UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

YSLETA DEL SUR PUEBLO, *a federally recognized sovereign Indian tribe,*	§	
Plaintiff,	§	
v.	§	**EP-17-CV-00162-DCG**
CITY OF EL PASO, and EL PASO WATER UTILITIES PUBLIC SERVICE BOARD,	§	
Defendants.	§	

MEMORANDUM ORDER

Presently before the Court is Defendants City of El Paso ("City") and El Paso Water Utilities Public Service Board's ("Water Utilities Board" or "Board") (collectively, "Defendants") "Motion to Dismiss" (ECF No. 13) ("Motion"). For the reasons that follow, the Court GRANTS IN PART and DENIES IN PART Defendants' Motion.

I. BACKGROUND

Plaintiff Ysleta Del Sur Pueblo ("Pueblo") is a federally recognized Indian Tribe.[1] In May 2017, the Pueblo brought this declaratory judgment action, pursuant to 28 U.S.C. §§ 1331, 1362, and 2201. It seeks judicial confirmation of the Pueblo's title to 111.73 acres of real property ("Property) encompassed by what is described as "the Ysleta Grant";[2] the Pueblo

[1] Verified Compl. for Declaratory J. Confirming Title to Real Prop. ¶ 1 [hereinafter "Complaint"], ECF No. 1.

[2] *Id.* ¶ 5.

alleges that it is the owner of the Property under the 1751 Spanish Land Grant.[3] It also asks the Court to enjoin Defendants from claiming any estate, right, title, or interest in or to the Property.[4]

In August 2017, the Court granted the parties' agreed motion to stay the case. After the stay was lifted, on December 5, Defendants filed the instant Motion, pursuant to Federal Rule of Civil Procedure 12(b)(6). The Pueblo filed its "Response in Opposition to Defendants' Motion to Dismiss" (ECF No. 14) ("Response") on December 19. Defendants did not file a reply.

II. STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a party to seek dismissal of a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). On a Rule 12(b)(6) motion, a court accepts well-pleaded facts as true and construes them in the light most favorable to the plaintiff. *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012). A viable complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To meet this "facial plausibility" standard, a plaintiff must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The Court's task, then, is "to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Doe ex rel. Magee v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 854 (5th Cir. 2012) (*en banc*) (citation and internal quotation marks omitted).

III. DISCUSSION

By their Motion, Defendants assert the following grounds for dismissal: (1) the Water Utilities Board lacks capacity to be sued, Mot. at 4–6; (2) the Pueblo's Complaint fails to allege

[3] *Id.* ¶¶ 27–29.
[4] *Id.* at 6.

sufficient facts and cognizable claim, *id.* at 6–8; and (3) this lawsuit is barred by the doctrines of governmental immunity and sovereign immunity, *id.* at 8–10.

A. The Water Utilities Board's Capacity to be Sued

Defendants contend that the Water Utilities Board lacks capacity to be sued and therefore, the Pueblo's claims against the Board should be dismissed. Mot. at 6; *see also Coates v. Brazoria Cty. Tex.*, 894 F. Supp. 2d 966, 968 (S.D. Tex. 2012) ("Whether a party has the capacity to sue or be sued is a legal question that may be decided at the Rule 12 stage." (citing 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1294 (3d ed. 2004)).

Under Federal Rule of Civil Procedure 17(b), the capacity of an entity such as the Water Utilities Board "to sue or be sued is determined . . . by the law of the state where the court is located." Fed. R. Civ. P. 17(b). In order for a plaintiff to sue a city department, it must "enjoy a separate legal existence." *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313 (5th Cir. 1991). "[U]nless the true political entity has taken explicit steps to grant the servient agency with jural authority, the agency cannot engage in any litigation except in concert with the government itself." *Id.* The "touchstone under Texas law is whether the sued servient entity has been granted the capacity 'to sue and to be sued.'" *Id.* at 313 n.1 (citing *Fazekas v. Univ. of Houston*, 565 S.W.2d 299, 302 (Tex. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.)). Without such a grant of jural authority, the entity has no more of a separate legal existence than "the accounting department of a corporation." *Id.* at 313. The plaintiff has the burden of showing that the city department has the capacity to be sued. *Id.* at 314.

In support of their contention, Defendants have submitted a copy of Ordinance No. 752 ("Ordinance"), which was adopted by the City in May 1952. Mot., Ex. 1. They point out that

the City, which is a home-rule municipality, created the Water Utilities Board. According to the Ordinance, the City "now owns and operates a water-work plant and system and a sewer system as a combined public utility," (hereinafter, "Water Utilities System" or "System"), *id.* at 15,[5] and the Board, which is referred to in the Ordinance as the Public Service Board, was created, pursuant to Article 1115 of the Texas Revised Civil Statutes,[6] to have "the complete management and control of the system," *i.e.*, the Water Utilities System, *id.* at 26. Defendants argue that the System[7] and its Board serve the City as an agent, and they are a component unit of the City. *Id.* at 6. Consequently, Defendants continue, the Board is not a legal entity separate from the City and lacks jural authority. *Id.*

In response, the Pueblo parses various provisions in the Ordinance to infer that the Water Utilities Board has the capacity to be named as a defendant in this lawsuit. Resp. at 3–5. The

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[5] Citations to the Ordinance refer to the Electronic Case Filing (ECF) page numbers imprinted on the pages of the same.

