Gregory Sullo and Brian Zimmerman v. Felix Michael Kubosh a/k/a Kubosh Bail Bonding, Paul Kubo

2020 | Cited 0 times | Court of Appeals of Texas | December 31, 2020

Opinion issued December 31, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00418-CV

GREGORY SULLO AND BRIAN ZIMMERMAN, Appellants V. FELIX MICHAEL KUBOSH A/K/A KUBOSH BAIL BONDING, PAUL KUBOSH A/K/A KUBOSH LAW OFFICE, Appellees/Cross-Appellants V. WILLIAM CARTER, SANDRA ARNAEZ, JASON ROCHA, EDUWIGIS SUASTE, SARA PADILLA, GRANT HIGHTOWER, WALTER LETHERMON, JONATHAN GLENN, KREGG GIBSON, GERRY CHANEY, JUAN ALVAREZ, JAIME GAYTKO, EDWARD CARNEY, PAUL COLLINS, CIRINO HERNANDEZ, PRESTON BAWA, MONICA WIRZ, EDRICH MACK, MERCY HAYES, JOSE ALAMO, RUBY SEPULVEDA, SEAN SIMON, KRISTAL OROZCO, JANET RAMIREZ- HERRERA, BALTAZAR MARTINEZ, SHELTON HARRIS, RANDALL STEVISON, BRIAN ARELLANO, FELIPE CAVAZOS, LARRY RICHARD, JEFFERY RHODES, HECTOR CUEVAS, CYNTHIA SANCHEZ, GINA TORRES, ROBERTO LARES, LEON TOUSANT, LINDA MARTIN, GREGORY BARNES, ELIZABETH GUERRERO, ALEICIA ROBERTS, ANA REYES, DERRICK RIVERS, DEVIN BARRIOS, CHRISTINA VILLANUEVA, PRISCILLA MUNOZ, JEANETTE MAYA, ERIC AYALA, FARID ABI-SAAB, JOE PECINA, ANDREW RAMIREZ, MAURICIO MENDEZ-BARRERA, MIGUEL DIAZ, PATRICK WASHINGTON, EARL CHILTON, DOROTHY SCOTT, THOMAS PITTARD, JUANITA MARIN, JULIO TORRES, RAYMOND FORD, VIRGINIA KNAUFF, CHERRY AYO-VAUGHN, JOSE CAMPA, ONYEKACHI EKEZIE, RIGGO DOMINGUEZ, MARQUIS WILLIAMS, RICARDO TREVINO, JESUS CASTRO, EDUARDO VALDEZ, BOLIVAR SIERRA, EVA CASTILLO, GUSTAVO GARCIA, SETTEA MENEDO, MICHAEL YOUNGBLOOD, AND BRANDON NASH, Cross-Appellees

On Appeal from the 333rd District Court Harris County, Texas Trial Court Case No. 2013-50819

Gregory Sullo and Brian Zimmerman v. Felix Michael Kubosh a/k/a Kubosh Bail Bonding, Paul Kubo

2020 | Cited 0 times | Court of Appeals of Texas | December 31, 2020

OPINION ON REHEARING

Appellants, Gregory Sullo and Brian Zimmerman, filed motions for rehearing

, but

we withdraw our November 19, 2019 opinion and judgment and issue this opinion

and judgment in their stead. Our disposition remains unchanged.

This interlocutory appeal arises out of three consolidated lawsuits filed by

William Carter and seventy-three against Felix Michael Kubosh, Kubosh Bail Bonding, Paul Kubosh, and Kubosh

ibiting

barratry. During the course of this litigation, the Kuboshes filed suit against Brian

Sullo & Sullo, LLP, a law firm that had initially represented the Carter parties before engaging Zimmerman to file suit on their behalf. Sullo, Zimmerman, and the

Kuboshes all filed motions to dismiss the claims against them under the Texas

motions to dismiss.

Sullo, Zimmerman, and the Kuboshes all appealed. Each of the appellants and

cross-appellants argue that the trial court erred in denying their respective motions

to dismiss under the TCPA.

all three TCPA motions to dismiss.

BACKGROUND

Andrew Sullo and his brother, Gregory Sullo, are attorneys and partners in the

Houston law firm of Sullo & Sullo, LLP. Andrew Sullo and Sullo & Sullo are third-

party defendants in the underlying proceedings, but they were not parties to the

TCPA motions discussed in this opinion and are not parties to this interlocutory

appeal. Attorneys at Sullo & Sullo practice in multiple areas of the law, including,

relevant to this case, defense and bonding services for traffic tickets and warrants

arising out of unpaid tickets. Their competitors include Kubosh Bail Bonding, which

is owned and operated by Felix Michael Kubosh, and Kubosh Law Office, which is

owned and operated by Paul Kubosh. A. Civil and Criminal Statutes and Disciplinary Rule Prohibiting Barratry

In 2011, the Texas Legislature passed Texas Government Code section

, in

relevant part:

(c) A person who was solicited by conduct violating Section 38.12(a) or (b), Penal Code, or Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, regarding barratry by attorneys or other persons, but who did not enter into a contract as a result of that conduct, may file a civil action against any person who committed barratry.

(d) A person who prevails in an action under Subsection (c) shall recover from each person who engaged in barratry:

(1) a penalty in the amount of $10,000;

(2) actual damages caused by the prohibited conduct; and

(3)

(e) This section shall be liberally construed and applied to promote its underlying purposes, which are to protect those in need of legal services against unethical, unlawful solicitation and to provide efficient and economical procedures to secure that protection.

TEX. GOV T CODE ANN. § 82.0651(c) (e). This statute became effective on

September 1, 2011.

Penal Code section 38.12(a) provides that a person commits the criminal offense of

barratry if, with intent to obtain an economic benefit, the person:

(1) knowingly institutes a suit or claim that the person has not been authorized to pursue; (2) solicits employment, either in person or by telephone, for himself or for another;

(3) pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client;

(4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;

(5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or

(6) accepts or agrees to accept money or anything of value to solicit employment.

TEX. PENAL CODE ANN. § 38.12(a).

Section 38.12(b) provides that a person commits an offense if the person:

(1) knowingly finances the commission of an offense under Subsection (a);

(2) invests funds the person knows or believes are intended to further the commission of an offense under Subsection (a); or

(3) is a professional who knowingly accepts employment within the results from the solicitation of employment in violation of

Subsection (a).

Id. § 38.12(b).

Penal Code section 38.12 dovetails with Rule 7.03(a) and (f) of the Texas

Disciplinary Rules of Professional Conduct, which provides:

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f) seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought with whom the lawyer has no family or past or present attorney-client relationship . . .

.

. . . .

(f) electronic communication initiated by a

lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

TEX. DISCIPLINARY RULES PROF L CONDUCT R. 7.03(a), (f), reprinted in TEX. GOV T

CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

B. and Initial Contact with the Carter Parties

Almost immediately after the civil barratry statute, Government Code section

82.0651, became effective in September 2011, Andrew Sullo informed individuals

who inquired about bonds individual would call a competing bail bond company to receive a quote for the price

of the bond, and Sullo promised that his office would beat the quoted price by ten

dollars. Prior to making the phone call, Sullo and the individual would program. This form included a paragraph that stated:

II. Potential Legal Action Attorney [Sullo] has reason to suspect that upon Client [the respective individual Price Match phone call to the bond company, the Bond Company will

transfer the call t Attorney believes this action may give rise to a civil cause of action

against the bond company or law firm under a new barratry statute or other law which, if successful, may result in money damages for Client. In some instances, the bond company may also quote on behalf of an attorney or law firm which may also give rise to a cause of action. Client agrees to make this phone call knowing that these potentially illegal or unethical actions may occur by the bond company or law firm. After a legal cause of action by Client against the bond company. If Client

wishes to pursue a legal cause of action against the bond company and Attorney believes a legal

cause of action does indeed exist, Client will be required to sign a separate contact agreement with Attorney. By signing this Disclosure & Agreement, Client is not committed or obligated to hire Attorney to pursue a legal cause of action against the bond company.

(Emphasis added). The form also asked each individual for their permission to

record the al action by the

Prior

to the program participants making their phone calls, Sullo provided each individual

with a printed instruction sheet that set out certain questions for the participant to

ask. These questions included whether the quoted price for the bond included attorney representation and whether the individual should report to the office of

Kubosh Bail Bonding or Kubosh Law Office which were located adjacent to each

other to complete paperwork.

