

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF NORTH CAROLINA
 EASTERN DIVISION

No. 4:10-CV-142-D

MARK DANIEL LYTTLE,

 Plaintiffs,

v.

THE UNITED STATES OF AMERICA, et
 al.,

 Defendants.

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)
)
) **MEMORANDUM OF LAW IN**
) **SUPPORT OF MOTION TO DISMISS**
) **OF DEFENDANT NORTH CAROLINA**
) **DEPARTMENT OF CORRECTION**

) Fed. R. Civ. P. 12(b)(1), (6)
)
)

NOW COMES Defendant North Carolina Department of Correction (hereinafter, “NCDOC” or “Defendant NCDOC”), by and through counsel, submitting this Memorandum of Law in support of its Motion to Dismiss.

NATURE OF THE CASE

_____ On 13 October 2010, Plaintiff Mark Daniel Lyttle (hereinafter, “Plaintiff”) filed this action generally seeking, in part, general and special damages from Defendant NCDOC pursuant to 42 U.S.C. § 1983, for purported violations of his constitutional rights as guaranteed by the Fifth and Fourteenth Amendments, and, pursuant to North Carolina law, for false arrest and imprisonment, negligence, and negligent infliction of emotional distress. On 15 October 2010, Plaintiff filed a “corrected” version of the Complaint raising the same claims against the NCDOC. Defendant NCDOC was served with a copy of the Corrected Complaint by certified mail on 4 November 2010.

Defendant NCDOC submits this Memorandum of Law in support of its contemporaneously filed Motion to Dismiss.

STATEMENT OF THE FACTS

Plaintiff alleges that, while a patient receiving psychiatric treatment at Cherry Hospital, he was charged with inappropriately touching a female orderly. (Compl. ¶ 26). Plaintiff was subsequently arrested for and convicted of that offense, for which he received a sentence of 100 days confinement. (Compl. ¶ 26). On 22 August 2008, Plaintiff was transferred to Neuse Correctional Institution, a facility operated by Defendant NCDOC, to serve his sentence. (Compl. ¶ 27). Plaintiff alleges that employees of Defendant NCDOC, while making certain inquiries during Plaintiff's intake interview process, mistakenly identified Plaintiff as having been born in Mexico. (Compl. ¶¶ 30-31). As a result of this alleged mistake, employees of Defendant NCDOC notified representatives of Immigration and Customs Enforcement (hereinafter, "ICE"), of Plaintiff's suspected alien status. (Compl. ¶¶ 28-29, 32). Subsequently, Plaintiff was apprehended by ICE agent Defendant Robert Kendall and interviewed by ICE agent Defendant Dashanta Faucette. (Compl. ¶ 35). Plaintiff alleges that, following the interview by Defendant Faucette, various ICE agents performed a computer database search of Plaintiff's criminal history. (Compl. ¶ 43).

Despite what Plaintiff contends was "evidence of [his United States] citizenship," Plaintiff alleges that ICE agent Defendant Dean Caputo ignored this evidence and instead executed a form ordering that Plaintiff "shall be detained in the custody of the Department of Homeland Security' pending a final determination by the immigration judge assigned to" Plaintiff's case. (Compl. ¶ 46) Plaintiff further alleges that Defendant Kendall then signed a "Form I-247 Immigration Detainer, notifying North Carolina DOC that [Plaintiff] was not to be released from custody because ICE had determined that [Plaintiff] was of Mexican nationality." (Compl. ¶ 47). After completing his sentence, Plaintiff was delivered into the custody of ICE on or about 28 October 2008. (Compl. ¶

58). Subsequently, Plaintiff was deported to Mexico, first on 18 December 2008, and a second time after being stopped trying to re-enter the United States on 29 December 2008. (Compl. ¶¶ 90, 93-94, 99). Plaintiff returned to the United States on 22 April 2009 and, after spending approximately two additional days in ICE custody, was released on 24 April 2009. (Compl. ¶¶ 113-17).

