NUMBER 13-16-00616-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

FERNANDO GARCIA AND NORA DE LEON, **Appellant,**

v.

JAIME SEGUY AND SOUTH TEXAS TRUCK SALES, **Appellees.**

On appeal from the 404th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Benavides and Longoria
Memorandum Opinion by Justice Benavides

This is an interlocutory appeal from an order denying a motion to dismiss under the Texas Citizens Participation Act (TCPA). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West, Westlaw through 2017 1st C.S.). By one issue, appellants Fernando Garcia and Nora De Leon (collectively Garcia, unless otherwise stated) assert that the trial court erred by denying their motion to dismiss appellees' Jaime Seguy and South Texas

Truck Sales (collectively Seguy, unless otherwise stated) lawsuit against them. We reverse and remand.

I. BACKGROUND

The record in this appeal is relatively short and straight-forward. Seguy sued Garcia for damages by alleging theories of defamation, libel per se, and business disparagement related to two online reviews posted by Garcia, a former customer, on Google+. According to Seguy's petition, Garcia and Seguy entered into a contract to purchase two Peterbilt trucks with Garcia initially paying Seguy $2,000 in non-refundable deposits. Seguy alleged that Garcia then "refused to fulfill the terms of the contracts and demanded a full refund." Garcia sued Seguy to recover its deposit, but was ultimately unsuccessful.

Shortly after losing their lawsuit, Garcia posted two negative reviews of South Texas Truck Sales on Google+. According to Seguy's petition, the first review was posted under Garcia's company's name and stated:

> [one star out of five] Worst nightmare! Stay away from this place. They are licensed robbers!

Seguy next alleged that the second review was posted by Garcia using a pseudonym and stated:

> [one star out of five] Ripp [sic] off place, if you want to get scammed go to this dealer.

In response to Seguy's lawsuit, Garcia answered and filed a motion to dismiss under the TCPA asserting that such reviews fell under the purview of the TCPA and mandated dismissal.

After holding a brief hearing on Garcia's motion, the trial court denied the motion to dismiss, and this appeal followed. *See id.* § 27.008(a).

II. MOTION TO DISMISS UNDER THE TCPA

By their sole issue, Garcia asserts that the trial court erred by denying their motion to dismiss under the TCPA.

A. Applicable Law and Standard of Review

The TCPA provides for the expedited dismissal of a legal action that implicates a defendant's right of free speech or other First Amendment right when the party filing the action cannot establish the TCPA's threshold requirement of a prima facie case. *Sullivan v. Abraham*, 488 S.W.3d 294, 295 (Tex. 2016).

A two-step process is initiated by motion of a defendant who believes that the lawsuit responds to the defendant's valid exercise of First Amendment rights. Under the first step, the burden is initially on the defendant-movant to show "by a preponderance of the evidence" that the plaintiff's claim "is based on, relates to, or is in response to the [movant's] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)). Relevant here, the "exercise of the right of free speech" is statutorily defined as a communication made in connection with a matter of public concern. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3). A matter of public concern includes an issue related to: (1) health or safety; (2) environmental, economic, or community, well-being; (3) the government; (4) a public official or public figure; or (5) a good, product, or service in the marketplace. *Id.* § 27.001(7). The TCPA does not require a movant to present testimony or other evidence to satisfy the movant's evidentiary burden. *Hicks v. Group & Pension Admins., Inc.*, 473 S.W.3d 518, 526 (Tex. App.—Corpus Christi 2015, no pet.). When it is clear from the plaintiff's pleadings that the

action is covered by the Act, the defendant need show no more. *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017).

