

Affirmed and Opinion filed June 2, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00198-CV

SUNBLIK, INC., Appellant

V.

HARRIS COUNTY APPRAISAL DISTRICT, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2007-62027

MEMORANDUM OPINION

Sunblik, Inc. appeals from the trial court's order granting the plea to the jurisdiction filed by Harris County Appraisal District ("HCAD").¹ We affirm.

I. Factual and Procedural Background

¹ Appellant's pleadings and notice of appeal identify both HCAD and the Harris County Appraisal Review Board as defendants. Because the record does not indicate that the Appraisal Review Board was served or appeared in the suit and it was not a necessary party, HCAD is the only appellee properly before this court. *See BACM 2002 PB2 Westpark Dr. LP v. Harris County Appraisal Dist.*, 14-08-00493-CV, 2009 WL 2145922 at *1, n. 1 (Tex.App.-Houston [14th Dist.] 2009, no pet.) (mem. op.).

The property at issue is described as 11460 East Freeway 74, Houston, Texas 77029. By deed dated February 5, 2004, Blinks Investment, Inc. (“Blinks”) conveyed the subject property to Sunblik, Inc. (“Sunblik”). Despite this conveyance, Blinks filed a notice of protest with HCAD’s Appraisal Review Board protesting the 2007 tax assessment for the property. On August 10, 2007, HCAD issued an order finding the property appraisal was incorrect and lowering the value.

On October 2, 2007, Blinks appealed that decision by filing an original petition in the trial court challenging the Review Board’s determination. On December 16, 2009, HCAD filed a plea to the jurisdiction arguing that the trial court lacked subject matter jurisdiction because Blinks was not the owner of the property as of January 1, 2007, and only the property owner had standing to appeal from the Review Board’s order. On December 23, 2009, Blinks filed an amended petition naming as plaintiff “Sunblik, Inc” and a motion pursuant to Texas Rule of Civil Procedure 28. On February 8, 2010, the trial court granted HCAD’s plea to the jurisdiction and dismissed the case. This appeal followed.

II. Standard of Review

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, 226 (Tex.2004). In our review, we construe the pleadings liberally in favor of the pleader and look to the pleader’s intent to determine whether the facts alleged affirmatively demonstrate the trial court’s jurisdiction to hear the cause. *See id.*

Standing is a component of subject-matter jurisdiction that cannot be waived. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex.1993). If a party does not have standing, a trial court has no subject-matter jurisdiction to hear the case. *Id.* at 444-45. A trial court’s jurisdiction to hear the subject matter of a dispute may be challenged by filing a plea to the jurisdiction. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex.2000).

A defendant may prevail on a plea to the jurisdiction by demonstrating that, even if all the plaintiff's pleaded allegations are true, an incurable jurisdictional defect remains on the face of the pleadings that deprives the trial court of subject-matter jurisdiction. *Harris County Appraisal Dist. v. O'Connor & Assocs.*, 267 S.W.3d 413, 416 (Tex.App.-Houston [14th Dist.] 2008, no pet.). In determining a plea to the jurisdiction, a trial court may consider the pleadings and any evidence pertinent to the jurisdictional inquiry. *Bland*, 34 S.W.3d at 554-55.

III. Analysis

Appellant claims that it timely amended its petition to cure a misnomer and to include Sunblik as a party pursuant to section 42.21(e)(1) of the Texas Tax Code and Texas Rule of Civil Procedure 28. Therefore, appellant contends, the trial court erred in granting HCAD's plea to the jurisdiction and denying its Rule 28 motion.

