



NUMBER 13-19-00367-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

CITY OF CORPUS CHRISTI,

Appellant,

v.

GRAHAM CONSTRUCTION
SERVICES, INC.,

Appellee.

On appeal from the County Court at Law No. 2
of Nueces County, Texas.

MEMORANDUM OPINION

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

Appellee Graham Construction Services, Inc. (Graham) filed suit against appellant the City of Corpus Christi (the City) for breach of contract. The City filed a plea to the jurisdiction, which the trial court denied. By three issues which we treat as one, the City

argues on appeal that the trial court erred by failing to grant its plea to the jurisdiction. We affirm.

I. BACKGROUND

In 2007, the City retained Carollo Engineers, P.C. (Carollo) in connection with the City's plan to replace its wastewater treatment plant. According to the contract between Carollo and the City, Carollo would provide, amongst other things, a preliminary engineering report and contract administration services during the construction project.

In 2009, the City issued a request for bids to construct a new treatment plant. Six companies submitted bids, but on December 1, 2009, the City awarded the contract to Graham to build the new facility for approximately \$50 million. The contract required Graham to complete the facility within 1,100 calendar days, in two defined phases. Phase 1, which encompassed 900 days, involved demolishing portions of the old facility and constructing a majority of the new facility's infrastructure. Phase 2, which was to begin once the City issued a certificate of substantial completion regarding phase 1, contemplated 260 days of work and involved additional construction work that would increase the plant's capacity during peak usage hours. After some additional contract changes, the final deadline to substantially complete phase 1 was October 20, 2012, with substantial completion of phase 2 by April 24, 2013, and completion of the entire project by June 23, 2013.

According to Graham, the beginning of the project was marred by "unanticipated delays and disruptions caused primarily by unclear or conflicting specifications in the contract, unnecessarily burdensome testing requirements, and an uncooperative and obstructionist attitude on the part of Carollo." The City replaced Carollo with Freese &

Nicholas, Inc. (FNI), but Carollo remained involved with the project. This led to Graham submitting fourteen different delay claims; and by April 2013, Graham had still not completed phase 1. On July 14, 2013, Graham held a meeting with FNI, Carollo, and the City to discuss the state of the project. After the meeting, Graham submitted to the City a 145-page report (REA 1). In REA 1, Graham requested to increase the contract price by \$8.6 million and extend the schedule by 191 days. The City had FNI analyze REA 1 and give recommendations but ultimately the City did not respond to Graham's requests. In 2014, Graham submitted REA 2, a supplemental report requesting additional compensation and an extension of the deadline due to the aforementioned complications and delays. The City retained a consulting firm, Navigrant, to analyze Graham's claims and requests within REA 2. The City sent its assistant city manager to San Francisco, California, to meet with both Graham and Navigrant. After meeting with Navigrant and evaluating its report, the City formulated a range of proposed values it intended to offer Graham to settle the dispute.

Graham believed that it had substantially completed phase 1 in April of 2014, but the City disagreed. It never sent Graham a certificate of substantial completion for phase 1. In October of 2015, Graham demobilized to avoid staying on the job site and "incur[ring] unnecessary expenses." Graham returned to the job site when the City demanded that it complete the project; however, when the City failed to respond to Graham's request for specific direction, Graham once again demobilized.

In May 2016, Graham sued the City for breach of contract damages, declaratory relief, and attorney's fees. The City filed a counterclaim against Graham and a third-party petition against Carollo. Almost three years later, in 2019, the City filed a plea to the

jurisdiction, arguing that Graham had failed to demonstrate that the City's governmental immunity had been waived. The trial court granted the plea to the jurisdiction as it pertained to the declaratory judgment claim but denied the plea as to all other grounds.¹ This appeal ensued. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8).

II. GOVERNMENTAL IMMUNITY

By one issue, the City argues that Graham did not plead facts showing that its immunity had been waived. More specifically, the City argues that Graham failed to demonstrate that the City has waived immunity for: (1) a suit that seeks to recover delay damages that were caused by an independent contractor; (2) a suit for breach of contract when the contractor has failed to comply with the contractual adjudication procedures of the contract; and (3) a claim for attorney's fees. In sum, the City asserts that the trial court erred by denying its plea to the jurisdiction.

A. Standard of Review and Applicable Law

We review a trial court's ruling on a plea to the jurisdiction de novo. See *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). When a plea to the jurisdiction challenges jurisdictional facts, we consider the facts alleged by the plaintiff and, "to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties" to determine whether the plaintiff has affirmatively demonstrated the court's jurisdiction to hear the case. *Tex. Nat. Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001). The process of deciding whether jurisdictional facts have been affirmatively pleaded is similar to a summary judgment: if the evidence does not raise a genuine issue of fact regarding the jurisdictional issue, then the plea to the jurisdiction

¹ Graham does not challenge the trial court's granting of the plea with respect to its declaratory judgment claim.

should be granted. See *Miranda*, 133 S.W.3d at 228. Thus, to defeat a plea to the jurisdiction, “we simply require the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue.” *Id.*

Section 271.152 of the Texas Local Government Code states one instance in which sovereign immunity is waived:

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. A “contract subject to this subchapter” must: (1) be in writing, (2) state the essential terms, (3) provide for goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity. *Id.* § 271.151(2)(A).

