TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00320-CV

Reagan National Advertising of Austin, Inc., Appellant

v.

James M. Bass, in His Official Capacity as the Executive Director of the Texas Department of Transportation, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT NO. D-1-GN-12-002674, HONORABLE TIM SULAK, JUDGE PRESIDING

MEMORANDUM OPINION

Reagan National Advertising of Austin, Inc., contends on appeal that the trial court erred in granting appellee's plea to the jurisdiction and motion to dismiss Reagan's petition alleging that the executive director[1] (ED) of the Texas Department of Transportation (TxDOT) acted ultra vires in denying Reagan's application for an outdoor advertising permit. *See* Tex. Transp. Code § 391.068(a) (providing for issuance of commercial advertising permit to applicant whose sign would comply with applicable statutes and rules); 43 Tex. Admin. Code § 21.170 (Tex. Dep't of Transp., Appeal Process for Permit Denials). For the following reasons, we will affirm the trial court's judgment.

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[1] The style of the underlying proceedings name Phil Wilson, the former Executive Director of TxDOT, as the defendant. We have substituted the current Executive Director's name in the style of this appeal. *See* Tex. R. App. P. 7.2 (providing for automatic substitution of officer's successor).

BACKGROUND

Reagan filed a lawsuit against TxDOT's ED, alleging that he wrongfully denied an appeal of a denied permit application submitted to TxDOT for the construction, erection, and maintenance of an outdoor advertising sign.[2] *See* Tex. Transp. Code §§ 391.067 (requiring permit for erection of commercial sign), .068 (providing for issuance of permit to applicant whose sign would comply with applicable statutes and rules); *see also* 43 Tex. Admin. Code § 21.170 ("If a sign permit is denied, the applicant may file a request with the executive director for an appeal."). Reagan sued the ED in his official capacity and alleged that its suit was not barred by sovereign immunity because the ED was "acting ultra vires by not following TxDOT's own regulations."

Reagan's petition specifically alleged that TxDOT issued it a permit, No. 87484, on June 13, 2008 that secured for Reagan a site adjacent to U.S. Highway 183 for the construction of an advertising sign. The permit was valid for one year, granting to Reagan the exclusive right to erect a sign at the site and renewable annually if the sign was erected within the one-year window. *See* 43 Tex. Admin. Code §§ 21.171 (Tex. Dep't of Transp., Permit Expiration), .172 (Tex. Dep't of Transp., Permit Renewals). On May 8, 2009, TxDOT issued a permit to another operator, A.C.M.E. Partnerships L.P. (ACME), for a site that was located within 1,500 feet of Reagan's site covered by Permit No. 87484, purportedly in violation of TxDOT's spacing regulations. *See id.* § 21.187 (Tex. Dep't of Transp., Spacing of Signs) ("Permitted signs on the same side of a regulated

[2] Reagan's petition actually challenged the ED's denial of two appeals of two denied permit applications, but it challenges only one of the two denials in this appeal so we do not recite facts related to the unchallenged denial.

highway, including freeway frontage roads, may not be erected closer than 1,500 feet apart on the same side of a regulated highway.").

Reagan did not build its sign within one year of June 12, 2008, so its Permit No. 87484 expired on June 12, 2009. On June 23, 2009, Reagan submitted another application to TxDOT for a sign permit at the same location as Permit No. 87484. TxDOT denied this second application, citing for its denial the 1,500-foot spacing restriction under its rule 21.187. *See id.* Reagan notified TxDOT that it was appealing to the ED the denial of its second permit application because TxDOT, in Reagan's view, had made a mistake in granting the ACME permit for a site within 1,500 feet of Reagan's still validly permitted location.

