



**IN THE
TENTH COURT OF APPEALS**

No. 10-19-00195-CV

HOUSE OF PRAISE MINISTRIES, INC.,

Appellant

v.

CITY OF RED OAK, TEXAS,

Appellee

**From the 40th District Court
Ellis County, Texas
Trial Court No. 87580**

MEMORANDUM OPINION

House of Praise Ministries, Inc. appeals from the trial court's order granting the City of Red Oak's plea to the jurisdiction and motion to dismiss. We affirm.

BACKGROUND FACTS

House of Praise (HOP) bought property in the City of Red Oak to build a new church. At the time HOP bought the property, there was a mobile home park as well as

a brick structure on the property. A City of Red Oak code enforcement officer determined that certain aspects of the property were substandard and dangerous.

In 2013, a hearing was held in municipal court to determine whether the property was in violation of the City's code. After the hearing, the municipal court issued an "Order for Substandard Structure" in which the court found the property was dilapidated, substandard and unfit for human habitation, hazardous to public health and safety and welfare, and did not meet the minimum standards for continued use and occupancy contained in the City's Code of Ordinances. HOP was ordered to make specified repairs or demolish and remove the brick structure and the mobile home park.

HOP filed a verified petition for review of the municipal court's order in the district court of Ellis County. The City filed a plea to the jurisdiction, and, after a hearing, the trial court granted the City's plea and dismissed HOP's verified petition. HOP appealed to this Court, and this Court affirmed the trial court's judgment in part and reversed and remanded in part. *House of Praise Ministries, Inc. v. The City of Red Oak*, No. 10-15-00148-CV, 2017 LEXIS 4095 (Tex. App. Waco —May 17, 2017, no pet.). This Court held that the trial court properly dismissed HOP's regulatory taking claim and its procedural due process claim. This Court noted that HOP's substantive due process claim was so intertwined with the regulatory taking claim that it was difficult to determine if HOP asserted a valid substantive due process claim. This Court remanded the case to the trial court to give HOP the opportunity to amend its pleadings to allege, if

it could, a substantive due process claim. This Court stated that if, on remand, HOP was unable to assert facts that make a prima facie case for a violation of substantive due process, it would then be appropriate to dismiss HOP's claim on a plea to the jurisdiction. *Id* at * 23.

HOP filed its second amended verified petition on October 18, 2018, well over a year after this Court's opinion on May 17, 2017. The City filed a second amended plea to the jurisdiction and motion to dismiss, and after a hearing, the trial court granted the City's motion.

SUBSTANTIVE DUE PROCESS

In the sole issue on appeal, HOP argues that the trial court erred in granting the City's second amended plea to the jurisdiction and motion to dismiss. A plea to the jurisdiction seeks dismissal of a case or cause of action for lack of subject matter jurisdiction. *See Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Subject matter jurisdiction involves a court's power to hear a case or cause of action. *Tellez v. City of Socorro*, 226 S.W.3d 413, 413 (Tex. 2007). We review the trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). When such a plea challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Id.* at 226; *Tex. Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 446 (Tex. 1993). If a plea to the

jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 227. If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. *Id.* at 227-228. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* Further, we take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Id.* at 228.

In its second amended verified petition, HOP alleges three areas where the City violated its substantive due process rights: 1) demanding an amortization destroys the use of property, 2) overzealous attempt to declare safety code violations to circumvent non-conforming use, and 3) filing a premature lis pendens. To show a substantive due process deprivation of property, a party must prove 1) he had a constitutionally protectable interest in the property, and 2) the government deprived him of that interest capriciously and arbitrarily. *City of Lubbock v. Corbin*, 942 S.W.2d 14, 21 (Tex. App. — Amarillo 1996, writ denied).

AMORTIZATION AGREEMENT

HOP first argues that the City violated its due process rights by demanding an Amortization Agreement. Sometime in July 2012, the City proposed an Amortization

Agreement which was an offer by the City not to pursue a court action against HOP regarding the condition of HOP's property if HOP agreed to the schedule set out in the agreement. HOP did not accept the Amortization Agreement.

HOP argued in its petition that the agreement would cause the deprivation and elimination of the trailer park. However, HOP never accepted the Amortization Agreement. The offer of an agreement did not deprive HOP of an interest in its property.

OVERZEALOUS CODE ENFORCEMENT - DECLARING THE PROPERTY A NUISANCE - UNFAIRLY TARGETING HOP'S PROPERTY

HOP next argues that the City violated its due process rights by overzealously identifying code violations. HOP contends that the City's code enforcement was excessive in identifying violations and that the City demanded remediation to the property "far in excess of what is required under the minimum standards of the City Ordinance." HOP argues that the City's excessive enforcement of the code violations was beyond the financial ability of HOP to remediate the property and that such enforcement deprived them of the economic value of the property and ultimately deprived them of their ownership of the property.