In the Corrected Complaint, Plaintiff asserts five (5) Claims for Relief against Defendant NCDOC.¹ In the Seventh Claim for Relief, Plaintiff alleges that NCDOC “deprived [him] of his constitutional right to liberty and deprived him of liberty without due process of law” and did so while acting “under color of law . . . in the performance of official duties under federal, state, county, or municipal laws, ordinances or regulations.” (Compl. ¶¶ 162-63). In the Eighth Claim for Relief, Plaintiff alleges that Defendant NCDOC “unconstitutionally discriminated against [him] on the basis of his race and ethnicity so as to deny him equal protection of the law” and, again, did so while acting “under color of law . . . in the performance of official duties under federal, state, county, or municipal laws, ordinances or regulations.” (Compl. ¶¶ 168-69). In the Ninth Claim for Relief, Plaintiff asserts that Defendant NCDOC, “acting within the scope of their employment” and without Plaintiff’s consent, “(1) plac[ed] him in an immigration hold without a legal basis to do so and (2) physically deliver[ed] [him] into the custody of ICE” at the expiration of his sentence. (Compl. ¶¶ 174-75).

In the Tenth Claim for Relief, Plaintiff asserts that Defendant NCDOC, while “acting within the scope of their employment,” “negligently act[ed] or omitt[ed] to act” in a variety of ways that

¹ Plaintiff collectively refers to Defendant NCDOC and “North Carolina Does 1-10” as the “North Carolina Defendants,” (Compl. ¶ 16), and indicates that the Seventh, Eighth, Ninth, Tenth, and Eleventh Claims for Relief are being pursued “Against the North Carolina Defendants” without further limitation or distinction, (Compl. pp. 33-37).

led to Plaintiff's "wrongful detention and deportation by ICE." (Compl. ¶¶ 178-180). In the Eleventh Claim for Relief, Plaintiff alleges that Defendant NCDOC negligently inflicted severe emotional distress in that its conduct was "without any basis in fact and likely to cause [him] to be selected for questioning because of his race and/or ethnicity, be placed on an immigration hold, and be transferred to ICE custody." (Compl. ¶¶ 184-85). With respect to each of the Tenth and Eleventh Claims for Relief, Plaintiff acknowledges that he has filed a claim with the North Carolina Industrial Commission in accordance with the North Carolina Tort Claims Act and that, if those claims are denied, he intends to seek monetary damages from Defendant NCDOC for "various torts committed." (Compl. ¶¶ 182, 187)

ARGUMENT

When a defendant seeks to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1) (2010) of the Federal Rules of Civil Procedure, the burden is on the plaintiff, the party asserting jurisdiction, to prove that the court has subject matter jurisdiction. *See Jones v. American Postal Workers Union*, 192 F.3d 417, 422 (4th Cir. 1999). A motion to dismiss under Rule 12(b)(1) should be granted "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). When evaluating its jurisdiction, a court is to regard the pleadings as evidence on the issue, but may also consider evidence outside the pleadings without converting the motion to one for summary judgment. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999).

When a defendant seeks to dismiss a complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the motion should be

granted when “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L. Ed. 2d 59, 65 (1984). In evaluating a motion to dismiss under Rule 12(b)(6), “a court must accept the factual allegations of the complaint as true.” *G.E. Investment Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001). Dismissals should be granted when warranted; the Rule 12(b)(6) procedure for early dismissal “streamlines litigation by dispensing with needless discovery and fact finding.” *Neitzke v. Williams*, 490 U.S. 319, 326-327, 109 S.Ct. 1827, 1832, 104 L. Ed. 2d 338, 347-348 (1989).

I. SOVEREIGN IMMUNITY AND IMMUNITY UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BARS PLAINTIFF’S SEVENTH AND EIGHTH CLAIMS FOR RELIEF BROUGHT PURSUANT TO 42 U.S.C § 1983

In 42 U.S.C. § 1983, Congress provided as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2010). In *Will v. Michigan Dep’t of State Police*, the Supreme Court of the United States held that a State is not a “person” for purposes of 42 U.S.C. § 1983. 491 U.S. 58, 63-64, 105 L. Ed. 2d 45, 53 (1989). The *Will* Court further held that suits brought against a State pursuant to 42 U.S.C. § 1983 are barred by the Eleventh Amendment unless the State has waived its immunity or Congress has acted to override that immunity. *Id.* at 66, 105 L. Ed. 2d at 55. Moreover, the *Will* Court observed that “in enacting § 1983, Congress did not intend to override well-established immunities or defenses under common law,” and that “the doctrine of sovereign immunity” was a

familiar common law defense. *Id.* at 67, 105 L. Ed. 2d at 55.

