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NO. COA05-362

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

AMY MCCOMB,  
Plaintiff,

v.

New Hanover County  
No. 04 CVS 3250

KENNETH PHELPS,  
Defendant.

Appeal by plaintiff from order entered 7 December 2004 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 19 October 2005.

*Bruce H. Robinson, Jr., for plaintiff-appellant.*

*Pennington & Smith, P.L.L.C., by Ralph S. Pennington, for defendant-appellee.*

HUDSON, Judge.

On 18 August 2004, plaintiff Amy McComb filed a civil complaint against defendant Kenneth Phelps, alleging fraud and intentional infliction of emotional distress. Defendant filed a motion to dismiss the claims pursuant to N.C. R. Civ. P. 12(b)(6) on 22 October 2004, which motion the court granted on 7 December 2004. Plaintiff appeals. As discussed below, we affirm.

Beginning in 1990, plaintiff began an affair with defendant, a married man who told plaintiff he was single. Several years later, plaintiff discovered defendant was married and broke up with

him, but after defendant claimed he was only remaining with his wife until their daughter was of age, plaintiff agreed to resume the relationship. Defendant did not leave his wife when his daughter turned eighteen, and after the daughter turned twenty-one, plaintiff angrily confronted defendant. Defendant hired an attorney to send plaintiff a letter instructing her to stay away from him and his family, and threatening legal action, including claims for "harassment, intentional infliction of emotional distress, alienation of affection, criminal conversation, and other causes of action." The letter concluded with a statement that if plaintiff ever contacted defendant's daughter again, "I will serve you with a lawsuit that will make your head swim. She is just a child. How dare you write such a nasty and vulgar letter to her? Shame on you."

Plaintiff argues that the court erred in dismissing her claims pursuant to N.C. R. Civ. P. 12(b)(6). Our standard of review for a motion to dismiss pursuant to Rule 12(b)(6) is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (internal quotations and citations omitted). In addition, "[t]he complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Id.* at 277-78, 540 S.E.2d at 419.

Plaintiff states in her brief that she has abandoned her fraud claim on appeal. Thus we address only her claim of intentional infliction of emotional distress. To recover under the tort of intentional infliction of emotional distress ("IIED"), a plaintiff must allege "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). "Liability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.'" *Id.* at 447, 276 S.E.2d at 331 (internal citations omitted). Whether plaintiff alleges conduct which can be considered extreme and outrageous is a matter of law, and we review this determination *de novo*. *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002). Only if the court finds that the behavior could be considered extreme and outrageous does the complaint properly withstand dismissal. *Id.* Behavior which is "annoyingly juvenile, obnoxious, and offensive, does not rise to the level of 'outrageous and extreme.'" *Id.* at 24, 567 S.E.2d at 410.

In her brief, plaintiff focuses her argument entirely on the letter she received from defendant's counsel, which threatened lawsuits if plaintiff did not leave defendant alone. Plaintiff does not attempt to argue that defendant's actions or promises during their affair constituted IIED. We thus consider whether the letter sent by defendant's counsel constitutes extreme and outrageous conduct attributable to defendant. An attorney's threat

to file suit, in itself, does not constitute extreme and outrageous conduct. *Burton v. NCNB Nat'l Bank*, 85 N.C. App. 702, 707, 355 S.E.2d 800, 803 (1987); *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 676, 355 S.E.2d 838, 844 (1987) ("sending a letter of demand to an adverse party in anticipation of litigation together with a proposed complaint setting forth the basis of its claim may not be reasonably regarded as extreme and outrageous conduct sufficient to support a claim for intentional infliction of mental distress.") In *Johnson v. Bollinger*, the plaintiff alleged that defendant, an armed animal warden, "'approached plaintiff . . . in an angry, hostile and threatening manner' . . . 'shook his hand in the plaintiff's face and said in a loud, rude and offensive manner . . ., 'You are a stupid son-of-a-bitch,' and 'You are a liar,' and stated further 'I will get you.'". *Johnson v. Bollinger*, 86 N.C. App. 1, 3, 356 S.E.2d 378, 380 (1987). This Court held that this conduct did not rise to the level of extreme and outrageous conduct, noting that:

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion.  
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*Id.* at 6, 356 S.E.2d at 382 (citing *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985)).

We believe that the assertion that "I will serve you with a lawsuit that will make your head swim," while arguably unprofessional, does not exceed the comments discussed in *Johnson v. Bollinger*, *supra*, nor is it an example of "conduct [that] exceeds all bounds usually tolerated by decent society." Nor do the comments in the letter chastising plaintiff for involving defendant's daughter in the dispute, while perhaps unnecessarily personal, rise to the level of extreme and outrageous. Because the court properly concluded that plaintiff had failed to allege the elements of a claim of intentional infliction of emotional distress, dismissal pursuant to Rule 12(b)(6) was appropriate.

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).