TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00498-CV

Long Canyon Phase II and III Homeowners Association, Inc., Appellant

v.

Chris Cashion and Lisa Cashion, Appellees

FROM THE COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY
NO. C-1-CV-15-001016, HONORABLE ERIC SHEPPERD, JUDGE PRESIDING

C O N C U R R I N G O P I N I O N

I join the Court's analysis and judgment, even though the outcome may do more to undermine than vindicate any "anti-SLAPP" goals of the Texas Citizens Participation Act (TCPA).[1] Viewed through our standard of review, as the Court recognizes, this case involves an HOA that has threatened spite-motivated and likely frivolous litigation against two of its homeowner members as part of a broader pattern of harassment—in short, conduct quite similar to the SLAPP-type lawsuit abuse whose elimination was the TCPA's professed goal.[2] Yet under the TCPA *as actually written*—and as the Judiciary is bound to apply it—it is the HOA that finds protection; indeed, the Act weaponizes the HOA's conduct by making it a predicate for dismissing responsive claims of the homeowner victims. And while ironic, this outcome is not isolated in the growing body of TCPA

[1] *See Serafine v. Blunt*, 466 S.W.3d 352, 365–67 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring) (summarizing anecdotal legislative history of the TCPA).

[2] *See id*.

cases—it is essentially a reprise of this Court's *Serafine* decision,[3] and no doubt more will follow. The primary root of such outcomes is the TCPA's broad definition of the "exercise of the right to petition," which protects lawsuits and even lawsuit threats without any explicit exclusion for frivolous or bad-faith litigation conduct.[4] But the Judiciary must continue to take these features of the Act as we find them, whatever one thinks of the outcomes in cases like *Serafine* and this one, because any refinement or limitation of that text must come from the Legislature instead.

Because the HOA met its initial burden through its reliance on the TCPA's "exercise of the right to petition" definition, the Court did not reach the HOA's alternative ground asserting that its pre-suit letter also sufficed as the "exercise of the right of association." The HOA's arguments in support of this ground are nonetheless noteworthy, at least for anyone who may be concerned about further divergence between the TCPA's professed "anti-SLAPP" purposes and the objective textual meaning courts must apply.

Intuitively, it would seem a bit far-fetched to argue, as the HOA does, that a letter from its lawyer threatening to sue the homeowners for tens of thousands of dollars, plus attorney's fees, plus thousands in additional fines, with an accompanying lien on the homeowners' property, and against the backdrop of the antagonistic history between the parties for which there was

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[3] *See id*. at 376–77 ("[I]t is arguably the claims asserted by Serafine that more closely resemble the SLAPP paradigm, at least if one credits the Blunts' account of the events preceding her lawsuit. . . . Yet it is Serafine's claims that are exalted and protected as the 'exercise of the right to petition' under the TCPA, in derogation of the Blunts' rights.").

[4] *See id*. at 377–90 (analyzing breadth of TCPA's "exercise of the right to petition" definition). And even if the definition is read to tacitly incorporate the "sham litigation" exception from First Amendment law, this would be a high bar that would not exclude much frivolous or bad-faith litigation conduct, as illustrated in both this case and *Serafine*. *See* slip op. at 11–12; *Serafine*, 466 S.W.3d at 382–83 (Pemberton, J., concurring).

evidence here, could be considered an "exercise of the right of association" between the HOA and the homeowners—that is, assuming this "right of association" bears any resemblance to the concept long familiar to constitutional law.[5] But the "exercise of the right of association" *as defined and protected by the TCPA* is worded more broadly than this, at least when read in isolation. The TCPA defines the "exercise of the right of association" as "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests."[6] The HOA correctly observes that its pre-suit letter was unquestionably a "communication," a term that is itself defined under the TCPA and would seemingly encompass any use of language.[7] It further reasons that an HOA's members "join together to collectively . . . promote, pursue, or defend common interests," an accurate assertion if one assumes that such organizations serve to advance collective neighborhood welfare and not merely competing sides of the petty personal squabbles sometimes seen within them. Ergo, the HOA concludes, its letter was "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests," and thereby qualifies as the

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[5] *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected . . . unless a correlative freedom to *engage in group effort toward those ends* were not also guaranteed. . . . According protection to *collective effort on behalf of shared goals* is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.") (citations omitted) (emphases added); Randall P. Bezanson, Sheila A. Bentzen & C. Michael Judd, *Mapping the Forms of Expressive Association*, 40 Pepp. L. Rev. 23, 34 (2012) ("An expressive association under the First Amendment is a common enterprise consisting of expression *by and for* the group, not the individual members who can easily enough speak for themselves.").

[6] Tex. Civ. Prac. & Rem. Code § 27.001(2).

[7] *See id*. § 27.001(1) (defining "communication" to "include[] the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic").

"exercise of the right of association" under the TCPA. Suddenly, the HOA's argument doesn't seem quite so far-fetched after all.

