IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-390

Filed: 15 November 2016

Onslow County, No. 13 CVS 3705

SANDHILL AMUSEMENTS, INC. and GIFT SURPLUS, LLC, Plaintiffs

v.

SHERIFF OF ONSLOW COUNTY, NORTH CAROLINA, HANS J. MILLER, in his official capacity; STATE OF NORTH CAROLINA, GOVERNOR PATRICK LLOYD (PAT) MCCRORY, in his official capacity; SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, FRANK PERRY, in his official capacity; DIRECTOR OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION, BERNARD W. (B.W.) COLLIER, II, in his official capacity; DIRECTOR OR BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT BRANCH OF THE STATE BUREAU OF INVESTIGATION, MARK J. SENTER, in his official capacity, Defendants

Appeal by defendants from order entered 21 January 2016 by Judge Ebern T. Watson, III, in Onslow County Superior Court. Heard in the Court of Appeals 21 September 2016.

Grace, Tisdale & Clifton, P.A., by Michael A. Grace and Christopher R. Clifton, for plaintiff-appellee Sandhill Amusements, Inc.

Hyler & Lopez, P.A., by Stephen P. Agan and George B. Hyler, Jr., for plaintiff-appellee Gift Surplus, LLC.

Turrentine Law Firm, PLLC, by S. C. Kitchen, for defendant-appellant Sheriff of Onslow County, Hans J. Miller.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General J. Joy Strickland, for defendant-appellant Director or Branch Head of the Alcohol Law Enforcement Branch of the State Bureau of Investigation, Mark J. Senter.

CALABRIA, Judge.

Appellants, government officials, appeal the denial of their motions to dismiss, asserting sovereign immunity. Because declaratory judgment was plaintiffs' only means of redress, plaintiffs' claims were not barred by the doctrine of sovereign immunity. Because their claims were not barred by sovereign immunity, plaintiffs were not required to allege waiver of sovereign immunity. The trial court therefore did not err in denying appellants' motions to dismiss.

I. Factual and Procedural Background

This matter was previously addressed by this Court in *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014) (hereinafter *Sandhill I*), *rev'd per curiam for reasons in dissent*, 368 N.C. 91, 773 S.E.2d 55 (2015). A brief recitation of the background of that case follows.

On 2 July 2013, Alcohol Law Enforcement ("ALE") agents and an officer with the Onslow County Sheriff's Office, in response to complaints that certain video gaming machines (hereinafter "kiosks") were providing money payouts, visited a business in the Rhodestown area of Onslow County. Inside, they found various gaming kiosks, in which customers could purchase gift certificates to be used at the online store of Gift Surplus, LLC ("Gift Surplus"). Customers also received equivalent credits ($1 is equivalent to 100 sweepstakes entries), and a free entry request code, which allows for 100 free sweepstakes entries. *Id.* at 342, 762 S.E.2d at 669-70.

ALE agents, as well as then-ALE Deputy Director Mark Senter ("Senter"), felt that the kiosks in Rhodestown violated the statutes regulating video sweepstakes machines. After receiving the ALE agents' report, District Attorney Ernie Lee ("Lee") and then-Onslow County Sheriff Ed Brown ("Brown") composed a letter to Richard W. Frye ("Frye"), President of Sandhill Amusements, Inc. ("Sandhill"), informing Frye that the kiosks would be seized as evidence and that those in possession of them would be criminally charged. *Id.* at 343-44, 762 S.E.2d at 670.

On 27 September 2013, Sandhill and Gift Surplus (collectively, "plaintiffs") filed a joint Complaint and Motion for Preliminary Injunctive Relief against Brown in his official capacity. On 9 October 2013, Brown filed motions to dismiss under Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, and failure to file an action on behalf of a real party at interest under N.C. Gen. Stat. § 1-57 (2013). On 11 October 2013, the trial court held a hearing concerning Brown's motion to dismiss and plaintiffs' motion for injunctive relief. On 4 November 2013, the trial court entered an order denying Brown's motion to dismiss and granting plaintiffs' motion for injunctive relief. The trial court also held that the suit was not barred by the doctrine of sovereign immunity and that Brown had failed to show that plaintiffs' claim should be dismissed under Rule 12(b)(1), Rule 12(b)(2), Rule 12(b)(6), or N.C. Gen. Stat. § 1-57. *Id.* at 344-45, 762 S.E.2d at 670-71.

