No. 05-17-00879-CV

In the Court of Appeals for the Fifth District of Texas

HINGA MBOGO, HINGA AUTOMOTIVE CO., d/b/a HINGA AUTO REPAIR, and 3516 ROSS AVENUE, DALLAS, TEXAS, *in rem*,

Appellants,

v.

CITY OF DALLAS, et al.,

Appellees.

On Appeal from the 68th Judicial District,
Dallas County District Court, Cause No. DC-16-07983

REPLY BRIEF OF APPELLANTS

Arif Panju (TX Bar No. 24070380)
INSTITUTE FOR JUSTICE
816 Congress Ave. Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Counsel of Record for Appellants

ORAL ARGUMENT REQUESTED

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- The Appendix will be cited as "App. (page)."

I. INTRODUCTION

The City's response brief ("Resp. Br.") argues that there is no subject matter jurisdiction over Hinga's claims because he is not guaranteed to win. Like the district court, the City misapplies the standards for a plea to the jurisdiction. The rule for such pleas is that the courts will have no subject matter jurisdiction if a plaintiff is guaranteed to lose. Here, this case raises novel issues of law and requires the application of developments in Texas law that occurred in 2009, 2010, and 2015 to the facts of this case. No case applies these developments to facts similar to those here and certainly no case specifically forecloses such claims. Because a plea to the jurisdiction requires only a showing of viability and not a demonstration that the plaintiff will win on the merits, the fact that no case law forecloses Hinga's claim is enough to survive a plea. This Court should apply the correct standard and find that Hinga's claims establish subject matter jurisdiction.

In addition to misapplying the plea standards, the City makes two discrete arguments as to why the district court should be affirmed. First, it argues that there is no statutory or constitutional waiver of governmental immunity here. Resp. Br. 13-15. Second, the City argues that the ordinances in question are not retroactive because Hinga purchased the property after the City made auto repair a nonconforming use. Resp. Br. 8, 22-24, 26, 32, and 36. The City alleges that

because Hinga purchased the property when it was nonconforming, the ordinances at issue are not retroactive.

The City errs on both points. First, the Texas Uniform Declaratory Judgments Act ("UDJA") waives the City's immunity and the immunity of the named City officers because it mandates that Hinga make the City a party to the suit. Second, Hinga began the use at issue here—operating an auto repair shop on Ross Avenue—in 1986. It was a lawful, conforming use at that time. The City made that use nonconforming in 1988, two years later. The City's ordinances thus attached new legal consequences to Hinga's established use. This is the very definition of a retroactive law. And even if the City's timeline were correct, Hinga is not challenging the City's decision to make his property nonconforming; he is challenging the City's decision to force him to stop operating an auto repair shop on Ross Avenue. The City did not make that decision until 2005—nineteen years after Hinga began his business and fourteen years after he purchased the property.

Finally, the City makes a number of erroneous factual and legal arguments on the merits. Hinga's opening brief ("Opening Br.") already refutes these arguments. And it is the viability of Hinga's claims—not the merits—that are at issue in this appeal. Nonetheless, this brief will further address why each of the City's merits arguments are wrong.

II. ARGUMENT

Below, Hinga discusses how the City and district court misapplied the standard for a plea to the jurisdiction and how, under the correct standard, Hinga's claims establish subject matter jurisdiction. He then addresses how the UDJA waives governmental immunity here. The following section discusses how the City's ordinances are retroactive. The final part of this brief addresses various erroneous legal and factual arguments made by the City.

A. Hinga's Constitutional Claims Are Viable

Although the City recounts the standards for a plea to the jurisdiction, Resp. Br. 11-13, it does not correctly apply them (and neither did the district court). For twenty-two pages, the City argues that Hinga should lose on the merits. Resp. Br. 15-37. Regardless of whether the City's analysis is correct (and, as discussed in Hinga's opening brief, it is not), the City's brief makes the case that because Hinga is not guaranteed to win, this Court does not have subject matter jurisdiction.

This is not the correct standard for a plea to the jurisdiction, however, and is certainly inappropriate for a case such as this, which deals entirely with issues of first impression arising under recent developments in the law. *See* Opening Br. 27-43. The Texas Supreme Court forcefully rejected the idea that a plaintiff must demonstrate that she will win in order to establish subject matter jurisdiction in *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015). In that

case, the state argued that it was immune from the plaintiffs' claims "because the [plaintiffs] had to prove their claims in order to survive a plea to the jurisdiction." *Id*. at 77. The Texas Supreme Court held that this was not the standard for a plea to the jurisdiction. Instead, the court stated that its case law "stands for the unremarkable principle that claims against state officials—like all claims—must be properly pleaded in order to be maintained, not that such claims must be viable on their merits to negate immunity. Because the [plaintiffs'] pleadings presented a viable claim, they were sufficient." *Id.* (citation omitted).

As *Patel* indicates, what Texas courts require is not that a plaintiff proves entitlement to victory, but rather that his claims are viable. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011) (government "retains immunity from suit unless the [plaintiffs] have pleaded a viable claim"). Viability means that the plaintiff must demonstrate that his claims are not "facially invalid." *City of Houston v. Johnson*, 353 S.W.3d 499, 504 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Thus, in considering whether subject matter jurisdiction exists, Texas courts have looked at whether the case law uniformly and overwhelmingly forecloses a claim or whether the plaintiff has sufficiently alleged a constitutional violation. *See Andrade*, 345 S.W.3d at 12-14 (holding that a claim was invalid because of a string of federal and state cases upholding the constitutionality of the government action at issue); *City of El Paso v. Ramirez*, 431 S.W.3d 630, 640

(Tex. App.—El Paso 2014, pet. denied) (denying a plea when the plaintiff's petition alleged facts that "go beyond the mere recitation of the elements of a claim for inverse condemnation"). The courts have also considered whether the petition contains an incurable defect or is otherwise foreclosed by the law. *See, e.g.*, *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 221 (Tex. 2004) (examining whether plaintiffs' allegations were sufficient to bring their claim under the Texas Tort Claims Act's wavier of sovereign immunity); *Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (examining whether the plaintiffs had standing); *Vanderwerff v. Tex. Dep't of Ins.-Div. of Workers' Comp.*, 05-15-00195-CV, 2015 WL 9590769, *3-4 (Tex. App.—Dallas Dec. 20, 2015, pet. denied) (examining whether plaintiff's claims were foreclosed by the redundant remedy doctrine and a failure to exhaust administrative remedies).

None of these circumstances exist here. The City has not demonstrated any incurable defects in Hinga's pleadings. Hinga's pleadings allege the elements of constitutional violations and describes exactly how the City's ordinances, as applied to him, satisfied those elements. CR 1403-04, 1407-12 [Defs.' Second Am. Answer, Special Exception, Rule 91a Mot. Dismiss, Affirmative Defenses, Countercls., Third-Party Compl. ("Second Am. Answer") ¶¶ 33-37, 59-102]; Opening Br. 16-18, 25-43. There is also no precedent that forecloses Hinga's

claims. In contrast to the clearly meritless claims in *Andrade*, the City has not pointed to a single case in this state, outside this state, or at the federal level that holds that zoning ordinances that destroy a party's settled expectations and investments are consistent with constitutional prohibitions on retroactive laws. The chief case relied upon by the City that addresses the cessation of nonconforming uses, *City of University Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972), applied the pre-2009 version of Texas's Takings Clause and rejects a challenge that Hinga does not make in this case. The City also fails to identify a single case that upholds retroactive zoning under the test for as-applied due course of law challenges post-*Patel*. The City also does not identify a single case where a court has applied the post-2009 version of article I, § 17 of the Texas Constitution and found that destroying or impairing a private entity's property interests for the benefit of private parties comports with that provision.[1]

The City's view that a plaintiff must prove that she will ultimately win to survive a plea to the jurisdiction would insulate the government from the

[1] The City's failure to demonstrate that Hinga's takings claim is foreclosed is apparent by the fact that the City spends significant time arguing that Hinga has not plead viable inverse condemnation and regulatory takings claims. Resp. Br. 34-35. Hinga does not make inverse condemnation or regulatory takings claims. Instead, he argues that the 2009 amendments to article I, § 17 prevent the government from destroying or depriving him of his right to use his property for the benefit of private entities. Opening Br. 41-43. The City's only response to this argument is to claim, without citation to authority, that these amendments apply only to the government's exercise of its eminent domain powers. The plain wording of the provision disproves this argument. *See* Opening Br. 41. That, and the fact that the City was unable to point to a single case that supports its interpretation, demonstrate that Hinga's takings claim is viable and should survive to be considered on the merits by the trial court.

consequences of all but the most obvious and well-established violations of constitutional law. It is also contrary to the Texas Supreme Court's requirement that a court considering a plea to the jurisdiction not decide the ultimate merits of a case. *See Miranda*, 133 S.W.3d at 228 (the standard for considering pleas to the jurisdiction "protect[s] the plaintiffs from having to put on their case simply to establish jurisdiction") (citation and quotation marks omitted). It also would prevent the development of Texas law, as the government could use a plea to the jurisdiction to dismiss any innovative or novel constitutional argument.

