NUMBER 13-19-00163-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

VERDE ENERGY SOLUTIONS LLC
AND ROBERTO R. THOMAE, **Appellants,**

v.

SGET DUVAL OIL I LLC,
THE SINCLAIR GROUP, INC.,
THE SINCLAIR GROUP, LLC,
SINCLAIR GROUP ENERGY TEXAS, LLC,
THE SINCLAIR GROUP TEXAS, LLC,
SINCLAIR GROUP ENERGY CAPITAL, LLC,
SINCLAIR TRADING, LLC,
SINCLAIR WEATHERS HOLDINGS, LLC,
H.L. SINCLAIR, SINCLAIR FAMILY, L.P.,
SINCLAIR FAMILY MANGEMENT, GP, LLC,
TERRY WELCH, BELGRAVE INTERNATIONAL
HOLDINGS LTD., JOHN D.M. BELGRAVE,
SINCLAIR BELGRAVE ENERGY LLC AND
SINCLAIR BELGRAVE ENERGY HOLDINGS LLP, **Appellees.**

On appeal from the 229th District Court
of Duval County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Tijerina
Memorandum Opinion by Justice Hinojosa

Appellants Verde Energy Solutions, LLC and its principal Roberto R. Thomae (Verde) appeal from the denial of Verde's motion to dismiss under the Texas Citizen's Participation Act (TCPA) and the granting of Sinclair Group Energy Texas LLC, Sinclair Family, LP, and Sinclair Family Management GP, LLC (the Sinclair Defendants); SGET Duval Oil I, LLC, The Sinclair Group, Inc., The Sinclair Group, LLC, The Sinclair Group Texas, LLC, Sinclair Group Energy Capital, LLC, Sinclair Group Energy Solutions, LLC, Sinclair Trading, LLC, Sinclair Weathers Holdings, LLC, Duval EOR Project 1, LP, Sinclair Belgrave Energy, LLC, and Sinclair Belgrave Energy Holdings LLP (the Sinclair Corporate Defendants); and H.L. Sinclair and Terry Welch (the Sinclair Individual Defendants) (collectively, the appellees') motions to dismiss under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 *et. al*.

By four issues, appellants argue that the trial court erred in granting appellees' motion to dismiss and denying its motion because these actions: (1) eliminated Verde's right to petition and right to access the courts; (2) applied the TCPA incorrectly; (3) ignored that Verde had clear and specific evidence for each element of its claims; and (4) violated Verde's constitutional rights. We dismiss in part and affirm in part.[1]

I. BACKGROUND

[1] This case is before this Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

According to Verde, Thomae has over forty years of experience in the oil and gas exploration and production business, working on hundreds of new or mature oil and gas fields in the United States, Canada, and Latin America. Thomae asserts that he formed Verde in 2010 to focus on "green" energy and the redevelopment of mature, pressure-depleted oil and gas fields. Verde contends it has identified over four hundred mature oil fields in the United States that "can be profitable in a low-price environment with minimal environmental impact" using Verde's proprietary "light oil air injection technology." Verde claims that its geo-scientists, engineers, petroleum landmen, and private oil operators have "diligently gathered, analyzed and created detailed compilations of oil field information that provide a competitive advantage over those who lack that compilation." Verde asserts that its "massive compilation and analysis of oil targets" comprise a proprietary trade secret.

On January 24, 2017, Verde entered into a Mutual Confidentiality Agreement (MCA) with Sinclair Group Energy Solutions, LLC (SGES). The MCA set forth that Verde was willing to disclose certain confidential information to SGES for the sole purpose of evaluating potential business opportunities with each other. One of the provisions of the MCA concerned the "ownership of information." This provision provided that:

> The Confidential Information shall remain the property of the Disclosing Party, and the Disclosing Party may demand the return thereof at any time upon giving written notice to the Receiving Party. Within 30 days of receipt of such notice, the Receiving Party shall return all of the original Confidential Information and shall destroy all copies and reproductions (both written and electronic) in its possession and in the possession of persons to whom it was disclosed . . . ."

