

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-912

Filed: 7 June 2016

Guilford County, No. 09 CVS 2437

DAVID WRAY, Plaintiff,

v.

CITY OF GREENSBORO, Defendant.

Appeal by Plaintiff from order entered 8 May 2015 by Judge James C. Spencer, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 26 January 2016.

Carruthers & Roth, P.A., by Kenneth R. Keller and Mark K. York, for the Plaintiff-Appellant.

Smith Moore Leatherwood LLP, by Patrick M. Kane, and Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr., for the Defendant-Appellee.

Wilson, Helms & Cartledge, LLP, by Lorin J. Lapidus, and NCLM, by General Counsel Kimberly S. Hibbard and Associate General Counsel Gregory F. Schwitzgebel, III, for Amicus Curiae, North Carolina League of Municipalities.

DILLON, Judge.

David Wray ("Plaintiff") brought suit against his former employer (Defendant City of Greensboro) to recover certain employee benefits he claims he was due. The trial court dismissed Plaintiff's claim based on governmental immunity. For the

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following reasons, we reverse the order of dismissal and remand the matter for further proceedings.

I. Background

In 1980, the City of Greensboro passed a resolution (the “City Policy”) stating that the City would pay for the legal defense and judgments on behalf of its officers and employees with respect to certain claims arising from their employment.

In 2003, Plaintiff became the Chief of Police for the City. In January 2006, Plaintiff resigned from his position as Chief of Police at the request of the City Manager, after alleged incidents within the Greensboro Police Department (the “Department”) resulted in state and federal investigations of Plaintiff and the Department.

After his resignation, Plaintiff was named as a defendant in actions filed by City police officers for Plaintiff’s alleged conduct occurring while he was serving as Chief of Police.¹ Plaintiff has incurred substantial litigation expenses in these actions and has requested reimbursement from the City under the City Policy. However, the City has declined Plaintiff’s request.

Plaintiff filed this present action against the City seeking \$220,593.71, the amount he paid defending the lawsuits filed against him. The City moved to dismiss the action pursuant to Rule 12(b)(1), (2) and (6) of the Rules of Civil Procedure. The

¹ See *Fulmore v. City of Greensboro*, 834 F. Supp.2d 396 (M.D.N.C. 2011); *Hinson v. City of Greensboro*, 232 N.C. App. 204, 753 S.E.2d 822 (2014).

trial court granted the City's Rule 12(b) motion to dismiss Plaintiff's complaint, concluding that the City was shielded by the doctrine of governmental immunity, holding that the City had not waived its immunity. Plaintiff timely appealed.

II. Summary of Holding

The City's motion to dismiss was made pursuant to Rule 12(b)(1), (2) and (6). The trial court granted the City's motion on the sole ground that the City was "shielded by the doctrine of governmental immunity, which immunity has not been waived." The trial court based this holding on its conclusion that the City's enactment of the City Policy pursuant to its authority granted under N.C. Gen. Stat. § 160A-167 was *not* an action which waives governmental immunity. However, we hold that Plaintiff has, in fact, set forth allegations that the City has waived governmental immunity, though *not* based on the City's act of enacting the City Policy, *but rather* based on the City's act of entering into an employment agreement with Plaintiff.

Specifically, Plaintiff has made a breach of contract claim, essentially alleging that he had a contract with the City to work for the City *and* that pursuant to the City's contractual obligations, the City is required to pay for his litigation expenses. Importantly, the City is authorized to enter into employment contracts with its police officers, and the City is authorized by N.C. Gen. Stat. § 160A-167 to enact a policy by which it may contractually obligate itself to pay for certain legal expenses incurred by these officers.

Whether the City is, in fact, contractually obligated to pay for Plaintiff's litigation expenses as alleged in the present case (under a theory that the City Policy is part of his contract or based on some other theory) goes *to the merits* of Plaintiff's contract claim and is not relevant to our threshold review of whether the City *is immune* from having to defend against these contract claims in court. Rather, we merely hold that the trial court erred in dismissing Plaintiff's complaint *based on the doctrine of governmental immunity*, the only basis of its order. Accordingly, we reverse the order of the trial court.

