

Opinion issued October 26, 2017



In The
Court of Appeals
For The
First District of Texas

NO. 01-17-00042-CV

HOA DAO AND KEYSTONE MANAGEMENT, Appellants
V.
HARRIS COUNTY APPRAISAL DISTRICT, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2014-40291

MEMORANDUM OPINION

In this ad valorem property tax case, Hoa Dao and Keystone Management (collectively, “Hoa Dao”) appeal the trial court’s order granting Harris County Appraisal District’s (“HCAD”) motion to dismiss Hoa Dao’s suit challenging the

appraised value of real property for the 2014 tax year. In two issues, Hoa Dao contends that the trial court erred in granting HCAD's motion because (1) the dismissal violates several provisions of the federal Bankruptcy Code and, (2) alternatively, she substantially complied with Texas Tax Code section 42.08. We affirm.

Background

On July 15, 2014, Hoa Dao sued HCAD to protest the value of real property for ad valorem purposes. The petition alleged that "Plaintiffs [Hoa Dao and Keystone Management] own the commercial offices building situated at 2218 Northpark Drive, Kingwood, Texas." On July 30, 2014, HCAD filed a general denial.

On May 28, 2015, HCAD filed a motion to dismiss Hoa Dao's suit for lack of subject matter jurisdiction. In its motion, HCAD contended that Hoa Dao had not paid the 2014 ad valorem taxes assessed for the property prior to the delinquency date and, in failing to do so, had forfeited her right to proceed to a final determination of the appeal. On June 29, 2015, Hoa Dao filed a response to HCAD's motion, asserting that Huy Can Dao had paid the 2014 taxes on March 18, 2015, and that the late payment was "an exceptional circumstance" under the federal Bankruptcy

Code.¹ Huy Can Dao is not a party to this proceeding.²

The trial court granted HCAD's motion to dismiss on October 19, 2016. Hoa Dao filed a motion for reconsideration, rehearing, or alternatively, new trial. The trial court denied the motion. This appeal followed.

Applicability of Bankruptcy Code

In her first issue, Hoa Dao contends that the trial court erred in granting HCAD's motion to dismiss because federal bankruptcy law preempts application of Tax Code section 42.08. Specifically, she argues that Huy Can Dao, as the property's co-owner and a bankruptcy debtor, was entitled to the protections afforded under 11 U.S.C. sections 108, 362, and 549, and therefore, the trial court's order of dismissal violates federal law.

A. Applicable Law

“A property owner is entitled to protest before the appraisal review board . . . determination of the appraised value of the owner's property[.]” TEX. TAX CODE ANN. § 41.41(a)(1) (West 2015). An owner may appeal an order of the appraisal review board determining a protest by the owner as provided under section 41.41.

¹ Hoa Dao attached to her response exhibits reflecting that Huy Can Dao filed a voluntary petition for Chapter 13 bankruptcy on January 2, 2015, and that he paid the 2014 taxes on the property.

² The record does not reflect the relationship between Huy Can Dao and Hoa Dao or Keystone Management.

Id. § 42.01(a)(1)(A). However, a property owner who appeals must pay taxes on the property subject to the appeal before the delinquency date or the property owner forfeits the right to proceed to a final determination of the appeal. *See id.* §42.08(b). Taxes become delinquent if they are not paid before February 1 of the year following the year in which they are imposed. *See id.* § 31.02(a). Further, if the court determines that the property owner has not substantially complied with section 42.08, the court shall dismiss the pending action. *See id.* § 42.08(d).

Compliance with section 42.08’s prepayment requirement “is a jurisdictional prerequisite to [the] district court’s subject matter jurisdiction to determine [a] property owner’s rights.” *U. Lawrence Boze’ & Assocs., P.C. v. Harris Cty. Appraisal Dist.*, 368 S.W.3d 17, 23 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (quoting *Lawler v. Tarrant Appraisal Dist.*, 855 S.W.2d 269, 271 (Tex. App.—Fort Worth 1993, no writ)). Whether a trial court has subject matter jurisdiction is a question of law that we review de novo. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

B. Analysis

Based on the appraised value of her property for the 2014 tax year, Hoa Dao owed \$13,460.05 in taxes. It is undisputed that Hoa Dao did not pay any of the assessed taxes for the 2014 tax year. The record reflects that Huy Can Dao paid the taxes on the property on March 18, 2015.

Hoa Dao argues that the extension provision under 11 U.S.C. section 108(a) prevents Tax Code section 42.08 from acting as a condition precedent for the continuance of the trial court's subject matter jurisdiction. Section 108 provides, in relevant part:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

11 U.S.C. § 108 (2014).

By its plain language, section 108 does not apply to this case. Section 108 provides an extension of time for a trustee to “commence an action” when the period within which the debtor may commence an action has not expired. *See Tow v. Pagano*, 312 S.W.3d 751, 759–60 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (noting that section 108(a) “allows a trustee to commence an action on behalf of the debtor’s estate within the period allowed by state law for such an action or within two years after the filing of a petition for bankruptcy, whichever is later.”). Hao Dao is not the trustee of Huy Can Dao’s bankruptcy estate. *See id.* at 761 (“Section 108(a)’s purpose is self-evident: it is to provide *the trustee* with additional time to

evaluate and to prosecute the debtor's potential claim's as assets of the bankruptcy estate.") (emphasis added). Section 108(a) does not prevent application of section 42.08 to Hoa Dao's suit.

Hoa Dao contends that dismissal of her suit violates the automatic stay provision of 11 U.S.C. section 362. Section 362 operates as a stay, applicable to all entities, of, among things:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

....

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C. § 362(a) (2009).

Hoa Dao argues that HCAD violated section 362 when it asserted an action against Huy Can Dao and sought to collect a pre-petition tax while he was under bankruptcy protection. This argument is unavailing. A petition filed under the Bankruptcy Code operates as an automatic stay of judicial proceedings *against the debtor*. 11 U.S.C. § 362(a)(1); *Three Legged Monkey, L.P. v. Cook*, 417 S.W.3d 541, 543 (Tex. App.—El Paso 2013, pet. denied). Huy Can Dao, the debtor, is not a party to the proceeding. Hao Dao is. Further, even if Huy Can Do were a party, this suit was instituted by Hoa Dao, not against her. *See Montgomery Ward & Co.*,

Inc. v. Denton Cty. Appraisal Dist., 13 S.W.3d 828, 829–30 (Tex. App.—Fort Worth 2000, pet. denied) (“‘Against the debtor’ means that Congress intended only to stay suits filed against bankrupt debtors, not suits filed by bankrupt debtors.”).

Hoa Dao also argues that Huy Can Dao was not authorized under the Bankruptcy Code to pay the ad valorem taxes out of estate funds once the bankruptcy petition was filed. She cites to 11 U.S.C. section 549 which provides, in pertinent part:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

11 U.S.C. § 549 (2016). By its terms, section 549 addresses what a *trustee* may do to recover property of the estate. Whether Huy Can Dao was authorized to pay the taxes out of his estate or not has no bearing on Hoa Dao’s obligation, as property owner, to pay the taxes assessed on her property.

We overrule Hoa Dao’s first issue.

Substantial Compliance with Section 42.08(b)

In her second issue, Hoa Dao contends that she substantially complied with section 42.08(b) because Huy Can Dao paid the 2014 taxes in full approximately

one-and-a-half months after the delinquency date.

Section 42.08(b) requires a property owner, to avoid forfeiture of his right to file a suit for judicial review, to pay either the lesser of the amount of taxes not in dispute or the current tax liability prior to the delinquency date for the tax year. *See* TEX. TAX CODE § 42.08(b); *U. Lawrence Boze*, 368 S.W.3d at 28. Section 42.08 does not immediately require full compliance upon filing the suit for judicial review; if a property owner “substantially complies,” the owner receives a thirty-day grace period to fully comply before the trial court is required to dismiss the action. *See* TEX. TAX CODE § 42.08(d). “Substantial compliance” means “that one has performed the ‘essential requirements’ of a statute” and it “excuse[s] those deviations from the performance required by statute which do not seriously hinder the legislature’s purpose in imposing the requirement.” *Mo. Pac. R.R. Co. v. Dallas Cty. Appraisal Dist.*, 732 S.W.2d 717, 721 (Tex. App.—Dallas 1987, no writ).³

In support of her argument that she substantially complied with section 42.08, Hoa Dao relies on this Court’s decision in *Harris County Appraisal District v. Krupp*

³ In *Missouri Pacific R.R. Co. v. Dallas County Appraisal District*, the Dallas Court of Appeals identified two objectives of section 42.08(b)’s prepayment requirement: (1) to ensure that property owners “would not use the right of judicial review as a subterfuge for delaying or avoiding the payment of at least some tax”; and (2) “to assure that the activities of the local governments which relied on ad valorem taxes would not be unduly impeded by granting the property owner the right of judicial review.” 732 S.W.2d 717, 721 (Tex. App.—Dallas 1987, no writ).

Realty Ltd. Partnership, 787 S.W.2d 513 (Tex. App.—Houston [1st Dist.] 1990, no writ). In that case, Krupp sought judicial review of two final orders of the Harris County Appraisal District and its Review Board following Krupp’s protest of the appraised value of its two properties. *Id.* at 514. The trial court denied HCAD’s motion to dismiss and rendered judgment for Krupp. *See id.* On appeal, HCAD argued that Krupp had failed to substantially comply with section 42.08 because although it had paid the taxes it owed on one of its properties before the delinquency date, it had paid taxes on the other property two-and-a-half months late. *Id.* at 515. We concluded that Krupp had substantially complied with section 42.08 and affirmed the trial court’s judgment. *See id.*

Krupp is distinguishable from the case before us. Here, in contrast to *Krupp*, Hoa Dao never paid any of the assessed taxes for tax year 2014 at any time. Moreover, although Huy Can Dao, who is not a party to this proceeding, paid the 2014 taxes on the property, he did not pay any portion of the taxes until after the February 1, 2015 deadline had passed. Courts have repeatedly held that if the property owner does not pay any portion of the assessed taxes by the delinquency date, even if it later pays some or all of the taxes after the due date, the property owner has not substantially complied with section 42.08(b). *See Carter v. Harris Cty. Appraisal Dist.*, 409 S.W.3d 26, 30 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *J.C. Evans Constr. Co. v. Travis Cent. Appraisal Dist.*, 4 S.W.3d 447, 451

(Tex. App.—Austin 1999, no pet.); *Gen. Motors Acceptance Corp. v. Harris Cty. Mun. Util. Dist. No. 130*, 899 S.W.2d 821, 823 (Tex. App.—Houston [14th Dist.] 1995, no writ); *see also Cent. Appraisal Dist. of Rockwall Cty. v. Lall*, 924 S.W.2d 686, 690 (Tex. 1996) (“[A] person judicially challenging a property tax must tender at least the amount conceded to be owed in order to maintain the action.”); *Filmstrips & Slides, Inc. v. Dallas Cent. Appraisal Dist.*, 806 S.W.2d 289, 291 (Tex. App.—Dallas 1991, no writ) (“Either the time requirement is complied with or it is not. . . . [W]e are not persuaded that paying after the tax delinquency deadline will suffice because any forgiveness will eventually lead to a complete obliteration of the time requirement.”).

We addressed a similar situation in *Harris County Appraisal District v. Dipaola Realty Associates, L.P.*, 841 S.W.2d 487 (Tex. App.—Houston [1st Dist.] 1992, writ denied). There, Dipaola filed a petition for review in November 1990 regarding the assessed taxes on its properties. *Id.* at 488. Dipaola did not pay any taxes on its properties before the January 1991 delinquency date but paid the taxes in full by November 1991. *Id.* The trial court denied HCAD’s motion to dismiss Dipaola’s petition, and HCAD appealed. *Id.*

This Court concluded that the evidence was insufficient to support the trial court’s finding of substantial compliance and reversed the lower court’s judgment.

Id. at 490. In its opinion, the Court addressed DiPaola’s contention that *Krupp* was controlling:

In *Krupp*, the taxpayer *paid* all of the taxes it owed various taxing authorities *before the delinquency date* except one payment to a school district (which was paid in full within two and one-half months of the due date and 17 months before the Appraisal District’s motion to dismiss was filed). We held that the evidence was sufficient to support the trial court’s finding of substantial compliance.

The instant case, however, is far different. Rather than paying all of its taxes except a single payment in a timely fashion, Dipaola paid *no* amount of the taxes it owed on time. Where all tax payments except one are made timely, then substantial compliance is at least possible. Those cases should be determined on a case by case basis, depending in part on the size of the amount paid timely, the size of the amount left unpaid by the delinquency date, and the promptness of the late payment. Here, however, where *no* tax money was timely paid, a finding of substantial compliance is not appropriate. We believe that *Krupp* was correctly decided in its circumstances, but that it does not apply here.

Id. at 490–91 (emphasis in original).⁴

Similarly, Hoa Dao paid no taxes on the property before the delinquency date. Although Huy Can Dao paid the taxes in full on March 18, 2015, he did not pay any portion of the taxes timely. *See Carter*, 409 S.W.3d at 30; *Krupp*, 841 S.W.2d at

⁴ We also note that, in *Krupp*, HCAD filed its motion to dismiss seventeen months after *Krupp* paid its taxes in full. *See Harris Cty. Appraisal Dist. v. Krupp Realty Ltd. Partnership*, 787 S.W.2d 513, 515 (Tex. App.—Houston [1st Dist.] 1990, no writ) (noting that taxpayer satisfied legislature’s second objective to “assure that the activities of the local governments which relied on ad valorem taxes would not be unduly impeded by granting the property owner the right of judicial review.”). Here, in contrast, HCAD filed its motion to dismiss two months after Huy Can Dao paid the taxes owed on the property.

490–91. Because Hoa Dao did not pay any portion of the assessed taxes before the delinquency date, she did not substantially comply with section 42.08(b). We overrule Hoa Dao’s second issue.

Conclusion

We affirm the trial court’s judgment.

Russell Lloyd
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.