Opinion issued March 1, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00150-CV

GULSHAN R. JALLAN, Appellant

V.

PNA INVESTMENTS, LLC, SAMMY VIRANI, AND STANLEY BROUSSARD, Appellees

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On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2020-69382

MEMORANDUM OPINION

In a previous lawsuit in Galveston County, appellee PNA Investments, LLC ("PNA") alleged that Parkway Express, LLC ("Parkway")[1] breached a commercial

[1] Parkway is not a party to this appeal.

lease and that its guarantors breached an attendant guaranty agreement.[2] While the suit was pending, Parkway and its guarantors brought the instant lawsuit in Harris County against PNA, alleging breach of the lease and other claims arising from the lease; against appellee Sammy Virani ("Virani"), a PNA principal, for tortious interference with the lease; and against appellee Stanley Broussard ("Broussard") for legal malpractice. On the motion of PNA, Virani, and Broussard, the trial court dismissed the instant suit for lack of subject-matter jurisdiction. In this appeal, appellant, Gulshan R. Jallan ("Jallan"), a Parkway guarantor, contends that the trial court erred in dismissing the suit and erred in doing so "with prejudice."

We reverse and remand.

Background

On July 1, 2006, PNA, as landlord, and Parkway, as tenant, entered into a commercial lease ("Lease"), under which PNA let to Parkway a convenience store and gas station (collectively, "the Store") located in Webster, Harris County, Texas. In conjunction with the Lease, PNA entered into a guaranty agreement ("Guaranty") with Jallan, Vikas Jain ("Jain"), Gurbax Singh ("Singh"), and Anil Rameshchandra Vyas (Vyas") (collectively, "the Guarantors").[3] Under the terms of the Lease,

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[2] *PNA Invs., LLC v. Parkway Express, LLC, Anil Rameshchandra Vyas, Vikas Jain, Gulshan R. Jallan, and Gurbax Singh*, Case No. CV-0083953 (Cty. Ct. at Law No. 1, Galveston Cty., Tex.).

[3] Jain, Singh, and Vyas are not parties to this appeal.

Parkway agreed to pay PNA a rental fee beginning at $5,000.00 per month and increasing to $10,000.00 per month over the course of the 15-year term of the Lease. The Lease also provided that, "at any time on or before the last day of the 84th lease month," and on the condition that no default had occurred, PNA was granted the option to purchase the Store for $2,300,000.00. In the Lease, the parties agreed that "[a]ll claims or disputes arising out of or relating to [the Lease], or the breach thereof, and all future disputes, shall be submitted to binding arbitration." And, the parties "stipulated and agreed that any litigation relating to this lease or the premises shall be filed in Harris County, Texas." A copy of the Guaranty is not included in the record in the appeal and does not appear in the record of the court below.

It is undisputed that, subsequently, on March 19, 2019, PNA terminated the Lease, asserting that Parkway had failed to pay rent as agreed. PNA filed a forcible-detainer suit in a Harris County justice court, which resulted in an "Agreed Judgment" granting possession of the Store to PNA. On April 25, 2019, Parkway vacated the premises.

On May 9, 2019, PNA brought the previous suit in Galveston County (the "Galveston County suit")[4] against Parkway for breach of the Lease and against the Guarantors for breach of the Guaranty, along with a claim for conversion. PNA asserted that Parkway materially breached the Lease by failing to pay rent as agreed,

[4] *See id.*

damaging the Store, and removing property belonging to PNA. And, despite notice, Parkway and the Guarantors failed or refused to cure the default. PNA sought damages of $22,000.00 in past due rent for the months of March and April 2019, $300,000.00 to remedy Parkway's disrepair of the Store, and $275,000.00 for property that Parkway had wrongfully removed. Parkway and Jallan answered the suit, generally denying the allegations and asserting various affirmative defenses. No counterclaims were asserted.

On September 19, 2019, PNA entered into a Rule 11 Agreement in the Galveston County suit with Parkway and the Guarantors, pursuant to which the parties agreed to waive arbitration and a jury trial and agreed to try "all claims, counterclaims, crossclaims, etc., in this matter" to the court. In executing the Agreement, Parkway and the Guarantors were represented by Broussard. The Galveston County trial court approved the Agreement.

