Mandamus conditionally granted and Order entered January 31, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00485-CV

IN RE DISNEY DTC, LLC N/K/A DISNEY PLATFORM DISTRIBUTION, INC., HULU, LLC AND NETFLIX, INC., Relators

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Original Proceeding from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-22-09128

OPINION

Before Justices Pedersen, III, Nowell, and Miskel
Opinion by Justice Pedersen, III

In this original proceeding, relators seek mandamus relief from the trial court's denial of their Rule 91a motion to dismiss. We conditionally grant the requested relief. Also pending in this Court is a motion to vacate our order staying proceedings below filed by the real parties in interest. We deny the motion as moot.

BACKGROUND

In 2005, the Legislature added Chapter 66 of the Texas Public Utility Regulatory Act (PURA) in an effort to "streamline state and municipal regulation

of cable service providers." House Comm. on Regul. Indus., Bill Analysis, Tex. H.B. 13, 79th Leg., 2d C.S. (2005). Prior to these amendments, each cable provider had to negotiate a franchise agreement with each affected municipality before entering the market. This was an "expensive and inefficient process" that resulted in a "maze of regulations" creating a barrier to entry for cable competitors. *Id.* at 20.

Chapter 66 set up a statewide franchise to eliminate the need to negotiate individual agreements. Through these amendments, the legislature placed in the Public Utility Commission (PUC) exclusive authority to issue a state-wide franchise authorizing the construction and operation of a cable or video services network in public rights-of-way. *See* TEX. UTIL. CODE ANN. § 66.002(5). In exchange, the holder of such franchise is required to pay a five percent franchise fee to each municipality in which a provider operates. *See id.* § 66.005(a).

In the underlying action, thirty-one Texas municipalities sued streaming providers Disney+, Hulu, and Netflix (the relators in this original proceeding). The municipalities allege that, under PURA, the streaming providers must pay each municipality five percent of their gross revenues derived from operations in that municipality. In their suit, the municipalities seek various types of relief. They request declaratory relief, asking the court to declare that the streaming providers have violated PURA by failing to obtain a state-issued certificate of franchise

authority and failing to pay franchise fees to municipalities. The municipalities also seek injunctive relief, asking the court to enjoin the streaming providers from using municipal public rights-of-way unless they comply with PURA. The municipalities also request an accounting of the franchise fees owed. The municipalities further assert a trespass claim against the streaming providers for wrongfully entering and using the public rights-of-way by delivering video programming to Texas customers (1) without obtaining the proper state-issued certificate of franchise authority from the commission, (2) without obtaining authorization from municipalities, and (3) without paying franchise fees. The municipalities additionally press a claim for unjust enrichment, arguing that the streaming providers have been unjustly enriched by avoiding payment of franchise fees. Last, the municipalities ask for attorney's fees.

The streaming providers filed a Rule 91a motion to dismiss. In their motion, they argued (1) the municipalities cannot enforce PURA's franchise obligations against non-franchise holders like relators and (2) streaming providers like relators are not required to obtain franchises because they do not construct or operate facilities on public rights-of-way.

On April 17, 2023, the trial court denied the Rule 91a motion to dismiss. This mandamus proceeding followed. This panel granted a stay of the proceedings in the trial court on May 31, 2023.

<u>ANALYSIS</u>

Entitlement to mandamus relief requires relators to show the trial court has clearly abused its discretion and that they have no adequate appellate remedy. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). The Texas Supreme Court has explained that "[m]andamus relief is appropriate when the trial court abuses its discretion in denying a Rule 91a motion to dismiss." *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding); *see also In re Com. Credit Grp. Inc.*, No. 05-21-00115-CV, 2021 WL 1884657, at *3 (Tex. App.—Dallas May 11, 2021, orig. proceeding) (mem. op.) ("Mandamus review is available when a trial court's misapplication of the law results in the denial of a motion to dismiss under Rule 91a.").

Under Rule 91a, a party may move for dismissal on the ground that a cause of action has no basis in law. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." TEX. R. CIV. P. 91a.1. In ruling on a Rule 91a motion to dismiss, a trial court may not consider evidence but "must decide the motion based solely on the pleading of the cause of action, together with any [permitted] pleading exhibits." TEX. R. CIV. P. 91a.6. Whether a defendant is entitled to dismissal under the facts alleged is a legal question. *See City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam).

Although PURA expressly provides a cause of action for municipalities, it is specifically limited to disputes about compensation from franchise fees. *See* UTIL. § 66.005(b). The statute makes clear that only holders of a "state-issued certificate of franchise authority" are required to pay franchise fees. *See* UTIL. §§ 66.002(6)(A), 66.005(a). Therefore, we conclude the statute does not provide municipalities with an express cause of action against non-franchise holders. The municipalities have not alleged the streaming providers are franchise holders. Nor do they dispute that the streaming providers are non-franchise holders.