All seventy-four Carter parties called Kubosh Bail Bonding, and, in each case,

an employee of Kubosh Bail Bonding answered the phone. When the Carter parties

informed the employee that they had unpaid traffic tickets that were in warrant

status, the employee transferred the call to Kubosh Law Office. A Kubosh Law

Office employee then asked each of the Carter parties questions about their tickets,

quoted them a price, and stated that the price included both the bond and legal

representation because the office did not offer bonding services without legal

representation. After the phone call ended, each of the Carter parties signed an

attorney- prosecute all claims against all necessary defendants arising from possible acts of

barratry committed in attempting to obtain legal services. contract included a provision allowing Sullo to associate with other attorneys and

law firms to prosecute the case. Eventually, each of the cases was referred to Brian

Zimmerman of Zimmerman Axelrad and Joe Fisher of Provost Umphrey. Each of

the Carter parties ultimately signed a new attorney-client contract agreeing to the Most of the Carter parties made their phone calls to Kubosh Bail Bonding in

September and October 2011, although several of the Carter parties made calls in

2012 and 2013. Seventy-two of the Carter parties met Sullo in his Houston office

and made their phone calls there. Two of the Carter parties, Michael Youngblood

and Brandon Nash, had traffic tickets from the City of Houston, but they were

Beaumont residents, and both of these individuals met with Sullo in a conference

room at the Beaumont office of Provost Umphrey to make their calls.

C. The Civil Barratry Lawsuits

Michael Youngblood, with Brian Zimmerman as his counsel of record, filed

suit against the Kuboshes in Jefferson County, where he resided, on April 5, 2013.

He asserted that the Kuboshes had violated the civil barratry statute, Government

Code section 82.0651, and he alleged:

On or about September 19, 2012, Plaintiff contacted Kubosh Bail which is owned and operated by Michael Kubosh. Plaintiff had three traffic iving a Kubosh Bail

number, and office number. Based on this contact information, Plaintiff

business card. A certified transcript of the telephone conversation is

attached hereto as

A representative for Kubosh Bonding Company answered the After Plaintiff informed the representative of Kubosh Bail that he

needed a quote for bonds for traffic tickets, the representative placed See Upon information and belief, Kubosh Law is owned and operated by Paul Kubosh.

The Kubosh Law representative then quoted Plaintiff a price for a bond for his traffic cases. The representative from Kubosh Law further indicated that the price quoted for a bond included the posting of the bond as well as the fee for an attorney to represent Plaintiff on his traffic cases. Plaintiff never sought an attorney to represent him in connection with obtaining his bond. Id.

He attached to his pleading a transcript of a conversation he had had with Michael

Kubosh, which included a notation that

William Carter, with Zimmerman as his counsel of record, filed suit in Harris

County against the Kuboshes for violation of the civil barratry statute on August 28,

2013. Over the next two months, Carter amended his petition several times to add a

total of seventy-one addition Kuboshes answered lawsuit on September 30, 2013, and they asserted

counterclaims, including claims for injunctive and declaratory relief relating to their

contention that the civil barratry statute violated their constitutional rights.

Brandon Nash, also with Zimmerman as counsel of record, filed a separate

suit in Jefferson County against the Kuboshes for violation of the civil barratry statute on October 1, 2014. The factual allegations in his petition were substantively

D. -Party Claims

During the course of discovery in this litigation, the Kuboshes learned that Andrew Sullo

had been involved with the Carter parties and their calls to the Kuboshes. On October

21, 2014, the Kuboshes amended their counterpetition against the Carter parties and

filed a third-party action against Andrew Sullo and his law firm, Sullo & Sullo, LLP.

Th amended counterpetition contained the following allegations:

[Andrew] Sullo orchestrated each and every Carter another 64 barratrously- [Sullo & Sullo] office (as well as other locations) to Kubosh Bonding

using phone numbers Sullo provided each Carter Plaintiff, along with -prepared form affidavit instructions listing Kubosh Law as the intended ultimate recipient of each Sullo-instructed call.

Sullo masterminded an attorney-crafted scheme to perpetrate a Fraud on the Court, defined in BLACK S LAW DICTIONARY recorded every Carter retaliate against the Kubosh Brothers . . . .

This Court should dismiss the Carter -tense

operative verb in the Civil Barratry Statute. Sullo and [Sullo & Sullo] have conspired with, and have been aided and abetted by their counsel, Zimmerman, and his firm, Zimmerman Axelrad, to barratrously solicit, file, and maintain the Carter Plaintiffs, Youngblood and frivolous lawsuits to reap undeserved economic benefits where their perceived pecuniary gain was a significant motivation for the filing and maintenance of these lawsuits.

The Kuboshes sought injunctive and declaratory relief,

arguing that the civil barratry statute was unconstitutional as applied to them. The

Kuboshes also asserted claims for common-law fraud and civil conspiracy against

the Carter parties, Andrew Sullo, and Sullo & Sullo, alleging that the Carter parties

made their calls to the Kuboshes under false pretenses because they never intended

to purchase bonding services from the Kuboshes.

Additionally, the Kuboshes brought claims in this suit against the Carter

parties, Andrew Sullo, and Sullo & Sullo for violation of the federal Racketeer

as a flexible vehicle for Third-Party Defendants Sullo and filing of

Michael Kubosh and Paul Kubosh by embroiling them in legally meritless but

expensive and time- The Kuboshes alleged

violations of RICO as well as conspiracy to violate RICO.

As predicate acts serving as the basis for RICO liability, the Kuboshes alleged

that the Carter parties, Sullo, and Sullo & Sullo engaged in mail fraud and wire fraud.

The Kuboshes alleged: By sending and receiving courthouse correspondence and service copies of court filings in the U.S. mail, and by using the U.S. mail to communicate with one another in furtherance of their RICO scheme of fraudulently mi a Fraud on the Court to make money under the guise of conducting

, each of the Carter Plaintiffs and Third-Party Defendants Sullo and [Sullo & Sullo] have engaged in mail fraud in violation of 18 U.S.C. § 1341.

By repeatedly using the telephone and by tying up the Kubosh Bonding and Kubosh Law telephone lines to fraudulently misrepresent themselves as ordinary consumers of bail bonding and/or legal services, interest in carrying out his . . . vendetta against the Kubosh Brothers,

each of the Carter Plaintiffs and Third-Party Defendants Sullo and [Sullo & Sullo] have engaged in one or more acts of wire fraud in violation of 18 U.S.C. § 1343.

The Kuboshes alleged that each raud that together comprise a

pattern of racketeering activity.

s both filed in Jefferson County to the Harris County

was pending for resolution of pretrial matters. See

TEX. GOV T CODE ANN. § one or more common questions of fact pending in the same or different constitutional

courts, county courts at law, probate courts, or district courts to any district court for

consolidated or coordinated pretrial proceedings, including summary judgment or remain pending in the Harris County district court.

Although in the years this litigation has been pending the Carter parties have

filed amended petitions in this case, adding factual details, the only cause of action

they have asserted against the Kuboshes is a claim for violation of the civil barratry

statute.

On April 6, 2016, the Kuboshes filed their fifth amended counterpetition and

fourth amended third-party petition. In this petition, the Kuboshes alleged:

The precise involvement of Zimmerman and [Joe] Fisher in planning and executing the calls is not yet completely known, but we do know from the Carter and Zimmerman were in email communication as early as January 27,

a little over two months following the first and most significant spate of calls made from . . . Sullo and Zimmerman almost nine months before Youngblood and Nash made and recorded

their calls.

. . . .

Defendants . . . shows the first discussions to set up this conference

room [at Provost Umphrey] were between Andrew Sullo and Brian Zimmerman on July 28, 2012, nearly two months before Mr. discussion to reserve the conference room between the lawyer, Andrew

Sullo, who entered into a contract with these Plaintiffs to make a phone call in exchange for a share in the resulting lawsuit, and one future counsel of record, Brian Zimmerman, at the offices of another future counsel of record, Joe Fisher, to which Sullo would have to drive 90 miles to record the call, except to further their criminal enterprise. . . . That is, the wrongfully-withheld e-mails show that the Provost Umphrey conference room was for nearly three months the launching the first of a pattern of Sullo-orchestrated, Sullo-scripted, and

Sullo- calls to the Kubosh Defendants.

In addition to the claims asserted in their earlier counterpetition, the Kuboshes added

ception of

Kuboshes.

