Reversed and Remanded and Memorandum Opinion filed October 18, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-01019-CV

NEWELL M. EVANS, Appellant

V.

THEODORE P. FULLER, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 11-DCV-187877

M E M O R A N D U M O P I N I O N

Appellant Newell Evans appeals from the trial court's dismissal of his lawsuit against appellee Theodore Fuller. The trial court granted Fuller's motion to dismiss, which alleged that Evans failed to state a viable cause of action; however, the court had not previously sustained Fuller's special exceptions to Evans's petition. Accordingly, we reverse and remand for further proceedings.

Background

According to Evans's original petition, Evans and Fuller are both grandsons of Ida Evans, now deceased, whose will was filed for probate in Fort Bend County Court at Law No. 2. Irma Fuller, Fuller's mother and Ida Evans's daughter, was named administrator. She filed a partition suit in the 240th District Court of Fort Bend County. In that suit, Irma Fuller is listed as the plaintiff and other heirs are listed as defendants. The exact nature of the partition proceedings is not suggested in Evans's petition or revealed in this record. Fuller apparently purchased a tract of real property as a part of the partition proceeding.

In his current petition, also filed in the 240th District Court, Evans primarily alleges that the sale of the property to Fuller was occasioned by mutual mistake or conspiratorial fraud and resulted in Fuller's unjust enrichment. Evans essentially contends that Fuller received a "sweetheart deal" from his mother, the estate administrator, to the detriment of other heirs. Although it is not entirely clear, Evans seems to be suggesting that Fuller either paid far less than the true value of the property or that he somehow received more actual property or property rights in the sale than he was supposed to. Among the relief sought, Evans requested that the deed Fuller received be reformed or set aside.

Fuller filed special exceptions to Evans's petition, complaining that Evans failed to state a viable cause of action. The record, however, does not contain any ruling on the special exceptions. Fuller then filed a motion to dismiss in which he again primarily asserted that Evans had failed to state a viable cause of action but also argued that Evans had failed to provide evidence supporting an action to try title.[1] The trial court granted the motion without stating reasons and dismissed the

[1] Fuller's motion was clearly not based on Texas Rule of Civil Procedure 91a, which permits dismissal of a cause of action on the grounds that it has no basis in law or fact. Tex. R.

case. Evans thereafter filed a motion to reinstate, and when that was denied, he filed an appeal of the denial of the motion to reinstate in the trial court along with supplemental briefing in support. The trial court also denied this "appeal." Among other points, Evans argued that the trial court could not dismiss for failure to state a viable claim without first providing an opportunity to amend the pleadings.

Discussion

In a single issue on appeal, Evans contends the trial court erred in dismissing his case for failure to state a viable cause of action without first having sustained special exceptions to his pleadings. We agree.

We generally review a trial court's order on a motion to dismiss under an abuse of discretion standard. *Fink v. Anderson*, 477 S.W.3d 460, 465 (Tex. App.–Houston [1st Dist.] 2015, no pet.) (citing *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001)). However, when a case is dismissed for failure to state a viable cause of action, we review the dismissal de novo and accept as true all material factual allegations and all factual statements reasonably inferred from the allegations set forth in the appellant's pleadings. *See Shirvanian v. DeFrates*, 161 S.W.3d 102, 105 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). Generally, only after a trial court sustains special exceptions and a party has been given an opportunity to amend its pleadings, may a case be dismissed for failure to state a viable cause of action. *E.g.*, *Tex. S. Univ. v. Rodriquez*, No. 14–

Civ. P. 91a. Fuller's motion did not meet several requirements of Rule 91a, including that the motion state that it is made pursuant to the rule. *Id*. 91a.2.

In a cover page to the motion, Fuller states that he was directed by the trial court to file the motion to dismiss. Evans confirms this in his brief to this court, adding that the direction came during a discovery hearing. The record on appeal does not contain a transcript from this hearing.

10–01079–CV, 2011 WL 2150238, at *5 (Tex. App.—Houston [14th Dist.] June 2, 2011, no pet.) (mem. op.); *Centennial Ins. Co. v. Commercial Union Ins. Cos.*, 803 S.W.2d 479, 483 (Tex. App.—Houston [14th Dist.] 1991, no writ).

The record supports Evans's contention that the trial court granted Fuller's motion—which alleged Evans failed to state a viable cause of action—without first sustaining Fuller's special exceptions and giving Evans an opportunity to amend his pleadings.[2] The record reveals that Fuller filed special exceptions but does not show that the trial court ever considered or ruled on the exceptions.

