

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

---

**NO. 09-15-00296-CV**

---

**CHARLES KIRKWOOD, Appellant**

**V.**

**JEFFERSON COUNTY AND W. PROPERTIES, LLC, Appellees**

---

---

**On Appeal from the 172nd District Court**  
**Jefferson County, Texas**  
**Trial Cause No. E-194,967**

---

---

**MEMORANDUM OPINION**

In January 2010, Jefferson County (the “County”) sued Sara Gleason to collect unpaid property taxes. In June 2010, the trial court signed a default judgment against Gleason. The record does not indicate that the County recorded an abstract of judgment in the county real property records. In August 2010, Gleason sold her property to Charles Kirkwood by warranty deed, with a notation that the grantee was responsible for all delinquent taxes. After almost three years, in March 2013, the County posted the property for sheriff’s sale and W. Properties,

LLC purchased the property at the March 2013 tax sale. The following August, W. Properties, LLC gave Kirkwood notice to vacate the premises. Kirkwood subsequently filed a petition for bill of review, in which he argued that he failed to receive notice of the tax sale. In April 2014, the trial court denied Kirkwood's petition. In January 2015, Kirkwood filed a motion for new trial, which the trial court granted. However, the County filed motions to dismiss for lack of standing and for lack of jurisdiction. The trial court granted both motions. On appeal, Kirkwood, acting *pro se*, challenges the dismissal of his case. We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

We first address whether the trial court properly denied the County's motion to dismiss for lack of standing. In its motion, the County asserted that Kirkwood was not entitled to notice of the tax sale because Gleason, the defendant to the judgment, is the only person that must be notified pursuant to the Texas Tax Code. *See* Tex. Tax. Code Ann. § 34.01(c) (West Supp. 2015) ("The officer charged with the sale shall give written notice of the sale in the manner prescribed by Rule 21a, Texas Rules of Civil Procedure, as amended, or that rule's successor to each person who was a defendant to the judgment or that person's attorney."). According to the County, it provided public notice, gave notice to Gleason, posted notice at the courthouse and on the County's website, and sent notice to the person

on the tax roll and the occupant of the property. The County further maintained that lack of notice is insufficient to invalidate the sale. *See id.* § 34.01(d) (stating that the officer’s failure to send written notice of sale or a defendant’s failure to receive that notice is, alone, insufficient to invalidate the sale itself or the title conveyed by the sale). According to Kirkwood, the County had notice that Kirkwood was the property owner at the time it posted the property for tax sale, and the County accepted partial payments from Kirkwood toward the delinquent taxes reflected by the default judgment against Gleason.

“A party can argue that a judgment is void in either a bill of review or a collateral attack.” *TFHSP Series LLC v. MidFirst Bank*, No. 05-14-00730-CV, 2015 WL 4653166, at \*3 (Tex. App.—Dallas Aug. 6, 2015, no pet.) (mem. op.). In his petition for bill of review, Kirkwood argued that his due process rights were violated by the lack of notice. A party has standing when he is personally aggrieved and, consequently, has a justiciable interest in the controversy. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005) (quoting *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). “A judgment entered without notice or service to an interested party is ‘constitutionally infirm’ in that the failure to provide notice violates ‘the most rudimentary demands of due process of law.’” *Sec. State Bank & Tr. v. Bexar Cty.*,

397 S.W.3d 715, 723 (Tex. App.—San Antonio 2012, pet. denied) (quoting *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988)). “[A] complete failure or lack of service on a party with a property interest adversely affected by the judgment constitutes a due process violation that warrants setting the judgment aside.” *Id.*

Gleason conveyed her interest to Kirkwood via a general warranty deed; thus, Kirkwood was the property owner at the time of the tax sale. *See Farm & Ranch Inv’rs, Ltd. v. Titan Operating, L.L.C.*, 369 S.W.3d 679, 681 (Tex. App.—Fort Worth 2012, pet. denied) (“A general warranty deed conveys all of the grantor’s interest unless there is language in the instrument that clearly shows an intention to convey a lesser interest.”). The record before us does not contain evidence showing that Kirkwood was provided or received notice of the sale, nor does it indicate that the lack of notice resulted from Kirkwood’s own fault or negligence. *See Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163-64 (Tex. 2015) (holding that when a bill-of-review plaintiff claims a due process violation for lack of service or notice, he need only prove that his “own fault or negligence did not contribute to cause the lack of service or notice.”); *see also Cleveland v. Taylor*, 397 S.W.3d 683, 693 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (“Neither an attorney’s arguments nor the pleadings or motions of a

party constitute evidence.”). Kirkwood’s due process rights were violated when he received no notice of the tax sale, and he was entitled to attack the sale independent of the Texas Tax Code. *See Sec. State Bank & Tr.*, 397 S.W.3d at 724 (holding that lienholder bank could properly assert a due process claim independent of the Texas Tax Code); *see also TFHSP Series LLC*, 2015 WL 4653166, at \*3. Because Kirkwood has a justiciable interest in the controversy at issue, the trial court erred by granting the County’s motion to dismiss for lack of standing. *See Lovato*, 171 S.W.3d at 848.

Next, we address whether the trial court properly granted the County’s motion to dismiss for lack of jurisdiction. In its motion, the County argued that governmental immunity shielded it from Kirkwood’s claims. However, a party may sue the state for equitable relief arising out of the state’s violation of constitutional rights. *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007). The Texas Constitution provides that no Texas citizen “shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” Tex. Const. art. I, § 19. “Sovereign immunity does not preclude a claim that the state deprived the plaintiff of property without due process of law.” *Tex. Dep’t of Health v. Rocha*, 102 S.W.3d 348, 354 (Tex. App.—Corpus Christi 2003, no pet.).

In his amended petition, Kirkwood sought injunctive relief to prevent the County from denying Kirkwood possession of his real property. While Kirkwood may not be able to maintain a suit for damages against the County, he can maintain a suit for equitable relief based on an alleged deprivation of his property without due process. *See M.A.L.*, 226 S.W.3d at 392; *see also Rocha*, 102 S.W.3d at 354. Because governmental immunity does not bar Kirkwood’s due process claim for equitable relief, the trial court erred by granting the County’s motion to dismiss for lack of jurisdiction. *See M.A.L.*, 226 S.W.3d at 392 (holding that the “court of appeals did not err by refusing to dismiss the plaintiffs’ claims for injunctive relief based on alleged constitutional violations.”); *see also Rocha*, 102 S.W.3d at 354. Under these circumstances, we sustain Kirkwood’s complaint challenging the dismissal of his lawsuit, we reverse the trial court’s orders granting the County’s motions to dismiss, and we remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

---

CHARLES KREGER  
Justice

Submitted on November 19, 2015  
Opinion Delivered February 11, 2016

Before McKeithen, C.J., Kreger and Johnson, JJ.