In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00229-CV

THE CITY OF BEAUMONT AND MAYOR BECKY AMES, IN HER OFFICIAL CAPACITY AS MAYOR OF THE CITY OF BEAUMONT, Appellants

V.

STARVIN MARVIN'S BAR AND GRILL, L.L.C., Appellee

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-189,628

MEMORANDUM OPINION

Appellant, the City of Beaumont ("City") appeals the trial court's order denying its plea to the jurisdiction, and granting Starvin Marvin's Bar and Grill, L.L.C. ("Starvin Marvin") temporary injunction enjoining the City from enforcing City of Beaumont Ordinance 11-025. We have appellate jurisdiction to consider an interlocutory order denying a governmental unit's plea to the jurisdiction. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (West 2008). We grant the City's plea to the jurisdiction in part and

thereby dismiss Starvin Marvin's claims for declaratory relief and its claim based on equitable estoppel for want of jurisdiction. We therefore, vacate the trial court's judgment granting temporary injunction.

In January 2010, Starvin Marvin entered into a commercial lease agreement with an option to purchase the building and property located on 2310 North 11th Street in Beaumont, Texas. As of the time of the hearing on the plea to the jurisdiction and the motion for temporary injunction, Starvin Marvin was a lessee and had not yet purchased the property. The property is located within the General Commercial Multiple-Family Dwelling District ("GC-MD") in Beaumont, Texas. Starvin Marvin's Bar & Grill is a restaurant that offers an outside patio where customers can enjoy food and live music. Prior to opening, Starvin Marvin made a substantial investment to upgrade and renovate the property, including renovations to the outside patio and stage. Starvin Marvin obtained all necessary permits from the City, including all electrical permits necessary for an expansion to the outdoor patio, which was electrically wired for sound and lighting with a stage built for live band performances.

Shortly after opening the restaurant in May 2010, however, a dispute arose between the restaurant and adjacent landowners and residents. The occupants of these properties called the Beaumont Police Department complaining of noise emanating from Starvin Marvin's outdoor patio. In late July 2010, Beaumont P.D. conducted a sound test in Starvin Marvin's parking lot and thereafter issued Starvin Marvin's manager a citation

for violating the City's noise ordinance. The owner of the restaurant, Marvin Atwood, complained to the City that the officer had improperly conducted the sound test from Starvin Marvin's property line and not "at the nearest residential line in a permanent residential zone" as stated in the zoning ordinance. The City dismissed the citation in August 2010. It is undisputed that Starvin Marvin's use of the property complies with the permitted uses of a GC-MD zone and the noise performance standards in the Zoning Ordinance.

On March 8, 2011, during a regular meeting of the Beaumont City Council, the City Council's agenda included a work session to review and discuss proposed amendments to Chapter 12, Article 12.08 Noise, of the Code of Ordinances. Atwood did not receive written notice of the work session regarding the noise ordinance, but rather the morning of the session, Atwood received a text message about the work session. Atwood did not see a copy of the proposed ordinance until after the City Council passed it. The recommendation from the City Manager, as prepared by the City Attorney, states, "[t]his amendment is necessary to bring our current noise ordinance into compliance with a settlement agreement entered into between the World Wide Street Preachers Fellowship and the City of Beaumont." The City entered into a settlement with the World Wide Street Preachers Fellowship in April 2008.[1] In the settlement agreement, the City of

[1] The settlement agreement stems from a lawsuit filed on behalf of World Wide Street Preachers Fellowship, Wallace Langford and Jeremy Burt for violations of their constitutional rights for preaching with megaphones and signs about sin and damnation

Beaumont agreed to "have or shall adopt a revised Noise Ordinance which includes specific language and definitions, such as specific decibel levels and distance, so as to make the Beaumont City Noise Ordinance comport with current Constitutional jurisprudence within sixty (60) days."

The only testimony offered during the work session regarding the proposed ordinance was from individuals residing around Starvin Marvin's location. No one from the Street Preacher litigation spoke. Starvin Marvin's counsel attended the work session and lodged an objection to the adoption of the proposed ordinance. He asked the City Council to postpone its adoption to provide adequate time for citizens to research and investigate the impact the ordinance would have on local businesses.

