Fourth Court of Appeals
San Antonio, Texas

CONCURRING OPINION

No. 04-21-00255-CV

IN RE CUSTOM HOME BUILDERS OF CENTRAL TEXAS INC. D/B/A Owner Managed Homes D/B/A Texas Build at Cost, Travis White, and White House Custom Design & Construction of Texas, Inc. D/B/A Forever Custom Homes

Original Mandamus Proceeding[1]

Opinion by: Irene Rios, Justice
Concurring Opinion by: Rebeca C. Martinez, Chief Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: December 15, 2021

I concur with the ultimate holding that the real parties' suit is an "[a]ction[] . . . for recovery of damages to real property," within the meaning of section 15.011 of the Texas Civil Practice and Remedies Code. I write separately because I believe the majority's framework is too expansive.

I agree with the majority that section 15.011 does not require a dispute over title or possession of real property. The Texas Supreme Court indicated as much in *In re Applied Chemical Magnesias Corporation*, 206 S.W.3d 114 (Tex. 2006) (orig. proceeding), when it distinguished a claim for damages to real property from a claim to quiet title, remarking: "Both

[1] This proceeding arises out of Cause No. 2021-CI-03430 pending in the 57th Judicial District Court, Bexar County, Texas, the Honorable Antonia Arteaga presiding.

cases fall within section 15.011's mandatory venue provision." *Id.* at 119.[2] Further, as explained by the majority, the plain language of the current statute, considered in light of earlier venue provisions, dispels the argument that section 15.011 requires a dispute over title or possession.[3]

I disagree, however, that section 15.011 includes any action for "money claimed as compensation for loss or injury to land or anything attached to land," or, as phrased elsewhere in the majority opinion, that section 15.011 includes within its ambit suits "primarily seeking monetary compensation based on physical damage or injury to a house."[4] This framework expands the statute beyond its plain terms and creates tension with a permissive venue provision. *See In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 701 (Tex. 2015) (orig. proceeding) ("[C]ourts should not give an undefined statutory term a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone."). There are at least three "actions" that could fit within the majority's framework that are not necessarily "[a]ctions . . . for recovery of damages to real property," and, I believe, the majority goes too far by implicating these circumstances unnecessarily.

First, suits on insurance policies can be "suits primarily seeking monetary compensation based on physical damage or injury to a house;" however, insurance policies are addressed specifically by section 15.032 of the Civil Practice and Remedies Code, which is a permissive venue statute. Suffice it to say, we need not decide, directly or indirectly, whether mandatory venue applies to claims related to insurance contracts. *Cf. In re Mountain Valley Indem. Co.*, No.

[2] The supreme court explained that, if a marble excavation company did not have a right to mine marble, the landowner would have a claim "for damages to its property for the marble that has been removed from its land," which would bring the case within section 15.011's mandatory venue provision. *Id.*

[3] In further support of the plain-language argument, the supreme court has described nuisance claims, which do not involve title or possession, as "[a]ctions for damage to real property." *See Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997).

[4] While the majority characterizes this suit as a "construction defect suit" and purports to decide only the case before it, nothing in its analysis of dictionary definitions suggests the analysis applies only to "construction defect suits."

09-20-00155-CV, 2020 WL 5551707, at *4 (Tex. App.—Beaumont Sept. 17, 2020, orig. proceeding) (per curiam) (mem. op.) ("We disagree with the underlying premise of the Relators' argument, which equates an action for recovery of damages to real property subject to the mandatory venue rules in section 15.011 with an action for claims from the alleged breach of an insurance policy in which the insurer contractually agreed to pay certain property damages claims.").

Second, contracts generally (not just insurance contracts) may "give rise" to actions for "money claimed as compensation for loss or injury to land or anything attached to land" but still not fall within the ambit of section 15.011. *See Umbaugh v. Miers*, 256 S.W.2d 660, 661 (Tex. Civ. App.—San Antonio 1953, no writ) (stating predecessor statute to section 15.011 had no application to actions for breach of contract); *see also Smith v. Reid*, 658 S.W.2d 800, 801 (Tex. App.—Dallas 1983, no writ) ("[S]uits for breach of contract are not for damages to land falling within the exception of [the predecessor statute to section 15.011].") (citation omitted). For example, a construction contract may specify liquidated damages when land or an affixed structure is "lost or injured," but a breach of contract claim for liquidated damages may not suffice for mandatory venue under section 15.011. *Cf. Trafalgar House Oil & Gas Inc. v. De Hinojosa*, 773 S.W.2d 797, 798 (Tex. App.—San Antonio 1989, no writ) ("Plaintiff's suit is not an action to recover land or quiet title; rather, it is a breach of contract action to recover liquidated damages for defendants' breaches of the notice requirements of the [oil and gas] lease."). I would reserve for another day the issue of whether damages for breach of a contract can be "damages to real property."[5]

