Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00572-CV

Ronald F. **AVERY**,
Appellant

v.

GUADALUPE COUNTY APPRAISAL DISTRICT,
Appellee

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 15-2442-CV
Honorable W.C. Kirkendall, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: April 12, 2017

AFFIRMED

In the underlying ad valorem tax case, Ronald Avery filed protests with the Guadalupe County appraisal review board ("the Board") regarding taxes on three of his properties. His protests raised six grounds. Following unfavorable decisions from the Board, Avery sued the Guadalupe County Appraisal District ("the District"), again raising the six grounds for his protest. The trial court granted the District's motion to dismiss for lack of jurisdiction on three of the grounds and rendered a summary judgment in favor of the District on the remaining three grounds. Avery now appeals from both orders. We affirm.

BACKGROUND

Avery owns three properties, two individually and one as a trustee. On May 22, 2015, Avery filed a protest for each property for the 2015 tax year. Avery stated the same six grounds in each protest for the three properties: (1) his property was over market value, (2) his property was appraised unequally compared to other properties, (3) his property should not be taxed in the jurisdiction of Texas, (4) his property should not be taxed in the Guadalupe County Appraisal District or in one or more taxing units, (5) his property should not be taxed based on the Texas Constitution, including Article VIII, sections 1(a), 1-5, and other laws, and (6) his property should not be taxed based on principals of unlawfulness of ad valorem taxes in America according to the Founders.

On July 21, 2015, the Board conducted a hearing on Avery's protests relating to all three properties. The next day, the Board issued a separate "Order Determining Protest" for each property, which stated

> the Board has determined that the protest concerned the following action(s) permitted by Section 41.41(a), Tax Code
>
> Value is over market value
>
> Value is unequal compared to other properties
>
> Having heard the evidence and arguments from both sides, the Appraisal Review Board with a quorum present determined that:
>
> Appraisal Review Board rejects the appeal to the Texas Constitution as a viable cause of appeal of appraised value.
>
> . . .
>
> If an ARB determination is not shown for a protested issue, it was withdrawn before or during the protest hearing. . . . .

Avery received notice of the three orders on July 24, 2015. On August 13, 2015, Avery wrote a letter to the District in which he acknowledged receipt of the orders, but he stated he did not receive rulings on his remaining three protest grounds. In the letter, he stated he needed the rulings on the remaining issues so he could file an appeal in district court. Rather than issue

additional orders addressing the three grounds, the Board set a hearing date for October 14, 2015, on the remaining three issues. On October 16, 2015, the Board issued a separate "Order Determining Protest" for each property, which stated

> the Board has determined that the protest concerned the following action(s) permitted by Section 41.41(a), Tax Code
>
> Property should not be taxed in the taxing unit of Texas
>
> Property should not be taxed in this appraisal district or in one or more taxing units
>
> The unlawfulness of ad valorem property tax in America according to the Founders
>
> Having heard the evidence and arguments from both sides, the Appraisal Review Board with a quorum present determined that:
>
> Land is located in Guadalupe County.
>
> Taxing entities reflected on record are correct.
>
> The Texas Constitution and Texas Tax Code allow the Guadalupe Appraisal District to appraise the property and the taxing entities are entitled to tax the property.
>
> . . .
>
> If an ARB determination is not shown for a protested issue, it was withdrawn before or during the protest hearing. . . . .

Avery filed his "Original Petition for Review" with the district court on December 14, 2015. In his petition, Avery appealed both the July 22, 2015 orders and the October 16, 2015 orders. On June 9, 2016, the District moved for a dismissal of Avery's appeal of the July 22, 2015 orders, which addressed Avery's first three protest grounds, arguing the trial court lacked jurisdiction because Avery's appeal from those orders was not timely. On that same date, the District also moved for both a traditional and no-evidence summary judgment on Avery's appeal from the October 16, 2015 orders, which addressed Avery's remaining three protest grounds. The trial court granted both motions and Avery now appeals.

