



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

COUNTY OF EL PASO,	§	No. 08-19-00294-CV
	§	
Appellant,	§	Appeal from the
v.	§	County Court at Law No. 3
KRYSTAL MIJARES AND	§	
MELISSA ALVARADO,	§	of El Paso County, Texas
	§	
Appellees.	§	(TC# 2016DCV0573)
	§	

OPINION

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a lawsuit stemming from settlement agreements between the County of El Paso and two of its former employees. The former employees contend that the County was contractually obligated to rehire them, and based on the County's failure to do so they have alleged claims for breach of contract, fraud, and fraudulent inducement. The County filed its jurisdictional plea asserting governmental immunity, which the trial court denied. On interlocutory appeal from that order, the County also suggests the dispute is moot because the former employees no longer seek to be rehired.

We reverse, in part, the denial of the plea to the jurisdiction. The former employees have failed to plead any statute or other legislative authority upon which to overcome the presumption

that the County is immune from suit. On the record before us, we conclude that this is an incurable defect at least with respect to the claims of fraud and fraudulent inducement. With respect to the contract claims, however, because a governmental entity may not regain waived immunity by virtue of a settlement agreement, the same waiver of immunity that applied to the original settled claims also applies to this subsequent dispute over the settlement agreement. We further reject the suggestion of mootness, as a live controversy still exists concerning the former employees' claims for damages. Accordingly, we reverse in part, with respect to fraud and fraudulent inducement, and we remand the case for further proceedings.

Background

Appellees Krystal Mijares and Melissa Alvarado are former employees of Appellant El Paso County. In 2012, they sued the County for, among other things, violations of the Fair Labor Standards Act and retaliation for making complaints. The County concedes that it was not immune from those claims, which were dismissed in 2013 pursuant to negotiated agreements. In addition to monetary payments to Mijares and Alvarado, the settlement agreements also provided that each of them "will be re-hired to a position of employment with the County subject to her approval and the approval of the official or department head overseeing the job selected."

In 2016, Mijares and Alvarado sued the County again, this time alleging breach of the settlement agreements, fraud, and fraudulent inducement. They alleged that they fulfilled their obligations under the agreements by "dismissing all of their claims against Defendant and selecting a position with EP County and applying for it." They applied for vacant positions from June 2013 to May 2015, but they were never rehired by the County. The petition alleged that all conditions precedent were fulfilled, including specific allegations that they selected and applied for vacant positions with the County for which they were qualified. Mijares and Alvarado contended that the

County was required to rehire them and obligated to act in good faith with respect to their applications and to approval by the official or department head overseeing the selected jobs. They alleged that the County did not seek approval for them to be rehired. They further alleged that they were induced to dismiss their original claims by the County's misrepresentation that they would be rehired, and that they were injured by their reasonable reliance on such misrepresentations. The petition sought damages and a declaration of the parties' obligations under the settlement agreements.

El Paso County filed a plea to the jurisdiction, which it amended twice. In the second amended plea, the County argued that it owed no unconditional contractual obligation to rehire Mijares and Alvarado, and that governmental immunity protected it from suit alleging the intentional torts of fraud or fraudulent inducement.

The trial court denied the plea to the jurisdiction, and the County initiated this interlocutory appeal. *See* TEX.CIV.PRAC.& REM.CODE ANN. § 51.014(a)(8).

Analysis

A plea to the jurisdiction is a challenge to the subject matter jurisdiction of the court hearing the case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *Socorro Indep. Sch. Dist. v. Hamilton*, 579 S.W.3d 831, 834 (Tex.App.--El Paso 2019, pet. denied). A court cannot decide a case in the absence of subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993); *Hamilton*, 579 S.W.3d at 834. As subject matter jurisdiction will not be presumed, the plaintiff has the burden of pleading facts to establish its existence. *Tex. Ass'n of Bus.*, 852 S.W.2d at 443-44, 446. "Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed de novo. Likewise, whether undisputed evidence of jurisdictional facts establishes a trial

court's jurisdiction is also a question of law." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We look only to the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry while eschewing examination of the merits of the case. *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002); *Hamilton*, 579 S.W.3d at 835.