In his motion, Fuller additionally mentioned that Evans failed to provide evidence in support of an action to try title.[3] It is not clear from Evans's pleadings, however, that he was raising such a cause of action, and there is no explanation in the motion to dismiss as to why Evans's failure to produce evidence at this stage of the litigation could support dismissal.

Lastly, we note that during a hearing on Evans's motion to reinstate, the trial judge suggested that Evans's lawsuit should have been filed in the county court at law where the underlying probate matter had been filed "because there were attorneys and ad litems in place in that probate process that are going to be vital to the determinations of the relief you seek."[4] This statement indicates the trial judge

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[2] Once a court sustains special exceptions, the aggrieved party must request an opportunity to amend its pleadings in order to preserve the issue for appellate review. *Parker v. Barefield*, 206 S.W.3d 119, 120-21 (Tex. 2006). In certain rare circumstances when a court can determine that amendment could not possibly cure the pleading insufficiency, an opportunity to amend may not be required. *See, e.g., Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007); *Shirvanian*, 161 S.W.3d at 112. These rules, however, do not apply here because it does not appear that the trial court sustained Fuller's special exceptions.

[3] This assertion is made under the heading "No Viable Cause of Action," and it is not clear whether it was intended to be a separate ground for dismissal.

[4] The trial judge also made a similar notation on the docket sheet regarding an earlier hearing for which we have no reporter's record.

may have had concerns regarding whether the court had subject matter jurisdiction over Evans's claims, although Fuller did not raise that as a ground in his motion to dismiss. A trial court, as well as an appellate court, can raise the issue of subject matter jurisdiction sua sponte. *See generally DeWolf v. Kohler*, No. 14–13–00778–CV, 2014 WL 6462363, at *3 (Tex. App.—Houston [14th Dist.] Nov. 18, 2014, no pet.) ("A court is obliged to determine whether it has subject-matter jurisdiction and must consider the question sua sponte even if it is not challenged by a party.").[5] The issue requires a legal determination that is subject to de novo review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). We review the pleadings to determine whether the pleader has alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction, liberally construing them in favor of the plaintiff to ascertain his intent. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

At the heart of Evans's claims are allegations of mutual mistake, fraud, and unjust enrichment in a sale of real property. Such claims are generally within a district court's jurisdiction. *See generally* Tex. Const. art. V, § 8; Tex. Gov't Code §24.007-.008; *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 624 (Tex. 2007). The trial judge's concern appeared to be that the claims pertained to a probate proceeding in the county court at law such that the county court might have exclusive or dominant jurisdiction over the claims. *See generally* Tex. Prob. Code § 5 (repealed, see now Tex. Est. Code §§ 31.001-32.002, 32.004) (governing jurisdiction of probate matters). Although it does appear from the pleadings that Evans's claims relate in some way to the probate of his grandmother's estate, as alleged, they more directly stem from the partition suit that was heard in the same

[5] We note that, if the trial judge intended to consider subject matter jurisdiction sua sponte, he would not have needed to direct Fuller to file a motion to dismiss, as is suggested by the record. *See DeWolf*, 452 S.W.3d at 382.

district court where Evans filed the present lawsuit. *See generally* Tex. Prop. Code § 23.002 (authorizing district courts to hear partition actions). Evans's pleadings reveal little about this partition suit and why it was considered by the district court and not the county court at law.[6]

Although a court considering subject matter jurisdiction may under appropriate circumstances consider evidence pertaining to the issue, *see Miranda*, 133 S.W.3d at 226-27, no such evidence was presented in this case. Fuller, indeed, did not file a plea to the jurisdiction, request dismissal due to a lack of subject matter jurisdiction, or otherwise challenge jurisdictional facts. There is nothing in the record before us that reveals the exact nature of the partition proceedings. Accordingly, the record does not support dismissal for lack of subject matter jurisdiction.

Conclusion

The trial court erred in dismissing Evans's lawsuit without first sustaining special exceptions and providing him an opportunity to amend. *See Rodriquez*, 2011 WL 2150238, at *5; *Centennial Ins.*, 803 S.W.2d at 483. Moreover, dismissal for want of subject matter jurisdiction on this record is unwarranted. Accordingly, we sustain Evans's sole issue and reverse and remand for further proceedings.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Boyce, Christopher, and Jamison.

[6] The sale at issue allegedly occurred in 2006. The record does not reveal if the probate action is still pending.