NO. _____

IN THE UNITED STATES SUPREME COURT

LORD, LEWIS & COLEMAN, L.L.C.
Petitioner
vs.

BELLACO, INC. AND JOHN D. RENFRO,
Respondents

On Petition for Writ of Certiorari to the
Supreme Court of Texas
Case No. 19-0407

PETITION FOR WRIT OF CERTIORARI

David L. Monroe
Counsel of Record
1156 Hacienda Place, Suite 103
West Hollywood, CA. 90069
(415) 559-6829
d.monroe.law@gmail.com
Counsel for Petitioner

The Petitioner, a Texas limited liability company, failed to pay a $50 franchise tax. As a result, the Texas Comptroller gave notice that it was forfeiting the LLC's "corporate privileges" under the Texas Tax Code, which defines the effects as, among other things, prohibiting the LLC from suing and defending in state courts. Texas Tax Code § 171.252. The Comptroller certified the failure to pay franchise taxes to the Texas Secretary of State, who forfeited the LLC's certificate of formation under the Tax Code in a letter dated January 28, 2011. The LLC brought suit about four-years later on a breach of contract claim for over $1 million in damages. The trial court and Texas Court of Appeals ruled that the Secretary of State's action in 2011 had the effect of terminating the existence of the LLC, such that it had to wind up its affairs and bring suit on all existing claims within three years or the claims would be extinguished, under the Texas Business Organizations Code. The LLC received no notice, other than the letter of forfeiture from the Secretary of State, that these actions were being taken against it. The Texas courts ruled the cause of action had been extinguished by operation of law before the lawsuit was filed.

QUESTION PRESENTED FOR REVIEW

Whether a Texas statute, which extinguishes a business entity's choses in action without notice, violates the Due Process clause of the U.S. Constitution?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

There are no interested parties other than those mentioned in the caption. In addition to the parties named in the caption, Box Creek Timber L.L.C. was a defendant in the trial court, but was dismissed in the trial court and was not a party to the underlying trial court proceedings at issue nor to appeals to the Twelfth Court of Appeals or the Texas Supreme Court.

Pursuant to this Court's Rule 29.6, undersigned counsel states that Bellaco, LLC is a closely held Texas entity.

There are no private or parent companies that own 10% or more of the stock of any party to this proceeding.

RELATED PROCEEDINGS

No. 14-0227*; Lord, Lewis & Coleman, LLC v. Bellaco, LLC, Box Creek Timber, LLC and John D. Renfr*o, in the 3rd District Court of Houston County, Texas

No. 12-18-00126-CV; *Lord, Lewis & Coleman, LLC, Appellants, v. Bellaco, LLC, Box Creek Timber LLC, and John D. Renfro*, Appellees, in the Twelfth Court of Appeals, Tyler, Texas

No. 19-0407; *Lord, Lewis & Coleman, LLC v. Bellaco, LLC and John D. Renfro*, in the Texas Supreme Court

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

PETITION FOR A WRIT OF CERTIORARI

Lord, Lewis & Coleman, L.L.C. petition for a Writ of Certiorari to review the ruling of the Texas Supreme Court and its refusal to review the Twelfth Court of Appeals opinion and reverse and remand for trial.

OPINIONS BELOW

The Twelfth Court of Appeals opinion in *Lord, Lewis & Coleman, LLC v. Bellaco, LLC*, issued on March 12, 2019 was reported at 2019 Tex.App. LEXIS 1989, 2019 WL 1142451. (APP. B).

The denial of the petition for review filed with the Texas Supreme Court on June 12, 2019 was reported at 2019 Tex. LEXIS 1052 (Tex., Oct. 18, 2019).

The denial on January 17, 2020 of the Motion for Rehearing filed with the Texas Supreme Court is unreported. Postcard notice is at APP. C.

JURISDICTION

The Texas Supreme Court denied the petition for review on October 18, 2019. A timely motion for rehearing was filed and the Texas Supreme Court motion denied the motion on January 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(3). As the constitutionality of statutes of Texas are drawn into question, 28 U.S.C. §2403(b) may apply, and a copy of this Petition is being served on the Attorney General of Texas.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall … be deprived of life, liberty, or property, without due process of law…. Amendment 5, U.S. Constitution.