The proposed noise ordinance ("Ordinance 11-025") establishes allowable decibel levels and provides that any sound exceeding those levels is a violation of the chapter. Beaumont, Tex., Noise Ordinance, ch. 12, art. 12.08, § 12.08.005 (2011). Ordinance 11-025 provides:

> Evidence that an activity or sound source produces a sound that exceeds the dB(A) levels specified in this section shall be prima facie evidence of a sound nuisance that unreasonably disturbs, injures, or endangers the comfort, repose, health, peace, or safety of others in violation of this chapter. Regardless of the measurable dB(A) level established above and measured as provided in this section the generator of any sound of such a nature as to cause persons of ordinary sensibilities occupying or using any property other than the property upon which the sound is being generated to be aware of sympathetic vibrations or resonance caused by the sound shall

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on the public sidewalks on Dowlen Street in Beaumont. *See World Wide Street Preachers Fellowship et al. v. Becky Ames et al.*, No. 1:07-CV-0856 (E.D.Tex. Nov. 9, 2007).

> also be prima facie evidence of a sound that unreasonably disturbs, injures, or endangers the comfort, repose, health, peace, or safety of others in violation of this chapter.

Id. The ordinance further provides that "[e]xterior noise levels shall be measured at the property line of an offended person." *Id.* § 12.08.006(c). Section 12.08.007 of the ordinance provides exceptions for noise emanating from within the central business district and from facilities on property located within the light and heavy industrial zoning districts. *Id.* § 12.08.007.

The City adopted Ordinance 11-025 on March 8, 2011. Starvin Marvin retained an industrial hygienist to conduct sound testing at its location to determine if it complied with the new ordinance. The tests indicate any use of its outside patio, with or without music, would be a prima facie violation of the new ordinance. Thereafter, Starvin Marvin initiated this lawsuit seeking a declaratory judgment that: (1) Ordinance 11-025 is void or not enforceable against Starvin Marvin; (2) that Starvin Marvin be entitled to use of its leased property as allowed under the City's Zoning Ordinances; and (3) that Starvin Marvin's "rights, title and interest" in and to the property and various agreements associated with the property was impacted by Ordinance 11-025. Starvin Marvin sought further relief under the doctrines of inverse condemnation and estoppel. Starvin Marvin also asked the trial court for a temporary and permanent injunction to enjoin the City of Beaumont from enforcing Ordinance 11-025 against Starvin Marvin. The City filed a Plea to the Jurisdiction. After an extensive hearing, the trial court denied the City's plea

and granted Starvin Marvin's temporary injunction based on the doctrine of equitable estoppel, and in so doing, enjoined the City from enforcing Ordinance 11-025 against Starvin Marvin, its employees, and customers. The City filed this appeal.

A plea to the jurisdiction is a dilatory plea, used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). "The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached." *Id*. A plea to the jurisdiction of a trial court seeks dismissal of the case on the ground that the court lacks subject matter jurisdiction, which is essential to a court's power to decide a case. *Id*. at 553-54. When a case includes various causes of action, the trial court should dismiss the causes over which it does not have subject matter jurisdiction, but retain those over which it has jurisdiction. *See Thomas v. Long*, 207 S.W.3d 334, 338-39 (Tex. 2006).

We review the trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). If a plea to the jurisdiction challenges the pleadings, then we must determine if the pleader alleged facts that demonstrate the court's jurisdiction to hear the case. *Id*. at 226. We consider the facts the plaintiff alleges, as well as the evidence the parties submit, to the extent the evidence is relevant to the jurisdictional issue. *Houston Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 156 (Tex. 2007) (quoting *Tex. Natural Res. Conservation Comm'n v. White*,

46 S.W.3d 864, 868 (Tex. 2001)). "[I]n a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). "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." *Id.* at 227-28.

Starvin Marvin sought to enjoin enforcement of Ordinance 11-025. The City argues that the trial court, as a court of equity, lacks jurisdiction to enjoin the enforcement of a penal ordinance or to declare the ordinance unconstitutional. Generally, a court of equity will not enjoin the enforcement of criminal law. *State v. Logue*, 376 S.W.2d 567, 569 (Tex. 1964). However if the penal ordinance is unconstitutional or void, and its enforcement threatens irreparable injury to vested property rights, then equity may intervene to protect those property rights. *City of La Marque v. Braskey*, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994)). If the court fails to find both that the law is unconstitutionally void and that irreparable injury to a vested property right will result, then the court lacks jurisdiction. *Id*. If questions of validity and constitutionality of a

penal ordinance can be resolved in a criminal proceeding, and vested property rights are not in jeopardy, then a court of equity should not intervene. *Morales*, 869 S.W.2d at 945. This limitation is not only true for suits seeking to enjoin enforcement of a penal ordinance, but also for suits seeking a declaratory judgment regarding the constitutionality of a penal statute or ordinance. *Id*. at 947.

