

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-474

NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

CAPTRAN NEVADA CORP.,
Plaintiff

v.

Moore County
No. 10 CVS 650

THE KIRKLIN LAW FIRM,
Defendant

Appeal by plaintiff from order entered 6 December 2010 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 26 October 2011.

Shirley & Adams, PLLC, by Ryan J. Adams, for plaintiff-appellant.

Van Camp, Meacham & Newman, PLLC, by James R. Van Camp, for defendant-appellee.

Bryant, Judge.

Where plaintiff's complaint fails to state a claim, and plaintiff fails to make a proper motion to amend the complaint, the trial court did not err in granting defendant's motion to dismiss based on Rule 12(b)(6).

The evidence before the trial court tended to show that CapTran Funding #1, Inc., and defendant, The Kirklin Law Firm ("defendant"), entered into a loan agreement on 22 July 2003 whereby CapTran Funding #1, Inc., would loan defendant up to \$400,000.00. A few months after this agreement was executed, CapTran Funding #1, Inc., assigned all of its rights, title and interests in the loan agreement to CapTran Reinsurance Ltd., which subsequently assigned all of its right, title and interest to CapTran Nevada Corp. ("plaintiff") in 2009.

Plaintiff filed a complaint against defendant on 31 March 2010 alleging, among other things, failure and refusal to repay loans in the amount of \$140,000.00 plus interest. Defendant answered and moved to dismiss pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, and for judgment on the pleadings pursuant to Rule 12(c). The trial court conducted a hearing on defendant's motion to dismiss on 29 November 2010. During the hearing, plaintiff offered in open court to amend its complaint. After review, the trial court granted defendant's motion to dismiss with prejudice pursuant to Rule 12(b) but did not address plaintiff's offer to amend. Plaintiff appeals.

On appeal, plaintiff raises the following issues: whether the trial court erred in (I) denying plaintiff's motion to amend its complaint, and (II) granting defendant's motion to dismiss.

I

Plaintiff argues the trial court erred in denying plaintiff's motion to amend its complaint. We disagree.

North Carolina General Statutes, Section 1A-1, Rule 15(a) provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend his pleading *only by leave of court* or by written consent of the adverse party" (2011) (emphasis added). "A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 601 (2004) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)).

During the hearing on defendant's motion to dismiss, defendant argued for dismissal based on deficiencies in plaintiff's complaint. In response, plaintiff offered to amend its complaint, stating "Your Honor, I don't think they have any merit, but we can solve that real simply if we're allowed to amend." Again, in response to defendant's argument for dismissal based on Rule 12(b)(6), plaintiff stated "[W]e don't think they have any merit, but we can take care of those real easily by amending the complaint, if Your Honor is so inclined."

On appeal, plaintiff argues it was error for the trial court to deny its motion to amend. Defendant, on the other hand, contends that plaintiff never actually made a motion to amend its complaint, rather, that plaintiff merely let the trial court know that it was willing to amend its complaint. Defendant argues this was insufficient as a matter of law.

After review, we find that this case is controlled by *Hunter*, 162 N.C. App. 477, 593 S.E.2d 595. In *Hunter*, evaluating facts very similar to those in the instant case, this Court concluded that "plaintiffs' oral offer that they 'would be willing to amend the petition and get more facts' at the Rule 12(b)(6) hearing [was] not a sufficient request for leave to amend."

Here, notwithstanding that plaintiff also cited Rule 15¹ in support of its offer to amend and made a proffer that defendant would not be prejudiced if plaintiff was allowed to amend its complaint, plaintiff's offer to the trial court was ambiguous,

¹ Rule 15(a) states "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2011).

it lacked conviction, and it was contingent upon the court's dismissal of the case. See *Helm v. Appalachian State Univ.*, 194 N.C. App. 239, 248, 670 S.E.2d 571, 577 (2008), *rev'd on other grounds*, 363 N.C. 366, 677 S.E.2d 454 (2009) ("The ambiguous language of [the] plaintiff's alleged oral motion is similar to the rejected language in *Hunter*. Here, [the] plaintiff's alleged request to amend was contingent upon the trial court's dismissal of the case and did not adequately inform either the trial court or [the] defendants that she truly intended to amend her complaint; instead, as in *Hunter*, [the plaintiff] indicated a mere willingness to amend her complaint.").

The facts in the instant case cannot be distinguished from *Hunter* and *Helm*. Accordingly, plaintiff's argument is overruled.

II

Plaintiff also argues the trial court erred in granting defendant's motion to dismiss pursuant to Rule 12(b). Defendant's motion to dismiss was based upon three sections of Rule 12(b)²; however, we only address the trial court's order based on Rule 12(b)(6), as it is dispositive. Plaintiff

² We note that plaintiff challenges the trial court's ruling on subject matter jurisdiction and personal jurisdiction and tend to agree with plaintiff that the trial court had jurisdiction. However, because we only reach the dispositive issue we do not further address the jurisdictional issues.

contends that the complaint does indeed state a claim upon which relief can be granted under Rule 12(b)(6). We disagree.

The standard of review for a motion based on Rule 12(b)(6) is "whether, construing the complaint liberally, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002) (citation and internal quotations omitted). "[A] complaint is deemed sufficient to withstand a motion to dismiss under Rule 12(b)(6) where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim." *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380-81 (1987) (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979) (internal quotations omitted)). Further, plaintiff's complaint should not be dismissed "unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Presnell*, 298 N.C. at 719, 260 S.E.2d at 613 (citation omitted).

However, "[d]ismissal is proper when one 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." *Guyton v. FM Lending Services, Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009) (internal quotations omitted) (emphasis added).

The crux of defendant's argument, that plaintiff failed to state a claim upon which relief can be granted, rests upon the special pleading requirements set forth in Rule 9, specifically 9(a), 9(c) and 9(f).

First, defendant alleges plaintiff violated North Carolina Rules of Civil Procedure, Rule 9(c), which requires plaintiff to plead conditions precedent. Rule 9(c) states, "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." N.C.G.S. § 1A-1, Rule 9(c) (2011). Next, defendant argues that plaintiff failed to demonstrate its legal existence and capacity to sue. Rule 9(a) reads in pertinent part that "any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue." N.C.G.S. § 1A-1, Rule 9(a) (2011). Last, defendant contends that plaintiff's complaint fails to comply with Rule 9(f), which states, "[f]or the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of special matter." N.C.G.S. § 1A-1, Rule 9(f) (2011).

We agree with defendant that plaintiff's complaint does contain deficiencies which serve to highlight plaintiff's failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Further, while plaintiff alleges a breach of contract, plaintiff omits information disclosing at what point in time the alleged breach, or breaches, occurred. As a result, we cannot decipher, nor could the trial court, whether the statute of limitations applies.

For these reasons, we find that plaintiff's complaint "on its face reveals the absence of facts sufficient to make a good claim." See *Guyton*, 199 N.C. App. at 33, 681 S.E.2d at 469. Thus, we find the trial court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(6). Accordingly, plaintiff's argument is overruled.

Affirmed.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).