

2022 WL 2920018

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Court of Appeals of Texas, Houston (1st Dist.).

ARK SAND COMPANY, INC., Appellant

v.

BRADLEY DEMOLITION & CONSTRUCTION, LLC, Bradley Sand and Concrete  
Crushing Company, LLC, Edward Bradley, and ELB Trucking, LLC, Appellees

NO. 01-21-00710-CV

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Opinion issued July 26, 2022

**On Appeal from County Court at Law No. 2, Galveston County, Texas, Trial Court Case No. CV-0079613**

**Attorneys and Law Firms**

Patrick Bates, Kyle L. Dickson, Philip McCrady-Nolen, for Appellant.

Thomas Knickerbocker, Craig Saunders, for Appellee Bradley Demolition & Construction, LLC, Edward L. Bradley, Bradley Sand & Concrete Crushing Company, LLC & ELB Trucking, LLC.

Stephen Ray Smith, for Appellee G.R. Birdwell Construction.

Michael Cortez, for Appellee Remedial Construction, LP.

Panel consists of Chief Justice Radack and Justices Countiss and Farris.

**MEMORANDUM OPINION**

Julie Countiss, Justice

\*1 In this interlocutory appeal,<sup>1</sup> appellant, Ark Sand Company, Inc. (“Ark”), challenges the trial court's denial of its motion to dismiss the third-party claims of appellees, Bradley Demolition & Construction, LLC (“BD&C”), Bradley Sand and Concrete Crushing Company, LLC, Edward Bradley (“Ed”), and ELB Trucking LLC (collectively, the “Bradley parties”), under the Texas Citizens Participation Act (“TCPA”).<sup>2</sup> In two issues, Ark contends that the trial court erred in denying its motion to dismiss and not awarding it attorney's fees.

We affirm.

**Background**

In its first amended petition, Ark alleged that it owned a 150-acre industrial sand pit located in Hitchcock, Galveston County, Texas, and that, in 2012, it entered into an oral lease agreement with BD&C under which BD&C leased and operated the sand pit for a five year-term to expire in June 2012 “without any option to renew.” Ark also alleged that, “At no time did Ark[ ]” ever

enter into a written lease agreement with BD&C related to the sand pit. In May 2017, Ark approached BD&C about renewing their oral lease agreement, but BD&C claimed to have a written lease agreement with Ark (the “purported written agreement”). According to BD&C, the purported written agreement provided that BD&C could operate at the sand pit for a ten-year term. Ark demanded a copy of the purported written agreement, which BD&C provided.

Ark denied the validity of the signature of its president, Kelly Bradley (“Kelly”), on the purported written agreement, alleging that the signature was “a forgery” and “not that of Kelly.” BD&C refused to vacate the sand pit after the five-year lease term under the oral lease agreement had expired.

Ark brought claims against BD&C for fraud, trespass, tortious interference with prospective business relations, and a declaratory judgment. Ark also sought a writ of possession.<sup>3</sup> As to its declaratory-judgment claim, Ark sought declarations from the trial court that the purported written agreement did not contain Kelly's signature and was “unenforceable”; the oral lease agreement between Ark and BD&C “terminated on June 30, 2017”; BD&C “ha[d] no right of possession to the [s]and [p]it”; and Ark was “entitled to the current market rate of all sand and gravel removed by [BD&C] from the [s]and [p]it” after June 30, 2017. And Ark requested attorney's fees under the Texas Declaratory Judgment Act.<sup>4</sup>

As to its fraud claim, Ark asserted that BD&C was “attempting to maintain control of the [s]and [p]it and pay Ark amounts that [were] less than [the] fair market value of the material” through the use of the purported written agreement and the forging of Kelly's signature. Ark alleged that as a result, it had “sustained actual damages” of more than \$250,000.

\*2 As to its trespass claim, Ark alleged that it owned and had “a lawful right to possess the [s]and [p]it,” BD&C had entered Ark's property, “the entry was physical, intentional, and voluntary,” and Ark was injured by the “depletion of the [s]and [p]it's resources, deprivation of ... access to the [s]and [p]it and [the] ability to use or otherwise monetize the [s]and [p]it, and damage to the [s]and [p]it's levees.”

