

Breach of Confidentiality Claim Survives Motion to Dismiss under Anti-SLAPP Law

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The Court of Appeals of Texas (Fourth District) upheld a trial court's order denying a motion to dismiss a breach of confidentiality agreement claim pursuant to the Texas Citizens Participation Act (TCPA), which is designed to protect people from strategic lawsuits against public participation (SLAPP). *Harper v. Crédito Real Bus. Cap.*, Case No. 21-0212 (Tex. App. July 20, 2022) (Martinez, **Chapa**, Watkins, JJ.)

Crédito Real Business Capital (CRBC) leases equipment and provides financing services to companies in the construction industry. CRBC provides its services through two limited liability companies: CR-FED and CR-FED Leasing. Earl Harper previously worked for CRBC as executive vice president and was required to sign a confidentiality agreement with CR-FED stipulating that he would not share its confidential information with third parties.

CRBC advanced money and leased equipment to Ontrack Site Services, a site grading contractor and customer with whom Harper worked. As part of his employment, Harper was provided with confidential information regarding CRBC's plans and projections for its relationship with Ontrack, including CRBC's willingness to extend additional financing or leasing services to the contractor. Harper allegedly used this information to help Ontrack negotiate better lease rates and financing terms to CRBC's detriment. CRBC terminated Harper's employment. Harper subsequently joined a new company and advised Ontrack to obtain financing from that company instead of CRBC.

CRBC sued Harper for breach of fiduciary duty and breach of contract for misappropriating CRBC's trade secrets and breaching the confidentiality agreement. Harper filed a motion to dismiss the breach of contract claim pursuant to the TCPA, under which a party can file a motion to dismiss a lawsuit if it "is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association." The trial court denied the motion. Harper appealed, contending the following:

- CRBC's breach of contract claim related to Harper's exercise of free speech.
- CRBC did not establish a *prima facie* case of its breach of contract claim.
- The trial court improperly considered CRBC's amended petition.

A motion to dismiss pursuant to the TCPA is evaluated under a three-step burden shifting framework:

- The movant must first demonstrate that the legal action is based on the movant's exercise of the right to free speech, the right to petition or the right to association.
- The nonmovant must then establish a *prima facie* case of its claim.
- If the nonmovant satisfies its burden, the action must still be dismissed if the movant establishes grounds on which it is entitled to judgment as a matter of law.

The Texas Court of Appeals first addressed whether the trial court was permitted to consider CRBC's amended petition when it ruled on the motion to dismiss. CRBC's amended petition merely clarified that "CRBC" was the assumed name for both CR-FED and CR-FED Leasing, rather than just CR-FED. Because the amended petition was filed well before the hearing date and did not include any element of surprise, the Court concluded that the trial court properly considered the amended petition when making its decision.

The Texas Court of Appeals next assumed that the TCPA applied and considered whether CRBC had established a *prima facie* case for its breach of contract claim. In support of its claim, CRBC had produced a copy of the confidentiality agreement and affidavits from CRBC managers attesting that CRBC had shared confidential pricing and financing information with Harper. The affidavits further claimed that Harper told Ontrack that he would help it secure additional financing from CRBC, drafted an email to CRBC on Ontrack's behalf that induced CRBC to provide more funding, and informed Ontrack that it could get cheaper rates elsewhere. The Court concluded that CRBC had met its burden of showing that Harper had breached the confidentiality agreement, even though the agreement was only between Harper and CR-FED. The Court thus affirmed the trial court's order denying Harper's motion to dismiss.

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