NUMBER 13-18-00559-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

CITY OF PHARR, **Appellant,**

v.

GABRIEL CABRERA, **Appellee.**

On appeal from the 370th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Benavides

The City of Pharr appeals from the denial of its plea to the jurisdiction in a suit filed by appellee, its former employee, Gabriel Cabrera. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8). By two issues, the City argues that sovereign immunity protects it from this suit and is not waived by Cabrera's breach of contract or declaratory judgment claims. We reverse and render.

I. BACKGROUND

Cabrera worked for the City for twenty-eight years until August 2015. At the time his employment with the City ended, he was the Golf Course Manager/Superintendent. Cabrera initially described his separation from the City as a "lay-off" and as "non-disciplinary termination." The City's manual provides for payment of accrued sick leave for certain qualified retirees, but not in the full amount if there are over ninety days of sick leave. No accrued sick leave payout is available for persons who separate from City service other than by retirement or death. The City refused to pay Cabrera accrued sick leave.

Cabrera alleged that he is entitled to be paid for his accrued sick leave based upon the City's employment personnel policy and procedures manual that he claims constitutes a contract between him and the City for the payment of benefits. The City's manual was adopted by City ordinance. He sued the City on January 19, 2018.

The City filed a general denial and asserted its defense of sovereign immunity reciting the portion of the manual stating that non-retirees do not receive sick leave pay outs. On May 21, 2018, Cabrera amended his petition to allege that he was "laid off/retired." He also sought a declaratory judgment on the interpretation of Cabrera's first amended petition. Cabrera filed a response and two supplemental responses to the City's plea. Cabrera filed a second amended petition on June 5, 2018. The City filed a supplement to its plea to the jurisdiction challenging the second amended petition. The trial court held a hearing on August 13, 2018[1] and signed an order denying the City's plea

[1] The transcript of the hearing is not part of the record on appeal.

to the jurisdiction on October 2, 2018. The City filed its interlocutory appeal from that order.

II. SOVEREIGN IMMUNITY

The City's first issue challenges the trial court's denial of its plea to the jurisdiction on the grounds of sovereign immunity.

Cabrera asserts on appeal that we do not have a sufficient record before us to decide the appeal in favor of the City because the City failed to bring forward the reporter's record of the oral hearing on the plea to the jurisdiction. Cabrera does not claim that evidence was heard.[2] The City asserts that no evidence was heard at the hearing. The trial court's order recited that it considered the plea to the jurisdiction, Cabrera's responses, "Cabrera's pleadings, hearing arguments of counsel, and considering authority provided by the parties" denied the plea to the jurisdiction.

A reporter's record is not always necessary to preserve error for appellate review. *See* TEX. R. APP. P. 34.1, 37.3(c). When the trial court does not hear evidence at the hearing; a reporter's record is not necessary to the appeal. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 782 (Tex. 2005) ("What is clear is that a reporter's record is required only if evidence is introduced in open court; for

[2] Cabrera's entire argument is:

> The City did not file with this Court a Reporter's Record. A hearing was held on August 13, 2018, on the City's plea to the jurisdiction. CR^. The record before this Court does not show what happened at the hearing.
>
> The City did not request as part of the Clerk's Record Cabrera's Response to the City's Plea to the Jurisdiction. CR 195-196; Brief p. 11, fn.3. The Order on the Plea specifically states that Cabrera's responses were considered. Apx.1.
>
> Because a complete record is not before this Court, the Order denying the plea to the jurisdiction is unreviewable.

nonevidentiary hearings, it is superfluous."); *Otis Elev. Co. v. Parmalee*, 850 S.W. 2d 179, 181 (Tex. 1993) (holding that no presumption applied to nonevidentiary hearing on motion for sanctions). The *Michiana* Court adopted a presumption that pretrial proceedings are nonevidentiary "absent a specific indication or assertion to the contrary." 168 S.W.3d at 783. Either party may allege that a hearing was evidentiary, but that allegation must be specific. A party must do more than assert that the trial court "considered evidence at the hearing—trial courts do that when a hearing is conducted entirely on paper or based solely on affidavits and exhibits filed beforehand. Instead, there must be a specific indication that exhibits or testimony was presented in open court beyond that filed with the clerk." *Id.* at 784. The record is sufficient.

As to Cabrera's claim that the record does not include his response to the plea to the jurisdiction, a supplemental clerk's record was filed that includes his response and supplemental responses.