Drawing this distinction between franchise holders and non-franchise holders is consistent with the statute's wording, which uses different language for a holder of a state-issued certificate of franchise authority and the separate concept of a service provider. "[F]undamental principles" of statutory interpretation require courts to "give effect to all the words of a statute and not treat any statutory language as surplusage[,] if possible." *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000). Failing to restrict municipalities' cause of action to suits against "holders" and using the term "holder" interchangeably with "service provider" would treat "holder" as surplusage.

We find persuasive the district court's reasoning in *City of New Boston v. Netflix, Inc.*, 565 F. Supp. 3d 865 (E.D. Tex. 2021), which involved a similar putative class action suit under PURA. In that case, the City of New Boston had

filed a class action suit for violation of Texas Utilities Code section 66.005(a) on behalf of all Texas municipalities against Netflix and Hulu. *See id.* at 866. Netflix and Hulu moved to dismiss the suit for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See id.* The district court granted the motions. *See id.* The district court reasoned that under the statute's clear language, the provider must be "the holder of a state-issued certificate of franchise authority" to incur a franchise fee. *See id.* at 867; *see also* UTIL. §§ 66.002(6)(A), 66.005(a). The court observed that, in drafting the statute, the legislature used different language for the holder of a state-issued certificate of franchise authority and the separate concept of "video service provider" and the court must give effect to every word in the statute. *See City of New Boston*, 565 F. Supp. 3d at 867–68. Because there was no dispute that neither Hulu nor Netflix was a holder of a state-issued certificate of franchise authority, the court concluded that the plaintiff was not entitled to franchise fees from them. *See id.* at 868.

This Court cannot bypass the state's authority to declare who holds a state-issued certificate of franchise authority for municipalities. The language inserted into the statute about the holder of a certificate of franchise authority demarcates the line of authority between municipalities and the state. The statute grants municipalities limited enforcement authority, which is restricted to the authority to regulate holders of state-issued certificates of franchise authority. *See* UTIL. §

66.011 (Municipal Police Power; Other Authority), § 66.013 (Municipal Authority) (referring to municipalities' powers to regulate only vis-à-vis holders of state-issued certificates of franchise authority). But before a certificate of franchise is issued, the PUC, through the attorney general, is the body which determines who should be a holder of such a certificate and to enforce compliance if a party improperly fails to file for a certificate. *See* UTIL. § 15.021(a) ("The attorney general, on the request of the commission, shall apply in the name of the commission for a court order under Subsection (b) if the commission determines that a public utility or other person is: (1) engaging in or about to engage in an act that violates this title or an order or rule of the commission entered or adopted under this title; or (2) failing to comply with the requirements of this title or a rule or order of the commission."). To allow a municipal plaintiff to bypass the PUC would undermine the regulatory scheme set forth in the statute and its overall purpose to centralize the issuance of franchises in one statewide body.

While our construction of PURA is supported by a plain-meaning reading of the statute, this Court may also consider persuasive authority from other jurisdictions with similar statutory schemes. *See Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 63 (Tex. 2015) (finding instructive an examination of similar statutes from other jurisdictions). Louisiana and Georgia both have parallel statutory schemes under which cable operators and video service providers must

obtain franchises to provide services in exchange for a percentage of the gross revenues paid to the affected municipalities. The Louisiana Court of Appeals has recently held that Louisiana municipalities had "no right of action" pursuant to similar statutory language because internet streaming providers do not "hold a franchise certificate." *City of Kenner v. Netflix Inc*., 366 So. 3d 642, 647 (La. Ct. App. 2023). The Court of Appeals for the State of Georgia has recently held the same for Georgia municipalities. *See Gwinnett Cnty. v. Netflix Inc*., 885 S.E.2d 177, 184 (Ga. Ct. App. 2023).

Other courts addressing the "holder" language in parallel state statutes have similarly held that municipalities have no express cause of action to sue "non-holders" such as relators. *See City of E. St. Louis v. Netflix, Inc.*, 630 F. Supp. 3d 1003, 1013 (S.D. Ill. 2022) (holding that statutory scheme did not permit municipalities to sue non-franchise holders); *City of Lancaster v. Netflix, Inc.*, No. 21STCV01881, 2022 WL 1744233, at *4 (Cal. Super. Ct. Apr. 13, 2022) (same). Here, too, we conclude PURA provides municipalities with a limited cause of action to sue franchise holders and that it does not extend to non-franchise holders.

