Opinion issued February 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00996-CV

JOSEPH W. & MICHELLE G. KELLY, AS THE PROPERTY OWNERS AND THE PROPERTY OWNERS, Appellants

V.

HARRIS COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF HARRIS COUNTY APPRAISAL DISTRICT, Appellees

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On Appeal from the 127th Judicial District Court
Harris County, Texas
Trial Court Case No. 2006-58443

MEMORANDUM OPINION

In this ad valorem property tax case, appellants, Joseph W. and Michelle G. Kelly, as real property owners, challenge the trial court's rendition of summary

judgment in favor of appellees, the Harris County Appraisal District ("HCAD") and the Appraisal Review Board of Harris County (the "ARB") (collectively, the "taxing authorities"), on the Kellys' claims that the subject real property was unequally and excessively appraised. In their sole issue, the Kellys contend that the trial court erred in granting summary judgment in favor of the taxing authorities on the ground that they had agreed upon the appraisal value of the subject property at an ARB hearing.[1]

We affirm.

Background

The Kellys own a 5,257 square foot single-family residence in Harris County, Texas. For tax year 2006, HCAD appraised the property as having a market value of $1,538,766 and assessed ad valorem taxes on the property based on that value. The Kellys filed a protest of that valuation and designated an agent to act as their representative at an administrative hearing, which was held before a three-member panel of the ARB. At the beginning of the hearing, the Kellys' agent, Thomas Orsak, signed and submitted a written statement to the ARB expressing his opinion that the property had a value of $1,365,210. Orsak and Shelly Summers, who represented HCAD's chief appraiser, attended the hearing at which the representatives of the parties offered the following sworn testimony:

[1] *See* TEX. TAX. CODE ANN. § 1.111(e) (Vernon 2008).

[Summers]: Account 0914350000004. My name is Shelly Summers, and I am under oath.

[Owner's Agent]: I'm Thomas Orsak, and I am under oath. And it hasn't been sold in the last year.

[Board Member]: And your opinion of value?

[Owner's Agent]: My opinion of value is 1,365,210.

. . . .

[Owner's Agent]: My basis in value is the ISD ratio which actually takes the subject property sale at 1,379,000 times 0.99 for 1,365,210. . . . So, 1,379,000 times the 0.99 is my opinion of value at 1,365,210 since there are no other comparable sales since then.

[Board Member]: Any comments or questions from the panel? No?

[Summers]: Our comparable property analysis is a random sample of nine properties in the area and then properly adjudged for the differences between two to get a median market value. In this case, the median market value is 1,628,900. We noticed the property at 1,538,766. Therefore, there is no unequal within the area. Looking at the ISD, this does show an unequal with the indicated market value which would be the sales price since this total remodel back in 2003 of 1,379,000. So, therefore, there is some unequal within the ISD. Therefore, the district's recommendation is 1,365,210.

[Board Member]: Okay. Any comments or questions from the panel? If not, we're going to go to Mr. Orsak. You don't have anything else, Mr.

> Orsak? Okay, we'll close testimony. Concur?
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> [Board Member]: Concur.
>
> [Board Member]: Panel has reached a decision regarding the account ending in 0004 for the tax year 2006 based on testimony that was presented to the panel to determine that the property was unequally appraised and set a value at $1,365,210.

After the hearing, the ARB subsequently ordered HCAD to correct the appraisal role accordingly, and the ARB sent to the Kellys a copy of its order, which informed the Kellys as follows:

> YOU HAVE THE RIGHT TO APPEAL THIS ORDER TO THE DISTRICT COURT. IF YOU WANT TO APPEAL, YOU SHOULD CONSULT AN ATTORNEY IMMEDIATELY. YOU MUST FILE A PETITION WITH THE DISTRICT COURT WITHIN 45 DAYS OF THE DATE YOU RECEIVE THIS NOTICE.