A. Standard of Review

"Sovereign immunity—usually called governmental immunity when referring to political subdivisions—protects governmental entities against suits and legal liabilities." *Hillman v. Nueces County*, 579 S.W.3d 354, 357 (Tex. 2019); *see Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003) (discussing the common-law doctrine of governmental immunity that protects political subdivisions of the State, including counties). Governmental immunity from suit defeats a trial court's jurisdiction. *Hillman*, 579 S.W.3d at 357; *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *see also Harris County v. Park at Westcreek, LP*, No. 01-18-00343-CV, 2020 WL

826725, at *3 (Tex. App.—Houston [1st Dist.] Feb. 20, 2020, no pet. h.) (mem. op.).

Whether a trial court has jurisdiction is a question of law subject to de novo review. *See Tex. Nat. Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002). Immunity is properly asserted in a plea to the jurisdiction. *See Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016); *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). If the plea to the jurisdiction challenges the pleadings, we liberally construe the pleadings to determine if the plaintiff has "alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Hous. Belt & Terminal Ry. Co.*, 487 S.W.3d at 160 (internal quotations omitted). If the plea to the jurisdiction challenges the existence of jurisdictional facts, which also implicate the merits of the case, "we consider evidence submitted by the parties to determine if a fact issue exists." *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632–33 (Tex. 2015); *see also Holland*, 221 S.W.3d at 642 (concluding a court may not weigh the claim's merits but must consider only the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry).

B. Breach of Contract

Texas Local Government Code § 271.152 waives qualifying local governmental entities' immunity from suit for certain breach of contract claims, stating:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE ANN. § 271.152.

For § 271.152's waiver of immunity to apply, three elements must be established: (1) the party against whom the waiver is asserted must be a "local governmental entity"

as defined by § 271.151(3), (2) the entity must be authorized by statute or the Constitution to enter into contracts, and (3) the entity must in fact have entered into a contract that is "subject to this subchapter," as defined by § 271.151(2). *Id.* § 271.152(2), (3); *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). The issue before us is the third one, whether there is a qualifying contract.

A "contract subject to this subchapter" is "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." TEX. LOC. GOV'T CODE ANN. § 271.151(2)(A). Section 271.151(2) has five elements that must be met before immunity is waived: "(1) the contract must be in writing, (2) state the essential terms of the agreement, (3) provide goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity." *City of Denton v. Rushing*, 570 S.W.3d 708, 710–11 (Tex. 2019) (quoting *Williams*, 353 S.W.3d at 135).

C. Plea to the Jurisdiction

Cabrera's second amended petition sought recovery from the City based upon breach of contract pursuant to § 271.152. *See* TEX. LOC. GOV'T CODE ANN. § 271.152. Cabrera alleged that the City's personnel manual constituted a contract that set out the terms for payment of sick leave upon leaving City service upon retirement.[3] He alleged that the City's failure to pay his accrued sick leave upon his lay-off/retirement from City

[3] The provisions for sick leave payout state: "Employees who separate from employment prior to retirement, whether voluntarily or involuntarily, will not receive sick leave pay out." Chapter 26, § 2, City of Pharr, Personnel Policies Manual. However, employees who retire in good standing who have worked the last ten years consecutively with the City of Pharr, "will be paid for accrued sick leave in the amount of ninety (90) work days plus one hour for every two hours in excess of 90 days . . . at the rate of pay earned at the time of retirement." *Id.*, § 1.

employment breached that provision and argued that other City employees whose employment had been terminated during similar time frames had been paid for their accrued sick leave. Cabrera also sought a declaratory judgment that he is entitled to sick leave based upon the alleged contract.

The City's plea to the jurisdiction sought dismissal of both claims arguing that the City had not waived immunity because the contract Cabrera alleged does not fit within the legislative waiver outlined in § 271.152. *See id.*; *City of Pearsall v. Tobias*, 533 S.W.3d 516, 521 (Tex. App.—San Antonio 2017, pet. denied). The City further pointed to the personnel manual which expressly states that it is not a contract, and to the provision that states that in the event of termination, no accrued sick leave will be paid. According to the City, Cabrera's employment with the City was terminated; he did not retire, and only qualified retirees are eligible to have accrued sick leave paid out, according to the manual.

Cabrera responded that the City waived immunity pursuant to § 271.152 and the personnel manual and the ordinance that approved it constituted a compliant unilateral contract. He attached evidence consisting of: (1) the ordinance adopting the personnel policy and procedures manual in 2012, and (2) the manual. After discovery, Cabrera filed several supplemental responses to which he attached additional evidence consisting of: (1) his leave request dated August 17, 2015 requesting payment for sick leave, (2) a newspaper article regarding the approval of $190,000 in severance pay to the former City Manager following his voluntary resignation; (3) a City document recommending disciplinary discharge of Frank Marin, Director of Parks and Recreation, (4) a check from the City to Marin for $34,840.92 that included payment for sick leave, and (5) a charge of

discrimination filed by Roy Gorea dated September 16, 2017; (6) Cabrera's job description on City letterhead approved by the City Manager dated March 3, 2005, (7) Marin's affidavit attesting that he was paid for his accrued sick leave and others were as well; and (8) discovery responses from the City naming persons the City identifies as retirees who had received sick leave pay outs.