We also conclude that PURA contains no clearly implied cause of action for municipalities to sue non-franchise holders. The Texas Supreme Court has held that "the existence of a private cause of action must be clearly implied in the statutory text." *Tex. Med. Res., LLP v. Molina Healthcare of Tex., Inc.*, 659 S.W.3d

424, 431 (Tex. 2023). "[T]he bar for implying a private cause of action is high." *Id.* Under this rule, "causes of action may be implied only when a legislative intent to do so appears in the statute as written." *Brown v. De La Cruz*, 156 S.W.3d 560, 567 (Tex. 2004). Courts must exercise caution when they are asked to imply a cause of action where the legislature did not expressly provide for one because "[t]he very balance of state governmental power imposed by the framers of the Texas Constitution depends on each branch, and particularly the judiciary, operating within its jurisdictional bounds." *Tex. Med. Res., LLP*, 659 S.W.3d at 432 (alteration in original) (quoting *Brown*, 156 S.W.3d at 569).

Here, we conclude the municipalities cannot meet the "high bar" of implying a cause of action. PURA vests exclusive franchising authority in the PUC. Only the attorney general and PUC have the power to instigate a suit or levy administrative penalties for noncompliance with PURA's franchise requirements. *See* UTIL. §§ 15.021, 15.023. As explained above, PURA also expressly limits a municipality's cause of action to compensation disputes with "holders." Nothing in the statute suggests that the legislature intended to establish a cause of action for municipalities against non-franchise holders.

Further, as the streaming providers point out, courts addressing similar statutes in other states have likewise refused to recognize implied causes of actions for municipalities. *See City of Maple Heights v. Netflix, Inc.*, 215 N.E.3d 500, 506–

07 (Ohio 2022); *City of Reno v. Netflix, Inc.*, 52 F.4th 874, 878 (9th Cir. 2022); *City of Ashdown v. Netflix, Inc.*, 52 F.4th 1025, 1028 (8th Cir. 2022); *City of Lancaster v. Netflix*, No. 21STCV01881, 2021 WL 4470939, at *5 (Cal. Superior Ct., Sep. 20, 2021); *Gwinnett Cnty*, 885 S.E.2d at 183; *Borough of Longport v. Netflix, Inc.*, No. CV-21-15303-SRC-MAH, 2022 WL 1617740, at *3 (D.N.J. May 20, 2022). As a result, implying a private cause of action here would undercut the Legislature's grant of the PUC's exclusive franchising authority and impermissibly expand the statute without support in the statute's text.

Although the municipalities insist that a right of action can be implied because PURA was intended to benefit municipalities by establishing a five percent franchise fee to be paid to them, the supreme court has outright rejected a "rule of necessary implication." Under the rule of necessary implication, "when a legislative enforcement scheme fails to adequately protect intended beneficiaries, the courts must imply a private cause of action to effectuate the statutory purposes." *Tex. Med. Res., LLP*, 659 S.W.3d at 432. Thus, because the supreme court has repudiated this rule, it is not sufficient here that the municipalities are an intended beneficiary of the statute. *See id.*

To the extent that the municipalities seek declaratory relief stating that the streaming providers were required to obtain a certificate of franchise authority, the Texas Uniform Declaratory Judgments Act also does not provide municipalities

with an independent right of action. It is well-established that the UDJA "does not confer jurisdiction on a trial court but rather makes declaratory judgment available as a remedy for a cause of action already within the court's jurisdiction." *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (orig. proceeding) (per curiam) (holding that mere request for declaratory judgment does not establish jurisdiction); *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Without a predicate cause of action, the municipalities' declaratory relief claim fails.

Moreover, we conclude PURA's exclusive grant of franchising authority to the PUC precludes granting the requested declaratory relief. In addressing plaintiff's request for declaratory relief stating that Hulu and Netflix were required to obtain a state-issued certificate of franchise authority, the district court in *City of New Boston* determined that it lacked authority to declare that defendants are, and should have always been, holders of a state-issued certificate of franchise authority. *See City of New Boston*, 565 F. Supp. 3d at 869–70. As the court observed, the statute defines "franchise" as an authorization "issued by a franchising authority" and designates the PUC as the franchising authority. *Id.* at 868. This authority is not qualified in any way; nor does the statute carve out any basis upon which the district court may also function as a franchising authority. *See id.* The district court thus reasoned that only the PUC had the authority to

determine who holds a state-issued certificate of franchise. *Id.* The same conclusion is warranted here.

To the extent the municipalities argue that they can also pursue their alternative claims for unjust enrichment and trespass, we disagree. The municipalities' trespass and unjust enrichment claims are based on their argument that relators should be deemed franchise holders, as are their claims for accounting and for attorney's fees. Because, as explained above, it is not the court's place to make this determination, these claims rise and fall together with the PURA claims.

CONCLUSION

The trial court abused its discretion by denying the Rule 91a motion. Accordingly, we conditionally issue a writ of mandamus compelling the trial court to (1) vacate its denial order and (2) grant the Rule 91a motion to dismiss. Moreover, the motion to vacate our stay order is denied as moot.

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/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE