In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00068-CV

THE CITY OF BEAUMONT, TEXAS AND THE CIVIL SERVICE COMMISSION OF THE CITY OF BEAUMONT, Appellants

V.

DERRICK WAYNE FOWLER, Appellee

On Appeal from the 136th District Court
Jefferson County, Texas
Trial Cause No. D-179,887

MEMORANDUM OPINION

In 2003 and 2005, Beaumont Police Officer Derrick Wayne Fowler participated in a promotional exam. Fowler subsequently sued the City of Beaumont (the "City") and the Civil Service Commission of the City of Beaumont (the "Commission") for negligence, breach of contract, breach of statutory duty, violations of the Texas Open Meetings Act, and violations of the Texas Constitution.[1] Fowler alleged that the exams

[1] Fowler's lawsuit was consolidated with other cases involving plaintiffs who are not parties to this appeal.

were not conducted in accordance with the City's labor agreement, with the Beaumont Police Officer's Association (the "Union"), and with Chapter 143 of the Local Government Code. Appellants filed a plea to the jurisdiction on grounds that the Union was the sole and exclusive bargaining agent for police officers, and, consequently, Fowler lacked standing to sue for breach of the agreement. The trial court denied the plea to the jurisdiction. On appeal, appellants challenge the denial of their plea to the jurisdiction. We affirm the trial court's order.

The Labor Agreement

The City and the Union entered into a "Labor Agreement," *i.e.*, a collective bargaining agreement, to

> . . . promote the mutual interests of the [City] and its employees; to provide for equitable and peaceful adjustment of differences which may arise; to establish proper standards of wages, hours and other conditions of employment which will provide and maintain a sound economic basis for the delivery of public services; and to provide for the operation of the services delivered by the [City] under methods which will further, to the fullest extent possible, economy and efficiency of operation, elimination of waste, realization of maximum quantity and quality of output, cleanliness, protection of property and avoidance of interruptions of service. . . .

The agreement defines an "employee" as a "sworn police officer who is a member of the bargaining unit." The agreement provides that "[n]o agreement, understanding, alteration or variation of the agreement, terms or provisions herein contained shall bind the parties unless made and executed in writing by the parties hereto."

Per the agreement, the Union is the "sole and exclusive bargaining agent for the employees in the bargaining unit in matters concerning wages, rates of pay, hours of employment, or conditions of work affecting police officers in the unit." In this capacity, the Union has "sole and exclusive representation rights under the grievance procedure herein." The agreement states, in pertinent part:

> The purpose of this grievance procedure is to establish effective machinery for the fair, expeditious and orderly adjustment of grievances. A grievance is defined as any dispute involving the interpretation, application or enforcement of a specific clause of this Agreement, or the demotion, suspension or termination for disciplinary purposes of any employee. Grievances may be filed by the Union, the Employer, or any employee. . . .

The agreement expressly allows an employee to submit a disciplinary grievance regarding termination, demotion, or suspension. Contract grievances are "submitted by the Union concerning a dispute involving the interpretation, application, or enforcement of a specific clause of this Agreement[.]" The Union submits these grievances to the chief of police. Once the chief renders a decision, if the grievance remains unresolved, the Union may submit the grievance to the city manager. Once the city manager renders a decision, if the grievance remains unresolved, the Union may request arbitration.

The Pleadings

We must first determine which of Fowler's amended petitions served as the live pleading at the time the trial court denied the plea to the jurisdiction. Appellants contend that Fowler's second amended petition was the live pleading on file at the time of the trial

court's ruling. Fowler relies on his fourth amended petition as the live pleading before the trial court.

Amended petitions are relevant to a court's review of a plea to the jurisdiction. *Tarrant Cnty. v. McQuary*, 310 S.W.3d 170, 173 (Tex. App.—Fort Worth 2010, pet. denied). When pleading amendments are untimely, leave of court is presumed when the record is silent as to any basis to conclude that the amended petition was not considered by the trial court and there is no showing of surprise or prejudice. *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988); *Nichols v. Bridges*, 163 S.W.3d 776, 783 Tex. App.—Texarkana 2005, no pet.); *see* Tex. R. Civ. P. 63.

On January 19, 2011, the trial court held a hearing on appellants' plea to the jurisdiction. Fowler's second amended petition was on file with the trial court. On January 24, 2011, the trial court filed a letter stating, in pertinent part:

> It is Defendants' position that an employee may only pursue a grievance in matters related to demotion, suspension, or termination for disciplinary purposes. Article 9, however, defines a grievance as "**any dispute involving the interpretation, application or enforcement of a specific clause of this agreement**, or the demotion, suspension or termination for disciplinary purposes of any employee." Thereafter, Article 9 provides a grievance may be filed by "the Union, Employer, or any **employee**."
>
> Accordingly, the Court will deny the Defendants' Plea to the Jurisdiction. . . .

