REVERSE and REMAND and 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

MEMORANDUM OPINION

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

Woods Capital Enterprises, LLC appeals the trial court's order dismissing its lawsuit and awarding appellee DXC Technology Services LLC attorney's fees under the Texas Citizens Participation Act (TCPA). In three issues, Woods Capital contends that (1) the hearing on DXC's TCPA motion was untimely, (2) DXC failed to meet its burden to show the TCPA applies or, alternatively, Woods Capital made more than a facial showing of its claims, and (3) the trial court awarded unreasonable attorney's fees without allowing Woods Capital an opportunity to respond. For

reasons set out below, we reverse the trial court's order and remand for further proceedings.

BACKGROUND

Woods Capital was invited to participate in a bid process for the purchase of property in Plano, Texas, known as the EDS Legacy Complex. The property, which was owned by DXC, comprises 91.036 acres and includes almost 1.6 million square feet of office space and two structural parking garages. Under the bid process, potential buyers were to include their "best and final pricing" in their final offers. Woods Capital subsequently submitted a bid in the form of a letter of intent (LOI) to offer to purchase the property for $115 million, contingent upon due diligence of the accuracy of the data provided by DXC. Only one other party, Highland Capital, submitted a "best and final" offer. Woods Capital was subsequently notified by DXC's broker that it had submitted the "winning bid."

On October 5, 2018, DXC executed the LOI and returned it to Woods Capital. The LOI contained Paragraph 15, under which DXC agreed to negotiate only with Woods Capital and to make no effort to market the property so long as the parties were in the process of negotiating the contract. Although the LOI expressly stated it did not constitute, and was not intended as, a contract, offer, or binding obligation, it did provide that Paragraph 15 was binding.

According to Woods Capital, it learned that while it was negotiating the terms of the purchase and sale agreement with DXC, DXC also began negotiating with the

losing bidder, Highland Capital. Once the negotiations began with the latter, Woods Capital claims that DXC began attempting to "re-trade" its deal and to insist on new terms not contemplated by the winning bid or the LOI.

On October 28, Woods Capital notified DXC in writing that it viewed the ongoing negotiations with and marketing of the property to Highland Capital as a breach of Paragraph 15 of the LOI and warned that it would "exercise all of its rights and remedies against" DXC and any third parties attempting to interfere with its "contractual rights." Four days later, on November 1, DXC notified Woods Capital it was terminating the LOI and all negotiations to sell the property to it. Nevertheless, the next day, which was a Friday, the parties made one last attempt at salvaging a deal. Woods Capital sent a revised contract that it believed was acceptable to DXC, but it could not arrange a wire transfer to make the $1 million earnest money deposit by day's end as required by DXC. On the following Monday morning, DXC notified Woods Capital that it was not pursuing the sale to it. Woods Capital later learned that DXC had signed a purchase and sale agreement with Highland Capital one day earlier.

On November 8, Woods Capital sued DXC, alleging claims for breach of contract and injunctive relief, and sought expedited discovery regarding the negotiations with Highland Capital beginning on October 5. In its petition, Woods Capital alleged that Paragraph 15 was a valid, binding, and enforceable contract that DXC breached by negotiating and marketing the property to a third party while it

was in the process of negotiating with Woods Capital. It also sought injunctive relief to preserve the status quo. The next day, Woods Capital filed a notice of lis pendens on the property.

DXC responded with a motion to dismiss under the TCPA and a separate motion to expunge the notice of lis pendens. In its TCPA motion, DXC contended it lawfully terminated the "non-binding" LOI and Woods Capital responded with a retaliatory lawsuit and notice of lis pendens to "chill" DXC's ability to sell the property to its preferred buyer. It argued that by filing the actions, Woods Capital intended to impinge on its rights of free speech and association. Woods Capital was served with the motion on November 13, 2018.