The first issue to be determined is whether the City entered into a unilateral contract with Cabrera by passing the ordinance that adopted the personnel policy and procedures manual. *See Williams*, 353 S.W.3d at 135. If it did not, that is the end of our inquiry and immunity has not been waived. *See City of Denton*, 570 S.W.3d at 709. The City manual and the acknowledgement that Cabrera signed stated in relevant part that:

> The manual is not a contract and the information provided is subject to change by the City as the need arises.
>
> Acceptance of the provisions of this manual is a condition of my employment with the City. By accepting employment after the effective date of this manual or by remaining employed by the City after the effective date of this manual, I agree to be bound by the terms and conditions of the manual.

In *City of Denton*, the City's personnel manual's disclaimer was similar to the one here: "The contents of this manual do not in any way constitute the terms of a contract . . . ."[4] 570 S.W.3d at 709; *see Williams v. First Tenn. Nat'l Corp*., 97 S.W.3d 798, 803

[4] The full disclaimer stated:

> The contents of this manual do not in any way constitute the terms of a contract of employment and should not be construed as a guarantee of continued employment with the City of Denton. Employment with the City of Denton is on an at will basis. This means that the employment relationship may be terminated at any time by either the City or the employee for any reason not expressly prohibited by law. Any oral or written statements by anyone, (except individual written employment agreements specifically authorized by the City Council) to the contrary are invalid and should not be relied upon by any prospective or existing employee. The City of Denton reserves the right to alter or amend the contents of this manual at any time without notice.

(Tex. App.—Dallas 2003, no pet.) (finding no employment contract where an employee handbook contained an express disclaimer); *Werden v. Nueces County Hosp. Dist*., 28 S.W.3d 649, 651 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.) (same); *Gamble v. Gregg County*, 932 S.W.2d 253, 255 (Tex. App.—Texarkana 1996, no writ) ("A personnel manual does not create property interests in the stated benefits and policies unless some specific agreement, statute, or rule creates such an interest.").

In general, Texas law disfavors employee manuals forming contractual obligations, particularly when there is a specific disclaimer, like there is here. *See Brown v. Sabre, Inc.*, 173 S.W.3d 581, 588 (Tex. App.—Fort Worth 2005, no pet.) (rejecting claim that manual with disclaimer created right to payment for accrued vacation time upon separation from employment). "The disclaimer opens with the unequivocal statement that the policies within the Manual do not constitute the terms of a contract. We need not look any further to negate contractual intent." *County of Dallas v. Wiland*, 216 S.W.3d 344, 354 (Tex. 2007) (acknowledging that an employee manual can disclaim contractual rights allegedly contained within the manual). To construe the manual as a contract would require ignoring the explicit disclaimer that Cabrera acknowledged and agreed to both by his signature in 2013 and by his continued employment.

Neither does the Ordinance constitute a unilateral employment contract between the City and Cabrera to waive the City's immunity from suit under local government code § 271.152. *See Williams*, 353 S.W.3d at 136. In *Williams*, the court held that a series of ordinances constituted a contract and analyzed the ordinances to determine whether they

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City of Denton v. Rushing, 570 S.W.3d 708, 709–10 (Tex. 2019)

met the five elements outlined above. *See id.* The court held that the City of Houston "manifested its intention to act in a specific way in the Ordinances by its extensive use of the word 'shall' and similar provisions that make the benefits offered to the Firefighters mandatory upon performance." *Id*. at 138. The Ordinances were authored by the City of Houston and were addressed to "a discrete group of offerees: those persons qualifying as 'eligible employees,' who were defined as 'all classified members of the fire department.' As such, the Ordinances constituted an offer that was communicated to the Firefighters, which the Firefighters accepted by performing." *See id.* In addition, the Ordinances promised the Firefighters specific compensation and outlined their duties. *Id.* Thus the Ordinances outlined the essential terms of the agreement between the Firefighters and the City of Houston including the time of performance, the price to be paid, and the service to be rendered. *See id.; City of Pearsall*, 533 S.W.3d at 523.