The Kuboshes also added a party to this suit: Gregory Sullo. 1 The Kuboshes

partner of [Sullo & Sullo] who foisted this fraud upon the courts of Texas and on the

Kubosh Defendants in his supervisory and representative capacity at [Sullo &

Sullo] T involved when the Carter parties made their calls to the Kuboshes, and thus

committed wire fraud, a predicate act under RICO. The Kuboshes also alleged that

Andrew Sullo, Gregory Sullo, and Sullo & Sullo committed the predicate act of

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1

In this petition, the Kuboshes also asserted individual claims against Edward James Carney, whose son, Edward Buckley Carney, was one of the Carter parties and who had died prior to the start of litigation. The Kuboshes asserted that, during the pendency of the case, Edward James Carney had fraudulently signed documents on for his commission of a fraud on this Court, presenting perjurious explanations for his

-cutter affidavits, and destroying

Gregory Sullo was not served with this petition naming him as a third-party

defendant until November 29, 2017, more than eighteen months after the Kuboshes

filed this petition.

E. The Kuboshes Petition for Mandamus Relief

In May 2016, shortly after they filed their fifth amended counterpetition and

fourth amended third-party petition, the Kuboshes sought mandamus relief in this

unredacted copies of a series of emails between Andrew Sullo, Brian Zimmerman,

and a paralegal at Provost Umphrey, ranging from July through early October 2012,

concerning the reservation of a conference room at the offices of Provost Umphrey

in Beaumont so Youngblood and Nash could make their calls to the Kuboshes. The

Kuboshes argued that withholding these emails was an improper offensive use of the

work product privilege, and a panel of this Court agreed. See In re Kubosh Bail

Bonding, 522 S.W.3d 75 (Tex. App. Houston [1st Dist.] 2017, orig. proceeding).

This Court and required the Carter parties to disclose the unredacted emails. F. claims and Third-Party Claims

On December 19, 2017, the Kuboshes filed their sixth amended

counterpetition and fifth amended third-party petition, raising the same claims as in

their previous petition, but adding claims against Brian Zimmerman. They alleged:

lo Plaintiffs [the Carter parties] appear as making good faith business the calls. Sullo, Zimmerman, Greg Sullo, Sullo & Sullo (collectively,

ffs conspired to execute a criminal enterprise and pre-planned Fraud on the Court and the Kuboshes.

conspiracy and criminal enterprise is to hide behind Texas discovery and evidentiary

rules to deliberately obfuscate discovery of the operative facts underlying the

lawsuits.

With respect to their RICO claims, the Kuboshes alleged:

All and each of the Sullo Plaintiffs, the Sullo Parties [including Gregory Sullo and Zimmerman] and Edwards James Carney, and their counsel of record, along with numerous persons who called the Kubosh to become plaintiffs in this lawsuit, formed a RICO association-in-fact

enterprise with common and continuing purposes, namely, to serve as a flexible vehicle to set up and file these in terrorem lawsuits based upon created facts for the express purpose of forcing a settlement, obtaining judgment, and causing the Kubosh Defendants to incur competitors Michael Kubosh and Paul Kubosh by embroiling them in

legally meritless but expensive and time- litigation. [Sullo & Sullo] and Zimmerman Axelrad are also

racketeering enterprises used for these same objectives. They alleged that the emails that were the subject of the prior mandamus proceeding

in this Court constituted RICO predicate acts of wire fraud, as Andrew Sullo and

Zimmerman used these emai d

purpose to create fraudulent lawsuits, fraudulently establish venue [in Jefferson

The Kuboshes further alleged:

the RICO enterprise actively and continuously supported and furthered

by the Sullo Plaintiffs, the Sullo Parties and Edward James Carney. In being the goal and ultimate mechanism of the racketeering activities of the RICO enterprise, the Sullo Parties have extended their racketeering activities to fraudulently claim privileges under the Texas rules in order to conceal their actions, offensively employing these privileges as part and parcel of their Fraud on the Court, including Brian Zimmerman filing a sworn declaration that directly contradicts representations as officer of the court of his co- counsel Joe Fisher in apparent perjury and obstruction of justice to underlying facts of the case and the operative facts themselves.

They alleged that the Sullo Parties Andrew and Gregory Sullo, Sullo & Sullo, and

Brian Zimmerman used the United States mail as part of their criminal enterprise,

in sending and receiving correspondence to and from the trial court. The Kuboshes

also alleged that the Sullo Parties improperly used the trust account held by

Zimmerman Axelrad, in connection with posting cash bonds involvement with the case.

In this petition, the Kuboshes asserted their claims for injunctive and

declaratory relief, common-law fraud, civil conspiracy, their RICO claims, and

which was defined in their pleadings to include Gregory Sullo and Brian

Zimmerman.

G.

On January 26, 2018, Zimmerman moved to dismiss all of the claims against

him were based on, related to, or filed in response to his right to petition, his right of

free speech, and his right of association, and, thus, the TCPA applied to the

. Specifically, Zimmerman argued that all of the claims against

him targeted his actions as counsel for the Carter parties, implicating his right to

present clear and specific evidence establishing a prima facie case on each element

of each cause of action asserted against him. Zimmerman also argued that, even if

the Kuboshes could establish a prima facie case, he could establish two defenses to

their claims the attorney- liability to nonclients for actions taken within the scope of representing a client, and the applicable statute of limitations which required the trial court to dismiss the

claims against him.

Gregory Sullo also moved for dismissal of all of the claims against him

pursuant to the TCPA on January 26, 2018. His motion to dismiss largely mirrored

Kuboshes could establish a prima facie case against him on each of their claims, he

could establish that their claims were barred by the statute of limitations, entitling

Gregory motions to dismiss addressed all of the causes of action asserted against

them: common-law fraud, civil conspiracy, RICO violations, conspiracy to violate

RICO, and violations of state and federal wiretapping laws.

On March 29, 2018, the Kuboshes responded to Gregory tions to dismiss. In addition to arguing that their claims against

Sullo and Zimmerman did not implicate any of the statutory rights protected under

the TCPA, they also argued that their claims were not subject to the TCPA because the claims fall within th The

Kuboshes also stated:

Zimmerman and Greg Sullo have also moved to dismiss claims of wiretapping and common law fraud, which the Kuboshes do not allege against Zimmerman and Greg Sullo. The wiretapping claims

are against Andrew Sullo and the Sullo Plaintiffs [the Carter parties], who made and recorded the calls for use for tortious and criminal purposes.

The Kuboshes therefore, in arguing against Sullo and Zimmerman motions, defended only their claims for RICO violations and for conspiracy to

violate RICO. 2

With respect to Gregory Sullo, participation in this conspiracy to barratrously recruit and fund Kubosh-suing

numerous emails sent to Sullo or & Sullo was being used as a RICO enterprise that it was not just Andrew Sullo

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are the RICO claims and the conspiracy to commit RICO claims. We never brought the the the wiretapping claims. They were not abandoned as a result of this motion. They were never brought in the first place. They are

their motion. All we have brought against Greg Sullo and Brian Zimmerman are the Kuboshes also argued that neither Zimmerman nor Sullo established an affirmative

defense to the RICO claims asserted against them.

pursuant to the TCPA. The Kuboshes filed their TCPA motion on March 29, 2018,

nearly five years after Youngblood filed the first barratry suit against them. In their

motion, t call to the Kuboshes, a could not establish a prima facie case on each element of their civil barratry claims,

asserting that they engaged in no prohibited conduct when the Carter parties called

and that the Carter parties could not prove that they were solicited by the Kuboshes.

The Kuboshes further argued that good cause existed to permit the late-filing

of their motion to dismiss:

The Kuboshes have good cause for the late filing of the motion in that any reasonable interpretation

of TCPA would inform that it is not available in this case because of the commercial speech exception of the TCPA. If the exception is not found to apply in the cases of hear all the motions to dismiss.

motions to dismiss would permit these issues to be determined solely from a one-sided perspective and would be inconsistent with the purposes and intent of the TCPA. Filing by Greg Sullo and Brian Zimmerman at this stage of the proceedings compels examination by the Court of all the underlying TCPA issues, and not just those in dismiss.

After holding a hearing, the trial court denied all three TCPA motions to

dismiss. The trial court did not state its rationale in the order denying the motions.

This interlocutory appeal followed. See TEX. CIV. PRAC. & REM. CODE ANN.

§ 27.008(b) (providing that appellate court shall expedite appeal from trial court

order on motion to dismiss legal action under TCPA).