Although HOP's second amended petition only alleges overzealous code enforcement, in its brief, HOP argues "Declaring the Property a Nuisance in Order to Eliminate the Grandfathered Non-Conforming Use Protection" and "Targeting Property

Without Citing Similar Properties” as additional violations of due process. However, none of the arguments establish a violation of HOP’s substantive due process rights.

HOP does not provide any facts in support of its claims that the City violated its substantive due process rights. As stated in our previous opinion on May 17, 2017, the conclusory allegations that the code enforcement officer enforced the City’s regulations arbitrarily and capriciously are inadequate, standing alone, to support a substantive due process claim. *House of Praise Ministries, Inc. v. The City of Red Oak*, No. 10-15-00148-CV, 2017 LEXIS 4095 at *n.11. HOP does not challenge the City’s regulations themselves, but rather only argues that the City overzealously identified and enforced the regulations. HOP’s conclusory allegations regarding the enforcement of the City’s regulations do not support a substantive due process claim.

LIS PENDENS

HOP next argues that the City violated its substantive due process rights by prematurely filing a notice of lis pendens. The City filed a Notice of Lis Pendens on February 22, 2013. At that time, the matter had been heard by a building commission, but no cause of action had been filed.

In its second amended petition, HOP only alleges that the City violated its substantive due process rights by prematurely filing the lis pendens. However, in the brief, HOP brings additional arguments that the City did not comply with the requirements of Section 12.007 (b) of the Texas Property Code for filing a notice of lis

pendens. Specifically, HOP states that the lis pendens does not identify the court in which the action is pending and that the City did not serve a copy of the notice on all interested parties. *See* TEX. PROP. CODE ANN. § 12.007 (b) &(d) (West 2014).

A lis pendens provides notice that an action is pending. *See* TEX. PROP. CODE ANN. § 12.007 (West 2014). When a lis pendens has been filed, a party may file a motion to expunge lis pendens. *See* TEX. PROP. CODE ANN. § 12.0071 (West Supp. 2019). The court shall order the notice of lis pendens expunged if the court determines that:

- (1) the pleading on which the notice is based does not contain a real property claim;
- (2) the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim; or
- (3) the person who filed the notice for record did not serve a copy of the notice on each party entitled to a copy under Section 12.007(d).

TEX. PROP. CODE ANN. § 12.0071 (c) (West Supp. 2019). HOP has not filed a motion to expunge the lis pendens or presented any argument to the trial court that the lis pendens does not comply with Section 12.007.

HOP argues that the prematurely filed notice of lis pendens prevented them from selling the property. However, the doctrine of lis pendens does not void a conveyance of the property during pendency of the suit; the interest of the grantor merely passes subject to it. *See Cherokee Water Co. v. Advance Oil & Gas Co.*, 843 S.W.2d 132, 135 (Tex. App. — Texarkana 1992, writ denied).

HOP does not, however, allege any facts in support of its claim that the premature notice of lis pendens violated its substantive due process rights. HOP does not provide

any authority, and we have found none, to support the argument that a prematurely filed notice of lis pendens violates substantive due process rights.

Because there were ongoing proceedings before the building commission at the time the lis pendens was filed, and a cause of action followed, there is nothing to show that the City acted capriciously or arbitrarily in filing the lis pendens.

CUMULATIVE EFFECT

HOP also argues on appeal that the City's "substantive due process violations were cumulative and entailed several instances of arbitrary and capricious conduct that resulted in violations of substantive due process." HOP does not cite any authority to support its argument that actions can be cumulated to create a substantive due process claim. See TEX. R. APP. P. 38.1 (i). Moreover, because we have determined HOP has failed to allege arbitrary and capricious conduct by the City there can be no cumulative effect of arbitrary and capricious conduct.

DAMAGES

In its second amended verified petition, HOP again requested monetary damages. In our prior opinion on May 17, 2017, we noted that damages were not appropriate in a procedural or substantive due process claim. *House of Praise Ministries, Inc. v. The City of Red Oak*, No. 10-15-00148-CV, 2017 LEXIS 4095 at *18. Damages cannot be requested when raising a procedural or substantive due process claim. *Smith v. City of League City*, 338 S.W.3d 114, 127, (Tex. App. —Houston [14th Dist.] 2011, no pet.). A due process claim in

which the plaintiff seeks monetary damages does not invoke the trial court's jurisdiction.

Id. HOP has not invoked the trial court's jurisdiction for its claims by requesting damages. We overrule the sole issue on appeal.

CONCLUSION

We affirm the trial court's judgment.

JOHN E. NEILL
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill

Affirmed

Opinion delivered and filed August 6, 2020

[CV06]

[RWR]