Here, the City's policy and procedure manual does not specify compensation for Cabrera's classification, nor does it specify his hours of service, but only generally defines work week.[5] Pay is similarly undefined—chapter 17, section 1 of the manual states, "The

[5] The manual provides:

CHAPTER 15. HOURS OF WORK; WORK CYCLES

> **Section 1**. The City's basic work schedule shall coincide with the established hours of business, which runs from Monday through Friday, starting at 8:00 o'clock AM through 5:00 o'clock PM and shall be a core workweek of forty (40) hours.
>
> **Section 2**. Depending on the purposes and function of each department, the City, acting through its management personnel (City Manager and Department Heads) may establish work schedules that provide for City services outside of the usual business cycle on an as needed basis but shall generally adhere to a forty hour work period.
>
> **Section 3.** Lunch breaks, rest stops, and any other such breaks shall be established by management personnel on an as needed basis.

final determination of applicable salary, wages, and benefits shall be made by the Board of Commissioners as part of its authority to manage the City's fiscal budget." Cabrera argues that his job description in combination with the manual furnishes additional terms. However, even if we were to consider the two together, they still do not state the essential terms of the agreement as the Ordinances in *Williams* did. *See Williams*, 353 S.W.3d at 138–39; *see also City of Pearsall*, 533 S.W.3d at 523 (describing contract terms).[6] Accordingly, the trial court erred by denying the plea to the jurisdiction because the City did not waive immunity based upon § 271.152. *See Williams*, 353 S.W.3d at 138–39.

We sustain the City's first issue.

E. Declaratory Judgment Action

In his declaratory judgment action, Cabrera sought to have the Ordinance approving the City's policy and procedure manual construed and a determination be made "including but not limited to that CABRERA is entitled to a sick leave payout." The

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Policy & Procedures Manual.

[6] The contract at issue in City of Pearsall was described as follows:

> [T]he City of Pearsall will pay Tobias an annual salary of $80,400.00, payable on a bi-weekly schedule. The contract provides for the city manager to work forty hours per week; the contract further compensates any additional time necessary for the full and proper performance through twelve personal days per calendar year. The contract requires the City of Pearsall to evaluate Tobias's performance at thirty days, ninety days, and at least once annually. The contract is for a term of two years. The contract also allows the City of Pearsall to terminate Tobias's services at any time, subject to the termination provisions in Section 3—Termination Pay. Specifically, the contract provides that in the event Tobias is "'involuntarily terminated' or 'suspended' for any reason by action of the Council . . . the City agrees to pay [Tobias] a cash payment, equal to one year's salary or the balance term of this agreement, whichever is less, plus any accrued leave."

City of Pearsall v. Tobias, 533 S.W.3d 516, 523 (Tex. App.—San Antonio 2017, pet. denied) (holding contract waived governmental immunity).

City responded that it is not only immune from liability, but immune from suit and Cabrera has not pleaded facts to show that the City has waived immunity or produced evidence to demonstrate such a waiver. Cabrera argues that declaratory judgment is proper to determine the proper construction of an ordinance citing *City of Austin v. Pendergrass*, 18 S.W.3d 261 (Tex. App.—Austin 2000, no pet.); and *City of Schertz v. Parker*, 754 S.W.2d 336 (Tex. App.—San Antonio 1988, no writ) ("This was an actual, bona fide, and justiciable controversy. A suit for declaratory judgment was therefore authorized."). In neither of those cases did the cities challenge jurisdiction.

A declaratory judgment action brought against the government that seeks a declaration of a party's rights and status under a statute is not barred by sovereign immunity. *IT-Davy*, 74 S.W.3d at 859–60; *City of Amarillo v. Nurek*, 546 S.W.3d 428, 434 (Tex. App.—Amarillo 2018, no pet.); *Bell v. City of Grand Prairie*, 221 S.W.3d 317, 324 (Tex. App.—Dallas 2007, no pet.). However, sovereign immunity bars a declaratory judgment action seeking a declaration of the government's liability for money damages. *See Texas Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 387–88 (Tex. 2011) (holding immunity barred declaratory judgment action that stream was not navigable and barred takings claim); *Bell*, 221 S.W.3d at 324-25 (citing *Williams*, 216 S.W.3d at 829). The relief Cabrera seeks may only be brought and considered under Chapter 271 of the local government code, but as we have already ruled, he has failed to point to any contract meeting that chapter's requirements. *See Lowell v City of Baytown*, 356 S.W.3d 499, 502 (Tex. 2011) (per curiam).

The City's second issue is sustained.

III. CONCLUSION

The judgment of the trial court is reversed, and we render judgment dismissing all claims against the City for want of jurisdiction.

GINA M. BENAVIDES,
Justice

Delivered and filed the
4th day of June, 2020.