No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment 14, U.S. Constitution.

Pertinent Texas statutory provisions are set forth in the Appendix: Texas Business Organizations Code provisions are at APP. D; Texas Tax Code provisions are at APP. E.

FACTS

Petitioner Lord, Lewis & Coleman, L.L.C. (hereafter "LL&C") is a Texas limited liability company formed in 2007. Ray Lewis and Rodney Coleman are the Members of LL&C.

In 2010, LL&C had failed to pay a franchise tax to the Texas Comptroller. Pursuant to the Texas Tax Code, the Comptroller gave notice to LL&C of the intended forfeiture of its corporate privileges, and when L&C did not pay the tax, the Comptroller forfeited LL&C's "Corporate Privileges." Tax Code Sections 171.251-171.258. The Comptroller then certified to the Texas Secretary of State that the LL&C had not revived its forfeited privileges within 120 days after forfeiture, and the Secretary of State took the added step of forfeiting the LL&C's certificate of formation; and issued a letter to the LL&C to that effect. Tax Code Sections 171.309-171.311, 171.3125. On January 28, 2011, the SOS issued a letter to LL&C that states, "pursuant to Section 171.309 of the Texas Tax Code, the Secretary of State hereby forfeits the charter, certificate or registration of the taxable entity as of the date noted above and records this

notice of forfeiture in the permanent files and records of the entity." A copy of the letter is attached at APP. G. This letter was the only notice or communication from Texas regarding the effect of the forfeiture.

LL&C received no further notices from Texas regarding any consequences surrounding the forfeiture of its corporate privileges and its certificate of formation.

Tax Code §§ 171.252 and 171.255 state the effects of forfeiture of corporate privileges: an entity shall be denied the right to sue or defend in a state court of Texas; and each director or officer is liable for a debt of the corporation during the time from which the report, tax or penalty was due and the time the corporate privileges are revived.[1] Tax Code Sec. 171.253 provides an entity may not make an affirmative recovery in a suit on a cause of action arising before the tax forfeiture until its corporate privileges are revived.

An entity may have its certificate of formation and its privileges reinstated by paying the tax, filing the required reports, and requesting reinstatement. Tax Code sections 171.312 - 171.313. If the SOS sets aside the forfeiture, the Comptroller shall revive the entity's corporate privileges. Tax Code section 171.314. There is no time limit on requesting reinstatement.

When LL&C learned it had been defrauded by Renfro in late 2014, it paid its past due franchise taxes on December 4, 2014, and got a "Tax Clearance Letter for Reinstatement" from the Comptroller. APP. H, with Lewis affidavit, APP. F. On December 8, 2014, Ray Lewis applied to the SOS on a SOS form for reinstatement and to set aside the forfeiture of LL&C's

[1] The Tax Code and some of the prior laws in Texas refer to "corporations;" however, the same provisions apply to all "taxable entities." *See* Tax Code Sections 171.3105, 171.3125. There is no dispute that LL&C is a "taxable entity" under the Tax Code.

authority to transact business in Texas, which was granted. APP. I. When its right to sue and defend in court was reinstated, LL&C then filed this lawsuit against Renfro on December 10, 2014 for breach of contract and fraud, alleging damages of over $1 million.

On Renfro's motion, the trial court dismissed LL&C's cause of action on February 7, 2018, not on the merits, but on the argument that LL&C's existence had been "extinguished" by the Texas Secretary of State in 2011; that LL&C was therefore a "terminated entity" as defined in Section 11.001(4) of the Texas Business Organizations Code (hereafter "BOC"); and therefore BOC Section 11.359 "extinguished" all LL&C's claims and causes of action not sued on within three years of its "termination." Because LL&C did not bring this action within three years of its "termination," the cause of action had been extinguished by operation of law.

LL&C appealed to the Twelfth Court of Appeals, which affirmed the trial court decision in a very short opinion. APP. B. LL&C sought discretionary review from the Texas Supreme Court, which was denied.