The following motions were set for hearing on December 5: (1) DXC's motion to dismiss under the TCPA and motion to expunge the lis pendens and (2) Woods Capital's motion for limited expedited discovery and motion to continue DXC's motions pending completion of discovery.

At the December 5 hearing, the trial court began with the motion to expunge and, after hearing argument, granted the motion and told DXC's attorneys to submit their request for fees. The trial court then asked about the discovery motion. After a brief discussion, DXC's counsel stated it was removing the TCPA motion from that day's docket and the parties would "get the discovery worked out, so long as we agree that we can't reset it past the statutory deadlines." Counsel further stated the trial court could "deal" with it if "we have a disagreement." Woods Capital's

counsel indicated he believed there was a 120-day deadline from the date the motion was filed, and the trial court remarked, "It only just got filed, didn't it? So y'all probably have at least 60, 90 days." The court advised the parties to "keep up" with the timelines. DXC's counsel then clarified that Woods Capital's motion to continue the hearing on the lis pendens was denied, and the motion to continue the TCPA was "moot" since he was "taking it down." The court subsequently signed an order granting the motion to expunge the lis pendens. It did not, however, rule either orally or in writing on any other motion set that day.

In early January 2019, DXC set a February 8 hearing on its application for attorney's fees related to the lis pendens. DXC later attempted to set a hearing on its TCPA motion for the same date, but the court set both motions for hearing on February 18, which was ninety-seven days after Woods Capital was served with the TCPA motion. Prior to the hearing, Woods Capital filed a supplemental response arguing that DXC forfeited its right to proceed on the motion because it failed to set a hearing before the statutorily mandated deadlines. It argued that DXC had, at most, ninety days to set a hearing, given that the trial court had not ordered discovery based on a showing of good cause as is required under section 27.006(b) of the Texas Civil Practice and Remedies Code, and the ninety days ended on February 11.

At the hearing, DXC's counsel took the position that because Woods Capital had requested discovery, the parties "discussed and agreed in open court to do discovery" at the last hearing, and discovery was produced, the timeline for hearing

the TCPA motion was extended to 120 days. Woods Capital's counsel disagreed, stating that under the rule, the parties can agree to extend the hearing up to ninety days. But, counsel explained, to extend to 120 days, the court had to find within the ninety-day period that there was "good cause" for discovery. The trial court responded that it had done so "by granting your continuance. . . 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." The court denied the timeliness objection and heard arguments on the motion. At the conclusion of the hearing, the trial court granted the TCPA motion, dismissed Woods Capital's claims with prejudice, and ordered DCX to present its evidence of attorney's fees within fourteen days. Thereafter, the trial court signed a second order awarding DCX $128,762.59 as reasonable and necessary attorney's fees and costs, making the judgment final. Woods Capital's postjudgment motion was overruled by operation of law. This appeal ensued.

ANALYSIS

In its first issue, Woods Capital contends the trial court erred in hearing the TCPA motion more than ninety days after it was served. In particular, Woods Capital argues the February 18 hearing was untimely because it was held ninety-seven days after Woods Capital was served with DXC's motion, and the statutory provision extending the deadline to 120 days does not apply because the trial court did not allow discovery upon a showing of good cause.

The TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them. *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding). The Act authorizes a party to file a motion to dismiss a legal action that is based on, related to, or in response to that party's exercise of its right to free speech, petition, or association as defined in the statute. TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001, 27.003.[1] But, the party seeking to avail itself of the statute's protections must move for dismissal and obtain a hearing on the motion within clearly defined periods. *Walker v. Pegasus Eventing, LLC*, No. 05-19-00252-CV, 2020 WL 3248476, at *5 (Tex. App.—Dallas June 16, 2020, no pet. h.) (mem. op.); *Braun v. Gordon*, No. 05-17-00176-CV, 2017 WL 4250235, at *3 (Tex. App.—Dallas Sept. 26, 2017, no pet.) (mem. op.). The failure to meet these requirements results in the defendant's forfeiting the statute's protections, and the case should continue as if the motion to dismiss were never filed. *Walker*, 2020 WL 3248476, at *5; *Braun*, 2017 WL 4250235, at *3.

