Dismissed and Memorandum Opinion filed November 30, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00694-CV

MICHAEL JOSEPH BITGOOD A/K/A MICHAEL EASTON, Appellant

V.

KARINA MARTINEZ, MARIANNA SULLIVAN, AND IMPERIAL LOFTS, LLC, Appellees

On Appeal from the County Court at Law No. 3
Fort Bend County, Texas
Trial Court Cause No. 22-CCV-070378

MEMORANDUM OPINION

Appellees Karina Martinez, Marianna Sullivan, and Imperial Lofts, LLC filed a motion to compel appellant Michael Joseph Bitgood a/k/a Michael Easton to cease direct communications with represented parties. Appellant filed a motion to dismiss appellees' motion under the Texas Citizens Participation Act (TCPA). *See* Tex. Civ. Prac. & Rem. Code § 27.003. Asserting that he is entitled to attorney's fees because the trial court denied his motion as moot, appellant brings this interlocutory appeal.

See Tex. Civ. Prac. & Rem. Code § 27.008(a); 51.014(a)(12). We dismiss for want of jurisdiction.

BACKGROUND

Appellant filed a petition seeking declaratory judgment and injunction and asserting claims for, inter alia, fraudulent billing under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Appellees filed a motion to compel appellant to cease direct communications with them as they were represented by counsel. Six days later, appellant filed a TCPA motion to dismiss appellees' motion to compel. Appellant also filed a motion to show authority pursuant to Rule of Civil Procedure 12. On September 13, 2022, the trial court conducted an oral hearing on appellant's Rule 12 motion to show authority, and signed an order granting the Rule 12 motion and striking appellees' pleadings. The trial court expressly declined to consider any other motions filed by appellant at that time because appellees were not represented by counsel.

Appellant appealed, challenging the denial of his TCPA motion, and the trial court's failure to award attorney's fees and sanctions under the TCPA. *See* Tex. Civ. Prac. & Rem. Code § 27.009(a)(1) (permitting award to the moving party of court costs and reasonable attorney's fees incurred in defending against the legal action if the trial court grants a TCPA motion and dismisses the legal action under the TCPA).

JURISDICTIONAL ANALYSIS

Because any order denying appellant's TCPA motion would be interlocutory, we would have jurisdiction only if a statute explicitly provides for an appeal from such an order. *See Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998). Subsection (a)(12) of section 51.014 of the Civil Practice and Remedies Code explicitly authorizes an interlocutory appeal from an order in which a trial court

denies a motion to dismiss under section 27.003. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(12). If a trial court does not rule on a motion to dismiss under section 27.003 by the thirtieth day following the date the hearing on the motion concludes, the motion is considered to have been denied by operation of law, and the moving party may pursue an interlocutory appeal under section 51.014(a)(12). *See* Tex. Civ. Prac. & Rem Code § 27.005(a), § 27.008(a), § 51.014(a)(12); *Clewis v. Harris Cnty.*, No. 14-18-00173-CV, 2018 WL 1802013, at *1 (Tex. App.—Houston [14th Dist.] Apr. 17, 2018, no pet.) (mem. op.). A motion to dismiss under section 27.003—the TCPA—may be denied in one of two ways: (1) an express denial of the motion by the trial court; or (2) the failure of the trial court to rule on the motion by the thirtieth day following the date the hearing concludes on the motion, in which case courts consider the motion to have been denied by operation of law. *See* Tex. Civ. Prac. & Rem. Code § 27.008(a); *Clewis*, 2018 WL 1802013, at *1.

For purposes of today's analysis, we presume without deciding that appellees' motion to compel a party to cease direct communication with represented parties is a "legal action" as defined in the TCPA and, accordingly, that the TCPA applies. *See* Tex. Civ. Prac. & Rem. Code § 27.001(6) (defining "legal action" as "lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief.").

Our record does not reflect that the trial court has expressly denied the motion to dismiss. The clerk's record in this appeal contains no order granting or denying the motion to dismiss. In the reporter's record filed of the hearing on appellant's Rule 12 motion to show authority, the trial court stated in open court that it was not hearing the TCPA motion at that time. Thus, appellant's right to an interlocutory appeal turns on whether the trial court failed to rule on the motion by the thirtieth day following the date the hearing on the motion concluded. We have no basis on

which to consider the motion to have been denied by operation of law because no hearing was held on the TCPA motion.

On October 11, 2023, notification was transmitted to the parties of this court's intention to dismiss the appeal for want of jurisdiction unless appellant filed a response demonstrating grounds for continuing the appeal on or before October 23, 2023. *See* Tex. R. App. P. 42.3(a). Appellant timely filed a response in which he alleged that the hearing held on his Rule 12 motion to show authority included consideration of the TCPA motion because the trial court "took judicial notice of the Anti-SLAPP statute, Chapter 27, and of the court's entire file, which contained the verified motion to dismiss."