On January 27, 2011, appellants filed a motion for leave to amend their plea to the jurisdiction, and Fowler filed his fourth amended petition without seeking leave to

amend.[2] On January 31, 2011, appellants filed their amended plea. On February 9, 2011, the trial court granted appellants' motion for leave to amend, but denied the amended plea to the jurisdiction.

The record demonstrates that at the time the trial court considered and ruled upon appellants' amended plea, Fowler's fourth amended petition was the live pleading on file with the trial court. The fourth amended petition identifies the Union as a defendant and alleges that the Union breached its duty of fair representation. At the hearing, the parties had discussed the concept that a plaintiff may survive a plea to the jurisdiction by alleging that the Union breached its duty to fairly represent him; thus, appellants could not have been surprised by Fowler's allegations. The record does not show that appellants moved to strike the petition or raised any allegations of surprise or prejudice. In fact, appellants' amended plea is based, in part, on the fourth amended petition. The record contains no indication that the trial court did not consider the fourth amended petition. We will consider Fowler's fourth amended petition as the live pleading on file at the time the trial court entered its formal order denying appellants' plea to the jurisdiction. *See City of El Paso v. Bustillos*, 324 S.W.3d 200, 206 (Tex. App.—El Paso 2010, no pet.); *see also Gatesco Q.M., Ltd. v. City of Houston*, 333 S.W.3d 338, 343 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Nichols*, 163 S.W.3d at 783.

[2] Fowler included his third amended petition in the appendix to his brief, but we cannot consider documents that are not included in the appellate record. *See Sowell v. The Kroger Co.*, 263 S.W.3d 36, 38 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Plea to the Jurisdiction

In one issue, appellants challenge the trial court's denial of their plea to the jurisdiction. Citing *City of Fort Worth v. Davidsaver*, 320 S.W.3d 467 (Tex. App.—Fort Worth 2010, no pet.), appellants contend that only the Union may sue as the "sole and exclusive bargaining agent" for police officers and Fowler cannot sue individually, unless he alleges that the Union failed to fairly represent him. Citing *City of Houston v. Williams*, No. 09-0770, 2011 Tex. LEXIS 229 (Tex. March 18, 2011) (not yet released for publication), Fowler contends that he has standing to sue as a third-party beneficiary of the labor agreement.

"Whether a court has subject matter jurisdiction is a question of law." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We review a trial court's ruling on a plea to the jurisdiction under a *de novo* standard. *Id*. at 228.

> When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend.
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> However, if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. . . . If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the

> jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.
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> . . .
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> When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor.

Id. at 226-28 (internal citations omitted).

In *Davidsaver*, Officer Davidsaver participated in the Fort Worth Police Department's promotional exam. *Davidsaver*, 320 S.W.3d at 470. Davidsaver alleged that exam points were improperly calculated according to the procedures of a Meet and Confer Agreement between the City of Fort Worth and the Fort Worth Police Officers Association instead of in accordance with the Local Government Code. *Id.* Davidsaver alleged that, as a result, he ranked lower on the list of promotion candidates. *Id.* Davidsaver sent a letter to the Association, which the Association forwarded to its Dispute Resolution Committee for review. *Id.* Before the Committee reviewed the complaint, Davidsaver sued for a judgment declaring that the Local Government Code, not the Agreement, applied to his exam. *Id.* at 470-71. Davidsaver requested a temporary restraining order and an injunction preventing the defendants from applying the Agreement to the exam results and from promoting any candidates on the basis of

exam scores calculated under the Agreement. *Id*. at 471. The City and the Civil Service Commission filed a plea to the jurisdiction, which the trial court denied. *Id*.

On appeal, the Fort Worth Court held that "the parties to the Agreement did not intend to give nonparty, individual police officers standing to sue under the Agreement." *Id*. at 474. Nevertheless, the Court explained that Davidsaver "may still survive a plea to the jurisdiction if he prevails on his argument that the Association, as his bargaining agent, breached its duty of fair representation in its handling of his grievance[:]"

> A union retains considerable discretion in processing the grievances of its members, but it must represent all employees fairly in its enforcement of a collective bargaining agreement. A breach of this duty of fair representation occurs only when the union's conduct toward an individual member "is arbitrary, discriminatory, or in bad faith."
>
> Because a union has discretion in handling its individual members' complaints, an employee has no absolute right to have his grievance taken to arbitration or to any other level of the grievance process. An employee does, however, have the right to expect that his employer will not "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." Thus, the duty of fair representation imposes an obligation on a union to investigate a grievance in good faith and to prosecute a grievance with reasonable diligence unless it decides in good faith that the grievance lacks merit or for some other reason should not be pursued. The critical question in determining whether a union has breached its duty of fair representation is whether its conduct was arbitrary, discriminatory, or in bad faith, so that it undermined the fairness or integrity of the grievance process.