As to its tortious-interference-with-prospective-business-relations claim, Ark alleged that “[t]here was a reasonable probability [that Ark] would have entered into a business relationship with a third party,” BD&C “acted with conscious desire to prevent the relationship from occurring or knew [its] interference was certain or substantially certain to occur as a result of [its] conduct,” and BD&C's interference proximately caused Ark's injury.

As to its request for a writ of possession for the sand pit, Ark alleged that it “ha[d] been the fee owner of the real property upon which the [s]and [p]it [was] located and operated” and BD&C was “a tenant wil[l]fully and without force holding over after the termination of its right to possession.” And “[u]pon a determination” by the trial court that the purported written agreement did not contain Kelly's signature and was unenforceable, Ark requested a writ of possession.<sup>5</sup>

BD&C answered, generally denying the allegations in Ark's petition and “plead[ing] the defense of a valid contract.” BD&C also brought counterclaims against Ark, which Ark answered.

Ark and BD&C then filed an agreed motion for bifurcated trials, requesting that the trial court order a separate trial for Ark's declaratory-judgment claim and asserting that “[t]he paramount issue in th[e] suit [was] whether the purported [written agreement was] valid” and if the purported written agreement was not valid then Ark would be entitled to pursue its other claims and seek damages against BD&C. But if the purported written agreement was valid, then Ark's “other claims for damages [would be] null.” Because “all other claims” brought by Ark and BD&C were contingent on Ark's declaratory-judgment claim, the parties asserted that the validity of the purported written agreement should be decided first. The trial court granted the agreed motion, stating that Ark's claim for a declaratory judgment “shall be separately tried first to the ... jury.”

At trial on Ark's declaratory-judgment claim, the jury found that Kelly did not sign the purported written agreement. And it found that Ark and BD&C agreed that:

- (1) BD&C “was authorized to lease and occupy the [s]and [p]it between June 1, 2012 and June 30, 2017 (the ‘Term?’);
- (2) BD&C “was not authorized to lease or occupy the [s]and [p]it after the Term ended”;
- (3) BD&C “was required to pay [Ark] royalty payments for each truckload of minerals [BD&C] removed from the [s]and [p]it during the Term”;
- (4) BD&C “was required to maintain books and records sufficient to allow [Ark] to audit the payments received from [BD&C]”; and
- (5) BD&C “was required to maintain the [s]and [p]it in compliance with applicable ordinances, laws, and industry standards.”

In its interlocutory judgment, the trial court granted Ark declaratory relief incorporating the jury's findings and also ordered “that [Ark] recover possession of the [s]and [p]it from [BD&C].”

After the trial court entered the interlocutory judgment, Ark filed its fifth amended petition.<sup>6</sup> alleging that it owned a 150-acre industrial sand pit, and that in 2012, Ark entered into an oral lease agreement with BD&C under which BD&C leased and operated the sand pit for a five year-term to expire in June 2012 “without any option to renew.” And “At no time did Ark[ ]” ever enter into a written lease agreement with BD&C related to the sand pit. In May 2017, Ark approached BD&C about renewing the oral lease agreement, but BD&C claimed to have the purported written agreement with Ark under which BD&C could operate at the sand pit for a ten-year term. After BD&C produced a copy of the purported written agreement, Ark denied the validity of the signature of its president, Kelly, on the agreement. Yet BD&C refused to vacate the sand pit after its agreed lease term under the oral lease agreement expired in June 2017. While operating at the sand pit, BD&C “caused severe damage to the [s]and [p]it” and “caused the [s]and [p]it's minerals to be taken by parties lacking any authorization,” namely, Ed and Bradley Sand & Concrete Crushing, LLC.<sup>7</sup> BD&C also failed to comply with city ordinances in excavating the sand pit and ultimately “excavated the [s]and [p]it in impermissible locations, failed to maintain mandated slope levels, and damage[d] the [s]and [p]it's levee barrier and top-soil deposits.”

\*3 Ark further alleged that in June 2019, a jury found that the purported written agreement contained the forged signature of Kelly. And BD&C finally vacated the sand pit on or about June 16, 2019.

