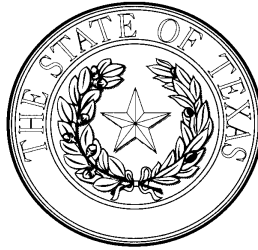


Opinion issued April 13, 2017



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-16-00297-CV

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**JOE SHIELDS, Appellant**

**V.**

**ULTIMATE VACATION GROUP LLC D/B/A ROYAL BAHAMAS  
CRUISE LINE, Appellee**

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**On Appeal from the County Civil Court at Law No. 4  
Harris County, Texas  
Trial Court Case No. 1071453**

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**MEMORANDUM OPINION**

Appellee Ultimate Vacation Group LLC d/b/a Royal Bahamas Cruise Line sued appellant Joe Shields for breach of a settlement agreement that resolved an earlier lawsuit between the parties. Shields filed a motion to dismiss under the Texas Citizens Participation Act, arguing that the lawsuit was related to a comment

he had filed with Federal Communications Commission. *See* TEX. CIV. PRAC. & REM. CODE §§ 27.001–.011. The trial court denied the motion to dismiss, and Shields filed this interlocutory appeal. In six issues, Shields argues that the court erred by denying his motion.

We conclude that Ultimate established by clear and convincing evidence a prima facie case for breach of contract, and that Shields did not establish a defense by a preponderance of the evidence. Accordingly, we affirm the trial court’s order denying the motion to dismiss.

### **Background**

Joe Shields has taken an active interest in citizen enforcement of the Telephone Consumer Protection Act. *See* 47 U.S.C. § 227. Since 1998, he has filed suits in state and federal courts alleging illegal telemarketing based on calls to his terrestrial and mobile telephones. In addition to private causes of action, over a period of approximately 14 years Shields filed 174 comments with the Federal Communications Commission under Docket No. 02-278, which pertains to “Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991.”

Shields sued Ultimate in federal district court for violation of the Telephone Consumer Protection Act based on an unsolicited phone call. Ultimate responded that Shields had consented to the call by providing his phone number on a webpage. Shields denied having done so and, in discovery, he sought proof of his

consent to the call. To facilitate discovery, the federal district court entered an agreed protective order requiring the parties to mark as “confidential” any discovery responses that they believed were entitled to protection from public disclosure.

Ultimate produced over 200 pages of documents to Shields. The three pages at issue in this dispute—labeled “Ultimate 00010” and “Ultimate 00204–05”—were not marked “confidential.” These documents are not in the appellate record, but the record includes descriptions of each document. Ultimate 00010 is a log file showing that Shields visited a website one month before the phone number that received the unsolicited call was placed in service. Ultimate 00204–05 are email communications dated one month before service was activated on the phone number. These documents purport to show that Shields consented to the call by providing his phone number, but he contends the documents are fabrications because the dates of the log file and the emails preceded the date of activation of his phone number.

While the litigation was pending in federal court, Shields filed a comment with the FCC under Docket No. 02-278. In his comment, Shields attached Ultimate 00010 and Ultimate 00204–05, and he shared his belief that these documents were fabricated to show that he allegedly had consented to receive the unsolicited call.

The parties settled the federal litigation. In the settlement agreement, Shields warranted that he had not disseminated or distributed any “Confidential Information,” as defined in the agreement, “with anyone for any reason at any time.” The settlement agreement further provided that Shields would be liable for any material breach in the liquidated amount of \$45,000.

Four months after the settlement, Ultimate learned that Shields had publicized its documents as an attachment to his FCC comment. Ultimate demanded that Shields take all necessary steps to ensure the FCC’s removal of its documents from the public record. Ultimate also alleged that Shields had defamed its attorneys in statements to the FCC, by alleging that they had engaged in fraud before a federal court. In addition to seeking liquidated damages for breach of contract, Ultimate demanded payment of \$125,000 to each of four individuals, for a total of \$500,000. Shields did not pay the settlement demands.

Ultimate sued Shields for breach of contract, but not for defamation. Shields filed a motion to dismiss under the Texas Citizens Participation Act. The crux of his argument was that Ultimate’s lawsuit was related to the exercise of his right of free speech, specifically his submission to the FCC. Shields attached as evidence the demand letter and his affidavit, in which he averred:

By filing my comments with federal proceeding 02-278 I was exercising my right of freedom of speech on a matter of public concern. I was expressing my opinion on the behavior of those in the telemarketing industry to fabricate evidence and falsely accuse

victims of illegal telemarketing. Moreover, at the time of submission of my comments the complained about information was not marked or treated as confidential.