[5] The majority opinion minimizes the breach of contract claim by asserting that virtually none of the real parties' allegations relate to their breach of contract claim. The majority follows this assertion with its conclusion: "The ultimate nature and principal purpose of this suit—for purposes of evaluating the application of the mandatory venue statue—is to recover monetary compensation for physical injury or damage to real property." Although the majority

Last, the majority's framework does not consider the element of time and, by this omission, may be overbroad. In the context of constructing a home, an issue exists as to whether "loss or injury to . . . anything attached to land" requires that this "anything" be attached before the allegedly wrongful construction occurs. In other words, is it enough that a claim challenges conduct in "attaching" a structure? Or, stated differently, is it enough that a claim relates to an unbuilt, but intended structure, as compared to a built, but deficient structure? *Cf. Wagner v. Kroger Co.*, 663 S.W.2d 43, 45 (Tex. App.—Houston [14th Dist.] 1983, writ dism'd) (holding predecessor statute to section 15.011 applied to suit for damages sustained in the collapse of a roof on a warehouse addition being built). The majority's framework assumes that section 15.011 applies regardless. I would not reach the issue.

Based on the specific allegations in the petition, I concur with the majority that the real parties' suit is an "[a]ction[] . . . for recovery of damages to real property," and, consequently, the action falls within the scope of the mandatory venue provision of section 15.011. I reject the real parties' argument that section 15.011 applies only to suits to recover real property or suits affecting title to land. I reject the real parties' second contention that all of their claims "sound in contract" because the real parties allege a negligence claim. The real parties' negligence claim does not reference a contract, and, by the claim, the real parties seek compensation for damage to

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opinion does not explain how or if this minimized breach of contract claim impacts its dominant purpose analysis, its analysis is inapposite. It is enough, under section 15.004 of the Civil Practice and Remedies Code, that a single claim be governed by a mandatory venue provision for the whole suit to be subject to that mandatory venue. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.004. Section 15.004 provides: "In a suit in which a plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by the mandatory venue provisions . . . , the suit shall be brought in the county required by the mandatory venue provision." *Id.* Section 15.004 was enacted in 1995, and the few courts to consider whether dominant purpose of the suit is relevant after the enactment of section 15.004, have determined, albeit cursorily, that the test is irrelevant or have avoided the matter. *See Madera Prod. Co. v. Atl. Richfield Co.*, 107 S.W.3d 652, 659 (Tex. App.—Texarkana 2003, pet. denied); *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227, 242 (Tex. App.—Austin 2002, pet. granted, judgm't vacated w.r.m.); *In re Riata Energy, Inc.*, No. 01-00-01138-CV, 2001 WL 1480291, at *4 (Tex. App.—Houston [1st Dist.] Nov. 21, 2001, orig. proceeding) (mem. op., not designated for publication); *Marshall v. Mahaffey*, 974 S.W.2d 942, 946 (Tex. App.—Beaumont 1998, pet. denied).

"components of the home and property that were *outside* the scope of [respondents]' work" (emphasis added). *See Bass v. City of Dallas*, 34 S.W.3d 1, 8–9 (Tex. App.—Amarillo 2000, no pet.) (explaining a party's acts may constitute both breach of contract and an actionable tort, and, to distinguish between the two, it is necessary to analyze both the source of the alleged duty and the nature of the loss) (*citing Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 45 (Tex. 1998)). Having determined these matters against the real parties, I would hold their negligence claim is an "[a]ction[] . . . for recovery of damages to real property." In so holding, I would consider the negligence claim only to the extent it alleges damages *outside* the scope of respondents' construction contract. In this way, I avoid the temporal complexity mentioned above. My analysis narrowly determines the original proceeding in real parties' favor because the entire case is subject to transfer to a mandatory venue based on the determination that real parties' negligence claim is governed by section 15.011. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.004.

For these reasons, I concur in the result only.

Rebeca C. Martinez, Chief Justice