But "new" does not mean "non-viable." This Court should decline the City's invitation to adopt a standard for a plea that has been rejected by the Texas Supreme Court and one that would insulate the government from liability and calcify Texas jurisprudence. As Hinga's opening brief demonstrates, his claims are clearly viable. He should have the chance to litigate them on the merits.[2]

* * *

Because the City and the district court misapplied the standard for a plea to the jurisdiction, this Court would be justified in reversing the district court's order on this point alone and remanding for consideration on the merits. To the extent that the Court considers the City's other arguments, however, Hinga addresses

[2] The viability of Hinga's claims is also demonstrated by the effort the City and the district court expended in analyzing them. Quite simply, facially invalid claims—*i.e.*, those that are certain to lose—do not require twenty-two pages of argument, an hour of oral argument, and significant post-hearing briefing to refute them. *See* Resp. Br. 15-37; Vol. 2 RR 4-33 (hearing on plea to the jurisdiction); CR 1364-1394 (post-hearing briefing on the plea to the jurisdiction).

them next.

B. The UDJA Waives the City's Governmental Immunity

The City argues that there is no statutory waiver of governmental immunity in this case. Resp. Br. 13-15. It is difficult to understand the basis for the City's claim because it is plainly wrong. Hinga brought his claims pursuant to the UDJA. CR 1404, 1411, 1413 [Second Am. Answer ¶¶ 34, 38, 96]. He sought a declaration that the City's ordinances, as applied to him, were unconstitutional, as well as an injunction against the City and its officers to prevent them from applying these ordinances to him in the future. *Id.* "For claims challenging the validity of ordinances . . . the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (citing Tex. Civ. Prac. & Rem. Code § 37.006(b)). Indeed, the statutory language is unmistakable: "In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party[.]" Tex. Civ. Prac. & Rem. Code § 37.006(b). This waiver applies to injunctive relief as well. *See City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (suits for injunctive relief may be maintained against governmental entities to remedy violations of the Texas Constitution).

Because Hinga has pleaded viable claims seeking declaratory and injunctive relief concerning the constitutionality of the City's ordinances as applied to him,

the UDJA waives the City's governmental immunity here.

C. Hinga's Use Predated the City Making Auto Repair Nonconforming

The City repeatedly argues that Hinga purchased the property after the City made auto repair a nonconforming use. Resp. Br. 27, 32, and 36. The City says that this means that its ordinances are not retroactive because the zoning changes that made Hinga's use nonconforming had already occurred. *Id*. at 4.

The City is simply wrong.[3] Hinga's use of the property began in 1986, when he leased the property and opened his business. CR 102 [Hinga Aff. Supp. Defs.' Mot. and Inc. Memo. of Law Supp. Temp. Inj. ("Hinga Temp. Inj. Aff.") ¶ 5]. He obtained his certificate of occupancy for auto repair at the same time. CR 103-04 [Hinga Temp. Inj. Aff. ¶ 10]. The City made that use nonconforming in 1988—two years later. CR 1151 [Ordinance 20049]. Thus, Hinga had legally been operating his business and engaging in auto repair for two years before the City changed the zoning on Ross Avenue.[4] As discussed in Hinga's opening brief, when the City

[3] Unfortunately, this is not the City's only factual error. The City also alleges that Hinga continues to use the property to conduct auto repairs. Hinga stopped repairing cars on Ross Avenue in 2016. CR 769 [Hinga Aff. Supp. Defs./Third-Party Plfs.' Mot. Summ. J. Inc. Memo. of Law Supp. Summ. J. ¶ 57].

[4] The City's emphasis on when Hinga purchased the property suggests that the City views Hinga's use of the property and his possession of the land and structures related to it as identical. If so, then the City is confusing a "nonconforming use" with a "nonconforming structure." According to the City's development code, a nonconforming use is "a use that does not conform to the use regulations of this chapter, but was lawfully established under the regulations in force at the beginning of the operation and has been in regular use since that time." Dallas, Tex., Development Code § 51A-2.102 (90) [Opening Br. App. Tab H]. A "nonconforming structure," on the other hand, "means a structure which does not conform to the regulations (other than the

changed the zoning on Ross Avenue and then, seven years later, ordered him to stop his previously conforming use, it attached new consequences to his use of the property. Opening Br. 27. This is the very definition of a retroactive law. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (a law is retroactive if it "attaches new legal consequences to events completed before its enactment"); Opening Br. 26-27.[5]

Regardless, even if the City's timeline was correct, Hinga does not claim that the City unconstitutionally applied a retroactive law to him when it made his property nonconforming. Instead, Hinga alleges that the City unconstitutionally applied a retroactive law to him when it passed an ordinance that required him to stop operating an auto repair shop on Ross Avenue. CR 1404 [Second Am. Answer ¶ 35]; CR 1411 [Second Am. Answer ¶ 97]. The City passed that ordinance in 2005—nineteen years after Hinga's use began and fourteen years after he purchased the property. CR 549 [Certification of Ord. 25960]. The City's argument

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use regulations) of this chapter, but which was lawfully constructed under the regulations in force at the time of the construction." Dallas, Tex., Development Code § 51A-2.102 (89) [Opening Br. App. Tab H]. (Presumably, the City recognizes that land cannot be nonconforming). When Hinga purchased the building and land in 1991, the building and land conformed to the City's zoning code. They remain conforming to this day. The City has never alleged his structure is nonconforming, so the question of when he purchased it and the land on which it sits is irrelevant. What matters for purposes of the retroactivity analysis is when his use began and his use began prior to the City's change in the zoning code.

[5] The City alleges that Hinga overlooks portions of *Landgraf* to misrepresent the holding of that case. Resp. Br. 25. The language from *Landgraf* the City alleges Hinga overlooked is quoted in Hinga's opening brief on page 26.

that its ordinances are not retroactive therefore fails.[6]

D. The City's Remaining Arguments Are Meritless

1. Hinga Does Not Need a Vested Right to Plead Viable Retroactivity and Due Course of Law Claims

The City argues that Hinga needed to plead that he possessed a vested right in order to bring a viable retroactivity claim. Resp. Br. 21-22, 24 (citing *Benners*, 485 S.W.2d at 778); Resp. Br. 24 (citing *Corpus Christi People's Baptist Church, Inc. v. Nueces Cty. Appraisal Dist.*, 904 S.W.2d 621, 626 (Tex. 1995)). Possessing a vested right is not a condition precedent for a claim under article I, § 16. *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 143 (Tex. 2010). *See* Opening Br. 32-34. In *Robinson*, the Texas Supreme Court explicitly stated that "[w]hat constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity." *Id*. Thus, the City urges this Court to use a standard for determining unconstitutional retroactivity that the Texas Supreme Court has explicitly said courts should not use.

Whether Hinga possesses a vested right is also irrelevant to whether he has pleaded a viable substantive due course of law claim under article I, § 19. First, Hinga's opening brief discussed at length the property interests he possesses that

[6] To the extent that this Court finds the question of what rights Hinga possessed and when to be relevant to the issue of whether subject matter jurisdiction exists here, the proper response would be to reverse the district court's order granting the plea and have that court resolve the factual issue in the course of determining the merits. *See Miranda*, 133 S.W.3d at 227-28 ("If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder").

are protected by Texas's Due Course of Law Clause. These include, among other things, his business, the improvements to the property, his permits, chattels, and his right to use the property. Opening Br. 36-37.

Second, the cases the City relies upon are distinguishable. Two of the cases, *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 16 (Tex. 2015), and *Dallas Cty. v. Gonzales*, 183 S.W.3d 94, 113 (Tex. App.—Dallas 2006, pet. denied), addressed whether, under the statutory provisions at issue, the government was legally obligated to provide employment benefits to the plaintiffs. *See Klumb*, 458 S.W.3d at 15-16 (analyzing whether, under Tex. Rev. Civ. Stat. Ann. Art. 6243h, plaintiffs were entitled to retirement benefits and pension funds); *Gonzales*, 183 S.W.3d at 112 (examining whether an employee's right to continued employment had vested under the County's leave policies). Statutorily created employment benefits are significantly different from the rights Hinga possesses. As discussed in his opening brief, Hinga's rights do not depend on the meaning of a governmental policy, but are fully realized, concrete, present interests recognized in federal and state law. Opening Br. 36-37. As such, the due course of law provision protects them. *Tarrant Cty. v. Ashmore*, 635 S.W.2d 417, 422 (Tex. 1982).

