Affirmed as Modified and Opinion filed September 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00924-CV

ROBERT ORTIZ, Appellant

V.

LAGUNA ENTERPRISES, INC., Appellee

On Appeal from the County Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 735,757

O P I N I O N

Robert Ortiz appeals from the trial court's order granting a plea to the jurisdiction and dismissing his lawsuit with prejudice. Ortiz filed suit alleging that Laguna Enterprises, Inc., obtained property that was wrongly taken from him pursuant to a writ of execution on his employer. On appeal, Ortiz contends that the trial court erred in granting the plea to the jurisdiction because he was not given adequate notice and an opportunity to amend his pleadings and because the pleadings did not affirmatively show that the court lacked jurisdiction. He also contends that the trial court erred in dismissing the lawsuit with prejudice. We shall modify the judgment and, as modified, affirm.

Background

In April 2000, Ortiz worked for Anchor Paving Co., Inc. Anchor was the judgment debtor in a lawsuit filed by Laguna Enterprises, Inc. Laguna obtained a writ of execution issued to collect on the judgment. On April 24, a Harris County constable seized various property at Anchor's offices pursuant to the writ. Ortiz claims that a video cassette recorder seized from the offices actually belonged to him, not Anchor, and instituted this lawsuit.

Laguna defended in part by filing a plea to the jurisdiction. Laguna served Ortiz's attorney by facsimile on Thursday, June 22, with a notice of hearing on the plea set for the following Tuesday, June 26. After the hearing, the court granted and signed an order sustaining the plea on June 26. Thereafter, Ortiz filed a Motion to Reinstate, but the court denied the motion and dismissed the case with prejudice on July 25.

Analysis

We first examine appellant's second issue. Ortiz asserts that the trial court erred in granting the plea to the jurisdiction because the pleadings did not affirmatively show that the trial court lacked jurisdiction. When a lack of jurisdiction is apparent on the face of the petition, the lawsuit should be dismissed. *See Jansen v. Fitzpatrick*, 14 S.W.3d 426, 431 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In reviewing a trial court's order dismissing for want of jurisdiction, we must construe the pleadings in favor of the plaintiff and look to the pleader's intent. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.3d 440, 446 (Tex. 1993).

Generally, statutory county courts have jurisdiction in "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition." TEX. GOV'T CODE ANN. § 25.0003(c)(1) (Vernon Supp. 2001). More specifically, Harris County Civil Courts at Law have jurisdiction to "hear a suit for the trial of the right to property valued at $200 or more that has been levied on under a writ of execution,

sequestration, or attachment." *Id*. § 25.1032(c)(5).

Ortiz's First Amended Original Petition states: "[t]he maximum amount of actual damages of the Plaintiff are no more than $100.00." Ortiz contends that the request for "exemplary damages" also contained in the petition should have been considered in determining the amount in controversy. The Government Code, however, specifically excludes "punitive damages" from jurisdictional calculations in county courts at law. *Id*. at 25.003(c)(1). Furthermore, the terms "exemplary damages" and "punitive damages" are generally considered synonymous. *See* BLACK'S LAW DICTIONARY 390 (6th ed. 1990)(stating "exemplary damages . . . are also called 'punitive'"); *see also Continental Coffee Prod. Co. v. Cezarez*, 937 S.W.2d 444, 453 (Tex. 1996); *Missouri Pac. R. Co. v. Lemon*, 861 S.W.2d 501, 525 (Tex. App.—Houston [14th Dist.] 1993, pet. dism'd by agr.)(using terms interchangeably). *But cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1997)(definitions section stating that "'exemplary damages' includes punitive damages," although it is unclear if the term exemplary damages is intended to mean more than punitive damages). Also, under § 25.1032(c)(5), the calculation of the property value does not include exemplary damages, and thus would not increase the value of the video recorder. The jurisdictional amount under this provision does not allow for the inclusion of any alleged exemplary damages amount in calculating the value of the property. It is further apparent that Ortiz's counsel at one point understood the exclusion of exemplary damages, because his petition used the following language in making the claim for such damages: "[t]he amount of attorney's fees and penalties, if any are to be recovered, interest, and exemplary damages, which are excluded from jurisdictional consideration, shall be determined by the fact finder. . . ."

It is clear that the face of the live pleadings demonstrated a lack of jurisdiction in the county court at law. *See Jansen*, 14 S.W.3d at 431. Accordingly, this point of error is overruled.

