

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-22-00546-CV

Texas Tech University System, Appellant

v.

**Dolcefino Communications, LLC d/b/a Dolcefino Consulting and San Angelo
Standard-Times, Appellees**

**FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-21-007069, THE HONORABLE MAYA GUERRA GAMBLE, JUDGE PRESIDING**

MEMORANDUM OPINION

Texas Tech University System filed this interlocutory appeal complaining of an implicit denial of its plea to the jurisdiction. Finding no denial of the plea on the record presented, we have no interlocutory jurisdiction and dismiss this appeal on appellee Dolcefino Communications, LLC d/b/a Dolcefino Consulting's motion to dismiss.

BACKGROUND

Dolcefino requested that the System produce documents relating to the internal investigation of Brian May, the former president of the System's Angelo State University, under the Public Information Act. May filed this suit under the Public Information Act seeking to bar the System from producing certain documents. *See* Tex. Gov't Code §§ 552.001, et seq. Dolcefino sued in Lubbock County seeking to require the System to produce the requested

documents. *See Dolcefino Comm. LLC dba Dolcefino Consulting*, DC-2021-CV-0676 (Lubbock County).

The System filed a plea in abatement contending that the Lubbock County District Court must abate its suit in favor of the dominant jurisdiction of this “inherently related” suit that was filed in Travis County before Dolcefino filed suit. After the Lubbock County District Court abated Dolcefino’s suit, Dolcefino intervened in this suit in Travis County District Court opposing May’s requested relief and making its own claims for relief.

After May nonsuited his claims in this suit, Dolcefino noticed a deposition of Ronny Wall, a System employee Dolcefino describes as the System’s public information gatekeeper. The System filed a motion to quash the deposition, asserting that Dolcefino had not consulted the System on scheduling and that the System was not available at the date and time noticed. The System also filed a plea to the jurisdiction urging that, because May’s claims were nonsuited, mandatory venue for Dolcefino’s claims was in Lubbock County, not Travis County. *See Tex. Gov’t Code § 552.321(b)*. At the hearing on the motion to quash, Dolcefino stated that its deposition of Wall would be limited to “jurisdictional discovery” concerning a particular informational request. Dolcefino proposed that the deposition of Wall in this case be held in Lubbock on September 23, 2022 when “these same parties . . . are taking a deposition of Mr. Wall next month in a different case pending in Lubbock.” The Travis County District Court denied the motion to quash, allowed the deposition “for jurisdictional discovery only” according to its notes filed as part of the clerk’s record, and set a hearing on the System’s plea to the jurisdiction for October 13, 2022.

The System filed a notice of appeal on September 6, 2022, asserting that by denying the motion to quash and ordering the System to participate in the deposition the trial

court had assumed jurisdiction and implicitly denied the System's plea to the jurisdiction. Dolcefino filed a motion to dismiss the appeal, contending that this Court lacks jurisdiction because the trial court has not denied the plea to the jurisdiction and that no other basis for jurisdiction over an interlocutory appeal exists. Dolcefino requested emergency consideration of the motion asserting that the System is using the automatic stay associated with interlocutory appeals to avoid the deposition set for September 23, 2022.

ANALYSIS

The question before us on this motion to dismiss this appeal is whether the trial court implicitly granted or denied the System's plea to the jurisdiction, thereby triggering this Court's jurisdiction over interlocutory appeals. The System argues that the trial court should have granted the plea to the jurisdiction without resort to evidence, but we cannot reach that issue unless our jurisdiction is invoked by the actual denial of the plea; the absence of a ruling is not necessarily a denial of the plea.