H.L. Sinclair signed the MCA for SGES. After executing the MCA, Verde as the

“Disclosing Party” shared its confidential information with Sinclair. According to Verde, this information constituted a “highly detailed spreadsheet” outlining the specific geological, engineering, and related data points of possible oil producing fields in Texas. Verde claims “the value of that spreadsheet is undeniable and would take someone with similar knowledge and judgment to commit thousands of hours to reproduce, if they ever could." Verde contended that it also introduced a “critical supplier,” John Belgrave, to Sinclair during this time period.

According to Verde, the parties formed Sinclair Group Energy Texas LLC (SGET) on March 29, 2017, ostensibly to begin a project using Verde’s confidential information. At SGET’s formation, the following contributions were made:

Member	Initial Contribution	Interest in Company
Sinclair Trading LLC	$200,000	35%
Verde	$100,000	35%
Terry Welch	$100,000	20%
Belgrave Int’l Holdings	$10.00	10%

In its brief, Verde contends it received a greater interest in the company because its “sweat equity” and confidential information necessitated a greater distribution. SGET was “subsequently invited to participate in SGET Duval Oil I LLC.”

On June 6, 2018, Sinclair and Terry Welch called for a “Combined Special Meeting” to be held on July 6, 2016. According to Verde, the July meeting was a planned “self-dealing transaction” wherein Sinclair Belgrave Energy LLC would acquire the assets of SGET and SGET Duval Oil I and would exclude Verde from this deal. Verde alleged that the Sinclair Group and Belgrave attempted to return Verde its $100,000 cash capital while intending to keep Verde’s confidential information. Verde immediately gave notice,

pursuant to the MCA, that Sinclair must return all of Verde's information to it within thirty days.

According to Verde, neither Sinclair nor any of his related businesses complied with the request to return the confidential information. Subsequently, Verde filed suit. Verde sued the Sinclair Defendants, the Sinclair Corporate Defendants, and the Sinclair Individual Defendants. In its Original Petition, Verde alleged three causes of action: (1) violation of the Texas Uniform Trade Secrets Act, (2) breach of contract, and (3) unfair competition. The Sinclair Defendants answered and filed a counterclaim for attorney's fees. SGET answered and filed counterclaims for damages (specifically, the return of alleged overpayments and company equipment) and defamation. The remaining defendants filed general denials.

Appellees then filed three separate, similar motions to dismiss under the TCPA. Verde responded by filing a "Motion to Dismiss the Defendants' Motion to Dismiss and Response." After a hearing, the trial court granted the appellees' motions to dismiss. In the same order, the trial court denied Verde's counter motion to dismiss. Verde appeals. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014.

II. TEXAS CITIZENS PARTICIPATION ACT[2]

The TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015)

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[2] We note that the Texas Legislature amended the TCPA during the 2019 legislative session. The amendments became effective September 1, 2019. Because this suit was filed before September 1, 2019, it is governed by the statute as it existed before the amendments, and all of our citations and analysis are to that version of the statute. *See* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, §§ 1–3, 5, 2013 Tex. Gen. Laws 2499, 2499–500 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011).

(orig. proceeding). The legislature enacted the TCPA "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 [persons] to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN. § 27.002. "The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." *Lipsky*, 460 S.W.3d at 589 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 27.002). When a plaintiff's claim implicates a defendant's exercise of First Amendment rights, chapter 27 allows the defendant to move for dismissal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a); *Andrews County v. Sierra Club*, 463 S.W.3d 867, 867 (Tex. 2015).

Reviewing a TCPA motion to dismiss requires a three-step analysis. *Youngkin v. Hines*, 546 S.W.3d 675, 679 (Tex. 2018). To begin, the moving party must show by a preponderance of the evidence that the TCPA properly applies to the legal action against it. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b). If the moving party meets its burden, the nonmoving party must then establish by clear and specific evidence a prima facie case for each essential element of its claim. *Id.* § 27.005(c). If the nonmoving party satisfies that requirement, the burden then shifts back to the moving party to prove each essential element of any valid defenses by a preponderance of the evidence. *Id.* § 27.005(d).

