Reversed and Remanded and Memorandum Opinion filed October 20, 2022.

In The

Fourteenth Court of Appeals

NO. 14-20-00655-CV

SHAZIA HAMEED GADDI, Appellant

V.

CITY OF TEXAS CITY, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 20-CV-0877

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

Shazia Hameed Gaddi appeals the trial court's grant of the City of Texas City's plea to the jurisdiction. Gaddi sued the City in a district court for claims stemming from prior nuisance abatement proceedings in municipal court. The municipal court proceedings had resulted in an agreed order of abatement. Gaddi's husband was a party to that agreed order but Gaddi was not. The grounds raised in the City's plea to the jurisdiction in this case include (1) Gaddi's failure to timely appeal the municipal court order, (2) res judicata based on the prior municipal

court order, and (3) governmental immunity. Because none of the grounds raised in the plea are supported on this record, we reverse the trial court's order and remand for further proceedings.

Background

Shazia Gaddi and her husband own real property located in Texas City, Texas, on which sits a commercial building in need of repairs. Both Gaddi's and her husband's names appear on the deed to the property. In 2019, a City inspector inspected the building pursuant to an application for a permit to remodel and concluded that the building was substandard. Accordingly, the City instituted formal abatement proceedings in municipal court, with the court apparently acting in an administrative capacity. *See* Tex. Loc. Gov't Code §§ 214.001–.012. The City asserts that it provided notice of the proceedings by posting it at the property and by sending it by certified mail both to the property address and the home address listed for Gaddi and her husband.

At the subsequent municipal court abatement hearing, the attorney for the City represented that the City and Gaddi's husband had reached an agreement and intended to enter an agreed order. Gaddi's husband agreed on the record that the building was substandard and signed an Agreed Order of Abatement. The agreed order states that Gaddi and her husband appeared for the hearing—which was incorrect in regards to Gaddi—and sufficient evidence was presented to establish the building on the property was in violation of City building codes. Among other things, the order also states that it was agreed between Gaddi's husband and the City that (1) abatement of the nuisance was reasonable; (2) the property owner was to have 180 days to bring the property into full compliance with city codes; and (3) if the property was not brought into full compliance within 180 days, the City could take the steps necessary for abatement, which might include demolishing the

structure, cleaning and grading the lot, and establishing a lien on the property, without further notice or hearing. It is undisputed and the record reflects that Gaddi did not participate in the municipal court proceedings, did not attend the hearing, and did not sign the agreed order. Moreover, no default judgment was requested or taken in the municipal court proceedings against Gaddi. Although Gaddi's husband attended the hearing and signed the agreed order, there is no evidence in the record that he had a power of attorney to act on Gaddi's behalf or any other authorization to do so.

Gaddi asserts that after the 180 days expired, she learned that the City was planning to demolish the building. She then filed the present lawsuit in district court. In her First Amended Petition, Gaddi denied that she received notice of the nuisance abatement proceedings or the municipal court hearing. In other pleadings, she has maintained that she was estranged from her husband and not living in their marital home during the time her husband signed the agreed order. In her petition, she raised claims for (1) denial of due process based on her allegation that she did not receive notice or an opportunity to be heard on the abatement; (2) constitutional taking for the City's plan to demolish the building; (3) selective enforcement, based on the allegation that other similarly situated properties have not been threatened with destruction; and in the alternative; (4) the impossibility of performance of the remediation of the building in the time allotted due to the City's refusal to timely issue permits; and (5) violations by the City of emergency relief orders relating to the COVID-19 pandemic. Among the relief sought, Gaddi lists (1) statutory damages under the Texas Tort Claims Act; (2) temporary and permanent injunctions; and (3) a declaratory judgment that any attempt to abate her property by demolition without notice and an opportunity to be heard will deprive her of property rights.

Proceedings on the City's Plea

In its First Amended Plea to the Jurisdiction, the City listed three grounds for granting the plea: (1) Gaddi's failure to timely appeal the municipal court's agreed order; (2) res judicata based on the municipal court's agreed order and Gaddi's alleged privity with her husband who signed the agreed order; and (3) governmental immunity. In the first ground, failure to timely appeal the agreed order, the City argued that Gaddi's takings claim is time barred because she failed to timely appeal the agreed order. Gaddi responded that she was never a party to the municipal court proceedings or the agreed order and no default judgment was taken against her. She did not contest that the agreed order was final as to her husband's interest in the property, just that it could not affect her interest in the property.

