to petition":

> "Exercise of the right to petition" means any of the following: . . .any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

TEX. CIV. PRAC. & REM. CODE § 27.001(4)(E). "Communication" means "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).

[2]A petition for declaratory action is included within the TCPA's definition of "legal action." *See* TEX. CIV. PRAC. & REM. CODE § 27.001(6) ("'Legal action' means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief.").

The Youngblood Parties admit that Texas courts "have not yet directly addressed" the "question of whether communications made during or in connection with mediation proceedings fall within the ambit of a citizen's 'right to petition' as protected by the TCPA." In support of their argument that the TCPA should apply to statements made during or in connection with mediation proceedings, they point to an opinion by the Austin Court of Appeals, *Long Canyon Phase II & III Homeowners Ass'n, Inc. v. Cashion*, 517 S.W.3d 212, 220 (Tex. App.—Austin 2017, no pet.).

In *Long Canyon*, 517 S.W.3d at 215-22, under the former version of the TCPA requiring only that a legal action "relate" to a party's exercise of the right to petition,[3] the Austin Court of Appeals considered whether homeowners' claims for harassment, negligence, and intentional infliction of emotional distress were based on, related to, or in response to an HOA's exercise of its right to petition. The dispute between the homeowners and the HOA concerned whether the homeowners were engaging in activities that unlawfully damaged the drainage easement on their property. *Id*. at 215. The HOA sent the homeowners a demand letter, threatening to fine them, file suit, and seek damages. *Id*. at 216. The homeowners then sued the HOA for harassment, negligence, and intentional infliction of emotional distress, alleging that the HOA had acted in bad faith and had "intentionally communicated through authorizing its attorney to write in a course and offensive manner, a letter addressed to the [homeowners] and by such action, [the HOA] and the Board intentionally annoyed and alarmed [the homeowners] on Christmas Eve." *Id*. The homeowners also alleged that "the HOA monitored visitors, watched yardworkers, made their presence known, trespassed, and took pictures of the [homeowners] property without consent." *Id*.

[3]The former version of the TCPA provided for 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* Acts 2011, 82nd Leg., ch. 341 (H.B. 2973), § 2, eff. June 17, 2011. In 2019, the Legislature amended the statute to delete "relates to." *See* Acts 2019, 86th Leg., ch. 378 (H.B. 2730). The current statute provides for dismissal of a legal action that "is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association . . . ." TEX. CIV. PRAC. & REM. CODE § 27.003(a).

According to the petition, the HOA "acted with intent to cause emotional distress to the [homeowners]," which "was severe." *Id*.

The demand letter sent by the HOA threatened to fine, sue, and place a lien on the homeowners' property "based on alleged violations of deed restrictions that limited the [homeowners'] use or maintenance of a portion of their property that was burdened by a drainage easement." *Id*. at 218. However, the court explained that a "review of the evidence—viewed in the light most favorable to the [homeowners], as required by the governing standard of review—reveal[ed] that the factual bases for the [homeowners'] claims are much broader than this." *Id*. "Although the [homeowners] do complain about the letter in their live petition (terming it a 'course and offensive' missive calculated to 'alarm[],' 'caus[e] emotional distress,' and even ruin their Christmas holidays), they present it as a component of a larger 'pattern of harassment' and 'bad faith' or 'ultra vires' conduct by the HOA board and 'some of the [HOA] members.'" *Id*. "This conduct, the [homeowners] alleged, has included 'constantly monitor[ing] visitors of the [homeowners], watch[ing] whenever someone comes to work in the [homeowners'] yard, and 'mak[ing] their presence known,' as well as 'trespass[ing] on the [homeowners'] property and tak[ing] pictures [there] without their consent." *Id*.

In addition to the homeowners' pleadings, "the trial court had other evidence before it that provided further background and context regarding the nature of the parties' dispute and the alleged 'harassment' by the HOA, including correspondence between the parties and an affidavit from [one of the homeowners]." *Id*. This evidence showed that the parties had previously litigated "the same issues regarding [the homeowners'] use of the drainage easement" and the homeowners had prevailed. *Id*. There was also evidence that in the interim, "the HOA had inconsistently and arbitrarily advised the [homeowners] that certain activities were permitted in the easement (e.g., planting grass or removing arborist-certified dead trees) only to blindside them later with

complaints about these same acts, and had similarly singled them out for disparate treatment compared to other residents who had been permitted even more intensive uses of the drainage easements on their respective properties." *Id*. at 219. Further, the homeowners "complained that following the HOA's [demand] letter, the association had refused to explain or elaborate precisely why or how any conduct by them, including conduct that HOA representatives had permitted, amounted to violations of the deed restrictions in the HOA's view." *Id*.

According to the appellate court, "[t]his collective body of evidence, in turn, tended to elaborate upon and support a central theme of the [homeowners] in their lawsuit—that in 'harassing' the [homeowners], the HOA's actors ha[d] acted out of personal animus or spite rather than in any good-faith belief that the [homeowners] had actually committed any of the deed-restriction violations of which they were accused, or at least in any good-faith belief that the alleged violations would survive the preclusive effect of the [former litigation's] judgment." *Id*. The appellate court noted that the HOA disputed "both the factual and legal merit of the [homeowners'] allegations." *Id*. However, the court stressed that "what matters initially is that the [homeowners] *complain of a much broader* course of conduct by the HOA than merely sending the [demand] letter." *Id*. (emphasis added). The court explained that "those factual bases beyond the [demand] letter" were not preserved by the HOA as a ground for dismissal in their motion. *Id*. Thus, the court held that the only TCPA challenge preserved by the HOA was to "those claims factually predicated on the [demand] letter." *Id*.