Ark brought claims against BD&C, Bradley Sand and Concrete Crushing Company, LLC, and Ed, including claims for fraud, trespass, aiding and abetting trespass, tortious interference with prospective business relations, negligence, gross negligence, civil conspiracy, conversion, and a declaratory judgment. Ark also sought to recover under the theories of quantum meruit and unjust enrichment. And Ark asserted that “the corporate forms of [BD&C] and Bradley Sand & Concrete Crushing, LLC should be disregarded” because Ed, the sole owner and operator of those companies, operated them “as mere tools or conduits” of himself “to perpetrate fraud on [Ark]” by taking minerals from the sand pit and selling them “to third parties in an effort to deprive [Ark] of its minerals and royalty interest.” As a result, according to Ark, Ed was personally liable for the debts and liabilities of those companies under the Texas Tax Code.<sup>8</sup>

The Bradley parties then filed a third-party petition against Kelly, Lois Ann Bradley (“Lois”), Hobbs Ranch, LLC (“Hobbs Ranch”), and Judy S. Bradley (“Judy”), an Ark employee (collectively, the “third-party defendants”). In their first amended thirty-party petition, the Bradley parties alleged that in 2012, Kelly, “the sole owner” of Ark, asked Ed “to take over the [sand] pit for the purpose of establishing an income source for himself.” At the time, “[t]he pit was completely flooded and incapable of producing any sand.” According to the Bradley parties, Kelly did not have the “equipment or capabilities to undertake and recommission the sand pit” and “knew that it would take at least a year” and a lot of money “to make the sand pit viable.” Kelly, his mother, Lois, and Judy, solicited Ed “to do the work and spend the money to rescue the [sand] pit.” Kelly “recruited, enticed[,] and cajoled” Ed “to take over [the] closed and flooded [sand] pit with the understanding that [Ed] could mine the pit for their mutual benefit and profit.” But Kelly “was only interested in getting Ed to drain the pit and get it running so he

could then evict him, after a year or two when he though[t] that Ed's original expenses would have been recovered.” And this would allow Kelly to “get all the future profits.” The Bradley parties alleged that Kelly, Lois, and Judy conspired “to harm the [Bradley parties’] reputation, income, business relations, and actively defamed them,” “[c]onspired to entice [the Bradley parties]” into operating the sand pit for the amount of “time that they felt would allow [Ed] to recoup his initial investment,” and conspired “to locate and elicit [the Bradley parties’] customers and competitors to plan for displacing [the Bradley parties] and then substituting themselves as the supplier to the same customers.”

\*4 The Bradley parties brought claims against the third-party defendants for conspiracy, fraud in a real estate transaction, negligent misrepresentation, intentional infliction of emotional distress, defamation, business disparagement, tax evasion, and violation of environmental laws. Additionally, as to Kelly, the Bradley parties argued that he was individually liable for Ark's conduct because he operated Ark “as his alter ego/sham to perpetrate actual fraud.” And as to Lois, the Bradley parties asserted that she created Hobbs Ranch “solely to be a repository for funds paid by the [the Bradley parties] for the lease of the sand pits” and “operat[ed] Hobbs Ranch as her alter ego,” and thus, she was individually liable for the misconduct of Hobbs Ranch.

According to the Bradley parties, as a result of the third-party defendants’ conduct, they had “suffered actual economic injuries of over six million dollars, the value of sand that was in place and processed for movement to existing customers at the time the [trial court] ordered them to stop all operations and leave the property on June 16, 2019.”

Ark timely moved to dismiss the Bradley parties’ third-party claims against the third-party defendants under the TCPA,<sup>9</sup> arguing that the Bradley parties’ third-party claims were a legal action subject to dismissal because they were “based on” and “in response to” Ark's “exercise of its protected right[ ] to petition.” (Internal quotations omitted.) According to Ark, the Bradley parties’ first amended third-party petition “complain[ed] about Ark's lawsuit conduct, pleadings, the result of the June[ ] 2019 jury trial, and [BD&C]’s eviction” and thus was filed in response to Ark's protected communications in Ark's suit against BD&C, Bradley Sand and Concrete Crushing Company, LLC, and Ed. Further, Ark asserted that the Bradley parties could not establish a prima facie case for each essential element of their claims.<sup>10</sup> Ark requested attorney's fees, costs, and sanctions.