JURISDICTION

A taxpayer who wishes to protest an action taken by a taxing authority must follow the procedures contained in the Texas Tax Code. *Harris Cty. Appraisal Dist. v. Tex. Nat'l Bank of*

Baytown, 775 S.W.2d 66, 69 (Tex. App.—Houston [1st Dist.] 1989, no writ). These requirements are jurisdictional. *Id.* To invoke the jurisdiction of the trial court, the taxpayer must satisfy three requirements: (1) he must file his petition within the statutorily prescribed time period, (2) he must be the record property owner, and (3) he must have exhausted his administrative remedies by protesting the initial valuation before the appraisal review board. *Storguard Invs., LLC v. Harris Cty. Appraisal Dist.*, 369 S.W.3d 605, 615 (Tex. App.—Houston [1st Dist.] 2012, no pet.). In its motion to dismiss, the District challenged only the timeliness of Avery's appeal of the July 22, 2015 orders.

Texas Tax Code article 42.21 requires an appealing party to "file a petition for review with the district court within 60 days after the party received notice that a final order has been entered from which an appeal may be had or at any time after the hearing but before the 60-day deadline." TEX. TAX CODE ANN. § 42.21(a) (West 2015). "Failure to timely file a petition bars any appeal under this chapter." *Id.* Compliance with article 42.21 is jurisdictional. *Appraisal Review Bd. v. Int'l Church of the Foursquare Gospel*, 719 S.W.2d 160, 160 (Tex. 1986); *Valero S. Tex. Processing Co. v. Starr Cty. Appraisal Dist.*, 954 S.W.2d 863, 865 (Tex. App.—San Antonio 1997, pet. denied).

In its motion to dismiss, the District alleged Avery was required to file his appeal from the July 22, 2015 orders within sixty days of the date he received notice of the orders. Avery does not dispute that he received notice of the July 22, 2015 orders on July 24, 2015. The District contends that, under article 42.21, Avery was required to file his petition for review no later than September 22, 2015. Avery filed his petition for review on December 14, 2015. However, Avery counters that the July 24, 2015 orders were not final, appealable orders because they did not dispose of all six of his grounds for protest. According to Avery, the July 24, 2015 orders did not become final and appealable until sixty days after he received notice of the Board's October 16, 2015 orders,

which disposed of his remaining three protest grounds. Avery concludes that his December 14, 2015 petition was timely.

Therefore, on appeal, Avery argues he is entitled to appeal all six protest grounds. In other words, Avery asserts he is entitled to appeal from the July 22, 2015 orders, which determined his protests based on (1) value over market value, (2) value is unequal compared to other properties, and (3) whether his property could be taxed in Texas. However, Avery makes no argument on appeal regarding grounds one and two. In his brief on appeal, he states: "In all fairness however, [he was] not here on appeal of a particular value of any of his property wherein he is asking the court to place a value upon it for the purposes of an ad valorem tax." Avery asserts he is "here to show the whole process of ad valorem property taxation is unconstitutional and unlawful and goes against the most fundamental principles of lawful government anywhere in the cosmos." As to the third protest ground, Avery argues that, even if the District's motion to dismiss had merit, the board voluntarily "reopened the 'Constitutional' and 'other laws' issues" at the second hearing. Therefore, Avery contends the only part of his protest that could have been dismissed, if the District's motion to dismiss has merit, is any dispute over the market value or equality of value of his property. But, he concludes his "remaining protest grounds render those two issues moot."

Because Avery's brief on appeal raises no argument regarding the board's determinations on the value of his property—whether it was over market value or unequal compared to other properties—we need not address whether Avery is entitled to appeal those determinations. However, because the board heard the protest on the constitutionality or lawfulness of ad valorem taxes at the second hearing, we next address whether the trial court properly rendered summary judgment in favor of the District on the issue of whether Avery's property could be taxed in Texas.

SUMMARY JUDGMENT

In its motion for a traditional summary judgment, the District provided evidence that Avery's properties were located in Guadalupe County and within the boundaries and taxing jurisdiction of Guadalupe County, Sequin ISD, and Lateral Roads. The District argued that because of its non-exempt status, each property was taxable as set forth in the Texas Constitution and the Texas Tax Code. In its no-evidence motion, the District asserted there was no evidence that any of Avery's three properties were either not taxable under Texas law or were exempt from ad valorem taxes.

