

NO. 02-19-00394-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS AT FORT WORTH

VICTOR MIGNOGNA
Appellant,

v.

FUNIMATION PRODUCTIONS, LLC, JAMIE MARCHI,
MONICA RIAL, AND RONALD TOYE
Appellees.

From the 141st District Court, Tarrant County, Texas
Honorable John Chupp, Presiding
Cause No. 141-307474-19

MOTION TO DISMISS APPEAL FOR LACK OF
SUBJECT MATTER JURISDICTION AND AS PREMATURE

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Monica Rial and Ron Toye**

**MOTION TO DISMISS APPEAL FOR LACK OF
SUBJECT MATTER JURISDICTION AND AS PREMATURE**

Appellees Monica Rial and Ronald Toye (Appellees) file this Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction and as Premature, and show as follows:

A. Procedural Background in the Court Below.

Appellant Victor Mignogna (“Mignogna”) sued Appellees in the trial court below on April 18, 2019, by the filing of Plaintiff’s Original Petition.

On July 19, 2019, Appellees filed their Motion to Dismiss under the Texas Citizens Participation Act, Texas Civil Practice & Remedies Code § 27.000 *et seq* (TCPA) (the “Motion to Dismiss”).

On October 4, 2019, the trial court entered its Order Granting Defendants’ Funimation Productions, LLC’s Motion to Dismiss Under the TCPA, Monica Rial and Ron Toye’s Motion to Dismiss Under the TCPA, and Jamie Marchi’s Motion to Dismiss Under the TCPA (the “Order”). In the Order, the trial court granted the Motion to Dismiss, reserving the issue of attorneys’ fees, costs, expenses, and sanctions, as allowed under the TCPA. *See* Appendix A attached hereto.

On October 24, 2019, Mignogna filed his Notice of Appeal, seeking appellate review of the Order “and all orders granting fees, costs or sanctions thereafter” entered in the proceedings below. *See* Appendix B attached hereto.

The Order, on its face, did not dispose of all claims between all parties, and cannot serve as a final judgment subject to appeal.

B. This Court Lacks Jurisdiction Because the Order Is Not Final.

This Court's jurisdiction is dependent on whether a judgment or order is final. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (“[T]he general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment.”).

The Order lacks finality because, on its face, the trial court reserved for further determination the issue of attorney's fees and sanctions, as provided under Texas Civil Practice & Remedies Code § 27.009. In particular, the Order states:

The Court retains jurisdiction so that Defendants may submit evidence and briefing in support of an award of attorneys' fees, costs, and other expenses incurred in defending the action, and an appropriate sanction pursuant to TEX. CIV. PRAC. & REM. CODE § 27.009. Defendants shall file their request for fees, costs, expenses, and appropriate sanctions within 30 days of this Order.

Appendix A, p. 5.

Accordingly, this Court should dismiss the appeal because the Court lacks jurisdiction to review the Order at this time. *See Pope-Nixon v. Howard*, 05-18-01215-CV, 2019 WL 911745 (Tex. App.—Dallas Feb. 25, 2019, no pet.) (mem. op.) (dismissing appeal for want of jurisdiction for lack of finality where trial court granted TCPA motion but reserved the issue of attorneys' fees, costs, and other expenses for future determination); *Leniek v. Evolution Well Services, LLC*, 14-18-

00954-CV, 2019 WL 438825 (Tex. App.—Houston [14th Dist.] Apr. 2, 2019, no pet.) (same).

C. The Grant of a Motion to Dismiss Under the TCPA Is Not Subject to Interlocutory Appeal Under Texas Civil Practice & Remedies Code Section 51.014.

Section 51.014(a)(12) of the Texas Civil Practices and Remedies Code provides for the appeal of an interlocutory order *denying* a motion to dismiss under the TCPA. However, there is no statutory provision specifically providing for the appeal of an interlocutory order *granting* a motion to dismiss under Chapter 27.003.

