In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-23-00182-CV

TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 10, APPELLANT

V.

WATERFORD LAGO VISTA, LLC, APPELLEE

On Appeal from the 419th District Court
Travis County, Texas
Trial Court No. D-1-GN-22-006969, Honorable Laurie Eiserloh, Presiding

November 20, 2023

MEMORANDUM OPINION[1]

Before QUINN, CJ, and PARKER and YARBROUGH, JJ.

Pending before us is the accelerated interlocutory appeal of Travis County Municipal Utility District No. 10 (MUD 10). It challenges the trial court's order denying a plea to the jurisdiction and finding that Waterford Lago Vista, LLC, has standing to bring suit for a breached development financing agreement. MUD 10 contests the order, contending the trial court erred in 1) determining governmental immunity had been waived

[1] Because this matter was transferred from the Third Court of Appeals, we apply its precedent when it conflicts with that of the Seventh Court of Appeals. TEX. R. APP. P. 41.3.

under Texas Local Government Code §§ 271.151 and 271.152 and 2) concluding Waterford had standing to sue since it was a non-party to the agreement. We affirm.

Background

In November 2004, Waterford LT Partners (developer) and MUD 10 entered into the agreement. It provided for the acquisition of sites and the design and construction of water, sewer, and drainage facilities to serve certain real property owned by the developer and within MUD 10's jurisdiction. The property at issue is section 4A of the Waterford on Lake Travis Subdivision.

Per the agreement, the improvements were to be constructed "in public rights-of-way or utility easements, which easements within [MUD 10] shall be dedicated by Developer, if required, without reimbursement, unless otherwise allowed by the rules . . . ." Furthermore, the developer guaranteed payment and advanced all funds for the costs of the project, including "costs of site acquisition, design, engineering, materials, labor, construction, testing, inspection and easements arising in connection with the project . . . ." So too did MUD 10 agree to "make all reasonable efforts to obtain approval for the sale of bonds and to sell bonds for the purpose of reimbursing the Developer in accordance with this Agreement at the earliest feasible date . . . ." This right to reimbursement was assignable by the developer to its lender. The developer eventually executed a deed of trust in favor of its lender, American Bank of Texas, and also assigned the bank its right to reimbursement.

Apparently, the developer defaulted. That resulted in the deed of trust being foreclosed upon and all rights being conveyed to Lewisville 9/4, Inc., a wholly owned subsidiary of American Bank of Texas. Thereafter, Lewisville conveyed the realty and all

associated rights to Waterford, which rights alleged included the right to reimbursement. Waterford then requested reimbursement of development costs under the Agreement from MUD 10. The latter refused payment, contending Waterford lacked reimbursement rights since terms of the agreement regarding their assignment were not followed. That resulted in Waterford suing MUD 10.

MUD 10 filed a plea to the jurisdiction, arguing there was no waiver of sovereign immunity under §§ 271.151 and 271.152 of the Texas Local Government Code and that Waterford lacked standing. Waterford responded through a partial motion for summary judgment addressing these jurisdictional contentions, among other things. The trial court convened a hearing on those matters and denied MUD 10's plea.

Issue One—Waiver of Governmental Immunity

Through its first issue, MUD 10 contends the trial court erred in finding a waiver of sovereign immunity. Specifically, it argued that the agreement here was not the type of contract under which immunity was waived. We will overrule the issue.

Section 271.152 of the Local Government Code "provides a clear and unambiguous waiver of governmental immunity from suit in the context of a breach of contract claim." *W. Tex. Mun. Power Agency v. Republic Power Partners, L.P.*, 428 S.W.3d 299, 307 (Tex. App.—Amarillo 2014, no pet.). Waiver is "triggered by the mere act of entering into a contract for goods or services." *Id.*; *see* TEX. LOC. GOV'T CODE ANN. § 271.152. Such an accord is "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." TEX. LOC. GOV'T CODE ANN. § 271.151(2)(A); *see also Zachry Constr. Corp. v. Port of Houston Auth.*, 449 S.W.3d 98,

106 (Tex. 2014) (discussing types of contracts for which governmental immunity is waived under chapter 271).

"Services," in section 271.151(2)(A), is "broad enough to encompass a wide array of activities" and "includes generally any act performed for the benefit of another." *City of Galveston v. CDM Smith, Inc.*, 470 S.W.3d 558, 566 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). The services provided need not be the primary purpose of the agreement. *Id.* For instance, the Supreme Court has found that a contract provided goods and services to a River Authority in *San Antonio River Auth. v. Austin Bridge & Rd.*, *L.P.*, 601 S.W.3d 616 (Tex. 2020). This was so because the services provided by Austin Bridge help the River Authority fulfill its management obligations. *Id.* at 628-29. Thus, they were "neither indirect nor attenuated." *Id.* at 630. The services provided to MUD 10 are similarly direct and unattenuated.