Adjudication procedures, including requirements for serving notices or engaging in alternative dispute resolution proceedings before bringing a suit or an arbitration proceeding, that are stated in the contract subject to this subchapter or that are established by the local governmental entity and expressly incorporated into the contract or incorporated by reference are enforceable except to the extent those procedures conflict with the terms of this subchapter.

Id. § 271.154; see *id.* TEX. GOV'T CODE ANN. § 311.034 (“Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.”).

B. Discussion

1. “Owner-Caused Delays”

The City first asserts that it has not waived immunity to suit for breach of contract because the damages were caused by an independent contractor. Under § 271.153(a)(1) of the Texas Local Government Code, the money award in a suit against a city for breach of contract is limited to, among other things, “any amount owed as compensation for the increased cost to perform the work as a direct result of *owner-caused* delays or acceleration.” TEX. LOC. GOV’T CODE ANN. § 271.153(a)(1) (emphasis added). In other words, the City argues that it retains its immunity to suit as to the delay damages because those damages were allegedly caused by Carollo, not the City itself. Thus, the City asserts there are no “owner-caused” delays for which Graham can recover damages.

However, § 271.153(a) does not define “owner-caused delays.” And the contract identified Carollo as the “Owner’s Representative.” This raises a genuine issue of material fact regarding this jurisdictional issue. See *Miranda*, 133 S.W.3d at 228. We conclude the trial court did not err in denying the City’s plea to the jurisdiction as to Graham’s claim for delay damages.

2. Contractual Adjudication Procedures

The City next contends that its immunity has not been waived because Graham failed to comply with the contractual adjudication procedures as outlined in the contract. See TEX. LOC. GOV’T CODE ANN. § 271.154. Under § 10.05 of the contract, Graham was required to provide notice of the general nature of any claim to both the City and Carollo within thirty days “after the start of the event giving rise [to the claim].” The contract additionally required that Graham submit a more substantive notice of “the amount or extent of the [c]laim . . . with supporting data” within sixty days of the event giving rise to the claim unless the engineer allowed additional time. Graham’s requests for additional

time and money compensation were based on fifteen different events. But, according to the City, Graham failed to provide the contractually required notice for any of those fifteen claims because Graham either: (1) notified Carollo but failed to notify the City; (2) failed to notify the City within the thirty-day and sixty-day deadlines; or (3) failed to provide the substantive information. In response, Graham asserts various arguments to justify its non-compliance with the contractual adjudication and notice requirements: (1) the City waived compliance with the contractual notice requirements by never enforcing them or informing Graham that relief was being denied because of untimely filed complaints; (2) enforcement would result in extreme forfeiture; (3) Graham substantially complied with the notice requirements; and (4) the contractual notice provision is void because it requires notice within less than ninety days.

The City argues that Graham is not allowed to raise these defenses to the City's claim of immunity. However, § 271.155 of the Local Government Contract Claims Act (the Act), which encompasses Texas Local Government Code sections 271.151 through 271.160, specifically states that the Act does not waive defenses available to a party to a contract. See *id.* § 271.155. Thus, Graham is allowed to raise defenses to the contract, including the contractual notice requirements. See *id.*; see also *Roma Indep. Sch. Dist. v. Ewing Const. Co.*, No. 04-12-00035-CV, 2012 WL 3025927, at *2 (Tex. App.—San Antonio July 25, 2012, pet. denied) (mem. op., not designated for publication) (concluding that immunity was waived because there was a fact issue concerning whether the “notice that was given and the actions taken in response waived compliance with contractual requirements, procedures, and provisions”).²

² The City argues Graham is wrong to rely on *Roma* for this proposition because it was specifically disapproved of in *Zachry Construction Corp. v. Port of Houston Authority of Harris County*, 449 S.W.3d 98,

Under the contract in the present suit, if Graham failed to timely file a claim in compliance with § 10.05 of the contract, then the City had the right to declare any such claim as invalid or untimely. However, the City never exercised that right; instead, the City actively evaluated Graham's claims. The City even asked to meet with Graham to discuss the claims. Similar to *Roma*, the actions by the City in response to Graham's untimely complaints raise a fact issue as to whether the City waived compliance with contractual requirements. See TEX. LOC. GOV'T CODE ANN. § 271.155; *Miranda*, 133 S.W.3d at 228; see also *Roma Indep. Sch. Dist.*, 2012 WL 3025927, at *2.

Graham further asserts that the notice requirements under the contract are void because they require notice to be made in less than ninety days.

A contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable. A stipulation that requires notification within less than 90 days is void.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.071(a). The City claims that § 271.154 allows government entities to enforce contractual requirements that would otherwise be void. We disagree with the City's interpretation of § 271.154. Under the City's stance, even a one-day notice requirement would be enforceable against another party. Section 271.154 states that adjudication procedures are enforceable "except to the extent those procedures conflict with the terms of this subchapter." TEX. LOC. GOV'T CODE ANN. § 271.154. And as discussed above, § 271.155 specifically preserves defenses for parties to a contract. See *id.* § 271.155.

110 (Tex. 2014). However, *Zachry* only disapproved of *Roma* to the extent that it concluded that § 271.153 cannot serve as a proper basis for granting a plea to the jurisdiction. See *id.* at 110 n.54. *Zachry* did not disapprove of *Roma*'s finding that a fact issue could be raised concerning the waiver of contractual notice requirements.

The City relies on a case this Court issued last year for the proposition that a plaintiff must demonstrate that contractual adjudication procedures were satisfied to be able to overcome a plea to the jurisdiction. See *Mission Consol. Indep. Sch. Dist. v. ERO Int'l, LLP*, 579 S.W.3d 123, 129 (Tex. App.—Corpus Christi—Edinburg 2019, no pet.). Despite the City's insistence that the present case is nearly identical to *Mission*, there are several important distinguishing factors. In *Mission*, we held that under § 271.154 of the Texas Local Government Code, a governmental entity's immunity has not been waived unless the plaintiff has satisfied the contractual notice requirements. *Id.* However, we also observed that the pleaded facts affirmatively established that ERO failed to comply with the contractual adjudication procedures. *Id.* Under the contract at issue, Mission was supposed to pay ERO within thirty days of receiving an invoice from ERO. See *id.* at 126. The contract further required that ERO file any administrative complaints within ninety days of when it knew or should have known that Mission breached the contract. *Id.* However, ERO filed its first administrative complaint thirteen months after Mission had received the final invoice. And Mission informed ERO that it was denying the requested relief because of ERO's untimely filed grievance. Lastly, and importantly, ERO raised no defense to justify its failure to comply with the adjudication procedures. Under these facts, we concluded that Mission's immunity had not been waived because ERO failed to show a "substantial claim that meets the Act's conditions." See *id.* at 129.

By contrast, in the present case, Graham has pleaded facts to demonstrate that the City waived compliance with the notice requirements by continuing to evaluate Graham's untimely filed complaints and requests for time and money adjustments. Unlike Mission, which notified ERO that its request was untimely and therefore denied, the City

gave no such notice to Graham. Graham has likewise pleaded facts demonstrating that the notice requirements were void under Texas law, whereas no such complaint was made by ERO. *See id.* Therefore, we conclude that Graham raised a fact issue as to this jurisdictional issue. *See Miranda*, 133 S.W.3d at 228. The trial court did not err by failing to grant the City's plea to the jurisdiction on this ground.

3. Attorney's Fees

Lastly, the City argues that even if Graham can proceed on its suit for breach of contract, the City remains immune to Graham's claim for attorney's fees. The City's position is based on local government code § 271.153, which states in part that "the total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to . . . [amongst other things,] reasonable and necessary attorney's fees that are equitable and just." TEX. LOC. GOV'T CODE ANN. § 271.153(a)(3). The City argues that § 271.153 only acts a limitation on recoverable damages; thus, § 271.153 does not act as an independent legal basis for recovering attorney's fees. However, we again disagree with the City's interpretation. Section 271.153 does not state that attorney's fees are only recoverable under the Act as authorized under other statutes. Rather, it generally states that reasonable and just attorney's fees are recoverable. *See id.* The San Antonio Court of Appeals has reached a similar conclusion regarding attorney's fees under § 271.153. *See City of Pearsall v. Tobias*, 533 S.W.3d 516, 527 (Tex. App.—San Antonio 2017, pet. denied) ("Because Tobias's pleadings state a claim under section 271.152, we likewise conclude Tobias's pleadings also allege a claim for attorney's fees under section 271.153 for which the City of Pearsall waived its immunity."). A federal district court applying Texas law also reached

a similar conclusion. See *Dallas/Fort Worth Int'l Airport Bd. v. INET Airport Sys., Inc.*, No. 4:13-CV-753-A, 2017 WL 4221077, at *4–6 (N.D. Tex. Sept. 21, 2017) (mem. op. & order) (rejecting the argument that “attorney’s fees may only be awarded [under § 271.153] . . . if another statutory provision authorizes the award”). Therefore, we conclude that Graham has alleged a claim for attorney’s fees under § 271.153 for which the City has waived its immunity. See *Tobias*, 533 S.W.3d at 527.

In conclusion, the trial court did not err by denying the City’s plea to the jurisdiction because Graham raised a fact issue regarding whether the damages were “owner-caused.” Graham also raised a fact issue as to whether the City waived compliance with the contractual notice requirements and whether the notice requirements were void under Texas law. And Graham has filed a claim for attorney’s fees under local government code § 271.153 for which the City has waived its immunity. We overrule the City’s sole issue.

III. CONCLUSION

We affirm the judgment of the trial court.

NORA L. LONGORIA
Justice

Delivered and filed the
25th day of June, 2020.