Id. at 477-78 (internal citations omitted). The Court stated that Davidsaver must "plead facts affirmatively showing that the Association's handling of his grievance was arbitrary, discriminatory, or in bad faith." *Id*. at 478.

Davidsaver alleged that the Association's refusal to file his dispute as a formal grievance established a breach of its duty of fair representation. *Id.* The Court stated that the decision to escalate Davidsaver's complaint was within the Association's discretion. *Id*. The evidence showed that the Association followed the Agreement's dispute resolution procedure, notified Davidsaver of the date and time that the Committee would review his dispute, encouraged Davidsaver to appear and present his dispute in person, allowed Davidsaver to be represented by counsel, considered Davidsaver's statement and exhibits, provided committee members with copies of Davidsaver's dispute, exhibits, and the Agreement, and voted on whether to prepare a formal written grievance. *Id.* The Court concluded that the Association's decision not to file a formal written grievance, alone, was insufficient to establish that its conduct was arbitrary, discriminatory, or in bad faith; thus, the Court concluded that the evidence failed to raise a fact question on the issue of breach of the Association's duty of fair representation. *Id*. The Fort Worth Court concluded that Davidsaver lacked standing to sue individually and that the trial court abused its discretion by denying the plea to the jurisdiction. *Id*.

Appellants contend that, as in *Davidsaver*, the agreement in this case allows only the Union to bring contract grievances and sue for breaches of the agreement. Appellants further contend that public policy mandates this result because "allow[ing] individual employees to bring suit after they 'sidestep' the grievance procedure [] simply opens the door for endless and frivolous litigation."

The Texas Supreme Court, however, has held that collective bargaining agreements are a type of third-party beneficiary contract. In *Williams*, former Houston firefighters sued the City of Houston for alleged wrongful underpayment of lump sums due upon termination of their employment. *Williams*, 2011 Tex. LEXIS 229, at **1-3. The City alleged that the suit was barred by governmental immunity. *Id*. at *1. The firefighters argued that immunity was waived by section 271.152 of the Local Government Code, which "under certain circumstances, waives governmental immunity for suits alleging breach of a written contract." *Id*. They argued that the City breached certain contracts, including Meet and Confer Agreements ("MCAs") and a Collective Bargaining Agreement ("CBA"). *Id*.

The court of appeals held that the firefighters lacked standing to sue for breach of the MCAs under the doctrine of *inclusio unius est exclusio alterius, i.e.*, "the presumption that purposeful inclusion of specific terms in a writing implies the purposeful exclusion of terms that do not appear." *Id*. at *42. The court of appeals concluded that only the Union and the City had standing to sue for breach of the MCAs. *Id*. at *43. The Texas Supreme Court, however, stated: "Although *inclusio unius* is a sound maxim of construction, judicial review cannot start and end on such a narrow basis when, as here, there is another valid ground to confer standing—the Firefighters' status as third-party beneficiaries under the MCAs." *Id*. The Court explained:

> Texas law recognizes that third parties have standing to recover under a contract that is clearly intended for their direct benefit. In determining

> whether there is intent to benefit a third party, we look to the entire agreement, giving effect to all its provisions. The contract need not have been executed *solely* to benefit the noncontracting party. We do not create a third-party benefit by implication; the presumption is the parties contracted only for themselves, absent a clear showing of intent otherwise. However, the agreement need not state "third-party beneficiary" or any similar magic words. Finally, a third party cannot enforce a contract if the third party benefits only incidentally from it.

Id. at **43-44 (internal citations omitted). The Court concluded that "the City and the Union expressed a clear intent to benefit the Firefighters when they contracted through the MCAs[;]" thus, the firefighters, as third-party beneficiaries, had standing to enforce the MCAs. *Id*. at *45.