The North Carolina Department of Correction is an agency of the State of North Carolina, created for the performance of the essential governmental function of controlling and rehabilitating criminal offenders. *See* N.C.G.S. §§ 143B-260, -261 (2009). The Supreme Court of North Carolina has previously held that a suit against Defendant NCDOC is, therefore, “a suit against the State.” *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990). *See also* *Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2002) (noting that the Eleventh Amendment confers “sovereign immunity on an arm of the State”). The Fourth Circuit has concluded that, whether addressed on the grounds of a lack of subject matter jurisdiction pursuant to Rule 12(b)(1), *see* *Abril v. Virginia*, 145 F.3d 182, 184 (4th Cir. 1998), or on the grounds of a failure to state a claim pursuant to Rule 12(b)(6), *see* *Biggs v. Meadows*, 66 F.3d 55, 58-59 (4th Cir. 1995), claims barred by Eleventh Amendment immunity are subject to dismissal. As a result, Plaintiff’s Seventh and Eighth Claims for Relief, asserting claims against Defendant NCDOC under 42 U.S.C. § 1983, are barred by the sovereign immunity bestowed by the Eleventh Amendment to the United States Constitution and must be dismissed.

II. PLAINTIFF’S NINTH CLAIM FOR RELIEF SEEKING DAMAGES FROM DEFENDANT NCDOC FOR FALSE IMPRISONMENT AND ARREST IS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

In deciding state law claims before it, a federal court applies established state law. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 228 (1966); *Erie v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194 (1938). In North Carolina, “[t]he State may be sued in tort only as authorized in the Tort Claims Act.” *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (N.C. 1983).

In N.C.G.S. § 143B-291 – the North Carolina Tort Claims Act – the North Carolina General Assembly established the North Carolina Industrial Commission, in part:

for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of the State of North Carolina.

N.C.G.S. § 143B-291(a) (2009). In his Ninth Claim for Relief, Plaintiff seeks damages from Defendant NCDOC for the state law intentional tort of false arrest and imprisonment. (Compl. ¶¶ 173-76). Plaintiff’s claim is barred by the doctrine of sovereign immunity.

In *Harwood v. Johnson*, the Supreme Court of North Carolina addressed several claims, including one for false imprisonment, brought against, *inter alia*, the members of the North Carolina Parole Commission. 326 N.C. at 238, 388 S.E.2d at 443. In addressing the claims made against the Parole Commission members in their official capacities, the *Harwood* court first observed that “North Carolina has a well-established common law doctrine of sovereign immunity which prevents a claim for relief against the State except where the State has consented or waived its immunity.” *Id.* Because the Parole Commission was created legislatively as part of the North Carolina Department of Correction, the court further concluded that a suit against the Parole Commission members in their official capacities was a suit against the State. *Id.*, 388 S.E.2d at 443 (citing N.C.G.S. § 143B-264 (1990)). Ultimately, the *Harwood* court dismissed the official capacity false imprisonment claims on the grounds of sovereign immunity in that North Carolina had not consented to suit in the state courts for such torts perpetrated by the Parole Commission. *Id.*, 388 S.E.2d at

443. *See also Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App. 163, 167, 567 S.E.2d 215, 218 (N.C. Ct. App. 2002) (noting that “[t]he State has not waived sovereign immunity for intentional torts by action of the Tort Claims Act or other statute”) Applying North Carolina law, this Court should dismiss Plaintiff’s claim for false arrest and imprisonment against Defendant NCDOC as they are barred by sovereign immunity.