In the second ground raised in the plea, the City contended that Gaddi's claims are barred by the doctrine of res judicata because they were adjudicated or could have been litigated in the municipal nuisance abatement proceedings. *See Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017) ("Res judicata bars the relitigation of claims that have been finally adjudicated or that could have been litigated in the prior action."). Although the City acknowledged that Gaddi did not participate in the municipal court proceedings, it asserted res judicata still applies to her claims because she was in privity with her husband in regard to the property in question. *See Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801–02 (Tex. 1994) ("Strict mutuality of parties is no longer required. . . . To satisfy the requirements of due process, it is only necessary that the party against whom the doctrine is asserted was a party or in privity with a party in the first action."). In response, Gaddi pointed out, among other things, that the theory of "virtual representation"—under which one spouse represents the

other spouse's interests—has been disapproved and that she owned an interest in the property directly and not simply as part of the community estate with her husband. *See Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) ("We disapprove the doctrine of preclusion by 'virtual representation.'"); *see also Cooper v. Tex. Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974) (noting abolishment of virtual representation doctrine in Texas and holding that when joint management community property is involved, one spouse does not represent the interest of the other spouse absent a power of attorney or other agreement in writing, stating "[t]he rights of the wife, like the rights of the husband and the rights of any other joint owner, may be affected only by a suit in which the wife is called to answer."); *cf. Drake Interiors, L.L.C. v. Thomas*, 433 S.W.3d 841, 851 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (distinguishing *Cooper* because the suit concerned liability on a debt and not simply ownership of joint management community property).

In its third ground, the City argued that the Declaratory Judgment Act did not clearly and unambiguously waive the City's governmental immunity. In response, Gaddi argued that immunity was waived under the United States and Texas constitutions and sections of the Texas Tort Claims Act.

At a hearing on Gaddi's motion for a temporary injunction, the City objected to the hearing on jurisdictional grounds. The trial court then took argument and evidence on the jurisdictional issues. Gaddi acknowledged that the municipal court had jurisdiction over the nuisance abatement action and issued a final order. She again pointed out, however, that she did not participate in those proceedings and no default judgment was taken against her. The City primarily argued that res judicata based on the agreed order should bar Gaddi's claims because she was in privity with her husband. After the hearing, the trial court signed an order granting the

plea to the jurisdiction, but the order does not specify on which of the three grounds it was based.

Analysis

Subject matter jurisdiction is essential to the authority of a court to decide a case. *See Clint I.S.D. v. Marquez*, 487 S.W.3d 538, 558 (Tex. 2016); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). The existence of subject matter jurisdiction is a question of law that we review de novo. *See Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 451 (Tex. 2016). A plea to the jurisdiction "may challenge the pleadings, the existence of jurisdictional facts, or both." *Alamo Heights I.S.D. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). When, as here, a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties if necessary to resolve the jurisdictional issues raised. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

Res judicata. We begin our analysis by noting that the City's second ground, res judicata, is not properly raised in a plea to the jurisdiction. A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject-matter jurisdiction, irrespective of the merits of the claim. *See Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Res judicata is an affirmative defense and a plea in bar and thus is not a proper ground for a plea to the jurisdiction. *See Tex. Hwy. Dep't v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967); *Town Park Ctr., LLC v. City of Sealy*, 639 S.W.3d 170, 182 (Tex. App.—Houston [1st Dist.] 2021, no pet.); *Metro. Life Ins. Co. v. RSL Funding, LLC*, No. 14-19-00155-CV, 2021 WL 330447, at *3 n.3 (Tex. App.—Houston [14th Dist.] Feb. 2, 2021, no pet.) (mem. op.); *City of Houston v. Johnson*, 353 S.W.3d 499, 506 n.2 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

Caselaw supports the notion that under proper circumstances, a plea to the jurisdiction based on res judicata can be treated as a motion for summary judgment. *See, e.g.*, *Town Park Ctr.*, 639 S.W.3d at 182 (discussing cases and explaining that a plea to the jurisdiction raising res judicata can be treated as a motion for summary judgment either when the parties agree to do so or all the hallmarks of a summary judgment proceeding are followed). Here, there is no indication in the record that the parties agreed to treat the plea to the jurisdiction as a motion for summary judgment. Moreover, the City did not comply with proper summary-judgment procedure in presenting its plea and evidence. *See id*.; *Walker v. Sharpe*, 807 S.W.2d 442, 447 (Tex. App.—Corpus Christi 1991, no writ). For starters, both parties presented live testimony on the res judicata issue, which would not be appropriate in a summary judgment context. *See* Tex. R. Civ. P. 166a(c); *Kennedy Con., Inc. v. Forman*, 316 S.W.3d 129, 134 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The trial court erred to the extent it granted the City's plea to the jurisdiction based on the res judicata ground.

