Concurring Opinion Filed July 29, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00380-CV

WOODS CAPITAL ENTERPRISES, LLC, Appellant
V.
DXC TECHNOLOGY SERVICES LLC, Appellee

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-05895-2018

OPINION CONCURRING IN THE JUDGMENT

Before Justices Pedersen, III, Reichek, and Carlyle
Concurring Opinion by Justice Carlyle

For the same reasons I articulated in *Walker v. Pegasus Eventing, LLC*, No. 05-19-00252-CV, 2020 WL 3248476, at *9–12 (Tex. App.—Dallas June 16, 2020, no pet. h.) (mem. op.) (Carlyle, J., concurring and dissenting), I believe the majority incorrectly concludes the trial court did not allow discovery on appellee's Texas Citizens Participation Act motion. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.004(c), 27.006(b). The record here provides an even stronger basis to conclude the court

allowed discovery, and thus that the hearing was timely based on a discovery-triggered extension of time. *See id.* Therefore, I concur only in the judgment.[1]

At the initial, timely scheduled hearing, counsel for the non-movant requested a continuance, representing it needed substantial discovery. The movant's counsel did not object, indicating the parties would "get the discovery worked out, so long as we agree that we can't reset it past the statutory deadlines." Movant's counsel continued, not opposing "limited discovery if it's relevant. . . . We should be able to work out the scope. If not, you[r honor] can deal with that if we have a disagreement"; if we "reset it before the statutory deadline . . . we're happy to take it down for today and allow them to conduct reasonable, limited discovery under the statute." Non-movant's counsel agreed, indicating a 120-day deadline, a deadline only relevant to cases in which the trial court allows discovery. *See id.* § 27.004(c). The court said they had "at least 60, 90 [additional] days." *See id.* Non-movant's counsel said, "We have time." Movant's counsel agreed. And the court concluded, "Okay. As long as you keep up with it, you have to file it again. That's fine with me."

After discovery, and at the rescheduled hearing, the non-movant argued the hearing had become untimely, requiring dismissal, because the timelines had not been extended by the discovery it requested, movant agreed to, and the court

[1] In its alternative analysis, the Court correctly concludes the TCPA does not apply.

allowed. *See id.* §§ 27.004(c), 27.006(b). The trial court told movant's counsel it believed it had allowed discovery "by granting your continuance. What you're telling me is in the future the Court should deny continuances such as yours and have their hearing set at the time they want to have it set. But basically, by the Court and the defendants granting you an extension you now want to come back and use that as the hammer to hit them in the head with." Though the trial court concluded it had allowed discovery, making the rescheduled hearing timely, the Court's opinion here cites the parties' agreement to reschedule and exchange discovery—and implicitly, the lack of a written discovery order—as conclusive proof that the trial court did not *allow* discovery.

By any meaning of the word, the trial court *allowed* discovery. As in *Walker*, we lack a written discovery order because the parties agreed to a continuance to undertake discovery. And as in *Walker*, the party who requested discovery received that discovery and then the most technical of TKOs with a non-merits determination on appeal.

A sensible reading of the TCPA, when viewed as a part of the body of Texas civil litigation law, should not be that parties—in this singular area of the law—cannot agree to a continuance to exchange discovery or that trial courts must—again, in this singular area of law—sign specific discovery orders whose sole purpose is to provide a paper trail to show that the court *allowed* discovery. A sensible reading of the TCPA would not ignore a trial court's own statements, not a one of which

indicates the court saw the limited discovery request here as supported by anything less than "good cause." *See id.* § 27.006(b).

At heart, we should not read our laws in ways that encourage parties to game the system, most especially when there is a sensible reading that prohibits the gamesmanship. *See In re Draiman*, 714 F.3d 462, 465 (7th Cir. 2013) (bankruptcy trustee's argument encouraged gaming the system to creditors' detriment). I would conclude here as the Seventh Circuit did there: the "only argument that the [non-movant] develops is semantic—and unconvincing." *Id.* at 466.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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