In September 2006, the Kellys filed suit against the taxing authorities, alleging that the property had been unequally and excessively appraised. The taxing authorities answered with a general denial and later moved for summary judgment "based on the agreement of value between the parties" and the enforceability of the agreement.[2] In response, the Kellys denied the existence of any agreement between its agent and the chief appraiser of HCAD as to the value of the property.

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[2] *See id.*

Standard of Review

Summary judgment is proper only when the evidence shows that there are no issues of material fact and that the moving party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). We may affirm a summary judgment only when the record shows that a movant has disproved at least one element of each of the plaintiff's claims or has established all of the elements of an affirmative defense as to each claim. *Id*.; *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). The movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.* In deciding whether there is a disputed material fact issue precluding summary judgment, proof favorable to the non-movant is taken as true, and the court must indulge every reasonable inference and resolve any doubts in favor of the non-movant. *Nixon v. Mr. Prop. Mgmt. Co*, 690 S.W.2d 546, 548–49 (Tex. 1985).

Analysis

In their sole issue, the Kellys argue that the trial court erred in granting summary judgment in favor of the taxing authorities because (1) no agreement as to the appraised value of the property existed between the Kellys and the chief appraiser, (2) the Kellys have an "absolute" statutory right to seek a judicial appeal from any order determining the appraised value of the property made by the ARB, and (3) the denial of an appeal violates their due process rights.

In their summary-judgment motion, the taxing authorities asserted that the Kellys' claims, as a matter of law, are barred because they, through their designated agent, had reached a final and enforceable agreement with HCAD as to the value of the subject property. They also asserted that the Tax Code precludes the Kellys from contesting the appraisal in the trial court. *See* TEX. TAX CODE ANN. § 1.111(e) (Vernon 2008).

In pertinent part, section 1.111(e) provides as follows:

> (e) An agreement between a property owner or the owner's agent and the chief appraiser is *final* if the agreement relates to a matter:
>
> (1) which may be protested to the appraisal review board or on which a protest has been filed but not determined by the board

Id. (emphasis added).

Generally, a property owner is entitled to appeal an order of the appraisal review board determining a protest by the property owner. TEX. TAX CODE ANN. § 42.01(1)(A) (Vernon 2008). However, section 1.111(e) agreements are "final and not subject to protest by the property owner or subject to a property owner's statutory suit for judicial review under chapter 42." *MHCB (USA) Leasing and Finance Corp. v. Galveston Cent. Appraisal Dist.*, 249 S.W.3d 68, 84 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see* TEX. TAX CODE ANN. §§ 41.01(b), 42.01(1)(A) (Vernon 2001); *Sondock v. Harris County Appraisal Dist.*,

231 S.W.3d 65, 69 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *BPAC Tex., L.P. v. Harris County Appraisal Dist.*, No. 01-03-01238-CV, 2004 WL 2422033, at *3 (Tex. App.—Houston [1st Dist.] October 28, 2004, no pet.) (mem. op.).

The Kellys argue that their appeal is not precluded by section 1.111(e) because "no agreement with the chief appraiser was made as required by section 1.111(e) of the code." They emphasize that the "order nowhere states or confirms that any agreement was made regarding the value between the property owner's agent and the chief appraiser (or the appraisal district for that matter)." They assert that the taxing authorities "offered no summary judgment evidence whatsoever supporting any contention that the chief appraiser, as opposed to the appraisal district, was a party to any agreement."

The Kellys note that this Court and the Court of Appeals for the Fourteenth District have issued several opinions[3] that at "first blush" seem to be controlling, but assert that these cases "are all easily distinguishable." They argue that because