III. THIS COURT LACKS SUBJECT-MATTER JURISDICTION OVER PLAINTIFF’S TENTH AND ELEVENTH CLAIMS FOR RELIEF SEEKING DAMAGES FROM DEFENDANT NCDOC FOR NEGLIGENCE AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

In both his Tenth and Eleventh Claims for Relief, Plaintiff notes that he “has filed a claim with the North Carolina Industrial Commission . . . in accordance with the North Carolina Tort Claims Act” and indicates that, “[i]f the claim is denied, or if the North Carolina Industrial Commission fails to respond within the time allowed by law, Plaintiff will amend this Complaint to seek monetary damages from the North Carolina Department of Correction for various torts committed.” (Compl. ¶¶ 182, 187). Plaintiff fundamentally misunderstands the North Carolina Tort Claims Act and its exclusivity as a forum for negligence-based claims against the State.

As explained in Argument II above, in N.C.G.S. § 143B-291(a), North Carolina’s legislature waived the State’s sovereign immunity for negligence-based torts only to the extent authorized by the North Carolina Tort Claims Act and vested jurisdiction for such claims exclusively in the North Carolina Industrial Commission. The Fourth Circuit has recognized the exclusivity of the forum provided by North Carolina and several federal district courts in North Carolina have dismissed on sovereign and Eleventh Amendment immunity grounds negligence-based claims brought against State agencies and officials outside of the North Carolina Industrial Commission. *See, e.g., Stewart*

v. North Carolina Dep't of Corr., 393 F.3d 484, 490-91 & n. 3 (4th Cir. 2005) (observing that North Carolina has vested “exclusive jurisdiction in the North Carolina Industrial Commission” for claims sounding in negligence); *Hooper v. North Carolina*, 379 F. Supp. 2d 804, 812-13 (M.D.N.C. 2005) (holding that district court lacked subject matter jurisdiction to consider plaintiff’s claim for negligent infliction of emotional distress and dismissed that claim on Eleventh Amendment immunity grounds); *Alston v. N.C. A&T State Univ.*, 304 F. Supp. 2d 774, 782-84 (M.D.N.C. 2004) (granting university’s motion to dismiss on sovereign immunity grounds and dismissing various state law claims, including negligent infliction of emotional distress, for lack of subject matter jurisdiction). Consistent with North Carolina state law and the federal courts’ interpretation of that jurisprudence, this Court should dismiss Plaintiff’s Tenth and Eleventh Claims for Relief for lack of subject matter jurisdiction and because those claims are barred by sovereign and Eleventh Amendment immunity.

IV. PLAINTIFF TENTH AND ELEVENTH CLAIMS FOR RELIEF SEEKING DAMAGES FROM DEFENDANT NCDOC FOR NEGLIGENCE AND NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED AS DEFENDANT NCDOC OWED PLAINTIFF NO LEGAL DUTY TO PREVENT HIS DEPORTATION BY FEDERAL OFFICIALS OR ANY INJURIES RESULTING THEREFROM AND ANY ALLEGEDLY NEGLIGENT ACTS OF DEFENDANT NCDOC WERE NOT THE PROXIMATE CAUSE OF PLAINTIFF’S INJURIES.

If this Court declines to dismiss Plaintiff’s Tenth and Eleventh Claims for Relief against Defendant NCDOC on the basis of sovereign immunity and lack of subject matter jurisdiction as argued more fully in Argument III, those claims are still subject to dismissal for lack of proximate cause. To recover damages under the North Carolina Tort Claims Act, a plaintiff must show that the injuries sustained were the result of a negligent act of a state employee acting within the course

and scope of employment. N.C.G.S. § 143-291(a) (2009); *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (N.C. 1988). To establish actionable negligence, a plaintiff must show that (1) defendant failed to exercise due care in the performance of some legal duty owed to Plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury. *Bolkhir*, 321 N.C. at 709, 365 S.E.2d at 900. Plaintiff cannot make either showing.

In his Complaint, though he alleges that “the North Carolina Defendants breached their duty of reasonable care,” (Compl. ¶ 178), Plaintiff fails to identify the origin of any such duty (and Defendant NCDOC is aware of none), in particular a duty to prevent Plaintiff’s detention and deportation by federal officials after the expiration of his incarceration in Defendant NCDOC and the subsequent injuries he alleges only ensued after leaving the custody of Defendant NCDOC. In the absence of any legal duty Defendant NCDOC owed to him, Plaintiff’s negligence-based claims cannot survive.

