Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00070-CV

The **CITY OF FLORESVILLE**, Texas, and Marissa Ximenez, Gloria E. Martinez, Juan Ortiz, Jade Jimenez,[1] Gloria Morales Cantu, and Monica Veliz, in their official capacities,
Appellants

v.

Cecilia 'Cissy' **GONZALEZ-DIPPEL**, in her official capacity, Nick Nissen, David Johns, and Paul W. Sack,
Appellees

From the 81st Judicial District Court, Wilson County, Texas
Trial Court No. CVW1912897
Honorable Lynn Ellison, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Luz Elena D. Chapa, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: August 12, 2020

AFFIRMED IN PART, REVERSED AND RENDERED IN PART, REMANDED IN PART, STAY LIFTED

This is an appeal from interlocutory orders denying appellants' plea to the jurisdiction and granting appellees a temporary injunction. We conclude the trial court erred, in part, by denying the plea to the jurisdiction and erred by granting the temporary injunction. We affirm in part, reverse in part, remand in part, and lift our stay on further trial court proceedings.

[1] While this appeal was pending, Gerard Jimenez passed away and his daughter, Jade Jimenez, has replaced him on the city council. She is automatically substituted in his place. *See* TEX. R. APP. P. 7.2(a).

BACKGROUND

This appeal arises out of the City of Floresville's decision to change the date of its November 2019 municipal elections to May 2020. The City's charter requires municipal elections to be held in the spring, on a date determined by the Texas Election Code. In 2011, by resolution, the city council changed the date of the spring municipal elections to correspond with the federal and state elections in November. *See* TEX. ELEC. CODE § 41.0052(c). But in 2019, again by resolution, the city council repealed the 2011 resolution and changed the date of all future municipal elections back to the spring. In doing so, the city council moved the November 2019 municipal elections to May 2, 2020.

Before the city council repealed the 2011 resolution, several of the appellees, Nick Nissen, David Johns, and Paul Sack, had already filed for a place on the ballot for the November 2019 city council elections; specifically, for places 3, 4, and 5. The current council members serving in those places did not file for a place on the ballot for a November 2019 election, and the City had no municipal elections in November 2019. The aforementioned appellees, joined by the City's mayor, Cecilia Gonzalez-Dippel, in her official capacity, sued the City, and each of the other city council members and the City's secretary in their official capacities.[2] Appellees also sought a temporary injunction. Appellees alleged the City's 2019 resolution was passed in violation of the Texas Election Code and Texas Open Meetings Act (TOMA). The City filed a general denial and plea to the jurisdiction.

After a hearing, the trial court granted appellees a temporary injunction. The temporary injunction declared the 2019 resolution void, declared council places 3, 4, and 5 vacant, and ordered the City to hold a special election on May 2, 2020. The trial court also denied the City's

[2] We refer to appellants collectively as "the City."

plea to the jurisdiction. The City timely filed notices of appeal regarding the interlocutory orders granting the temporary injunction and denying its plea to the jurisdiction. This court stayed the enforcement of the temporary injunction, including the May 2, 2020 special election, and further proceedings in the trial court.

PLEA TO THE JURISDICTION

The City's plea to the jurisdiction argued: (1) appellees' suit constituted an improper attempt to assert a quo warranto claim; (2) appellees' complaint about moving the election is moot because appellees failed to timely act to be placed on the ballot; (3) the mayor has no standing to sue in her official capacity; and (4) the City did not violate TOMA or the Election Code.

A. Standard of Review

We review a trial court's ruling on a plea to the jurisdiction de novo. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016). If the plea to the jurisdiction challenges the pleadings, we liberally construe the pleadings to determine if the plaintiff "has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). When the plea to the jurisdiction challenges the existence of jurisdictional facts that implicate the merits, "we consider relevant evidence submitted by the parties to determine if a fact issue exists." *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632-33 (Tex. 2015). "We take as true all evidence favorable to the nonmovant, indulge every reasonable inference, and resolve any doubts in the nonmovant's favor." *Id.* at 633. "If the evidence creates a fact question regarding jurisdiction, the plea must be denied pending resolution of the fact issue by the fact finder." *Id.* If, however, a governmental entity conclusively establishes facts negating the trial court's jurisdiction, "the plea to the jurisdiction must be granted as a matter of law." *Id.*

B. Improper Quo Warranto Claim

"Standing is a prerequisite to subject-matter jurisdiction and is a proper ground to assert in a plea to the jurisdiction." *Harlandale Indep. Sch. Dist. v. C2M Const., Inc.*, No. 04-07-00304-CV, 2007 WL 2253510, at *1 (Tex. App.—San Antonio Aug. 8, 2007, no pet.) (mem. op.). "A quo warranto proceeding is the exclusive remedy for challenging a public official's right to hold office and only the State of Texas, not a private litigant, has standing to bring such a claim." *Nelson v. Head*, No. 13-18-00484-CV, 2019 WL 6315425, at *4 (Tex. App.—Corpus Christi Nov. 26, 2019, no pet.) (mem. op.) (citing authorities). A proceeding brought by a party other than the State of Texas to attack a city council member's right to hold office and serve in an official capacity constitutes an improper attempt to pursue a quo warranto claim. *See id.*

In their trial court pleadings, appellees sought declaratory and injunctive relief that would effectively remove the current city council members in places 3, 4, and 5 from office. Appellees also sought to require the City to hold a special election. In its plea and on appeal, the City has argued most of appellees' requests for declaratory relief and injunctive constitute an improper attempt to pursue a quo warrant claim. Appellees have not disputed, either in the trial court or on appeal, that the primary relief they seek attacks the current council members' right to hold office. Instead, appellees argue they generally have standing to file suit.

