



NUMBER 13-15-00494-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

THE STATE OF TEXAS,

Appellant,

v.

YS & LS & LS PARTNERSHIP, LTD., ET AL.,

Appellees.

**On appeal from the County Court at Law No. 3
of Nueces County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Justice Garza**

This is a condemnation case with a counterclaim by the landowner, appellee YS & LS Partnership, Ltd. (“YS”), for inverse condemnation.¹ By one issue, appellant the

¹ The State’s First Amended Petition for Condemnation also lists “Prosperity Bank, successor in interest by merger with First Victoria National Bank” as an owner. Prosperity Bank is not a party to this appeal.

State of Texas contends that the trial court erred in denying its plea to the jurisdiction because YS's counterclaim is barred by sovereign immunity. We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

In October 2013, the State filed a petition for condemnation seeking to condemn a strip of land consisting of 0.034 of an acre fronting South Padre Island Drive, a state highway in Corpus Christi, Texas. The Special Commissioners awarded YS the sum of \$150,000; the State objected to the award. See TEX. PROP. CODE ANN. § 21.014 (West, Westlaw through 2015 R.S.). YS filed a counterclaim for inverse condemnation.

In its counterclaim, YS alleged that the State noticed its intent to take the property in November 2007. YS alleged that it was required to disclose the impending condemnation to prospective tenants and was therefore unable to lease the property. YS alleged that the State's acts constituted a taking of its property.

The State filed a plea to the jurisdiction in which it argued that it is entitled to sovereign immunity because YS has not alleged a valid inverse condemnation claim. The State argued that sovereign immunity barred YS's counterclaim because the counterclaim covered the same property that the State sought to condemn, and YS therefore had no valid inverse condemnation claim. The State, relying on *Westgate, Ltd. v. State*, 843 S.W.2d 448, 454 (Tex. 1992), later filed a supplemental plea to the jurisdiction in which it argued that YS's counterclaim is barred by sovereign immunity because YS's claims for damages are not recoverable under Texas law.

YS filed a response in which it argued that it had pleaded "intentional acts by the State" which were sufficient to state a valid takings claim. The trial court held a hearing

on the State's plea to the jurisdiction on August 19, 2015. At the hearing, the State argued that *Westgate* governed the issue and required the trial court to find that YS's claims were barred by sovereign immunity. YS argued that *Westgate* was distinguishable because it provides for an "exception" in situations where the government acts intentionally to harm a landowner, which YS argued it had pled. No evidence was introduced at the hearing. Approximately a month later, on September 24, 2015, the trial court denied the State's plea to the jurisdiction. This appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the trial court's subject matter jurisdiction. *Id.*; see *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

The plaintiff has the initial burden to plead facts affirmatively showing that the trial court has jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216, 220 (Tex. App.—Fort Worth 2003, pet. denied). Whether a trial court has subject matter jurisdiction and whether the pleader has alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction are questions of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). We construe the pleadings liberally in favor of the pleader, look to the pleader's intent, and accept as true the factual allegations in the pleadings. See *Miranda*, 133 S.W.3d at 226, 228.

When 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, even when the evidence implicates the merits of the cause of action. *Id.* at 227; *Blue*, 34 S.W.3d at 555; see *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). If the 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. *Miranda*, 133 S.W.3d at 228. But 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 227–28. In considering the evidence, we “take as true all evidence favorable to the nonmovant” and “indulge every reasonable inference and resolve any doubts in the nonmovant’s favor.” *Id.*

“An action for inverse condemnation is the appropriate avenue of relief for a property owner whose property has been taken for public use without due process or without institution of proper condemnation proceedings, and who wishes to recover compensation for that loss.” *Dahl ex rel. Dahl v. State*, 92 S.W.3d 856, 861 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing *City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643, 646 (Tex. 1971)) (other citations omitted). Sovereign immunity does not shield the State from an inverse condemnation action. See *id.*; see also *Gen. Servs. Comm’n v. Little–Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2001) (citations omitted). However, “a plaintiff suing a governmental entity cannot create jurisdiction by stating a takings claim unless that claim is facially valid.” *Bell v. City of Dallas*, 146 S.W.3d 819, 825 (Tex. App.—Dallas 2004, no pet.). Whether particular facts are enough to state a valid takings claim is a question of law. *Gen. Servs. Comm’n*, 39 S.W.3d at 598 (citation omitted).

III. DISCUSSION

The State contends that the trial court erred in denying its plea to the jurisdiction because YS failed to adequately plead a cause of action for inverse condemnation, and therefore, sovereign immunity is not waived. To plead a cause of action for inverse condemnation, YS was required to assert that its property was taken, damaged or destroyed for, or applied to, public use. See *A.C. Aukerman Co. v. State*, 902 S.W.2d 576, 578 (Tex. App.—Houston [1st Dist.] 1995, pet. denied). Additionally, the act which resulted in the taking must be intentional. *Id.* The taking, damage or destruction must be an actual physical appropriation or invasion of property, or unreasonable interference with the owner's right to use and enjoy his property. *Id.*

The State argued—in its supplemental plea and on appeal—that the supreme court's holding in *Westgate* governs this appeal. See *Westgate*, 843 S.W.2d at 453. We agree. In *Westgate*, the supreme court held that there was no taking when the State and the City of Austin publicly announced plans to condemn the plaintiff's land, impairing the plaintiff's ability to lease its shopping center. See *id.* at 450–51, 453. The court held that “publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some direct restriction on use of the property.” *Id.* at 453. The court found that, in order to allege a valid inverse condemnation claim, there must be a “current, direct restriction” on the use of the land, referring to a physical act or legal restriction on the property's use, “such as a blocking of access or denial of a permit for development.” *Id.* at 452. Here, YS alleged that the State's announcement of its intent to take the property prevented YS from leasing the property to prospective tenants, thereby causing it

damages. YS has not alleged a “current direct restriction” on the use of its land such as an “actual physical or legal restriction on the property’s use, such as a blocking of access or denial of a permit for development.” *Id.* Accordingly, YS has failed to state a valid inverse condemnation claim, and the State’s sovereign immunity was not waived. See *Dahl*, 92 S.W.3d at 862. We sustain the State’s sole issue.

IV. CONCLUSION

We reverse the trial court’s order and remand for further proceedings consistent with this opinion.

DORI CONTRERAS GARZA
Justice

Delivered and filed the
28th day of July, 2016.