

Writ conditionally granted June 2, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-20-00454-CV

**IN RE TABLETOP MEDIA, LLC D/B/A ZIOSK AND ZIOSK
PAYROLL, LLC, Relator**

**Original Proceeding from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-02256**

MEMORANDUM OPINION

Before Justices Whitehill, Pedersen, III, and Carlyle
Opinion by Justice Pedersen, III

The Texas Citizens Participation Act (“TCPA”) permits a defendant to file a motion to dismiss in certain specified cases, and it requires the trial court to conduct a hearing, and rule on the motion, within specific and relatively short time frames. In this original proceeding, we are asked to consider whether a trial court has the statutory authority to grant a TCPA motion to dismiss more than thirty days after the hearing on the motion. Applying this Court’s precedent, we conclude the answer is no, and we conditionally grant the writ of mandamus.

Background

In the underlying proceeding, relator Tabletop Media, LLC, d/b/a Ziosk and Ziosk Payroll, LLC (Ziosk) filed a lawsuit against real parties E La Carte, Inc., d/b/a Presto, one of Ziosk's competitors, and Gregory Yoder, James Wyborny, and Nathan Salyer, former Ziosk employees who now work for Presto. Ziosk asserted claims against its former employees for breach of their noncompete, nonsolicitation, and nondisclosure obligations. Ziosk asserted claims against Presto for defamation, business disparagement, and tortious interference with its customers and potential customers. In addition, Ziosk alleged claims for trade secret misappropriation and conspiracy against all of the defendants. The trial court signed a temporary restraining order and an order setting a hearing on a request for temporary injunction.

On April 8, 2019, real parties filed a motion to dismiss under the TCPA. The TCPA hearing was reset several times for a variety of reasons but finally took place on September 11, 2019, 156 days after the motion was filed. On October 24, forty-three days after the hearing, the trial court issued an order granting in part and denying in part the real parties' motion to dismiss. The trial court dismissed Ziosk's claims for breach of contract, trade secret misappropriation, tortious interference, and conspiracy. The trial court also dissolved the temporary restraining order and awarded costs and attorney's fees, the amount to be determined at a future date.

Ziosk appealed the trial court's order, but this Court dismissed the appeal for want of jurisdiction.¹

Ziosk filed a motion to reopen the case and vacate that portion of the trial court's order granting the motion to dismiss. Although the trial court granted Ziosk's motion to reopen the case, the court denied Ziosk's motion to vacate. Ziosk then filed a petition for mandamus relief.

In its petition, Ziosk first contends that the trial court's October 24 order is void because the TCPA prohibits a trial court from ruling on a TCPA motion to dismiss more than thirty days after the trial court hears the motion. Ziosk also urges that the October 24 order is void because the trial court did not conduct a hearing on the motion within the statutorily mandated timeframe. This Court requested a response from real parties and respondent, and real parties filed a response. After reviewing the petition, real parties' response, relator's reply, and the mandamus record, we conclude the trial court was without authority to grant the TCPA motion outside the time allowed by statute. Therefore, the October 24 order is void, and relator is entitled to the relief requested.

Applicable Law

TCPA dismissal motions must be heard and resolved on an expedited basis.

¹ See *Tabletop Media, LLC v. E La Carte, Inc.*, No. 05-19-01411-CV, 2019 WL 6974759, at *1 (Tex. App.—Dallas Dec. 20, 2019, no pet.) (mem. op.).

Generally, the hearing must be held within sixty days after the motion is served. TEX. CIV. PRAC. & REM. CODE § 27.004(a). The deadline can be extended to ninety days if the court's docket conditions require it, good cause exists, or the parties agree to an extension. *Id.* § 27.004(a), (b). The deadline can be extended to 120 days if the trial court allows discovery, but that is the maximum extension permitted. *Id.* § 27.004(c).

Once a TCPA motion is heard, the trial court must rule on it within thirty days or the motion is denied by operation of law. *Id.* §§ 27.005(a), 27.008(a). This Court has held that a trial court's written order signed over thirty days after the hearing is void. *See Dobrott v. Jevin, Inc.*, No. 05-17-01472-CV, 2018 WL 6273411, at *2 (Tex. App.—Dallas Nov. 30, 2018, no pet.) (mem. op.); *Kim v. Manchac*, No. 05-17-00406-CV, 2018 WL 564004, at *1 (Tex. App.—Dallas Jan. 26, 2018, no pet.) (mem. op.); *Dallas Morning News, Inc. v. Mapp*, No. 05-14-00848-CV, 2015 WL 3932868, at *3 (Tex. App.—Dallas June 26, 2015, no pet.) (mem. op.).