Other than the January 28, 2011 letter from the SOS giving notice of charter forfeiture under the Tax Code, LL&C never received any notice: (1) that its "existence" was being "terminated" according to the Tax Code or the BOC; (2) that it had three years to wind up its affairs and file suit on existing claims or they would be extinguished, pursuant to the BOC; (3) that it had privileges to sue in state court for purposes of bringing suit on claims; or (4) any notice that any penalties or requirements of provisions of the BOC applied to LL&C. There was no "notice" of the penalty being imposed, other than the singular letter from the SOS.

LL&C argued in the court of appeals below that it was incorrect to rule that LL&C's "existence" was "terminated" by the mere issuance of a tax forfeiture letter by the SOS, that said nothing about "termination of existence," dissolution, winding up, and gave no notice at all that LL&C's existence was in danger, because that would clearly violate due process requirements for lack of notice and clarity. LL&C was given no "notice" or opportunity to cure.

The COA ignored LL&C's protestations, and held in a short opinion that "the plain language of the statutes makes clear that an entity whose charter has been forfeited is a terminated entity, unless the forfeiture has been set aside. Tex. Bus. Orgs. Code Ann. 11.001(4)."

BOC Section 11.004 is part of the definitions section of Chapter 11 of the BOC titled "Winding Up and Termination of Domestic Entity." APP. D.

Section 11.001(4) gives the following definition:

> (4) "Terminated entity" means a domestic entity the existence of which has been:
>
> (A) terminated in a manner authorized or required by this code, unless the entity has been reinstated in the manner provided by this code; or
>
> (B) forfeited pursuant to the Tax Code, unless the forfeiture has been set aside.

There are no provisions in the Texas Tax Code that provide for the "existence" of a filing entity to be "forfeited." In their briefing below, Respondents agreed that "the Tax Code contains no provision providing for the 'forfeiture' of a domestic entity's existence." Appellee's Brief in the Court of Appeals at 39. The provision is so vague as to fail to meet constitutional due process.

LL&C asks this Court to hold that the Texas statutory scheme violates procedural due process, because the notice provided by the SOS, in this case one letter of forfeiture under Section 171.309 of the Tax Code, is inadequate in multiple ways. It gives no notice that failure to pay the franchise tax will result in the termination of the "existence" of an entity. It makes no reference to the BOC, nor the statutory requirements there for dissolution and winding up of a terminated entity within three years.

As set forth in more detail below, this scheme also subjects LL&C to multiple and inconsistent penalties for failure to pay a franchise tax: (1) its "corporate privileges" were revoked by the Comptroller under the Tax Code, and it could not sue in Texas court: yet (2) under the BOC liquidation provisions, LL&C not only has the right to sue on its claims, but must do so within three years or the causes of action disappear.

LL&C raised the constitutional issues in the courts below repeatedly.

In the trial court:

In Plaintiff's Reply to Defendant's Traditional Motion for Summary Judgment, at page 14: "Due process requires notice. None of the statutory prerequisites for involuntary termination under the BOC occurred…." For the SOS to involuntarily terminate an entity, it must send notice of intent, and then a certificate of termination. Since the SOS did neither in this case, it violates LL&C's due process rights to hold it was "involuntarily terminated."

In the Twelfth Court of Appeals:

In Petitioner's Motion for Rehearing to the Twelfth Court of Appeals, at page 7, heading III, LL&C argued the COA's ruling "denies Lord Lewis due process of law." At page 8,

Petitioner cited and quoted the 14th Amendment. BOC Section 11.252 provides that the SOS must issue a "certificate of termination" to terminate an entity's existence, which provides notice of the State's action. Since no such certificate was ever given to LL&C, and no notice was given that it was required to wind up its business and file suit or its claims would be forfeited, citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), due process requires notice and an opportunity to be heard prior to the deprivation of property. The Motion for Rehearing was denied without comment by the Court.

In the Supreme Court of Texas:

In its Petition for Review, LL&C argued at page 14 that the failure of Texas to give LL&C notice that it was being "terminated" and therefore that it was subject to the provisions of Subchapter H of the BOC violated LL&C's rights to due process as they were deprived of property rights without the notice required by U.S. law, citing the Fourteenth Amendment and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). The same argument, that the lack of notice that the LL&C was being dissolved deprived the LL&C and its stakeholders due process under the Fourteenth Amendment, was repeated.