Even if Plaintiff were able to identify a legal duty owed to him by Defendant NCDOC to prevent his deportation, he cannot establish that the acts or omissions of Defendant NCDOC proximately caused his injuries. The Supreme Court of North Carolina has defined proximate cause to mean:

a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the Plaintiff’s injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (N.C. 1984).

Here, even if Defendant NCDOC or its employees were somehow negligent in identifying Plaintiff on 22 August 2008 as a potential illegal alien, (Compl. ¶¶ 27, 30-32), Plaintiff’s own allegations

make clear that, at a minimum, the intervening acts or omissions of Defendants Faucette, Caputo, Kendall, ICE Does 1-10, and the United States of America, and others, whether individually or collectively, were the proximate cause of his injuries, (Compl. ¶¶ 35-120).

Instead, Plaintiff alleges, among other things, that following his release into ICE custody on 28 October 2008, the various ICE officials: interrogated him, (Compl. ¶ 60); charged him with being an illegal alien, (Compl. ¶ 64); coerced and manipulated him into signing conflicting statements, including that his name was “Jose Thomas” and that his father was a Mexican citizen, (Compl. ¶¶ 72-75); scheduled a hearing before an Immigration Judge who issued an order that Plaintiff be removed to Mexico, (Compl. ¶ 78); subsequently ignored “numerous references to [his] United States citizenship and his Social Security Number” after the immigration judge’s order had been entered, (Compl., ¶ 80); issued a “Warrant of Removal/Deportation,” (Compl. ¶ 81); transported him to Mexico and forced him to cross the border, (Compl. ¶ 90); refused him reentry into the United States on 29 December 2008, (Compl. ¶ 94); again deported him to Mexico, (Compl. ¶ 99); delayed his reentry back into the United States on 22 April 2009 despite Plaintiff’s possession of a passport issued by U.S. Embassy officials in Guatemala, (Compl. ¶¶ 105-111); commenced new deportation proceedings against him on 23 April 2009, (Compl. ¶ 114); and finally released him from custody on 24 April 2009, (Compl. ¶ 117).² Given this factual history, it cannot reasonably be said that

² This litany of facts does not include several other allegations in the Complaint relating events and circumstances resulting from the acts of unnamed parties that more likely than not caused, or contributed to, Plaintiff’s alleged physical, mental, and emotional injuries and distress, all well after his release from NCDOD custody on 28 October 2008. For example:

- 1) “while in the custody of ICE” he attempted suicide “on or about 17 November 2008,” (Compl. ¶ 76);
- 2) when first deported to Mexico, he “spoke no Spanish,” “had approximately three dollars in his pocket,” had to resort to “begging, sleeping the streets and trying to

Defendant NCDOC's alleged misidentification of Plaintiff's citizenship status created a "natural and continuous sequence, unbroken by any new and independent cause" and produced Plaintiff's injuries.

Plaintiff does not allege, nor could he, that Defendant NCDOC has either the legal authority, the experience, or the means to expel an individual from the United States. In light of ICE's exclusive authority and that agency's expertise in investigating, processing and deporting illegal aliens, no reasonable employee of Defendant NCDOC and certainly not Defendant NCDOC itself could have "reasonably foreseen" that the physical and psychological injuries that Plaintiff allegedly sustained were "probable" to result from Defendant NCDOC's (or its employees') alleged misidentification of Plaintiff's citizenship status. As a result, Plaintiff cannot establish that the alleged negligent acts or omissions of Defendant NCDOC, through its employees, proximately caused his deportation from the United States or the injuries he allegedly sustained as a result. Accordingly, Plaintiff's Tenth and Eleventh Claims for Relief should be dismissed for failure to state a claim upon which relief can be granted.

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- 3) find shelter" for eight days, (Compl. ¶¶ 92-93);
suffered severe physical and mental abuse by the guards of the Honduran jail to which he was later confined by Honduran immigration officials, (Compl. ¶ 102)

Respectfully submitted, this the 23rd day of December, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on 23 December 2010, I electronically filed the foregoing Memorandum of Law in Support of Motion to Dismiss of Defendant North Carolina Department of Correction with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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This the 23rd day of December, 2010.

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