

No. 13-25-00386-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH DISTRICT OF TEXAS
AT CORPUS CHRISTI-EDINBURG, TEXAS

TONI MAREK,

Appellant,

v.

PHI THETA KAPPA HONOR SOCIETY,

Appellee.

Appeal from Cause No. 25-03-92211-D
In the 377th Judicial District Court, Victoria County, Texas

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE JUDGMENT

TO THE HONORABLE THIRTEENTH COURT OF APPEALS:

Appellee Phi Theta Kappa Honor Society (PTK) respectfully requests that this Court summarily affirm the district court's denial of Appellant Toni Marek's motion to dismiss and, in support thereof, would respectfully show the Court as follows:

INTRODUCTION

The Texas Citizens Participation Act (TCPA), Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.*, involves high stakes for the movant and non-movant alike. But those high stakes come with strict deadlines.

Appellant Toni Mark failed to meet these mandatory deadlines. Accordingly, she has forfeited her right to the TCPA's protections and cannot possibly obtain relief from this Court. The Court should summarily affirm the decisions below.

BACKGROUND

On March 26, 2025, PTK filed its Petition and Request for Temporary Restraining Order against Marek in the 377th Judicial District Court, Victoria County, Texas. 1.CR.6. Marek filed a Motion to Dismiss under the Texas Citizens Participation Act on April 4, 2025. 3.CR.1077.

Following denial of the TRO, 3.CR.1102, PTK voluntarily nonsuited its claim against Marek. 3.CR.1105. Despite this, Marek filed a Motion for Costs, Attorneys' Fees, and Sanctions Pursuant to the TCPA on April 21, 2025. 4.CR.1111.

Although the parties attempted to confer and agree upon a hearing date, no such agreement was reached. As such, Judge Stephen Williams entered an order on May 21, 2025, informing the parties that Marek's (1) TCPA Motion to Dismiss and (2) Motion for Costs, Attorneys' Fees, and Sanctions Pursuant to the TCPA would be heard by submission on July 18, 2025. 4.CR.1557. Marek did not object to this hearing date.

On July 28, 2025, Judge Williams denied Marek's (1) TCPA Motion to Dismiss and (2) Motion for Costs, Attorneys' Fees, and Sanctions Pursuant to the TCPA. 5.CR.1625. These orders resolved all pending claims against all parties.

Marek filed a Notice of Appeal on both orders on July 31, 2025, 5.CR.1627, and an Amended Notice of Appeal on both orders on August 7, 2025. 5.CR.1630.

ARGUMENT

I. The TCPA contains strict deadlines that must be followed.

A TCPA motion must be filed not later than the 60th day after the date of service. Tex. Civ. Prac. & Rem. Code § 27.003(a). Once filed, the TCPA mandates that a hearing on that motion must be set within 60 days, “unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties.” *Id.* § 27.004(a).

However, the TCPA is clear that “*in no event* shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).” *Id.* § 27.004(a) (emphasis added). Under subsection (c), a hearing may only occur after 90 days “[i]f the court allows discovery under Section 27.006(b).”

But even if such discovery is allowed, the movant cannot let the hearing linger, as the TCPA further provides that “in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.” *Id.* § 27.004(c).

II. The trial court’s denial of Marek’s TCPA motions should be summarily affirmed.

The trial court’s order denying Marek’s TCPA Motion to Dismiss should be summarily affirmed because she failed to set that motion for hearing within the mandatory deadlines set forth by the TCPA, and consequently forfeited her right to that relief.

As such, there is nothing for this Court to review on appeal. *See, e.g., Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 604 (Tex. 2012) (“When a party fails to preserve error in the trial court or waives an argument on appeal, an appellate court may not consider the unpreserved or waived issue.”).

Moreover, because Marek’s TCPA Motion to Dismiss is the only basis for her Motion for Costs, Attorneys’ Fees, and Sanctions Pursuant to the TCPA, *see* 4.CR.1111, the trial court’s denial of that motion should be summarily affirmed as well.

