IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-239

No. COA20-525

Filed 1 June 2021

Cumberland County, No. 19 CVS 4382

RICHARD BRADLEY, II and JOSHUA CHRISTIAN BRADLEY, Plaintiffs,

v.

CITY OF FAYETTEVILLE, et al., Defendants.

Appeal by Plaintiffs from order entered 17 January 2020 by Judge A. Graham Shirley in Cumberland County District Court. Heard in the Court of Appeals 23 March 2021.

Richard A. Bradley II, pro se.

NCLEAG, PLLC, by D. Brandon Christian, for Defendant-Appellee City of Fayetteville.

GRIFFIN, Judge.

¶ 1 Richard Bradley, II ("Plaintiff"), appeals from the trial court's order dismissing his claims against the City of Fayetteville (the "City") and four unnamed police officers. Plaintiff contends the trial court erred by holding that Plaintiff (1) failed to properly plead that the City waived governmental immunity and (2) failed to properly serve the four unnamed police officers with process. After careful review, we affirm.

I. Factual and Procedural Background

¶ 2 Plaintiff is a resident of Fayetteville. On 11 September 2018, Plaintiff received a citation for "Dog Running at Large" from the Cumberland County Animal Control ("CCAC"). While Plaintiff was discussing his citation with officers from CCAC, a police officer from the Fayetteville Police Department ("FPD") responded to the scene, interrupted the discussion, and demanded identification from Plaintiff. The police officer told Plaintiff "that he was conducting an investigation into who Plaintiff is." Plaintiff asked what crime he was suspected of committing. The police officer never articulated a crime. The police officer told Plaintiff that you must always have identification on you under North Carolina law. The officer also asserted his belief that you are required to furnish that identification when requested to do so by a police officer.

¶ 3 The police officer then detained Plaintiff in his yard for an hour while waiting for two more police officers to provide backup**.** Plaintiff continued to deny the police officer's repeated requests for identification during this time. After the two additional officers arrived, an officer entered Plaintiff's yard, handcuffed Plaintiff, and placed Plaintiff in the back of a patrol car. Plaintiff then requested that a supervising officer visit the scene, hopeful that the supervising officer would clarify the situation. The three police officers detained Plaintiff in a patrol car for an additional forty minutes before a supervising officer from the FPD arrived and ordered the three police officers

to "cut [Plaintiff] loose."

¶ 4 The next day, on 12 September 2018, Plaintiff filed an internal affairs complaint with the FPD regarding his treatment by the FPD police officers. On 7 March 2019, Plaintiff received a disposition from the FPD Chief of Police. This disposition stated that the police officers detained Plaintiff on September 11 for violation of local ordinances under N.C. Gen. Stat. § 14-4 and for resisting, delaying, and obstructing an investigation under N.C. Gen. Stat. § 14-223. Plaintiff never received the results of the internal affairs investigation.

¶ 5 Plaintiff filed a complaint and issued a summons on 23 July 2019. The complaint named the "City of Fayetteville, & Officer _____, & Officer _____, & Officer _____, & Officer _____" as defendants. The General Civil Action Cover Sheet accompanying the complaint and summons named only the "City of Fayetteville, NC" as defendant. The summons named as defendant the "[FPD] responding officers (2011 hours, 11SEP18)". The Sheriff of Cumberland County served the summons on the City by delivering a copy to an FPD records supervisor and to the Fayetteville city attorney. No summons was ever served on any individual officer of the FPD.

¶ 6 The City filed a motion to dismiss Plaintiff's complaint on 16 August 2019. Following a hearing, the trial court entered an order dismissing Plaintiff's complaint pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. The court dismissed Plaintiff's claims against the City with prejudice, because Plaintiff failed

to allege a waiver of governmental immunity by the City. The court dismissed Plaintiff's claims against the four unnamed police officers without prejudice for insufficient process and service of process, because "[n]o Police Officer of the City of Fayetteville ha[d] been named [in the complaint] or served in his/her individual capacity." Plaintiff timely appeals.

II. Analysis

A. Jurisdiction

¶ 7 We first address whether Plaintiff's appeal is properly before this Court at this time. The City argues that Plaintiff's appeal is interlocutory and therefore not ripe for review by this Court. We disagree.

¶ 8 "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "[I]nterlocutory decrees are immediately appealable . . . when they affect some substantial right of the appellant and will work an injury to him if not corrected before an appeal from final judgment." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 433 (1980). An interlocutory order, in particular, may also be immediately appealed where the order "discontinues

the action" in the trial court. *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381; N.C. Gen. Stat. § 1-277(a) (2019).

¶ 9 Assuming Plaintiff's appeal is interlocutory, Plaintiff's claims against the City are appropriate for interlocutory review. Our Court has consistently held that an appeal from an order which grants a motion to dispose of a case on grounds of governmental immunity from suit affects a substantial right.[1] *See Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605–06 (2018); *Greene v. Barrick*, 198 N.C. App. 647, 650, 680 S.E.2d 727, 730 (2009) (noting Court's belief that a grant of sovereign immunity implicates the same issues as a denial of immunity); *Odom v. Lane*, 161 N.C. App. 534, 535, 588 S.E.2d 548, 549 (2003) ("[A]n order allowing summary judgment on grounds of governmental immunity for one of several defendants affect[s] a substantial right.").

¶ 10 The trial court's order granted the City's motion to dismiss on grounds of governmental immunity from suit pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Precedents are unclear as to whether

[1] We acknowledge the City's argument for a change in the law in accordance with dicta from *Ballard*. *See Ballard*, 257 N.C. App. at 564, 811 S.E.2d at 605 (opining that an "appeal from an order granting a motion to dismiss based on sovereign or governmental immunity [sh]ould not automatically affect a substantial right, simply because the ruling involved immunity"). However, as the *Ballard* Court recognized, we are bound to adhere to the decisions of prior panels of this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

governmental immunity is best analyzed as a lack of subject-matter jurisdiction under Rule 12(b)(1), a lack of personal jurisdiction under Rule 12(b)(2), or a party's failure to state a claim for which relief can be granted under Rule 12(b)(6). *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982) (acknowledging but declining to decide this "crucial" distinction); *Davis v. Dibartolo*, 176 N.C. App. 142, 144–45, 625 S.E.2d 877, 880 (2006) (declining to review interlocutory appeal of denial of motion to dismiss for lack of subject matter jurisdiction due to sovereign immunity under Rule 12(b)(1), but reviewing denial of Rule 12(b)(6) motion based upon governmental immunity); *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245–46 (2001) (declining to review interlocutory appeal of denial of motion to dismiss due to sovereign immunity under Rule 12(b)(1), but reviewing denial of Rule 12(b)(2) motion for lack of personal jurisdiction based upon governmental immunity).

¶ 11 There is no need to resolve this uncertainty in the present case. The trial court based its ruling on Rules 12(b)(1), 12(b)(2), and 12(b)(6). The cases cited above decline to review an interlocutory appeal under Rule 12(b)(1). They do reach the merits of interlocutory appeals under Rules 12(b)(2) and 12(b)(6). Our current precedent supports this Court's consideration of Plaintiff's interlocutory appeal under two of the three grounds listed in the trial court's order. *See Teachy*, 306 N.C. at 328, 293 S.E.2d at 184 (deeming the distinction "crucial in North Carolina because [N.C. Gen. Stat.

§] 1–277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion"). Therefore, the dismissal of Plaintiff's claims against the City is properly before this Court.

¶ 12 The dismissal of Plaintiff's claims against the four unnamed officers is also properly before this Court. Assuming Plaintiff's appeal is interlocutory, the trial court's order dismissed Plaintiff's present case against the four unnamed officers, discontinuing the action and preventing further developments in the case at this time. *See* N.C. Gen. Stat. § 1-277(a) (allowing immediate appeal where an order "discontinues the action").

¶ 13 The City contends that the trial court's order dismissing Plaintiff's claims against the unnamed officers is not immediately appealable because it dismissed those claims without prejudice for a curable reason. The City acknowledges that no binding North Carolina precedent to this effect exists. The City instead directs this Court to a recent decision from the Fourth Circuit Court of Appeals. In *Bing v. Brivo Systems, LLC*, the Fourth Circuit reiterated its rule that a dismissal without prejudice is only immediately appealable where "the grounds for dismissal clearly indicate that no amendment in the complaint could cure the defects in the plaintiff's case." *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 610 (4th Cir. 2020) (citation omitted). We recognize the City's extensive argument encouraging this Court to adopt the Fourth Circuit's jurisprudence under these circumstances. We do not see the need

for such a ruling in the present case. In any event, the trial court's decision was based upon Plaintiff's failure to make timely service of process on the individual responding police officers—not solely on Plaintiff's curable failure to properly name the officers in his complaint.

B. Motion to Dismiss

1. Claims Against the City

¶ 14 Plaintiff argues that the trial court erred by dismissing his claims against the City because his complaint "alleged facts that if taken to be true, are sufficient to establish a waiver of (governmental) immunity." We disagree. The trial court properly dismissed Plaintiff's claims against the City because Plaintiff failed to properly plead that the City waived its governmental immunity from suit.

¶ 15 Governmental immunity "ordinarily grants the state, its [local government entities], and its public officials, in their official capacity, an unqualified and absolute immunity from law suits" arising out of their "performance of a governmental, rather than proprietary, function." *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citation omitted). A local government entity, such as a county or city, "may waive its governmental immunity by (1) engaging in a proprietary activity; (2) entering into a valid contract, thereby consenting to be sued; or (3) purchasing liability insurance, but only to the extent of coverage." *Fuller v. Wake Cnty.*, 254 N.C. App. 32, 42, 802 S.E.2d 106, 113 (2017). "In order to overcome

a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity." *Paquette*, 155 N.C. App. at 418, 573 S.E.2d at 717. "Absent such an allegation, the complaint fails to state a cause of action." *Id.*

¶ 16 Plaintiff correctly asserts that a complaint does not need to use any "particular language" to assert a waiver of governmental immunity; the complaint "need only allege facts that, if taken as true, are sufficient to establish a waiver by the State [or local government entity] of sovereign immunity." *Green v. Kearney*, 203 N.C. App. 260, 268, 690 S.E.2d 755, 762 (2010) (citations omitted). Plaintiff's complaint does not reference governmental immunity nor the established ways in which governmental immunity can be waived. Plaintiff's complaint pleads only the facts of the interaction with the FPD responding police officers which prompted his claims.

¶ 17 Plaintiff's complaint does not, and could not, allege that the City waived its governmental immunity. First, the City of Fayetteville did not engage in a proprietary activity through the FPD police officers executing their official duties. *See Arrington v. Martinez*, 215 N.C. App. 252, 257, 716 S.E.2d 410, 414 (2011) ("The provision of police services is a governmental function which is protected by governmental immunity[.]"). Second, Plaintiff does not allege the existence of a contract between Plaintiff and the City. *Howard v. Cnty. of Durham*, 227 N.C. App. 46, 50, 748 S.E.2d 1, 3 (2013) ("[I]f plaintiff properly pled a valid contract between her and [the local government entity], [the entity] would not be protected by sovereign

immunity as to a claim for breach of the contract."). Finally, there is no indication in Plaintiff's complaint, nor in the record before the Court, that the City waived its immunity through the purchase of liability insurance. N.C. Gen. Stat. § 160A-485 (2019); s*ee Price v. Davis*, 132 N.C. App. 556, 559, 512 S.E.2d 783, 786 (1999). Therefore, the trial court did not err in dismissing Plaintiff's claims against the City because Plaintiff failed to allege any form of waiver of governmental immunity by the City.

2. Claims Against the Unnamed Officers

¶ 18 Plaintiff also argues that the trial court erred by dismissing his claims against the four unnamed officers. Plaintiff contends that he alleged in his complaint sufficient facts to show that the unnamed officers committed tortious acts outside the scope of their official duties. But the trial court properly dismissed Plaintiff's claims for a different reason: Plaintiff failed to issue process and service of process on the defendant officers pursuant to Rule 4 of the North Carolina Rules of Civil Procedure.

¶ 19 The trial court's order dismissed Plaintiff's claims against the four unnamed officers pursuant to Rules 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure for "insufficient process and service of process" in accordance with Rule 4. *See* N.C. R. Civ. P. 12(b)(4), (b)(5). Under Rule 4 of the North Carolina Rules of Civil Procedure, the court has personal jurisdiction over an individual defendant only where the plaintiff: (1) issues a summons directed to the defendant which informs the

defendant of the case against them and notifies the defendant that they are required to appear, N.C. R. Civ. P. 4(b); and (2) serves process on the defendant in a manner which is reasonably calculated to provide the defendant with notice of the case against them, N.C. R. Civ. P. 4(j)(1).

¶ 20 A summons must be served within sixty days of issuance or extended within ninety days of issuance. N.C. R. Civ. P. 4(c), 4(d). Failure to serve or continue a summons results in a discontinuance of the action with respect to each defendant not properly served. N.C. R. Civ. P. 4(e). "Unless notice is given to the defendant of proceedings against him and he is thereby given the opportunity to appear and be heard or he appears voluntarily, the court has no jurisdiction to proceed to judgment even though it may have subject matter jurisdiction." *Harris v. Maready*, 311 N.C. 536, 542, 319 S.E.2d 912, 916 (1984).

¶ 21 Plaintiff issued the summons and complaint in this case on 23 July 2019. The summons did not list any of the four individual officers by name. Plaintiff's summons was directed only to "Fayetteville Police Department responding officers (2011hrs 11SEP18)." The summons was delivered to the City's municipal attorney and an FPD records supervisor and was considered proper service on the City itself.[2] No summons

[2] Proper service under Rule 4 specifies that service of a summons and complaint must be delivered to the citys manager, mayor, or clerk—not to the city attorney or a representative of the police department. *See* N.C. R. Civ. P. 4(j)(5). However, the City chose to waive proper service and sought dismissal based on governmental immunity in this case.

was ever served on any individual officer. When the trial court entered the order dismissing Plaintiff's claims on 17 January 2020—well over ninety days after Plaintiff issued the summons—there was no information in the record before the court which showed that the individual officers had been named and notified of Plaintiff's claims. The trial court never obtained personal jurisdiction over any of the responding FPD police officers. Therefore, the court did not err by determining that the action had been discontinued with respect to the four unnamed officers and dismissing Plaintiff's claims.

III. Conclusion

¶ 22 Based on the foregoing reasons, we hold that the trial court did not err in dismissing Plaintiff's claims. The trial court's order is affirmed.

AFFIRMED.

Judges INMAN and WOOD concur.

Report per Rule 30(e).