Texas counties enjoy governmental immunity from suit which, to the extent it applies, deprives a court of its subject matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). "The party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express legislative permission." *City of Dallas v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *see also Luttrell v. El Paso County*, 555 S.W.3d 812, 826 (Tex.App.--El Paso 2018, no pet.). "To prevail on a plea to the jurisdiction, the defendant must show an incurable jurisdictional defect on the face of the pleadings." *Nairn v. Killeen Indep. Sch. Dist.*, 366 S.W.3d 229, 247 (Tex.App.--El Paso 2012, no pet.).

I. Breach of contract

The County argues that the disputed settlement agreements did not unconditionally require it to rehire Mijares and Alvarado as they allege in their petition. Rather, the County argues that the settlements merely provided that they were eligible to be rehired, expressly subject to their future application for some position and also expressly subject to approval by the official who would oversee that job. The County thus argues that the settlement agreements unambiguously established conditions precedent to the rehiring of Mijares and Alvarado. Absent allegations that the conditions precedent were satisfied by approvals from the appropriate official or department head, the County contends that Mijares and Alvarado failed to sufficiently allege jurisdictional facts to plead a cause of action that pierces its governmental immunity.

The County concedes it was not immune from suit for the underlying claims that were released by the settlement agreements. The County further acknowledges that it is not categorically immune from suit for breach of a settlement agreement when it lacked immunity from suit for the underlying claims. *Cf. Tex. A & M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 521 (Tex. 2002) (plurality op.) (“when a governmental entity is exposed to suit because of a waiver of immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued”); *see also Hughes v. Tom Green County*, 573 S.W.3d 212, 221 (Tex. 2019) (“*Lawson* provides that a governmental entity cannot create immunity for itself by settling a claim for which it lacks immunity only to assert immunity from suit in a subsequent action to enforce the government's agreement.”); *Hamilton*, 579 S.W.3d at 841. However, the County argues that Mijares and Alvarado nevertheless bear the burden of proving that all conditions precedent have been satisfied. *See Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998). Because Mijares and Alvarado have neither pleaded nor demonstrated their approval for rehire by an official or department head overseeing a selected job, the County contends that a jurisdictional fact necessary to pursue the breach of contract claims against it has been negated.

Strictly as a matter of their pleading burden, Mijares and Alvarado did all that the rules require by generally alleging in their petition that all conditions precedent to their rights of recovery have been fulfilled. *See Tex.R.Civ.P. 54* (“In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred.”). Still, the County contends that because it specifically denied the occurrence of the alleged condition precedent of approval for rehire by an appropriate supervisor, Mijares and Alvarado are required to prove that as an element of their claim. *See id.* (“When such performances or occurrences have been so plead, the party so pleading same shall be required to

prove only such of them as are specifically denied by the opposite party.”). But establishing that it would be the plaintiffs’ burden to prove satisfaction of conditions precedent to prevail at trial does not necessarily imply that this issue must be resolved to determine whether the County is immune from responding to this suit at all. In that regard, the County suggests that when a governmental entity challenges the sufficiency of jurisdictional facts, plaintiffs bear the burden to overcome such a challenge to demonstrate a waiver of immunity. The County contends that its argument that it had no unconditional contractual obligation to rehire Mijares and Alvarado is such a jurisdictional fact that must be refuted by them to overcome its immunity from suit.

Relying upon the examples of *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004), and *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018), the County’s argument treats all of the elements of the contract claims in this dispute as “jurisdictional facts,” such that the plaintiffs must demonstrate at least a fact dispute as to each element to overcome governmental immunity from suit. But *Miranda* and *Alamo Heights* involved different types of claims with different sources of authority for the waiver of governmental immunity. *Miranda* involved a premises liability claim, implicating the Texas Tort Claims Act. The Supreme Court observed that a unique statutory scheme applied in which immunity from suit was co-extensive with immunity from liability under the Texas Tort Claims Act, which provides that “[s]overeign immunity to suit is waived and abolished *to the extent of liability created by this chapter.*” *Miranda*, 133 S.W.3d at 224 (emphasis supplied, quoting TEX.CIV.PRAC.& REM.CODE ANN. § 101.025(a)). Similarly, for the workplace harassment claims presented more recently in *Alamo Heights*, the Court noted that the statutory waiver of immunity under the Texas Commission on Human Rights Act was expressly tied to establishing a statutory violation: “The TCHRA waives immunity from suit only for statutory violations, which means the trial court lacks subject-matter

jurisdiction over the dispute absent some evidence the school district violated the TCHRA.” *Alamo Heights*, 544 S.W.3d at 763 (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635-37 (Tex. 2012)); *see also* TEX.LAB.CODE ANN. § 21.002(4) (defining a TCHRA “complainant” as “an individual who brings *an action or proceeding under this chapter*” (emphasis supplied)); *id.* § 21.254 (waiving immunity for certain claims by TCHRA complainants).