Texas permits appeals from an interlocutory order that grants or denies a plea to the jurisdiction by a governmental unit. Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). The Texas Supreme Court has held that trial-court actions that implicitly deny pleas to the jurisdiction satisfy section 51.014(a)(8) and give courts of appeals jurisdiction to consider interlocutory appeals from that implicit denial. *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006) (by granting partial summary judgment on merits, court implicitly overruled plea to the jurisdiction). That court has also held that trial courts considering a plea to the jurisdiction have broad discretion to allow reasonable opportunity for targeted discovery. *Mission Consol. Indep.*

Sch. Dist. v. Garcia, 372 S.W.3d 629, 642-43 (Tex. 2012) (citing *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex.2004)).

In a case in which a trial court granted a continuance regarding a state entity's plea to the jurisdiction and allowed additional discovery, this Court rejected the state entity's contention that the trial court had thereby implicitly denied its plea to the jurisdiction; this Court dismissed the interlocutory appeal of the alleged implicit denial of the plea for want of jurisdiction. *Texas Dep't of Pub. Safety v. Salazar*, No. 03-11-00206-CV, 2011 WL 1469429, at *1 (Tex. App.—Austin Apr. 19, 2011, no pet.) (mem. op); *see also Abbott v. Doe*, No. 03-22-00107-CV, 2022 WL 710093, at *2 (Tex. App.—Austin Mar. 9, 2022, no pet.) (mem. op.) (trial-court actions that do not reach merits do not implicitly deny pleas to the jurisdiction).

In this case, the trial court has not ruled on the plea to the jurisdiction. It did not explicitly overrule the System's plea to the jurisdiction as it set a hearing on the plea to the jurisdiction on October 13, 2022—twenty days after the deposition date. The denial of the motion to quash did not implicitly overrule the plea because discovery into the basis for the plea is permitted. *See Mission*, 372 S.W.3d at 642-43; *Salazar*, 2011 WL 1469429, at *1. Dolcefino asserted at the hearing that it sought discovery limited to the jurisdictional issue in this cause and the trial court denied the motion to quash the deposition on that basis. The System argues here that the trial court did not set any manageable limitation nor did Dolcefino's counsel request any specific jurisdictional discovery other than labelling the requested deposition as "jurisdictional" at the hearing. But we are not persuaded that any lack of specificity in the order rises to the level of implicitly denying the plea to the jurisdiction that the trial court has expressly set for hearing after the deposition.

The System argues that its plea can be decided purely on the pleadings because Dolcefino's claims can be brought only in Lubbock County. It cites cases holding that a trial court abused its discretion by denying a plea to the jurisdiction because some discovery was not complete when the undisputed facts show that the plea should be denied. *See City of Kemah v. Vela*, 149 S.W.3d 199, 205 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). The System also notes the Texas Supreme Court's holding that when the consideration of jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that the determination must be made as soon as practicable. *Miranda*, 133 S.W.3d at 227.

But the System has not shown that the trial court denied its plea to the jurisdiction by allowing the deposition. Courts can permit discovery into the basis for the exercise of jurisdiction before the trial court rules on the plea. *Salazar*, 2011 WL 1469429, at *1. The deposition permitted was limited by Dolcefino's counsel and by the trial court to "jurisdictional discovery" and was appended to a deposition involving these parties in Lubbock County where the System argues the claims in this case must be decided. At the same hearing in which the trial court denied the motion to quash, it set the hearing on the plea to the jurisdiction for hearing on October 13, 2022, subject to being held sooner if Dolcefino's trial set in another case settled. It is hard to imagine a more explicit non-ruling on a plea to the jurisdiction, coupled with a clear intention to rule on the plea as soon as is practicable.

CONCLUSION

Because the plea to the jurisdiction has not been explicitly or implicitly granted or denied and no other basis for jurisdiction has been proposed or is evident, we lack jurisdiction over this interlocutory appeal. We grant Dolcefino's motion to dismiss this appeal for want of jurisdiction and dismiss the appeal.

Darlene Byrne, Chief Justice

Before Chief Justice Byrne, Justices Triana and Smith

Dismissed for Want of Jurisdiction

Filed: September 20, 2022