In its Motion for Rehearing filed in the Texas Supreme Court, at pages 10-13, LL&C again repeated the due process arguments that Texas deprived LL&C of a valuable property right without notice and an opportunity to be heard, and again cited *Logan*.

The Texas Supreme court never addressed any of these arguments, but chose to let the COA ruling stand.

ARGUMENT

Texas claims that the SOS's January 28, 2011 letter and action forfeited, not just the privileges of LL&C, but also its very existence, such that it became a "terminated entity" within the meaning of BOC section 11.001(4). As a terminated entity under the BOC Section 11.356, LL&C ceased to exist for the purpose of continuing its business affairs, and "survives" solely for the purposes set out in Section 11.356: prosecuting and defending claims in court; liquidating property; winding up its affairs and distributing assets pursuant to BOC Section 11.053; and settling affairs not completed before termination. The glaring problem with this interpretation is that Texas never gave LL&C any notice that its "existence" might be "terminated" if it did not cure the default; or that its "existence" was being 'terminated;" that it was subject to winding up its affairs under the BOC; or that it had three years to file suit on all claims or they would be extinguished by operation of law

The Texas courts' actions are in clear violation of the due process requirements of notice and, at a minimum, an opportunity to present objections prior to the extinguishment of their property interest, as set forth by this Court in *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and its progeny.

The threshold for review of this case by this Court is an incredibly high one. As this Court recited in *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 500 n.9 (1985) the Court has variously stated it will defer to lower courts on state-law issues unless there is "plain" error (*Palmer v. Hoffman*, 318 U.S. 109, 118 (1943)), the view of the lower court is "clearly wrong" (*The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959)), there is a "clearly erroneous" construction

(*United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960)), or there is a just plain "unreasonable" construction (*Propper v. Clark*, 337 U.S. 472, 486-487 (1949)).

Petitioners believe this ease qualifies, as the Texas court's application of law is in clear violation of U.S. Supreme Court precedents. S.Ct.R.10 (c).

First, it is clear that a "cause of action" is property protected by the Fourteenth Amendment's due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). An established state procedure that destroys a property interest without proper procedural safeguards in unconstitutional. *Id.*

Second, prior U.S. Supreme Court precedent clearly sets forth the due process requirements applicable here. "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), quoting *Mullane*, supra. Actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the property interest of any party. *Id.*

"The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard; and in order to enjoy that right, they must be notified." *Fuentes v. Shevin*, 407 U.S. 67 (1972). Due process requires notice before the deprivation at issue takes effect, and the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Id.*

Personal service of written notice within that jurisdiction is the classic form of notice always adequate in any type of proceeding. *Mullane*. The fundamental requisite of due process is the opportunity to be heard, and this right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or default. *Id.*

If Texas law provides that the forfeiture of an entity's charter or certificate of formation by the SOS constitutes the termination of an entity's existence, such that it is subject to winding up its affairs and liquidating all it causes of actions within three years or they are destroyed, due process requires that it institute procedures that provide fair notice to those entities of those consequences. Such a statutory scheme is constitutionally invalid as it now exists, and as it is applied to LL&C, because it deprives LL&C of a protected right without due process. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

It would be a simple matter for the SOS to tell a filing entity that it was being "involuntarily terminated" such that it was subject to the "winding up" procedures of the BOC when its charter or certificate of formation was forfeited under the Tax Code. The same notice that the SOS gives under BOC Sec. 11.251(b) would easily suffice. But again, the Tax Code states no additional penalties upon a corporation's privileges upon forfeiture of its certificate of formation, and provides no notice.

When the SOS "involuntarily terminates" an entity for one of the reasons stated in BOC Section 11.251(b), the SOS sends first written notice stating that the entity is subject to involuntary termination, and gives the entity an opportunity to cure. If the entity does not cure,

BOC Section 11.252 requires the SOS to send a "certificate of termination" that states the entity is involuntarily dissolved, and the date and cause of the termination. BOC Section 11.252(c) states: "Except as otherwise provided by this chapter, the existence of the filing entity is terminated on the issuance of the certificate of termination by the Secretary of State."

