IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-20

Filed: 5 September 2017

Durham County, No. 13 CVS 5618

CARLA KELLEY, Plaintiff,

v.

MICHAEL D. ANDREWS, in his Official capacity as Sheriff of Durham County and John Doe Surety, Defendants.

Appeal by Plaintiff from Order entered 19 September 2016 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 17 May 2017.

Gray Newell Thomas, LLP, by Angela Newell Gray, for Plaintiff-Appellant.

Office of the County Attorney, by Senior Assistant County Attorney Marie Costello Inserra, for Defendants-Appellees.

DILLON, Judge.

Carla Kelley ("Plaintiff") appeals the trial court's order granting Michael D. Andrews' ("Defendant") motion to dismiss. This is the third appeal of this action to this Court.

I. Background

In April 2011, Plaintiff was terminated from her employment with the Durham County Sheriff's Department. In December 2013, Plaintiff filed a complaint for wrongful termination against Sheriff Michael D. Andrews (the "Sheriff") in his official capacity and against a placeholder, "John Doe Surety, as the surety for the Sheriff."

After a series of motions, orders and two appeals to this Court, the Sheriff re-submitted a motion to dismiss, essentially contending that he was immune from civil liability as a public official unless the actual surety was joined and that dismissal of the claims against him was appropriate due to Plaintiff's failure to join the actual surety within the applicable three-year statute of limitations. Also, Plaintiff, having learned the name of the Sheriff's surety, submitted a motion to amend her complaint to replace the John Doe defendant with the actual surety.

After a hearing on the parties' motions, the trial court granted the Sheriff's motion to dismiss and denied Plaintiff's motion to amend her complaint. Plaintiff appeals.

II. Analysis

Plaintiff's claim is for wrongful discharge that allegedly occurred when her employment was terminated on 8 April 2011. "The limitations period for a tort action based upon wrongful discharge in violation of public policy is three years." *Winston v. Livingstone Coll.*, Inc., 210 N.C. App. 486, 488, 707 S.E.2d 768, 770 (2011) (citing N.C. Gen. Stat. § 1-52(1) (2011)). The statute of limitations begins to run on the date

of discharge. *See Renegar v. R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 79, 549 S.E.2d 227, 229 (2001). Accordingly, the statute of limitations on Plaintiff's claims expired on 8 April 2014. Plaintiff brought this action prior to April 2014, but – not knowing the name of the actual surety at that time – named "John Doe" as the surety defendant. It was not until February 2016, well after the statute of limitations had expired, that Plaintiff – after learning the identity of the Sheriff's surety – moved to amend her complaint to join the surety as a defendant in place of "John Doe."

"[A] sheriff is a public official [generally] entitled to sovereign immunity and, *unless the immunity is waived pursuant to a statute*, is protected from suit against him in his official capacity." *Myers v. Bryant*, 188 N.C. App. 585, 587, 655 S.E.2d 882, 885 (2008) (emphasis added) (citation and internal quotation marks omitted). For example, also relevant to this case, our statutes provide that a sheriff may waive immunity by purchasing a bond. N.C. Gen. Stat. § 58-76-5 (2015).

We have held that a plaintiff seeking to pursue a claim against a sheriff in his official capacity must specifically allege that the sheriff has waived the right to rely on an immunity defense. *Phillips v. Gray*, 163 N.C. App. 52, 56, 592 S.E.2d 229, 232 (2004). In the present case, Plaintiff has alleged that the Sheriff has waived his immunity through the purchase of a bond, pursuant to N.C. Gen. Stat. § 58-76-5. *See Sellers v. Rodriguez*, 149 N.C. App. 619, 624, 561 S.E.2d 336, 339 (2002) (stating that "a sheriff may also waive governmental immunity by purchasing a bond"). However,

we have held that the purchase of a bond precludes a sheriff from relying upon "the protective embrace of governmental immunity . . . *only where the surety is joined as a party to the action*," *Summey v. Barker*, 142 N.C. App. 688, 691, 544 S.E.2d 262, 265 (2001) (emphasis added); *see also Messick v. Catawba County*, 110 N.C. App. 707, 715, 431 S.E.2d 489, 494 (1993). Our Supreme Court has essentially held as such in *Mellon v. Prosser*, where that Court adopted the reasoning that N.C. Gen. Stat. § 58-76-5 mandates that the surety be joined. *Mellon v. Prosser*, 126 N.C. App. 620, 623, 486 S.E.2d 439, 442 (1997) (J. Wynn dissenting), *reversed per curiam in part for reasons stated in the dissent,* 347 N.C. 568, 494 S.E.2d 763 (1998). Further, our Supreme Court has held that the plaintiff's recovery against a sheriff is limited by the amount of the bond. *Hill v. Medford*, 158 N.C. App. 618, 623, 582 S.E.2d 325, 328-29 (2003) (J. Martin dissenting), *reversed per curiam for reasons stated in the dissent*, 357 N.C. 650, 588 S.E.2d 467 (2003).

Here, Plaintiff did name "John Doe" as the surety defendant, but failed to name the actual surety prior to the expiration of the statute of limitations. Plaintiff is without any real excuse for this failure as explained by the dissent adopted by our Supreme Court in *Mellon*:

> Plaintiff contends that he was unable to name the surety at the time the complaint was filed and that the surety could only be added after discovery. This explanation defies the common knowledge that the name of a sheriff's surety is a matter of public record and therefore should be easily discoverable. . . . Since the name of the surety could

> have been determined rather easily, it would not have been a hardship for plaintiff to find out that information and amend his complaint joining the surety as a party. . . .
>
> The requirement of naming the surety in an action against the sheriff is clear cut and jurisdictional.

Mellon, 126 N.C. App. at 624-25, 486 S.E.2d at 442-43 (J. Wynn dissenting). Based on N.C. Gen. Stat. § 58-76-5 and on our Supreme Court's holdings in *Hill* and *Mellon*, we conclude that by failing to add the actual surety within the applicable statute of limitations, the pleadings on their face demonstrate that Plaintiff is not entitled to any recovery. That is, since the amount of Plaintiff's recovery is limited by the Sheriff's immunity to the amount Plaintiff can recover from the surety and since the pleadings show that the surety would have an absolute defense based on the statute of limitations, the pleadings show that Plaintiff is not entitled to any relief on her tort claim. Therefore, we conclude that the trial court did not abuse its discretion in denying Plaintiff leave to amend her complaint to add the surety well after the statute of limitations had run, especially given that the surety's name is a matter of public record, and that dismissal of her complaint against the Sheriff was appropriate.

Plaintiff argues, though, that her naming of "John Doe" as the surety defendant within the statute of limitations saves her claim and that the trial court should have granted her motion to amend her complaint after the statute had run to substitute John Doe with the actual surety, pursuant to Rule 15 of our Rules of Civil Procedure, which provides that amendments relate back in time to the original

pleading. Our Supreme Court has expressly held, however, that the "relation back" relief provided in Rule 15 does not apply to *adding new parties*:

> When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. *We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party*.

Crossman v. Moore, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995) (emphasis added) (involving a plaintiff seeking to add a new party-defendant after the statute of limitations had run).

We recognize that both our Court and our Supreme Court have interpreted *Crossman* to "mean that [N.C. Gen. Stat. § 1A-1,] Rule 15(c)[,] is not authority for the relation back of claims against a new party, but may allow for the relation back of an amendment to correct a mere misnomer." *Liss v. Seamark Foods*, 147 N.C. App. 281, 283, 555 S.E.2d 365, 367 (2001) (internal quotation marks omitted); s*ee also State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 438, 666 S.E.2d 107, 112 (2008) (stating that, "in *Crossman*[,] we explicitly barred the use of the relation-back doctrine to add a new party"). However, we are persuaded that our Supreme Court's reasoning in *Crossman* applies to the present case and that Plaintiff, here, is not attempting to correct a misnomer in the name of the Sheriff's surety, but rather is

attempting to add a new party. As such, permitting Plaintiff to amend the complaint after the statute of limitations has expired would have the effect of adding a new party to the action, which our Supreme Court in *Crossman* explicitly ruled was not the purpose of Rule 15(c). *Id.* Therefore, we must conclude that the trial court did not abuse its discretion in denying Plaintiff's Rule 15(c) motion to amend.

Plaintiff further argues that the trial court lacked the authority to enter its order granting the Sheriff's motion, based on her contention that the trial court was revisiting a prior decision of another superior court judge which had denied another motion filed by the Sheriff to dismiss her complaint. Indeed, it is well established that, ordinarily, "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). And in the present matter, a superior court judge denied the Sheriff's first motion, a motion which contended that the court "lack[ed] [] jurisdiction over [the Sheriff] due to [] immunity."

We are not persuaded, however, by Plaintiff's argument for two reasons. First, in the hearing on the Sheriff's first motion, the superior court judge expressly stated that he was not considering any argument concerning the running of the statute of limitations and that such argument would have to be made in a separate motion:

> [Defendant's Attorney]: The surety's name is The Hartford and the time has expired to add them. The statute of limitations has expired.
>
> The Court: Well, that's a separate motion that's not before me as to whether it relates back.
>
> [Defendant's Attorney]: If the Court grants them - if they ask for an amendment, they seek to add The Hartford as a party, then -
>
> The Court: Then I decide that or some other judge decides it based upon applicable law as to whether it relates back. But that's not actually before me.
>
> [Defendant's Attorney]: Then that would be a separate motion, a separate 12(b) motion, for statute of limitations.
>
> The Court: Right.

And second, in the second appeal of this matter, our Court's mandate stated that the trial court had jurisdiction to consider the Sheriff's second motion based on his statute of limitations argument that was not considered by the first judge and to grant the Sheriff's motion if so inclined. *Kelley v. Andrews*, ___ N.C. App. ___, ___, 781 S.E.2d 717, ___ (2016) (unpublished).

AFFIRMED.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).