[6] Former Article 1115 provided:

> The management and control of any such system or systems during the time they are encumbered, may by the terms of such encumbrance, . . . be placed in the hands of a board of trustees to be named in such encumbrance, consisting of not more than five members, one of whom shall be the mayor of the city or town. The compensation of such trustees shall be fixed by such contract, but shall never exceed five per cent of the gross receipts of such systems in any one year. The terms of office of such board of trustees, their powers and duties, the manner of exercising same, the election of their successors, and all matters pertaining to their organization and duties may be specified in such contract of encumbrance. In all matters where such contract is silent, the laws and rules governing council of such city or town shall govern said board of trustees so far as applicable.

City of San Antonio v. Guadalupe-Blanco River Auth., 191 S.W.2d 118, 123 (Tex. Civ. App.—Galveston 1945) (quoting Tex. Rev. Stat. Ann. art. 1115), *rev'd*, 200 S.W.2d 989 (Tex. 1947). Former Article 1111 provided that "[a]ll cities and towns including Home Rule Cities operating under this title shall have power to build and purchase, to mortgage and encumber their . . . water systems[] [and] sewer systems . . . and to evidence the obligation therefor by the issuance of bonds . . . ." *Id.* at 122 (quoting Tex. Rev. Stat. Ann. art. 1111). Article 1115 was repealed and re-codified in 1999; the current law contains similar language. Tex. Gov't. Code Ann. § 1502.070.

[7] The Court notes that the Water Utilities System is not named as a party to this lawsuit.

Court is not persuaded; the Pueblo has failed to show that the Board is a legal entity separate from the City[8] or that the City, which created the Board, has given the Board jural authority. As such, the Water Utilities Board is not a proper party. The Court therefore grants Defendants' Motion on this ground.[9]

B. Pleading sufficiency

The City makes two sets of arguments regarding pleading sufficiency. First, the City disputes the Pueblo's factual allegations and faults the Pueblo for, essentially, not proving up its case. *See e.g.*, Mot. at 7 ("Plaintiff is not the rightful owner of the Property"); *id.* at 8 ("Plaintiff has failed to *adduce any evidence* to show that said property is one and the same land that was purportedly given to Plaintiff" (emphasis added)); *id.* ("[T]hose transfers in title are in fact valid, unless and *until Plaintiff can prove otherwise*." (same)). The Court declines to consider such arguments at the pleading stage. *See YETI Coolers, LLC, v. JDS Indus., Inc.*, No. 1:17-CV-424-RP, 2018 WL 1277752, at *7 (W.D. Tex. Mar. 12, 2018) ("The plausibility requirement does not require plaintiffs to prove that they will succeed on the merits to survive a motion to dismiss."

[8] It is worth noting that a Texas appellate court has held that the San Antonio waterworks system—which was also created pursuant to Article 1115 and under a city ordinance that contained provisions similar to those in the Ordinance at issue here—is not an entity independent from the City of San Antonio. *E.g.*, *San Antonio Water Sys. v. Smith*, 451 S.W.3d 442, 450–51 (Tex. App.—San Antonio 2014, no pet.) ("Although SAWS [*i.e.*, the San Antonio Water System] is not an entity independent from the City of San Antonio, management and control of the utility has been delegated by the City to the SAWS board of trustees. In exercising such management and control, the SAWS board acts as an agent of the City."); *see also Zacharie v. City of San Antonio*, 952 S.W.2d 56, 58–59 (Tex. App.—San Antonio 1997, no pet.) (holding the water system "is an agent of the City [of San Antonio]" and noting that "the Waterworks Board of Trustees of San Antonio, the predecessor to the current Water System, was an agent of the city" (citing cases)); Tex. Atty. Gen. Op. DM-444 (Tex. A.G.), 1997 WL 419084, at *4 (concluding that board of a municipal utility system created pursuant to former article 1115 is agent of municipality and not a separate legal entity).

[9] In its Response, the Pueblo also argues that if the Court should hold that the Board does not have capacity to be sued in this action, then it should grant the Pueblo leave to amend its complaint to name the individual members of the Board. *See* Resp. at 5. For two reasons, the Court declines to address this issue at this time. First, the Court has not issued a Scheduling Order yet, which typically sets a deadline for amending a pleading without the Court's leave. Second, the Court does not have the benefit of the City's argument on this issue, as it has not filed a reply.

(citing *Twombly*, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." (citation and quotation marks omitted))).; *see also Gines*, 699 F.3d at 816 ("We accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." (internal quotes and brackets omitted)).

