



IN THE  
TENTH COURT OF APPEALS

No. 10-19-00178-CV

TONY LEE MARTIN,

Appellant

v.

D.L. WALKER,

Appellee

From the 414th District Court  
McLennan County, Texas  
Trial Court No. 2018-4524-5

---

---

OPINION

---

---

This is an interlocutory appeal from the trial court's order denying a motion to dismiss under the Texas Citizens Participation Act ("TCPA"). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001-.011 (West 2015) (provisions of the TCPA); *see also id.* § 51.014(a)(12) (authorizing an interlocutory appeal from an order denying a TCPA motion to dismiss). Appellee, D.L. Walker, sued appellant, Tony Lee Martin, for damages associated with Martin's operation of illegal gambling machines, generally referred to as "eight-liners."

Because we conclude that Walker's suit against Martin falls under the TCPA's "commercial speech" exemption, *see id.* § 27.010(b), we affirm.

## I. BACKGROUND

In her live pleading, Walker alleged that Martin engaged in numerous criminal activities and that:

7.6 At all relevant times[,] Tony Lee Martin and his agents[,] servants[,] and employees knew that Plaintiff was addicted to playing the illegal eight-liner gambling devices owned and operated by Defendant but nevertheless urged and enticed Plaintiff to continue playing the illegal gambling devices and [Plaintiff] continued to lose more money than Plaintiff won resulting in Plaintiff losing substantial sums of money and suffered extreme mental and emotional distress over an extended period of time.

7.7 At all relevant times[,] Tony Lee Martin and his agents[,] servants[,] and employees made false representations to Plaintiff about Plaintiffs [sic] ability to win cash money playing his eight-liner gambling machines; said representations were known by Tony Lee Martin to be material and to also be false but, nevertheless made such representations with the intent that Plaintiff act upon such representations, which Plaintiff did all to Plaintiff's harm and damage.

8.0 The illegal acts and omissions of the Defendant individually and by and through criminal enterprises and combinations organized and operated by Defendant, his relatives, agents[,] servants[,] and employees and affiliates were the producing cause, or in the alternative, the proximate cause of injuries and damages to Plaintiff.

Thereafter, Martin filed a motion to dismiss, asserting that the TCPA compels the dismissal of this suit because the claims made in Walker's suit are based on, relate to, or are in response to Martin's exercise of the right of free speech, and because the complained-of communication relates to "a good, product, or service" and, thus, is a

“communication made in connection with a matter of public concern. Walker responded by alleging, among other things, the “commercial speech” exemption outlined in section 27.010(b) of the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b). Martin countered that Walker failed to present sufficient evidence establishing the “commercial speech” exemption.

After a hearing, the trial court denied Martin’s TCPA motion to dismiss. This appeal followed.

## II. STANDARD OF REVIEW

We review de novo a trial court’s denial of a motion to dismiss under the TCPA. *Schmidt v. Crawford*, 584 S.W.3d 640, 646-47 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (citing *Holcomb v. Waller County*, 546 S.W.3d 833, 839 (Tex. App.—Houston [1st Dist.] 2018, pet. denied)); *see Johnson-Todd v. Morgan*, 480 S.W.3d 605, 609 (Tex. App.—Beaumont 2015, pet. denied). In reviewing the trial court’s ruling, we consider the pleadings and the evidence the trial court considered at the time the ruling occurred. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a); *see In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015).

## III. THE TCPA

The TCPA establishes a multi-step process for the expedited dismissal of legal actions that are “based on, relate[] to, or [are] 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 ANN. § 27.003(a). Initially, the party who files a motion to dismiss under the TCPA must

show “by a preponderance of the evidence that the legal action is based on, relates to, or is in response to” the movant’s exercise of the above-enumerated protected rights. *Id.* § 27.005(b). If the movant meets that burden, then under the second step, the burden shifts to the non-movant to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(c). If the non-movant fails to satisfy its burden to present a prima-facie case under section 27.005(c), the trial court must dismiss the action within the TCPA’s expedited time frame. *See id.* § 27.005(c)-(d); *see also id.* §§ 27.003(b), .004, .005(a), .007(b), .008 (establishing deadlines). However, if the non-movant satisfies its burden to present a prima-facie case, the movant may still obtain dismissal by establishing “by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.” *Id.* § 27.005(d).

Despite the foregoing multi-step dismissal process, the TCPA exempts certain actions from the TCPA’s application. *Id.* § 27.010 (establishing four exemptions). The relevant exemption here is the “commercial speech” exemption, which provides that the TCPA,

does not apply to a legal action 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, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

*Id.* § 27.010(b). All of the section 27.010 exemptions are “wholly unnecessary unless the TCPA applies,” and as discussed above, “the TCPA only applies when the claim is based

on the defendant's exercise of the right of free speech, association, or to petition." *Castleman v. Internet Money Ltd.*, 546 S.W.3d 684, 688 (Tex. 2018) (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001(1)-(4), .003(a)). Therefore, when invoked, the trial 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 id.* If an action falls under a TCPA exemption, the TCPA does not apply and may not be used to dismiss the action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010; *see also Best v. Harper*, 562 S.W.3d 1, 11 (Tex. 2018) (noting that, if a TCPA exemption applies, the movant cannot invoke the TCPA's protections).

#### IV. ANALYSIS

In his sole issue on appeal, Martin alleges that the trial court erred by not dismissing this suit under the TCPA because Walker's allegations relate to his exercise of free speech and, thus, implicate the TCPA, and because the "commercial speech" exemption does not apply.

With regard to his initial burden under the TCPA, Martin stated in his motion to dismiss that: "The statements Plaintiff [Walker] alleges were made . . . include an issue related to 'a good, product, or service,' and therefore are a 'communication made in connection with a matter of public concern.'"<sup>1</sup> Martin further noted that Walker's "claims

---

<sup>1</sup> On appeal, Martin contends that Walker's claims also implicate criminal activity, which is a matter of public concern that relates to community well-being. However, this contention was not pleaded in Martin's motion to dismiss and, thus, was not before the trial court at the time of the complained-of ruling.

and allegations in this legal action, all of which are denied by Defendant, are nonetheless based on, relate to, or are in response to what would be Defendant's exercise of the right of free speech." The phrase "matter of public concern" is part of the TCPA's definition of "exercise of the right of free speech." See TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3) ("Exercise of the right of free speech' means a communication made in connection with a matter of public concern."). Furthermore, in his motion, Martin sufficiently alleged that Walker's legal action is based on, relates to, or is in response to Martin's exercise of one of the TCPA's protected rights—the exercise of the right of free speech. See *id.* § 27.005(b)(1)(A).

In deciding whether a legal action should be dismissed under the TCPA, the trial court must consider the pleadings and affidavits stating the facts on which the liability is based. See *id.* § 27.006(a). To determine the basis of a legal action for purposes of the first step in the dismissal procedure, it is necessary to consider Walker's petition, which is "the 'best and all-sufficient evidence of the nature of the action.'" *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) (quoting *Stockyards Nat'l Bank v. Maples*, 127 Tex. 633, 95 S.W.2d 1300, 1302 (Tex. 1936)). "The basis of a legal action is not determined by the defendant's admissions or denials, but by the plaintiff's allegations." *Id.* "When it is clear from the

---

As stated above, in reviewing the trial court's ruling, we consider the pleadings and the evidence the trial court considered at the time the ruling occurred. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (West 2015); see *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015).

plaintiff's pleadings that the action is covered by the Act, the defendant need show no more." *Id.*

In the instant case, Walker asserted, in her live pleading, that Martin operated illegal eight-liner gambling machines and, despite knowing that she is a gambling addict, encouraged and enticed her to play these machines, causing her to lose substantial sums of money. Walker also alleged that Martin made false representations to her about her ability to win cash money playing the illegal eight-liner gambling machines. We conclude that Walker's pleading is sufficient to establish that her lawsuit is based on, related to, or was in response to Martin's exercise of his right of free speech. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(1) (defining "communication" as including "the making or submitting of a statement . . . in any form or medium . . . ."), (4) (defining "exercise of the right of free speech as a "communication made in connection with a matter of public concern"), (7)(E) (defining "matter of public concern" as including "an issue related to . . . a good, product, or service in the marketplace"); *Hersh*, 526 S.W.3d at 468. Accordingly, Martin met his initial burden under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b).