The developer and MUD 10 entered the contract to acquire sites and to design and construct water, sewer, and drainage facilities. Those facilities were to serve real property located within MUD 10's jurisdiction and owned by the developer. MUD 10 engineers also designed and managed it. Admittedly, the developer guaranteed payment and advanced all the funds to cover costs, including "costs of site acquisition, design, engineering, materials, labor, construction, testing, inspection and easements arising in connection with the project . . . ." Yet, MUD 10 agreed to reimburse the developer for same.

Moreover, the parties to the accord acknowledged therein that "water, sanitary sewer, and drainage facilities [were] necessary to serve [MUD 10], but [MUD 10] ha[d] no funds on hand for such purposes at the present time[.]" So too did they say that it was in

MUD 10's "best interest . . . to provide for the design and construction of the water, sewer, and drainage facilities to serve the Property." Thus, like Austin Bridge, the developer at bar was facilitating the performance of MUD 10's obligations through building and initially funding the improvements.

Moreover, courts from sister jurisdictions found that immunity had been waived in comparable circumstances. For example, in *Joshua Dev. GP, LLC v. Johnson Cnty. Special Util. Dist.*, No. 10-20-00183-CV, 2022 Tex. App. LEXIS 8277, at *14-15 (Tex. App.—Waco Nov. 9, 2022, no pet.) (mem. op.), waiver occurred when the purpose of the contract was to construct infrastructure necessary to connect homes in a subdivision to the utility district's water and sewer system. Under that circumstance, the utility district received both goods, i.e., the infrastructure, and services, i.e., the design and engineering services for the infrastructure and payment for a contractor to complete the infrastructure.

In *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 832-33, 838 (Tex. 2010), the Court found waiver where a water authority and residential developers contracted to obligate developers to build water and sewer facilities and lease them to the water authority. Likewise, in *NBL 300 Grp. Ltd. v. Guadalupe-Blanco River Auth.*, 537 S.W.3d 529, 534 (Tex. App.—San Antonio 2017, no pet.), waiver again occurred. There, the water authority and a residential developer contracted for the latter to build a wastewater collection system. In return, the water authority agreed to reimburse the developer for costs related thereto though imposition of a connection fee on each lot.

The jurisdictional circumstances at bar differ from those in *Joshua*, *Kirby*, and *NBL* in no material way. So, the outcome here should be the same. Moreover, the accord before us also encompasses the provision of financial or fiscal services. That adds

support to our conclusion that the trial court did not error in finding immunity waived. So, we overrule the first issue.

Issue Two—Standing to Sue MUD 10

By its second issue, MUD 10 argues Waterford lacked standing to pursue a claim under chapter 271. The tenor of its argument is a bit unclear. We interpret it as suggesting that 1) any waived immunity is lost through assignment of the contract and 2) the contractual rights entitled Waterford to reimbursement were not properly assigned. As construed, we overrule this issue as well.

To address the former interpretation, we turn to *First Citizens Bank & Trust Co. v. Greater Austin Area Telcoms. Network*, 318 S.W.3d 560, 568-69 (Tex. App.—Austin 2010, no pet.). There, the Third Court of Appeals recognized that "in enacting section 271.152, the legislature waived sovereign immunity for suits brought by assignees of those who enter into contracts that are subject to subchapter I." *Id.* Waterford claims to be such an assignee. So, immunity survives assignment, contrary to MUD 10's position.

As for the propriety of the transfer, that implicates Waterford's privity to the contract. Questions of privity implicate capacity, not standing. *Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, 520 S.W.3d 145, 153 (Tex. App.—Austin 2017, pet. denied); *see also Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, No. 05-13-00506-CV, 2015 Tex. App. LEXIS 11496, at *42-43 (Tex. App.—Dallas Nov. 4, 2015, no pet.) (mem. op. on reh'g). Included within this is the legitimacy of one's claim to be an assignee of an agreement. As observed in *Nat'l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 129 (Tex. App.—Dallas 2014, no pet.), "[w]hether TBF was the assignee of the lease between NHRC and KMBS is not an issue of standing . . . [r]ather, it is a question

of whether TBF can recover in the capacity in which it sued, an issue that goes to the merits of TBF's claim." *Id.* No less is true here.

The propriety of the assignment and whether it afforded Waterford the capacity to seek reimbursement under the contract is not an issue of standing. Thus, it is not subject to disposition through a plea to the court's jurisdiction. *See McLane Champions, LLC v. Houston Baseball Partners LLC*, 671 S.W.3d 907, 913 (Tex. 2023) (concluding that "the assignment may (or may not) affect [appellee's] ability to recover damages from [appellant]. But it does not affect [appellee's] constitutional standing and thus does not call into question the court's subject matter jurisdiction).

Having overruled each of MUD 10's appellate issues, we affirm the trial court's order denying the plea to the jurisdiction.

Brian Quinn
Chief Justice