NO. COA09-578

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

SHERRY LYNN EARP,
Plaintiff,

v.

Durham County
No. 08 CVS 6391

GEORGE L. QUINLAN, BLUE RIDGE SOLVENTS & COATINGS, INC., and ATFAB, LLC,
Defendants.

Appeal by plaintiff from order filed 8 January 2009 by Judge Allen Baddour in Durham County Superior Court. Heard in the Court of Appeals 28 October 2009.

Taibi Kornbluth Law Group, P.A., by Anthony D. Taibi and Michael A. Kornbluth, for plaintiff-appellant.

Wake Law Office, by Judy Y. Tseng, for defendants-appellees.

STEELMAN, Judge.

The trial court's denial of plaintiff's motion to amend in a prior lawsuit does not bar plaintiff's claims in a subsequent lawsuit. Issues, which are not presented in a party's brief, or for which no reason or argument is stated, are deemed abandoned. Plaintiff's claims for piercing the corporate veil and "alter ego" have been abandoned on appeal, thus the trial court's dismissal of all claims which are dependent upon those theories are affirmed. The trial court erred by dismissing plaintiff's claims for

conspiracy to interfere with civil rights, and civil obstruction of justice against defendant Quinlan. The trial court erred in granting defendants' motion to dismiss for failure to join a necessary party pursuant to Rule 12(b)(7).

I. Factual and Procedural Background

Because plaintiff's action was dismissed pursuant to Rule 12(b)(6), the factual background is based solely upon the allegations contained in plaintiff's complaint.

In September 1998, Sherry Lynn Earp (Earp) began working for Carochem Inc. (Carochem), a company that manufactures chemical supplies. In 2001, Carochem hired John M. Durrett (Durrett). In 1997, Durrett pled no contest to the felonies of promoting sexual performance by a child, and possession of material depicting sexual conduct by a child in the Circuit Court of Brevard County, Florida. He was sentenced to 56 months in prison followed by 120 months probation. One of the conditions of his probation was that he "not own or possess a personal computer that has a modem or in any way accesses an 'on-line', 'Internet', or any other E-mail service." He was further prohibited from accessing an "on-line" or "Internet" service.

Carochem owned one Internet-capable office computer. Shortly after Durrett was hired, Earp accessed the computer immediately after Durrett and found pornographic photographs. Earp was frequently subjected to viewing pornographic material, "including illegal photographs of naked and sexually abused children," and "the explicitness and perversity of such images increased over

time." Earp spoke on several occasions with Carochem's vice-president and general manager, Tom Carr (Carr), about the pornographic material.

In 2005, George L. Quinlan (Quinlan) purchased Carochem. Quinlan lives in Virginia and owns ATFAB, L.L.C. (ATFAB), which is a North Carolina corporation. Quinlan is also one of the owners of Blue Ridge Solvents & Coatings, Inc. (Blue Ridge), which is a Virginia corporation. A Blue Ridge employee, Randy Bumgarner (Bumgarner), was installed as Carochem's general manager. Carr was retained as a manager.

In October 2006, Quinlan's daughter, Carrie McCrary (McCrary), visited the Carochem office. Earp told McCrary about Durrett's use of the computer to view pornographic materials, and McCrary, in turn, informed Quinlan of Earp's complaints. Bumgarner then told Durrett that the computer was not for his personal use. Quinlan disapproved of Bumgarner's actions in instructing Durrett to stop using the computer for personal use, and Bumgarner was removed from his position.

Durrett briefly used the computer after his meeting with Bumgarner. Earp later discovered a new "documents" folder labeled, "For Sherry." Inside the folder was a document labeled, "You Are One Nosy B _ _ _ _." Earp opened the document, which stated, "Please remove the knife from my back, you might need it later!" Earp called Quinlan to complain, and Quinlan requested that she e-mail the folder to him. When Durrett returned to the office, Carr told him to leave the property and not return. Carr told Earp that

he considered Durrett to have been fired. Approximately one week later, McCrary and her husband visited the Carochem office to examine the computer.

In November 2006, Earp learned that Carochem had decided to rehire Durrett. Quinlan assigned Durrett and Earp to work opposing part-time shifts. This resulted in Earp going from full-time employment to part-time employment. A few weeks later, Earp told Quinlan and Carr that she had consulted with an employment attorney. Carr instructed Earp not to return to work.

On 25 April 2007, Earp filed a complaint in Durham County Superior Court against Carochem and Durrett (the first lawsuit). On 10 April 2008, Earp filed a motion seeking to add Carr, Quinlan, Blue Ridge, and ATFAB as defendants.

In a deposition taken in the first lawsuit, Quinlan testified that he had a computer expert make a copy of the hard drive of the office computer, and "there were no pornographic images on the hard drive." On 2 May 2008, Earp's computer expert examined the same hard drive and determined that pornographic images had been viewed on the computer as early as 2001. He also determined that someone had attempted to delete these files from the computer in the fall of 2006 and on 8 November 2007.

On 30 May 2008, the trial court granted Earp's motion to join Carr as a defendant, but denied her motion to join Quinlan, Blue Ridge, and ATFAB. On 3 July 2008, Earp filed a document styled as "Plaintiff's Motion for 15(B) Motion to Amend, Rule 60 Motion to Reconsider, Rule 37 Motion to Compel Discovery, and Motion for Rule

11 Sanctions," seeking to add Quinlan as a defendant. On 11 August 2008, the trial court denied this motion.

On 26 November 2008, Earp filed a new action (the second lawsuit) that named only Quinlan, Blue Ridge, and ATFAB as defendants (collectively defendants). This lawsuit contained many of the same allegations contained in the first complaint and in Earp's proposed amendments to the first complaint. The second lawsuit also alleged that Earp's longtime physician had diagnosed Earp as suffering from Post Traumatic Stress Disorder (PTSD), and it was the physician's professional opinion that "the matters in contention in this lawsuit caused or substantially contributed to [Earp's] PTSD."

In the second lawsuit, Earp asserted eleven causes of action: (1) obstruction of justice; (2) negligent supervision and retention of Durrett; (3) negligent infliction of emotional distress; (4) intentional infliction of emotional distress; (5) wrongful termination in violation of public policy; (6) wrongful retaliation in violation of public policy; (7) piercing the corporate veil; (8) that Quinlan operated Carochem, ATFAB and Blue Ridge as his alter egos; (9) conspiracy to interfere with civil rights; (10) civil obstruction of justice; and (11) punitive damages.

On 18 December 2008, defendants filed a Motion to Dismiss the second lawsuit pursuant to Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure together with a Motion for Rule 11 sanctions against both plaintiff and her attorney. On 8 January 2009, the trial court granted defendants' motion to dismiss

pursuant to Rules 12(b)(6) and (7) but denied defendants' motion for sanctions. The trial court's order of dismissal does not state the basis of the dismissal under Rule 12(b)(6).

On 23 April 2009, Earp filed a Notice of Voluntary Dismissal in the first lawsuit. Earp appeals the 8 January 2009 order granting defendants' motion to dismiss the second lawsuit.

II. Motion to Dismiss Pursuant to Rule 12(b)(6)

In her first argument, Earp contends that the trial court erred by granting defendants' Rule 12(b)(6) motion to dismiss. We agree in part and disagree in part.

A. Standard of Review

Upon appeal of a Rule 12(b)(6) motion to dismiss, this Court takes as true all allegations of fact in the complaint. *Cage v. Colonial Building Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (citation omitted). We conduct a *de novo* review of the pleadings to determine their legal sufficiency and "whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (citations omitted), *appeal dismissed*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007). Dismissal is proper when one of three conditions is satisfied: (1) the complaint on its face reveals that no law supports plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily

defeats plaintiff's claim. *Wood v. Guilford Cty*, 355 N.C. 161, 166, 558 S.E.2d 490, 494, (2002) (citations omitted).