[3] *See Loposer v. Harris County Appraisal Dist.*, 14-07-00956-CV, 2009 WL 2146151 (Tex. App.—Houston [14th Dist.] July 21, 2009, no pet.) (mem. op); *Amidei v. Harris County Appraisal Dist.*, No. 01-08-00833, 2009 WL 2050974 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.); *Verm v. Harris County Appraisal Dist.*, No. 14-06-01046-CV, 2008 WL 2580041 (Tex. App.—Houston [14th Dist.] July 1, 2008, no pet.) (mem. op.); *Mann v. Harris County Appraisal Dist.*, No. 01-07-00436-CV, 2008 WL 1747807 (Tex. App.—Houston [1st Dist.] Apr. 17, 2008, no pet.) (mem. op.); *Hartman v. Harris County Appraisal Dist.*, 251 S.W.3d 595 (Tex. App.—Houston [1st Dist.] 2007, no pet); *Sondock v. Harris County Appraisal Dist.*, 231 S.W.3d 65 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *BPAC Texas, LP v. Harris County Appraisal Dist.*, No. 01-03-01238-CV, 2004 WL 2422033 (Tex. App.—Houston [1st Dist.] Oct. 28, 2004, no pet.) (mem. op.).

the cases "hinge[d] upon an agreement" between the agent of the property owner agent and HCAD the "issue" of whether the purported agreements were in fact made with the chief appraiser "was never raised or discussed," and the agreements were not shown to be with the chief appraiser as required by statute," "each of those decisions was incorrect and contrary to law."

After the parties filed their briefs with this court, the Fourteenth Court of Appeals issued an opinion addressing the issue of whether an agreement with an HCAD representative is an agreement with the chief appraiser under section 1.111(e). *See KM TS Spring Cypress L.L.C. v. Harris County Appraisal Dist.*, No. 14-09-00978-CV, 2010 WL 3921126, at *1 (Tex. App.—Houston [14th Dist.] Oct. 7, 2010, no. pet. h.) (mem. op.). In *KM TS*, the property owners argued that their appeal to the trial court was not precluded by their appraisal agreement because they had no agreement with the chief appraiser and section 1.111(e) requires such an agreement to be between the property owner or the owner's agent and the chief appraiser. *Id*. The court rejected the property owners' argument and held that an agreement between a property owner and an HCAD representative is an agreement under section 1.111(e) that precludes appeal. *KM TS*, 2010 WL 3921126, at *2. It noted that the Tax Code allows a chief appraiser to delegate authority to his employees. *See* TEX. TAX CODE ANN. § 6.05(e) (Vernon 2008), § 41.45(c) (Vernon Supp. 2010).

Here, similarly, the Kellys' agent and a representative of HCAD agreed to the value of the Kellys' property at their protest hearing. The Tax Code does state, "The chief appraiser shall appear at each protest hearing before the appraisal review board to represent the appraisal office." TEX. TEX. CODE ANN. § 41.45(c). However, the "chief appraiser may delegate authority to his employees." *Id.* § 6.05(e). In fact, it is not uncommon for an HCAD representative to appear at protest hearings on behalf of the chief appraiser. *See Sondock*, 231 S.W.3d at 69 (at protest hearing, "HCAD's representative" offered an opinion on value of the property); *Loposer v. Harris County Appraisal Dist.*, No. 14-07-00956-CV, 2009 WL 2146151, at *1 (Tex. App.—Houston [14th Dist.] July 21, 2009, no pet.) (mem. op.) ("HCAD's representative" testified at protest hearing to property's market value); *Prince v. Harris County Appraisal Dist.*, No. 14-07-00919-CV, 2009 WL 20975, at *1 (Tex. App.—Houston [14th Dist .] Jan. 6, 2009, no pet.) (mem.op.) ("an HCAD representative" appeared at protest hearing); *Mann v. Harris County Appraisal Dist.*, No. 01-07-00436-CV, 2008 WL 1747807, at *1 (Tex. App.—Houston [1st Dist.] Apr. 17, 2008, no pet.) (mem. op.) ("[E.W.] represented HCAD's chief appraiser at the protest hearing").

