

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

v.

141st JUDICIAL DISTRICTFUNIMATION PRODUCTIONS, LLC,
JAMIE MARCHI, MONICA RIAL,
AND RONALD TOYE,
Defendants

TARRANT COUNTY, TEXAS

**PLAINTIFF'S MOTION TO STRIKE OR DISREGARD
DEFENDANTS' LATE FILINGS**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Victor Mignogna requests that the Court strike the documents Defendants filed in support of their TCPA motions to dismiss, which were filed after the deadline to file their motions to dismiss, and disregard (for the purposes of its TCPA analysis) all affirmative defenses filed after the deadline for their motions to dismiss.

I. BACKGROUND

The deadline for Defendant Funimation Productions, LLC's ("Funimation") motion to dismiss under the Texas Citizens Participation Act (Texas Civil Practice and Remedies Code, Chapter 27) was July 15, 2019.¹ Funimation filed its motion to dismiss on July 1, 2019. Funimation subsequently filed *Funimation Production, LLC's Supplemental Brief in Support of its TCPA Motion* ("Funimation's First Supplement") on July 29, 2019 (*i.e.*, 2 weeks after its motion to dismiss deadline) and filed *Defendant Funimation Productions, LLC's Supplemental*

¹ Funimation's service date was May 14, 2019. (Rule 11 Agreement filed May 29, 2019). Its motion to dismiss was due 60 days later. TEX. CIV. PRAC. & REM. CODE §27.003(b). Sixty days after May 29, 2019 was July 13, 2019, a Sunday; hence, Funimation's deadline was extended to Monday, July 15, 2019. TEX. R. CIV. P. 4.

Evidence in Support of its TCPA Motion to Dismiss (“Funimation’s Second Supplement”) on August 6, 2019 (*i.e.*, 3 weeks after its motion to dismiss deadline).

The deadline for Defendants Monica Rial’s (“Rial”) and Ronald Toye’s (“Toye”) motion to dismiss under the TCPA was June 18, 2019.² Plaintiff agreed to a joint motion and agreed order extending this deadline to July 19, 2019.³ Rial and Toye filed their motion to dismiss on July 19, 2019. Subsequently, Rial and Toye filed *Defendants Monica Rial and Ronald Toye’s Supplemental Affirmative Defense* (“Rial and Toye’s Supplemental Defense”) on July 26, 2019 (*i.e.*, a week after the deadline for their motion to dismiss) and *Defendants Monica Rial and Ronald Toye’s Supplement to Motion to Dismiss* (“Rial and Toye’s Supplement”) on July 30, 2019 (*i.e.*, 11 days after the deadline for their motion to dismiss).

II. ARGUMENT & AUTHORITY

A motion to dismiss a legal action under the TCPA must be filed no later than the 60th day after the date of service of the legal action (unless extended by the trial court for good cause). TEX. CIV. PRAC. & REM. CODE §27.003(b). The issue here is whether the TCPA permits supplementing a motion to dismiss after the 60-day deadline has passed.

The TCPA does not state whether supplementation after the 60-day deadline is permitted, unlike, for example, the procedural rule governing summary judgment motions which permits the filing of supporting evidence up to 21 days before the motion’s hearing date. TEX. R. CIV. P. 166a(c). Rather, the TCPA imposes an express deadline for filing the motion to dismiss based on the date of service, and reviewing courts consistently have held

² Rial and Toye were served on April 19, 2019. (Rule 11 Agreement dated April 19, 2019); hence, their motion to dismiss would have been due sixty days later, *i.e.*, by June 18, 2019. TEX. CIV. PRAC. & REM. CODE §27.003(b).

³ Rule 11 Agreement filed June 19, 2019.

that this deadline is firm. Braun v. Gordon, 05-17-00176-CV, 2017 WL 4250235 (Tex. App.—Dallas Sept. 26, 2017, no pet.); Jordan v. Hall, 510 S.W.3d 194 (Tex. App.—Houston [1st Dist.] 2016, no pet.); Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181 (Tex. App.—El Paso 2014, no pet.).

