TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00131-CV

The State of Texas, Appellant

v.

City of Austin, Texas; Elaine Hart, in her official capacity as City Manager of the City of Austin; and Austin Firefighters Association, Local 975, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT NO. D-1-GN-16-004307, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING

ORDER AND MEMORANDUM OPINION

PER CURIAM

Appellant the State of Texas seeks to appeal an interlocutory order signed by the trial court on February 7, 2017, granting a motion to dismiss filed by appellee Austin Firefighters Association, Local 975 (AFA) pursuant to the Texas Citizens Participation Act (TCPA). *See* Tex. Civ. Prac. & Rem. Code §§ 27.003, .005. The State appeals the February 7 order to the extent it operates as a denial of the State's plea to the jurisdiction, *see id.* § 51.014(a)(8) (providing for interlocutory appeal of order granting or denying plea to jurisdiction by governmental unit), but acknowledges that the order is unclear with respect to the trial court's intent. On our own motion, we will abate the appeal and remand the case to the trial court for clarification of the order.

BACKGROUND

The suit underlying this appeal was filed by two taxpayers, Mark Pulliam and Jay Wiley (collectively, "the Taxpayers"), against the City of Austin and AFA. In their petition, the Taxpayers complain that the City has been impermissibly granting firefighters paid "release time" to do political work for AFA, a firefighters' union. The State subsequently intervened in the suit to stop the practice of "release time," which in the State's view constitutes the "unconstitutional gifting of taxpayer money to a political union."

AFA filed a motion to dismiss the Taxpayers' and the State's claims under the TCPA. *See id.* §§ 27.003, .005. In response, the State filed a plea to the jurisdiction, making two arguments. First, the State asserted that it retained sovereign immunity and that, consequently, the trial court lacked subject-matter jurisdiction "over the TCPA claim against [the State]." Second, the State argued that the TCPA does not apply to the State's claim against AFA because the TCPA expressly states that it may not be used to dismiss the State's lawsuit, which according to the State was brought by the Attorney General in the name of Texas to enforce the Texas Constitution. *See id.* § 27.010.

On February 7, 2017, following a hearing on AFA's motion to dismiss and on the State's plea to the jurisdiction, the trial court signed an order stating that "[AFA's] Texas Citizens Participation Act Motion to Dismiss is GRANTED in all respects" and that "all claims of Plaintiffs against [AFA] are hereby DISMISSED with prejudice in their entirety. Plaintiffs shall take nothing from these claims."

ANALYSIS

The State filed a notice of appeal pursuant to section 51.014(a)(8) of the Texas Civil Practice and Remedies Code, which authorizes the interlocutory appeal of a trial court's ruling on a plea to the jurisdiction by a governmental unit. *See id.* § 51.014(a)(8). In its brief, the State asserts that the trial court erred to the extent it denied the State's plea to the jurisdiction when it granted AFA's motion and dismissed the State's claims. However, the State also asserts that, as a threshold matter, it is does not appear that this Court has jurisdiction to review the order. The State explains that although it filed its notice of appeal "[o]ut of an abundance of caution," the February 7 order on AFA's motion to dismiss does not operate as a ruling with respect to the State's plea to the jurisdiction because the order does not dismiss the State's claims. Specifically, the State points out that the February 7 order does not mention the State by name, use the term "intervenor," or mention the State's plea to the jurisdiction. Thus, according to the State, nothing from the face of the February 7 order suggests that the trial court, in fact, intended to reject the State's jurisdictional challenge and dismiss the State's claims against AFA. The State requests that this Court clarify that the order granting AFA's motion to dismiss does not apply to the State's claims and that, as a result, AFA's motion to dismiss was denied by operation of law. *See id.* § 27.005(a).

In response, AFA disputes the State's suggestion that the February 7 order is unclear with respect to the trial court's disposition of the State's claims. AFA argues that the phrase "in all respects" includes the State's claims and that because the State's claims parallel those of the plaintiffs, *i.e.* the Taxpayers, we should presume that the trial court intended to include the State when it used the term "Plaintiffs" in its order. *See In re Ford Motor Co.*, 442 S.W.3d 265, 275

(Tex. 2014) (explaining that intervenor seeking affirmative relief should be characterized as plaintiff). In addition, AFA argues that "despite the State's urgings, there is no requirement that a trial court rule directly or explicitly on a plea to the jurisdiction . . . [because] a court may implicitly deny challenges raised in a plea to the jurisdiction by ruling on the underlying matter." *See Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006) (explaining that trial court's ruling on merits constituted an implicit rejection of appellant's jurisdictional challenges); *see also* Tex. R. App. P. 33.1(a)(2)(A) (record must show that trial court ruled on request, objection, or motion, either expressly or implicitly). Thus, AFA reasons, the trial court unambiguously dismissed the State's claims and, in doing so, implicitly denied the State's plea to the jurisdiction. Alternatively, AFA requests that this Court abate the appeal to obtain clarification from the trial court.

Whether this Court has jurisdiction to consider this interlocutory appeal turns on whether the trial court rejected the State's jurisdictional challenge to AFA's motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). From the record before us, we are unable to discern whether the trial court intended to dismiss the State's claims against AFA and, in doing so, to deny the State's plea to the jurisdiction. Accordingly, we abate this appeal to permit clarification by the trial court. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (stating that appellate court can abate appeal to permit trial court to clarify intention of its order). If the trial court intended to dismiss the State's claims and to deny the State's plea to the jurisdiction, it shall modify the order to clearly evidence that intent. If the trial court did not intend to deny the State's plea to the jurisdiction and dismiss the State's claims, it shall certify this in writing. The trial court shall then

include the modified order or certification clarifying its intent in a supplemental clerk's record to be filed with the clerk of this Court on or before October 12, 2017.

It is so ordered on September 12, 2017.

Before Justices Puryear, Field, and Bourland

Abated and Remanded

Filed: September 12, 2017