A. Standard of Review

We review a trial court's grant of summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A party moving for traditional summary judgment has the burden of establishing that no material fact issue exists and the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In reviewing the granting of a traditional summary judgment, we consider all the evidence in the light most favorable to the non-movant, indulging all reasonable inferences in favor of the non-movant. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

In a no-evidence motion for summary judgment, the moving party must assert there is no evidence of one or more essential elements of the claim on which the non-movant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i). Once the motion is filed, the burden shifts to the non-movant to present evidence raising an issue of material fact as to the challenged elements of its cause of action. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). If the non-movant produces more than a scintilla of evidence raising a genuine issue of material fact on the challenged elements, the trial court must deny the motion. *See Hamilton v. Wilson*, 249 S.W.3d

425, 426 (Tex. 2008). However, the non-movant is not required to marshal its entire proof, as its response need only raise a fact issue on the challenged elements. *Id.*

Ordinarily when a party moves for both a traditional and no-evidence summary judgment and the trial court grants the motion without stating its grounds, we first review the trial court's decision as to the no-evidence summary judgment. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). This is so because, if the non-movant failed to produce more than a scintilla of evidence under the no-evidence standard, there is no need to analyze whether the movant's summary judgment proof satisfied the burden related to traditional summary judgment motions. *Id.* However, in this case, the District moved for a traditional summary judgment on grounds different from those presented in its no-evidence motion. Therefore, we first address the trial court's decision on the District's traditional motion for summary judgment.

B. Traditional Summary Judgment

The trial court rendered summary judgment in favor of the District on the following protest grounds: (1) whether Avery's properties should not be taxed in the taxing unit of Texas; (2) whether Avery's properties should not be taxed in Guadalupe County, Sequin ISD, and Lateral Roads; and (3) the unlawfulness and constitutionality of ad valorem property tax in America according to the Founders.

Section 1 of Article VIII of the Texas Constitution establishes the constitutional standard for taxation:

> Sec. 1. (a) Taxation shall be equal and uniform.
> (b) All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.

TEX. CONST. art. VIII, § 1(a-b). In accordance with these constitutional directives, ad valorem tax rates must be uniform for all types of property and ad valorem tax values must be based on the

"market value" of the property. *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 935 (Tex. 1996).

Avery points to section 1-e of Article VIII for his argument that the laws concerning ad valorem taxes are contradictory because section 1-e prohibits "State ad valorem taxes." Therefore, Avery argues Article VIII, section 1(a-b), is unenforceable. Under section 1-e, "No State ad valorem taxes shall be levied upon any property within this State." TEX. CONST. art. VIII, § 1-e. The Texas Supreme Court has held that "[a]n ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 502 (Tex. 1992). "Clearly, if the State merely authorized a tax but left the decision whether to levy it entirely up to local authorities, to be approved by the voters if necessary, then the tax would not be a state tax. The local authority could freely choose whether to levy the tax or not." *Id.* at 503. "To the other extreme, if the State mandates the levy of a tax at a set rate and prescribes the distribution of the proceeds, the tax is a state tax, irrespective of whether the State acts in its own behalf or through an intermediary. Between these two extremes lies a spectrum of other possibilities." *Id.* "Our Constitution clearly recognizes the distinction between state and local taxes, and the latter are not mere creatures of the former." *Id.* at 513.

In this case, we conclude there is no conflict because the ad valorem taxes here are not "state taxes" because the State of Texas neither imposes nor controls the ad valorem taxes. Instead, they are imposed and controlled by the local taxing units. The Texas Tax Code provides that real property is taxable by a taxing unit if the real property is located within the boundaries of the taxing unit on the first day of January of the tax year. TEX. TAX CODE § 21.01. A "taxing unit" is defined as

> a county, an incorporated city or town[,] a school district, a special district or authority[,] or any other political unit of this state, whether created by or pursuant to the constitution or a local, special, or general law, that is authorized to impose and is imposing ad valorem taxes on property even if the governing body of another political unit determines the tax rate for the unit or otherwise governs its affairs.

