

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00394-CV

BOBIE KENNETH TOWNSEND, Appellant

v.

MONTGOMERY CENTRAL APPRAISAL DISTRICT, Appellee

**On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 09-12-12429 CV**

MEMORANDUM OPINION

Bobie Kenneth Townsend, the appellant, filed suit against the Montgomery Central Appraisal District (the District) and its Chief Appraiser, Mark Castleschoult, in his official capacity, seeking an injunction, a declaratory judgment, and damages based on theories of negligent hiring, breach of fiduciary duty, theft of property, and fraud. Townsend's complaints spring from his tax dispute with the District, but he did not timely file a petition for review in a district court to litigate the appraised value that the District placed on his property. Based on the District's and Castleschoult's pleas to the

jurisdiction, the trial court dismissed Townsend's suit. Townsend raises thirty-three issues on appeal, but none of Townsend's issues allege the trial court erred in granting the defendants' pleas to the jurisdiction. While Townsend has not directly attacked the trial court's order of dismissal, the record establishes that Townsend's suit was properly dismissed; we affirm the trial court's order.

Background

In 2004, Townsend purchased a home whose previous owner had been given a three year variance to allow time for repairs. During the variance, the District reduced the appraised value of the home from \$139,230 to \$30,770. After the variance ended, Townsend notified the District that the home had not been repaired, and in several of the following years, Townsend protested the District's determination of the home's value, specifically tax years 2005, 2006, 2008, and 2009. *See Tex. Tax Code Ann. § 41.41* (West 2008) (providing for property owner's right to protest). After Townsend filed his protests, the District refused Townsend's request that the District extend the variance; however, the District did issue final orders that lowered the home's appraised value below the value the District initially assessed on Townsend's home. Nevertheless, the market value the District placed on Townsend's home remained significantly higher than the value that had been placed on the home during the period covered by the variance. After the District gave Townsend notices of its respective final orders, Townsend did not seek to have the District's respective final orders reviewed by a district court through the

filings of petitions for review, as provided by the Tax Code. *See Tex. Tax Code Ann. § 42.21* (West Supp. 2010). By statute, the failure to timely file a petition for review generally bars complaints about an appraisal district's determination of a protest. *See id.* §§ 42.01 (West 2008), 42.21(a).

In December 2009, Townsend sued the District and Castleschoult, seeking an injunction, declaratory relief, and damages based on theories of negligent hiring, breach of fiduciary duty, theft of property, and fraud. In his petition, Townsend claimed that Castleschoult “wantonly, maliciously, and knowingly lied” to the Appraisal Review Board about whether Townsend’s home had been repaired, which increased the market value of the property. The District and Castleschoult answered, and their answers include pleas to the jurisdiction. The defendants’ pleas assert that the District is a political subdivision of the State of Texas, and that Townsend’s suit is barred by the doctrines of governmental and official immunity. The pleas to the jurisdiction also allege that Townsend failed to exhaust his administrative remedies under the Texas Tax Code.

Townsend responded to the pleas, asserting that the District does not operate as a government agency and that Castleschoult is not a state officer. After the trial court granted the defendants’ pleas to the jurisdiction, Townsend appealed.

Standard of Review

First, we address whether the trial court properly granted the District’s and Castleschoult’s pleas challenging the trial court’s exercise of jurisdiction over

Townsend's claims. A trial court must have subject matter jurisdiction to decide a case, and subject matter jurisdiction may be challenged by a plea to the jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000). Because a plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the asserted claims have merit, the plea should be decided without delving into the merits of the case. *Id.* at 554. Whether a petition alleges facts affirmatively demonstrating that a trial court possesses subject matter jurisdiction over the claims that have been asserted in the lawsuit is a question of law that is reviewed *de novo*. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

In determining the sufficiency of the plaintiff's pleadings, courts construe the pleadings in the plaintiff's favor and look at the plaintiff's intent. *Id.* Where the plaintiff's pleadings affirmatively negate the existence of jurisdiction, "then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Id.* at 227. Stated another way, to prevail on a plea to the jurisdiction, a defendant must show that even if all the plaintiff's pleaded allegations are true, an incurable jurisdictional defect remains on the face of the pleadings that deprives the trial court of subject matter jurisdiction. *Appraisal Review Bd. Of Harris Cnty. Appraisal Dist. v. O'Connor & Assocs.*, 267 S.W.3d 413, 416 (Tex. App.—Houston [14th Dist.] 2008, no pet.). When a plea to the jurisdiction challenges the existence of jurisdictional facts, we may consider evidence relevant to the jurisdictional issue. *Miranda*, 133 S.W.3d at 227. Additionally,

“[i]n a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court’s jurisdiction by alleging a valid waiver of immunity.” *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