While Reagan's appeal to the ED was pending—for approximately a year— TxDOT cancelled ACME's permit, ACME requested an administrative hearing at the State Office of Administrative Hearings (SOAH) with respect to the cancellation, *see id.* § 21.176 (Tex. Dep't of Transp., Cancellation of Permit) (providing for administrative hearing upon request when permit is cancelled), and TxDOT entered into a settlement agreement with ACME reinstating ACME's permit and dismissing the SOAH proceedings. In memos produced between the time that ACME's permit was cancelled but prior to its settlement with TxDOT, several TxDOT employees opined that the ACME permit had originally been improperly granted because of the spacing restrictions and Reagan's then-valid Permit No. 87484. Nonetheless, the ED denied Reagan's appeal of its permit denial about a month after TxDOT signed its settlement agreement with ACME, stating in his denial that Reagan's requested sign site "was unavailable and [] remains so at this time."

In response to Reagan's lawsuit, the ED filed a plea to the jurisdiction and motion to dismiss and, subject thereto, an answer and general denial. The trial court granted the ED's plea to the jurisdiction and motion to dismiss, and Reagan appeals.

DISCUSSION

A plea to the jurisdiction challenges a trial court's authority to decide the subject matter of a specific cause of action. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Analysis of whether this authority exists begins with the plaintiff's live pleadings. *Id.* at 226. The plaintiff has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Id.* Mere unsupported legal conclusions do not suffice. *See Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 515–16 & n.7 & 8 (Tex. App.—Austin 2010, no pet.).

A reviewing court must also consider evidence that the parties presented below that is relevant to the jurisdictional issues, *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000), including evidence that a party has presented to negate the existence of facts alleged in the plaintiff's pleadings. *See Brantley v. Texas Youth Comm'n*, 365 S.W.3d 89, 94 (Tex. App.—Austin 2011, no pet.). The ultimate inquiry is whether the plaintiff's pled and un-negated facts, taken as true, and liberally construed with an eye to the pleader's intent, affirmatively demonstrate a claim or claims within the trial court's subject-matter jurisdiction. *Id.* We review this question of law de novo. *Id.*

While sovereign and governmental immunity protect the State and its subdivisions from lawsuits generally, the illegal or unauthorized acts of a state official are not considered acts of

the State and, therefore, an action against a State official complaining that the officer acted without legal authority or failed to perform a purely ministerial act is permitted under the ultra vires exception to sovereign immunity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370–72 (Tex. 2009); *see also Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017) ("An *ultra vires* action requires a plaintiff to 'allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'" (quoting *Heinrich*, 284 S.W.3d at 372)). Ultra vires suits must be brought against the state actors in their official capacity rather than against the State or its subdivisions. *Heinrich*, 284 S.W.3d at 374.

Reagan's pleadings complain about various alleged mistakes that TxDOT made in processing Reagan's and ACME's permit applications: "violating its own regulations" by improperly applying the spacing requirements, issuing an invalid permit to ACME, and essentially compounding the errors by reinstating ACME's permit rather than issuing Reagan's requested permit. As no statute provides for judicial review of permit-application denials,[3] *KEM Tex., Ltd. v. Texas Dep't of Transp.*, No. 03-08-00468-CV, 2009 WL 1811102, at *5 (Tex. App.—Austin June 26, 2009, no pet.) (mem. op.), and sovereign immunity bars suit against TxDOT, Reagan has couched its complaints about TxDOT's actions as "ultra vires" claims against the ED. Reagan's petition claims that in denying its appeal, the ED made factually incorrect statements and "acted ultra vires by committing a nondiscretionary act unauthorized by law, effectively trampling on Reagan's rights." Reagan

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[3] Trial courts possess jurisdiction to grant judicial review of an agency action only when provided for by statute, or when the agency action affects a vested property right or otherwise violates a constitutional right. *Continental Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 397 (Tex. 2000). Reagan has made no allegations that TxDOT's actions affect any of its vested property rights or violate its constitutional rights.

seeks a declaration that the ED acted ultra vires in denying Reagan's permit appeal and injunctive relief requiring the ED to issue the denied permit.

To determine whether Reagan's claims fall within the trial court's subject-matter jurisdiction, we must consider whether its pled and un-negated facts, taken as true and liberally construed, demonstrate that the ED acted outside of his authority or failed to perform a purely ministerial act. *See Brantley*, 365 S.W.3d at 94. It is not enough that a plaintiff merely asserts legal conclusions or labels a defendant's actions as ultra vires—what matters is whether the *facts* alleged constitute actions beyond the governmental actor's statutory authority, properly construed. *See Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.); *Creedmoor-Maha Water Supply*, 307 S.W.3d at 517.

Acts alleged to be outside scope of statutory authority

To determine whether the trial court had jurisdiction under the ultra vires exception for acts alleged to be outside TxDOT and the ED's statutory authority, we consider the factual allegations in Reagan's pleadings as well as the evidence presented by the parties. Reagan contends that TxDOT improperly issued the ACME permit due to the 1,500-foot spacing regulation, failed to grant Reagan's second permit application despite the improperly granted ACME permit, improperly reinstated ACME's permit under the settlement agreement, and denied Reagan's appeal of the denial of its permit application by, again, improperly applying the 1,500-foot spacing regulation. This last allegation is the only act specifically alleged to have been committed by the ED himself rather than the agency broadly.

The legislature has granted TxDOT the authority to "regulate [by rule] the orderly and effective display of commercial signs," and the applicable statute requires TxDOT to issue a permit only upon the application's compliance with TxDOT's rules. Tex. Transp. Code § 391.032; *see id.* §§ 201.201 ("The [Texas Transportation] [C]ommission governs the Texas Department of Transportation), 391.068(a) (noting that Commission "shall" issue permit to person whose sign, if erected, would comply with rules adopted under section 391.032). Reagan cites no statutes mandating *how* TxDOT must determine whether a sign for which a permit application is filed complies with TxDOT's rules. Other than requiring TxDOT to issue a permit *if* a sign requested therein would comply with applicable statutes and rules, the determination of whether that compliance exists is left to the discretion of the agency. *See KEM Tex.*, 2009 WL 1811102, at *5 (holding that whether outdoor advertising permit application complies with applicable statutes and rules is determination left to discretion of TxDOT and that "legislature did not prescribe any particular procedure through which TxDOT is to make determinations required by section 391.068 of the transportation code"); *see also Hall*, 508 S.W.3d at 242 (distinguishing cases where agency's determination is subject to explicit constraints in *how* determination is made from those where agency is unconstrained in making determination).

Both TxDOT and the ED have the statutory authority to determine whether permit applications meet the regulatory and statutory requirements, which determination is left to the exercise of their discretion. *See KEM Tex.*, 2009 WL 1811102, at *5; *see also Texas Dep't of Ins., Div. of Workers' Comp. v. Brumfield*, No. 04-15-00473-CV, 2016 WL 2936380, at *5 (Tex. App.—San Antonio May 18, 2016, no pet.) (mem. op.) (holding that focus of plaintiff's allegations

was commissioner's discretionary act—his decision to deny claim—rather than any specific allegations indicating that commissioner acted without legal authority and, therefore, failed to state ultra vires claim). The substance of Reagan's complaint is that TxDOT and the ED made various mistakes in reviewing the permit applications at issue and determining whether they complied with applicable rules. However, "[c]omplaints that an official reached a wrong result when exercising its delegated authority are insufficient to state an ultra vires claim of exceeding statutory authority." *Brumfield*, 2016 WL 2936380, at *5.