We reject defendants' assertion that we should review the dismissal by the trial court under an abuse of discretion standard under the cases of *Hursey v. Homes By Design, Inc.*, 121 N.C. App. 175, 464 S.E.2d 504 (1995) and *Badillo v. Cunningham*, 177 N.C. App. 732, 629 S.E.2d 909 (2006). These cases deal with the dismissal of cases based upon discovery violations pursuant to Rule 37 of the North Carolina Rules of Civil Procedure, and are not applicable to dismissals pursuant to Rule 12(b)(6).

We further note that on appeal, it is incumbent upon the appellant to demonstrate error on the part of the trial judge. *Stott v. Nationwide Mut. Ins. Co.*, 183 N.C. App. 46, 50, 643 S.E.2d 653, 656, *disc. review denied*, ___ N.C. ___, 653 S.E.2d 876 (2007). Earp argues that even if she has defectively stated a claim, "her Complaint should not have been dismissed if the alleged facts *could* support a cause of action, albeit a cause with a different legal basis." However, Earp does not articulate what those other claims might be. It is not the role of the appellate courts of North Carolina to construct arguments for either the appellant or appellee, or to conduct legal research to buttress the arguments actually made by the parties. *See generally Ford v. Mann*, ___ N.C. App. ___, ___, 690 S.E.2d 281, 284 (2010).

B. Denial of Motion to Amend

We first address defendants' assertion that the trial court properly granted their motion to dismiss based upon the previous

denial of Earp's motion in the first lawsuit to amend her complaint. Defendants contend that Earp is precluded from commencing an independent action against the same parties, seeking the same relief as set forth in her proposed amendments to the complaint in the first lawsuit. We disagree.

Whether a motion to amend a pleading is allowed or denied is addressed to the sound discretion of the trial court and is accorded great deference. *See Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 432, 531 S.E.2d 476, 480 (2000). A trial court's order denying a motion to amend is an interlocutory order,

> that is, one given in the progress of a cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit. The doctrine of *res judicata* does not apply to decisions upon ordinary motions incidental to the progress of the trial with the same strictness as to a judgment.

Calloway v. Ford Motor Co., 281 N.C. 496, 501-02, 189 S.E.2d 484, 488 (1972) (citations, internal quotations, and alterations omitted). The doctrine of *res judicata* only applies when a party attempts to litigate the same cause of action after a full opportunity to do so in a previous proceeding. *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 84, 398 S.E.2d 628, 631 (1990), *disc. rev. denied*, 328 N.C. 570, 403 S.E.2d 509 (1991).

In the instant case, Earp did not have a full opportunity to litigate her claims against these same defendants. The trial court's denial of her 3 July 2008 motion to amend in the first

lawsuit was not a final judgment on the merits, and does not preclude Earp from filing the second lawsuit.

This argument is without merit.

C. Arguments Abandoned on Appeal

Earp's complaint sets forth 11 separate claims. On appeal, Earp only argues the following claims should not have been dismissed: (1) the negligent supervision and retention of Durrett; (2) negligent infliction of emotional distress; (3) intentional infliction of emotional distress; (4) wrongful termination in violation of public policy; (5) wrongful retaliation in violation of public policy; (6) conspiracy to interfere with civil rights; and (7) civil obstruction of justice. Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure provides, "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)6) (2010). There being no argument made or authorities cited with respect to the four remaining claims, they are deemed abandoned.

In addition, five of the seven argued claims are dependent upon the "piercing the corporate veil" and "alter ego" claims in order to be viable. As discussed below, the dismissal of these claims is affirmed.

1. Defendants Blue Ridge and ATFAB

Earp has asserted claims against defendants Blue Ridge and ATFAB only in their capacity as "alter egos" of Quinlan. Earp's claims for piercing the corporate veil have been abandoned on

appeal. The trial court's order dismissing Earp's claims against Blue Ridge and ATFAB pursuant to Rule 12(b)(6) is affirmed.