The appellate court then noted that the HOA pre-suit demand letter fell within the TCPA's definition of exercise of the right to petition because the "established understanding under First Amendment jurisprudence, both now and at the time of the TCPA's enactment, was that pre-suit demand letters generally fall within the 'right to petition.'" *Id*. at 220. In considering whether the homeowners' claims for harassment, negligence, and intentional infliction of emotional distress

were based on, related to, or in response to the HOA sending its demand letter, the court stressed the homeowners in their response to the TCPA motion to dismiss stated that they "filed this suit in response to the continued pattern of harassment by the HOA and the board *that is partly represented by the Letter*." *Id*. at 221-22 (emphasis in original). That is, the act of sending the demand letter was alleged to have contributed to the pattern of harassment and the act of intentionally causing emotional distress. *See id*. Having concluded that the homeowners' harassment, negligence, and intentional infliction of emotional distress claims were based on, related to, or in response to the HOA's demand letter, the appellate court held the TCPA applied. *Id*.

Here, however, Zaccaria and Pioneer's declaratory action is not based on or in response to the Youngblood Parties' statements made in mediation. That is, the statements made in the second mediation do not form the basis of the declaratory action. Instead, viewing the pleadings and evidence in the light favorable to Zaccaria and Pioneer, the declaratory action is based on the allegation that the settlement agreement from the first mediation is void and unenforceable. The Youngblood Parties point to the following allegations made by Zaccaria and Pioneer in their petition about statements made by the Youngblood Parties: (1) the Youngblood Parties had "asserted that Zaccaria will receive nothing on account of his partnership interests and instead will be indebted to the limited partnerships"; (2) they had "assert[ed] the very same claims against Zaccaria" that were resolved pursuant to the settlement agreement; (3) they had stated "the purported [settlement agreement had] settled nothing and . . . released nothing"; (4) they had made or done something to suggest that "there was no meeting of the minds of the parties upon fundamental provisions meant to be expressed in the purported [settlement agreement]"; and (5) they had "contend[ed]" that "their claims against Zaccaria remain and may be unilaterally determined by [the Youngblood Parties], and Zaccaria is not released from them." These

allegations merely allege that the parties could not agree on how the settlement agreement should be interpreted. While the Youngblood Parties contend that Zaccaria and Pioneer have conceded in their brief that their declaratory action was filed in response to statements made during the second mediation, we find no such concession. The Youngblood Parties state that the declaratory action was filed after the parties could not agree during the second mediation on how the settlement agreement should be interpreted, they are clear that their petition was "not 'based on or in response to' what occurred at the mediation." Instead, they state that their declaratory claims are based on the settlement agreement itself, emphasizing that they alleged in their petition that the settlement agreement is void and unenforceable.

We agree that this record demonstrates that the declaratory action was merely filed in response to statements made in the mediation in the same way all lawsuits not settled in mediation are filed—parties file lawsuits when they disagree and do not settle. To conclude under this record that the declaratory action was filed in response to statements made during the mediation would expand the TCPA's application to all lawsuits where the parties engage in a pre-suit mediation. Given that the legislature has provided for a "cloak of confidentiality" around mediation through its enactment of section 154.053(c) of the Texas Civil Practice and Remedies Code, such an interpretation would be absurd and could not have been the legislative intent in enacting the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 154.053(c) ("Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court."); *see also Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018) ("[W]e construe [a] statute's words according to their plain and common meaning, unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results.") (quoting *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008)). We therefore hold that the Youngblood Parties did not

demonstrate that the TCPA applies, and the trial court did not err in denying their motion to dismiss under the TCPA.

ATTORNEY'S FEES

Having held that the trial court did not err in denying the motion to dismiss, we must now consider Zaccaria and Pioneer's argument that the trial court erred in denying their request for attorney's fees and costs. They argue that the Youngblood Parties motion to dismiss was frivolous and intended solely to delay the underlying litigation. According to Zaccaria and Pioneer, the Youngblood Parties presented "no plausible argument" and merely filed their motion to dismiss in response to Zaccaria and Pioneer filing their motion for summary judgment.

The TCPA provides that if the trial court "finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court *may* award court costs and reasonable attorney's fees to the responding party." TEX. CIV. PRAC. & REM. CODE § 27.009(b) (emphasis added). "An attorney's fees award under section 27.009(b) is entirely discretionary and requires the trial court to find the motion was frivolous or solely intended to delay." *Pinghua Lei v. Nat. Polymer Int'l Corp.*, 578 S.W.3d 706, 717 (Tex. App.—Dallas 2019, no pet.). "'Frivolous' is not defined in the TCPA, but one court has explained that 'the word's common understanding contemplates that a claim or motion will be considered frivolous if it has no basis in law or fact and lacks a legal basis or legal merit.'" *Id*. (quoting *Sullivan v. Texas Ethics Comm'n*, 551 S.W.3d 848, 857 (Tex. App.—Austin 2018, pet. denied)). In reviewing this record, we cannot conclude that the Youngblood Parties' argument had no basis in law and fact as a matter of law. Thus, given the trial court's discretion to award attorney's fees under section 27.009(b), we hold the trial court did not abuse its discretion in failing to award Zaccaria and Pioneer reasonable attorney's fees.

CONCLUSION

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

Liza A. Rodriguez, Justice