This is settled law, considering on at least two recent occasions—including just a few months ago—this Court rejected attempts to appeal judgments under the TCPA that are not final. *See Hollis v. ProPath Associates, PLLC*, 02-19-00167-CV, 2019 WL 3024472, at *1 (Tex. App.—Fort Worth July 11, 2019, no pet.) (order granting dismissal under the TCPA that does not resolve all claims is not subject to appeal as a final judgment or on an interlocutory basis); *Flynn v. Gorman*, No. 02-16-00131-CV, 2016 WL 4699198, at *1 (Tex. App.—Fort Worth Sep. 8, 2016, no pet.) (per curiam) (mem. op.) (holding that an order granting a TCPA motion to dismiss is not an appealable interlocutory order).

Because no final judgment exists, and the TCPA does not allow for appellate jurisdiction over an interlocutory order *granting* a motion to dismiss under Chapter 27.003, this Court does not currently have jurisdiction over this appeal.

WHEREFORE, Appellees Monica Rial and Ronald Toye pray that this Court enter an order dismissing this appeal for lack of jurisdiction and as premature, and granting such other relief to which Appellees may be entitled.

Respectfully submitted,



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Attorneys for Appellees

Monica Rial and Ron Toye

CERTIFICATE OF CONFERENCE

This is to certify that on October 28, 2019 I attempted to confer with Appellant, through his counsel of record, via electronic mail on October 27 and 28, 2019 regarding the merits of the foregoing motion, and did not receive a reply. Therefore, a conference has not been held regarding the merits of the foregoing motion.

/s/ J. Sean Lemoine

J. Sean Lemoine

UNSWORN DECLARATION

My name is J. Sean Lemoine, my date of birth is December 27, 1972, and my address is 3131 McKinney Ave., Suite 100, Dallas, Texas 75204. I declare under penalty of perjury that:

1. My name is J. Sean Lemoine. I am over eighteen (18) years of age and am legally competent to make this Declaration, which is true and correct, is based on my personal knowledge, and is made voluntarily and not under duress;

2. I am an attorney licensed to practice law in the State of Texas. I am counsel for Monica Rial and Ron Toye. In connection with the representation of Ms. Rial and Mr. Toye, I am familiar with and responsible for the preparation and maintenance of the pleadings, discovery, correspondence, and other proceedings associated with this case;

3. I have reviewed the Motion above and concluded that every factual statement in the Motion is supported by competent evidence included in the Appendix or record;

4. Appendix A attached hereto is a true, correct, and complete copy of the Order entered by the trial court below on October 4, 2019. Appendix B attached hereto is the Notice of Appeal filed by Appellant on October 24, 2019.

Executed in Dallas County, State of Texas, on October 29, 2019.



J. Sean Lemoine

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, I provided a true and correct copy of the foregoing to the following attorneys for the parties *via EFS*:

Ty Beard ty@beardandharris.com Jim E. Bullock carey@beardandharris.com Attorney for Appellant Victor Mignogna	John D. Volney jvolney@lynllp.com Attorney for Appellee Funimation Productions, LLC.
Samuel Johnson sam@johnsonsparks.com Attorney for Appellee Jamie Marchi	

/s/ J. Sean Lemoine _____
J. Sean Lemoine

Appendix A

CAUSE NO. 141-307474-19

VICTOR MIGNOGNA,
Plaintiff

v.

FUNIMATION PROCUCTIONS, LLC,
JAMIE MARCHI, MONICA RIAL,
AND RONALD TOYE,
Defendants

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IN THE DISTRICT COURT
141ST DISTRICT COURT
TARRANT COUNTY, TEXAS

FILED
TARRANT COUNTY
2019 OCT -4 AM 11:32
THOMAS A. WILDER
DISTRICT CLERK

**ORDER GRANTING DEFENDANTS'
FUNIMATION PRODUCTIONS, LLC'S MOTION TO DISMISS UNDER THE TCPA,
MONICA RIAL AND RON TOYE'S MOTION TO DISMISS UNDER THE TCPA, and
JAMIE MARCHI'S MOTION TO DISMISS UNDER THE TCPA**

On September 6, 2019, this Court considered Defendant Funimation Productions, LLC's ("Funimation") Motion to Dismiss under the TCPA, Monica Rial ("Rial") and Ron Toye's ("Toye") Motion to Dismiss Pursuant to the Texas Citizens Participation Act, Defendant Jamie Marchi's ("Marchi") Motion to Dismiss Pursuant to the Texas Citizens Participation Act, the responses, the replies, the evidence, other documents on file, and the arguments of counsel. The Court finds that the three Motions should be and are **GRANTED** in full.

