

Reversed and Remanded and Memorandum Opinion filed May 23, 2017.



In The

Fourteenth Court of Appeals

NO. 14-15-01088-CV

**VERTICAL NORTH AMERICA, INC. N/K/A RAIZEN NORTH AMERICA,
INC., Appellant**

V.

VOPAK TERMINAL DEER PARK, INC., Appellee

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2012-33666**

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

Vertical North America, Inc., n/k/a Raizen North American, Inc. (“Vertical NA”) brings this appeal from an order in favor of Vopak Terminal Deer Park, Inc. (“Vopak”) dismissing its suit for want of jurisdiction. We reverse and remand.

Vertical NA, a Houston-based ethanol trader and distributor, entered into a series of contracts with Vopak, a terminaling company that provides bulk tank

storage service. At the time, Vertical NA was a corporate subsidiary of Vertical UK LLP. On August 25, 2011, Vertical UK entered into a Purchase and Sale Agreement (“PSA”), selling Vertical NA to Raizen Trading LLP. Vertical NA filed suit against Vopak in June 2012 for breach of contract and fraud. In July 2015, Vopak moved to dismiss the suit on the basis Vertical NA lacked standing “because it does not own the claims it is asserting.” The trial court granted Vopak’s motion and dismissed the suit.

In its first issue, Vertical NA contends the trial court erred in concluding it lacked standing. Vopak asserted Vertical NA lacked standing to assert its claims because after execution of the PSA those claims were owned by Vertical UK. Vertical NA countered that Vopak’s complaint was one of capacity rather than standing. In the hearing on Vopak’s motion to dismiss, Vertical NA again urged this argument, stating “there is a very serious issue as to whether this is a question of standing or a question of capacity. . . . It’s an issue of capacity. And they’ve long since waived their right to raise an issue of capacity.” In its brief, Vertical NA notes that if the issue were treated as a question of capacity, rather than standing, the trial court’s judgment must be vacated.

A plaintiff must have both standing and capacity to bring a lawsuit. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). “A plaintiff has *standing* when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.” *Lovato*, 171 S.W.3d at 848-49 (quoting *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996) (emphasis in the original)). A plaintiff may have capacity even if it has no legally cognizable interest in the outcome of the case. *AVCO Corp., Textron Lycoming Reciprocating Engine Div. of AVCO Corp. v.*

Interstate Sw., Ltd., 251 S.W.3d 632, 649 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

A challenge to who owns a claim raises the issue of capacity, not standing, and requires compliance with Rule 93, including the requirement to file a verified pleading. Tex. R. Civ. P. 93(1); *Pledger v. Schoellkopf*, 762 S.W.2d 145, 145–46 (Tex. 1988) (concluding contention that corporation rather than plaintiff shareholder owned fraud and tortious interference claims challenged capacity to sue and was waived); *Southwest Indus. Inv. Co. v. Berkeley House Inv'rs*, 695 S.W.2d 615, 617 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (appellant waived issue of whether plaintiff owned the asserted contract claim by failing to comply with Rule 93). Although standing can never be waived, the issue of capacity to sue is waived both at trial and on appeal if it is not challenged by a verified pleading. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993); *Nootsie*, 925 S.W.2d at 662. “The Texas Rules of Civil Procedure require that a defendant challenging a plaintiff’s capacity to sue raise the matter by verified pleading, if lack of capacity is not evident from the petition.” *Intracare Hosp. N. v. Campbell*, 222 S.W.3d 790, 793 n. 2 (Tex. App.—Houston [1st Dist.] 2007, no pet.); Tex. R. Civ. P. 93. The defendant bears the burden to challenge a plaintiff’s capacity to sue. *Lovato*, 171 S.W.3d at 853 n. 7; *Intracare Hosp. N.*, 222 S.W.3d at 793 n. 2.

Vertical NA’s lack of capacity, if any, is not evident from its first amended petition. The record does not reflect, and Vopak does not assert, that it satisfied the requirements of Rule 93. Accordingly, we do not address that issue on its merits. *See Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, No. 05-13-00506-CV, 2015 WL 6750047, at *1, 18 (Tex. App.—Dallas Nov. 4, 2015, no pet.) (mem. op.).

The record reflects Vertical NA's standing was challenged solely on its lack of ownership of the claims brought. Because the ownership argument goes to capacity, not standing, it does not raise a question of subject matter jurisdiction. *See Prostok v. Browning*, 112 S.W.3d 876, 921 (Tex. App.—Dallas 2003), *aff'd in part, rev'd in part on other grounds*, 165 S.W.3d 336 (Tex. 2005). Accordingly, the trial court erred in dismissing Vertical NA's claims on that basis and we sustain Vertical NA's first issue.

The trial court's order is reversed and the cause remanded for further proceedings.

/s/ John Donovan
Justice

Panel consists of Justices Jamison, Donovan, and Jewell.