We first consider whether Starvin Marvin has a "vested property right." Starvin Marvin argues that the City waived this issue. However, the City raised this issue in its plea to the jurisdiction, in the hearing on the City's plea, and also adequately briefed it in this appeal. We find that the City properly preserved this issue for our review.

The U.S. Constitution does not create property interests, but rather the existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law[.]" *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701. 33 L. Ed. 2d 548 (1972); *Stratton v. Austin Indep. Sch. Dist.*, 8 S.W.3d 26, 29 (Tex. App.—Austin, 1999, no pet.). "A person's property interests include actual ownership of real estate, chattels, and money." *Stratton*, 8 S.W.3d at 29 (citing *Roth*, 408 U.S. at 572). A right is "vested" when it "has some definitive, rather than merely potential existence." *Tex. S. Univ. v. State Street Bank & Trust Co.*, 212 S.W.3d 893, 903 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The Texas Supreme Court has held that "property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once

made." *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972). Further, a lessee's rights do not exceed those of the property owners, as such, lessees do not have a constitutionally protected right to use property in a certain way, without restriction. *See City of Houston v. Guthrie*, 332 S.W.3d 578, 597 (Tex. App.—Houston [1st Dist.] 2009, pet denied).

In *City of La Marque*, the city passed an ordinance prohibiting the operation of a kennel within 500 feet of a dwelling. 216 S.W.3d at 862. Prior to the passage of the ordinance, a property owner established and operated a state-licensed cat shelter on property that was located within 100 feet of three residences. *Id*. The city issued citations to the property owner for violations of the ordinance. *Id*. The property owner sought an injunction from the trial court to prevent the enforcement of the ordinance against her, which she claimed, among other injuries, would cause her facility to close. *Id.* Because the property owner's alleged injuries concerned a particular use of her property, which is not a vested property right, the Houston Court of Appeals dismissed the case for want of jurisdiction, concluding that the property owner could challenge the ordinance in the municipal court where her citations were pending. *Id*. at 864.

Starvin Marvin's use of the leased property as a restaurant with live outdoor music is not a constitutionally protected vested property right. *See Benners*, 485 S.W.2d at 778; *Guthrie*, 332 S.W.3d at 597; *City of La Marque*, 216 S.W.3d at 863. Starvin Marvin contends that its claims are excepted from the general jurisdictional rule because the

Ordinance 11-025 imposes penalties against its customers, as well as any bands it may hire to play in the outdoor venue. In support of its position, Starvin Marvin relies on *City of Austin v. Austin City Cemetery Ass'n*, which held that irreparable injury could occur when the penal provision operates against the potential customers of a business, as well as against the operator. 28 S.W. 528, 529-30 (Tex. 1894). In *City of Austin*, the court considered an ordinance that prohibited the use of property in certain areas for burial purposes and made it a crime for a cemetery association, as well as individuals, to bury a dead body except in certain locations. *Id.* at 528-29. The court reasoned that the ordinance effectively prevented the business from challenging its validity because the business's customers would be reluctant to expose themselves to criminal liability to test the law. *Id*. at 529-30. Thus, without a customer willing to accept that risk, the business owner had no adequate remedy at law. *Id*. *City of Austin* is distinguishable from this situation. In *City of Austin*, the ordinance at issue explicitly penalized the behavior of the business owner and the customers, making it impossible for the business owner to adequately contest the validity of the ordinance by violating it when its customers did not also do so. Whereas, here, Starvin Marvin is free to disregard the ordinance by playing pre-recorded music in its outdoor patio area at levels that would violate the ordinance. Starvin Marvin could do this free of involvement from its customers or outside bands. In so doing, Starvin Marvin would be able to test the validity of the ordinance as a defense to prosecution. *See State v. Logue*, 376 S.W.2d at 569-72; *Destructors, Inc. v. City of*

Forest Hill, No. 2-08-440-CV, 2010 Tex. App. LEXIS 3658, at *8-13 (Tex. App.—Fort Worth May 13, 2010, no pet.) (mem. op.); *Mr. W. Fireworks, Inc. v. Comal Cnty.*, No. 03-06-00638-CV, 2010 Tex. App. LEXIS 2384, at 20-23 (Tex. App.—Mar. 31, 2010, no pet.) (mem. op.).