We review de novo the trial court's determinations that the parties met or failed to meet their § 27.005 burdens. *Tex. Campaign for the Env't v. Partners Dewatering Int'l,*

LLC, 485 S.W.3d 184, 192 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.); *Tervita, LLC v. Sutterfield*, 482 S.W.3d 280, 282 (Tex. App.—Dallas 2015, pet. denied). We also review de novo issues of statutory construction. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015).

III. Jurisdictional Issue

As a threshold matter, we must first address the appellees' argument regarding whether we have jurisdiction over the orders being appealed by Verde. Generally, appellate courts only have jurisdiction from final judgments and orders*. Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 195 (Tex. 2001). A judgment is final for the purposes of appeal if it disposes of all pending parties and claims. *Id*. This appeal, however, arises from two interlocutory orders. Intermediate appellate courts only have jurisdiction to review interlocutory orders when they are explicitly authorized by statute. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 51.012, .014. "We strictly apply statutes granting interlocutory appeals because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable." *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011).

A. The Appellees' TCPA Motion to Dismiss

The appellees posit that, under Texas Civil Practice and Remedies Code § 51.014(a)(12), "a person may appeal from an interlocutory order of a district court that . . . denies a motion to dismiss filed under Section 27.003." *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(12). Here, the trial court *granted* appellees' motion to dismiss Verde's lawsuit under the TCPA. Because this order does not arise from a *denial* of a motion to dismiss under section 27.003, when we strictly construe the statute as we must,

we agree with the appellees that we have no jurisdiction over the appeal of this order. *See id*.; *see also Cavin v. Abbott*, No. 03-18-00073-CV, 2018 WL 2016284, at *3 (Tex. App.—Austin Apr. 30, 2018, pet. denied) (mem. op.) (dismissing an appeal for want of jurisdiction when the interlocutory order "*granted* a TCPA motion to dismiss") (emphasis in original). Currently, no statute expressly provides for an interlocutory appeal of an order granting a motion to dismiss under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.012, .014; *see also Trane US, Inc. v. Sublett*, 501 S.W.3d 783, 786 (Tex. App.—Amarillo 2016, no pet.) (holding the same); *Fleming & Assocs. v. Kirklin*, 479 S.W.3d 458, 460–61 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (same); *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 887 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (same); *see also Flynn v. Gorman*, No. 02–16–00131–CV, 2016 WL 4699198, at * 1 (Tex. App.—Fort Worth Sept. 8, 2016, no pet.) (mem. op.) (same).

In short, Verde must wait until it has a final judgment in this case before it can raise this issue on appeal, as we have no jurisdiction over this order.[3] We make no comment regarding the merits of this possible future appeal, i.e. whether the trial court erred in applying the Texas Citizens Participation Act to this case. We proceed to the remaining interlocutory order before us, which is the trial court's denial of Verde's counter motion to dismiss and response.

B. Verde's Counter Motion to Dismiss and Response

Verde's counter motion to dismiss and response to the appellees' motion to

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[3] This issue was also the focus of Appellees' Motion to Partially Dismiss for Want of Jurisdiction, which was filed on April 17, 2019. We carried this motion with the case. In light of our foregoing analysis, we hereby grant this motion.

dismiss asserted three arguments: (1) that the appellees were not asserting a first amendment right; (2) that Verde could establish "a prima facie case for each essential element of the claim in question" with "clear and specific evidence"; and (3) that the appellees' motion was a "brazen attempt to use their superior funds to quell Verde and Thomae's First Amendment right of petition." Of note, Verde's counter motion only requested that appellees' motion to dismiss be dismissed; the counter motion did not request that appellees' counterclaims be dismissed.