III. Analysis

In general, the doctrine of sovereign/governmental immunity “provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them in their official capacity.” *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 151, 544 S.E.2d 587, 589 (2001). Under the doctrine of *sovereign immunity*, it is the State of North Carolina which “is immune from suit [in the absence of] waiver[,]” whereas under the doctrine of *governmental immunity*, counties and cities are “immune from suit for *negligence* of [their] employees in the exercise of governmental functions absent waiver of immunity.” *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (emphasis added).

Our Supreme Court has instructed that when the State has the authority to enter into a contract and it does so voluntarily, “the State implicitly consents to be

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sued for damages on the contract in the event it breaches the contract.” *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Likewise, a city or county waives immunity when it “*enters into a valid contract.*” *M Series Rebuild v. Town of Mt. Pleasant*, 222 N.C. App. 59, 65, 730 S.E.2d 254, 259 (2012) (citations omitted) (emphasis in original). However, a municipality waives governmental immunity only for those contracts into which it is authorized to enter. *See Smith*, 289 N.C. at 322, 222 S.E.2d at 425 (“The State is liable only upon contracts authorized by law.”).

The relationship between a municipality and its police officers is, indeed, contractual in nature. And a municipality is authorized to enter into employment contracts with individuals to serve as police officers. Further, relevant to this appeal, the General Assembly has authorized municipalities to provide for the defense of their officers and employees in any civil or criminal action brought against a member in the member’s official or individual capacity. N.C. Gen. Stat. § 160A-167 (1980). We hold that under G.S. 160A-167, one way a municipality is authorized to provide such benefit is by contract. We note that N.C. Gen. Stat. § 160A-167 is permissive; the General Assembly does *not* require a city to make any provision for the defense of employees, contractual or otherwise, but if a municipality does so, “[t]he city council, authority governing board, or board of county commissioners . . . shall have adopted . . . uniform standards under which claims made or civil judgments entered

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against . . . employees or officers, or former employees or officers, shall be paid.” N.C. Gen. Stat. § 160A-167(c).

In the present case, pursuant to its authority under N.C. Gen. Stat. § 160A-167, the City passed the City Policy, which provided as follows:

[It] is hereby declared to be the policy of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments and to satisfy the same, either through insurance or otherwise, when resulting from any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of their employment or duty as employees or officers of the City, except and unless it is determined that an officer or employee (1) acted or failed to act because of actual fraud, corruption or actual malice[,] or (2) acted or failed to act in a wanton or oppressive manner.

The City enacted the City Policy in 1980 and it remained in effect during the entire time Plaintiff was employed by the City. Whether the City Policy is, in fact, an element of Plaintiff’s employment contract and whether Plaintiff’s litigation expenses are covered thereunder go to the merits of Plaintiff’s contract claim. However, in the present appeal, we are not concerned with the *merits* of Plaintiff’s contract claims; rather, we only address whether the City is shielded from having to defend against those claims based on governmental immunity.

It appears that Plaintiff was an at-will employee of the City. North Carolina has traditionally embraced a strong presumption that employment is “at-will,” that is, terminable at the will of either party. *Soles v. City of Raleigh*, 345 N.C. 443, 446,

480 S.E.2d 685, 687 (1997) (internal citation omitted). However, the relationship between an employer and an at-will employee is still contractual in nature. In terms of benefits earned during employment, our Court has consistently applied a unilateral contract theory to the at-will employment relationship. *See Roberts v. Mays Mills, Inc.*, 184 N.C. 406, 411-12, 114 S.E. 530, 533-34 (1922); *White v. Hugh Chatham Mem'l Hosp., Inc.*, 97 N.C. App. 130, 131-32, 387 S.E.2d 80, 81 (1990); *Brooks v. Carolina Telephone*, 56 N.C. App. 801, 804, 290 S.E.2d 370, 372 (1982). A unilateral contract is one where the offeror is the master of the offer and can withdraw it at any time before it is accepted by performance. *White*, 97 N.C. App. at 132, 387 S.E.2d at 81. While the offer is outstanding, the offeree can accept by meeting its conditions. *Id.*

In sum, Plaintiff has essentially pleaded that he had an employment relationship with the City and that the City has contractually obligated itself to pay for his defense as a benefit of his contract. Whether the City is, in fact, obligated to pay *contractually* by virtue of its passage of the City Policy goes to the merits and is not the subject of this appeal.

We are unpersuaded by the City's argument that this case is controlled by our Supreme Court's holding in *Blackwelder v. City of Winston-Salem*, in which that Court stated that "[a]ction by the City under N.C.G.S. § 160A-167 does not waive immunity." *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432,

436 (1992). The Supreme Court was referring to immunity from *tort* actions, stating in the previous sentence that the General Assembly has expressly prescribed in N.C. Gen. Stat. § 160A-485 that “the only way a city may waive its governmental immunity is by the purchase of liability insurance.” *Id.* Extending the language in *Blackwelder* to contract claims would lead to bizarre results. For instance, an employee would have no remedy if his city-employer breached an express provision in his written employment contract which stated that the city would pay for any G.S. 160A-167-type litigation expenses he might incur defending a suit brought by a third party.

We are further unpersuaded by the City’s argument that Plaintiff failed to “specifically allege a waiver of governmental immunity.” *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005). We agree that “[a]bsent such an allegation, the complaint fails to state a cause of action.” *Id.* However, we do not require *precise language* alleging that the City has waived the defense of governmental immunity – “consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver[.]” *Id.*; *see also Sanders v. State Personnel Com’n*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007). Rather, we look to Plaintiff’s amended complaint to determine whether Plaintiff has sufficiently alleged the City’s waiver of governmental immunity. *See Sanders*, 183 N.C. App. at 19, 644 S.E.2d at 13. In the amended complaint, Plaintiff alleges that he was employed by the City’s Police Department as the Chief of Police,

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that he was acting within the “course and scope of his employment” at all times material to his claim, that pursuant to the provisions of the City Policy he is entitled to reimbursement for his legal expenses and fees, and that the City failed to honor the City Policy. We believe that these allegations are sufficient to establish waiver through a breach of Plaintiff’s contractual relationship as an employee of the City. Accordingly, this argument is overruled. In concluding as such, we take no position as to *the merits* of Plaintiff’s contract action – “[t]oday we decide only that [P]laintiff is not to be denied his day in court because his contract was with the State.” *Smith*, 289 N.C. at 322, 222 S.E.2d at 424.

IV. Conclusion

We hold that the City is not shielded by the doctrine of governmental immunity to the extent that Plaintiff’s action is based in contract. We reverse the order of the trial court and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

Because I believe the trial court properly granted defendant City of Greensboro's motion to dismiss plaintiff's complaint, I respectfully dissent.

In its 8 May 2015 order, the trial court concluded that defendant maintained its governmental immunity from suit: "Neither the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167, waives governmental immunity. See Blackwelder v. City of Winston-Salem, 332 N.C. 319, 420 S.E.2d 432 (1992)." However, in reaching this conclusion, the trial court provided no findings of fact, and the record provides no indication that a request for findings was made by the parties. Thus, we must determine whether there was sufficient evidence to support the trial court's presumed finding that defendant City of Greensboro did not waive its governmental immunity by express waiver, purchase of liability insurance, or entry into a valid contract. *See Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 101, 545 S.E.2d 243, 246 (2001) ("In the absence of an express waiver of sovereign immunity by [defendant], we must determine whether there was sufficient evidence to support the presumed finding by the trial court that the county waived its sovereign immunity as to [plaintiff's] contract claims either by the purchase of liability insurance or by entering [into] a valid contract.")

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In his complaint, plaintiff asserts in pertinent part that he began employment with the Police Department of the City of Greensboro as a police officer in March of 1981, after the Greensboro City Council's adoption of the resolution at the center of this dispute. Through the years, plaintiff was promoted through the ranks: Sergeant, Lieutenant, Assistant Chief, and in July 2003, Chief of Police. In January 2006, plaintiff resigned as Chief of Police. Following his resignation, investigations into alleged civil rights violations perpetrated by plaintiff were conducted by federal and state bureaus of investigation. Multiple lawsuits were filed against plaintiff in Guilford County Superior Court on the basis of conduct alleged to have occurred in his role as Chief of Police. Plaintiff requested that the City provide him with legal representation but was denied. Plaintiff alleged that "[a]s an employee of the City acting within the course and scope of his employment, and pursuant to the provision of the City Policy, [plaintiff] is entitled to indemnification and reimbursement of the expenses he has incurred . . . in connection with his defense [of lawsuits totaling \$220,593.71]."