The TCPA requires that a hearing on a motion to dismiss must be set not later than the sixtieth day after the date the motion is served. TEX. CIV. PRAC. & REM. CODE ANN. § 27.004(a). The hearing may be extended in certain specified

[1] The Texas Legislature amended the TCPA effective September 1, 2019. Those amendments apply to "an action filed on or after" that date. Act of May 17, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. 684, 687. Because this lawsuit was filed before September 1, 2019, the amendments do not apply to this case. *See* Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961–64, *amended by* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, 2013 Tex. Gen. Laws 2499–2500. All citations to the TCPA are to the version before the 2019 amendments took effect.

circumstances, including an agreement of the parties to do so, "but in no event shall the hearing occur more than 90 days after service of the motion." *Id*. The statute further provides that, if the court, on a showing of good cause, "allows" specified and limited discovery relevant to the motion, the court may extend the hearing date to "allow" such discovery, "but in no event shall the hearing occur more than 120 days after the service of the motion." *Id*. §§ 27.004(c), 27.006(b).[2] The parties, however, may not agree to extend the time to 120 days. *Walker*, 2020 WL 3248476, at *8.

In the *Walker* case, this Court addressed the timeliness of a TCPA hearing under a similar set of facts. As here, the parties agreed to limited discovery relevant to the defendant's motion. In addition, they agreed that the hearing on the TCPA motion would not "be set later than the statutorily mandated time frame, which is up to 120 days . . . ." *Id*. at *2.

The TCPA hearing was subsequently set on the 85th day after service of the motion, but at the beginning of the hearing, the trial court discovered that one of the defendants had not been served with the motion or given notice of the hearing. *Id*.

[2] Specifically, the statute provides that "[o]n a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion." TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b). Moreover, "[i]f the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003. *Id*. § 27.004(c).

at *3. Consequently, the trial court reset the hearing for a date outside the ninety days but within 120 days of service of the motion. *Id*. at *3, 6. On the day of the reset hearing, the plaintiffs argued the hearing was untimely because it was being held beyond the ninety-day statutory deadline, and the only permissible basis to do so, to allow for discovery, did not apply. *Id*. at *3. The trial court overruled the objection and subsequently denied in part and granted in part the TCPA motion. *Id*. at *4.

On appeal, this Court concluded the hearing was untimely and rejected the defendant's argument that since the parties had a rule 11 agreement to allow discovery and to hold the hearing no later than 120 days after service of the motion, the court had a ministerial duty to enforce the agreement. We explained that under the terms of section 27.004, parties may not, by agreement, extend the hearing date beyond ninety days after service of the motion, although the court may allow discovery and conduct the hearing up to 120 days after service. *Id*. at *8. And, to permit a rule 11 agreement to serve as an "allowance" of discovery by the court would "circumvent the statutory restriction that parties may not agree to an extension beyond ninety days." *Id*. Additionally, we rejected Walker's argument that the court granted a discovery extension at the earlier hearing by affording them an extension of time to file additional exhibits in support of their respective positions.

Here, the record shows that, at the original hearing, the trial court had before it DXC's TCPA motion and a motion to expunge lis pendens as well as Woods

Capital's motion for continuance and motion for expedited discovery. After the trial court ruled in DXC's favor on the lis pendens motion, DXC's counsel "took down" the TCPA motion, saying the parties could work out the discovery. And although DXC represents in its brief that the trial court granted a continuance of the hearing on the TCPA issue, the record shows that it was DXC's counsel that specifically clarified at the hearing that Woods Capital's motion to continue the TCPA hearing was "moot" since he was "taking it down." The trial court made no ruling on any motion other than the lis pendens and, in fact, specifically advised the parties to keep up with the timelines on the TCPA motion.