A. Standing

Our court and the First Court of Appeals have addressed and rejected these arguments. See *Woodway Drive L.L.C. v. Harris County Appraisal Dist.*, 311 S.W.3d 649 (Tex. App. – Houston [14th Dist.] 2010, no pet.); *BACM 2002 PB2 Westpark Dr. LP v. Harris County Appraisal Dist.*, No. 14-08-00493-CV, 2009 WL 2145922 (Tex. App. - Houston [14th Dist.] 2009, no pet.) (mem. op.); and *GSL Welcome BP 32 L.L.C. v. Harris County Appraisal Dist.*, No. 01-10-00189-CV, 2010 WL 4484361 (Tex. App. – Houston [1st Dist.] 2010, no pet.) (mem. op.). We reach the same outcome here.²

² See also *Woodway Drive LLC v. Harris County Appraisal Dist.*, No. 14-09-00524-CV, 2010 WL 724174 (Tex.App.-Houston [14th Dist.] Mar. 4, 2010, no pet.) (mem. op.); *Scott Plaza Assoc., Ltd. v. Harris County Appraisal Dist.*, No. 14-09-00707-CV, 2010 WL 724189 (Tex.App.-Houston [14th Dist.] Mar. 4, 2010, no pet.) (mem. op.); *SWP Remic Prop. II LP v. Harris County Appraisal Dist.*, No. 14-08-00425-CV, 2010 WL 26524 (Tex.App.-Houston [14th Dist.] Jan. 7, 2010, no pet.) (mem. op.); *Skylane West Ltd. v. Harris County Appraisal Dist.*, No. 14-08-00507-CV, 2009 WL 4913256 (Tex.App.-Houston [14th Dist.] Dec. 22, 2009, no pet.) (mem. op.); *DL Louetta Village Square LP v. Harris County Appraisal Dist.*, No. 14-08-00549-CV, 2009 WL 4913259 (Tex.App.-Houston [14th Dist.] Dec. 22, 2009, no pet.) (mem. op.).

As a general rule, only a property owner may protest tax liability before an appraisal-review board and seek judicial review in court. *Tourneau Houston, Inc. v. Harris County Appraisal Dist.*, 24 S.W.3d 907, 909 (Tex.App.-Houston [1st Dist.] 2000, no pet.). Section 42.21(a) of the Property Tax Code requires a party who appeals as provided by Chapter 42 of the Property Tax Code to timely file a petition for review with the district court. Failure to timely file a petition bars any appeal under the chapter. Tex. Tax Code Ann. § 42.21(a) (Vernon Supp. 2009). Section 42.01 of the Tax Code specifies that a property owner is entitled to appeal an order of the appraisal review board determining a protest by the property owner as provided by sections 41.41 *et seq.* of the Property Tax Code. *Id.* § 42.01(1)(A). Alternatively, a property owner may designate a lessee or an agent to act on the property owner's behalf for any purpose under the Property Tax Code, including filing a tax protest. *Id.* §§ 1.111 (Vernon 2008) (authorizing a designated lessee or agent to act for a property owner), 41.413(b) (Vernon 2008) (authorizing a lessee to protest for the property owner in certain circumstances).

Therefore, to qualify as a “party who appeals” by seeking judicial review of an appraisal-review board's tax determination under section 42.21(a), appellant had to be an owner of the property, a designated agent of the owner, or the authorized lessee of the property under the circumstances stated in section 41.413. A party who does not meet one of the above criteria would lack standing under the Property Tax Code. *BACM*, 2009 WL 2145922, at *3. If the litigant lacks standing, the trial court is deprived of subject-matter jurisdiction to consider a suit for judicial review based on an ad valorem tax protest. *Id.*

Here, Blinks did not own the property as of January 1, 2007. It did not claim rights to protest under the Property Tax Code as either a lessee or an agent. Therefore, Blinks lacked standing to pursue judicial review as a “party who appeals” under section 42.21(a). The record does not reflect that Sunblik pursued its right of protest as the actual property owner. According to the record, Sunblik was not named as a party until December 23, 2009, when a First Amended Original Petition was filed. Therefore, the Review Board had

not determined a protest by the actual property owner, Sunblik, upon which it would then premise a right to appeal as the property owner. *See* Tex. Tax Code Ann. §§ 42.01(1)(A), 42.21(a); *BACM*, 2009 WL 2145922, at *4.