Unlike the foregoing scenarios in which the statutory waiver of governmental immunity expressly implicated the elements required to prove ultimate liability, thus equating the allegations necessary to invoke jurisdiction with those necessary to state a claim, the waiver of immunity in this dispute was established before this suit was ever filed, and the relevant authority is *Lawson*. The County has conceded that its immunity had been waived as to the original employment-related claims asserted against it by Mijares and Alvarado. And just as in *Lawson*, “when a governmental entity is exposed to suit because of a waiver of immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued.” *Lawson*, 87 S.W.3d at 521. Thus, the County’s concession that immunity from suit was waived as to the original claims operates as a concession that the same waiver of immunity carries forward to the subsequent claim that a contract settling the original dispute was breached. As the Court explained, “[w]hile it is certainly true . . . that a suit for breach of a settlement agreement is separate and apart from the suit on the settled claim, enforcement of a settlement of a liability for which immunity is waived should not be barred by immunity.” *Id.*

The County’s arguments depend heavily on its contentions about the proper interpretation of the settlement agreements, and whether it had an unconditional obligation to rehire Mijares and Alvarado. But “[i]mmunity from suit does not turn on the validity of the settlement agreement sued on.” *Id.* at 523. We therefore conclude that the County’s immunity has been waived with

respect to the claims for breach of the settlement agreements, and we overrule that aspect of the interlocutory appeal.

II. Fraud and fraudulent inducement

In contrast to the arguments with respect to breach of contract, the County relies upon the Tort Claims Act to argue that governmental immunity has not been waived as to the remaining claims of fraud and fraudulent inducement. In response, Mijares and Alvarado argue that the evidence raises genuine issues of material fact about their fraud claim. They did not specifically plead that the State has waived the County's immunity to fraud-based claims, nor have they offered any legal argument to that effect on appeal.

Fraud is not included within the limited scope of the waiver of immunity for tortious conduct under Section 101.021 of the Civil Practice and Remedies Code. Texas courts have acknowledged the lack of consent by the State to be sued for fraud. *See, e.g., Ethio Exp. Shuttle Serv., Inc. v. City of Houston*, 164 S.W.3d 751, 758 (Tex.App.--Houston [14th Dist.] 2005, no pet.) (citing TEX.CIV.PRAC.& REM.CODE ANN. § 101.057(2)); *City of Fort Worth v. Pastusek Indus., Inc.*, 48 S.W.3d 366, 372 (Tex.App.--Fort Worth 2001, no pet.). We sustain the County's appeal to the extent Mijares and Alvarado have attempted to pursue claims against it for fraud or fraudulent inducement.

III. Mootness

Finally, in an argument raised for the first time on appeal, the County argues that the lawsuit is moot because both Mijares and Alvarado conceded in their depositions that they are no longer seeking employment with the County. In response, Mijares and Alvarado note that they have alleged damages based on the County's past failure to rehire them, in breach of the settlement agreements.

To the extent the County suggests that a controversy becomes moot and jurisdiction is lost when a controversy ceases to exist between the parties at any stage of the legal proceedings, *see, e.g., In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005), that does not accurately describe the state of this dispute. Mijares and Alvarado seek damages for a breach of contract alleged to have taken place in the past, and the County has offered no legal argument to explain why, over six years after the settlement agreements were executed, they must continue to actively seek rehiring to maintain a live controversy.

Conclusion

We reverse the denial of the County's plea to the jurisdiction in part. We render judgment dismissing the claims for fraud and fraudulent inducement, and we remand the case for further proceedings.

MICHAEL MASSENGALE, Visiting Justice

July 13, 2020

Before Rodriguez, Palafox, and Massengale, JJ.
Massengale, J., Sitting by Assignment