Starvin Marvin has not shown that enforcement of the ordinance would cause an irreparable injury to a vested property right. As such, we hold that the trial court did not have jurisdiction to hear Starvin Marvin's causes of action for declaratory relief or its cause for relief based on equitable estoppel. In like manner, we do not have jurisdiction over those causes on this appeal. *See Benners*, 485 S.W.2d at 778; *Guthrie*, 332 S.W.3d at 597; *City of La Marque*, 216 S.W.3d at 863. Because we hold the trial court did not have jurisdiction over Starvin Marvin's estoppel cause of action, and that action formed the basis of the trial court's judgment, we vacate the trial court's judgment granting temporary injunction.

Our vacating of the temporary injunction, however, has no effect on Starvin Marvin's inverse condemnation claim. The trial court granted the temporary injunction expressly on Starvin Marvin's cause of action based on estoppel, rather than on the inverse condemnation cause of action. But, even if the trial court had relied on inverse condemnation as a basis for the temporary injunction, on this record, we conclude Starvin Marvin would be unable to satisfy all the requirements for obtaining a temporary injunction. A party is entitled to receive a temporary injunction when the party has

pleaded and proven: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). To establish a probable right to recovery, the applicant must establish he or she has a cause of action for which he may be granted relief. *See Walling v. Metcalfe*, 863 S.W.2d 56, 57-58 (Tex. 1993). While Starvin Marvin pleaded inverse condemnation as a cause of action, in its appellate brief, Starvin Marvin concedes that it "contractually cannot bring a claim for inverse condemnation/regulatory taking against the City" and argues that "[t]he [trial] court was shown evidence that Starvin Marvin's would not be entitled to any award or price paid in the event any condemnation or taking, total or partial occurs." Moreover, during the temporary injunction hearing, Starvin Marvin's owner, Marvin Atwood, testified that under the terms of the commercial lease agreement for the property, he is not entitled to any condemnation revenue. The commercial lease agreement, admitted as evidence in the hearing, specifically provides:

> If any condemnation or taking, total or partial, occurs, [Starvin Marvin] will not be entitled to any part of the award or price paid in lieu thereof, and [Starvin Marvin] expressly waives any right or claim to any part thereof, and Landlord [Chasem 2, Ltd.] is to receive the full amount of such award or price.

Here, the evidence is undisputed that Starvin Marvin waived its right to any part of a condemnation award, and therefore has no interest in any potential award from an inverse condemnation claim. *See generally Motiva Enters., LLC v. McCrabb*, 248 S.W.3d 211,

214-16 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (holding that lessee had no interest in condemnation award when lessee waived its right to condemnation award in lease agreement); *see also Texaco Ref. & Mktg., Inc. v. Crown Plaza Grp.*, 845 S.W.2d 340, 342 (Tex. App.—Houston [1st Dist.] 1992, no writ) (lessee had right to share in condemnation award where lessee had right to terminate or pay reduced rent after partial taking and lessee did not otherwise waive the right in the lease.). Therefore, the trial court could not have reasonably concluded, based on the evidence presented in the temporary injunction hearing, that Starvin Marvin had a probable right to the relief on its inverse condemnation claim.

We vacate the judgment of the trial court granting temporary injunction, and dismiss for want of jurisdiction Starvin Marvin's causes of action seeking declaratory relief and its cause of action seeking to enjoin the enforcement of the ordinance under the doctrine of equitable estoppel.

JUDGMENT VACATED; DISMISSED IN PART FOR WANT OF JURISDICTION.

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CHARLES KREGER
Justice

Submitted on September 15, 2011
Opinion Delivered December 22, 2011

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

DISSENTING OPINION

The City argues that any future enforcement of the ordinance against Starvin Marvin's is "purely speculative." Compliance with the ordinance is not optional, however. Starvin Marvin's should be able to challenge the validity of the ordinance governing its business without subjecting itself to a possible enforcement action.