Mandamus generally issues to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). Mandamus is also proper, however, if a trial court issues an order beyond its jurisdiction because such an order is void ab initio. *In re Panchakarla*, No. 19-0585, 2020 WL 2312204, at *2 (Tex. May 8, 2020) (orig. proceeding); *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding).

Discussion

Real parties do not dispute that the challenged order was issued too late. Instead, they insist that pursuant to *In re Herbert*, No. 05-19-01126-CV, 2019 WL 4509222, at *2 (Tex. App.—Dallas Sept. 19, 2019, orig. proceeding) (mem. op.), the court’s untimeliness should not be held against them because they acted with “reasonable diligence” in trying to secure a timely ruling. Specifically, they assert that during the thirty-day time period for the court to rule, they contacted the court coordinator on three separate occasions, requesting an update on the signed order.

Real parties’ reliance on *Herbert* is flawed. That case addressed whether the trial court has the discretion to deny a TCPA movant’s reasonable requests for a timely *hearing*. We concluded that “the trial court must set a TCPA motion to dismiss for hearing within the applicable statutory deadline (sixty, ninety, or 120 days after service of the motion, depending on the circumstances) if the movant makes reasonable efforts to obtain a timely hearing.” *Id.* The *Herbert* case did not hold that the TCPA movant’s “reasonable efforts” to obtain a ruling authorizes an untimely order. This Court has consistently declined to make exceptions to the thirty-day deadline for issuing a ruling, reasoning that the TCPA includes no provision permitting the court to extend the thirty-day deadline. *See Dobrott*, 2018 WL 6273411, at *2 (rejecting argument that trial court had authority to grant TCPA motion to dismiss more than thirty days after hearing because ruling was made within court’s plenary power); *Kim*, 2018 WL 564004, at *1 (trial court’s order of

dismissal reversed because it was granted forty-two days after hearing on TCPA motion to dismiss); *Dallas Morning News*, 2015 WL 3932868, at *3 (TCPA does not include provision empowering trial court to rule on motion to dismiss after it has been overruled by operation of law). We also decline to make an exception in this case. We conclude the trial court’s October 24 order is void. Having concluded that the trial court’s untimely order is void, we need not consider whether the hearing on the real parties’ TCPA motion to dismiss was also untimely. TEX. R. APP. P. 47.1.

In their response, real parties also argue that relator’s petition should be denied because of the delay in bringing this original proceeding. “Although mandamus is not an equitable remedy, its issuance is controlled largely by equitable principles.” *In re Int’l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding). One such principle is that “equity aids the diligent and not those who slumber on their rights.” *Id.* (quoting *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding)). “[A] delay in filing a mandamus petition may result in the waiver of the right to relief unless the relator can justify the delay.” *In re Kam*, No. 05-19-01462-CV, 2020 WL 1815830, at *1 (Tex. App.—Dallas Apr. 10, 2020, orig. proceeding) (mem. op.).

“Two essential elements of laches are (1) unreasonable delay by one having legal or equitable rights in asserting them; and (2) a good faith change of position by another to his detriment because of the delay.” *In re Dryden Co.*, No. 05-20-00028-CV, 2020 WL 205314, at *1 (Tex. App.—Dallas Jan. 14, 2020, orig. proceeding)

(mem. op.) (quoting *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 80 (Tex. 1989)). Here, real parties complain that relator unreasonably delayed the proceedings by filing an improper interlocutory appeal, failing to respond to this Court's request for jurisdictional clarification, and waiting until February to file its motion to reopen the case and to vacate the order granting the TCPA motion to dismiss. They urge that the detriment caused by relator's unreasonable delay is their additional cost and expense of analyzing and responding to multiple filings and attending an unnecessary hearing.

Although a delay of only a few months can constitute laches and result in denial of mandamus relief, *see Rivera*, 858 S.W.2d at 366, we are not persuaded that relator waived its right to mandamus relief in this case. The record reflects that relator actively pursued a remedy by attempting to appeal, filing a motion to vacate, and bringing this petition for mandamus, all within a six-month period. We conclude that any delay in seeking mandamus relief was not unreasonable, and we reject real parties' laches argument.

Conclusion

Because the trial court did not rule on the TCPA motion to dismiss within the statutory time period, the October 24, 2019 order is void, and the controlling ruling is the denial of the motion by operation of law. Relator is, therefore, entitled to mandamus relief.

We conditionally grant the petition for writ of mandamus, and we direct the trial court to vacate its October 24, 2019 order within thirty days of the date of this opinion. A writ will issue if the trial court fails to comply.

/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

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