Brown appealed the trial court's order. On appeal, we held that "the declaratory judgment procedure is the only method by which Plaintiffs have recourse to protect their property interests in the kiosks, we hold that the trial court properly exercised jurisdiction and that sovereign immunity did not bar Plaintiffs' claim for injunctive relief." *Id*. at 351, 762 S.E.2d at 675. We then (i) affirmed the trial court's order denying Brown's motions to dismiss; (ii) vacated portions of the preliminary injunction which exceeded the scope of a preliminary injunction; and (iii) dismissed the remainder of Brown's appeal from the grant of a preliminary injunction as interlocutory. *Id*. at 357, 762 S.E.2d at 679.

In a dissenting opinion, Judge Ervin[1] agreed with the majority regarding Brown's motion to dismiss and the failure of his sovereign immunity defense, but contended that, "since Plaintiffs did not demonstrate a likelihood of success on the merits at trial, that portion of the trial court's order preliminarily enjoining Defendant from enforcing various statutory provisions against Plaintiffs should be reversed." *Id*. at 370, 762 S.E.2d at 686. On appeal, our Supreme Court agreed *per curiam* with the dissent, reversing our decision and remanding in accordance with Judge Ervin's opinion.

The instant case follows *Sandhill I*. On 12 November 2015, plaintiffs filed an amended complaint against the new Sheriff of Onslow County, Hans J. Miller

[1] Subsequent to our decision in *Sandhill I*, Judge Ervin was elected to the Supreme Court of North Carolina. Justice Ervin recused himself from the decision on appeal.

("Miller"); the Governor of North Carolina, Pat McCrory; the Secretary of the North Carolina Department of Public Safety, Frank Perry; the Director of the North Carolina State Bureau of Investigation ("SBI"), B.W. Collier, II; and the current Director or Branch Head of the ALE Branch of the SBI, Senter (collectively, "defendants"). This amended complaint sought a declaratory judgment that plaintiffs' kiosks did not constitute gambling, and preliminary and permanent injunctive relief prohibiting defendants from seeking to terminate plaintiffs' business.

On 20 November 2015, Miller filed a motion to dismiss, pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. This motion was substantially similar to the motion in *Sandhill I*, and raised the same bases for dismissal, including failure to state a claim, nonjusticiability, and sovereign immunity. On 9 December 2015, the remaining defendants collectively filed a motion to dismiss, pursuant to the same Rules of Civil Procedure, also alleging failure to state a claim and sovereign immunity.

On 21 January 2016, the trial court entered an order on defendants' motions to dismiss. The trial court denied the motions of Miller and Senter to dismiss, and granted the motions to dismiss of the remaining defendants.

Miller and Senter (collectively, "appellants") appeal.

II. Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

III. Sovereign Immunity

On appeal, appellants contend that the trial court erred in denying their respective motions to dismiss. We disagree.

Appellants contend that the trial court erred in denying their respective motions to dismiss because appellants enjoyed sovereign immunity. This issue was explicitly addressed in *Sandhill I*.

In a portion of the prior decision with which the dissent agreed, and which did not form the basis of the Supreme Court's reversal, we held:

> Here, as in *Am. Treasures*, Plaintiffs face restrictions on their property rights resulting from Sheriff Brown's transmission of the innocent owner letter, which effectively barred any future sale and current placement of their kiosks. Additionally, as in *Am. Treasures*, sovereign immunity acts as a bar to Plaintiffs' ability to seek redress through monetary damages. Without such redress, Plaintiffs have no viable option for protecting their property rights during this litigation.
>
> Accordingly, as (i) the facts at present are sufficiently similar to the controlling cases in this area and (ii) the declaratory judgment procedure is the only method by which Plaintiffs have recourse to protect their property interests in the kiosks, we hold that the trial court properly exercised jurisdiction and that sovereign immunity did not bar Plaintiffs' claim for injunctive relief.

Sandhill I, 236 N.C. App. at 351, 762 S.E.2d at 675.

In the instant case, as in *Sandhill I*, the closure of plaintiffs' businesses and seizure of their machines would impact their property rights. Sovereign immunity acts as a bar to their ability to seek redress through monetary damages. Accordingly, declaratory judgment is the only method by which plaintiffs may seek relief. We hold, as we did in *Sandhill I*, that plaintiffs' claims were not barred by appellants' assertions of sovereign immunity.

Appellants next contend that the trial court erred in denying appellants' motions to dismiss because plaintiffs failed to allege that appellants waived sovereign

immunity. Ordinarily, this would be true. However, as we have held that sovereign immunity does not bar plaintiffs' claims, we hold that plaintiffs were not required to allege waiver of that doctrine, inapplicable as it was.

Given that plaintiffs' claims were not barred by the doctrine of sovereign immunity, we hold that they were not required to allege waiver of sovereign immunity. We further hold that the trial court did not err in denying appellants' motions to dismiss on the basis of sovereign immunity.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).