Under these circumstances, we conclude, as we did in *Walker*, that the parties' agreement to conduct limited discovery did not constitute an "allowance" of discovery on a showing of good cause by the trial court. Moreover, DXC's assertion that Woods Capital's untimeliness argument is barred by the invited error doctrine is likewise unavailing. DXC argues, as did the defendant in *Walker*, that Woods Capital induced the alleged error by stating, in open court, that the hearing deadline was 120 days from filing the lawsuit.[3] But, as explained in *Walker*, the statute mandates that the hearing must occur within specific deadlines irrespective of the remarks of counsel. *See id*. at *7 ("[I]rrespective of who requested that the hearing

[3] Counsel's remark regarding the deadline was less definitive than represented in the appellee's brief. Woods Capital's counsel stated, "There's [a] 120-day, I think, deadline from the date the motion was filed."

be rescheduled, the statute mandates that the hearing must occur within the deadlines specified therein."). Thus, the invited error doctrine does not apply. *Id*.

In sum, we conclude that section 27.004(c), which allows for the hearing to be extended to 120 days if the trial court allows discovery, does not apply here. Absent a timely hearing, DXC forfeited its motion, and the trial court should have denied the motion in its entirety. *Id*. at *9.[4]

But even if the hearing on the motion was timely, we would nevertheless conclude that the trial court erred in granting it for the simple reason that DXC failed to meet its threshold burden to show the TCPA applies. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005. DXC argues the TCPA applies because its negotiations with Highland Capital were an exercise of its right of free speech and association. DXC argues the communications are TCPA-protected speech because the "massive and centrally-located Property at issue is integral to the economy, physical appearance, and community well-being of the City of Plano" and, for support, relies on the property's size and ultimate purchase price of $125 million.[5]

[4] DXC filed a postsubmission brief alerting our Court to the Texas Supreme Court's recent opinion in *In re Panchakarla*, No. 19-0585, 2020 WL 2312204 (Tex. May 8, 2020) (orig. proceeding) (per curiam). To the extent DXC argues that, under *Panchakarla*, the trial court had plenary authority to grant DXC's motion even if the hearing was held outside the statutory deadline passed, we cannot agree. The *Panchakarla* decision addresses a trial court's plenary authority to vacate a timely grant of a TCPA motion. *In re Panchakarla*, 2020 WL 2312204, at *3. The opinion does not address, nor purport to address, the consequences of failing to set a timely hearing on the motion.

[5] To the extent DXC relies on evidence that is not a part of this record, we do not consider it. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (stating that courts shall consider only the "pleadings and supporting and opposing affidavits" in determining whether parties met respective burdens").

For purposes of the TCPA, the "exercise of free speech" means a communication made in connection with a matter of public concern. *Id*. § 27.001(3). The TCPA defines a "matter of public concern" to include issues related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace. *Id*. § 27.001(7). But not every communication related to one of the broad categories set out in section 27.001(7) always regards a matter of public concern. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 137 (Tex. 2019). When construing the TCPA's list of the kind of things meant by "matter of public concern," we should not ignore the common meaning of the words being defined and, as the supreme court explained, the phrase "commonly refers to matters 'of political, social, or other concern to the community,' as opposed to purely private matters." *Id*. at 135. For example, a private contract dispute affecting only the fortunes of the private parties involved does not fall within the ambit of a matter of public concern. *Id*. We review whether communications are a matter of public concern under a de novo standard of review. *Id*. at 132.

This suit is based on private communications with a third party regarding the sale of property. These communications were allegedly a breach of a binding "no-shop" provision of the LOI. The amended petition alleged that by negotiating with and marketing the property to a third party (Highland Capital) during its negotiations

with Woods Capital, DXC caused Woods Capital financial harm and caused it to lose the benefits it expected to receive from the property.