THE TCPA MOTIONS TO DISMISS

motions to dismiss. Each party argues that the trial court erred by making these

rulings.

A. Standard of Review and Governing Law

The TCPA 3

3 The Texas Legislature amended the TCPA in its most recent legislative session. The amendments are effective September 1, 2019. Because this suit was filed before the effective date of the amendments, it is governed by the statute as it existed before the amendments, and all of our citations and analysis are to the TCPA as it existed prior to September 1, 2019. See Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1 12, secs. 27.001, 27.003, 27.005, 27.006, 27.009, 27.010, 2019 Tex. Sess. Law Serv.

684, 684 87 (to be codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001 .011). Youngkin v. Hines, 546 S.W.3d 675, 679 (Tex. 2018) (quoting In re Lipsky, 460

S.W.3d 579, 584 (Tex. 2015)); see TEX. CIV. PRAC. & REM. CODE ANN. § 27.002

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

; D

Magazine Partners, L.P. v. Rosenthal, 529 S.W.3d 429, 433 34 (Tex. 2017)

(recognizing that TCPA is designed to balance these dual policies). ExxonMobil

Pipeline Co. v. Coleman, 512 S.W.3d 895, 898 (Tex. 2017) (per curiam) (quoting

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

-step

procedure to expedite the dismissal of claims brought to intimidate or to silence a

nt rights. Id. (citing TEX. CIV. PRAC.

& REM. CODE ANN. § 27.003); In re Lipsky, 460 S.W.3d at 586. For a legal action to

be brought . . . First

Amendment rights, see ExxonMobil, 512 S.W.3d at 898, and in retaliation for a

the action must be based on,

relate[] right of free speech, right to petition, or right of association. See TEX. CIV. PRAC. & REM. CODE ANN.

§ 27.003(a). That party may then file a motion to dismiss the legal action. Id.

A TCPA motion to dismiss must be filed not later than the 60th day after the

date of service of the legal action, but the trial court may extend the time to file a

motion to dismiss on a showing of good cause. Id. § 27.003(b); see id. § 27.001(6)

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claim, or counterclaim or any other judicial pleading or filing that requests legal or

To obtain dismissal under the TCPA, the moving party must establish, as a

threshold matter, that the TCPA properly applies to the legal action against it.

Youngkin, 546 S.W.3d at 679. Hence, the first step in analyzing a motion to dismiss

plaintiffs S & S Emergency

Training Sols., Inc. v. Elliott, 564 S.W.3d 843, 846 (Tex. 2018); Youngkin, 546

S.W.3d at 680; see TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b).

The TCPA defines

right of association join together t TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2). The exercise of the right of free a matter of -defined to include an issue

related to (1) health or safety; (2) environmental, economic, or community well-

being; (3) the government; (4) a public official or public figure; or (5) a good,

product, or service in the marketplace. Id. § 27.001(3), (7); Adams v. Starside

Custom Builders, LLC, 547 S.W.3d 890, 892 (Tex. 2018) right of free speech protected in United States and Texas Constitutions in that, under

TCPA, communication made in connection with a matter of public

). The e is statutorily defined to include, in

relevant part, . . . and

judicial body. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4)(A)(i), (B).

itself is defined to include statement or document in any form or medium, including oral, visual, written,

Id. § 27.001(1); Adams, 547 S.W.3d at 894 (stating that

under TCPA). The TCPA expressly states that it does not apply to four different types of legal actions, including an action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, . . . or a commercial transaction in which

TEX. CIV. PRAC.

& REM. CODE ANN. § 27.010(b). The party asserting that a claim is exempt from the TCPA bears the burden of establishing the applicability of the exemption to its suit.

Deaver v. Desai, 483 S.W.3d 668, 673 (Tex. App. Houston [14th Dist.] 2015, no pet.).

In determining whether to dismiss a legal action under the TCPA, the court

TEX. CIV. PRAC. & REM. CODE ANN.

§ 27.006(a); Adams PA

If the TCPA movant meets its initial burden to establish the applicability of the TCPA, the burden shifts to the nonmoving party, the party bringing the legal action, to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. Youngkin, 546 S.W.3d at 679; see TEX.

CIV. PRAC. & REM. CODE ANN. § 27.005(c). specific ev unambiguous, sure, or free from doubt explicit or relating to a particular named thing. S & S Emergency Training Sols., 564 S.W.3d

at 847 (quoting In re Lipsky, 460 S.W.3d at 590). the TCPA, means evidence that is legally sufficient to establish a claim as factually

necessary to support a rationa Id.

(quoting In re Lipsky, 460 S.W.3d at 590); see In re Lipsky, 460 S.W.3d at 590 91

(stating that TCPA requires must provide enough detail to show the

If the party bringing the legal action establishes a prima facie case on each

element of its claim, the burden shifts back to the moving party to establish by a

preponderance of the evidence each essential element of a valid defense to the

Youngkin, 546 S.W.3d at 679 80; see TEX. CIV. PRAC. & REM.

CODE ANN. § 27.005(d); ExxonMobil, 512 S.W.3d at 899 (stating that even if

plaintiff establishes prima facie case, court will dismiss underlying action if TCPA

movant can establish each element of valid defense by preponderance of evidence).

If the court orders dismissal of a legal action under the TCPA, the court shall

and (2) sanctions against the party bringing the underlying determines sufficient to deter the party who brought the legal action from bringing TEX. CIV. PRAC. & REM. CODE ANN.

§ 27.009(a); D Magazine Partners, 529 S.W.3d at 442 (holding that, upon dismissal

of claims under TCPA, defendant

We Porter-

Garcia v. Travis Law Firm, P.C., 564 S.W.3d 75, 83 (Tex. App. Houston [1st

Dist.] 2018, pet. denied). We consider the pleadings and the evidence in a light

favorable to the nonmovant. Id. at 84; Dolcefino v. Cypress Creek EMS, 540 S.W.3d

194, 199 (Tex. App. Houston [1st Dist.] 2017, no pet.).

B. Gregory to Dismiss the 4

1. RICO Claims

In their amended counterpetition and third-party petition, the Kuboshes sued

Gregory Sullo and Zimmerman and

maintain[ing] the frivolous lawsuits to reap underserved economic

benefits where their perceived pecuniary gain was a significant motivation for the

4 Sullo and Zimmerman moved to dismiss all of the claims against them pursuant to the TCPA. In their response, the Kuboshes addressed only their RICO claims and asserted that they had not brought any other claims against Sullo and Zimmerman. statute, Penal Code section 38.12, Texas Rule of Disciplinary Procedure 7.03, and

the RICO mail and wire fraud statutes.

The Kuboshes alleged that Gregory Sullo and Zimmerman, in addition to

Andrew Sullo and the Carter parties d then did engage in

mail fraud, wire fraud, violation of federal wiretap law, and perjury that furthered

Specifically, the Kuboshes alleged:

lo Parties [defined to include Gregory Sullo and Zimmerman] . . . formed a RICO association-in-fact enterprise with common and continuing purposes, namely, to serve as a flexible vehicle to set up and file these in terrorem lawsuits based upon created facts for the express purpose of forcing a settlement, obtaining judgment, and causing the Kubosh Defendants to incur enormous Michael Kubosh and Paul Kubosh by embroiling them in legally

meritless but expensive and time-

Emails between A. Sullo and Brian Zimmerman who used the

to create fraudulent lawsuits, fraudulently establish venue and

ultimate mechanism of the racketeering activities of the RICO

enterprise, the Sullo Parties have extended their racketeering activities to fraudulently claim privileges under the Texas rules in order to conceal their actions, offensively employing these privileges as part and parcel of their Fraud on the Court, including Brian Zimmerman filing a sworn declaration that directly contradicts representations as officer of the court of his co-counsel Joe Fisher in apparent perjury and obstruction of participation in the underlying facts of the case and the operative

case have been tailored to address whatever inquiry into the facts

they seek to obstruct or substantive ruling they seek to foreclose. Their actions have been taken with no legitimate purpose and only to conceal the truth and to increase the burden and expense to the Kubosh Defendants by making the defense of the lawsuits so prohibitively expensive as to force a settlement, and to obtain

ns and offensive use of work product and attorney-client privilege are racketeering activities of their criminal enterprise, as recognized by the First Court of Appeals In re Kubosh Bail Bonding], and are targeted to make the litigation prohibitively expensive, prevent the discovery of the truth, force

. . . racketeering enterprise affects interstate commerce because it uses the instrumentalities of interstate commerce to tie up at least three Texas civil courts in two

. . . have used the U.S. mail, an instrumentality of interstate commerce, as part of their RICO Fraud on the Court pleadings and discovery responses in Carter, Youngblood and Nash as instances of using the U.S. Postal

participation in the underlying lawsuits, specifically use of

actually counsel for Youngblood and Nash for their traffic

warrant cases and that Zimmerman was actively conspiring to conceal the truth regarding their barratrous orchestration of all of -mail, an instrumentality of interstate commerce, to the Kubosh Defendants and emails between the Sullo Parties, specifically including the Emails between A. Sullo and Brian Zimmerman to procure a fraudulently anchor venue in Beaumont for the Youngblood and

Nash

service copies of court filings in the U.S. mail, and by using the

U.S. mail to communicate with one another in furtherance of their RICO scheme of fraudulently misrepresenting the Sullo rts to barratrously orchestrate a Fraud on the Court the Kubosh Defendants, each of the Sullo Plaintiffs, the Sullo

Parties and Edward James Carney have engaged in mail fraud . . .

at Provost Umphrey for A. Sullo to procure Beaumont Plaintiffs

participation and Bri claims and manufacturing of the case facts with A. Sullo and

attorneys in his own firm. The ongoing litigation, as found by the First Court of Appeals, is part of the continuing racketeering activity, and use of the mails and electronic systems employed

- participating in the commission of a fraud on this Court,

-cutter affidavits, and destroying

possession, Third-Party Defendants A. Sullo, G. Sullo, [and] Brian Zimmerman . . . have engaged in obstruction of justice . . .

d: recruit and fund Kubosh-suing plaintiffs is clear. He is a co-owner of

Sullo & Sullo, the firm that was operated as a criminal enterprise to turn their clients into plaintiffs in a critical mass of manufactured claims. Greg Sullo is copied on many pieces of email correspondence, as early as February 28, 2012 and including several where both Greg Sullo and Ms. Shivers [an attorney at Zimmerman Axelrad, and who posted the bond for Youngblood and Nash] were copied, on November 1 and 11, 2013 and again on December 16, 2013. In addition, the amended privilege log references emails to which Greg Sullo is a party. Greg a RICO enterprise that it was not just Andrew Sullo working in his

section, but that he deployed the full resources of his firm.

The Kuboshes also argued inference that Sullo agreed to commit two more racketeering acts,

Sullo and the evidence of his involvement in the planning and execution

by his presence on the supposedly work product privileged emails to which he was a party. Greg Sullo was also part of the so-

With respect to Zimmerman, it is undisputed that the majority of the Carter

the parties immediately signing attorney-client representation agreements with

Andrew Sullo. It is also undisputed that Andrew Sullo first contacted Zimmerman

about the cases in January 2012 and that Zimmerman accepted referral of the cases

in May or June 2012 and undertook their representation.

With respect to the basis of their RICO claims, the Kuboshes alleged that

formed a RICO association-in-fact enterprise with common and continuing purposes, namely, to serve as a flexible vehicle to set up

and file these in terrorem Kuboshes alleged that Zimmerman committed a RICO predicate act of wire fraud

d purpose to create fraudulent lawsuits,

fraudulently establish venue and fraudulently file and maintain the

2. as TCPA Movants to Show RICO Claims Against Them

In moving to dismiss TCPA, Sullo and Zimmerman bore the initial burden of showing by a preponderance

of the evidence that the TCPA applies to the claims asserted against them and that

no exemption from TCPA coverage applies. In this case, they were required to show

that the conduct nication[s] made in

here

the provision of legal services by Sullo and Zimmerman and that those

communications were protected. See TEX. CIV. PRAC. & REM. CODE ANN.

§ 27.001(3), (7); Adams, 547 S.W.3d at 892.

a. brought in relation to a matter of public concern Both the barratry claims that the Sullo firm and Zimmerman have brought and

maintained against the Kuboshes on behalf of the Carter parties and the RICO claims

that the Kuboshes have brought against Sullo and Zimmerman for filing and

maintaining the Carter barratry suits against the Kuboshes arise out of a

matter of public concern the allegedly barratrous sale of legal services. See TEX.

CIV. PRAC. & REM. CODE ANN. § 27.001(3), (7); cf. DeAngelis v. Protective Parents

Coalition, 556 S.W.3d 836, 852 (Tex. App. or private communications related to the provision of legal services to the public by

licensed attorneys . . . exercise of free speech under the T Deaver, 483 S.W.3d at 673 74 (holding

legal services, which are offered in marketplace, and thus statements address matters

of public concern). Accordingly, this Court must determine in this TCPA suit

whether Sullo and Zimmerman have shown by a preponderance of the evidence that

the actions for which the Kuboshes have sued them are constitutionally protected

communications in relation to their provision of legal services to their clients and

are not, as the Kuboshes allege, actions that are not constitutionally protected but

are, instead, actionable in themselves as communications prohibited by law.

We note as a threshold matter that the violations of the criminal barratry

statute, Penal Code section 38.12, alleged by the Kuboshes as RICO predicate acts against the defendants, including Sullo and Zimmerman, in the underlying suit are

not the same as the violations of the civil barratry claims brought against the

Kuboshes by the Carter parties under sections (c), (d), and (e) of the then-newly-

enacted Texas civil barratry statute, Government Code section 82.0651. Under the

plain language of section 82.0651, each of the civil barratry actions brought by the

Carter parties against the Kuboshes could only have been brought by a person

[of the Kuboshes] violating Section 38.12(a) or (b), Penal

Code, or Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct. See

TEX. GOV T CODE ANN. § 82.0651(c). And, in addition, these civil barratry claims

could have been brought and maintained on behalf of the Carter parties by the Sullo

firm and Zimmerman only if the Carter parties did not contract [with the alleged offender, the Kuboshes] as a result of

in improperly soliciting their business. Id. The Carter parties did not enter

into contracts with the Kuboshes for legal or bail bond services. Therefore, the civil

barratry statute applies allegedly barratrous actions.

Conversely, the Kuboshes RICO claim against Sullo and Zimmerman is

based on Sullo and Zimmerman and manufacturing the barratry claims brought by the Carter parties against the Kuboshes

after soliciting the Carter parties to create them, and then representing the Carter

parties in pursuing those claims in the solicited litigation. These actions are all represented by the Kuboshes as acts of criminal barratry in violation of Penal Code

section 38.12(a) and (b) and, because of the use of phones and other electronic

communications in soliciting and maintaining allegedly barratrous litigation, as

RICO predicate acts.

b. Whether the TCPA movants have shown that their actions, represented by the Kuboshes as RICO predicate acts, are protected communications

In their amended counterpetition and third-party petition, the Kuboshes

accuse Sullo, Zimmerman, and the other defendants of violating Penal Code section

38.12, the criminal barratry statute, which prohibits . . . to

a prospective client money or anything of value to obtain employment as a

within the scope of license, registration, or certification that results from

the solicitation of employment in violation of Subsection (a) of section 38.12. See

TEX. PENAL CODE ANN. § 38.12(a)(3), (b)(3). Specifically, the Kuboshes allege that,

Carter parties something of value an interest in recovering damages from the

Kuboshes in a civil lawsuit in order to obtain employment by the Carter parties.

The Kuboshes contend that both the solicitation of the Carter

parties as prospective clients and their representation of them in barratry litigation

against the Kuboshes by use of the telephone and electronic communications are not constitutionally protected acts of free speech and of the right to petition, but are

instead illegal acts of mail fraud and wire fraud in violation of both the Texas Penal

Code and RICO, and, thus, are RICO predicate acts that are not protected by the

TCPA. To carry their initial burden in their TCPA motion, therefore, Sullo and

Zimmerman were required to show by a preponderance of the evidence that they

were sued solely for actions taken Carter parties and not for conduct outside the scope of that legal representation or

, namely barratrous activities of their

own. See Youngkin, 546 S.W.3d at 681.

Zimmerman argues in support of his TCPA motion that all of the alleged

his capacity as counsel for the Carter parties and are, therefore, within the scope of

his representation of his clients and are constitutionally protected acts to which the

TCPA applies. See Youngkin, 546 S.W.3d at 681 (setting out affirmative defense of

attorney immunity); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015)

(same); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 406 (Tex. App. Houston [1st Dist.] 2005, pet. denied) or without merit, is not independently actionable if the conduct is part of the

claims that, even though the Kuboshes repeatedly claims against him consulting with referring counsel, filing pleadings and discovery responses, asserting privileges, and using trust accounts to

post bonds for

clients these acts See Cantey Hanger, 467 S.W.3d at 482; see also

Youngkin kind of conduct

at issue rather than the alleged wrongfulness

Zimmerman also argues that his conduct in sending the emails relating to

securing the Provost Umphrey conference room for Youngblood and Nash to make

their calls to the Kuboshes is protected by attorney immunity even though these

actions occurred before any of the Carter parties filed suit and thus occurred outside

the litigation context. See Troice v. Greenberg Traurig, L.L.P., 921 F.3d 501, 505 06 (5th Cir. 2019) (examining case law from Texas intermediate appellate courts

applying doctrine of attorney immunity outside of litigation context, concluding that

and holding that Texas

Supreme Court would apply attorney immunity doctrine to conduct occurring in

non-litigation context).

In their TCPA motion RICO suit against them,

Sullo and Zimmerman he barratry lawsuits against the Kuboshes on behalf of the Carter parties, his filing of amended petitions

and discovery responses, his assertion of privilege, and his communications with

Andrew Sullo and Gregory Sullo concerning the maintenance and status of the

barratry lawsuits actions

are all actions that they took in connection with the Carter

lawsuits against the Kuboshes and are therefore acts of free speech,

association, and the right to petition that are protected by the TCPA. See Hawxhurst

, 550 S.W.3d 220, 227 (Tex. App. Austin 2018, no pet.)

petition in a lawsuit

In support of their TCPA motion them, Sullo and Zimmerman observe that Texas Supreme Court has held that the

ated to, or in

See Youngkin, 546 S.W.3d at 680; see also

Hersh v. Tatum no allegations. . . . covered by the [TCPA] Sullo and Zimmerman further point out that an attorney is immune from

liability to nonclients for conduct within the scope of his representation of his clients.

Youngkin, 546 S.W.3d at 681; Cantey Hanger, 467 S.W.3d at 481 (stating that

defense of attorney immunity stems fro interpose any defense or supposed defense, without making themselves liable for

Kruegel v. Murphy, 126 S.W. 343, 345 (Tex. App. Dallas

Furthermore, they argue, the Texas Supreme Court has held:

Put differently, an attorney may be liable to nonclients only for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer. We also clarified in Cantey Hanger that the above inquiry correctly focuses on the kind of conduct at issue rather than the alleged wrongfulness of said conduct. That is, a lawyer is no more susceptible to liability for a given action merely because it is alleged to be fraudulent or otherwise wrongful.

Youngkin, 546 S.W.3d at 681; see Cantey Hanger (quoting Toles v. Toles, 113 S.W.3d 899, 910 11 (Tex. App. Dallas 2003, no

pet.)). They also argue that l and should not remove Cantey Hanger, 467 S.W.3d at 483 (quoting Alpert,

178 S.W.3d at 406). The attorney- faithful, and aggressive represe Youngkin, 546 S.W.3d at 682 (quoting Cantey Hanger, 467 S.W.3d at 481).

Sullo and Zimmerman thus argue that they have demonstrated by a

preponderance of the evidence that the TCPA applies to the RICO claims asserted

against them. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (providing that

relates to, or is in response to a p ; Youngkin, 546 S.W.3d at 680 81 (holding that

f the Rule 11 agreement into the court record

; James v. Calkins, 446 S.W.3d 135, 147 48

(Tex. App. Houston [1st Dist.] 2014, pet. denied) (holding that TCPA applied to

ent lien claim was based on lis

pendens defendant had filed in another proceeding); see also River Plantation Cmty.

, No. 09-17-00451-CV, 2018

WL 4120252, at *4 (Tex. App. Beaumont Aug. 30, 2018, no pet.) (mem. op.) We conclude that Sullo and Zimmerman have failed to bear their burden of

showing by a preponderance of the evidence that the communications for which they

were sued were lawful acts of legal representation protected by the First Amendment

as opposed to unlawful acts of criminal barratry, mail fraud, and wire fraud.

Moreover, as we discuss below, we conclude that the Kuboshes have established a

prima facie case on each essential element of their RICO claims against these

defendants and that Sullo and Zimmerman have failed to establish each essential

element of a valid defense to the Kubo. See TEX.

CIV. PRAC. & REM. CODE ANN. § 27.005(c), (d) (providing that if TCPA movant

meets its initial burden to establish applicability of TCPA, burden shifts to

nonmoving party party bringing underlying legal action to establish by clear and

specific evidence prima facie case against TCPA movant for each essential element

of claim in question and that, if nonmoving party does so, burden shifts back to

movant to establish each essential element of valid defense to nonmoving claims); Youngkin, 546 S.W.3d at 679 80.

3. Burden as TCPA Non-Movants to Make a Prima Facie Case Against Sullo and Zimmerman

To establish a prima facie case for their RICO claims against Sullo and

Zimmerman, the Kuboshes were required to produce evidence legally sufficient to establish these claims as factually true if not countered; that is, they were required

to support their RICO claims with support a rational inference that the allegation of fact is true. S & S Emergency

Training Sols., 564 S.W.3d at 847 (quoting In re Lipsky, 460 S.W.3d at 590). If the

party bringing the underlying action establishes a prima facie case on each element

of its claim against the TCPA movant, the burden shifts back to the movant to

establish by a preponderance of the evidence each essential element of a valid

Youngkin, 546 S.W.3d at 679 80; see TEX. CIV.

PRAC. & REM. CODE ANN. § 27.005(d); ExxonMobil, 512 S.W.3d at 899.

The Kuboshes alleged that Sullo and Zimmerman violated the following

provision of RICO:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The different subsections of section 1962 have three common

elements that a plaintiff must demonstrate to establish civil RICO liability: (1) a

person who engages in (2) a pattern of racketeering activity, (3) connected to the

acquisition, establishment, conduct, or control of an enterprise. Snow Ingredients,

Inc. v. SnoWizard, Inc., 833 F.3d 512, 523 24 (5th Cir. 2016); Abraham v. Singh,

or more predicate criminal acts that are (1) related and (2) amount to or pose a threat Snow Ingredients, 833 F.3d at 524 (quoting St.

Germain v. Howard, 556 F.3d 261, 263 (5th Cir. 2009) (per curiam)); Abraham, 480

F.3d at 355. The predicate criminal acts can be violations of either state or federal

law. Snow Ingredients, 833 F.3d at 524. entities associating together for the common purpose of engaging in a course of

Whelan v. Winchester Prod. Co., 319 F.3d 225, 229 (5th Cir. 2003).

The Kuboshes also alleged that Sullo and Zimmerman along with Andrew

Sullo, Sullo & Sullo, and the Carter parties conspired to violate section 1962(c).

United

States v. Delgado, 401 F.3d 290, 296 (5th Cir. 2005); see 18 U.S.C. § shall be unlawful for any person to conspire to violate any of the provisions of

s . To prove a RICO conspiracy, the plaintiff

must establish (1) that two or more people agreed to commit a substantive RICO

offense and (2) that the defendant knew of and agreed to the overall objective of the

RICO offense. Delgado, 401 F.3d at 296. Under section 1962(d), there is no

t the two

Id. offenses that can constitute racketeering activity, including mail fraud and wire

fraud. See 18 U.S.C. § 1961(1)(B). The United States Code defines mail fraud as

follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. . . .

Id. § 1341; United States v. Whitfield

(citation omitted). The United States Code defines wire fraud as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343; United States v. Stalnaker, 571 F.3d 428, 436 (5th Cir. 2009)

-intent crime requiring proof that the (quoting United States v. Nguyen, 504 F.3d 561, 568 (5th Cir. 2007)).

The Texas Supreme Court has consistently pointed out that while attorney

immunity is Youngkin, 546 S.W.3d at 682. Attorneys are

Id. Specifically, attorneys are not shielded from liability to nonclients for

their actio attorney engages when discharging his duties to his client. Cantey Hanger, 467

S.W.3d at 482.

The c fall outside the reach of the attorney- participating in a fraudulent business scheme with a client, knowingly assisting a

client with a fraudulent transfer to avoid paying a judgment, stealing of goods or

services on the Youngkin, 546 S.W.3d at 682 83; Cantey Hanger, 467 S.W.3d at 482 83. Finally,

t -

-immunit Cantey Hanger, 467 S.W.3d at 484; see also Troice that criminal conduct [by an attorney] does not automatically negate immunity, but .

Thus, the focus of the inquiry into whether the attorney-immunity defense

-client

Youngkin, 546 S.W.3d at 683; see also Troice, 921 F.3d at

analysis . . . their framework remains whether that behavior was in the scope of

.

Unlike those alleged to be within the

scope of the TCPA were held to be constitutionally protected activities, the

Kuboshes alleged that Sullo and Zimmerman either took actions outside the scope

of representation of their existing clients in furtherance of an illegal s pay[], give[], or advance[] . . . to a prospective client money or [some]thing of value

to obtain employment as a professional from the knowingly

accept[ed] employment within the scope of [their] license, registration, or

certification that result[ed] from the solicitation of employment in violation of [Penal

Code] Subsection [38.12](a). See TEX. PENAL CODE ANN. § 38.12(a)(3), (b)(3). The Kuboshes pleaded their claims against Sullo and Zimmerman clearly and

specifically and supported them by evidence of the actions taken, which they allege

were unlawful. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.005(c) (setting out prima facie case requirement), 27.006(a) (requiring court, in determining whether to dismiss legal action u .

Specifically, the Kuboshes produced evidence showing that none of the Carter individual plaintiff had agreed in writing to participate in the price match program and to call Kubosh Bail Bonding expecting that they would likely be transferred to the Kubosh Law Office. The record includes ms setting out the price match program that each of the Carter parties signed before calling the Kuboshes, instruction sheets informing the Carter parties what to ask during their calls, form affidavits completed by each of the Carter parties after their calls, and attorney-client agreements signed by each of the Carter parties and Andrew Sullo. The record also includes evidence in the form of emails that Zimmerman was involved in setting up the conference room in Beaumont where Youngblood and Nash called the Kuboshes and evidence that Gregory Sullo participated in email exchanges concerning the suits against the Kuboshes. Thus, the Kuboshes pleaded that Sullo and Zimmerman committed violations of law that clearly and specifically bring their actions within the scope of the criminal barratry statute, Penal Code section 38.12, Rule 7.03 of the Disciplinary Rules of Professional Conduct, and 18 U.S.C. sections 1341 and 1343, prohibiting mail and wire fraud, predicate acts under RICO. See, e.g., Whitfield Stalnaker -intent crime requiring proof

(citation omitted); see also Snow Ingredients, 833 F.3d at

523 pattern of

that predicate criminal acts can be violations of state or federal law). And they

supported their claims with evidence stating the facts on which their RICO claims

are based. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.005(c), 27.006(a).

Accordingly, we hold that the Kuboshes established a prima facie case against

Sullo and Zimm , satisfying their burden of

proof necessary to avoid dismissal under the TCPA. See S & S Emergency Training

Sols., 564 S.W.3d at 847; In re Lipsky, 460 S.W.3d at 590 91. That is, they referenced evidence that is legally sufficient to establish their claims as factually true

if not countered. See S & S Emergency Training Sols., 564 S.W.3d at 847; In re

Lipsky, 460 S.W.3d at 590.

4. S Limitations Defense to RICO Claims

Because the Kuboshes established a prima facie case on each element of the

underlying RICO claims upon which Sullo and Zimmerman sought dismissal, the

burden shifted back to Sullo and Zimmerman to establish by a preponderance of the

evidence each essential element of a valid defense to the RICO claims. See TEX. CIV.

PRAC. & REM. CODE ANN. § 27.005(d); Youngkin, 546 S.W.3d at 679 80;

ExxonMobil, 512 S.W.3d at 899. We look to the opposing affidavits stating the facts on which the . . . defense is based, see TEX.

CIV. PRAC. & REM. CODE ANN. § 27.006(a), a Adams, 547 S.W.3d at 897.

Here, them should be dismissed because the statute of limitations expired before the claims

were brought against them, providing a complete defense to those claims. The

Kuboshes respond that their evidence of Sullo and Zimmerman that form

the basis of the RICO claims against these defendants was obtained only after this

Court ordered the release of previously withheld emails on May 16, 2017. A RICO plaintiff must bring his claims within four years of discovering the

harm. Rotella v. Wood, 528 U.S. 549, 553 54 (2000 Love , 230

F.3d 765, 773 (5th Cir. 2000). The Fifth Circuit has als separate injuries, allows a civil RICO claim to accrue for each injury when the

plaintiff discovers or should have discovered that injury. Id. at 773 75. And it has

accrues when the plaintiff becomes aware of a fraud; it has held, instead, that a RICO

cause of action against a defendant does not accrue under the injury-discovery rule

Id. at 777. Moreover, under the doctrine of

fraudulent concealment, the limitations period for a RICO claim is tolled until the

plaintiff discovers, or with reasonable diligence should have discovered, the

concealed fraud. Id. at 779 (quoting Klehr v. A.O. Smith Corp., 521 U.S. 179, 184

(1997)). All of these doctrines the discovery rule, the accrual rule, and the

fraudulent concealment rule apply in this case.

The Kuboshes contend that they did not realize until the filing of the Nash

petition in October 2014 that third-party defendant Andrew Sullo had concealed a reserve of recordings to use against the Kuboshes in the Carte them and that only then did they realize the nature of the RICO injury they had

of the Nash petition revealed that there were recordings of the phone calls that the

Kuboshes alleged constituted RICO predicate acts. The Kuboshes further argue that

only through the privilege log produced in this case did they discover that Gregory

which the Kuboshes allege is unlawful under RICO. They contend that the third-

party defendants actively worked to conceal the facts pertinent to their RICO injury

and that they required court intervention to secure the evidence needed to establish

the allegedly unlawful scheme.

We conclude that Sullo and Zimmerman have failed to establish their

limitations defense by a preponderance of the evidence. Accordingly, we hold that

they limitations grounds.

We hold that the Kuboshes suit under RICO is not subject to dismissal under

the TCPA. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003, 27.005; see also id.

§ 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

). Therefore, s the TCPA. 5

6

5 The Kuboshes also argue that their RICO claims against Sullo and Zimmerman fall within the commercial speech exemption and, therefore, the TCPA is not applicable xercise of his right of freedom

of speech, right to petition, or right of association, the Act does not apply to certain situations. One of these situations to which the TCPA does not apply is a legal action he business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services . . . or a commercial transaction in which the intended audience is an actual commercial speech exemption. TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b). We find it unnecessary to reach this argument.

6 Sullo and Zimmerman also seek their attorney s fees and costs pursuant to section 27.009(a) of the

TCPA. Under the TCPA, if the court orders dismissal of a legal action, the court shall award to the moving party (1) court costs, reasonable

justice and equity may require, and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party from bringing similar actions described in the TCPA. TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a); Youngkin v. Hines, 546 S.W.3d 675, 683 (Tex. 2018); see Sullivan v. Abraham, 488 S.W.3d 294, 299 (Tex. 2016) (holding that TCPA requires award of

Because s them under the TCPA, we overrule their issue seeking motions. C. The Kuboshes Claims Against Them

1. The Constitutionality of Government Code Section 82.0651

In the underlying litigation, the Kuboshes have asserted a First Amendment

claim challenging the constitutionality of Government Code section 82.0651 as

applied in .

Recognizing the public importance to the State of Texas of the construction

and application of the barratry laws, especially then-recently-enacted section

82.0651, as a matter of public concern, the State intervened as of right in this

litigation. It filed a brief in this appeal in which it states the following:

This litigation has been pending, in various forms and with various parties, since 2013. But, crucially, the district court has not yet decided the fundamental issue in the case: whether lawyer Paul Kubosh/Kubosh Law Office and bail bondsman Felix Michael Kubosh/Kubosh Bonding (the Kuboshes) violated the Texas civil barratry statute, TEX. GOV T CODE § 82.0651(c). Until the district court has made that determination, there cannot and should not be a resolution of the -applied First Amendment challenge. . . . The Court should decl the Texas civil barratry statute.

(Emphasis added.)

We whether the Kuboshes violated the civil

barratry statute, Government Code section 82.0651 and therefore that the

-applied First Amendment challenge should not be resolved at this time. We further observe that, as

stated above, the district court has also not yet

decided whether the challenged actions of Sullo, Zimmerman, and the other

are lawful acts of representation of clients or

unlawful acts that violated the criminal barratry statute, section 38.12 of the Penal

Code. And from that observation we draw the reasonable inference that it is just as

premature for us to decide in this TCPA action whether the TCPA movants, Sullo

and Zimmerman, were exercising their First Amendment rights to practice the legal

profession in representing their clients in the barratry suits against the Kuboshes, or

were participating in an illegal scheme to enrich themselves by soliciting clients to

manufacture civil barratry claims for their own pecuniary gain and then representing

those persons as plaintiffs in their barratry suits against the Kuboshes.