Plaintiff filed an Original Petition on April 18, 2019. Defendants answered and then filed Motions to Dismiss under the Texas Citizens Participation Act ("TCPA").¹ The Parties agreed in a Rule 11 agreement filed with the Court on August 6, 2019, that Plaintiff's response to the TCPA Motions would be filed on or before August 30, 2019. It appears from the arguments of counsel and documents on file that Plaintiff made a good faith attempt to file Responses according to the terms of the Rule 11 agreement but due technical errors was unable to meet the deadline; therefore, the Court **FINDS** that Plaintiff's Response to Defendants' TCPA Motions to Dismiss is deemed

¹ TEX CIV. PRAC. & REM CODE ANN §§27.001-010.

 **E-MAILED**
10/4/19
By Jeff Fisher

Copy mailed to each
Attorney of record
On 10/4/19


timely filed. On September 3, 2019, Plaintiff withdrew the affidavits of Victor Mignogna, Chuck Huber and Christopher Slatosch that were attached to Plaintiff's Response to Defendants' TCPA Motions to Dismiss, therefore the Court did not consider the withdrawn affidavits. Plaintiff additionally filed Plaintiff's Second Amended Petition on September 3, 2019, which added additional evidence that was not included in Plaintiff's Response to Defendant's TCPA Motion to Dismiss. "Nothing in the [TCPA] statute prohibits claimants from amending their pleadings; however, amendment after a TCPA motion is filed would be contrary to the purpose of the statute, and possibly a violation of the Texas Rules of Civil Procedure.² Accordingly, the Court did not consider evidence submitted after the agreed upon deadline in the Rule 11 agreement with the exception of Plaintiff's Response to Defendants' TCPA Motions to Dismiss (without the withdrawn affidavits), which was deemed timely filed by this Order.

The purpose of the TCPA is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.³ The TCPA shall be construed liberally to effectuate its purpose and intent fully.⁴

Plaintiff Mignogna has filed causes of action against all Defendants for Defamation, Tortious Interference with Existing Contracts, Tortious Interference with Prospective Business

² See Laura Lee Prather & Robert T. Sherwin, *The Changing Landscape of the Texas Citizens Participation Act*, TEX. TECH LAW REV. 1, 18 nn. 152-53 (print version scheduled for publication Winter 2019) (available online at <https://ssrn.com/abstract=3447482>) (citation omitted).

³ TEX CIV. PRAC. & REM CODE ANN §27.002.

⁴ TEX CIV. PRAC. & REM CODE ANN §27.011(b).

Relations, and Civil Conspiracy. Plaintiff has also sued Defendant Funimation for Vicarious Liability for the conduct of Defendants Marchi, Rial, and Toye.

The Court **FINDS** that Defendants have shown by a preponderance of the evidence that all causes of action against all Defendants asserted by Plaintiff Mignogna are based on, relate to, or are in response to the Defendant's right to free speech, the right to petition, or the right to association under the TCPA.⁵

Additionally, the Court **FINDS** that Defendants have shown by a preponderance of the evidence that the communications related to Plaintiff's causes of action relate to a public concern, and the communications involve allegations of conduct by Plaintiff that relate to health and safety, environmental, economic or community well-being.⁶

DEFAMATION

Plaintiff has asserted in his Petition that:

Vic is a voice actor who has performed the voices of animated characters for over 22 years, mainly in "anime" productions. In June 2017, Funimation contracted with Vic to provide the voice for dubbed anime properties it was distributing within the U.S. In 2018, Vic was cast as the English voice for "Broly," the lead character in the fantasy martial arts anime film *Dragon Ball Super: Broly*. The cast also included Monica. *Dragon Ball Super: Broly* was released in the U.S. on January 16, 2019 and was an instant financial success for Funimation, earning \$7 million on its first day and \$24 million within the first five days of its premiere." In addition to his voice work, "Vic attends fan conventions, approximately 35-40 per year. He earns a sizeable income from appearance fees guaranteed by contract with the convention producers and from signing autographs, taking photos with fans, and appearing on guest panels.