If the movant can demonstrate that the plaintiff's claim implicates one of these rights, the second step shifts the burden to the plaintiff to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. *In re Lipsky*, 460 S.W.3d at 587 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c)). In determining whether the plaintiff's claim should be dismissed, the court is to consider the pleadings and any supporting and opposing affidavits. *Id.* Within defined time limits, the court must then rule on the motion and must dismiss the plaintiff's claim if the defendant's constitutional rights are implicated and the plaintiff has not met the required showing of a prima facie case. *Id.* The phrase "clear and specific evidence" has been defined as more than mere notice pleading, but not more than the burden of proof required for the plaintiff to prove at trial. *See id.* at 590–91. Instead, a plaintiff must provide enough detail to show the factual basis for its claim. *Id.*

In reviewing this two-step process under the TCPA, we first examine whether a defendant moving to dismiss under the TCPA has met his burden by a preponderance of evidence as a legal question that we review de novo. *See Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). If a defendant meets his burden, we then examine the pleadings and evidence in a light favorable to the plaintiff to determine whether the plaintiff has marshaled "clear and specific" evidence to support each alleged element of their causes of action. *Id.* at 80–81.

B. Discussion

Garcia argues that they are entitled to dismissal because they met their initial burden of showing that they exercised their right of free speech in a communication made in connection with a matter of public concern, and that Seguy failed to establish by clear and specific evidence a prima facie case for each element of his underlying claims.

1. Garcia's Initial Burden

As the movant, Garcia had to show that Seguy's claims were based on, related to, or in response to Garcia's exercise of the right of free speech. *See In re Lipsky*, 460 S.W.3d at 586. The record shows that the statements at issue came from online reviews of Garcia and his business that were posted on Google+.

As stated earlier, in the context of the TCPA, the exercise of free speech is a communication made in connection with a matter of public concern, which includes an issue related to a good, product, or service in the marketplace. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001(3); 27.001(7). Garcia's public online reviews of South Texas Truck Sales related to a prior business transaction entered into by Garcia and Seguy over the purchase of two Peterbilt trucks. Relevant to this case, we conclude that these reviews related to a good, product, or service in the marketplace, as contemplated by section 27.001(7), and Seguy's claims against Garcia are based in relation to, or in response to, Garcia's exercise of their right to free speech. *See Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299, 307–09 (Tex. App.—Dallas 2013, pet. denied) (holding that a business review that gave a business an "F" rating on its website fell within the exercise of free speech as defined by the TCPA); *see also Ford v. Bland*, No. 14-15-00828-CV, 2016 WL 7323309, at *2 (Tex. App.—Houston [14th Dist.] Dec. 15, 2016, no

pet.) (mem. op.) (holding that an online complaint made to the Better Business Bureau was an exercise of the right to free speech under the TCPA).

2. Seguy's Burden to Avoid Dismissal

Next, we examine whether Seguy marshalled clear and specific evidence to support each alleged element of the three causes of action Seguy asserted.

Seguy filed a response to Garcia's motion to dismiss and attached an affidavit signed by Seguy that essentially verified that he was the owner of South Texas Truck Sales and that all the facts stated in the petition and the exhibits were "true and correct." Additionally, in an exhibit attached to his response, Seguy set forth a comparison of revenues in a heading labeled "Special damages" that "in the thirty days after 4/25/2015" revenue was at "$223,550," and "in the thirty days after 4/25/2016" revenue was at "$117,780".

a. Defamation, Libel Per Se, and Business Disparagement

Seguy first asserted a cause of action for defamation. To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement. *WFAA–TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

Secondly, Seguy asserted a cause of action for libel per se. A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty,

integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West, Westlaw through 2017 1st C.S.). Classifying a defamatory statement as libel *per se* relieves the plaintiff of the necessity of proving an injury as a result of the statement. *Columbia Valley Reg'l Med. Ctr. v. Bannert*, 112 S.W.3d 193, 199 (Tex. App.—Corpus Christi 2003, no pet.). In other words, the words used are so obviously hurtful that they require no proof that they caused injury in order for them to be actionable. *Id.* Certain categories of statements are classified as actionable *per se*, including those statements that are falsehoods that injure one in his office, business, profession, or occupation. *Id.*

Lastly, Seguy asserted a cause of action for business disparagement. Business disparagement and defamation are similar in that both involve harm from the publication of false information. *In re Lipsky*, 460 S.W.3d at 591. To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff. *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003).

