

Affirmed and Memorandum Opinion filed January 7, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00425-CV

**SWP REMIC PROPERTIES II LP, AS THE PROPERTY OWNERS AND THE
PROPERTY OWNERS, Appellants**

V.

HARRIS COUNTY APPRAISAL DISTRICT, Appellee

**On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2007-46741**

MEMORANDUM OPINION

“SWP Remic Properties II LP (“SWP”), as the property owners and the property owners,”¹ appeal from the trial court’s order granting Harris County Appraisal District’s

¹ The notice of appeal includes the unusual reference of “SWP Remic Properties II LP as the Property Owners and the Property Owners” as the parties appealing and refers to “plaintiffs” throughout the notice. The appellants’ brief lists the appellants as “Equitex Ltd, also known as SWP Remic Properties II LP, as the Property Owners and the Property Owners.” SWP claims below and on appeal that Equitex is a “property owner” or, alternatively, that SWP is the common name of Equitex. We will refer to the entities

(“HCAD”)² plea to the jurisdiction. In its plea, HCAD contended SWP had no standing to seek judicial review of HCAD’s resolution of an ad valorem tax protest because SWP was not the property owner for that tax year. We affirm.

I. Factual and Procedural Background

The property at issue is located at 15215 Blue Ash Drive 210 in Houston. UDR Texas Properties, L.P. sold the property to Equitex, Ltd. by special warranty deed in February 2005.³ Therefore, according to the record, Equitex, Ltd. was the legal owner of the property on January 1, 2007, and SWP does not dispute this fact. Nevertheless, SWP, but not Equitex, filed a notice of protest with HCAD’s Appraisal Review Board concerning the 2007 tax assessment for this property. On June 22, 2007,⁴ the chairman of the Appraisal Review Board signed an Order Determining Protest, mailed to O’Connor & Associates, SWP’s designated agent for the protest process, ordering a reduction in the appraised value of the property. The record does not indicate that Equitex pursued a protest as the owner of the property.

collectively as “appellants.”

² SWP’s live pleadings and notice of appeal identify both HCAD and its Appraisal Review Board as defendants. However, the record does not indicate that the Review Board appeared in the trial court. HCAD represents that the Review Board was neither served, nor did it appear. An appraisal review board is not a necessary party to a petition for judicial review of the board’s order. Tex. Tax Code Ann. § 42.21(b) (Vernon Supp. 2009). Because the Review Board is not a necessary party, and the record does not reflect that the Review Board appeared in the trial court below, we conclude that HCAD is the only appellee properly before this court. *See BACM 2002 PB2 Westpark Dr LP v. Harris County Appraisal Dist.*, No. 14-08-00493-CV, 2009 WL 2145922, at *1 n.1 (Tex. App.—Houston [14th Dist.] June 21, 2009, no pet.) (mem. op.).

³ The legal description attached to the special warranty deed states that this is the same property conveyed to SWP Remic Properties II-A, L.P. in deed dated January 1, 1994. There is no indication in the record or by the parties in their briefs what the relationship between UDR Texas Properties, L.P. and SWP is, if any.

⁴ The “Order Determining Protest” indicates that the order was signed June 22, 2007. The top of the page lists a date of June 28, 2007. In its Statement of Facts, HCAD states that the order was delivered on July 19, 2007, although there is no evidence of this delivery date in the record. HCAD does not contend that SWP failed to timely file an appeal from the order; rather, HCAD argues SWP did not have standing to appeal because it did not own the property as of January 1, 2007.

SWP filed an original petition for judicial review on August 3, 2007, “by and on behalf of the property owners,” challenging the Review Board’s determination and claiming the Review Board failed to provide proper hearings on the protests. SWP continued to assert that it owned the property. On March 7, 2008, HCAD filed a plea to the jurisdiction, arguing (1) SWP was not the owner of the property as of January 1, 2007, (2) only the property owner had standing to appeal from the Review Board’s order, and, therefore, (3) the trial court lacked subject-matter jurisdiction. HCAD attached a copy of the special warranty deed to its plea.

On March 28, 2008, SWP filed a first amended original petition, naming Equitex as a plaintiff in the suit for judicial review. SWP and Equitex responded to HCAD’s plea to the jurisdiction, contending the procedural “defects” had been corrected by applying section 42.21(e)(1) of the Texas Tax Code to correct or change the name of the plaintiffs. HCAD replied, contending section 42.21(e)(1) did not apply in this case.

On April 4, 2008, “EQUITEX LTD a/k/a SWP REMIC PROPERTIES II LP as the PROPERTY OWNERS and the PROPERTY OWNERS” filed a second amended and supplemental original petition pursuant to (1) Texas Rule of Civil Procedure 28 to substitute the true name of the plaintiffs and (2) Texas Tax Code section 42.21(e); the plaintiffs also filed a supplemental response to the plea to the jurisdiction making the same arguments. HCAD filed a supplemental reply, arguing that there was no evidence Equitex did business as SWP and again reiterating that section 42.21(e) did not apply. On April 21, 2008, the trial court granted HCAD’s plea to the jurisdiction and dismissed the suit without prejudice.

II. Standard of Review

Standing is a component of subject-matter jurisdiction that cannot be waived. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993). If a party has no standing, a trial court has no subject-matter jurisdiction to hear the case. *Id.* at 444–45. A trial court’s jurisdiction to hear the subject matter of a dispute may be challenged by

filing a plea to the jurisdiction. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

A defendant may prevail on a plea to the jurisdiction by demonstrating that, even if all the plaintiff's pleaded allegations are true, an incurable jurisdictional defect remains on the face of the pleadings that deprives the trial court of subject-matter jurisdiction. *Harris County Appraisal Dist. v. O'Connor & Assocs.*, 267 S.W.3d 413, 416 (Tex. App.—Houston [14th Dist.] 2008, no pet.). In determining a plea to the jurisdiction, a trial court may consider the pleadings and any evidence pertinent to the jurisdictional inquiry. *Bland*, 34 S.W.3d at 554–55.

We review a trial court's ruling on a plea to the jurisdiction de novo. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (setting forth standard of review for pleas to the jurisdiction). In our review, we construe the pleadings liberally in favor of the pleader and look to the pleader's intent to determine whether the facts alleged affirmatively demonstrate the trial court's jurisdiction to hear the cause. *See id.* In a review of a plea to the jurisdiction, we cannot examine the merits of the case. *See Houston Indep. Sch. Dist. v. 1615 Corp.*, 217 S.W.3d 631, 635 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (op. on reh'g).

III. Analysis

In a single issue, appellants assert that the trial court erred in granting the plea to the jurisdiction. Specifically, appellants contend the trial court had jurisdiction because SWP timely filed a petition for judicial review in the name of “SWP Remic Properties II LP, as the property owners and the property owners” following the Review Board's order and Equitex is a property owner. Alternatively, appellants argue SWP timely amended its petition to include Equitex pursuant to section 42.21(e)(1) of the Texas Tax Code and Texas Rule of Civil Procedure 28.

A. Standing

This court recently addressed both of these arguments in *BACM 2002 PB2 Westpark Dr LP v. Harris County Appraisal District*, No. 14-08-00493-CV, 2009 WL 2145922 (Tex. App.—Houston [14th Dist.] June 21, 2009, no pet.) (mem. op.), and we reach the same outcome here in holding SWP lacked standing to prosecute Equitex’s tax protest.

As a general rule, only a property owner may protest tax liability before an appraisal-review board and seek judicial review in court. *Tourneau Houston, Inc. v. Harris County Appraisal Dist.*, 24 S.W.3d 907, 909 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (op. on reh’g). Section 42.21(a) of the Property Tax Code requires a party who appeals as provided by Chapter 42 of the Property Tax Code to timely file a petition for review with the district court. Failure to timely file a petition bars any appeal under the chapter. Tex. Tax Code Ann. § 42.21(a) (Vernon Supp. 2009).⁵ Section 42.01 of the Tax Code specifies that a “*property owner* is entitled to appeal . . . an order of the appraisal review board determining . . . a protest by the *property owner*” as provided by sections 41.41 *et seq.* of the Property Tax Code. *Id.* § 42.01(1)(A) (emphasis added). Alternatively, a property owner may designate a lessee or an agent to act on the property owner’s behalf for any purpose under the Property Tax Code, including filing a tax protest. *Id.* §§ 1.111 (Vernon 2008) (authorizing a designated lessee or agent to act for a property owner), 41.413(b) (Vernon 2008) (authorizing a lessee to protest for the property owner in certain circumstances).

Therefore, to qualify as a “party who appeals” by seeking judicial review of an appraisal-review board’s tax determination under section 42.21(a), SWP had to be an

⁵ We note that the Texas Legislature amended subsection 42.21(a), effective June 19, 2009, to extend the time to file a petition for review from forty-five days to sixty days after the party received notice that a final order has been entered from which an appeal may be had or at any time after the hearing but before the 60-day deadline. *See* Act of May 29, 2009, 81st Leg., R.S., ch. 905, §§ 1, 5, 2009 Tex. Gen. Laws 2435, 2435–36 (current version at Tex. Tax Code Ann. § 42.21(a) (Vernon Supp. 2009)). These changes to this subsection do not affect our resolution of this issue.

owner of the property, a designated agent of the owner, or the authorized lessee of the property under the circumstances stated in section 41.413. A party who does not meet one of the above criteria would lack standing under the Property Tax Code. *BACM*, 2009 WL 2145922, at *3. If the litigant lacks standing, the trial court is deprived of subject-matter jurisdiction to consider a suit for judicial review based on an ad valorem tax protest. *Id.*

Here, SWP did not own the property as of January 1, 2007. SWP did not claim rights to protest under the Property Tax Code as either a lessee or an agent. Therefore, SWP lacked standing to pursue judicial review as a “party who appeals” under section 42.21(a). The record does not reflect that Equitex pursued its right of protest as the actual property owner. According to the record, Equitex was not named as a party until March 28, 2008 when SWP filed a first amended original petition. Therefore, the Review Board had not determined a protest by the actual property owner, Equitex, upon which Equitex could premise a right to appeal as the property owner. *See* Tex. Tax Code Ann. §§ 42.01(1)(A), 42.21(a); *BACM*, 2009 WL 2145922, at *4.

B. Application of Section 42.21(e)(1)

Appellants also contend the trial court had jurisdiction because section 42.21(e)(1) allows amendment of a timely filed petition “to correct or change the name of a party.” *See* Tex. Tax Code Ann. § 42.21(e)(1); *BACM*, 2009 WL 2145922, at *5. We disagree, for the same reasons announced in *BACM*.

Section 42.21(e) specifies that only petitions that are “timely filed under Subsection (a) or amended under Subsection (c)” may later be amended to correct or change a party’s name.⁶ *See* Tex. Tax Code Ann. § 42.21(e)(1). To seek judicial review under Subsection (a), the plaintiff must be a “party who appeals as provided by [Chapter 42],” meaning the plaintiff must be the property owner, a properly designated agent, or a lessee. *Id.* § 42.21(a); *see also id.* §§ 1.111, 41.413(b).

⁶ Appellants do not argue that Subsection (c) applies to this case.

SWP timely filed a petition for review; however, SWP did not own the property on January 1, 2007, and thus lacked standing to seek judicial review. *See BACM*, 2009 WL 2145922, at *5. Appellants' argument that subsection 42.21(e)(1) operates to allow SWP to correct or change the party's name presupposes that Equitex was a proper party entitled to seek judicial review. *Id.* However, Equitex did not pursue its right of protest as the property owner. When no proper party timely appealed to the district court, the trial court did not acquire subject-matter jurisdiction, and the Review Board's determination became final. *See id.*

Appellants argue that because suit was filed in the name of "SWP Remic Properties II LP, as the property owners and the property owners," the suit encompasses Equitex, the record legal owner of the property, as a plaintiff. Again, this contention presupposes that Equitex was a proper party to seek judicial review under Chapter 42. *See Tex. Tax Code Ann. § 42.01(1)(A); BACM*, 2009 WL 2145922, at *5. Equitex did not pursue its administrative remedies by protesting the valuation of the property before the appraisal review board and, thus, it failed to satisfy the jurisdictional requirements to seek judicial review. *See BACM*, 2009 WL 2145922, at *5.⁷

C. Application of Texas Rule of Civil Procedure 28

Lastly, appellants argue the trial court had jurisdiction to hear the case because Texas Rule of Civil Procedure 28, which governs suits by or against entities doing business under an assumed name, permits substitution of Equitex as SWP's "true name." Rule 28 states:

Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or

⁷ Appellants also cite *Plaza Equity Partners v. Dallas Central Appraisal District*, 765 S.W.2d 520 (Tex. App.—Dallas 1989, no writ), for the proposition that a defect in identifying the property owner in a notice appealing the Appraisal Board's order does not deprive the district court of jurisdiction. However, in *Plaza Equity Partners*, unlike here, the actual property owner had pursued its administrative remedies and filed suit in the district court. *See Plaza Equity Partners*, 765 S.W.3d at 521–22.

against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

Tex. R. Civ. P. 28. Appellants contend the name SWP is the “common name” for the “true name” Equitex.

In this case, SWP attempted to substitute its “true name” Equitex by filing a “second amended and supplemental original petition” and arguing Rule 28 permitted the substitution. For a party to take advantage of Rule 28 and sue in its common name, “there must be a showing that the named entity is in fact doing business under that common name.” *Seidler v. Morgan*, 277 S.W.3d 549, 553 (Tex. App.—Texarkana 2009, pet. denied). Whether an entity does business under an assumed or common name is a question of fact for the trial court. *Sixth RMA Partners, L.P. a/k/a RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003).

Appellants did not make a showing that Equitex was in fact doing business under the common name SWP, nor was there evidence that the entities, themselves, used the name SWP as an assumed or common name to warrant application of Rule 28. *Compare Sixth RMA Partners*, 111 S.W.3d at 52 (concluding evidence supported assumed-name finding when Sixth RMA presented evidence that RMA Partners, L.P. was used as trade name for various RMA partnerships, RMA letterhead was used, and payments on notes were made to RMA) *and Chilkewitz v. Hyson*, 22 S.W.3d 825, 829 (Tex. 1999) (stating some evidence supported application of Rule 28 when stationery and phone-number listing used by one-person professional association contained name of individual).⁸ Thus, this argument lacks merit.

⁸ Although appellants cite HCAD's records that reflect SWP as the property owner even after the property sale, HCAD's records alone are not sufficient to establish Equitex operated its business under the common name of SWP. *See KM-Timbercreek, LLC v. Harris County Appraisal Dist.*, — S.W.3d —, No. 01-08-00689-CV, 2009 WL 3321332, at *7 (Tex. App.—Houston [1st Dist.] Oct. 15, 2009, no pet.) (stating only Timbercreek could establish whether it operated its business under an assumed or common name). There is no evidence that Equitex held itself out as SWP or requested HCAD refer to it as SWP in its records. *Id.*

Accordingly, we overrule appellants' issue on appeal.

IV. Conclusion

SWP and Equitex lacked standing to bring suit, and therefore the trial court lacked subject-matter jurisdiction to hear the dispute. Because neither SWP nor Equitex was a proper party entitled to judicial review under the Property Tax Code, section 42.21(e)(1) of the Property Tax Code does not apply to change the name of the plaintiff. Likewise, because there is no evidence in the record that Equitex was doing business as SWP or that the entities used the name SWP as a common name for Equitex, Texas Rule of Civil Procedure 28 could not be used to substitute Equitex for SWP. Therefore, the trial court did not err in granting HCAD's plea to the jurisdiction. The trial court's judgment is affirmed.

/s/ **Kent C. Sullivan**
 Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.