The Kellys assert that the above cases are distinguishable because the property owners did not raise the issue of whether the chief appraiser was present to enter an agreement. As noted above, a chief appraiser has the authority to

delegate his duties and to have a representative appear at protest hearings. TEX. TAX CODE ANN. §§ 6.05(e), 41.45(c). Here, the ARB held a protest hearing, an HCAD representative appeared on behalf of the chief appraiser, no objection was made that the chief appraiser was not present, and, during the hearing, an agreement was made between the Kellys agent and the HCAD representative as to the value of the property. We hold that the agreement is final and not subject to protest or subject to judicial review under chapter 42. *MHCB*, 249 S.W.3d at 83; *see* TEX. TAX CODE ANN. §§ 41.01(b), 42.01(1)(A).

The Kellys further assert that they had an "absolute right to appeal" to the trial court because the ARB issued an order which authorized the appeal and the tax code provides that a property owner is "entitled" to appeal an order of an appraisal review board. TEX. TAX CODE ANN. § 42.21(a). However, a section 1.111(e) agreement is final regardless of whether it is later approved or adopted by the board. *Sondock*, 231 S.W.3d at 69; *Mann*, 2008 WL 1747807, at *5. At the moment an agreement is reached, it becomes final, thus, rendering any subsequent determinations by the board regarding the value irrelevant. *Sondock*, 231 S.W.3d at 69. At the time the agreement between the Kellys and HCAD's representative was reached, the board had not determined the Kellys protest of the initial appraised value of the property. Because the agreement became final, and the subsequent approval and order by the board was irrelevant, the Kellys did not have

an ARB order to appeal. *See Mann*, 2008 WL 1747807, at *6 ("we conclude that the protest was not 'determined by the Board,' even though, after the parties reached an agreement, the Board entered an 'Order determining Protest' that set the appraised value at the amount agreed to by the parties").

The Kellys also assert that the denial of their appeal to the trial court violates their right to due process. However, this Court previously considered and rejected the same argument in *Mann*, *Hartman*, and *BPAC*. *See Mann*, 2008 WL 1747807, at *6; *Hartman*, 251 S.W.3d at 601; *BPAC*, 2004 WL 2422033, at *3. Likewise, the Fourteenth Court of Appeals has rejected this argument. *See KM TS*, 2010 WL 3921126, at *3; *Sondock*, 231 S.W.3d at 70.

It is well-established that the collection of taxes constitutes deprivation of property; therefore, a taxing authority must afford a property owner due process of law. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36–37, 110 S. Ct. 2238, 2250–51, (1990). Texas courts have held that "[d]ue process simply affords a right to be heard before final assessment; it does not detail the review mechanism." *ABT Galveston Ltd. P'ship v. Galveston Cent. Appraisal Dist.*, 137 S.W.3d 146, 155 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (quoting *Dallas County Appraisal Dist. v. Lal*, 701 S.W.2d 44, 47 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)); *see Mann*, 2008 WL 1747807, at *6; *Hartman*, 251 S.W.3d at 601; *Sondock*, 231 S.W.3d at 70; *BPAC*, 2004 WL 2422033, at *3. In

cases involving taxation, due process is satisfied if a taxpayer is given an opportunity to be heard before an assessment board at some stage of the proceedings. *See Mann*, 2008 WL 1747807, at *6; *Hartman*, 251 S.W.3d at 601 *Sondock*, 231 S.W.3d at 70; *BPAC*, 2004 WL 2422033, at *3. The courts in *Mann*, *Hartman*, *Sondock*, and *BPAC* each held that the property owners were not deprived of their statutory due process rights when they were given an opportunity to be heard before a review board and reached an agreement with the taxing authority at that review. *Hartman*, 251 S.W.3d at 601; *Sondock*, 231 S.W.3d at 70; *BPAC*, 2004 WL 2422033, at *3.

Here, the Kellys filed a protest and were given an opportunity to present arguments before the ARB. HCAD's representative agreed with the Kellys' valuation of the subject property and the Kellys made no objections or final comments, even though they were given the opportunity to do so. We conclude that the Kellys' due process rights were not violated because they were given an opportunity to be heard before the ARB and they reached an agreement with HCAD during their protest review.

Accordingly, we hold that the trial court did not err in granting summary judgment in favor of the taxing authorities. We overrule the Kellys' sole issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.