IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1230

Filed: 6 August 2019

Moore County, 18 CVD 699

QUALITY BUILT ADVANTAGE, INC., Plaintiff,

v.

PAM GRAHAM, Defendant.

Appeal by Plaintiff from Order entered 6 September 2018 by Judge James P. Hill, Jr. in Moore County District Court. Heard in the Court of Appeals 24 April 2019.

Chris Kremer for plaintiff-appellant.

The Brough Law Firm, PLLC, by T. C. Morphis, Jr., for defendant-appellee.

MURPHY, Judge.

This appeal arises from Plaintiff Quality Built Advantage, Inc.'s *Complaint For Money Owed*, which was dismissed by the trial court. Where a plaintiff sues a municipal official—purportedly for negligence committed in the course of employment—but fails to allege the substantive elements of such claim or a waiver of governmental immunity and does not join the municipal employer, the complaint is properly dismissed. Here, the complaint reads in its entirety: "Defendant caused [P]laintiff to incur an unnecessary expense of $300.00 for an unnecessary site

inspection[.]" The trial court did not err in granting Defendant Pam Graham's motion to dismiss for failure to state a claim.

Additionally, when the record is incomplete, issues not adequately presented on appeal are deemed waived. A record is incomplete when it does not contain so much of the litigation as is necessary for an understanding of all issues presented on appeal. We will not speculate or make arguments for appellant on issues not adequately presented on appeal. Here, Plaintiff's challenges to the grant of Defendant's motion to dismiss for failure to join a necessary party and denial of its oral motion for leave to amend are waived for failure to provide a complete record.

BACKGROUND

In 2017, Plaintiff submitted a site plan to the Town of Aberdeen ("Town") Planning and Inspections Department as part of the process to obtain the necessary Zoning Compliance Permit to build on Plaintiff's property ("Property") pursuant to the Town's Unified Development Ordinance. The site plan showed four trees were to be removed as part of the construction of a new house on the Property. Defendant served as the Town Planning Director at the time. Along with another town planner, Defendant, in her official capacity, determined efforts needed to be made to preserve the trees as required by the Town's tree conservation and stormwater drainage ordinances.

On 8 August 2017, the Town communicated this requirement via email to Plaintiff and stated, "[w]e are willing to consider information provided by a qualified expert that stormwater cannot be appropriately handled on the lot if the house location is altered as we suggested." Pursuant to this request, Plaintiff hired a licensed engineer to conduct a site visit and prepare a report regarding the Property. The expert endorsed Plaintiff's site plan, leading the Town to authorize the proposed location for the house and the removal of the four trees. Plaintiff was issued a Zoning Compliance Permit on 25 August 2017.

Plaintiff instituted this action by filing a *Complaint For Money Owed* (AOC-CVM-200) in the Moore County District Court Small Claims Division on 25 May 2018. This one-page form constitutes the extent of Plaintiff's complaint. The complaint reads in its entirety: "Defendant caused [P]laintiff to incur an unnecessary expense of $300.00 for an unnecessary site inspection[.]"

The magistrate entered judgment in favor of Defendant on 19 June 2018 and Plaintiff appealed to District Court. On 2 August 2018, Defendant filed an *Answer and Motion to Dismiss*. The trial court heard the case on 27 August 2018 and granted Defendant's motion to dismiss for failure to state a claim and for failure to join a necessary party. The trial court also denied Plaintiff's oral motion for leave to amend its complaint. Plaintiff timely appealed.

ANALYSIS

A. Failure to State a Claim

In its entirety, Plaintiff's complaint reads: "Defendant caused [P]laintiff to incur an unnecessary expense of $300.00 for an unnecessary site inspection[.]" Plaintiff argues on appeal that this language "states a cause of action for negligence if nothing else[,]" and contends that the trial court erred in granting Defendant's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We disagree.

We review dismissals under Rule 12(b)(6) de novo to determine "whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). Dismissal under Rule 12(b)(6) is proper when any of the following three conditions is satisfied: "(1) the complaint on its face reveals that no law supports the 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 the plaintiff's claim." *Id.* "[D]espite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6)." *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979), *disapproved of on other grounds by Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). "Merely asserting a grievance is not enough." *Braun v. Glade Valley Sch., Inc.*, 77 N.C. App. 83, 86, 334 S.E.2d 404, 406 (1985). We find two

independently adequate bases to affirm the trial court's grant of Defendant's Rule 12(b)(6) motion.

First, the face of the complaint reveals Plaintiff failed to state a claim upon which relief may be granted. Plaintiff's only allegation is that Defendant's actions caused it to incur "an unnecessary expense" for "an unnecessary site inspection." Even taking this as true, our review reveals no North Carolina statute or any binding decision that entitles a person seeking a permit to hold a public official or the local government employer responsible for costs the applicant subjectively believes are unnecessary. Plaintiff's complaint does not allege the required substantive elements of a claim for negligence. The essential elements of a common-law negligence claim are "the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 555, 638 S.E.2d 260, 265 (2006). "If no duty exists, there logically can be neither breach of duty nor liability." *Id.* Plaintiff cites *Gallimore v. Sink*, 27 N.C. App. 65, 218 S.E.2d 181 (1975), and *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 752 S.E.2d 661 (2013), to support the legal sufficiency of its claim. These authorities are not applicable here because, in those cases, we found the plaintiffs actually alleged the substantive elements of the claims asserted. *See Gallimore*, 27 N.C. App. at 68, 218 S.E.2d at 183; *see also*

Podrebarac, 231 N.C. App. at 75, 752 S.E.2d at 664. Plaintiff failed to make such allegations.

Further, the allegations in Plaintiff's complaint, when taken as true, do not establish a legal duty. On appeal, Plaintiff makes no attempt to argue the specific legal duty established by its allegation. Plaintiff's suit does not state a claim upon which relief may be granted and simply asserts a grievance against Defendant.

Second, Plaintiff made a fatal mistake in failing to allege a waiver of governmental immunity when Defendant raised governmental immunity as an affirmative defense in her answer. "[W]hen the complaint does not specify the capacity in which a public official is being sued for actions taken in the course and scope of [their] employment, we will presume that the public official is being sued only in [their] official capacity." *White v. Trew*, 366 N.C. 360, 360-61, 736 S.E.2d 166, 166-167 (2013). If a plaintiff intends to allege an individual capacity claim, the complaint must reflect that intention in the caption, allegations or relief sought. *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724-725 (1998). Our Supreme Court in *Mullis* described three mandatory indicia of capacity: (1) pleadings should indicate in the caption whether defendant is being sued "in his official capacity" or "in his individual capacity"; (2) the allegations as to the extent of liability claimed should provide further evidence of capacity; and (3) the prayer for relief should indicate whether plaintiff seeks to recover damages from defendant individually or

as an agent of the governmental entity. *Id.* At least one mandatory indicia is absent here.

The complaint's caption does not use the words "in [her] official capacity" or "in [her] individual capacity." Further, the allegation describes the site inspection as unnecessary, and that it was caused to be incurred by Defendant. An individual cannot cause another individual or entity to take specific action in this manner that the party deems unnecessary unless the individual was exercising governmental authority. As the complaint does not specify the capacity and its allegation regards actions taken in the course and scope of Defendant's employment with the Town, we conclude she is being sued in her official capacity.

Our Supreme Court has previously noted, "official-capacity suits are merely another way of pleading an action against the governmental entity." *Mullis*, 347 N.C. at 554-555, 495 S.E.2d at 725 (citing *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21-22 (1997)). "Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits." *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). It applies when the government entity is being sued for the performance of a governmental function. *Id.*

"In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 899 (2017). A complaint must allege facts that, if taken as true, are sufficient to establish a waiver. *Id.* at 48, 802 S.E.2d at 899. Taking Plaintiff's statement that "Defendant caused [P]laintiff to incur an unnecessary expense of $300.00 for an unnecessary site inspection" as true, the complaint still does not allege any facts sufficient to establish a waiver of immunity.

As the complaint merely alleges a grievance and Plaintiff did not allege a waiver of governmental immunity, we reject Plaintiff's argument and affirm the trial court's grant of Defendant's motion to dismiss for failure to state a claim.

B. Failure to Join a Necessary Party

Plaintiff also argues the trial court erred in granting Defendant's motion to dismiss for failure to join a necessary party pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure. In its written order, the trial court failed to recite the name of the necessary party and did not explain why such an unnamed party was necessary. Defendant suggests on appeal that the Town is the unnamed necessary party. In contrast, Plaintiff contends that the Town is not a necessary party because Plaintiff intended to sue Defendant only in her individual capacity and that its claim should not have been dismissed unless the defect could not have been cured.

"A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence." *Crosrol Carding Devs. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971). As to the review of a dismissal based upon Rule 12(b)(7) for failure to join a necessary party, "dismissal . . . is proper only when the defect cannot be cured[.]" *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E.2d 19, 22, *cert. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981). However, in this case Plaintiff did not provide an adequate record for us to determine whether the defect could be cured, thus waiving this issue.

"This Court has repeatedly noted that it is the appellant's duty to ensure that the record is complete. Without evidence in the record of error by a trial judge, the appellate court is not required to and should not assume error on the part of the trial judge." *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 430, 610 S.E.2d 237, 239 (2005) (citation omitted). In our review, we can look no further than the record presented on appeal, as no transcript was provided by Plaintiff. *See* N.C. R. App. P. 9(a) (2019) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.").

We are unable to review Plaintiff's challenge to the trial court's conclusion that the defect could not be cured because Plaintiff failed to include a transcript of the

hearing on Defendant's motion to dismiss that would provide any basis for finding error. *See* N.C. R. App. P. 9(a)(1)(e) (2019) ("The record on appeal in civil actions . . . shall contain: . . . so much of the litigation . . . as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record . . . or designating portions of the transcript to be so filed[.]"). Plaintiff does not suggest on appeal how the defect could be cured, and it is not our role to speculate or create arguments to solve this defect. *See First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010) ("It is not the role of the appellate courts . . . to create an appeal for an appellant, . . . nor is it the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein.") (internal quotation marks and citations omitted). Plaintiff's argument regarding the trial court's Rule 12(b)(7) ruling is dismissed.

C. Motion for Leave to Amend

Plaintiff argues that, even if the complaint failed to state a claim upon which relief may be granted or failed to join a necessary party, the trial court abused its discretion by denying its oral motion for leave to amend pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure. Plaintiff never filed a written motion seeking leave to amend the complaint and only so moved during the hearing on Defendant's motion to dismiss. The trial court denied Plaintiff's oral motion, which

Plaintiff contends constitutes an abuse of discretion because the court "fail[ed] to declare any reason for the denial."

Denial of a motion to amend "will not be disturbed on appeal absent a showing of an abuse of discretion." *NationsBank of North Carolina, N.A. v. Baines*, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994). The trial court's ruling on a motion to amend "is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "In the absence of any declared reason for the denial of leave to amend, this Court may examine any apparent reasons for such denial." *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 45, 626 S.E.2d 315, 324-325 (2006), *disc. rev. denied*, 360 N.C. 531, 633 S.E.2d 674 (2006). Proper reasons for justifying denial of an amendment are (1) undue delay, (2) bad faith, (3) undue prejudice, (4) futility of amendment, and (5) repeated failure to cure defects by previous amendments. *Id.* at 45, 626 S.E.2d at 325.

As discussed earlier, it is Plaintiff's duty to ensure the record is complete, and we will not assume error on the part of the trial judge. *Faulkenberry*, 169 N.C. App. at 430, 610 S.E.2d at 239. Plaintiff again failed to meet this duty insofar as the record is not sufficient to show the trial court may have abused its discretion in denying the oral motion for leave to amend. Plaintiff does not provide us with a transcript of the

hearing that might suggest the trial court's reasoning for justifying its denial, which is essential to determining whether an abuse of discretion occurred. *See* N.C. R. App. P. 9(a)(1)(e) (2019). The transcript or a narrative could also be informative as to what Plaintiff's proposed amendment included and whether such an amendment would have been futile. Also, Plaintiff does not argue on appeal what its amendment would have been. It is not possible to determine whether there was an abuse of discretion without engaging in improper speculation. *See First Charter Bank*, 203 N.C. App. at 580, 692 S.E.2d at 463. This challenge by Plaintiff is likewise dismissed.

CONCLUSION

The trial court did not err in granting Defendant's motion to dismiss for failure to state a claim. Plaintiff's challenges to the grant of Defendant's motion to dismiss for failure to join a necessary party and to the denial of its motion for leave to amend are dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).