The City argued that the firefighters lacked standing to sue for breach of the CBA because they failed to establish that their Union breached its duty of fair representation. *Id*. at *48. The Court of Appeals concluded that showing a breach of the CBA is an indispensable predicate to an employee's suit against the City for violating the CBA. *Id.* at *49. The Supreme Court disagreed:

> [T]hat "predicate" only applies to "hybrid" suits—cases in which the employee alleges both breach of the collective bargaining agreement by the employer, *and* breach of the duty of fair representation by the union, as when the union has mishandled grievance and arbitration proceedings. It typically is an issue in suits under federal labor law, such as when an employee who is covered by a collective bargaining agreement sues for wrongful termination *after* losing under grievance and binding arbitration procedures. Here, no grievance or arbitration occurred at all, so whether the Union breached its duty is not an issue. As such, the Firefighters are not required to establish the predicate of any breach of duty. . . .

Id. at *49 (internal citations omitted). The Supreme Court also rejected the City's contention that the firefighters failed to exhaust the CBA's grievance procedures. *Id*. at *48. The Court concluded that, because the firefighters were retirees and not "active employees or members of the bargaining unit," they were not required to exhaust the remedies provided by the collective bargaining agreement. *Id*. at **50-52. The Court concluded that, as with the MCAs, the firefighters had standing to enforce the CBA as third-party beneficiaries. *Id*. at *52.

Although *Williams* involves retirees, not employees like Fowler, the Texas Supreme Court recognized that "collective bargaining agreements are recognized as a type of third-party beneficiary contract." *Id*. Like *Williams*, the labor agreement in this case expresses a clear intent to benefit police officers. *See id*. at **43-44. The agreement states an intent to "promote the mutual interests of the [City] and its *employees*[,]" including "proper standards of wages, hours and other conditions of employment[.]" *See id*. at *44. The agreement grants certain benefits to police officers, such as leave, wages, overtime pay, and insurance. *See id*. at **44-45. These benefits are limited to police officers through the agreement's definition of "employee" and are not promised to the City or the Union. *See id*. at *45. As a third-party beneficiary to the labor agreement, Fowler has standing to enforce the labor agreement. *See id*. at **45, 50-52.

Appellants, however, contend that Fowler cannot survive a plea to the jurisdiction on grounds that the Union failed to fairly represent him during the grievance process.

According to appellants, the Union's duty to fairly represent Fowler would have arisen only in the event Fowler "avail[ed] himself of the grievance procedures afforded by the Agreement."[3] The record indicates that Fowler did not file a grievance regarding the 2003 promotional exam. Per *Williams*, breach of the duty of fair representation is therefore not an issue and Fowler was not required to establish the predicate of any breach of duty by the Union. *See id*. at *49. The record does indicate that Fowler filed a grievance regarding the 2005 promotional exam. Unlike *Davidsaver*, Fowler's allegations against the Union do not center on the Union's decision not to file a formal written grievance regarding the 2005 exam. *See Davidsaver*, 320 S.W.3d at 478. Fowler alleges that he filed a grievance to complain about the 2005 exam and the Union accepted the grievance, but the Union subsequently entered into a settlement agreement that abandoned Fowler's grievance and "promoted four additional lieutenants but reduced the number of sergeant promotions[.]" According to Fowler, the settlement was reached without his knowledge and postponed his promotion. Fowler alleges that the Union "wholly failed to protect [his] interests and discharge its duty of fair representation."

[3] To the extent appellants attempt to raise an independent argument that Fowler failed to exhaust his contractual remedies before filing suit, appellants have not established that this is an issue of subject matter jurisdiction as opposed to an issue for summary judgment. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *see also Fort Worth Transp. Auth. v. Thomas*, 303 S.W.3d 850, 855-56 (Tex. App.—Forth Worth 2009, pet. denied); *Lindsey v. Gen. Dynamics Corp.*, 450 S.W.2d 895 (Tex. Civ. App.—Waco 1970, no writ) ("Where there is a labor contract between a union and an employee which provides procedures for settlement of disputes between the employee and employer, an employee is not entitled to redress in the courts where he fails to exhaust his remedies under the contract.").

Accordingly, Fowler's petition suggests that the Union's conduct undermined the fairness or integrity of the grievance process by entering a settlement agreement that did not protect his interests and did not treat him fairly. When the facts that Fowler pleaded are taken as true, his pleadings are sufficient to create a fact issue about whether the Union's handling of his grievance was arbitrary, discriminatory, or in bad faith. *See Davidsaver*, 320 S.W.3d at 478.

In summary, we conclude that Fowler has standing to enforce the labor agreement. For this reason, the trial court properly denied appellants' plea to the jurisdiction. We overrule appellants' sole issue and affirm the trial court's order denying appellants' plea to the jurisdiction.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on June 30, 2011
Opinion Delivered August 11, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.