In contrast, when, according to the holding in this case, the SOS effects the "involuntary termination" of the existence of an entity under the Tax Code when a certificate of formation is forfeited, the SOS is silent about the effect. There is no notice. There is no "certificate of termination."

LL&C might very likely have taken a different action were it notified that it was losing valuable property rights if suit was not filed within three years. But it was never told.

Texas law creates a trap for the unwary that has deprived LL&C of a very valuable property right – a fraud and breach of contract claim worth over $1 million. The Forfeiture letter, at APP. G, fails to give adequate notice, as it fails to convey the required information, and thus violated the most rudimentary demands of due process. *Mullane*, 339 U.S. at 314. The letter is wholly inadequate to convey the gravity of the SOS's actions; it can even be characterized as "misleading." Without giving a "filing entity" sufficient notice to understand the penalty it is being subjected to, the statutory scheme runs afoul of basic due process notice. An entity can hardly take action about a process it has been given no notice is occurring.

If LL&C was being subjected to the requirements of a "terminated filing entity" under the BOC, it had a right to notice of such proceedings and an opportunity to be heard. No such notice was given in any way, shape or form.

The "fact" of its "termination" under Texas law was not revealed to LL&C until three (3) years after its property, its causes of action, had been extinguished by operation of law. Therefore, Texas deprived LL&C of its property without any notice, any opportunity to cure nor any opportunity to be heard.

The Texas scheme is also unconstitutional because it subjects LL&C to suffer two inconsistent penalties simultaneously for failure to pay a franchise tax. The Tax Code provides that an entity that has lost its privileges may not sue or defend in state court. Tax Code Section 171.252. It may continue its business affairs without interference; however, its officers and directors are personally liable for its debts. *Id.* The Revisor's Notes to Tax Code Section 171.251 (APP. E) makes clear that forfeiture of corporate privileges does not result in loss of the right to do business in Texas, but the right to sue and defend in state courts. There is no direction to cease business. There is no direction to "wind up" the entity's affairs, or to liquidate or dissolve the entity's assets.

Yet, at the same time, because LL&C's "existence" was terminated under the BOC, it has a limited survival after termination, as provided in BOC Section 11.356. LL&C is ordered by BOC Section 11.356 to cease its normal operations, except for winding up its affairs and dissolving its assets, which include bringing suit in state court to preserve causes of action (if they cannot be settled or preserved in some other way). BOC Section 11.356(a), (b). BOC Section 11.359, which the court of appeals relied on to deprive LL&C of its causes of action, is part of the Subchapter H, "Claims Resolution on Termination." LL&C was never advised that it had to wind up, liquidate, or dissolve its assets.

Texas cannot have it both ways. LL&C, while deprived of its right to sue and defend in state court under the Tax Code, was simultaneously required to file suit or lose its causes of action under the BOC.

The "evil" that the tax forfeiture statutes attempt to address is a corporation's failure to pay franchise taxes; and in that regard, it is a revenue measure. *Williams v. Adams*, 74 S.W.3d 437, 440 (Tex. App. - Corpus Christi 2002, pet. denied).

Tax forfeiture not only strips an entity of the privilege to sue and be sued in Texas courts. *See* Tax Code § 171.252. Tax Code § 171.255 subjects officers and directors to personal liability for the debts of an entity that has forfeited its privileges for failure to pay franchise taxes. This consequence has been described as a "Draconian provision designed to encourage payment of the corporate franchise tax." *Williams v. Adams*, 74 S.W.3d 337, 440 (Tex. App. – Corpus Christi 2002). It is penal in nature, and as such, must be strictly construed, and must not be extended beyond the clear meaning of its language. *Id.*

The penalty for failure to pay a franchise tax imposed by the Texas courts on LL&C in this case is even more draconian. The loss of LL&C's breach of contract and fraud cause of action is unconstitutional. This court should grant review.

Respectfully submitted

By: /s/ David L. Monroe

David L. Monroe
1156 Hacienda Place, Suite 103
West Hollywood, CA. 90069
(415) 559-6829
d.monroe.law@gmail.com