2. Cross-Motion

-motion to dismiss the Carter

against them pursuant to the TCPA. We first address

This -settled that the purpose of the TCPA is

early in the lawsuit to dismiss claims that seek to inhibit a

Jordan v. Hall, 510 S.W.3d 194,

198 (Tex. App. Houston [1st Dist.] 2016, no pet.) (quoting Paulsen v. Yarrell, 455 S.W.3d 192, 197 (Tex. App. Houston [1st Dist.] 2014, no pet.)); see Miller

Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181, 193 (Tex. App. El Paso 2014,

ensuring that courts will dismiss SLAPP suits quickly and without the need for

. Civil Practice and Remedies Code section

day after the date of service of the legal TEX. CIV. PRAC. & REM. CODE ANN.

§ 27.003(b); Grant v. Pivot Tech. Sols., Ltd., 556 S.W.3d 865, 885 (Tex. App. Austin 2018, pet. denied); Bacharach v. Garcia, 485 S.W.3d 600, 602 (Tex. App. Houston [14th Dist.] 2016, no pet.). cause of action, petition, complaint, cross-claim, or counterclaim or any other

TEX. CIV. PRAC. &

REM. CODE ANN. § 27.001(6). The trial court may extend the time to file a motion

7 Id. § 27.003(b); Grant, 556 S.W.3d at

885; Jordan, 510 S.W.3d at 197.

7 The TC whether good cause exists to allow the withdrawal of deemed admissions and to

allow the late-filing of a summary judgment response, the Texas Supreme Court has held that good cause i See Wheeler v.

Green, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam) (withdrawal of deemed admissions); Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 688 (Tex. 2002) (late-filing of summary judgment response). Here, Youngblood originally filed suit against the Kuboshes for violation of

the civil barratry statute in Jefferson County on April 5, 2013. Carter filed suit

against the Kuboshes in Harris County on August 28, 2013, and Nash filed suit

against the Kuboshes in Jefferson County on October 1, 2014. Although the

plaintiffs have amended their petition several times during the course of this

litigation, the only cause of action they have ever asserted against the Kuboshes is a

claim for violation of the civil barratry statute. The Kuboshes did not file their TCPA

motion to dismiss the civil barratry claims against them until March 29, 2018, nearly

five years after Youngblood first filed suit.

The Kuboshes acknowledge that their TCPA motion to dismiss was not filed

within sixty days after the date of service of the legal action against, and, thus, that

their motion to dismiss wa for their late filing of the motion to dismiss and that the trial court erred by denying

their motion on this basis. Specifically, the Kuboshes argue that

It was only well after the deadline to file a TCPA motion to dismiss that the true factual background emerged in this case, and that the discovery revealed that the evidence showed that, in fact, the Sullo

Plaintiffs [e.g., Youngblood, Carter, Nash] were acting on behalf of Andrew Sullo and could not be actual or potential customers of the Kuboshes in connection with the communications at issue. The Kuboshes contend that, due to the actions of Andrew Sullo and Zimmerman,

they were unable to determine the true nature of the case against them, justifying the

late filing of their TCPA motion. We disagree.

The record reflects that on October 21, 2014, approximately three weeks after

Nash filed the third and last suit against the Kuboshes, the Kuboshes filed their

second amended answer and counterpetition in the Carter suit. This pleading

ere

made for an improper purpose. Specifically, the Kuboshes alleged:

[Andrew] Sullo orchestrated each and every Carter another 64 barratrously- [Sullo & Sullo] office (as well as other locations) to Kubosh Bonding

using phone numbers Sullo provided each Carter Plaintiff, along with -prepared form affidavit instructions listing Kubosh Law as the intended ultimate recipient of each Sullo-instructed call.

Sullo masterminded an attorney-crafted scheme to perpetrate a Fraud on the Court, defined in BLACK S LAW DICTIONARY bribery

recorded every Carter retaliate against the Kubosh Brothers . . . .

. . . .

This case does not involve barratry by Kubosh Bonding or Kubosh Law but, instead, a Fraud on the Court orchestrated by Sullo and [Sullo & Sullo] using each Carter, Youngblood and Nash Plaintiff, 64 people -in- aided and abetted by Zimmerman and Zimmerman Axelrad. This Court should bring an end to the first phase of this lawsuit by dismissing, with prejudice, the Carter

The Kuboshes then, in that same pleading, raised an as-applied challenge to the

constitutionality of the civil barratry statute and asserted claims against the Carter

parties, Andrew Sullo, and Sullo & Sullo, including claims for common-law fraud,

civil conspiracy, RICO violations, and conspiracy to violate RICO.

On January 22, 2016, in the Nash case, the Kuboshes filed a combined motion

to transfer venue, amended answer, original counterclaim against Nash, and original

third-party claims against Andrew Sullo, Gregory Sullo, and Sullo & Sullo, LLP.

The Kuboshes all Zimmerman and Fisher in planning and executing the calls is not yet completely

Andrew and Zimmerman were in email communication as early as January 27, 2012

a little over two months following the first

whelming evidence

of obstruction of justice. . . . The [Carter parties] are relevant to this case only as a

tool for the criminal enterprise of Third-Party Defendants [Andrew Sullo, Gregory

Sullo, and Sullo & Sullo] and their confederates, Brian Zimmerman The Kuboshes again challenged the constitutionality of the civil barratry statute and

asserted claims against the Carter parties, Andrew Sullo, Gregory Sullo, and Sullo & Sullo, including claims for common-law fraud, civil conspiracy, RICO violations,

conspiracy to violate RICO, and violations of federal and state wiretapping statutes.

The Kuboshes alleged that the Carter parties and the association-in-fact enterprise with common and continuing purposes, namely, to

serve as a flexible vehicle to set up and file these in terrorem lawsuits based upon

created facts . . .

The record also reflects that while the Carter parties and Andrew Sullo have

and received a

common-law fraud claims the Kuboshes also moved for summary judgment on the claims in

September 2015 and again in August 2017. The Kuboshes, however, did not seek

dismissal of the claims against them under the TCPA until March

Kuboshes moved for dismissal under the TCPA, they had been asserting that the

lawsuits were a nearly three-and-a-half years before they filed their TCPA motion.

One of the overarching purposes of the TCPA is to provide an expedited

dismissal procedure for lawsuits that are based on, related to, or in response to the

exercise of certain statutorily-protected rights. See, e.g., In re Lipsky, 460 S.W.3d at expedited dismissal of such suits

Jordan, 510 S.W.3d at

to seek dismissal of claims that implicate certain protected rights).

they were served with a legal action setting out the only causes of action that have

been asserted against them and filed after the Kuboshes have filed dispositive

summary judgment motions on those causes of action, would frustrate the purpose

of the TCPA and its expedited procedures. We conclude that the Kuboshes did not

establish good cause for the late filing of their TCPA motion to dismiss. We therefore

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8 The parties disagree regarding the appropriate standard of review for this issue. The Kuboshes argue that we should review this question de novo, pointing out that appellate courts review trial court rulings granting or denying TCPA motions to dismiss, as well as questions of statutory construction of the TCPA, de novo. See Porter-Garcia v. Travis Law Firm, P.C., 564 S.W.3d 75, 83 (Tex. App. Houston [1st Dist.] 2018, pet. denied). The Carter parties argue that we should review this issue for an abuse of discretion, pointing out that section 27.003(b) provides that the may extend the time to file a motion under this section on a showing of good cause for an abuse of discretion. See TEX. CIV. PRAC. & REM. CODE ANN.

§ 27.003(b) (emphasis added); see, e.g., Carpenter, 98 S.W.3d at 686 (reviewing tri abuse of discretion). We need not determine which standard of review is appropriate

for reviewing the question of whether a trial court properly determined that good cause did or did not exist for the late filing of a TCPA motion because, under the facts of this case, even under the less-deferential de novo standard of review, the Kuboshes have not established that good cause existed for them to file their TCPA motion nearly five years after the filing of the first suit asserted against them. , and we hold that the trial court did not

barratry suits

against them.

Conclusion

the

s to dismiss under the TCPA.

Evelyn V. Keyes Justice

Panel consists of Justices Keyes, Kelly, and Landau.