The TCPA applies to any "legal action" that is based on, relates to, or is in response to a party's exercise of the right to free speech. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a). The TCPA defines "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claims, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id*. § 27.001(6). The question before this court now is whether Verde's counter motion to dismiss and response are considered a "legal action" under the TCPA statute. Three of our sister courts have previously dealt with this issue on appeal, and all of them have concluded that a party may not seek the dismissal of a TCPA motion to dismiss by filing a responsive or countermotion to dismiss under the same act. *See Paulsen v. Yarrell*, 537 S.W.3d 224, 231–33 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Roach v. Ingram*, 557 S.W.3d 203, 217–18 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *Deepwell Energy Services, LLC v. Aveda Transp. & Energy Svcs*., 574 S.W.3d 925 (Tex. App.—Eastland 2019, pet. denied); *see also Patel v. Patel*, No. 14-18-00771-CV, 2020 WL 2120313, at *1 (Tex. App.—Houston [14th Dist.] May 5, 2020, no pet.) (mem. op.).

Plainly, a motion to dismiss is not a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim. *Roach*, 557 S.W.3d at 217. Thus, we must determine if Verde's counter motion to dismiss and response constituted "any other judicial pleading or filing that requests legal or equitable relief." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6). In *Paulsen*, the Austin court of appeals applied a rule of statutory construction called *ejusdem generis*, explaining that "when general words follow an enumeration of two or more things, they apply only to . . . things of the same general kind or class specifically mentioned." *Paulsen*, 537 S.W.3d at 233 (internal citations omitted). The court elaborated:

> For these purposes, the enumeration of "lawsuit, "cause of action, "petition," "complaint," and "counterclaim" is best characterized by the observation that each element of this class is a procedural vehicle for the vindication of a legal claim, in a sense that is not true for a motion to dismiss. Were we to conclude otherwise, the proliferation of "piecemeal or seriatim 'motions to dismiss' attacking myriad 'legal actions' that consist merely of individual filings within or related to a lawsuit, as opposed to the underlying lawsuit and substantive claims that are the Act's core focus" would result in application of the TCPA that "strays from—and, indeed, undermines through cost and delay—its manifest purpose to secure quick and inexpensive dismissal of meritless 'legal actions' that threaten expressive freedoms.

Id. at 233–34 (citing *In Re Elliott*, 504 S.W.3d 455, 480 (Tex. App.—Austin 2016, no pet.). The *Paulsen* court also held that defining a counter motion to dismiss as a "legal action" could allow a plaintiff to defend a TCPA motion to dismiss while avoiding the statutory requirement to prove the case has merit by establishing a prima facie case for each element of the claim. *Id*. at 234; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005. The *Paulsen* court ultimately concluded that "the TCPA's dismissal mechanism does not authorize a countermotion to substitute for a standard response in opposition." *Paulsen*,

537 S.W.3d at 234.

We find this reasoning persuasive and reach the same conclusion here. Under our de novo review of the TCPA, construing Verde's counter motion to dismiss and response to appellees' motion to dismiss as a "legal action" would thwart the TCPA's legislative intent. See *Lippincott*, 462 S.W.3d at 509.

We recognize that the Sinclair Defendants and SGET filed counterclaims against Verde and that counterclaims are considered a "legal action" under § 27.001(6). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6). Verde, however, did not petition the trial court to dismiss these counterclaims in its counter motion to dismiss and response.[4] Instead, Verde's motion contended that: (1) the appellees did not assert a first amendment right in their motion; (2) Verde could establish a prima facie case for each essential element for each cause of action pleaded with specific evidence; and (3) the appellees' motion was an attempt to thwart Verde's access to the courts. "Generally, a claim must have been asserted in the trial court in order to be raised on appeal." *Dreyer v. Greene,* 871 S.W.2d 697, 698 (Tex. 1993); *see also* TEX. R. APP. P. 33.1. Because we cannot rule on issues that the trial court did not first consider, we do not address this point.

We overrule this issue.

IV. CONCLUSION

We dismiss the appeal from the trial court's order granting appellees' motion to dismiss under the TCPA because we lack jurisdiction. We affirm the trial court's order

[4] Verde's "Conclusion and Prayer" in its countermotion to dismiss and response prayed that "the Court deny or strike the [appellees'] TCPA motion and grant [its] TCPA motion and award them attorney[']s fees as well as all other civil remedies allowed by that statute."

denying Verde's counter motion to dismiss and response to appellee's TCPA motion to dismiss.

LETICIA HINOJOSA
Justice

Delivered and filed the
12th day of November, 2020.