Analysis

From the pleadings and the record, it is apparent that Townsend failed to exhaust his administrative remedies under the Tax Code with respect to the appraisal orders about which Townsend complains. Property owners dissatisfied with the District’s assessment are entitled to protest the property’s appraised value before the appraisal review board. Tex. Tax Code Ann. §§ 41.01(a)(1), 41.41(a)(1) (West 2008). The right to protest includes protesting the denial of an exemption, as well as any action of the chief appraiser that adversely affects the property owner. *Id.* § 41.41(a)(4), (9). Property owners are then entitled to appeal the appraisal review board’s order determining their protest to obtain judicial review of the order. *Id.* § 42.01(1)(A) (West Supp. 2010). A property owner who appeals must file a petition for review with the district court within sixty days after receiving notice of the District’s entry of a final order. *Id.* § 42.21(a). Failure to timely file a petition for review bars any appeal under the Tax Code. *Id.* In summary, the Texas Tax Code provides a detailed administrative procedure to resolve property tax disputes, and those procedures are exclusive. *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006); see Tex. Tax Code Ann. § 42.09 (West 2008).

The record shows that Townsend failed to appeal the appraisal review board's final orders he now wishes to attack, comprising the final orders the District issued during 2005, 2006, 2008 and 2009. Townsend did not timely file petitions for review with respect to the District's final orders. Therefore, he is foreclosed from obtaining judicial review of the District's property appraisal determinations. *See Tex. Tax Code Ann. § 42.21(a).* Because Townsend did not appeal from the final appraisal orders in issue, they became final. *See KM-Timbercreek, LLC v. Harris Cnty. Appraisal Dist.*, 312 S.W.3d 722, 728 (Tex. App.—Houston [1st Dist.] 2009, no pet.); Tex. Tax Code Ann. § 42.21(a).

The claims advanced by Townsend in his suit are not within the statutory exceptions to the Tax Code's exclusive remedy provision.¹ Tex. Tax Code Ann. 42.09

¹ Sec. 42.09 Remedies Exclusive.

(a) Except as provided by Subsection (b) of this section, procedures prescribed by this title for adjudication of the grounds of protest authorized by this title are exclusive, and a property owner may not raise any of those grounds:

(1) in defense to a suit to enforce collection of delinquent taxes; or
(2) as a basis of a claim for relief in a suit by the property owner to arrest or prevent the tax collection process or to obtain a refund of taxes paid.

(b) A person against whom a suit to collect a delinquent property tax is filed may plead as an affirmative defense:

(1) if the suit is to enforce personal liability for the tax, that the defendant did not own the property on which the tax was imposed on January 1 of the year for which the tax was imposed; or

(2) if the suit is to foreclose a lien securing the payment of a tax on real property, that the property was not located within the boundaries of the taxing unit seeking to foreclose the lien on January 1 of the year for which the tax was imposed.

(West 2008). In his suit, Townsend seeks declaratory and injunctive relief against the District and Castleschoultd regarding the appraisals of his home's value, and the lawsuit asserts that the District and Castleschoultd improperly considered Townsend's home as having been repaired when the District appraised the home's value. Townsend also sought to have his home removed from the tax rolls. We conclude that all of Townsend's claims concern a dispute over the home's value. We further conclude that Townsend should have, but did not, appeal from each of the final orders in issue that assessed a market value on his home. Tex. Tax Code Ann. § 42.21(a). Because Townsend did not file appeals from the District's final orders, he failed to exhaust his remedies under the Tax Code. The trial court did not err in concluding that Townsend's failure to exhaust his administrative remedies deprived it of the right to exercise subject matter jurisdiction over Townsend's claims for declaratory and injunctive relief. *See Miranda*, 133 S.W.3d at 226-27.

Townsend's petition also includes claims against the District and Castleschoultd for negligent hiring, breach of fiduciary duty, theft of property, and fraud. Townsend contends that the Texas Constitution provides the trial court with jurisdiction to hear these claims. *See Tex. Const. art. V, § 8*. However, the Texas Constitution provides that trial courts have jurisdiction "except in cases where exclusive, appellate, or original

(c) For purposes of this section, "suit" includes a counterclaim, cross-claim, or other claim filed in the course of a lawsuit.

jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.” Tex. Const. art. V, § 8.

