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NO. COA09-1319

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

LEONARD D. HENSLEY,
Plaintiff,

v.

McDowell County
No. 07 CVS 175

MCDOWELL COUNTY and COUNTY
SHERIFF'S DEPARTMENT, GERALD
HICKS, SHARON CARPENTER,
RANDY WOOD, in their representative
and individual capacities,
Defendants.

Appeal by plaintiff from order entered 17 April 2009 by Judge James L. Baker in McDowell County Superior Court. Heard in the Court of Appeals 24 February 2010.

C. Gary Triggs, P.A., by C. Gary Triggs, for plaintiff appellant.

Russell & King, P.A., by Sandra M. King, for defendant appellees.

HUNTER, JR., Robert N., Judge.

In 2004, officers from the McDowell County Sheriff's Department assisted the North Carolina State Bureau of Investigation ("SBI") and the Federal Bureau of Investigation ("FBI") in executing a federal search warrant at the home of Leonard Hensley ("plaintiff"). In 2008, plaintiff filed suit against McDowell County, the McDowell County Sheriff's Department, Gerald Hicks, Sharon Carpenter, and Randy Wood (collectively

"defendants") alleging misconduct arising out of the execution of this warrant. Plaintiff's causes of action include: (1) invasion of privacy, (2) damage to personal property, (3) defamation, (4) intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED"), and (5) violation of freedom of speech.

On 17 April 2009, the trial court granted defendant's motion to dismiss all of plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and plaintiff now appeals. After review, we conclude that plaintiff has alleged insufficient facts in his complaint to support his causes of action. Accordingly, we affirm the trial court's order.

I. BACKGROUND

In his complaint, plaintiff alleges the following facts:

16. That, on or about March 10th, 2004 at about 8:30 a.m. without any prior warning, agents of the Sheriff['s] Department of McDowell and other law enforcement agencies both State and Federal arrived on the property of the Plaintiff and thereafter, began to question the Plaintiff concerning alleged acts of misconduct which were false, malicious and untrue and engaged in what is contended by the Plaintiff to be an unlawful search and seizure of property owned by the Plaintiff located on the premises.
17. That, after the agents arrived, the Plaintiff repeatedly asked to be allowed to contact his attorney and was told that he would not be allowed to do so until later. Despite having requested the presence of an attorney or witnesses the agents at the scene continued with the search without permission in an unlawful fashion.
18. That, upon information and belief, the search warrant served upon the Plaintiff violated both the Fourth and Sixth Amendments of the United States Constitution and the applicable provisions of the

Constitution of the State of North Carolina. The warrant was insufficient on its face and was based upon false information which the agents knew or by reasonable diligence should have known was false or misleading.

19. That, during the course of the search, the Plaintiff was detained in a[n] illegal sense and not allowed to leave or make calls, which violated the Constitution and protected rights of the Plaintiff.

. . . .

23. That, during the course of the search and seizure conducted on the premises of the Plaintiff, various property was damaged or seized resulting in the loss or decreased value of said property as a result of said acts.

24. That the Defendants and/or their agents acted in an unlawful or improper fashion during the course of their search and seizure of items at the home of the Plaintiff which was the proximate cause of damage to various items owned by the Plaintiff.

. . . .

28. That, upon information and belief, the Defendants have both at the time of the search and at times thereafter up to and including the present discussed various issues related to the search and seizure and/or made allegations against the Plaintiff, which are derogatory in nature at a time where they knew or by reasonable diligence should have known such statements were false; however, [despite] such knowledge they continued to distribute the information which resulted in the defamation of the Plaintiff's character.

29. That, as a direct and proximate result of the acts and omissions on the part of the Defendants, the character and the reputation of the Plaintiff has been diminished with many people throughout the community having questions about why his house was searched and what if anything he had done, which the Plaintiff is not in a position to dispel or stop.

. . . .

33. That, as a direct and proximate result of the acts and omissions of the part of the Defendants both at the time of the search and thereafter, the Plaintiff has suffered from severe emotional and mental distress, which includes but is not limited to the following:
- A. Feeling of paranoia;
 - B. Feelings of helplessness and loss of self-worth;
 - C. Sleepiness;
 - D. Bouts of crying;
 - E. Feeling of hopelessness;
 - F. Excess weight gain;
 - G. Feelings of depression and anxiety.

. . . .

35. That the acts and omissions on the part of the Defendants were intentionally designed to cause severe emotional and mental distress or in the alternative were so grossly negligent that any reasonable person would have understood that such actions were likely to cause and did in fact cause severe emotional and mental distress to the Plaintiff. The acts were so outrageous, so extreme and so egregious as to violate all generally accepted standards of decency within a civilized society.

. . . .

40. That upon information and belief, the underlying reason for the interference of the Defendants and the search of the Plaintiff[']s premises was to stifle or interfere with his right to freedom of speech and freedom of association.

Based on these allegations, plaintiff pled relief in the form of compensatory and punitive damages for claims of invasion of privacy, damage to personal property, defamation, IIED, NIED, and violation of freedom of speech.

On 7 April 2008, defendants filed an answer and a Rule 12(b)(6) motion to dismiss. In their motion to dismiss, defendants argued that plaintiff's complaint was insufficient on its face to state a claim upon which relief could be granted, and that

defendants were entitled to have plaintiff's complaint dismissed. On 10 November 2008, defendants filed a supplemental memorandum in support of their motion to dismiss, in which they allege that plaintiff failed to respond timely to a request for admissions. The request for admissions asked plaintiff to admit that the search warrant was issued by a federal magistrate and that the warrant was presented to plaintiff at the outset of the search by a federal agent.

In an order signed 26 March 2009, the trial court granted defendants' motion to dismiss "[a]fter reviewing the pleadings and relevant authority and hearing arguments from counsel," and dismissed plaintiff's complaint without prejudice. Plaintiff filed a timely notice of appeal to this Court and raises one issue for review: whether dismissal of his complaint under Rule 12(b)(6) was proper.

II. ANALYSIS

A. *Jurisdiction and Standard of Review*

Our Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009) (review of final judgment). When reviewing dismissed complaints under Rule 12(b)(6), "this Court reviews *de novo* 'whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted.'" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation omitted), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009). This Court must determine "whether, as a matter of law, the allegations of

the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.'" *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 448 (2008). "[T]he complaint is to be liberally construed, and should not be dismissed 'unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.'" *Hyde v. Abbott Laboratories*, 123 N.C. App. 572, 575, 473 S.E.2d 680, 682 (1996) (citation omitted). "We are not required, however, "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005) (citation omitted).

B. Plaintiff's Complaint

Plaintiff contends that the trial court erred in dismissing his suit because the complaint, in conjunction with several submitted affidavits, is sufficient to support his causes of action. We disagree.

The record shows that the trial court did not consider plaintiff's affidavits in its order, and plaintiff does not specifically reference the affidavits in his complaint. Because no affidavits were considered, this Court will address the issues presented under Rule 12(b)(6) rather than Rule 56 which would allow a court to convert the order dismissing plaintiff's complaint into an order for summary judgment. *See Laster v. Francis*, ___ N.C. App.

___, ___, 681 S.E.2d 858, 862 (2009) (only "documents attached, specifically referred to, or incorporated by reference in the complaint" may properly be considered in Rule 12 motion to dismiss without converting motion to summary judgment). Like the trial court, our review is limited to an examination of "the pleadings and relevant authority and . . . arguments from counsel" applying the *de novo* standard for a motion to dismiss.

Rule 8 of the North Carolina Rules of Civil Procedure requires that a pleading contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the *transactions, occurrences, or series of transactions or occurrences*, intended to be proved showing that the pleader is entitled to relief[.]" N.C.R. Civ. P. 8(a)(1) (2009) (emphasis added). "Notice of the nature and extent of the claim is adequate if the complaint contains 'sufficient *information* to outline the elements of [the] claim or to permit inferences to be drawn that these elements exist.'" *Pastva v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 493 (1996) (emphasis added). A complaint is properly dismissed "when on its face the complaint reveals the absence of *fact* sufficient to make a good claim[.]" *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380 (1987) (emphasis added).

*1. Invasion of Privacy, Damage to Personal
Property, and Violation of Freedom of Speech*

The linchpin of these causes of action is the content and execution of the federal search warrant on 10 March 2004. Based on the actions of the sheriff's deputies in connection therewith,

plaintiff claims that he suffered his damages. In the claims for invasion of privacy¹ and damage to personal property, plaintiff claims that the search of his home was "unlawful"; and in the claim for violation of freedom of speech, plaintiff asserts that the purpose of the search was to "stifle" his constitutional rights.

In light of these foundational allegations, we observe that, if plaintiff has failed to show that the search warrant was invalid or that the search was unlawful, then plaintiff's claims for invasion of privacy, damage to personal property, and violation of freedom of speech were properly dismissed under Rule 12(b)(6). Accordingly, we begin by examining the allegations concerning the federal search warrant.

The factual attack on the validity of the federal search warrant in plaintiff's complaint, in its entirety, is as follows: "[t]he warrant was insufficient on its face and was based upon false information which the agents knew or by reasonable diligence should have known was false or misleading." Plaintiff does not restate the factual allegations contained in the search warrant, nor does he explain, in any way, how the facts alleged in the warrant were false. Plaintiff does not allege how the officers should have known that the factual recitation was fatally deficient. The complaint lacks any information concerning the

¹ We presume plaintiff's privacy tort is intrusion upon seclusion given that North Carolina does not recognize the privacy torts of false light or disclosure of private facts, and plaintiff has not alleged that defendants appropriated his likeness. *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 29, 588 S.E.2d 20, 27 (2003).

identity of the contraband sought by the police, the scope of the search, and whether any officers exceeded that scope. Outside of his assertion that the warrant was "insufficient," no facts in the complaint support plaintiff's claim.

Given this lack of factual background, plaintiff's characterization of the federal search warrant is entirely conclusory, therefore we need not assume the allegation's veracity under our standard of review. *Good Hope*, 174 N.C. App. at 274, 620 S.E.2d at 880. Since plaintiff otherwise fails to adduce any facts supporting his contention that the search warrant was "insufficient," we presume that the officers were lawfully on plaintiff's property with probable cause to search for the items outlined in the search warrant, whatever those items may have been. We therefore conclude that plaintiff's causes of action for invasion of privacy, damage to personal property, and violation of freedom of speech were properly dismissed by the trial court.

2. *Defamation*

Regarding his claim for defamation, plaintiff alleges that the deputies "discussed various issues related to the search and seizure and/or made allegations against the Plaintiff, which are derogatory in nature." This allegation is also conclusory and insufficient under Rule 8.

In order to forecast a claim for defamation, plaintiff was required to plead facts supporting the essential elements of the cause of action. See, e.g., *Craven v. Cope*, 188 N.C. App. 814, 817-18, 656 S.E.2d 729, 732-33 (2008) (discussion of facts

sufficient to overcome motion to dismiss for claim of defamation). Plaintiff was therefore required, at a minimum, to plead enough facts to show that the statements made by the officers were, in fact, false. *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987). ("a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation"). The record shows that plaintiff alleges no facts showing what was said or how the statements made were false. We therefore agree that dismissal of plaintiff's claim for defamation by the trial court was also proper.

3. *IIED, NIED, and Punitive Damages*

Plaintiff's remaining claims for IIED, NIED, and punitive damages are all based on the execution of the search warrant and defendants' alleged defamatory remarks. Since we have already concluded that these underlying causes of action are not supported by adequate factual assertions in the complaint, the trial court properly dismissed these ancillary claims as well.

4. *Notice Pleading*

This Court recognizes the liberal nature of notice pleading and this State's policy in favor of resolving cases on the merits. see N.C.R. Civ. P. 8 comment; *Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986). Nevertheless, a complaint, even under notice theory, must contain sufficient factual allegations to support a claim for relief, even if the

claim is mislabeled. *Manning v. Manning*, 20 N.C. App. 149, 154, 201 S.E.2d 46, 50 (1973) ("While [Rule 8] does not require detailed fact pleading, nevertheless, we hold that it does require a certain degree of specificity."); *Buchanan v. Hunter Douglas, Inc.*, 87 N.C. App. 84, 86, 359 S.E.2d 271, 272 (1987) ("If a plaintiff's claim is mislabeled in his complaint, that fact will not, in and of itself, prove fatal to the action if critical facts are sufficiently pled in the body of the complaint that will give the adverse party notice of the assertions against him."). As in *Manning*, we conclude that the complaint here does not present sufficient "critical facts" to support plaintiff's claims. As a result, plaintiff's assignment of error is overruled.

III. CONCLUSION

The record shows that plaintiff's complaint failed to allege sufficient facts to withstand defendants' motion to dismiss under Rule 12(b)(6). Because plaintiff has failed to allege facts supporting the essential elements of his causes of action, we conclude that the trial court did not err in dismissing plaintiff's claims without prejudice. Accordingly, the order of the trial court is

Affirmed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).