We agree appellees' primary requests for declaratory relief and injunctive constitute an improper attempt to pursue a quo warrant claim. Because appellees are not the State of Texas, appellees lack standing to attack the current council members' right to hold office. *See id.* We reverse the trial court's order denying the City's plea in part, and render an order dismissing appellees' claims for declaratory and injunctive relief that attack the current city council members' right to hold office. However, appellees' alternative request for a judgment requiring the City to hold a special election is not an improper quo warranto claim.

C. Mootness of Request for Special Election

"Once a case or claim is determined to be moot, a court lacks subject matter jurisdiction to decide the issues." *Nickelson v. State ex rel. Nickelson*, No. 04-17-00113-CV, 2018 WL 1831679, at *2 (Tex. App.—San Antonio Apr. 18, 2018, no pet.) (mem. op.). A dispute over whether a special election must be held becomes moot when a final judgment ordering the relief requested cannot be rendered in time for election officials to comply with the order, would necessarily interfere with the printing of the official ballot, or if absentee balloting has begun during the pendency of the appeal. *See Maldonado v. Johnson*, No. 04-18-00599-CV, 2018 WL 4517551, at *2 (Tex. App.—San Antonio Sept. 21, 2018, no pet.) (mem. op.); *Price v. Dawson*, 608 S.W.2d 339, 340 (Tex. Civ. App.—Dallas 1980, no writ). To determine whether an election dispute is moot, Texas courts may take "judicial notice of the statutes and of the dates of election." *See Sterling v. Ferguson*, 53 S.W.2d 753, 761 (Tex. 1932). In response to the Governor's disaster declaration regarding the COVID-19 pandemic, the City passed Ordinance No. 2020-003 moving the May 2020 election to November 2020. In light of this ordinance delaying the May 2020 elections, we cannot say appellees' request for a special election is necessarily moot.

D. The Validity of the City's 2019 Resolution

In the trial court, appellees challenged the validity of the City's 2019 resolution, which rescinded the City's 2011 resolution and declared all future municipal elections will occur in the spring. Appellees alleged the 2019 resolution is invalid because the resolution was passed in violation of TOMA and the Election Code.

1. Standing versus Merits

In its plea and on appeal, the City has argued appellees lack standing and have suffered no injury because the City did not violate TOMA or the Election Code in adopting the 2019 resolution. "[T]he jurisdictional inquiry into standing is different from an inquiry into the merits of the claim."

See Okland v. Travelocity.com, Inc., No. 02-08-00260-CV, 2009 WL 1740076, at *6 (Tex. App.—Fort Worth June 18, 2009, pet. denied) (mem. op.). "Standing focuses on the question of who may bring an action, and just as a court may not delve into the merits of a claim when deciding whether standing exists, Appellants may not cloud the jurisdictional issue with merit-based arguments, evidence, or both." *Id.* Because the City's arguments assert appellees have suffered no harm because the City complied with TOMA and the Election Code, the City's arguments relate to the merits, and not appellees' standing. The City's arguments are therefore not proper bases for dismissal of appellees' claims for want of jurisdiction. *See id.*

2. Mootness of the Alleged TOMA Violation

In the trial court, appellees alleged the City violated TOMA. Appellees alleged the council improperly discussed the 2019 resolution in a closed, executive session on July 17, 2019. At the hearing in the trial court, the City argued the council met again on August 8, 2019, and in full compliance with TOMA, passed the same resolution. The City did not expressly argue in the trial court that the resolution passed on August 8, 2019, mooted appellees' TOMA claim.

The City's jurisdictional argument is, in essence, raised for the first time on appeal. "The parties cannot waive subject matter jurisdiction and may raise it for the first time on appeal." *Hernandez v. Martinez*, No. 04-19-00076-CV, 2019 WL 5580261, at *1 (Tex. App.—San Antonio Oct. 30, 2019, no pet.) (mem. op.). "Where jurisdiction is raised for the first time on appeal, we must construe the pleadings and the record in favor of the party asserting jurisdiction." *Id.* "If the pleadings or the record conclusively negate jurisdiction, then the suit should be dismissed." *Id.* If the plaintiff lacked a full and fair opportunity to develop the record and amend their pleadings to address the jurisdictional challenge, the issue must be remanded to the trial court. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 100 (Tex. 2012).