2. Defendant Quinlan

The complaint does not specify in what capacity Quinlan is being sued. It appears that Earp has asserted claims against Quinlan in an individual capacity and acting as the "alter ego" of Carochem. Earp's claims for piercing the corporate veil and "alter ego" have been abandoned on appeal. The trial court's order dismissing Earp's claims against Quinlan as the "alter ego" of Carochem is affirmed. We only address Earp's claims asserted against Quinlan individually.

3. Negligent Supervision and Retention

The tort liability for a claim of negligent supervision and retention arises out of the employment relationship. *See Woodson v. Rowland*, 329 N.C. 330, 358, 407 S.E.2d 222, 239 (1991). This claim is thus based upon Earp and Durrett's employer-employee relationship with Carochem. In the complaint, it appears that Earp has asserted this claim against Quinlan, not in an individual capacity, but as the "alter ego" of Carochem. Earp's claims for piercing the corporate veil and "alter ego" have been abandoned on appeal, thus the trial court's order dismissing this claim pursuant to Rule 12(b)(6) is affirmed.

4. Intentional Infliction of Emotional Distress

Earp alleges that she suffered "severe emotional distress" as a result of the intentional or reckless acts by Durrett. Earp's

complaint alleges an action against Quinlan for his ratification of Durrett's actions.

> As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal.

Brown v. Burlington Industries, Inc., 93 N.C. App. 431, 436, 378 S.E.2d 232, 235 (1989) (citation and internal quotation omitted). Durrett was an employee of Carochem. It appears that Earp has asserted this claim against Quinlan, not in an individual capacity, but acting as the "alter ego" of Carochem. Earp's claims for piercing the corporate veil and "alter ego" have been abandoned on appeal, thus the trial court's order dismissing this claim pursuant to Rule 12(b)(6) is affirmed.

5. Negligent Infliction of Emotional Distress

Earp alleges that "[d]efendants engaged in the wrongful, negligent, reckless misconduct described above[,]" which was a proximate cause of her severe emotional distress. Earp failed to allege specific negligent acts on the part of Quinlan, acting in an individual capacity. It appears from her complaint that Earp is asserting this claim against Quinlan as the "alter ego" of Carochem, based upon the negligent supervision and retention of Durrett. Earp's claims for piercing the corporate veil and "alter ego" have been abandoned on appeal, thus the trial court's order dismissing this claim pursuant to Rule 12(b)(6) is affirmed.

6. Wrongful Termination/Retaliation in Violation of Public Policy

Earp has asserted the claims of wrongful termination in violation of public policy and wrongful retaliation in violation of public policy. These claims are based upon Earp's employer-employee relationship with Carochem. In the complaint, it appears that Earp has asserted these claims against Quinlan as the "alter ego" of Carochem. Earp has asserted no basis for individual liability against Quinlan. Earp's claims for piercing the corporate veil and "alter ego" have been abandoned on appeal, thus the trial court's order dismissing these claims pursuant to Rule 12(b)(6) is affirmed.

D. Conspiracy to Interfere with Civil Rights

Earp asserted that Quinlan conspired "to interfere with the exercise or enjoyment by [Earp] of her right to work . . . in an environment free of sexually oppressive conduct." N.C. Gen. Stat. § 99D-1 provides that it is a violation if:

> (1) Two or more persons, motivated by race, religion, ethnicity, or gender . . . conspire to interfere with the exercise or enjoyment by any other person [of a constitutional right]; and
>
> (2) One or more persons engaged in such a conspiracy use force, repeated harassment, violence, physical harm to persons or property, or direct or indirect threats of physical harm . . .; and
>
> (3) The commission of an act described in subdivision (2) interferes, or is an attempt to interfere, with the exercise or enjoyment of a right, described in subdivision (1), of another person.

N.C. Gen. Stat. § 99D-1(a) (2009).

Our Supreme Court has held that a complaint sufficiently stated a claim for civil conspiracy when the complaint alleged (1) a conspiracy; (2) wrongful acts done by the alleged conspirators in furtherance of the conspiracy; and (3) damages as a result of the conspiracy. *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 115 (2008). "[T]he complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." Id. at 444, 666 S.E.2d at 116 (quoting *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997)).

Earp's complaint alleged that Quinlan, motivated by Earp's gender, conspired with Durrett and Carr "to interfere with the exercise or enjoyment by [Earp] of her right to work and earn a living in an environment free of sexually oppressive conduct."

The Supreme Court of the United States has stated that severe or pervasive discriminatory conduct, which creates an abusive work environment to employees because of their race, gender, religion, or national origin, offends Title VII of the Civil Rights Act of 1964. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 301-02 (1993). Title VII was enacted due to Congress' concern with the creation of workplace equality for women and men. *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996). "An employee is harassed or otherwise discriminated against because of his or her sex if, but-for the employee's sex, he or she

would not have been the victim of the discrimination." *Id.* at 142 (citation and internal quotations omitted).

Quinlan's acts, which Earp alleged were his part in the conspiracy, include: (1) "repeated covering up of sexual harassment," and (2) "aiding and abetting the harassment of [Earp]." Earp further claimed that she was damaged as a result of the conspiracy. In liberally construing Earp's complaint, she has alleged sufficient facts tending to show (1) the existence of the conspiracy, (2) acts in furtherance thereof, and (3) injury as a result of these acts. We hold that these allegations, taken together, are sufficient to withstand a motion to dismiss.

The trial court erred by dismissing this claim.

E. Civil Obstruction of Justice

Civil obstruction of justice is a common law cause of action, consisting of "'acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice.'" *Grant v. High Point Reg'l Health Sys.*, 184 N.C. App. 250, 255-56, 645 S.E.2d 851, 855 (2007) (quoting *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984)), *disc. review improvidently allowed*, 362 N.C. 502, 666 S.E.2d 757 (2008). "The common law offense of obstructing public justice may take a variety of forms." *Id.* at 253, 645 S.E.2d at 853 (citation and quotations omitted).

Earp's complaint alleged: (1) after Quinlan was put on notice of the lawsuit, he tampered with evidence by altering or removing the Internet history, deleting files, and altering the contents of

the computer; (2) these actions were designed to impede and hinder Earp's discovery of evidence; and (3) Quinlan's conduct was meant to obstruct the administration of justice. These allegations were sufficient to sustain a claim against Quinlan based upon civil obstruction of justice.

The trial court erred by dismissing this claim.

III. Motion to Dismiss Pursuant to Rule 12(b)(7).

In her second argument, Earp contends that the trial court erred by granting defendants' Rule 12(b)(7) motion to dismiss for failure to join necessary parties. We agree.

A trial court errs when it dismisses a case because a necessary party has not been joined. *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202 (1983) (citations omitted). "When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. Any such defect should be corrected by the trial court *ex mero motu* in the absence of a proper motion by a competent person." *Id.*, 304 S.E.2d at 202-03 (citing *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978)). "Absence of necessary parties does not merit a nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead." *Booker*, 294 N.C. at 158, 240 S.E.2d at 367 (citation omitted). The trial court erred in granting defendants' motion to dismiss pursuant to Rule 12(b)(7).

IV. Conclusion

We reverse the trial court's order dismissing Earp's claims for relief based upon conspiracy to interfere with civil rights and civil obstruction of justice against defendant Quinlan, acting in his individual capacity. We affirm the trial court's order dismissing the remainder of Earp's claims asserted against Quinlan, acting in an individual capacity. We affirm the trial court's order dismissing Earp's claims asserted against Blue Ridge, ATFAB, and defendant Quinlan, acting in an official capacity. We reverse the trial court's order granting a motion to dismiss for failure to join a necessary party pursuant to Rule 12(b)(7).

AFFIRMED IN PART, REVERSED IN PART.

Judges ELMORE and HUNTER Jr., Robert N. concur.

Report per Rule 30(e).