Despite its framing the mistakes as "ultra vires" acts, Reagan merely complains that TxDOT and the ED incorrectly applied the 1,500-foot spacing requirement to its and ACME's permit applications—a determination that, even if incorrect, was within the agency's statutory authority to make. *KEM Tex.*, 2009 WL 1811102, at *5. Errors or mistakes by state officials are insufficient, on their own, to establish an ultra vires act. *See, e.g.*, *Creedmoor-Maha Water Supply*, 307 S.W.3d at 517–18 ("These are allegations that [the agency] reached an incorrect or wrong result when exercising its delegated authority, not facts that would demonstrate [the agency] exceeded that authority."); *MHCB (USA) Leasing & Fin. Corp. v. Galveston Cent. Appraisal Dist. Review Bd.*, 249 S.W.3d 68, 81 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) ("Additionally, just because an agency determination is wrongly decided does not render that decision outside the agency's authority [because] an incorrect agency determination rendered pursuant to the agency's authority is not a determination made outside that authority."); *Williams v. Houston Firemen's Relief & Ret. Fund*, 121 S.W.3d 415, 430 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("[T]he crux of [plaintiff's]

argument is that the trustees interpreted the statute in a way they should not have. This is a complaint of 'getting it wrong,' not of acting outside statutory authority.").

Texas appellate courts "have repeatedly stated that it is not an *ultra vires* act for an official or agency to make an erroneous decision while staying within its authority. Indeed, an *ultra vires* doctrine that requires nothing more than an identifiable mistake would not be a narrow exception to immunity: it would swallow immunity." *Hall*, 508 S.W.3d at 242–43. "[S]overeign immunity comes with a price; it often allows the 'improvident actions' of the government to go unredressed." *Id.* at 243.

It is not enough that Reagan allege that TxDOT or the ED made mistakes in reviewing the permit applications and appeals at issue and determining whether they met applicable laws and regulations. TxDOT and the ED have the authority to make such determinations, and mistakes or errors made in that process do not, in themselves, constitute ultra vires actions but determinations within the agency's and ED's discretion. We overrule Reagan's ultra vires argument based on alleged acts outside the scope of TxDOT or the ED's authority.

Alleged failure to perform ministerial duties

Reagan also argues in its brief that the ED acted ultra vires by "fail[ing] to perform ministerial acts" when TxDOT entered into the ACME settlement and failed to reinstate Reagan's permit. For a duty to be "ministerial," however, the law must prescribe and define the duties to be performed "with such precision and certainty as to leave nothing to the exercise of discretion and judgment." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994); *see Crystal Int'l, Inc. v. Texas Comm'n on Envtl. Quality*, No. 03-16-00008-CV, 2016 WL 4272117, at *4 (Tex.

App.—Austin Aug. 10, 2016, no pet.) (mem. op.) ("If an action involves personal deliberation, decision, and judgment, it is discretionary; actions that require obedience to orders or the performance of a duty to which the actor has no choice are ministerial."). While it is true, as Reagan points out, that TxDOT "shall" issue a permit if a proposed sign would comply with applicable rules, *see* Tex. Transp. Code § 391.068(a), that duty is not ministerial because it is contingent on the exercise of personal deliberation, decision, and judgment. *See Crystal Int'l*, 2016 WL 4272117, at *4; *KEM Tex.*, 2009 WL 1811102, at *5. Rather than requiring TxDOT to simply issue a permit upon receipt of an application, the legislature requires the agency to review the application to ensure that the requested sign would comply with applicable laws and regulations and makes that determination unreviewable.

TxDOT and the ED acted within their statutory discretion to determine whether the permit applications at issue met the applicable statutory and regulatory requirements. Accordingly, Reagan may not rely on the "ministerial duty" avenue for ultra vires claims, and the trial court did not have jurisdiction over Reagan's ultra vires claims on this basis either.

CONCLUSION

Because Reagan's pleadings and the un-negated facts therein, taken as true and liberally construed, do not affirmatively demonstrate any claims within the trial court's subject-matter jurisdiction, *see Miranda*, 133 S.W.3d at 226, the trial court properly granted appellee's plea to the jurisdiction and motion to dismiss and, accordingly, we affirm.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: September 27, 2017