When interpreting a statute, the Court begins with the statutory language as the “surest guide to what lawmakers intended” and “the alpha and omega of the interpretive process.” Beving v. Beadles, 563 S.W.3d 399, 404-406 (Tex. App.—Fort Worth 2018, pet. denied). And, the Court presumes that “the Legislature included each word in the statute for a purpose and **that words not included were purposefully omitted.**” Grant v. Pivot Tech. Sols., Ltd., 556 S.W.3d 865, 873 (Tex. App.—Austin 2018, pet. filed) (emphasis added); Hearst Newspapers, LLC v. Status Lounge Inc., 541 S.W.3d 881, 887 (Tex. App.—Houston [14th Dist.] 2017, no pet.), reh'g denied (Jan. 30, 2018); Miller Weisbrod, L.L.P., 511 S.W.3d at 185. Indeed, the Court must enforce the statute “as written” and “refrain from rewriting text that lawmakers chose,” DeAngelis v. Protective Parents Coalition, 556 S.W.3d 836, 847 (Tex. App.—Fort Worth 2018, no pet.), and should be “disinclined to apply any extratextual tool of interpretation” or engage in “open-ended improvisation” in the face of an unambiguous statute. Beving, 563 S.W.3d at 406, fn. 5.

Here, the TCPA unambiguously states that a motion to dismiss must be filed by a date certain (60 days after service) and that a hearing must be conducted by a date certain, TEX. CIV. PRAC. & REM. CODE §§27.003-27.004, but it does not state that supplementation is permitted after that deadline. Since the Court is to presume that the Legislature intentionally omitted any provision for supplementing a motion to dismiss after its filing deadline, Grant, 556 S.W.3d at 873; Hearst Newspapers, LLC, 541 S.W.3d at 887; Miller Weisbrod, L.L.P.,

511 S.W.3d at 185, the Court should presume that the Legislature did not authorize supplementation after the deadline for the motion has passed.

What is the point of a deadline if the movant can continue supplementing after the deadline? If Defendants are permitted to continue supplementing their motion after the deadline, they essentially are granted a perpetual opportunity to file their motion to dismiss and defeat the purpose of the sixty-day deadline. *See* TEX. R. CIV. P. 69 (supplemental pleadings constitute separate and distinct parts of the supplemented pleading); *see also* Miller Weisbrod, L.L.P., 511 S.W.3d at 193 (“We see nothing in the statute or its history and purpose to indicate the Legislature intended to create a perpetual opportunity to file a motion to dismiss.”). Moreover, Plaintiff is put in the position of trying to file a response (to meet his evidentiary burden and preserve his case) that hits a constantly moving target.

Furthermore, in determining whether to grant a motion to dismiss, the Court is to consider the parties’ pleadings and shall dismiss if the movant establishes each essential element of a valid defense by a preponderance of the evidence. TEX. CIV. PRAC. & REM. CODE §§27.005-27.006. Hence, a movant’s amendment of its pleadings after the deadline for its motion to dismiss (such as, Rial and Toye’s Supplemental Defense) modifies the basis for dismissal of the non-movant’s case after the TCPA’s 60-day filing deadline. To consider additional defenses filed after the filing deadline would likewise defeat the TCPA’s 60-day filing deadline.

III. PRAYER

WHEREFORE, Plaintiff requests that the Court strike Funimation’s First Supplement, Funimation’s Second Supplement, and Rial and Toye’s Supplement, disregard Rial and Toye’s Supplemental Defense for purposes of the Court’s TCPA analysis, and order

Defendants not to file any further affidavits or evidence in support of their TCPA motions. Plaintiff further requests that the Court award him such other and further relief to which he may be entitled at law or in equity. Plaintiff prays for general relief.

Respectfully submitted,
BEARD HARRIS BULLOCK HUGHES

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Certificate of Conference

A conference was held via email with John Volney, counsel for Defendant Funimation, and Sean Lemoine, counsel for Defendants Toye and Rial, on August 7, 2019, on the merits of this motion. A reasonable effort has been made to resolve the dispute without the necessity of court intervention, and the effort failed. Therefore, it is presented to the Court for determination.

/s/ Ty Beard

Date: August 7, 2019

Certificate of Service

The undersigned certifies that the foregoing motion was electronically filed today and served via electronic filing manager on counsel of record.

/s/ Ty Beard

Date: August 7, 2019