In his first issue, Ortiz contends that the trial court denied him due process of law by

failing to ensure that he received proper notice and an opportunity to amend his pleadings before the court ruled on the plea to the jurisdiction. Ortiz's counsel claims that counsel for Laguna served the Plea to the Jurisdiction on him by facsimile to his office on a Friday afternoon and scheduled the hearing on the motion for the next Tuesday. He further states that he did not have actual notice of the hearing on the plea until June 27, the day after the hearing, when he returned from the State Bar Convention.

We need not address the substantive issues of this point of error because we find that any error committed by the trial court in not allowing sufficient time to amend the pleadings was harmless. *See Sabine Gas Transmission Co. v. Winnie Pipeline Co.*, 15 S.W.3d 199, 202 (Tex. App.—Houston [14th Dist.] 2000, no pet.)(error in dismissing for lack of jurisdiction held harmless); *Landbase, Inc. v. Texas Employment Com'n*, 885 S.W.2d 499, 501 (Tex. App.—San Antonio 1994, writ denied)(if court erred in failing to file findings of fact on dismissal for lack of jurisdiction, such error was harmless since basis for ruling was apparent on the record); *Green v. Watson*, 860 S.W.2d 238, 245 (Tex. App.—Austin 1993, no writ)(same); *Bellair, Inc. v. Aviall of Texas, Inc.*, 819 S.W.2d 895, 898 (Tex. App.—Dallas 1991, writ denied)(even if trial court erred in its ruling at special appearance hearing, such error was harmless in light of party's later admissions). No order of a trial court is to be reversed on appeal unless the appellate court determines that the error complained of probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to the appellate court. TEX. R. APP. P. 44.1. Even if the trial court has a mandatory duty, its failure to perform is harmless when the appellate record affirmatively shows that the complaining party suffered no injury. *See Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989); *Green*, 860 S.W.2d at 245.

In his brief, and in the Motion to Reinstate, Ortiz claims only that, given an opportunity, he would have amended his petition to include a request for a certain amount of exemplary damages, which he further claims would have brought him within the

jurisdictional limits of the court. As we already held, exemplary or punitive damages are not included in calculating the amount in controversy for jurisdiction in county courts at law. *See* TEX. GOV'T CODE ANN. §§ 25.0003(c)(1), 25.1032(c)(5). Such added sums would, therefore, not have brought Ortiz within the jurisdictional limits of the trial court. Ortiz suffered no harm in not being allowed to amend his pleading; hence, any error in failing to give adequate time to amend was harmless. Accordingly, this point of error is overruled.

In his third point of error, Ortiz contends that the trial court erred in dismissing his lawsuit "with prejudice" against refiling. Generally, once a trial court learns that it lacks jurisdiction, it becomes the duty of the court to dismiss the cause without rendering a judgment on the merits. *Li v. University of Texas Health Science Center at Houston*, 984 S.W.2d 647, 654 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). The dismissal of a lawsuit "with prejudice" acts as a final determination on the merits. *Attorney General of Texas v. Sailer*, 871 S.W.2d 257, 258 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Therefore, a dismissal for want of jurisdiction with prejudice constitutes error. *Id.*

Laguna cites *Mossler v. Shields*, 818 S.W.2d 752 (Tex. 1991), for the proposition that, when a party has filed several frivolous and harassing lawsuits, a court can dismiss the case with prejudice on a plea to the jurisdiction. The decision in *Mossler*, however, does not touch upon jurisdictional issues; instead the opinion involves a dismissal for discovery abuse. *Id.* at 753-54. The case is, therefore, inapposite to our analysis. Finally, there is no evidence in the record before us to establish that Ortiz has filed any frivolous or unduly harassing lawsuits against Laguna or has threatened any such suit. In fact, in his brief, Ortiz specifically rejects the statements characterizing any other lawsuits as retaliatory. *See* TEX. R. APP. P. 38.1(f); *Gallagher v. Balasco*, 789 S.W.2d 618, 620 (Tex. App.—Houston [1st Dist.] 1990, writ denied)(once challenged, factual assertions in a brief cannot be accepted as established fact). The trial court erred in dismissing the case with prejudice[1], and the

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[1] Typically, in a dismissal for want of jurisdiction, the merits are not reached so that prejudice does not attach. If a court lacks jurisdiction, how can it dispose of a matter on the merits?

judgment should therefore be modified to reflect a dismissal without prejudice. *See Li*, 984 S.W.2d at 654; *Sailer*, 871 S.W.2d at 258.

The judgment of the trial court is modified to substitute the phrase "without prejudice" for the phrase "with prejudice," and, as modified, is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).