Failure to appeal. In its first ground in the plea, the City argued that Gaddi's takings claim is barred because she failed to timely appeal the agreed order, citing *City of Dallas v. Stewart*, 361 S.W.3d 562, 579–80 (Tex. 2012). Among other issues in *Stewart*, the supreme court explained that a constitutional takings claim based on a nuisance abatement ruling could be brought for the first time in the appeal of that ruling to a district court, but if the party asserting a taking fails to comply with applicable appellate deadlines or to assert the takings claim in the appeal, the party would be precluded from bringing the claim in a separate action. *Id*. at 580; *see also Patel v. City of Everman*, 361 S.W.3d 600, 601 (Tex. 2012) (describing *Stewart* as holding: "[A] party asserting a taking based on an allegedly improper administrative nuisance determination must appeal that

determination and assert his takings claim in that proceeding."). The issue essentially is that a party asserting a taking based on a nuisance abatement ruling must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit. *See Stewart*, 361 S.W.3d at 579.

In this case, however, Gaddi asserts that the municipal court's agreed judgment affects her property interests but that she was not a party to the proceedings in municipal court, did not sign the agreed judgment, and was not represented by anyone who signed the agreed judgment, and no default judgment was taken against her. An individual who is not a party to a final judgment may collaterally attack the judgment if her interests—such as property ownership—are directly and necessarily affected by the judgment. *E.g.*, *In re A.V.T.R.*, No. 14-19-00986-CV, 2021 WL 924372, at *6 (Tex. App.—Houston [14th Dist.] Mar. 11, 2021, no pet.) (mem. op.). Unlike a direct appeal, a collateral attack asserting a judgment is void may be brought at any time. *See PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 271–72 (Tex. 2012). Accordingly, Gaddi's failure to timely perfect a direct appeal from the municipal court did not deprive the district court of jurisdiction over this case.

Governmental Immunity. In its third ground in the plea to the jurisdiction, the City argued that the Declaratory Judgment Act (DJA) did not clearly and unambiguously waive the City's governmental immunity. Governmental immunity deprives a court of subject matter jurisdiction over claims against political subdivisions of the state, including cities, absent clear and unambiguous waiver. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). Immunity from suit implicates a court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Harris Cty. v. Annab*, 547 S.W.3d 609, 612 (Tex. 2018).

In its plea, the City provided boilerplate law regarding governmental immunity and then asserted that the DJA did not waive governmental immunity. This, of course, is correct because the DJA does not create jurisdiction where jurisdiction does not otherwise exist. *See* Tex. Civ. Prac. & Rem. Code § 37.003(a); *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002) ("The DJA does not extend a trial court's jurisdiction, and a litigant's request for declaratory relief does not confer jurisdiction on a court or change a suit's underlying nature."). The City did not assert governmental immunity in regard to any of Gaddi's other claims or on her declaratory judgment request based on her other claims.

In response to the plea, Gaddi argued that immunity was waived in this case under the United States and Texas constitutions and several sections of the Texas Tort Claims Act. *See* U.S. Const. amend. V (takings), XIV (due process); Tex. Const. art. I, §§ 13 (due course of law), 17 (taking, damage, or destruction of property), 19 (due course of law); Tex. Civ. Prac. & Rem. Code §§ 101.021, 101.025, 101.0215; *see also Stewart*, 361 S.W.3d at 568 (noting the takings clause is self-executing and authorizes suit against the government). After raising it in the plea, the City did not pursue the governmental immunity ground any further. The City did not mention the ground in response to Gaddi's request for injunctive relief or at the trial court hearing and does not raise it on appeal. The City appears to have abandoned this ground, and we find no merit in it.

Conclusion

The trial court erred in granting the City's plea to the jurisdiction. Accordingly, we reverse the trial court's order granting the City's plea to the jurisdiction and remand for further proceedings.

/s/ Frances Bourliot
Justice

Panel consists of Justices Jewell, Bourliot, and Poissant.