Having concluded that Martin met his initial burden under the TCPA, we now turn to Walker's contention that the trial court properly denied Martin's motion to dismiss because her claims fall under the TCPA's "commercial speech" exemption. As

stated earlier, section 27.010(b) outlines the “commercial speech” exemption. According to the Texas Supreme Court, this exemption applies when,

(1) the defendant was primarily engaged in the business of selling or leasing goods or services, (2) the defendant made the statement or engaged in the conduct on which the claim is based in the defendant’s capacity as a seller or lessor of those goods or services, (3) the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides, and (4) the intended audience of the statement or conduct were actual or potential customers of the defendant for the kind of goods or services the defendant provides.

*Castleman*, 546 S.W.3d at 688. “[T]he only reasonable construction of the exemption’s reference to ‘the statement or conduct’ is as a reference back to ‘the defendant’s’ statement or conduct ‘on which the claim is based.’” *Id.* Moreover, the non-movant bears the burden of proving a statutory exemption from application of the TCPA. *See Deaver v. Desai*, 483 S.W.3d 668, 673 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see also Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 282 (Tex. App.—Dallas 2015, pet. denied).

On appeal, Martin generally contends that Walker failed to prove all of the elements of the “commercial speech” exemption. We disagree.

First, the evidence and pleadings establish that Martin was primarily in the business of selling or leasing goods or services—*i.e.*, gambling services and entertainment through use of the eight-liner machines. *See Castleman*, 546 S.W.3d at 688. Regarding the second element, Walker alleged in her live pleading that, despite knowing that she is a gambling addict, Martin encouraged and enticed her to play these machines, causing her to lose substantial sums of money. Walker also alleged that Martin made false



representations to her about her ability to win cash money playing the illegal eight-liner gambling machines. Additionally, Walker executed two affidavits, wherein she detailed the operations of Martin's "game room," as well as interactions she had with Martin while at the "game room." These interactions included the exchange of pleasantries, the extension of free game play to Walker, communications made by Martin to Walker regarding payouts, payouts made by Martin and his employees to Walker, food and drinks provided to Walker by Martin and his employees, Martin introducing Walker to a man who owned the Baby Girls game room in Waco, Texas, that also had eight-liners, Martin encouraging Walker to visit another eight-liner game room located on New Road in Waco, and Walker losing more than \$86,000 on Martin's eight-liner gambling machines. We therefore conclude that Walker's evidence is sufficient to establish the second element of the *Castleman* analysis. *See id.*

Moreover, Walker's pleadings and evidence also establish the third and fourth elements of the *Castleman* analysis. As outlined above, the pleadings and evidence demonstrated that Martin's alleged conduct arose out of his commercial conduct involving the kind of goods or services that Martin provided—*i.e.*, gambling services and entertainment through use of the eight-liner machines. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b) (requiring that "statement or conduct arises out of the sale or lease of goods, services, . . . or a commercial transaction in which the intended audience is an actual or potential buyer or customer"); *see also Castleman*, 546 S.W.3d at 688 (interpreting

the “commercial speech” exemption to require, among other elements, that “the statement or conduct at issue arose out of a commercial transaction involving the kind of goods or services the defendant provides”). And finally, the pleadings and evidence establish that the intended audience of Martin’s statements and conduct were actual or potential customers—Walker and other customers referenced in Walker’s first affidavit—of Martin’s for the kind of goods or services Martin provided—once again, gambling services and entertainment through use of the eight-liner machines. *See Castleman*, 546 S.W.3d at 688.

Based on the foregoing, we agree with Walker that the “commercial speech” exemption applies to her claims against Martin in this case. And given this, we need not address Martin’s assertion that Walker failed to meet her burden under the TCPA of establishing by clear and specific evidence a prima facie case for each essential element of her claim against Martin. *See Best*, 562 S.W.3d at 11 (noting that, if a TCPA exemption applies, the movant cannot invoke the TCPA’s provisions). Accordingly, we overrule Martin’s sole issue on appeal.

## V. CONCLUSION

We affirm the trial court’s order denying Martin’s motion to dismiss under the TCPA.

JOHN E. NEILL  
Justice

Before Chief Justice Gray,  
Justice Davis, and  
Justice Neill

Affirmed

Opinion delivered and filed July 29, 2020

[CV06]

