Opinion issued December 13, 2012.

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00344-CV

CHOCKALINGAM S. PALANIAPPAN, Appellant

V.

HARRIS COUNTY APPRAISAL DISTRICT, Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2008-61882

DISSENTING OPINION

To seek review of a final decision of an appraisal review board, a party "must file a petition for review with the district court within 45 days after the party received notice that a final order has been entered." *See* Act of May 28, 1989, 71st Leg., R.S., ch. 796, § 44, 1989 Tex. Gen. Laws 3591, 3604 (amended 2009) (TEX.

TAX CODE ANN. § 42.21(a), since amended); *see also Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006). If a party fails to petition the district court within 45 days of receiving notice of the final order, the trial court lacks subject-matter jurisdiction, and the appraisal review board's decision is final. *KM-Timbercreek, LLC v. Harris Cnty. Appraisal Dist.*, 312 S.W.3d 722, 728 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Although no party contested Palaniappan's timely filing of his tax protest in the district court, the majority presumes it was not timely filed and vacates the trial court's judgment. Because the law does not support such a presumption, we should address the merits of the appeal and the issues raised by the parties. Because we do not, I respectfully dissent.

The appellate courts generally may not reverse for unassigned error, except for those errors deemed to be fundamental. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Lack of subject-matter jurisdiction is a fundamental error that an appellate court may recognize and address even when a party does not raise a jurisdictional challenge. *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003). However, the record must "affirmatively and conclusively" show lack of jurisdiction. *McCauley v. Consol. Underwriters*, 304 S.W.2d 265, 266 (Tex. 1957) (per curiam); *see also In re B.L.D.*, 113 S.W.3d at 350 (holding that unassigned error may be reviewed "when the record shows on its face that the

court lacked jurisdiction"); *Haney v. Purcell Co.*, 796 S.W.2d 782, 787 (Tex. App.—Houston [1st Dist.] 1990, writ denied) ("The record must affirmatively and conclusively disclose such error.").

Subject-matter jurisdiction is reviewed de novo. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446. The plaintiff has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The court may presume the truth of the plaintiff's good faith allegations to support jurisdiction. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 503 (Tex. 2010). When an appellate court questions subject-matter jurisdiction for the first time on appeal, it must construe the petition in favor of the plaintiff, and, if necessary, review the entire record to determine if any evidence supports jurisdiction. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

In *DeGuerin v. Washington County Appraisal District*, this Court held that general allegations in the petition that the trial court had jurisdiction and that all conditions precedent had occurred were sufficient to establish that the petition to review an appraisal review board's decision was timely filed and that the court thus had jurisdiction. No. 01-11-00548-CV, 2012 WL 1379633, at *2 (Tex. App.—Houston [1st Dist.] Apr. 19, 2012, no pet. h.) (mem. op.) (citing *Tex. Ass'n of Bus.*, 852 S.W.2d at 446). In that case, the appraisal review board objected to the

timeliness of the plaintiff's petition for the first time on appeal, but the record was silent about whether the plaintiff had timely protested its tax assessments. *Id.* In rejecting a challenge to the trial court's jurisdiction, our court held that a silent evidentiary record established only that nothing contradicted the plaintiff's jurisdictional assertions in his petition. *Id.*

Similarly, no party has contended Palaniappan's petition was filed too late—neither during the district court proceedings nor on appeal. Palaniappan's petition states that the trial court had jurisdiction and that all conditions precedent had been met. Taking these uncontroverted allegations as true, Palaniappan has established that the court has subject-matter jurisdiction, at least with respect to the timely filing of his petition. *See Frost Nat'l Bank*, 315 S.W.3d at 503. Given that no other evidence exists in the record bearing on whether the petition was timely filed, these allegations are sufficient. *See DeGuerin*, 2012 WL 1379633, at *2.

Nothing in the record disturbs the veracity of this allegation. The record reflects that Palaniappan filed his petition in district court on October 16, 2008, forty-eight days after the ARB's final order denying his protest was dated, August 29, 2008. The date of the final order is not controlling; rather, by statute it is the date that Palaniappan received notice of the ARB's final order that determines whether the petition was timely. *See* Act of May 28, 1989, 71st Leg., R.S., ch. 796, § 44, 1989 Tex. Gen. Laws 3591, 3604 (amended 2009). The record contains no

evidence regarding when the letter disclosing the ARB's decision was sent or received, or if it was ever sent. As in *DeGuerin*, the lack of evidence regarding receipt of the letter means only that there is nothing to contradict Palaniappan's allegations that the court has jurisdiction—it does not show that the trial court lacked it due to untimely filing. *See DeGuerin*, 2012 WL 1379633, at *2; *Miranda*, 133 S.W.3d at 226. Because the record contains no evidence that the petition was untimely, the face of the record does not affirmatively and conclusively show that the trial court lacked subject-matter jurisdiction on this basis.

The majority opinion presumes that a notice was mailed on August 29, 2008, the date of the ARB's final order, and further presumes that Palaniappan received notice of the ARB's decision more than forty-five days before he filed suit. These presumptions cannot be reconciled with the requirement that lack of jurisdiction be "affirmatively and conclusively" found on the face of the record when it is not challenged by a party on appeal. *See McCauley*, 304 S.W.2d at 266; *In re B.L.D.*, 113 S.W.3d at 350.

The majority's reliance on *Dallas Central Appraisal District v. Las Colinas Corporation* is misplaced, because the presumption of delivery created by section 1.07(c) of the Tax Code that the court of appeals relied on in that case applies when some evidence exists that the notice was properly mailed. *Compare Dallas Cent. App. Dist. v. Las Colinas Corp*, 814 S.W.2d 816, 818 (Tex. App.—

Dallas 1991), *rev'd on other grounds sub nom. Dallas Cent. App. Dist. v. Seven Inv. Co.*, 835 S.W.2d 75 (Tex. 1992), *with Harris Cnty. Appraisal Dist. v. Dincans*, 882 S.W.2d 75, 77 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (holding that the appraisal district's statement that notice had been mailed was insufficient to establish the presumption), *and WHM Props., Inc. v. Dallas Cnty.*, 119 S.W.3d 325, 330–31 (Tex. App.—Waco 2003, no pet.). In contrast, because this issue was never contested in the trial court, no proof exists in the record that the letter was ever mailed so as to render the suit untimely.

Leaving aside that the opinion was reversed on other grounds, the reasoning in *Las Colinas Corporation* is unpersuasive. Section 1.07(c) provides that notice "is presumed delivered when it is deposited in the mail. This presumption is rebuttable when evidence of failure to receive notice is provided." TEX. TAX CODE ANN. § 1.07(c) (West 2008). Section 1.07(c) thus creates a presumption of delivery upon a showing that the appraisal district properly mailed the notice. It applies in disputes about whether—not when—notice was received. *See, e.g., Aldine Indep. Sch. Dist. v. Ogg*, 122 S.W.3d 257, 266–67 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The presumption of section 1.07(c) is inapposite for purposes of determining the filing deadline following receipt of notice under section 42.21(a).

Conclusion

The parties raise challenges to the trial court's judgment and to our jurisdiction to hear this case, but the timely filing of the plaintiff's petition in the trial court was not one of them. Absent any proof, we should not decide on our own that timeliness was lacking. Because we should proceed to review the issues that the parties have briefed, I respectfully dissent from the dismissal of the appeal.

Jane Bland
Justice

Panel consists of Justices Keyes, Bland, and Sharp.

Bland, J., dissenting.