Appellees' pleadings and the record do not conclusively establish the August 8, 2019 council meeting was conducted in full compliance with the law. The only evidence the City presented in support of its argument was that the council adopted another resolution on August 8, 2019, cancelling the November election and setting the upcoming municipal elections for May 2020. The record contains the minutes of a public meeting, but the record does not conclusively establish full compliance with TOMA and all other applicable laws. Also, because the City did not clearly raise the issue as a jurisdictional defect in the trial court, appellees lacked a full and fair opportunity in the trial court to develop the record and amend their pleadings to address whether the August 8, 2019 meeting mooted their TOMA claim. We therefore cannot sustain the City's mootness issue and must remand the issue to the trial court for its consideration. *See id.*

D. The Mayor's Standing to Sue in Her Official Capacity

The City's mayor, Cecilia Gonzalez-Dippel, is a party to the pleadings in the trial court. Mayor Gonzalez-Dippel filed suit in her official capacity. In its plea and on appeal, the City has argued Mayor Gonzalez-Dippel lacks standing to sue the City in her official capacity because she lacked the City's authorization to sue on its behalf. In their response to the City's plea and on appeal, appellees have not directly responded to this issue.

When a pleading names a party in her official capacity, the pleading alleges the governmental unit as the party. *See Donohue v. Butts*, 516 S.W.3d 578, 581 (Tex. App.—San Antonio 2017, no pet.). Generally, a member of a governmental entity lacks standing to step into the shoes of the governmental body to prosecute a legal action the governmental entity has not decided to take. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986); *see also Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) ("Texas's standing test parallels the federal test . . . .").

By suing in her official capacity, Mayor Gonzalez-Dippel stepped into the shoes of the City to sue as a plaintiff. *See Donohue*, 516 S.W.3d at 581. Appellees' pleadings also named the City as the defendant. Appellees cite no authority supporting a mayor in a home-rule municipality has standing to sue the city, on behalf of the city, when the city council allegedly passes a resolution in violation of state law. Because a member of a governmental entity generally lacks standing to step into the shoes of the governmental body to prosecute a legal action the governmental entity has not officially decided to take, and the record does not show the City's mayor may bring suits on the City's behalf without the council's approval, we hold Mayor Gonzalez-Dippel lacks standing to sue in her official capacity. *See Bender*, 475 U.S. at 544.

E. Conclusion

We reverse the trial court's order denying the City's plea to the jurisdiction in part. We render an order granting the City's plea in part, dismissing with prejudice: (1) Mayor Gonzalez-Dippel, in her official capacity, as a plaintiff in the suit; and (2) the remaining appellees' requests for relief regarding the right of the City's current council members to hold office. We remand the issue of whether the resolution adopted at the August 8, 2019 council meeting moots appellees' TOMA claim for the trial court's consideration. We otherwise affirm the trial court's order denying the City's plea regarding the validity of the City's 2019 resolution.

TEMPORARY INJUNCTION

The trial court granted appellees a temporary injunction, declaring the City's 2019 resolution void and having no legal effect. Within the temporary injunction, the trial court preliminarily determined appellees would be awarded their attorney's fees, but awarded no specific amount to appellees. The City argues the trial court erred when it issued its temporary injunction without a bond, without a trial setting, without jurisdictional findings of fact, and while acting

beyond its authority. The City also argues the trial court erred by awarding appellees attorney's fees.

"Whether to grant or deny a temporary injunction is within the trial court's sound discretion." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). "The reviewing court must not substitute its judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion." *Id.* A trial court abuses its discretion by issuing a temporary injunction that fails to comply with the law. *See Bankler v. Vale*, 75 S.W.3d 29, 32 (Tex. App.—San Antonio 2001, no pet.).

A temporary injunction must order an applicant to post a bond, set the bond amount, and set a trial date. *Id.* at 32-33 (citing TEX. R. CIV. P. 683). The trial court's temporary injunction did not require appellees to post a bond, set a bond amount, or set a trial date. As a result, the temporary injunction is void, and the trial court abused its discretion by issuing a temporary injunction that failed to comply with the law. *See id.* We therefore reverse the trial court's order granting appellees' application for temporary injunction. *See Member 1300 Oak, LLC v. Famous Koko, Inc.*, No. 05-16-01287-CV, 2017 WL 1360232, at *2 (Tex. App.—Dallas Apr. 13, 2017, no pet.) (mem. op.). Because we reverse the temporary injunction on these grounds, we need not address the City's other challenges to the temporary injunction. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We reverse in part the trial court's order denying the City's plea to the jurisdiction. We render an order dismissing Mayor Gonzalez-Dippel in her official capacity from this suit and the remaining appellees' claims for declaratory and injunctive relief that attack the current council members' right to hold office. We remand the City's mootness challenge to appellees' TOMA claim to the trial court for its consideration. The trial court's order denying the City's plea is affirmed as to appellees' claim that the 2019 resolution violated the Election Code. Additionally,

we reverse the trial court's order granting appellees a temporary injunction, dissolve the temporary injunction in its entirety, and lift our stay on further trial court proceedings.

Luz Elena D. Chapa, Justice