In their response, the Bradley parties argued that the trial court should deny Ark's motion to dismiss because Ark lacked standing to file its motion to dismiss as it was not a defendant in the Bradley parties’ third-party action. The Bradley parties also argued that any motion to dismiss was premature because service on the third-party defendants was not complete and the third-party defendants had not yet answered. And the Bradley parties asserted that Ark, as the movant, failed to show by a preponderance of the evidence that the Bradley parties’ first amended third-party petition came within the scope of the TCPA.

After an oral hearing, the trial court denied Ark's motion to dismiss.

### Standard of Review

We review de novo the denial of a TCPA motion to dismiss.  *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019);   *Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 353 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). In deciding if a legal action should be dismissed under the TCPA, we consider “the pleadings, evidence a court could consider under [Texas] Rule [of Civil Procedure] 166a, ... and supporting and opposing affidavits stating the facts on which the liability or defense is based.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a). The plaintiff's allegations, and not the defendant's admissions or denials, constitute the basis of a legal action.  *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). We review the pleadings and evidence in the light most favorable to the non-movants.  *Schimmel v. McGregor*, 438 S.W.3d 847, 855–56 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Whether the TCPA applies is an issue

of statutory interpretation that we also review de novo. [S & S Emergency Training Sols., Inc. v. Elliott](#), 564 S.W.3d 843, 847 (Tex. 2018).

### TCPA Motion to Dismiss

\*5 In its first issue, Ark argues that the trial court erred in denying its motion to dismiss the Bradley parties' third-party claims because Ark met its burden to show that the claims were "based on or in response to" Ark's exercise of its right to petition and the Bradley parties failed to provide "clear and specific evidence supporting a prima facie case" for their third-party claims. (Internal quotations omitted.)

The TCPA provides a procedure for the expedited dismissal of retaliatory lawsuits that seek to intimidate or silence citizens on matters of public concern. [In re Lipsky](#), 460 S.W.3d 579, 584 (Tex. 2015); [John Moore Servs., Inc.](#), 500 S.W.3d at 37. "The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits." [In re Lipsky](#), 460 S.W.3d at 589; see [KTRK Tel., Inc. v. Robinson](#), 409 S.W.3d 682, 688 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Under the TCPA, a party may move to dismiss a "legal action" that is "based on or is in response to" the party's "exercise of the right of free speech, right to petition, or right of association." [TEX. CIV. PRAC. & REM. CODE ANN. § 27.003\(a\)](#); [Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC](#), 591 S.W.3d 127, 131 (Tex. 2019); [Rodriguez v. Universal Surgical Assistants, Inc.](#), No. 01-19-00236-CV, 2020 WL 4758426, at \*2 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, pet. denied). A "[l]egal action" is "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief." [TEX. CIV. PRAC. & REM. CODE ANN. § 27.001\(6\)](#) (internal quotations omitted).

The Bradley parties, in their first amended third-party petition, brought claims against the third-party defendants—Kelly, Lois, Hobbs Ranch, and Judy—for conspiracy, fraud in a real estate transaction, negligent misrepresentation, intentional infliction of emotional distress, defamation, business disparagement, tax evasion, and violation of environmental laws. The Bradley parties did not bring third-party claims against Ark. Thus, Ark is not named as a party in the Bradley parties' third-party action.

The TCPA gives only *parties* the permission to file a motion to dismiss. See [TEX. CIV. PRAC. & REM. CODE ANN. § 27.003\(a\)](#); see also *id.* [§ 27.005\(b\)](#) ("[O]n the motion of a party under [s]ection 27.003, a court shall dismiss the legal action against the moving party ...."); [Nuno v. Risk](#), 612 S.W.3d 645, 660 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) (party filing motion to dismiss "bears the initial burden [of] demonstrat[ing] by a preponderance of the evidence that the [non-movant's] legal action is based on, relates to, or is in response to the [party]'s exercise of the right of free speech, the right to petition, or the right of association"). And the basis of a legal action is determined by the plaintiff's allegations. [Hersh](#), 526 S.W.3d at 467; see [Heard v. Moore](#), 101 S.W.3d 726, 728 (Tex. App.—Texarkana 2003, pet. denied) ("It is well established that plaintiffs are the masters of their suit regarding the claims and parties they choose to pursue."); [Prosperity Energy Corp. v. Terfam Family, Ltd.](#), Nos. 13-15-00184-CV, 13-15-00234-CV, 2015 WL 3946553, at \*7 (Tex. App.—Corpus Christi—Edinburg Jun. 29, 2015, orig. proceeding [mand. denied]) (mem. op.).