In addition to Plaintiff's assertions, Defendants provided specific evidence in their Motions and Replies that are before this Court and they have argued that Plaintiff is a Public Figure as contemplated by Texas defamation law. This Court must recognize and apply the reasoning of

⁵ TEX CIV. PRAC. & REM CODE ANN §§27.005.

⁶ TEX CIV. PRAC. & REM CODE ANN §27.001(7).

the Second Court of Appeals in *Lane v Phares*, 544 S.W.3d 881, (Tex. App – Fort Wort 2018, no pet.), which has similar facts and circumstance as the instant case. Therefore, the Court **FINDS** by a preponderance of the evidence that Plaintiff Mignogna is a public figure. Additionally, the Court **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **DEFAMATION** cause of action against all Defendants.

TORTIOUS INTERFERENCE WITH EXISTING CONTRACTS

The Court **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **TORTIOUS INTERFERENCE WITH EXISTING CONTRACTS** cause of action against all Defendants.

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

The Court **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS** cause of action against all Defendants.

CIVIL CONSPIRACY

Plaintiff has alleged in his Petition that “Defendants conspired and acted in concert to defame Vic, unlawfully (or, alternatively, lawfully by unlawful means) interfere with his existing contracts, and unlawfully (or, alternatively, lawfully by unlawful means) interfere with his prospective business relations, and each knowingly assisted and participated in the other’s actions”. The underlying causes of action have been dismissed by this Order under the TCPA. The Court **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **CIVIL CONSPIRACY** cause of action against any and all Defendants.

VICARIOUS LIBAILITY

Vicarious liability claims against Defendant Funimation relate to causes of action and conduct by Defendants Marchi, Rial and Toye that have been dismissed by this Order under the TCPA. The Court **FINDS** that Defendants have shown by a preponderance of the evidence that the Defendants Marchi, Rial and Toye were Independent Contractors at all times while associated with Defendant Funimation. The Court additionally **FINDS** that Plaintiff has failed to establish, by clear and specific evidence, a prima facie case for each element of his **VICARIOUS LIBAILITY** claim against Defendant Funimation.

Therefore, the Court **GRANTS** the TCPA Motions. Plaintiff Victor Mignogna's claims against Defendants Funimation, Marchi, Rial and Toye are thus **DISMISSED WITH PREJUDICE**.

The Court retains jurisdiction so that Defendants may submit evidence and briefing in support of an award of attorneys' fees, costs, and other expenses incurred in defending the action, and an appropriate sanction pursuant to TEX. CIV. PRAC. & REM. CODE § 27.009. Defendants shall file their request for fees, costs, expenses, and appropriate sanctions within 30 days of this Order.

SIGNED on October 4, 2019.



JUDGE JOHN P. CHUPP
141ST JUDICIAL DISTRICT COURT

Appendix B

CAUSE NO. 141-307474-19VICTOR MIGNOGNA,
Plaintiff,§
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IN THE DISTRICT COURT

v.

FUNIMATION PRODUCTIONS, LLC,
JAMIE MARCHI, MONICA RIAL,
AND RONALD TOYE,
Defendants141st JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Victor Mignogna (“Vic”) files this Notice of Appeal. Vic desires to appeal the *Order Granting Defendants’ Funimation Productions, LLC’s Motion to Dismiss Under the TCPA, Monica Rial and Ron Toye’s Motion to Dismiss Under the TCPA, and Jamie Marchi’s Motion to Dismiss Under the TCPA* signed on October 4, 2019 by the 141st District Court of Tarrant County, Texas in cause number 141-307474-19 styled *Victor Mignogna v. Funimation Productions, LLC, Jamie Marchi, Monica Rial, and Ronald Toye* (and all orders granting fees, costs or sanctions thereafter). This appeal is being taken to the Second District Court of Appeals.

Respectfully submitted,
BEARD HARRIS BULLOCK HUGHES
and MARTINEZ HSU

By: /s/ Jim E. Bullock

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