Id. at § 1.04(12).

The Texas Constitution also provides that, with exceptions that do not apply here, "[t]he several counties of the State are authorized to levy ad valorem taxes upon all property within their respective boundaries for county purposes . . . ." TEX. CONST. art. VIII, § 1-a. The interpretive commentary to section 1-a states:

> Under these amendments [to sections 1a, 1b, and 1c], the state abandoned the state property tax for general revenue purposes with a few minor exceptions. This tax had applied to real property and tangible business property, but had long been the object of attack on the grounds that it was poorly and inequitably administered. Undervaluation, evasion of both tangible and intangible personal property, and of uniformity in the assessment rate from county to county, among different kinds of property within the same county, and among the individual owners of the same kind of property in the same county were among the main arguments advanced against the tax.
>
> Furthermore, it was contended that counties and local subdivisions of the state should be allowed the exclusive privilege of taxing real estate for county and local purposes in view of the fact that an ad valorem tax is the only form of tax which counties, cities and towns may depend upon for revenue, while the state has the whole field of taxation open to its requirements. *Therefore, the amendment provided that even though the state tax structure should no longer include the ad valorem tax, it was to remain an integral and important part of the tax structure of the political sub-divisions of the state, and hence does not relieve property owners of all general property taxes.*

TEX. CONST. art. VIII, § 1-a interp. commentary (emphasis added).

The Texas Constitution also allows for the assessment and collection of property taxes by school districts:

> The Legislature shall be authorized to pass laws for the assessment and collection of taxes in all school districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school

> districts for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified voters of the district voting at an election to be held for that purpose, shall approve the tax.

TEX. CONST. art. VII, § 3(e).

Finally, Texas Constitution allows for the assessment and collection of property taxes for the maintenance of public roads:

> (c) The Legislature may authorize an additional annual ad valorem tax to be levied and collected for the further maintenance of the public roads; provided, that a majority of the qualified voters of the county voting at an election to be held for that purpose shall approve the tax, not to exceed Fifteen Cents (15¢) on the One Hundred Dollars ($100) valuation of the property subject to taxation in such county.
>
> . . .
>
> (e) The Legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws.

TEX. CONST. art. VIII, § 9(c), (e).

Therefore, under the Texas Constitution, Guadalupe County, Sequin ISD, and Lateral Roads all had the constitutional authority to impose and collect ad valorem taxes on Avery's properties.

Avery does not dispute that his properties are located within the boundaries and taxing jurisdiction of Guadalupe County, Sequin ISD, and Lateral Roads. Instead, on appeal, Avery asserts that merely citing to the Texas Constitution and Tax Code is not sufficient to entitle the District to summary judgment. In addition to arguing the laws concerning ad valorem taxes are contradictory and, therefore, unenforceable; Avery also contends (1) no two properties in Texas can ever be taxed equally and uniformly with other property, and (2) there are genuine issues of material fact concerning the lack of a lawful source of authority to levy ad valorem taxes.

The Texas Supreme Court has "held that ad valorem tax rates must be uniform for all types of property in accordance with the directive in section 1 of article VIII." *Enron Corp.*, 922 S.W.2d at 935. However, "the courts of this state, in common with the courts of other jurisdictions, early

recognized that exact uniformity and equality of taxation was unattainable . . ." *State v. Whittenburg*, 153 Tex. 205, 209, 265 S.W.2d 569, 572 (1954); *see also Enron Corp.*, 922 S.W.2d at 935 (citing to *Whittenburg*, 265 S.W.2d at 572). But, a "reasonable discrepancy between the actual value of the property and the value at which it is assessed for taxes is permissible to allow for a difference in judgment [as to the value of the property]." *Enron Corp.*, 922 S.W.2d at 935; *Dallas Cty. v. Dallas Nat'l Bank*, 142 Tex. 439, 179 S.W.2d 288, 289 (1944).