The third-party petition alleges that Kelly acted as Ark's alter ego. The alter-ego theory allows a corporate agent to be held individually liable for a corporation's obligations when the corporation is organized and operated as a mere tool or business conduit of the individual and there is such unity between the corporation and the individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice. [Wilson v. Davis](#), 305 S.W.3d 57, 68 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (internal quotations omitted).

\*6 But the third-party petition does not seek to hold Ark liable for Kelly's actions under a reverse corporate veil-piercing theory. *See, e.g.,*  *Cappuccitti v. Gulf Indus. Prods., Inc.*, 222 S.W.3d 468, 481–82 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (explaining reverse veil-piercing); *Richard Nugent & CAO, Inc. v. Estate of Ellickson*, 543 S.W.3d 243, 266 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (both direct and reverse veil-piercing are appropriate (1) where corporation is organized and operated as mere tool or business conduit of another; and (2) there is such unity between corporation and individual that separateness of corporation has ceased and holding only corporation or individual liable would result in injustice). Nor has Ark admitted to any conduct which would make it liable for Kelly's actions.

Because Ark is not named as a third-party defendant and the third-party petition does not otherwise seek to hold Ark liable, Ark has no need of protection from the third-party action.<sup>11</sup> As a result, we hold that the trial court did not err in denying Ark's motion to dismiss.

We overrule Ark's first issue.<sup>12</sup>

### Conclusion

We affirm the trial court's order denying Ark's TCPA motion to dismiss.

### All Citations

Not Reported in S.W. Rptr., 2022 WL 2920018

### Footnotes

1 *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.008, 51.014(a)(12).

2 *See id.* §§ 27.001–.011.

3 Additionally, Ark sought a temporary injunction, and to recover under the theories of quantum meruit and unjust enrichment.

4 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009.

5 *See* TEX. PROP. CODE ANN. § 24.004.

6 Ark later filed a sixth amended petition.

7 According to Ark, Ed and Bradley Sand & Concrete Crushing, LLC sold materials taken from the sand pit to third parties “for large sums.”

8 *See* TEX. TAX CODE ANN. §§ 171.252, 171.255. In response to Ark's fifth amended petition, BD&C, Bradley Sand and Concrete Crushing Company, LLC, and Ed answered, generally denying the allegations in Ark's petition and asserting certain defenses.

9 *See*  TEX. CIV. PRAC. & REM. CODE ANN. § 27.003. The Texas Legislature amended the TCPA in June 2019, and the amendments apply to an action filed on or after September 1, 2019. *See Rodriguez v. Universal Surgical Assistants*,

*Inc.*, No. 01-19-00236-CV, 2020 WL 4758426, at \*1 n.2 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, pet. denied). Although Ark's original petition was filed before September 1, 2019, the Bradley parties' third-party petition, alleging claims against the third-party defendants, was filed after September 1, 2019. Thus, the current version of the TCPA applies to this appeal, and all citations to the statute herein are to the TCPA as it exists after September 1, 2019. See *Staub v. Pesca Holding LLC*, 621 S.W.3d 299, 302–05 (Tex. App.—Austin 2021, no pet.) (holding current version of TCPA applied when defendant was added as party after 2019 amendments).

- 10 See TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).
- 11 Because none of the third-party defendants joined Ark's motion to dismiss, we do not reach the issue of whether any of them would have been entitled to dismissal under the TCPA. See *Johnson-Todd v. Morgan*, 480 S.W.3d 605, 611 (Tex. App.—Beaumont 2015, pet. denied) (concluding term “party” in  section 27.003 did not limit protection provided by TCPA solely to those who were named as parties in prior suit that gave rise to retaliation suit, but rather, “appeared intended to relate to a person who is a ‘party’ in the retaliation suit,” and holding attorney who represented party in prior suit was entitled to protection of TCPA in retaliation suit).
- 12 Our disposition of Ark's first issue makes it unnecessary to address its second issue. See TEX. R. APP. P. 47.1.