On October 28, 2020, while the Galveston County suit was pending, Parkway and the Guarantors brought the instant lawsuit in the 113th District Court of Harris County (the "Harris County suit" or "instant suit") against PNA, Virani, and Broussard. In their petition, Parkway and the Guarantors did not dispute that Parkway had failed to pay rent as agreed, that it lost possession of the Store in the justice court, and that the Guarantors had personally guaranteed Parkway's performance of the Lease terms. Rather, they complained that PNA had breached

the Lease by "refusing to allow Parkway the option to purchase the leased premises," as provided in the Lease. They also asserted that PNA breached the Lease by filing its lawsuit in Galveston County because the Lease required that all litigation be filed in Harris County. They alleged that "PNA further breached its agreement evidenced by the Justice Court agreement," the terms of which are not in the record before us. They brought a conversion claim against PNA, complaining that it "wrongfully took possession of the fuel remaining in the underground tanks" at the Store. And, they alleged that PNA violated the Texas Deceptive Trade Practices Act by "engag[ing] in a pattern of false, misleading and unconscionable acts, omissions or behavior." They sought a "full accounting" of Parkway's payments to PNA and Virani.

With respect to Virani, Parkway and the Guarantors alleged that he, "throughout the Lease term," had tortiously "interfered with Parkway's option to purchase" the Store.

With respect to Broussard, who had previously represented them in the Galveston County suit, Parkway and the Guarantors alleged, as pertinent here, that, "[i]n strict violation of instructions," Broussard had entered into "certain agreements" with counsel for PNA and had "failed to provide any meaningful services." Jallan asserted that, "[a]s a result of [Broussard's] ineffective representation," he "had been materially jeopardized in his defenses and claims in the Galveston County lawsuit."

On November 23, 2020, PNA and Virani filed a Motion to Transfer Venue in the instant suit, asserting that, in the Rule 11 Agreement, the parties had modified "any prior agreements," i.e., the Lease terms, "regarding venue between the parties and agreed to submit all claims[] and counterclaims between the parties to the County Court at Law No. 1 of Galveston County." They asserted that venue was proper in Galveston County because PNA and Virani were residents and PNA had maintained its registered agent there. They requested that the instant suit be transferred to Galveston County and "that it be consolidated with any case still pending in Galveston County." Subject to their Motion to Transfer, PNA and Virani also filed a Motion to Compel Arbitration. The record does not reflect that the trial court ruled on the Motion to Transfer or the Motion to Compel Arbitration.

On November 24, 2020, PNA, Virani, and Broussard filed a Motion to Dismiss for Lack of Jurisdiction in the instant suit. In the motion, they argued that Parkway and the Guarantors were named defendants in the previously filed, and still pending, Galveston County suit and that their claims constituted compulsory counterclaims that had to be raised in the Galveston County suit. Accordingly, the Harris County trial court lacked "subject-matter jurisdiction" to hear their claims. And, because the Lease served as the "foundation of" the claims in both courts, "continuing, exclusive jurisdiction rest[ed] with the Galveston County Court."

On December 15, 2020, after a hearing, the Harris County trial court granted the Motion to Dismiss for Lack of Jurisdiction and dismissed the claims by Parkway and the Guarantors with prejudice. On December 18, 2020, Parkway and the Guarantors filed a motion for reconsideration, which the trial court denied.

Subsequently, Jallan alone filed the instant appeal.[5]

On May 11, 2021, a final judgment was issued in the Galveston County suit. There, the trial court ruled in favor of PNA and ordered that Parkway and the Guarantors, jointly and severally, pay PNA actual damages in the amount of $657,368.48 and ordered that "all claims" by Parkway, Jallan, Jain, Singh, and Vyas, "regardless of how a claim has been pled or asserted," were "denied and dismissed with prejudice to the refiling of such claims."

Dismissal

In his first and second issues, Jallan argues that the Harris County trial court erred in dismissing the instant suit for "lack of jurisdiction" and in doing so "with prejudice."

