

IN THE UNITED STATES DISTRICT COURT
 FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID F. EVANS, ET AL.,)	
)	
Plaintiffs)	No. 1:07 CV 739
)	
vs.)	
)	
THE CITY OF DURHAM,)	<u>SUPPLEMENTAL</u>
NORTH CAROLINA, ET AL.,)	<u>MEMORANDUM ON BEHALF</u>
)	<u>OF MICHAEL B. NIFONG</u>
)	
Defendants)	

This supplemental memorandum is submitted on behalf of the defendant Michael B. Nifong simply to advise the Court of two recent cases of more or less local interest applying and interpreting the May 18, 2009 Supreme Court decision in Ashcroft v. Iqbal, 556 U.S. ____, 129 S.Ct. 1937, __ L.Ed.2d ____ (2009) and Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Walker v. Prince George’s County, Maryland, ____ F.3d ____ (No. 08-1462, July 30, 2009 4th Circuit) involved the seizure of a pet wolf named Dutchess by a county animal control officer. Justice O’Connor, for the Court, found the Walkers’ pleadings woefully lacking under Ashcroft v. Iqbal, as simply threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, and referenced legal conclusions couched as factual allegations. We concede, for present purposes, that the three plaintiffs in the case at hand did a better job with their lengthy complaint than did the Walkers, whose wolf was seized, but these plaintiffs still fail under Ashcroft v. Iqbal.

A much fuller discussion of these pleading issues appears in Judge Leonard’s July 23, 2009 opinion in Angell v. BER CAR, Inc., ____ B.R. ____ (Bkcy. EDNC, No. L-08-00174-8-JRL, July 23, 2009). In that case the allegations were much more specific and factual than in

Walker, and in many ways mirror the allegations in the present case, yet were still found wanting under Ashcroft v. Iqbal.

It is worth noting that on July 22, 2009 Senator Specter of Pennsylvania introduced S.1504, a bill entitled the Notice Pleading Restoration Act of 2009, to provide that federal courts shall not dismiss a complaint under Rule 12(b)(6) or Rule 12(e), Federal Rules of Civil Procedure, “except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).” The bill, without a co-sponsor, was referred to the Judiciary Committee. Senator Specter, in offering the bill, accused the Supreme Court in Twombly and Iqbal of making an end run around precedent, adding that:

The effect of the Court’s actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries.

Congressional Record July 22, 2009

It should be noted the senator was speaking generally, not about this case.

Senator Specter’s bill however is just that, a bill. It is not law and may never become law. Twombly and Iqbal of course are good law, and we continue to believe and contend that the present complaint of the three plaintiffs fails the tests of Twombly and Iqbal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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