Avery's contention that Texas lacks a lawful source of authority to levy ad valorem taxes is premised on his argument that "Texas citizens possess *allodial title* to their property and that their property cannot be lawfully alienated or aliened by any government" and "a democratic vote of the people or their representatives approving [a] property tax is null and void from its inception . . . ."[1] Avery concludes the State of Texas and its political subdivisions lack authority from any source to impose ad valorem property taxes on the citizens of Texas.

Because "'jurisdiction to tax' means the legitimate power to tax, [Tax Code] section 11.01, which defines the state's taxing jurisdiction over real and tangible personal property, also defines the limits of the legitimate power of the State of Texas and its political subdivisions to tax such property." *Dallas Cty. Appraisal Dist. v. L.D. Brinkman & Co. (Texas), Inc.*, 701 S.W.2d 20, 22 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). "The Constitution was framed with reference to the common law, and in judging what the Constitution means we should keep in mind that it is not the beginning of the law of the state, but that it assumes the existence of a well-understood system, which was still to remain in force and be demonstrated, and that the constitutional definitions are in general drawn from the common law." *Great S. Life Ins. Co. v. City of Austin*, 112 Tex. 1, 243 S.W. 778, 780 (1922).

[1] As used by Avery, "allodial" means "free; not holden of any lord or superior; owned without obligation of vassalage or fealty; the opposite of feudal." BLACK'S LAW DICTIONARY (4th ed. 1968).

"It has always been the primary and fundamental rule that no sovereignty or taxing district could exercise the power of taxation, except as to property actually or constructively within its jurisdiction. This rule applies to counties and municipalities, as well as states." *Id.* The Texas Constitution "was adopted by the people February 15, 1876. The first Legislature thereafter met in that same year, and in August passed several general acts covering substantially the entire field of taxation." *Id.* at 783. "An examination of these and subsequent acts will show that in many, if not in all, instances they merely declare and apply the common-law principles of taxation . . . ." *Id.*

For these reasons, we must reject Avery's arguments regarding the authority and lawfulness of Texas taxing units to impose and collect ad valorem taxes.

C. No Evidence Summary Judgment

In its no-evidence motion for summary judgment, the District alleged there was no evidence Avery's properties were not taxable under Texas law or totally exempt.

Under the Texas Constitution all real and tangible personal private property in this State is subject to taxation unless it comes under an exemption authorized in the Texas Constitution. *Dallas Cty. Appraisal Dist.*, 701 S.W.2d at 22. Exemptions from taxation are not favored by the law and will not be favorably construed. *N. Alamo Water Supply Corp. v. Willacy Cty. Appraisal Dist.*, 804 S.W.2d 894, 899 (Tex. 1991). "Statutory exemptions from taxation are subject to strict construction because they undermine equality and uniformity by placing a greater burden on some taxpaying businesses and individuals rather than placing the burden on all taxpayers equally." *Id.* Accordingly, the burden of proof of showing that property falls within a statutory exemption is on the claimant. *Id.*

At trial and on appeal, Avery asserts the District's no-evidence summary judgment lacks merit because he provided "some evidence" in the form of his affidavit and attached exhibits. The

exhibits are: (1) letters he sent to the District regarding the hearings on his protest issues, and (2) "true and correct quotes of the Founding Fathers of America and the authors of works upon which our nation and states were based." In his affidavit, Avery alleged all the quotes and written evidence "show that ad valorem taxes are contrary to the lawful principles of government," "the pleadings this affidavit supports are [his] own personal writings and constitute [his] testimony as to facts as well as [his] arguments for appeal," and the quotes of the Founding Fathers of America and the authors of works upon which our nation and states were based "are [his] own writings and stand as [his] own testimony where applicable."

Avery's "evidence" is not evidence of his entitlement to a tax exemption. His "evidence" is merely a re-assertion of his argument that Texas and its taxing units do not have the authority to impose ad valorem taxes. Therefore, we must conclude the trial court did not err in granting the District's no-evidence summary judgment on whether Avery's properties were exempt from ad valorem taxes.

CONCLUSION

For the reasons stated above, we affirm the trial court's Order on Defendant's Motion to Partially Dismiss for Lack of Jurisdiction and the trial court's Summary Judgment.

Sandee Bryan Marion, Chief Justice