A. Marek forfeited her right to relief under the TCPA.

Texas law is clear that the TCPA movant “ha[s] the burden to timely obtain a hearing in his efforts to invoke the TCPA’s protections.” *Grubbs v. ATW Investments, Inc.*, 544 S.W.3d 421, 425 (Tex. App.—San Antonio 2017, no pet.). *See also Braun v. Gordon*, No. 05-17-00176-CV, 2017 WL 4250235, at *3 (Tex. App.—Dallas Sept. 26, 2017, no pet.) (“The statute requires a defendant seeking its protections to move for dismissal and obtain a hearing on the motion within certain clearly defined periods.”).

If the movant fails to do so, this Court has held that “the trial court *[i]s not authorized to grant the motion*,” and thus *cannot dismiss* plaintiff’s case. *In re Giles*, 675 S.W.3d 376, 384 (Tex. App.—Corpus Christi–Edinburg 2023, no pet.) (citing *Grubbs*, 544 S.W.3d at 425) (emphasis added).

As such, a defendant’s “failure to meet the procedural requirements *result[s]* *in his forfeiting the statute’s protections.*” *Grubbs*, 544 S.W.3d at 425 (emphasis added). *See also Hill v. Keliher*, No. 01-20-00419-CV, 2022 WL 3031620, at *11 (Tex. App.—Houston [1st Dist.] Aug. 2, 2022, no pet.) (“movant waives his motion to dismiss by failing to . . . set the motion for a hearing within the statutory 90-day deadline”); *Walker v. Pegasus Eventing, LLC*, No. 05-19-00252-CV, 2020 WL 3248476, at *5 (Tex. App.—Dallas June 16, 2020, pet. denied) (“The failure to meet these requirements results in the defendant’s forfeiting the statute’s protections, and the case should continue as if the motion to dismiss were never filed.”).

In *Grubbs*, the movant initially set its motion for hearing within the statutory deadlines, but that hearing was reset *by agreement* on multiple occasions, eventually taking place 183 days after the motion to dismiss was filed. 544 S.W.3d at 425. Despite the parties’ repeated agreements to the resetting, the court of appeals held that “the statute itself expressly restricts agreements in this context . . . precluding a hearing from occurring more than 90 days after the motion is served.” *Id.* It therefore held that the movant forfeited its right to dismissal under the TCPA. *Id.*

The same result applies here—irrespective of whether Marek was entitled to an additional 30 days under Tex. Civ. Prac. & Rem. Code § 27.004(a)—as the record conclusively establishes that Marek failed to set her Motion to Dismiss for hearing within either the 60-day or 90-day deadline mandated by the TCPA.

Marek Failed to Obtain a Hearing within 60 Days. Marek filed her Motion to Dismiss on April 4, 2025, 3.CR.1077, meaning that it had to be heard within 60 days—i.e., before June 3, 2025—“unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties.” *Id.*

It is undisputed that the parties never reached an agreement to extend this deadline, and Marek never obtained a ruling from the trial court that either (1) its “docket conditions . . . required a later hearing” or (2) that “good cause” existed for a later hearing. Absent such a ruling from the trial court, Marek was required to obtain a hearing before June 3, 2025. As such, her failure to have her motion heard until July 18, 2025 constitutes a forfeiture of the protections afforded by the TCPA, eliminating her ability to obtain relief from this Court. *See Giles*, 675 S.W.3d at 384.

Marek Also Failed to Obtain a Hearing within 90 Days.¹ The result is the same if the Court finds some basis in the record for concluding that Marek satisfied the requirements of Section 27.004(a).²

¹ It is undisputed that the trial court never entered an order permitting discovery under Section 27.006(b). As such, there is no plausible argument that Marek was entitled to hold her hearing with 120 days of filing under Tex. Civ. Prac. & Rem. Code § 27.004(c).

