NO. COA12-171
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STEFAN LITWIN,
Plaintiff,

v. Orange County
No. 11 CVS 909

UNIVERSITY OF NORTH CAROLINA k/a
UNIVERSITY OF NORTH CAROLINA AT
CHAPEL HILL,
Defendant.

Appeal by plaintiff from order entered 24 August 2011 by Judge Michael R. Morgan in Orange County Superior Court. Heard in the Court of Appeals 27 September 2012.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Brian R. Berman, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Stefan Litwin ("Plaintiff") appeals from a final order of the Orange County Superior Court granting defendant's motion to dismiss on grounds of sovereign immunity pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(2). We affirm.

I. Factual and Procedural History

Plaintiff is the George Kennedy Distinguished Professor of Music at the University of North Carolina at Chapel Hill ("UNC"), and is therefore its employee. Plaintiff's complaint alleges that on 8 September 2010, he sent an email to the chair of UNC's music department requesting authorization to teach approximately forty-five days during the 2010-2011 academic year at the Hochschule für Musik Saar ("Hochschule"), a music college in Germany where Plaintiff held a paid position.[1] The chair of the department denied this request via letter on 17 September 2010, determining that Plaintiff's involvement with the Hochschule would conflict with his commitment to UNC pursuant to UNC's policies and regulations. The chair further determined that Plaintiff's position with the Hochschule appeared to be a "tenured, full-time position on the faculty." As a result, the chair demanded that Plaintiff provide verification that he had "resigned [his] duties there or arranged for them to be conducted entirely between May 15-August 15 going forward."

Pursuant to UNC's internal regulations, appeal of the chair's decision was to the Dean of the College of Arts and

[1] In the 2009-2010 academic year, Plaintiff had been permitted by the music department to teach a number of days at the Hochschule.

Sciences. However, Plaintiff objected to his appeal being heard by the Dean, on the grounds that the Dean had been consulted before the chair's decision and was biased. In response to this objection, Plaintiff's second appeal was instead heard by the Provost. In a letter dated 7 October 2010, the Provost affirmed the department chair's decision. Plaintiff subsequently appealed to UNC's Chancellor, who again affirmed the department chair's decision via letter dated 28 October 2010.

On 18 April 2011, Plaintiff filed a complaint in Orange County Superior Court alleging the existence of a contract between Plaintiff and UNC, the terms of which are contained in three letters exchanged between Plaintiff and the university administration during his nomination and confirmation process ("the Letters"). Plaintiff asserts the contact also includes UNC's *Trustee Policies and Regulations Governing Academic Tenure in the University of North Carolina at Chapel Hill* ("the Trustee Policies"). Plaintiff claims that the terms of this employment contract obligate him "to seek approval of external activity for pay," and that UNC "breached its obligation" in denying his request by failing "to exercise its discretion in a reasonable manner and based upon good faith and fair dealing." In addition, Plaintiff sought a declaratory judgment to the same

effect. On 18 May 2011, UNC filed a motion to dismiss the complaint "for sovereign immunity, lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted in this forum." Plaintiff subsequently amended his complaint to join "Count Three: Petition for Judicial Review" to his first two claims.[2] The amended complaint was filed on 25 July 2011, the same day as the trial court's hearing on UNC's motion to dismiss Plaintiff's original two claims. On 25 August 2011, the trial court dismissed with prejudice Plaintiff's breach of contract and declaratory judgment claims pursuant to "N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(2)." The trial court noted that Plaintiff had amended his complaint to include the petition for judicial review.

On 3 November 2011, UNC filed its motion to dismiss the petition for judicial review. On 13 December 2011, the trial court granted UNC's motion to dismiss the petition. The order dismissed the petition without prejudice pursuant to N.C. Gen. Stat. § 150B-45(a)(2) because Plaintiff was not a resident of Orange County and had therefore filed his petition in the wrong

[2] Because UNC had not yet filed a responsive pleading to Plaintiff's original complaint, Plaintiff was permitted to amend his complaint as a matter of course. *See* N.C. R. Civ. P. 15(a).

venue. On 22 December 2011, Plaintiff filed his notice of appeal from the 25 August 2011 order dismissing the breach of contract and declaratory judgment claims. Plaintiff does not contest the dismissal of his petition for judicial review here.

II. Jurisdiction

As Plaintiff appeals from the final judgment of a superior court, an appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

A. Motion to Dismiss Appeal

As a threshold matter, we must address UNC's motion arguing Plaintiff's appeal is untimely pursuant to N.C. R. App. P. 3(c). Rule 3(c) requires that an appeal be taken "within thirty days after entry of judgment," N.C. R. App. P. 3(c)(1), or "within thirty days after service upon the party of a copy of the judgment if service is not made within" three days after entry. N.C. R. App. P. 3(c)(2). UNC argues the entry of the trial court's 25 August 2011 order granting UNC's motion to dismiss the breach of contract and declaratory judgment claims was a "final judgment" with respect to those claims. Thus, UNC contends Plaintiff failed to timely file and serve his notice of appeal, since Plaintiff did not file such notice until 22

December 2011, almost four months after entry of the trial court's order dismissing his breach of contract and declaratory judgment claims.

With the exception of certain interlocutory orders affecting a "substantial right" or properly certified pursuant to North Carolina Rule of Civil Procedure 54(b), the relevant statutory procedures generally permit a party to appeal only from a *final* judgment of the superior court. *See Veazey v. Durham*, 231 N.C. 357, 361–63, 57 S.E.2d 377, 381–82 (1950). A final judgment is defined as "one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (quoting *Veazey*, 231 N.C. at 361–62, 57 S.E.2d at 381).

