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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-778

No. COA21-586

Filed 15 November 2022

Watauga County, No. 20CVS104

TOWN OF BOONE and MARSHALL ASHCRAFT, in his individual capacity as a resident and taxpayer of the town of Boone, Plaintiffs,

v.

WATAUGA COUNTY, TOWN OF SEVEN DEVILS, and TOWN OF BLOWING ROCK, Defendants, and TOWN OF BEECH MOUNTAIN, Intervenor.

Appeal by Plaintiffs from Order entered 23 March 2021 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 6 April 2022.

Meade Law, PLLC, by Allison M. Meade, and Sumrell Sugg, P.A., by Scott C. Hart and Frederick H. Bailey, III, for Plaintiffs-Appellants.

Poyner Spruill LLP, by Andrew H. Erteschik and John Michael Durnovich, and Eggers, Eggers, Eggers & Eggers, PLLC, by Stacy C. Eggers IV, for Defendant-Appellee Town of Beech Mountain.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Anthony S. di Santi and Andrea Capua, and Womble Bond Dickinson (US) LLP, by Bradley O. Wood, for Defendant-Appellee Watauga County.

Deal, Moseley & Smith, LLP, by Allen C. Moseley, for Defendant-Appellee Town of Blowing Rock.

Angle, Rupp & Rupp, P.A., by Robert B. Angle, Jr., for Defendant-Appellee Town of Seven Devils.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Town of Boone (Boone) and Marshall Ashcraft (Ashcraft) (collectively, Plaintiffs) appeal from the trial court’s Order granting Motions to Dismiss this action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure filed by County of Watauga (Watauga County), Town of Seven Devils (Seven Devils), Town of Blowing Rock (Blowing Rock) and Town of Beech Mountain (Beech Mountain) (collectively, Defendants¹). The Record before us tends to reflect the following:

¶ 2 N.C. Gen. Stat. § 105-472 authorizes North Carolina counties that have adopted a local sales and use tax to choose how the North Carolina Department of Revenue—which collects and allocates those taxes to the counties—distributes those taxes between the counties and their municipalities either on a per capita or an ad valorem basis. Under the per capita method, “[t]he net proceeds of the tax collected in a taxing county shall be distributed to that county and to the municipalities in the county on a per capita basis according to the total population of the taxing county,

¹ Beech Mountain is not a named defendant but is rather an intervenor in this case. However, at least for purposes of this appeal, Beech Mountain is aligned with the named defendants. On appeal to this Court, the parties to this case caption Beech Mountain as a defendant in their appellate filings and refer generally to “Defendants” as including Beech Mountain. For ease of reading, and solely for purposes of this appeal, we include Beech Mountain under our term “Defendants”.

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plus the total population of the municipalities in the county.” N.C. Gen. Stat. § 105-472(b)(1) (2021). Under the ad valorem method, “[t]he net proceeds of the tax collected in a taxing county shall be distributed to that county and the municipalities in the county in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding the distribution.” N.C. Gen. Stat. § 105-472(b)(2).

¶ 3

In 2013, the Watauga County Board of Commissioners adopted a resolution choosing the ad valorem method for purposes of distributing local sales tax proceeds between the county and its municipalities. Prior to 2013, Watauga County had elected to have these local sales tax proceeds distributed on a per capita basis. The result of choosing the ad valorem method of distribution was to reduce the amount of funds distributed by the Secretary of Revenue to Watauga County itself while increasing the amount of funds distributed to Seven Devils, Blowing Rock, and Beech Mountain. The amount of funds distributed to Boone decreased.

¶ 4

In adopting the resolution electing the ad valorem method, however, Watauga County also entered into separate agreements with the three municipalities—Seven Devils, Blowing Rock, and Beech Mountain. Under these agreements, Seven Devils, Blowing Rock, and Beech Mountain each agreed to pay a portion of the local sales taxes distributed to them to Watauga County as part of their budget process. Boone, however, was excluded from these agreements.

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¶ 5

On 20 February 2020, almost seven years later, Plaintiffs filed a Complaint against Watauga County alleging Watauga County had acted in violation of N.C. Gen. Stat. § 105-472 by choosing the ad valorem distribution method in 2013 and continuing to use that method while also operating under the agreements with Seven Devils, Blowing Rock and Beech Mountain. The gist of the allegations of Plaintiffs' Complaint was that Section 105-472 only authorized two local sales tax distribution methods—ad valorem or per capita—and Watauga County's adoption of the ad valorem method combined with its agreements with the three municipalities created a third hybrid local sales tax distribution that was neither per capita nor a true ad valorem distribution. Thus, Plaintiffs asserted, Watauga County was in violation of Section 105-472. Plaintiffs sought declaratory and injunctive relief against Watauga County and, additionally, monetary damages.