As the City notes in its brief, a "takings" claim is included in Starvin Marvin's pleadings. The City argues that Starvin Marvin's "attempt to abandon his takings claim by negating his right to proceeds for the City's taking in an inverse condemnation suit is without merit." The City explains as follows:

> An inverse condemnation proceeding provides an adequate remedy for damages where there is a governmental taking. *Meek v. Smith*, 7 S.W.3d 297, 300 (Tex. App.—Beaumont 1999, no pet.). Marvin Atwood's testimony is that the noise ordinance would impact, if not shut down, his business. [] At the same time, Atwood states that the lease takes away his right to damages unless he buys the property [], which he has initiated the option to purchase and is in negotiations to do so. [] The lease, however, speaks to the lease being terminated and the rent being abated in the event of the condemnation of "all of the premises." [] The Plaintiff, however, does not contract away his business interest through the lease, nor does he contract away his options or right to take legal action in the event a portion of the premises is taken. The "owner of any legal right or interest in land" must be adequately compensated when a governmental agency imposes restrictions that unreasonably interferes with their property rights. *Zinsmeyer v. State*, 646 S.W.2d 626, 628 (Tex. App.—San Antonio 1983, no writ); *see also Mayhew* [*v. Town of Sunnyvale*], 964 S.W.2d [922, 935 (Tex. 1998)].

The City contends Starvin Marvin's has an adequate remedy: the regulatory takings claim asserted in its pleadings.

Starvin Marvin's argues that the ordinance will have a "significant negative financial impact" on Starvin Marvin's and may put it out of business. That is the type of property loss claim that a district court exercising civil jurisdiction considers. Starvin Marvin's argues the noise ordinance worked a change in the zoning ordinance although the City did not comply with applicable zoning law. A civil district court has jurisdiction to consider the validity of an ordinance, and to issue a temporary injunction to protect an owner pending a trial. *See generally City of Kermit v. Spruill*, 328 S.W.2d 219, 224 (Tex. Civ. App.—El Paso, 1959, writ ref'd n.r.e.) (temporary injunction, pending final hearing of case, to protect private property rights injuriously affected by ordinance).

Before the unconstitutionality of an ordinance can be declared under the Declaratory Judgment Act, however, "the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard." Tex. Civ. Prac. & Rem. Code Ann. §§ 37.004(a), 37.006(b) (West 2008). We should instruct the trial court to withdraw the order declaring the ordinance unconstitutional; service of Starvin Marvin's pleading on the Attorney General of the State of Texas is required because a constitutional challenge to the ordinance is made in the pleading. The current noncompliance with that service requirement does not require dismissal of the action at this stage, however. *See generally Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 389 (Tex. 1977) (noncompliance with a joinder statute). The error can be cured.

Essentially, Starvin Marvin's asserts that the City did not comply with zoning law, and the new ordinance interferes with investment-backed expectations and deprives Starvin Marvin's of the economically beneficial uses of the property. *See City of Dallas v. Stewart*, No. 09-0257, 2011 Tex. LEXIS 517, at **11-15 (Tex. July 1, 2011); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 667-72 (Tex. 2004). A determination of the relief to which Starvin Marvin's may be entitled should await the trial on the merits. The only question at the temporary injunction hearing is whether Starvin Marvin's is entitled to preserve the status quo pending the trial. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993).

In addition to estoppel and the unconstitutionality of the ordinance, the trial court stated other grounds for the temporary injunction. *See generally Lumberton Mun. Util. Dist. v. Cease*, 596 S.W.2d 601, 603-04 (Tex. Civ. App.—Beaumont 1980, no writ) ("The failure to give notice to the Attorney General did not deprive the trial court of jurisdiction to grant relief on other legal grounds."). The trial court found, among other things, a "probable, imminent, and irreparable injury" and the City's failure to follow zoning law. But whether or not the temporary injunction should have been granted, dismissal of the declaratory judgment action in this appeal is unwarranted. The trial court has jurisdiction to resolve the dispute. I respectfully dissent.

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DAVID GAULTNEY
Justice

Dissent Delivered
December 22, 2011