“An agency has exclusive jurisdiction when ‘a pervasive regulatory scheme indicates that [the Legislature] intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.’” *Jim Wells Cnty. v. El Paso Prod. Oil and Gas Co.*, 189 S.W.3d 861, 871 (Tex. App.—Houston, [1st. Dist.] 2006, pet. denied). The Tax Code’s provisions governing appraisal of properties for ad valorem tax purposes, with its procedures for resolving disputes over valuation, is an example of such a pervasive regulatory scheme. *See id.* All of Townsend’s claims are grounded on his contention that the District and its representatives failed to properly appraise his home. As Townsend’s complaints for negligent hiring, breach of fiduciary duty, theft of property, and fraud all seek to attack the District’s final appraisal orders, the District had exclusive jurisdiction to address these claims, subject to Townsend’s right to obtain review through an appeal of the District’s final orders. *See* Tex. Tax Code Ann. § 42.09 (West 2008); *Rourk*, 194 S.W.3d at 502. We conclude that Townsend’s failure to exercise his right to appeal deprived the trial court of jurisdiction over Townsend’s claims for negligent hiring, breach of fiduciary duty, theft of property, and fraud.

We also reject Townsend’s claim that the appraisal district is not a political subdivision of the State. *See* Tex. Tax Code Ann. § 6.01(c) (West 2008). Governmental immunity shields political subdivisions of the State from suit and liability. *Tooke v. City*

of Mexia, 197 S.W.3d 325, 332 (Tex. 2006); *see also Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Political subdivisions of the state are entitled to governmental immunity unless it has been waived. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Immunity from suit, unlike immunity from liability deprives a trial court of subject matter jurisdiction unless the government has consented to be sued. *Miranda*, 133 S.W.3d at 224; *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Trial courts may exercise jurisdiction over lawsuits against governmental entities where the governmental entity has consented to the suit. *See Jones*, 8 S.W.3d at 638. In a suit against a governmental entity, the plaintiff bears the burden of establishing that the government consented to being sued, “which may be alleged either by reference to a statute or to express legislative permission.” *Id.*

In this case, Townsend failed to plead any statutory provision that operates to waive the District’s immunity. Because the pleadings and jurisdictional evidence fail to demonstrate that the legislature gave consent to the types of claims Townsend asserted in his suit, the trial court could reasonably have concluded that it lacked subject matter jurisdiction over Townsend’s tort claims. *See Jones*, 8 S.W.3d at 638.

Townsend also filed claims against Castleschoult, the District’s chief appraiser, in his official capacity. Townsend sought injunctive relief against Castleschoult because Castleschoult allegedly considered Townsend’s home to have undergone repairs, and Townsend’s suit includes a request that Castleschoult be required to remove his home

from the tax rolls. A suit against a government employee in his official capacity is a suit against his government employer, and an employee sued in his official capacity has the same governmental immunity, derivatively, as his government employer. *Franka v. Velasquez*, 332 S.W.3d 367, 382-83 (Tex. 2011); *see McLennan Cnty. v. Veazey*, 314 S.W.3d 456, 459 (Tex. App.—Waco 2010, pet. denied) (stating that an employee sued in his official capacity may raise any defense that would be available to his employer, including the defense of immunity); *see also Tex Civ. Prac. & Rem. Code Ann.* §§ 101.001(2), (3) (West 2011). However, governmental immunity does not preclude prospective injunctive remedies in official capacity suits against government employees who violate statutory or constitutional provisions. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368-69 (Tex. 2009).

Townsend's claims against Castleschoultd do not fall within the *ultra vires* exception. To fall within the *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but must allege that the officer acted without legal authority or failed to perform a purely ministerial act. *Id.* at 372. Immunity from suit exists if the suit arises from the performance of the government employee's discretionary duties, the employee acted in good faith, and acted within the scope of his authority. *Franka*, 332 S.W.3d at 383. With respect to Castleschoultd's duties, we note that the chief appraiser of an appraisal district has a statutory duty to prepare appraisal records for each taxable property located within the district. Tex. Tax Code Ann. § 25.01(a) (West

2008). The chief appraiser's duties also include a statutory duty to value taxable property by applying generally accepted appraisal methods and techniques to assess the property's market value. *See id.* § 23.01(a), (b) (West Supp. 2010).

With respect to Townsend's complaints against Castleschoultd, all of Townsend's claims concern Castleschoultd's statutory duties of determining a home's market value for the District's appraisal records. *See Heinrich*, 284 S.W.3d at 372. Because Townsend's claims against Castleschoultd do not fall within the *ultra vires* exception, we conclude the trial court did not err in dismissing them for lack of jurisdiction.

Having reviewed the record, we conclude the trial court properly granted the District's and Castleschoultd's jurisdictional pleas. Because Townsend's suit was properly dismissed, the remaining issues Townsend asks us to address would not result in his gaining any relief from the trial court's order dismissing his case; therefore, as they would not afford him any relief, we need not address them. *See Tex. R. App. P.* 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.") We affirm the trial court's order dismissing Townsend's suit without prejudice for lack of subject matter jurisdiction.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on April 1, 2011
Opinion Delivered July 28, 2011
Before McKeithen, C.J., Kreger and Horton, JJ.