¶ 6

On 21 May 2020, the trial court entered an Order, upon consent of the parties, permitting Beech Mountain to intervene in the lawsuit. On 26 May 2020, Plaintiffs filed an amended complaint including Beech Mountain as intervenor. Both Watauga County and Beech Mountain, respectively, filed Answers and Motions to Dismiss, including motions pursuant to N.C.R. Civ. P. 12(b)(1), contending Plaintiffs lacked standing to sue in that they failed to show any injury in fact and the matter involved a political question not redressable by the courts.

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¶ 7 On 30 September 2022, the trial court entered an order determining Blowing Rock and Seven Devils were both necessary parties to the action and requiring Plaintiffs to join them in this action or be subject to dismissal. Plaintiffs did so by issuance of summonses to those two municipalities in October 2020. Plaintiffs filed a Second Amended Verified Complaint filed 9 December 2020 naming Seven Devils and Blowing Rock as party-defendants.

¶ 8 Defendants subsequently each filed Motions to Dismiss pursuant to Rule 12(b)(1) alleging Plaintiffs lacked standing and the trial court lacked subject-matter jurisdiction over this matter on the bases Plaintiffs had failed to allege the infringement of a legal right and that this action was barred by the political question doctrine. On 23 March 2021, the trial court entered its Order granting Defendants' Motions to Dismiss and dismissed Plaintiffs' lawsuit. The trial court concluded:

Plaintiffs lack standing because they have failed to identify a legal right at stake and have failed to identify any infringement of a legal right. Therefore, the Court does not have subject-matter jurisdiction to decide their claims. In addition, the Court concludes that the Plaintiffs' claims fail under the political-question doctrine. Therefore, for this additional reason, the Court does not have subject-matter jurisdiction to decide their claims.

On 14 April 2021, Plaintiffs timely filed written Notice of Appeal from the trial court's 23 March 2021 Order.

Issue

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¶ 9 The dispositive issue on appeal is whether Plaintiffs have shown the infringement of a legal right under N.C. Gen. Stat. § 105-472 through Watauga County’s adoption of an ad valorem method for the distribution of local sales taxes to confer standing on Plaintiffs to bring this action and to provide the trial court subject-matter jurisdiction.

Analysis

¶ 10 The trial court in this case dismissed this action for lack of subject-matter jurisdiction under Rule 12(b)(1) on the basis Plaintiffs lacked standing to bring this action and, additionally, on the basis Plaintiffs’ lawsuit raised a non-justiciable political question. With respect to standing, Plaintiffs contend the trial court erred in dismissing this action arguing the North Carolina Declaratory Judgment Act provides them standing to declare their rights and the lawfulness of Watauga County’s actions under N.C. Gen. Stat. § 105-472. Plaintiffs submit that they “seek a declaratory judgment proclaiming Watauga County’s adoption of [a] hybrid sales tax distribution framework to be outside of that which is permitted under [N.C. Gen. Stat.] § 105-472.”

¶ 11 “Standing is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction.” *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quotation marks omitted). “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear

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the claim.” *Estate of Apple v. Commercial Courier Express Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). “As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing.” *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007). Standing may properly be challenged by a 12(b)(1) motion to dismiss. *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (“[s]tanding concerns the trial court’s subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss.”). “The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*.” *Fairfield Harbour Prop. Owners Ass’n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011).

¶ 12 The North Carolina Supreme Court recently clarified, under North Carolina law, standing exists when a party alleges the infringement of a legal right under a valid cause of action. *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, 376 N.C. 558. There, in relevant part, the Supreme Court explained:

When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because “every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.” N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, even where a plaintiff has no factual injury and the action is solely in the public interest, the plaintiff has standing to vindicate

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the legal right so long as he is in the class of persons on whom the statute confers a cause of action.

Id. ¶ 82.

¶ 13 Here, Plaintiffs contend the North Carolina Declaratory Judgment Act provides standing to bring their action against Watauga County. Specifically, Plaintiffs point to N.C. Gen. Stat. § 1-254 of the Act which provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (emphasis added). As a general matter, under this statute, the Declaratory Judgment Act does provide Plaintiffs a cause of action for declaratory judgment under proper circumstances.

¶ 14 Plaintiffs assert they are seeking a declaratory judgment that, under N.C. Gen. Stat. § 105-472, Watauga County not be permitted to enter into agreements with Seven Devils, Blowing Rock, and Beech Mountain to receive funds from those municipalities from their local sales tax distributions. Section 105-472, however, governs how the North Carolina Department of Revenue is to allocate and distribute local sales taxes. Subsection (a) requires the Secretary of Revenue to allocate the net proceeds of local sales taxes to the county in which it was collected. N.C. Gen. Stat.

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§ 105-472(a). Subsection (b) directs how the Secretary is to distribute allocated funds between a county and its municipalities. N.C. Gen. Stat. § 105-472(b). Subsection (b) provides: “The Secretary shall divide the amount allocated to each taxing county among the county and its municipalities in accordance with the method determined by the county.” *Id.* The statute directs counties to adopt a resolution electing either the ad valorem method or the per capita method for distribution. *Id.* The statute further sets out the timing and process for a county to follow in adopting the resolution and delivering the resolution to the Secretary and, also, what happens if a county does not timely adopt or deliver the resolution:

The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the fiscal year following the succeeding fiscal year. In order for the resolution to be effective, a certified copy of it must be delivered to the Secretary in Raleigh within 15 calendar days after its adoption. If the board fails to adopt a resolution choosing a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year.

N.C. Gen. Stat. § 105-472(b).

¶ 15 Here, Plaintiffs’ real concern is not Watauga County’s choice of the ad valorem distribution method—although they have a clear preference for the per capita

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method—but rather the agreements between Watauga County and the municipal defendants. Plaintiffs acknowledge they have no right to compel Watauga County to elect a particular method of distribution. Indeed, it is not clear Plaintiffs have any right to compel *any* resolution electing a distribution method—as in the absence of a new resolution, the Secretary simply continues to distribute the local sales tax proceeds under the existing method. Indeed, Plaintiffs do not contend the resolution has not been timely adopted or delivered to the Secretary. Plaintiffs also make no contention the Secretary has not distributed the funds correctly or in non-compliance with the statute.

¶ 16 N.C. Gen. Stat. § 105-472, however, addresses how the Department of Revenue is to distribute the funds between a county and the municipalities, how the county is to determine which distribution method is to be used, and how to inform the Secretary of that determination to effectuate the distribution of funds. It does not address how those funds may be used after distribution. Nor does it address any relationship between the county and municipalities beyond the Secretary’s distribution of funds. As such, specifically in the context of the allegations in this case, Plaintiffs are not parties whose “rights, status or other legal relations are affected by” Section 105-472. *See* N.C. Gen. Stat. § 1-254. Indeed, and crucially, Plaintiffs make no contention the agreements between Defendants or the remittance of funds by Seven Devils, Blowing

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Rock, and Beech Mountain to Watauga County are otherwise *ultra vires* or impermissible.²

¶ 17 Thus, Plaintiffs have not shown the infringement of any legal right protected by Section 105-472. Therefore, in the context of the allegations in this case, because Plaintiffs are not parties whose “rights, status or other legal relations are affected by” Section 105-472, Plaintiffs are not parties entitled to bring a declaratory judgment action under N.C. Gen. Stat. § 1-254. Consequently, Plaintiffs do not have standing to bring this action and the trial court properly dismissed Plaintiffs’ action for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. Because we conclude the trial court properly dismissed Plaintiffs’ suit on this basis, we do not reach the issue of whether this action was otherwise barred by the political question doctrine.

Conclusion

¶ 18 Accordingly, for the foregoing reasons, we affirm the trial court’s 23 March 2021 Order dismissing Plaintiffs’ Second Amended Complaint.

² For instance, in their Reply Brief to this Court, Plaintiffs assert they “have continuously maintained that the gravamen of this action is whether Watauga County exceeded the General Assembly’s grant of authority by intentionally circumventing the tax revenue distribution methods authorized in N.C.G.S. § 105-472(b). The Defendant-Municipalities have no authority under N.C.G.S. § 105-472(b), and therefore it is not their actions that Plaintiffs have challenged.” Plaintiffs further articulate the issue they present in their lawsuit as “has Watauga County acted unlawfully and exceeded its statutory authority under N.C.G.S. § 105-472(b)?”

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AFFIRMED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).