B. Application of Section 42.21(e)(1)

Appellant also contends the trial court had jurisdiction because section 42.21(e)(1) allows amendment of a timely filed petition “to correct or change the name of a party.” *See* Tex. Tax Code Ann. § 42.21(e)(1) (Vernon Supp. 2009); *BACM*, 2009 WL 2145922, at *5. We disagree, for the same reasons announced in *BACM*.

Section 42.21(e) specifies that only petitions that are “timely filed under Subsection (a) or amended under Subsection (c)” may later be amended to correct or change a party’s name.³ *See* Tex. Tax Code Ann. § 42.21(e)(1). To seek judicial review under Subsection (a), the plaintiff must be a “party who appeals as provided by [Chapter 42],” meaning the plaintiff must be the property owner, a properly designated agent, or a lessee. *Id.* § 42.21(a).

Blinks filed a timely appeal; however, it did not own the property on January 1, 2007, and thus lacked standing to seek judicial review. *See BACM*, 2009 WL 2145922, at *5. Appellant's argument that subsection 42.21(3)(1) operates to allow it to correct or change the party's name presupposes that Sunblik was a proper party entitled to seek judicial review. *Id.* However, Sunblik did not pursue its right to protest as the property owner. When no proper party timely appealed to the district court, the trial court did not acquire subject matter jurisdiction, and the Review Board’s determination became final. *See id.* Appellant’s reliance upon *Womack Machine Supply Co. v. Fannin Bank*, 499 S.W.2d 917 (Tex. Civ. App. – Houston [14th Dist.] 1973, *rev’d on other grounds*, 504 S.W.2d 827 (Tex. 1974), and *Ealey v. Insurance Co. of North Am.*, 660 S.W.2d 50 (Tex.

³ Appellant does not argue that Subsection (c) applies to this case.

1983), is therefore misplaced. *See GSL Welcome BP 32 L.L.C.*, 2010 WL 4484361, at *5-6.

C. Application of Texas Rule of Civil Procedure 28

Appellant also argues that the trial court had jurisdiction to hear the case because Texas Rule of Civil Procedure 28, which governs suits by or against entities doing business under an assumed name, permits substitution of Sunblik as Blinks “true name.” Rule 28 states:

Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

Tex. R. Civ. P. 28.

In this case, Blinks attempted to substitute its purported “true name,” Sunblik, by filing an amended original petition and arguing Rule 28 permitted the substitution. For a party to take advantage of Rule 28 and sue in its common name, there must be a showing that the named entity is in fact doing business under that common name. *Seidler v. Morgan*, 277 S.W.3d 549, 553 (Tex.App.-Texarkana 2009, pet. denied). Whether an entity does business under an assumed or common name is a question of fact for the trial court. *Sixth RMA Partners, L.P. a/k/a RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex.2003).

Appellant did not make a showing that Sunblik was in fact doing business under the common name Blinks, nor was there evidence that Sunblik used Blinks as a common name to warrant application of Rule 28. *Compare Sixth RMA Partners*, 111 S.W.3d at 52 (concluding evidence supported assumed-name finding when Sixth RMA presented evidence that RMA Partners, L.P. was used as trade name for various RMA partnerships, RMA letterhead was used, and payments on notes were made to RMA) and *Chilkewitz v. Hyson*, 22 S.W.3d 825, 829 (Tex.1999) (stating some evidence supported application of

Rule 28 when stationery and phone-number listing used by one-person professional association contained name of individual).⁴

IV. Conclusion

For the reasons set forth above, appellant's issues are overruled. We find the trial court did not err in granting appellee's plea to the jurisdiction and affirm the trial court's judgment.

PER CURIAM

Panel consists of Justices Anderson, Brown, and Christopher.

⁴ Although appellant cites HCAD's records that reflect Blinks as the property owner even after the property sale, HCAD's records alone are not sufficient to establish Sunblik operated its business under the common name of Blinks. *See KM-Timbercreek, LLC v. Harris County Appraisal Dist.*, 312 S.W.3d 722, 731 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (stating that only Timbercreek could establish whether it operated its business under an assumed or common name). There is no evidence that Sunblik held itself out as Blinks or requested HCAD refer to it as Blinks in its records. *See id.*