Second, the City claims that the Pueblo fails to assert a cognizable legal theory or plead sufficient facts under a cognizable legal theory. Mot. at 7–8. The Pueblo responds that this Court has relied on many of the facts alleged here, when ruling in favor of the Pueblo in an earlier litigation involving these and other parties. Resp. at 10 (citing *Ysleta del Sur Pueblo v. El Paso Elect. Co.*, No. 3:16-CV-00035-KC (W.D. Tex., Feb. 24, 2017) (Cardone, J.), ECF No. 43). The City, not having filed a reply, has failed to respond to this and other arguments the Pueblo advances on this point. The Court denies the City's Motion on the pleading sufficiency ground.

C. Immunity

The City asserts "governmental immunity" from suit and from liability for governmental functions. Mot. at 8 (citing Tex. Civ. Prac. & Rem. Code § 101.011).[10] The Pueblo says that the governmental immunity, which is extended by the State of Texas to cities and counties as a defense to state law claim, is not applicable in this federal law action in federal court. Resp. at 10.

The Court agrees. Under Texas law, "[a] municipality engaged in a function defined by the Legislature to be governmental is entitled to governmental immunity provided that the Texas Legislature has not otherwise authorized a waiver of this immunity." *Carnaby v. City of*

[10] The City *and* the Water Utilities Board, both, appear to assert immunity. Because the Court has already held that the Water Utilities Board is not a proper party to this lawsuit, the Court will limit its discussion of the immunity issue to the City.

Houston, No. 4:08-CV-1366, 2009 WL 7806964, at *16 (S.D. Tex. Oct. 28, 2009). However, "[g]overnmental immunity does not apply to federal claims brought in federal court." *Springboards to Educ., Inc. v. Houston Indep. Sch. Dist.*, No. CV H-16-2625, 2017 WL 7201938, at *3 (S.D. Tex. Sept. 20, 2017).

The City also appears to assert sovereign immunity. Mot. at 9.[11] The Pueblo counters that the protection of sovereign immunity does not extend to the City, a smaller unit of government, because it is not an arm of the State of Texas. *See* Resp. at 11 (citing *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 369 (2001) and *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994)). As the City has failed to file a reply, it has not addressed this argument by the Pueblo.

Sovereign immunity protects the state, and consequently "arms of the state," from liability for federal claims in federal court. *Alden v. Maine*, 527 U.S. 706, 756 (1999). However, lesser entities such as counties and municipalities "are determined not to be arms of the state." *See Residents Against Flooding v. Reinvestment Zone No. Seventeen, City of Houston, Tex.*, 260 F. Supp. 3d 738, 760 (S.D. Tex. 2017) (citing cases). Consequently, courts have held that cities, such as the City here, are not entitled to the Eleventh Amendment's sovereign immunity. *See, e.g.*, *Tr. v. Avigilon Corp.*, No. 2:10-CV-605, 2012 WL 12828858, at *5 (E.D. Tex. Mar. 9,

[11] It is unclear whether the City is conflating governmental immunity with sovereign immunity under the Eleventh Amendment to the United States Constitution, *see Bonillas v. Harlandale Indep. Sch. Dist.*, 832 F. Supp. 2d 729, 735 (W.D. Tex. 2011) ("Governmental immunity is distinct from sovereign immunity. While sovereign immunity protects the state and its divisions from suit and liability, governmental immunity extends to political subdivisions such as counties, cities, and school districts." (citing *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003), *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976), and *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 813 (Tex. 1993))).

Further, "[b]ecause sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under [Federual Rule of Civil Procedure] 12(b)(1) and not with prejudice." *Warnock v. Pecos Cty., Tex.*, 88 F.3d 341, 343 (5th Cir. 1996). To the extent Defendants have failed to cite Rule 12(b)(1), the Court construes their motion as pursuant Rule 12(b)(1) with respect to their claim of sovereign immunity.

2012) ("On balance, more recent and specific authority of the Court of Appeals for the Fifth Circuit requires this Court to find that the [City of Tyler, City of Lewisville, and City of Richardson, Texas] are not part of the "state" and are therefore not entitled to immunity under the Eleventh Amendment."). The Court denies the City's Motion on the immunity ground.

IV. CONCLUSION

Accordingly, **IT IS ORDERED** that Defendants City of El Paso and El Paso Water Utilities Public Service Board's "Motion to Dismiss" (ECF No. 13) is **GRANTED IN PART** and **DENIED IN PART**. The Motion is granted as to Defendants' request for dismissal of claims against Defendant El Paso Water Utilities Public Service Board, and denied as to all other requests.

IT IS THEREFORE ORDERED that Plaintiff Ysleta Del Sur Pueblo's claims against Defendant El Paso Water Utilities Public Service Board are **DISMISSED** and that Defendant El Paso Water Utilities Public Service Board is **TERMINATED** from this action.

So ORDERED and SIGNED this 22nd day of March 2018.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE