



Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00276-CV

Beverly STRAUB,
Appellant

v.

PESCA HOLDING LLC,
Appellee

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2019-CI-07873
Honorable Rosie Alvarado, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: March 10, 2021

AFFIRMED

This accelerated interlocutory appeal arises from a common law fraud action filed by Pesca Holding LLC against Beverly Straub. Straub moved to dismiss the suit under the Texas Citizens Participation Act (TCPA). The motion was denied by operation of law. Because common law fraud claims are exempted from the 2019 amendments to the TCPA, Straub failed to meet her burden on the applicability of the TCPA. We affirm the denial of Straub's motion to dismiss under the TCPA and remand this cause for further proceedings.

BACKGROUND

On December 21, 2018, Pesca entered into a contract with Bengt Skoldeberg, Gudrun Skoldeberg, and Texas Sun & Shade to purchase Texas Sun & Shade's equity and VASA Window Covering, Inc.'s assets. On April 18, 2019, Pesca sued the Skoldebergs alleging fraudulent misrepresentation on the nature of VASA's financial stability and its true value.

On December 2, 2019, Pesca amended its petition to add a claim against the Skoldebergs for fraudulent misrepresentation of the value of Texas Sun & Shades's shares. On December 9, 2019, Pesca again amended its petition to add Beverly Straub, the Skoldebergs' accountant, as a defendant alleging she prepared and provided a balance sheet that misrepresented VASA's assets to Pesca's detriment. Pesca claimed Straub was liable for fraud and participatory "concert of action." Pesca further alleged that Straub breached her fiduciary duties to Pesca by preparing false accounting documents for both corporations with the intent to induce Pesca to purchase those corporations.

On January 29, 2020, Straub timely filed a motion to dismiss under the TCPA. The motion was heard on April 16, 2020. Because the trial court did not rule on the motion, on May 16, 2020, the motion was denied by operation of law. This accelerated interlocutory appeal followed.

ISSUES ON APPEAL

On appeal, Straub raises five issues: (1) whether the amendment to section 27.010 of the TCPA, which became effective on September 1, 2019, applies to Pesca's cause of action for common law fraud against Straub given that the original action was filed before the effective date of the 2019 amendment; (2) whether the TCPA applies because Pesca's claims are based on, related to, and are in response to Straub's exercise of the right to free speech on a matter of public concern; (3) whether the TCPA applies because Pesca's claims are based on, related to, and are in response to Straub's right of association with the Skoldebergs; (4) whether Pesca failed to make a

prima facie case for each essential element of its claims; and (5) whether the trial court erred in failing to award Straub attorney's fees and mandatory sanctions under the TCPA.

Because we conclude that the September 1, 2019 amendments to the TCPA apply to Pesca's common law fraud cause of action against Straub, thus precluding Straub from invoking the TCPA, we will only address Straub's first issue.

STANDARD OF REVIEW

Questions of statutory construction are reviewed de novo. *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017); *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). "In construing statutes our primary objective is to give effect to the Legislature's intent." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010); accord *Molinet*, 356 S.W.3d at 411. "[We] first look to the statute's language to determine that intent, as we consider it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.'" *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008) (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)); accord *Molinet*, 356 S.W.3d at 411. We consider the statute as a whole rather than focusing on individual provisions. *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 183 (Tex. 2019) (citing *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)). "Where statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012); accord *TGS-NOPEC*, 340 S.W.3d at 439. Where the "statute assigns detailed definitions to many of the terms it employs, . . . we must adhere to statutory definitions." *Adams*, 547 S.W.3d at 894 (citing *TGS-NOPEC*, 340 S.W.3d at 439).

SEPTEMBER 1, 2019 AMENDMENTS TO THE TCPA

The TCPA contemplates an expedited dismissal procedure applicable to claims brought to intimidate or silence a defendant's exercise of the rights enumerated in the Act. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *Coleman*, 512 S.W.3d at 898). The party invoking the TCPA may file a motion to dismiss the "legal action . . . not later than the 60th day after the date of service of the legal action." TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b); accord *Warner Bros. Entm't, Inc. v. Jones*, 611 S.W.3d 1, 11 (Tex. 2020). In addition, under the September 1, 2019 amendments, the party must show its "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." TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003(a), .005(b); accord *Coleman*, 512 S.W.3d at 898. Section 27.010, which provides the exemptions to the TCPA, was amended in 2019 to include an exemption for common law fraud. See Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 9, sec. 27.010, 2019 Tex. Gen. Laws 684 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(12)).

The evolution of section 27.010 provides a context for our analysis. As enacted in 2011, the statute exempted only (a) enforcement actions brought in the name of Texas or a political subdivision of the State by state and county attorneys; (b) "legal action[s] brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the intended audience is a buyer or customer"; and (c) personal injury legal actions. Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, sec. 27.010 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.010). In 2019, the Texas Legislature amended the TCPA to exempt from its application various legal actions, including a legal action for common law fraud. See Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 9, sec. 27.010, 2019 Tex. Gen.

Laws 684 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(12)). The amendments to the Act, which took effect on September 1, 2019, applied “only to an action filed on or after the effective date of the Act.” *Id.* §§ 11–12. “An action filed before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.” *Id.* § 11.

The issue before us is whether the “common law fraud” exception, which became effective on September 1, 2019, applies to Pesca’s fraud claims against Straub, which were asserted when she was added as a party to the lawsuit after the effective date of the Act. *See id.* §§ 9, 11.

A. Parties’ Arguments

Straub argues that the September 1, 2019 amendments to the TCPA do not apply to Pesca’s cause of action for fraud because the legislature mandated that the amendments to the statute apply only to an “action filed before the [September 1, 2019,] effective date of [the] Act.” Straub contends the legislature’s clear instruction was that the amendments should apply only to new actions filed after the effective date of September 1, 2019. In Straub’s view, because Pesca filed its original petition before September 1, 2019, the amendments do not apply to her even though she was added to the lawsuit after the effective date of the statute.

Pesca argues that because Straub was added as a party after the 2019 amendment exempting a legal action for common law fraud from the TCPA, the new TCPA applies, and Straub cannot move to dismiss under the TCPA.

B. Which Version of the Statute Applies?

To support her argument, Straub directs us to *S&P Consulting Engineers PLLC v. Baker*, 334 S.W.3d 390, 395–98 (Tex. App.—Austin 2011, no pet.) (en banc). In *S&P Consulting Engineers*, the Third Court of Appeals considered which version of section 150.002 of the Texas Civil Practice & Remedies Code applied when, after the suit was filed and after the amendments

to the statute became applicable, another party was added to the lawsuit. *Id.* at 395. The Third Court concluded that the prior version of the statute applied because the suit was filed prior to the statutory amendments becoming effective. *Id.* at 397–98; *see Jay Miller & Sundown, Inc. v. Camp Dresser & McKee Inc.*, 381 S.W.3d 635, 644 (Tex. App.—San Antonio 2012, no pet.).

This case differs from *S&P Consulting Engineers*. There, the amendments applied

only to an action or arbitration filed *or commenced* on or after the effective date [Sept. 1, 2009] of this Act. An action or arbitration filed or commenced before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and the law is continued in effect for that purpose.

S&P Consulting Eng'rs, 334 S.W.3d at 395 (alteration in original) (emphasis added) (quoting Act of May 29, 2009, 81st Leg., R.S., ch. 789, § 3, 2009 Tex. Gen. Laws 1991, 1992) (SB 1201). The issue in *S&P* was whether the action was “commenced” before SB 1201 took effect. Because SB 1201 did not specify whether “an action commences for all persons with the filing of the original petition or whether an action commences for each defendant the first time it is named as a defendant,” *S&P* turned to “the rules of civil procedure for some guidance and context for interpreting the words ‘action’ and ‘commence.’” *Id.* at 396. Relying on the language of Rule 38(a),¹ *S&P* determined that “[t]his rule does not state or indicate that these new [amended] petitions commence new actions or suits against the new parties; rather, the subsequent [amended] petitions by defendants against new parties become part of an action that has already commenced.” *Id.*

¹ Rule 38(a) provides in part that

any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him.