² Although the parties attempted to reach agreement on a hearing date, no such agreement was ever made. But even if the parties had agreed to hold the hearing after July 3, 2025, Texas law is clear that such an agreement is not permitted under Section 27.004(a), which “expressly restricts agreements in this context . . . precluding a hearing from occurring more than 90 days after the motion is served.” *See Grubbs*, 544 S.W.3d at 425. Nor would such an agreement constitute “waiver” of PTK’s right to enforce Section 27.004(a)’s “mandatory” statutory requirements. *Id.*

If such a finding is made, then Marek was required to obtain a hearing on her motion to dismiss within 90 days of filing—i.e., July 3, 2025 (April 4, 2025 + 90 days). But as already noted, Marek did not obtain a hearing on her Motion to Dismiss until July 18, 2025, which was 105 days after her motion was filed and 15 days after the 90-day statutory deadline.

Thus, under this Court’s decision in *Giles*, Marek forfeited the protections of the TCPA, meaning that the “trial court *was not authorized to grant the motion*,” and therefore could not “dismiss” PTK’s case under the TCPA. 675 S.W.3d at 384 (emphasis added). The decision below should be summarily affirmed.

III. The trial court’s denial of Marek’s Motion for Costs, Attorneys’ Fees, and Sanctions Pursuant to the TCPA should be summarily affirmed.

“For more than a century, Texas law has not allowed recovery of attorney’s fees unless authorized by statute or contract. This rule is so venerable and ubiquitous in American courts it is known as ‘the American Rule.’” *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006). “Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party’s fees.” *Id.*

As the title (and substance) of Marek’s “Motion for Costs, Attorneys’ Fees, and Sanctions *Pursuant to the TCPA*” makes clear, the TCPA is *the sole basis* for Marek’s alleged entitlement to recover such costs, fees, and sanctions. *See* 4.CR.1115 (citing Tex. Civ. Prac. & Rem. Code § 27.009(a)(1)).

However, the TCPA itself makes it clear that such costs, attorneys’ fees, and sanctions are only recoverable “*if the court orders dismissal* of a legal action under” the TCPA. Tex. Civ. Prac. & Rem. Code § 27.009(a) (emphasis added). Absent such an order, Marek is not entitled to recover her costs and attorneys’ fees—or obtain sanctions—under the TCPA or any other statute.

It is undisputed that the trial court did not “order[] dismissal” of PTK’s legal action under the TCPA. To the contrary, Marek’s TCPA Motion to Dismiss was *denied* on July 28, 2025. 4.CR.1625. This decision was clearly correct, as Marek forfeited her right to the TCPA’s protections by failing to set her motion for hearing within the TCPA’s mandatory deadlines. *See* Part II, *supra*.

Absent a timely heard and successful TCPA Motion to Dismiss, there is no statutory basis for this Court to reverse the denial of Marek’s Motion for Costs, Attorneys’ Fees, and Sanctions Pursuant to the TCPA. As such, the trial court’s order denying Marek’s motion should be summarily affirmed without further briefing or oral argument.

CONCLUSION AND PRAYER

Appellee Phi Theta Kappa Honor Society respectfully requests that the Court summarily affirm the decisions below.

November 12, 2025

Respectfully submitted,

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ATTORNEYS FOR APPELLEE PHI THETA KAPPA HONOR SOCIETY

CERTIFICATE OF CONFERENCE

I certify that on November 12, 2025, I conferred with Marc J. Randazza via email regarding this motion. It is opposed.

/s/ Owen J. McGovern
Owen J. McGovern

CERTIFICATE OF COMPLIANCE

This motion complies with the length limitations of TEX. R. APP. P. 9.4 because this motion consists of 1,816 words as determined by Microsoft Word Count, excluding the parts of the motion exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Owen J. McGovern
Owen J. McGovern

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2025, a true and correct copy of the foregoing motion has been electronically filed and served on all counsel below. *See* Tex. R. App. P. 9.2(c)(1), 9.5(b)(1).

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