The common element in each of Seguy's three causes of action require that the alleged defamatory, false, or disparaging statements must be actionable statements—that is, statements that assert objectively verifiable facts rather than opinions. *See Backes v. Misko*, 486 S.W.3d 7, 24 (Tex. App.—Dallas 2015, pet. denied). However, an opinion, like any other statement, can be actionable if it expressly or impliedly asserts facts that can be objectively verified. *Palestine Herald-Press Co. v. Zimmer*, 257 S.W.3d 504, 509 (Tex.

App.—Tyler 2008, pet. denied). Whether a statement is an opinion or an assertion of fact is a question of law. *See Bannert*, 112 S.W.3d at 198. We construe the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. *Id.* Further, we view the statements in their context, and they may be false, abusive, unpleasant, or objectionable to the plaintiff, but still not be defamatory in light of the surrounding circumstances. *Id.*

b. The Statements

With these principles in mind, we turn to the statements at issue. The first statement stated:

> [one star out of five] Worst nightmare! Stay away from this place. They are licensed robbers!

A term that is by its nature, an indefinite or ambiguous individual judgment that rests solely in the eye of the beholder or constitutes a loose and figurative term employed as a metaphor or hyperbole constitutes a protected expression of opinion. *Avila v. Larrea*, 394 S.W.3d 646, 659 (Tex. App.—Dallas 2012, pet. denied). In examining the context of the first statement of this case, the phrase "worst nightmare" was used figuratively as an opinion and cannot be objectively verified. *See id.* Accordingly, such statement is not actionable. The next part of the statement labels Seguy as "licensed robbers." After construing the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement, we agree with Garcia that such a statement is oxymoronic, figurative, and cannot be read as anything but a hyperbolic expression of opinion. *See id.* Therefore, we conclude that nothing in Garcia's first statement is actionable as a matter of law. *See Bannert*, 112 S.W.3d at 198.

Next, we examine the second statement, which stated:

> [one star out of five] Ripp [sic] off place, if you want to get scammed go to this dealer.

Viewing this statement as a whole and in context, we conclude that a person of ordinary intelligence would likewise perceive these words as nothing more than rhetorical hyperbole. *See Am. Broadcasting Cos., Inc. v. Gill*, 6 S.W.3d 19, 30 (Tex. App.—San Antonio 1999, pet. denied) (defining "rhetorical hyperbole" as "extravagant exaggeration" "employed for rhetorical effect"). Such rhetorical hyperboles are not actionable because they are not subject to objective verification, it is not provable as false, and therefore not actionable. *See Id.* at 29; *see also Phantom Touring, Inc. v. Affiliated Pubs.*, 953 F.2d 724, 728 (1st Cir. 1992) (holding that phrases such as "rip-off" "fraud" "scandal" "snake-oil job" is figurative and hyperbolic because no objective evidence can be used to disprove it and those adjectives are subject to numerous interpretations). Accordingly, we also conclude that Garcia's second statement is not actionable as a matter of law. *See Bannert*, 112 S.W.3d at 198.

Because we hold that the statements at issue in this case are not actionable, we conclude that Seguy failed to meet his burden under the TCPA to marshal clear and specific evidence to support each alleged element of his three causes of action.

3. Summary

In summary, the trial court erred by failing to dismiss Seguy's lawsuit pursuant to the TCPA because: (1) Garcia's online reviews related to a good, product, or service in the marketplace, as contemplated by section 27.001(7), and Seguy's claims against Garcia are based in relation to, or in response to, Garcia's exercise of their right to free speech; and (2) Garcia's statements are not actionable as a matter of law, and as a result, Seguy failed to establish by clear and specific evidence a prima facie case on his asserted

causes of action of defamation, libel per se, and business disparagement to avoid dismissal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b),(c). We sustain Garcia's sole issue.

III. CONCLUSION

We reverse the trial court's denial of Garcia's motion to dismiss and remand the case to the trial court to enter an order of dismissal and conduct further proceedings consistent with this opinion.

GINA M. BENAVIDES,
Justice

Delivered and filed the
15th day of February, 2018.