I've previously expressed the view that the meaning and scope of the TCPA's definitions of protected expression should presumably be informed by the Act's broader stated purposes referring to constitutional rights[8] and the technical meaning that "right of association," "right to petition," and "right of free speech" have acquired in age-old constitutional jurisprudence.[9] But at least when construing the TCPA's "exercise of the right of free speech" definition, the Texas Supreme Court has continued to emphasize only the "four corners" of that provision's text without any explicit consideration of broader statutory or jurisprudential context.[10] To the extent this implies we must read the "exercise of the right of association" definition in isolation, I still think the definition plainly refers to a "communication" that is a component of the parties' "join[ing] together to collectively express, promote, pursue, or defend common interests," and must therefore advance

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[8] *See id*. § 27.002 ("The purpose of [the TCPA] 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.") (emphasis added).

[9] *See Serafine*, 466 S.W.3d at 379–80 (Pemberton, J., concurring) ("We must, in short, look beyond what may initially seem to be the plain or obvious import of the ["exercise of the right to petition" definition] as it appears when read in isolation. We must instead determine its meaning against a broader contextual backdrop of the TCPA read as a whole and in light of background law. When doing so, it becomes apparent that the TCPA's use of the term 'exercise of *the right to petition*,' like 'exercise of *the right of free speech*' and 'exercise of *the right of association*,' evokes 'particular terms from the Texas and United States Constitutions,' with 'particular meanings given those terms over centuries of jurisprudence.'" (quoting *Jardin v. Marklund*, 431 S.W.3d 765, 772 (Tex. App.—Houston [14th Dist.] 2014, no pet.)).

[10] *See ExxonMobil Pipeline Co. v. Coleman*, ___ S.W.3d. ___, No. 15-0407, 2017 Tex. LEXIS 215, at *7–15 (Tex. Feb. 24, 2017) (per curiam); *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509–10 (Tex. 2015) (per curiam).

interests the parties share, as opposed to merely being a "communication" between two persons who happen to share some "common interests" that may be unrelated or even adverse to the communication. Some decisions from our sister courts have read the definition similarly,[11] and applying that construction to this record, viewed through our standard of review, would be fatal to the HOA's argument. But that ship may have already sailed as far as this Court's own precedents are concerned.

A panel of this Court has held that communications between HOA members suffice as the "exercise of the right of association" under the TCPA by virtue of the members' "common interests" in the HOA's purposes.[12] Although the communications in question in that case would appear to advance the parties' shared interests, as they concerned alleged wrongdoing by the HOA's property-management company,[13] this was not explicitly a consideration in the Court's analysis.[14]

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[11] *See Cheniere Energy, Inc. v. Lofti*, 449 S.W.3d 210, 213–16 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (recognizing that communications between corporate CEO and general counsel concerning firing of assistant general counsel would not fall within TCPA's "exercise of the right of association" merely by virtue of the "common interest" inherent in their coworker or attorney-client relationship; definition required that the pair have shared a "common interest" in the firing specifically); *Herrera v. Stahl*, 441 S.W.3d 739, 743, 745 (Tex. App.—San Antonio 2014, no pet.) (similarly reasoning that disparaging and insulting statements made between HOA members did not qualify as "exercise of the right of association," notwithstanding "common interest" HOA members shared, absent further proof that the statements expressed, promoted, or defended such an interest); *see also Levatino v. Apple Tree Café Touring, Inc*., 486 S.W.3d 724, 728 (Tex. App.—Dallas 2016, pet. denied) ("[A] lawyer's adversarial communication to a third party on behalf of his client does not meet the [TCPA] statutory definition of exercising the right of association.").

[12] *See Neyland v. Thompson*, No. 03-13-00643-CV, 2015 Tex. App. LEXIS 3337, at *11–12 (Tex. App.—Austin Apr. 7, 2015, no pet.) (mem. op.).

[13] *Id*. at *8–10.

[14] *See id*. at *11–12 ("[The] HOA members share common interests, such as ownership of the Sunchase 'Common Elements' and 'Common Expenses.' Thus, in the TCPA's terms, these

This precedent, as I've previously suggested, arguably implies that the TCPA's "exercise of the right of association" definition would reach any communication between any two individuals who share some relationship or affiliation that can be said to have some element of "common interests," regardless whether furthered by the communication—a virtually endless list.[15] And if so, this precedent would likewise support the expansive application of the "exercise of the right of association" that the HOA advocates here.

Such issues and uncertainties highlight the need for further guidance from the Texas Supreme Court regarding the meaning and scope of the "exercise of the right of association" under the TCPA,[16] which like other "difficult issues of statutory construction" under the Act, "broadly impact not only the sound operation of our civil justice system, but the sometimes-competing rights of Texans that the statute was expressly intended to balance and reconcile."[17] Then again, the Legislature, if it saw fit, "could provide, by amending the TCPA, the clearest and most direct expression of any legislative intent that has been eluding the Judicial Branch."[18]

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communications [between HOA members] were between individuals *who joined the Sunchase HOA to* collectively express, promote, or defend their common interests as Sunchase homeowners.") (emphasis added).

[15] *See Serafine*, 466 S.W.3d at 378–79 (Pemberton, J., concurring) (citing the example of communications between spouses).

[16] The recent *Coleman* decision presented that issue, but the high court ultimately did not reach it. *See Coleman*, 2017 Tex. LEXIS 215, at *14–15.

[17] *See Serafine*, 466 S.W.3d at 394 (Pemberton, J., concurring).

[18] *Id*. at 394–95.

Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Field
Joined by Justice Field

Filed: March 3, 2017