In this case, a "final judgment leaving nothing to be judicially determined between the parties" was not entered by the trial court until its dismissal of Plaintiff's third claim, the petition for judicial review, on 13 December 2011. Plaintiff filed his notice of appeal on 22 December 2011, within the thirty-day period mandated by the appellate rules. Thus, Plaintiff's appeal is timely.

UNC argues that the addition of the petition for judicial review to Plaintiff's amended complaint does not save this appeal from being untimely. UNC asserts that a petition for judicial review cannot be joined to a civil complaint, because of the unique nature of such petitions. In support of this contention, UNC cites *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 661-62 (1990), in which our Supreme Court held that a writ of certiorari and a complaint should not be joined in the same proceeding. UNC does not provide any authority suggesting the same holds true for *petitions for judicial review and complaints*; rather, UNC argues the quasi-appellate nature of judicial review proceedings is similar to those used in evaluating a writ of certiorari, and thus a petition for judicial review may not be properly joined with a complaint. UNC concludes that "[b]ecause the [petition for judicial review] could not properly be joined with Plaintiff's complaint, the superior court's dismissal with prejudice of the breach of contract claim and the declaratory judgment claim was the final decision on the merits of the complaint." We disagree with UNC's reasoning.

Regardless of whether UNC is correct in evaluating the propriety of joining a petition for judicial review with a

complaint, we do not agree with its conclusion that such an improper joinder would compel dismissal of Plaintiff's appeal. Even accepting UNC's premise that a petition for judicial review cannot be properly joined with a civil complaint, UNC cites no case law indicating why such improper joinder would change the meaning of "final judgment" as articulated by *Duval* and *Veazey*.

UNC contends that an order dismissing some but not all of Plaintiff's claims, an order which would normally be understood to be interlocutory, should be treated as a final judgment if remaining "claims" are ultimately dismissed as improperly joined with the complaint or otherwise improper. This runs contrary to the fact that the appeals process is "designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (quoting *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)). Perhaps more importantly, accepting UNC's argument would result in uncertainty among litigants, as it might often be unclear when an order seemingly interlocutory on its face might be a "final judgment" from which an immediate appeal was required. Plaintiff correctly notes this uncertainty would likely lead

litigants to file clearly improper interlocutory appeals out of perceived necessity. For the foregoing reasons, we hold Rule 3(c) does not bar this Court from hearing this case, and review the merits of Plaintiff's appeal.

B. Sovereign Immunity

Plaintiff argues the trial court erred by dismissing his breach of contract and declaratory judgment claims for lack of personal and subject matter jurisdiction on the basis that UNC is immune from suit in this case. We disagree that the trial court erred.

"Our review of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo* . . . . Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005) (citations and quotation marks omitted). "The standard of review of the trial court's decision to grant a motion to dismiss under Rule 12(b)(2) is whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate." *M Series Rebuild, LLC v. Town of Mount Pleasant*, __ N.C. App. __, __, 730

S.E.2d 254, 257 (2012) (quotation omitted). It is clear that a motion to dismiss based on sovereign immunity is a jurisdictional issue, however "whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina." *Id.*

The substantive law of sovereign immunity in this state is well developed. In this case, Plaintiff relies in large part on our Supreme Court's holding in *Middlesex Const. Corp. v. State*, which clarified that our case law abolishes "sovereign immunity in only those cases where an administrative or judicial determination [is] not available," including "contract actions for which no remedy [has] been provided." 307 N.C. 569, 574–75, 299 S.E.2d 640, 643–44 (1983).

UNC claims the General Assembly has provided Plaintiff a remedy, in the form of the judicial review procedures of Article 4 of the Administrative Procedure Act. *See* N.C. Gen. Stat. § 150B-43 *et seq*. Thus, UNC maintains that Plaintiff is limited to pursuing judicial review of UNC's final agency decision, and Plaintiff may not bring suit against UNC in this case. Plaintiff argues that he is entitled to file suit against UNC because the judicial review procedures of Chapter 150B "do[] not provide any damage remedy for breach of contract," and are thus

inadequate.

However, "[t]he burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy," *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992), and "the party making such a claim must include such allegation in the complaint." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002) (citation and quotation marks omitted). Although "precise language alleging that the State has waived the defense of sovereign immunity is not necessary," the complaint still needs to "contain[] sufficient allegations to provide a reasonable forecast of waiver." *Sanders v. State*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007) (quoting *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005)). At a minimum, "allegations of the facts justifying avoidance of the administrative process must be pled in the complaint." *Bryant v. Hogarth*, 127 N.C. App. 79, 86, 488 S.E.2d 269, 273 (1997) (citing *Huang*, 107 N.C. App. at 715–16, 421 S.E.2d at 815–16).

A review of Plaintiff's complaint reveals no factual allegations explicitly addressing the inadequacy of a petition for judicial review in his case. In fact, Plaintiff

subsequently amended his original complaint to include a petition for judicial review. Thus, it cannot be said that Plaintiff's complaint provides a "reasonable forecast of waiver." *Sanders*, 183 N.C. App. at 19, 644 S.E.2d at 13. Therefore, we hold that Plaintiff has failed to meet his burden of pleading "sufficient allegations to justify avoidance of the administrative process." As was the case in *Huang*, "[t]here is nothing in [Plaintiff's] complaint filed in the superior court and nothing in this record to show that [Plaintiff] raised in the trial court the alleged inadequacy of his administrative remedies. He has therefore failed to properly raise the issue and the complaint should have been dismissed by the trial court." *Huang*, 107 N.C. App. at 716, 421 S.E.2d 816.

Accordingly, the judgment of the trial court is

AFFIRMED.

Judges ERVIN and MCCULLOUGH concur.

Report per Rule 30(e).