Two other cases relied upon by the City, *City of New Braunfels v. Stop The Ordinances Please*, 520 S.W.3d 208, 212-13 (Tex. App.—Austin 2017, pet. filed),

and *Consumer Serv. All. of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 805-06 (Tex. App.—Dallas 2014, no pet.), addressed an exception to the rule that prohibits a civil court from construing a penal statute. For this exception to apply, the plaintiff needed to show an irreparable injury to his vested property rights. The ordinances at issue in Hinga's case are not penal and the discussions of vested property rights in *Stop The Ordinances Please* and *Consumer Serv. All.* are irrelevant here.[7]

2. The City Did Not Demonstrate a Compelling Governmental Interest Here and Thus Fails the *Robinson* Retroactivity Test

The City argues that the ordinances at issue here satisfy the public-interest prong of the *Robinson* test. Reply at 17-18. Specifically, the City argues that the ordinances satisfy this prong because they "reflect[] a substantial relationship to the general public welfare" and there was "evidence that the public interest would be served." *Id*. at 19. This misstates the *Robinson* public-interest prong. *Robinson* expressly states that "[t]he presumption is that a retroactive law is unconstitutional without a *compelling justification* that does not greatly upset settled expectations." *Robinson*, 335 S.W.3d at 147 (emphasis added). The City has not even attempted to argue that its interest here is compelling. Nor could it; no court has found such

[7] The fact that Hinga does not need to possess a vested property right before bringing a due course of law claim is demonstrated by the Texas Supreme Court's decision in *Patel*, the case from which Hinga's claim stems. In that case, the Texas Supreme Court did not address whether the plaintiffs possessed a vested right. Indeed, the words "vested rights" do not appear in the majority opinion, the concurrences, or the dissents in *Patel*. This Court should not rewrite *Patel* to add a standard that the Texas Supreme Court simply did not consider.

interests to be compelling. *See* Opening Br. 30-31.

3. Hinga Did Not Waive Any Argument Regarding the Third-Party Defendants

Finally, the City argues that Hinga has waived any arguments regarding the district court's dismissal of claims against third-party defendants, the Mayor and City Councilmembers, by not briefing these arguments. Resp. Br. 10. Hinga's opening brief specifically defined "the City" to mean both the municipal corporation of the City of Dallas and third-party defendants, members of the Dallas City Council and the Mayor in their official capacities. Opening Br. ii. The argument section of Hinga's opening brief (and this brief as well) discusses why the district court erred in dismissing his claims against "the City," which includes third-party defendants. *See id.* at 24-45. Hinga's arguments thus apply to the third-party defendants and Hinga has not waived any issue against them.

III. CONCLUSION

For the reasons discussed above, and the reasons discussed in his opening brief, Hinga has pled viable constitutional claims and subject matter jurisdiction exists in this case. This Court should reverse the district court's order granting the City's plea and remand this case for consideration of the merits.

RESPECTFULLY SUBMITTED this 30th day of October, 2017.

By: /s/Arif Panju

Arif Panju (TX Bar No. 24070380)
INSTITUTE FOR JUSTICE
816 Congress Ave. Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Robert Gall (TX Bar No. 24101009)
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: bgall@ij.org

William R. Maurer
(WA Bar No. 25451)*
INSTITUTE FOR JUSTICE
10500 NE 8th Street, Suite 1760
Bellevue, WA 98004
Tel: (425) 646-9300
Fax: (425) 990-6500
Email: wmaurer@ij.org

Ari Bargil
(FL Bar No. 71454)*
INSTITUTE FOR JUSTICE
2 South Biscayne Blvd., Suite 3180
Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601
Email: abargil@ij.org

**Admitted Pro Hac Vice*

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 3,832 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Arif Panju
Arif Panju (TX Bar No. 24070380)
INSTITUTE FOR JUSTICE

Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2017, a true and correct copy of the foregoing *REPLY BRIEF OF APPELLANTS* was filed with the Clerk of Court and served in compliance with Tex. R. App. P. 9.5(b)(1) via the courts electronic filing manager on the following counsel of record:

AMY I. MESSER
Texas State Bar No. 00790705

BARBARA ROSENBERG
Texas State Bar No. 17267700

MELISSA A. MILES
Texas State Bar No. 90001277

KRISTEN MONKHOUSE
Texas State Bar No. 24092853

7DN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201
Telephone: 214-670-3519
Fax: 214-670-0622
Email: amy.messer@dallascityhall.com;
barbara.rosenberg@dallascityhall.com; melissa.miles@dallascityhall.com;
kristen.monkhouse@dallascityhall.com

Counsel for Appellees

/s/ Arif Panju
Arif Panju (TX Bar No. 24070380)
INSTITUTE FOR JUSTICE

Counsel for Appellants