TEX. R. CIV. P. 38(a) (emphasis added); *accord Morris v. Ponce*, 584 S.W.3d 922, 927 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

Unlike *S&P*, here, the legislature omitted the word “commence” in stating when the TCPA amendments would take effect. Instead, the legislature mandated that the amendments would apply “only to an action filed on or after the effective date of the Act.” *See* Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11–12.

The word “action” is not defined in the Act. However, “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.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6). The issue then is whether the 2019 TCPA amendment applies to a party added to a pending action by way of an amended petition after the effective date of the amendment.

Two cases are instructive in our analysis, *Better Business Bureau of Metropolitan Dallas, Inc. v. Ward*, 401 S.W.3d 440 (Tex. App.—Dallas 2013, pet. denied), and *In re Estate of Check*, 438 S.W.3d 829 (Tex. App.—San Antonio, 2014, no pet.).

In *Ward*, the issue was whether the appellate court had jurisdiction over an interlocutory appeal involving a motion to dismiss under the TCPA.² *Ward* was added as a plaintiff after the effective date of the TCPA. The defendant filed a motion to dismiss *Ward*’s claims under the TCPA. *Ward* argued that the TCPA did not apply because the original suit was filed before the TCPA became effective. The Dallas Court of Appeals disagreed. It concluded that, based on the definition of “legal action” under the TCPA, the defendant had sixty days from service of the amended petition that added *Ward* to seek dismissal of *Ward*’s suit. The *Ward* court then determined that the “definition of ‘legal action’ in the statute is broad and evidences the legislative intent to treat any claim by any party on an individual and separate basis.” *Ward*, 401 S.W.3d at 443; *cf. EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 758 (Tex. 2020) (presumption of broad

² Under the TCPA, a motion to dismiss must be filed within sixty days of service of the legal action filed against the movant. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b).

meaning). Accordingly, the *Ward* court concluded it had jurisdiction in the interlocutory appeal because the defendant filed its motion to dismiss Ward’s claims within sixty days after it was served with the amended petition—which added Ward as a plaintiff and his individual claims against the defendant. *Ward*, 401 S.W.3d at 443.

Check presented a different set of facts, but this court reached an analogous conclusion. *See Check*, 438 S.W.3d at 829. In that case, Check filed a will contest objecting to the probate of his brother’s will. The executor counterclaimed alleging defamation. Check, however, did not file a motion to dismiss the original counterclaim under the TCPA. Rather, after the sixty-day deadline expired, Check was served with an amended counterclaim. After being served with the amended petition, Check filed a motion to dismiss under the TCPA. The motion, however, was denied by operation of law.

On appeal, Check contended that under the definition of “legal action,” the executor’s amended counterclaim reset the sixty-day deadline. This court disagreed, concluding instead that “*in the absence of new parties or claims*, the deadlines for filing a motion to dismiss would run from the date of service of the original legal action.” *Id.* at 835 (emphasis added).

Like *Ward* and *Check*, we conclude that the definition of “legal action” contained in section 27.001(6) is a clear and unambiguous manifestation of “legislative intent to treat any claim by any party on an individual and separate basis.” *See Ward*, 401 S.W.3d at 443; *see also Check* 438 S.W.3d at 837. Thus, if a party is added to an existing lawsuit by way of an amended petition, for purposes of a motion to dismiss under the TCPA, that party’s claims will be treated separately from the preexisting parties’ claims in any earlier petitions. *See Ward*, 401 S.W.3d at 443; *see also Check* 438 S.W.3d at 837. Therefore, we hold that the 2019 amendments to the TCPA, which exempt common law fraud from the Act, apply to a newly added party’s claims when the new party is added to a legal action on or after the effective date of the Act.

On the facts of this case, a contrary conclusion would be absurd since it would mean that Straub would have had to file a motion to dismiss within sixty days after the original petition was filed when she was not yet a party to the suit. *Cf. Molinet*, 356 S.W.3d at 411.

Because of our holding, Straub's remaining issues are moot.

CONCLUSION

We hold that when Straub was first added as a defendant—on a date after the 2019 amendments to the Texas Citizens Participation Act became effective—the fraud causes of action against her were exempted from the TCPA. Therefore, we affirm the denial of Straub's motion to dismiss and remand the cause for further proceedings.

Patricia O. Alvarez, Justice