Shields anticipated that Ultimate would attempt to establish a prima facie case for breach of contract, and he argued that the court should nevertheless dismiss the lawsuit because he could prove, by a preponderance of the evidence, each essential element of a defense. In his original answer, Shields asserted six defenses, which he characterized as “affirmative defenses.” Three of these defenses argued that nothing included with his FCC comment was confidential.<sup>1</sup> One defense repeated the allegations that Shields made in the federal court litigation. The other two defenses related to issues of contract interpretation.<sup>2</sup>

In response to the motion to dismiss, Ultimate argued that, for various reasons, its cause of action for breach of contract was not subject to the TCPA. It also argued that dismissal was unwarranted because it could demonstrate by clear

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<sup>1</sup> In particular, Shields alleged that he could not have shared “Confidential Information” with anyone because the documents were not marked “confidential” as required by the protective order at the time he filed his submission with the FCC. He further argued Ultimate’s suit was barred by equitable estoppel because it failed “to designate production as confidential information prior to entering into an agreement,” leading to an “unjust and inequitable burden.” He also contended that all conditions precedent were not satisfied because Ultimate “failed to properly designate what constituted confidential information at the time the Agreement was signed.”

<sup>2</sup> Shields argued that the settlement agreement “is missing essential terms and is indefinite on what constitutes confidential information.” He also alleged that he “relied on fraudulent information” that he had been “released from any and all claims ‘to the date of this Settlement Agreement and Release.’”

and specific evidence a prima facie case for breach of contract. Ultimate identified each essential element of breach of contract and showed support for each in the pleadings and affidavit of its attorney, Jack Wagner. It also refuted each of the defenses that Shields had pleaded in his answer.

The trial court denied the motion to dismiss, and Shields appealed.

### **Analysis**

On appeal, Shields raises six issues challenging the trial court's denial of his TCPA motion to dismiss. In his first three issues, he argues that he proffered "sufficient evidence" to show that none of the documents included in his FCC filing were marked "confidential" as required by the parties' agreed protective order. In his fourth issue, he argues that he proffered "sufficient evidence" that Ultimate's legal action was based on, related to, and was in response to his exercise of free speech about a matter of public concern in a federal proceeding which is part of the administration of the law. In his fifth issue, Shields argues that he showed by "sufficient evidence" that Ultimate brought its legal action for an improper purpose. Finally, in his sixth issue, he argues that because it is a felony under Texas law to fabricate evidence, it is against public policy to consider fabricated evidence as confidential.

The TCPA provides for dismissal of meritless claims that are based on the defendant's exercise of the rights of free speech, petition, or association, as defined

by the statute. TEX. CIV. PRAC. & REM. CODE § 27.003. The TCPA establishes a summary procedure which affords the parties an opportunity to show whether the claims at issue relate to or are in response to the exercise of protected constitutional rights. *See id.* § 27.003(a). This procedure does not require the parties to marshal all of their evidence. When ruling on a motion to dismiss, a court must “consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.” *Id.* § 27.006(a).

To obtain dismissal under the TCPA, a movant must show “by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party’s exercise of (1) the right of free speech; (2) the right to petition; or (3) the right of association.” *Id.* § 27.005(b). If the movant meets this burden, then the burden shifts to the nonmovant to establish “by clear and specific evidence a prima facie case for each essential element of the claim in question.” *Id.* § 27.005(c). A “prima facie case” means “evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.” *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). Mere notice pleadings that might satisfy the requirements of the Rules of Civil Procedure may not provide a sufficient factual basis to support a prima facie claim in the context of the TCPA dismissal procedure. *Id.* at 590–91. Once the nonmovant establishes its prima facie case, the burden shifts back to the movant, who may obtain dismissal by establishing “by a preponderance of the

evidence each essential element of a valid defense to the nonmovant’s claim.” TEX. CIV. PRAC. & REM. CODE §27.005(d).

On appeal, we review de novo a trial court’s ruling on a motion to dismiss under the TCPA. *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 891–92 (Tex. App.—Houston [1st Dist.] 2015, no pet.). We review the pleadings and evidence in a light favorable to the nonmovant. *Id.* at 892.

### **I. Nonmovant’s prima facie case**

“The essential elements of a claim for breach of contract are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach.” *B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). “A breach of contract occurs when a party fails or refuses to do something he has promised to do.” *Id.*

In its petition, Ultimate alleged the existence of a valid contract, its settlement agreement with Shields. The specific provisions at issue in this case, Sections 5.3.1, 5.3.3, and 5.3.7, are as follows:

5.3.1. Plaintiff [Shields] and Defendant [Ultimate] Released Parties acknowledge that there is a mutual benefit to the Parties hereto in maintaining the confidentiality of all monies paid, in the provision of information and/or documentation as required by the Settlement Agreement and Release in settlement of the Litigation, and in the provision of responses to requests for admission, response to requests for production, and answers to interrogatories in the Litigation (“Confidential Information”).

\* \* \*

5.3.3. Plaintiff and his attorneys jointly agree, promise, warrant, and covenant that, prior to the payment under Paragraph 4, they have not disseminated, distributed, shown, or otherwise shared any Confidential Information with anyone for any reason at any time, save and except for those persons within the law offices of Plaintiff's attorney and any persons hired and/or retained by Plaintiff's attorney to provide services in the Litigation.

\* \* \*

5.3.7. Any breach of this provision is a material breach of this Agreement and may be enforced by injunction, including a temporary restraining order and a temporary injunction. In addition, should any provision of Paragraph 5.3 be found to be violated, Plaintiff shall pay liquidated damages in the amount of Forty-Five Thousand Dollars and No Cents (\$45,000.00). Such liquidated damages shall be deemed to be a genuine estimate of the foreseeable damages incurred by Defendant due to Plaintiff's failure to performance [sic] under the provisions of Paragraph 5.3.

Ultimate alleged that Shields breached the agreement by making the representation in Section 5.3.3 while knowing that he already had shared Ultimate 00010 and Ultimate 00204-05 as part of the comment he had submitted to the FCC.

The petition also alleged that Ultimate had suffered and would continue to suffer damages. The element of performance or tendered performance by the plaintiff was established by the Wagner affidavit, which stated: "Ultimate performed under the terms of the Agreement by the payment of settlement proceeds to Mr. Shields, among other ways." This factual statement was not

rebutted or contradicted by Shields's answer or affidavit. *See Lipsky*, 460 S.W.3d at 590.

Shields argues that he could not have breached Section 5.3.3 because the documents he attached to his FCC comment were not marked "confidential," or they were publicly filed with a federal district court, not under seal. The primary dispute concerns the interpretation of "Confidential Information" in Section 5.3.3. Ultimate argues that it has the same meaning in Section 5.3.3 as it does in Section 5.3.1. Shields argues that "Confidential Information" has the same meaning as it did in the agreed protective order entered in the federal litigation.

In conducting our analysis, we are not able to consider the protective order, because it is not part of the appellate record. "Evidence that is not contained in the appellate record is not properly before this Court." *See* TEX. R. APP. P. 34.1.

Despite the deficiencies in the appellate record, some facts are undisputed by the parties. They agree that at least portions of the Ultimate 00010 and Ultimate 00204-05 documents were included with the FCC comment, and they agree those documents were not marked "confidential" under the agreed protective order in the federal litigation. The entirety of the settlement agreement is not in the appellate record, but the pleadings include the relevant provisions. Section 5.3.1 stated that the parties "acknowledge that there is a mutual benefit" in "maintaining the confidentiality of all monies paid," in providing information and documentation to

effectuate the settlement agreement, and “in the provision of responses to requests for admission, response to requests for production, and answers to interrogatories in the Litigation (‘Confidential Information’).” “Confidential Information” was defined in the settlement agreement as “responses to requests for admission, response to requests for production, and answers to interrogatories in the Litigation.” The defined term was not limited to documents that had been marked “confidential.”

In Section 5.3.3, the defined term “Confidential Information” appeared again in reference to the warranty that Ultimate maintains was breached. Thus, the warranty provided by Shields in Section 5.3.3, by referencing “Confidential Information,” included all discovery responses from the federal litigation, not only those documents that had been marked “confidential.”

In his first three issues, Shields essentially argues that he could not have breached the warranty provision of the settlement agreement because the documents in question were not marked “confidential.” Having concluded that the settlement agreement defined “Confidential Information” differently, to include all discovery responses provided by Ultimate, we find his arguments unavailing. To the extent that Shields’s arguments depend on evidence that is not part of the appellate record, he has not rebutted or contradicted the evidence that Ultimate

produced to establish a prima facie case of its breach-of-contract claim. We overrule Shields's first three issues.

## **II. Improper purpose**

In his fifth issue, Shields asserts that he introduced sufficient evidence to show that Ultimate's claim was brought for an improper purpose. The TCPA directs that a court "shall dismiss a legal action" if the movant shows by a preponderance of the evidence that it "is based on, relates to, or is in response to" the movant's exercise of the rights of free speech, to petition, or of association. TEX. CIV. PRAC. & REM. CODE § 27.005(b). It further provides that a court may not dismiss a "legal action" when the nonmovant "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* The ruling on the motion to dismiss does not require a determination of whether the legal action was brought "for an improper purpose." *See id.* But the TCPA provides that at the request of the movant, the court "shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation." *Id.* § 27.007(a).

Shields does not provide a reference to the record to identify any evidence that supports his argument about an alleged improper purpose by Ultimate, nor

does he explain how such a finding would support a ruling in his favor on his motion to dismiss, in light of the clear statutory directives on ruling on a motion to dismiss. We overrule the fifth issue.

### **III. Valid defense**

In his sixth issue on appeal, Shields argues that “the trial court erred in denying” his motion to dismiss “when it is against public policy to treat fabricated evidence filed in any legal proceeding, a felony under Texas criminal law, as confidential.” The brief has no references to the record in support of this argument. The brief fails to articulate a coherent argument that Shields proved by a preponderance of the evidence that the settlement agreement was unenforceable as against public policy. A brief “must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.” TEX. R. APP. P. 38.1(i). We hold that the sixth issue is inadequately briefed.

## Conclusion

Having concluded that Ultimate satisfied its burden to avoid dismissal under the TCPA by demonstrating a prima facie case for each element of its contract claim, we need not address the remaining disputed question of whether the TCPA applies to this dispute. *See* TEX. R. APP. P. 47.1. We affirm the order of the trial court.

Michael Massengale  
Justice

Panel consists of Justices Jennings, Higley, and Massengale.