To be sure, the trial court held a hearing on September 13, 2022, and "took judicial notice" of the TCPA and the court's file at the beginning of the hearing. At the conclusion of the hearing, the trial court granted appellant's Rule 12 motion to show authority and struck appellees' pleadings. At that time, the following exchange occurred between appellant, appellees' former counsel, and the trial court:

> MR. OUBRE [appellees' former counsel]: Well, Your Honor, if that is the Court[']s ruling I can't go forward with any other hearings today.
>
> MR. BITGOOD: That is correct.
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> *****
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> MR. BITGOOD: Now, Judge, Mr. Beers['] motion [the TCPA motion] is what is left and he can't say a word.
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> MR. OUBRE: Your Honor, I'm going to — can I at least request a continuance of any additional motions? In light of the fact that you have ruled that my clients have lost their lawyers and they — I think they are entitled to have representation in this case.
>
> THE COURT: Mr. Oubre is correct. His clients do not have representation at this time. So you are correct in that. So I cannot move forward because they don't have representation.

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> MR. BITGOOD: Okay. If the Court will sign the order, interlineate the Default, we will go to mediation. If mediation doesn't settle then we will be back.

The record reflects that no hearing on the TCPA motion to dismiss occurred on the day of the Rule 12 motion hearing, and that all parties understood that the TCPA motion would not be heard that day. Appellant asserts in his brief that because the trial court struck appellees' pleadings, he "obtained the maximum relief any litigant could have sought" intimating that the trial court impliedly granted his TCPA motion. However, the record on appeal does not indicate any ruling on appellant's TCPA motion or any setting for an oral hearing following the ruling on the Rule 12 motion.

Because no hearing was held, the record does not reflect that the trial court failed to rule on the motion to dismiss by the thirtieth day following the date the hearing on the motion concluded, and we have no basis on which to consider the motion to have been denied by operation of law. *See* Tex. Civ. Prac. & Rem. Code § 27.008(a); *Puig v. Hejtmancik*, No. 14-17-00358-CV, 2017 WL 5472781, at *2 (Tex. App.—Houston [14th Dist.] Nov. 14, 2017, no pet.) (mem. op.) (dismissing appeal of TCPA motion for lack of jurisdiction because record did not reflect a hearing had been held on the motion or an order from which an appeal could be taken).

Appellant further contends that the trial court "orally denied the motion to dismiss as 'moot'" through an email from the court coordinator. As evidence of an "oral denial," appellant cites an email communication dated September 19, 2022, from the trial court's coordinator in which she stated, "Good Afternoon, per Judge White the court considers the motion is moot at this time." We do not construe the court coordinator's email as a ruling of denial from the trial court.

In the context of a mandamus proceeding other courts have held an email is sufficient if the email is "clear and specific." *See In re Scott Pelley, P.C.*, No. 05-21-00314-CV, 2021 WL 3891595, at *3 (Tex. App.—Dallas Aug. 31, 2021, orig. proceeding) (mem. op.) (email from trial court instructing the clerk that the court had no jurisdiction considered clear and specific enough to trigger mandamus proceeding); *In re Yamaha Golf-Car Co.*, No. 05-19-00292-CV, 2019 WL 1512578, at *2 (Tex. App.—Dallas Apr. 8, 2019, orig. proceeding) (mem. op.) (email from trial court to court coordinator stating specific rulings on several motions considered clear and specific enough to trigger mandamus proceeding). Appellant has not cited, and independent research has not revealed, authority that a court coordinator's email stating the trial court "considers the motion is moot at this time" was sufficient to be considered a ruling by the trial court.

Appellees filed a motion to dismiss this appeal on the ground that the appeal is moot because the parties entered into a settlement agreement after the hearing on the Rule 12 motion. In their motion appellees assert that appellant entered into an agreement that he would "not take any further action to seek or obtain or accept recovery in any court attorney's fees or sanctions, under Chapter 27 (SLAPP) against any of these released parties." The settlement agreement on which appellees rely is not part of the appellate record. As support for their motion appellees attached the agreement to their motion to dismiss. Because the agreement is not a part of our record, we cannot review appellees' contention that this appeal is moot. *See Fox v. Alberto*, 455 S.W.3d 659, 668 n.5 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (attachment of documents as exhibits or appendices to briefs or motions is not formal inclusion in the record on appeal, and, therefore, the settlement agreement cannot be considered); *see also* Tex. R. App. P. 34.1 (evidence not contained in the appellate record is not properly before the appellate court).

Because the appellate record does not reflect a denial of the motion to dismiss, the purported ruling from which appellant seeks to appeal, we lack jurisdiction over this appeal. *See Puig*, 2017 WL 5472781, at *2. Accordingly, we dismiss this appeal for lack of jurisdiction.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Wise, Zimmerer, and Poissant.