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[5] Although Jallan's notice of appeal, which was not filed until March 23, 2021, was untimely, it was filed within the implied extension period. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997); *Smith v. Hous. Lighting & Power Co.*, 7 S.W.3d 287, 288–89 (Tex. App.—Houston [1st Dist.] 1999, no pet.). This Court notified Jallan that his appeal would be dismissed, however, if he did not timely file a reasonable explanation for the late notice of appeal, as required. *See Smith*, 7 S.W.3d at 289. On October 29, 2021, Jallan timely filed a sufficient explanation. *See id.*

Standard of Review and Guiding Principles of Law

"'Jurisdiction' refers to the power of a court, under the Constitution and laws, to determine the merits of an action between parties and to render a judgment." *Gordon v. Jones*, 196 S.W.3d 376, 382 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). Subject-matter jurisdiction "exists by operation of law only, and cannot be conferred upon any court by consent or waiver." *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000). Whether a trial court has subject-matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "Jurisdiction and venue are not synonymous." *Gordon*, 196 S.W.3d at 383.

"Venue" pertains solely to where a suit may be brought and differs from whether a court has "jurisdiction of the property or thing in controversy." *Id.* (internal quotations omitted). Venue generally refers to a particular county, but may refer to a particular court. *Id.* The transfer of a case from one forum to another "pertains to venue, not jurisdiction." *Gonzalez v. Reliant Energy, Inc*., 159 S.W.3d 615, 622 (Tex. 2005). Venue may be waived if not challenged in due order and on a timely basis. *See* TEX. R. CIV. P. 86; *Massey v. Columbus State Bank*, 35 S.W.3d 697, 700 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

"[T]he doctrine of dominant jurisdiction pertains to venue and not to subject-matter jurisdiction." *Gordon*, 196 S.W.3d at 382. "Dominant jurisdiction" applies when venue is proper in two or more Texas counties or courts. *Gonzalez*, 159 S.W.3d at 622. Generally, if two lawsuits concerning the same subject matter are pending in courts of concurrent jurisdiction, the court in which suit was first filed acquires "dominant jurisdiction," if venue is proper.[6] *Id.* (noting that dominant jurisdiction recognizes "the plaintiff's privilege to choose the forum" and accepts that choice as correct, provided that forum is proper); *Gordon*, 196 S.W.3d at 383. "[W]hen cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other cases should abate." *Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001).

Thus, a "motion to abate is the proper procedure for asserting a claim of dominant jurisdiction." *French v. Gilbert*, No. 01-07-00186-CV, 2008 WL 5003740, at *4 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (mem. op.); *see Gordon*, 196 S.W.3d at 385 (noting that court "properly disposes of motion premised on dominant jurisdiction by *abating the cause* to permit the court of dominant jurisdiction to proceed"); *see also generally Speer v. Stover*, 685 S.W.2d 22, 23 (Tex.

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[6] Generally, however, if a plaintiff's venue choice is not properly challenged through a motion to transfer, venue becomes fixed in the county in which the plaintiff filed suit. *See* TEX. R. CIV. P. 86; *In re Masonite Corp.*, 997 S.W.2d 194, 197 (Tex. 1999); *Wilson v. Tex. Parks & Wildlife Dep't*, 886 S.W.2d 259, 260 (Tex. 1994).

1985) ("Pleas in abatement and pleas to the jurisdiction have different objectives and different results. Sustaining a plea to the jurisdiction requires dismissal; sustaining a plea in abatement requires that the claim be abated until removal of some impediment.").

The granting of a plea in abatement in a later-filed suit is mandatory when "an inherent interrelation of the subject matter exists in two pending lawsuits." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 293–94 (Tex. 2016). In such instances, it is "not required that the exact issues and all the parties be included in the first action before the second is filed, provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues." *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988), *overruled in part on other grounds*, *J.B. Hunt Transp.*, 492 S.W.3d at 292–93. "In determining whether an inherent interrelationship exists, courts should be guided by the rule governing persons to be joined if feasible and the compulsory counterclaim rule." *Wyatt*, 760 S.W.2d at 247; *see also* TEX. R. CIV. P. 39, 97(a).[7] Abatement of a lawsuit due to the pendency of a prior suit is based on the principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues. *Perry*, 66 S.W.3d at 252.

[7] A party who fails to assert a compulsory counterclaim in the initial action is barred by the doctrine of res judicata from asserting it in a later lawsuit. *See* TEX. R. CIV. P. 97(a); *Williams v. Nat'l Mortg. Co.*, 903 S.W.2d 398, 403 (Tex. App.—Dallas 1995, writ denied); *see also Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988), *overruled in part on other grounds*, *J.B. Hunt*, 492 S.W.3d at 292–93.

Analysis

Jallan, as pertinent here, brought the instant lawsuit in the 113th District court of Harris County, alleging claims for breach-of-contract, conversion, tortious interference, an accounting, violations of the DTPA, and attorney malpractice and seeking damages of over $100,000. As a district court, the trial court has general subject-matter jurisdiction over such suits. *See* TEX. CONST. art. V, § 8 (providing that district court has exclusive, original jurisdiction of "all actions, proceedings, and remedies," except when Constitution or other law confers jurisdiction on some other court); TEX. GOV'T CODE § 24.007 ("The district court has the jurisdiction provided by Article V, Section 8, of the Texas Constitution."). "A district court has original jurisdiction of a civil matter in which the amount in controversy is more than $500, exclusive of interest." TEX. GOV'T CODE § 24.007(b). Thus, we hold that the trial court has subject-matter jurisdiction over Jallan's claims and that it erred in dismissing the suit for lack of jurisdiction. *See Gordon*, 196 S.W.3d at 381–82. The existence of the first-filed suit in Galveston County did not deprive the Harris County court, in which the subsequent instant suit was filed, of subject-matter jurisdiction. *See Mower v. Boyer*, 811 S.W.2d 560, 563 n.2 (Tex. 1991); *Tovias v. Wildwood Props. P'ship, L.P.*, 67 S.W.3d 527, 529 Tex. App.—Houston [1st Dist.] 2002, no pet.).

We recognize that, in substance, PNA, Virani, and Broussard argued in their Motion to Dismiss that the claims raised by Parkway and the Guarantors in the instant suit actually constituted compulsory counterclaims that Parkway and the Guarantors were required to raise in the pending Galveston County suit, i.e., a dominant-jurisdiction issue. *See Thibodeau v. Lyles*, 558 S.W.3d 166, 168 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("We give effect to the substance of the document . . . filed rather than its title or form.").

However, a dominant jurisdiction issue "only arises when an inherent interrelation of the subject matter exists in two *pending* lawsuits." *J.B. Hunt Transp.*, 492 S.W.3d at 292 (internal quotations omitted, emphasis added); *see also In re Tex. Christian Univ.*, 571 S.W.3d 384, 387 (Tex. App.—Dallas 2019, orig. proceeding) (noting that question of dominant jurisdiction arises when there are two parallel proceedings pending in two courts of concurrent jurisdiction). And, the remedy is abatement of the later-filed suit to allow the first-filed suit to proceed. *Gordon*, 196 S.W.3d at 385 (noting that court "properly disposes of motion premised on dominant jurisdiction by *abating the cause* to permit the court of dominant jurisdiction to proceed").

Here, PNA, Virani, and Broussard have presented proof to this Court that a final judgment has issued in the Galveston County suit, which is relevant to this Court's jurisdiction. *See Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621,

623–24 (Tex. 2012) (taking judicial notice of matter outside appellate record and noting that court must consider its jurisdiction, even if sua sponte); *see also* TEX. R. EVID. 201 (noting that courts may take judicial notice at any stage of proceedings). Appellate courts lack jurisdiction to address moot issues or to render advisory opinions. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000). A matter is moot when a court's action cannot affect the parties' rights or interests. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012).

We conclude that there are no longer "two pending lawsuits" because the Galveston County suit has proceeded to judgment. *See J.B. Hunt Transp.*, 492 S.W.3d at 292. As such, there is no longer a "first-filed suit that could be permitted to proceed." *See Gordon*, 196 S.W.3d at 386. Although there is authority holding that if a party files a plea in abatement, calling the trial court's attention to the pendency of a prior suit involving the same parties and same controversy, the subsequent case must be dismissed, this Court has held that the dismissal contemplated is not a dismissal with prejudice, as was rendered here, but a dismissal to permit the first-filed suit, which had remained pending until then, to proceed. *See id*. at 385–86.

Having held above that the trial court erred in dismissing the instant suit for lack of jurisdiction, we sustain Jallan's first and second issues.

Conclusion

We reverse the trial court's judgment of dismissal with prejudice against Jallan and remand for further proceedings. We dismiss all pending motions as moot.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Kelly and Landau.