In support of its claims, Jonas Woods, president of Woods Capital, submitted an affidavit that detailed Woods Capital's negotiations with DXC and how he learned that DXC was also negotiating with a third party despite the LOI. Woods testified that once the side negotiations began, DXC began efforts to change the deal terms with Woods Capital, which Woods details in the affidavit, and ultimately entered a purchase and sale agreement with another party. As a result of DXC's failure to sell it the property, Woods said Woods Capital suffered lost investment opportunities in the property and incurred in excess of $250,000 in due diligence and legal fees related to its efforts to buy the property. Attached to the affidavit were the various documents relative to the sale, including emails between DXC and Highland Capital regarding the sale of the property. The record, however, is devoid of allegations or evidence that the dispute had any relevance beyond the pecuniary interests of the private parties involved, and certainly not to the city of Plano's environmental or economic interests or community well-being. While DXC contends "not all properties are created equal" and that this property should be treated differently because it involves the redevelopment of a "huge corporate campus" designed to house "thousands of workers," there is nothing in the evidence to support that the communications at issue here involved these concerns. Because we conclude the communications do not relate to a matter of public concern, they do

not implicate the TCPA. *See Creative Oil & Gas*, 591 S.W.3d at 136–37 (private business communications to third-party purchasers of single well's production concerned only private contract dispute and did not relate to matter of public concern); *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 830 (Tex. App.—Dallas 2020, pet. denied) (op. on reh'g) (defendants failed to show plaintiff's claims were based on, related to, or in response to exercise of free speech when communications involved offers to buy or sell scrap metal and did not discuss benefits of recycling or seek to promote health or safety, or environmental, economic or community well-being).

Nor has DXC shown that the communications relate to its exercise of the right of association as defined by the TCPA. "'Exercise of the right of association' means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2). This Court has consistently held that to constitute an exercise of the right of association under the TCPA, the nature of the communication between individuals who join together must involve public or citizen participation. *Erdner v. Highland Park Emergency Ctr.*, 580 S.W.3d 269, 275 (Tex. App.—Dallas 2019, pet. denied).

Here, DXC has not shown its communications with Highland Capital involved any public or citizen participation. Construing the TCPA to find a right of association simply because there are communications between parties with a shared

interest in a private business transaction does not further the TCPA's purpose to curb strategic lawsuits against public participation. *BusPatrol Am., LLC v. Am. Traffic Sols., Inc.*, No. 05-18-00920-CV, 2020 WL 1430357, at *8 (Tex. App.—Dallas Mar. 24, 2020, no pet. h.) (mem. op.). We conclude DXC failed to meet its burden to establish by a preponderance of the evidence that Woods Capital's claims are based on, related to, or in response to DXC's exercise of a right of association as defined by the TCPA. Thus, even if the hearing was timely, we would nevertheless sustain Woods Capital's second issue to the extent it argues that DXC failed to meet its burden to show the TCPA applies to the claims here. Moreover, because the dismissal of Woods Capital's claims under the TCPA was error, the attorney's fee award predicated on a successful TCPA motion must also be reversed.

We reverse the trial court's orders granting DXC's motion to dismiss under the TCPA and awarding DXC attorney's fees and costs under the TCPA. We remand the cause for further proceedings consistent with this opinion.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

Carlyle, J, concurring

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WOODS CAPITAL ENTERPRISES, LLC, Appellant	On Appeal from the 416th Judicial District Court, Collin County, Texas Trial Court Cause No. 416-05895-2018.
No. 05-19-00380-CV V.	Opinion delivered by Justice Reichek; Justices Pedersen, III and Carlyle participating.
DXC TECHNOLOGY SERVICES LLC, Appellee	

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's February 21, 2019 Order Granting Defendant DXC Technology Services, LLC's Motion to Dismiss Under Texas Citizen's Participation Act and March 20, 2019 Order on Defendant DXC Technology Services, LLC's Application for Attorney's Fees and Costs, and we **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant WOODS CAPITAL ENTERPRISES, LLC recover its costs of this appeal from appellee DXC TECHNOLOGY SERVICES LLC.

Judgment entered July 29, 2020