In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00089-CV

BOBIE KENNETH TOWNSEND, Appellant

V.

APPRAISAL REVIEW BOARD OF MONTGOMERY COUNTY, TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 10-08-09020 CV

MEMORANDUM OPINION

This appeal concerns the 2010 appraisal of Bobie Kenneth Townsend's property by the Montgomery County Appraisal District. Townsend, the appellant, sued the Appraisal Review Board of Montgomery County (the Board), seeking to have his property removed from Montgomery County's tax rolls, and requesting an award of damages based on an alleged breach of fiduciary duty. Townsend's petition, liberally construed, asserts four claims which allege that (1) he suffered damages when the Board refused to remove his property from the tax rolls, (2) the Board breached its fiduciary duties by failing to address his claims, (3) the Board, by breaching various fiduciary

duties, denied Townsend his right to receive due process under the Texas Constitution, and (4) the Board denied Townsend his right under the Texas Constitution to receive "due course of law of the land[.]" The Board appeared and then filed a motion to dismiss for want of jurisdiction. Townsend appeals from the trial court's order dismissing his suit.

Townsend raises two issues on appeal. In issue one, Townsend argues the Board's final order did not clearly require him to serve the District. In issue two, Townsend argues that his service on the Board is sufficient. We affirm the trial court's order.

Background

In May 2010, Townsend filed a notice of protest with the District claiming that his property should not be taxed and that the District had improperly denied, modified, or cancelled his request for an exemption. *See* Tex. Tax Code Ann. § 41.41 (West 2008) (providing for property owner's right to protest), § 41.44 (West 2008) (providing that property owner must file a written notice of protest with the appraisal review board). After conducting a hearing, the Board issued a written final order determining Townsend's protest. *See* Tex. Tax Code Ann. § 41.45 (West Supp. 2010) (requiring the appraisal review board to conduct a hearing on the protest), § 41.47 (West 2008) (requiring the appraisal review board to make its decision by written order). In its final order, the Board determined that Townsend's property was "over market value, value is unequal compared with other properties[.]" The Board ordered that the value that had been placed on the Townsend property should be changed to $124,900. *See id.* § 41.47.

After the Board gave Townsend notice of its final order, Townsend timely filed a petition for review with the district court naming the Board as the only party. *See* Tex. Tax Code Ann. § 42.21(a) (West Supp. 2010) (requiring petition for review to be filed within 60 days after the party received notice that a final order was entered). The Board's answer to Townsend's petition includes a plea to the jurisdiction. The Board's plea asserts that Townsend failed to invoke the jurisdiction of the court because he failed to "sue the proper and necessary party[.]" *See id.* § 42.21(b). The Board subsequently filed a motion to dismiss for want of jurisdiction. In its motion to dismiss, the Board stated "[t]he failure to file suit against the proper party within the applicable time period is jurisdictional[,]" and that Townsend "failed to invoke the jurisdiction of this Court because of the failure to include the Montgomery Central Appraisal District as a party within sixty (60) days after receipt of the Board's final order as required by the Code."

Townsend responded to the Board's plea, asserting that although he "may have been ignorant of the provision under Section 42.21of the Texas Tax Code[,]" he served the appraisal district by serving the chairman of the Board. In its reply, the Board notes that the Texas Rules of Civil Procedure apply to *pro se* litigants, and once again points out that "[Townsend] did not file a lawsuit against the appraisal district as required by the Code. [Townsend] does not dispute this fact and the court must dismiss the cause of action for want of jurisdiction." Even though the Board's pleadings notified Townsend that he needed to make the District a party to his lawsuit, he never did so.

Subsequently, the trial court granted the Board's motion to dismiss for want of jurisdiction. In the trial court's findings of fact and conclusions of law, the trial court found the Board was the only defendant named in Townsend's lawsuit, the Board's motion to dismiss asserts the trial court lacked jurisdiction because Townsend had failed to include the District as a defendant, and that Townsend had not filed any supplemental or amended petitions to include the District as a defendant in this matter. The trial court concluded that Townsend "failed to perfect an appeal of his protest because he failed to include the District as a defendant in this lawsuit[,]" and that due to Townsend's failure to sue or include the District, the court did not have jurisdiction over Townsend's lawsuit. Townsend appealed.

Standard of Review

First, we consider whether, based on the Board's plea to the jurisdiction, the trial court properly granted the Board's motion to dismiss. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (noting that "the plea should be decided without delving into the merits of the case"). 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. *Id.* at 553-54. 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 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.). 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).

Generally, a litigant has a right to amend its pleadings to attempt to cure pleading defects. *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002). A pleader must be given an opportunity to amend in response to a plea to the jurisdiction if the defects are curable. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). If a plaintiff has a reasonable opportunity to amend after a governmental entity files a plea to the jurisdiction, and if the pleadings do not state a cause of action upon which the trial court has jurisdiction, then the trial court should dismiss the plaintiff's action with prejudice. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004).

Although the general rule expresses a preference to allow a plaintiff the opportunity to amend, a plaintiff can waive this opportunity through inaction. *Robinson v. Alief Indep. Sch. Dist.*, 298 S.W.3d 321, 328 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (citing *Kassen v. Hatley*, 887 S.W.2d 4, 13-14 n.10 (Tex. 1994)). Specifically, a plaintiff who does not present an objection to the trial court or request an opportunity to amend its petition waives any complaint that it was not given an opportunity to amend. *See Kassen*, 887 S.W.2d at 13 n.10; *Tara Partners, Ltd. v. City of South Houston*, 282 S.W.3d 564, 578 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("By failing to seek permission to amend after the trial court found the City's plea meritorious, appellants forfeited the opportunity to amend while this case was pending in the trial court.").

Analysis

In issue one, Townsend claims that the Board's final order did not sufficiently explain how he was required to serve his petition for review in district court. Townsend's petition named only the Board, and does not name the District. By statute, a party who files a petition seeking review of a final appraisal order must bring the petition for review "against the appraisal district[.]" Tex. Tax Code Ann. § 42.21(b). The statute further provides that "[a] petition for review is not required to be brought against the appraisal review board, but may be brought against the appraisal review board in addition to any other required party, if appropriate." *Id.* The information required to be included in the Board's final order does not include information on how service of the petition is

perfected, as that information is found in section 42.21(b). *See id.* We conclude that the Board's final order contained the information required by section 41.47(e). *See id.* § 41.47(e). We overrule issue one.

In issue two, Townsend argues that his service on the Board is sufficient. With respect to the consequences that resulted from Townsend's failure to name or serve the District, the record shows that Townsend made no effort to amend his petition despite the fact that he had the opportunity to do so. Townsend could have amended his original petition in response to the Board's first supplemental original answer, plea to the jurisdiction, and special denials, as each notified Townsend that he had failed to sue the District, a necessary party to the suit. The Board also filed its motion to dismiss for want of jurisdiction providing Townsend with an additional opportunity to correct his pleadings by naming and serving the District. We conclude that Townsend had the opportunity to amend his petition to make the District an additional party to his suit before the trial court dismissed his suit for lack of jurisdiction. *See Levatte v. City of Wichita Falls*, 144 S.W.3d 218, 225 (Tex. App.—Fort Worth 2004, no pet.); *see also Haddix v. Am. Zurich Ins. Co.*, 253 S.W.3d 339, 346-47 (Tex. App.—Eastland 2008, no pet.).

After the trial court dismissed Townsend's suit, Townsend did not file any post-judgment motions requesting that he be allowed an opportunity to amend to add the District as a party. *See Kassen*, 887 S.W.2d at 13 n.10. Townsend also did not object or except to the trial court's conclusion that the court had no jurisdiction in the matter.

Finally, we note that Townsend's brief does not ask that we give him the opportunity to cure his failure to name the District as a party to his appeal from the Board's final order. *See Levatte*, 144 S.W.3d at 225.

A taxpayer's failure to make the District a party to a suit challenging an appraisal review board's final order deprives the trial court of subject matter jurisdiction over a suit challenging the decisions of the appraisal review board. *Appraisal Review Bd. v. Int'l Church of Foursquare Gospel*, 719 S.W.2d 160, 160 (Tex. 1986) ("Compliance with § 42.21 [of the Texas Tax Code] is jurisdictional and the jurisdictional error of the trial court is apparent on the face of the record."). We overrule issue two.

Having reviewed the record, we conclude the trial court properly granted the Board's jurisdictional plea, and that Townsend, through his inaction, waived his right to amend his pleadings. Because Townsend's suit was properly dismissed, the trial court acted properly when it refused to address the merits of the four claims alleged in Townsend's petition. We overrule Townsend's issues, and we affirm the trial court's order dismissing Townsend's suit for want of jurisdiction.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on July 11, 2011
Opinion Delivered August 31, 2011
Before McKeithen, C.J., Gaultney and Horton, JJ.