In response to the allegations of the complaint, defendant City of Greensboro filed a motion to dismiss. In its motion, defendant requested that the trial court dismiss plaintiff's complaint for lack of personal and subject matter jurisdiction, and for failure to state a claim. Defendant does not contest any of the allegations asserted in plaintiff's complaint, but rather states the following:

4. Plaintiff contends that he is entitled to a declaratory judgment that the City should provide for a defense and indemnification under a 13 November 1980 Resolution (the “Resolution”). The Resolution addresses the provision to City Officers and employees of a defense against civil claims for acts alleged to have been performed in the scope and course of their employment “unless it is determined that an officer or employee (1) acted or failed to act because of actual fraud, corruption, or actual malice or (2) acted or failed to act in a wanton or oppressive manner.” A copy of that Resolution is attached as Exhibit A.

5. The Resolution vests the City Manager (or his designee) with the authority to “determine whether or not a claim or suit filed against an officer or employee . . . meets the standards . . . for providing a defense for such officer or employee.” (Ex. A. . . .).

The Resolution declares “the *policy* of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments[.]” (emphasis added). This statement prescribes an *intent* to provide for the defense of officers and employees. *See generally* N.C. Gen. Stat. § 143-300.3 (2015) (“[T]he State *may* provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity” (emphasis added)); *In re Annexation Ordinance*, 303 N.C. 220, 230, 278 S.E.2d 224, 231 (1981) (“We conclude that the provisions of G.S. 160A-45 [(entitled “Declaration of policy”)] are statements of policy and should not be treated as part of . . . [statutory] procedure”); *Paschal v. Myers*, 129 N.C. App. 23, 29, 497 S.E.2d 311, 315 (1998) (“Plaintiff maintains . . . the mere fact that the . . . Board of County Commissioners had adopted, as an ordinance, the

County's personnel policies contained in the Handbook demands that the Handbook's personnel policies were a part of his [employment] contract. This argument is unpersuasive.”); *Lennon v. N.C. Dept. of Justice*, No. COA15-660, 2016 WL 1565892, at *4 (N.C. Ct. App. Apr. 19, 2016) (unpublished) (“Because petitioner cannot establish that the State was contractually bound to provide services for his legal defense in the underlying civil action, petitioner has consequently failed to establish a waiver of sovereign immunity by contract.”).

Furthermore, the Resolution does not provide substantive rights or procedural steps. *Contra Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (Acknowledging that “the relationship between employees vested in the retirement system and the State [was] contractual in nature,” the Court found evidence in the record to support the trial court’s finding that “the tax exemption was a term of the retirement benefits offered in exchange for public service to state and local governments.”); *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 545, 552, 344 S.E.2d 821, 822, 826 (1986) (acting under the authority of N.C. Gen. Stat. § 160A-162 (1982), authorizing municipal corporations to fix salaries or other compensation or to approve and adopt pay plans to compensate city employees, the City Council passed an ordinance wherein “[e]ach full-time employee shall earn vacation leave at the rate of five-sixths (5/6) workdays per calendar month of service”). Thus, I would hold that

the Resolution is not a contractual provision upon which plaintiff can compel defendant's performance.

While we acknowledge there is plenary support for the proposition that an employer-employee relationship is essentially contractual and such a relationship often waives immunity from suit on the contract, *see Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 21, 644 S.E.2d 10, 14 (2007) (“[T]he existence of the relation of employer and employee . . . is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied. *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934),” as quoted by *Archer v. Rockingham Cnty.*, 144 N.C.App. 550, 557, 548 S.E.2d 788, 792–93 (2001)); *Sanders*, 183 N.C. App. at 22, 644 S.E.2d at 14 (“Under [*Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976)], because the State entered into a contract of employment with [the] plaintiffs, it now occupies the same position as any other litigant.” (citation omitted)), here, the Resolution central to this action is not a contractual provision.

Though the majority opinion frames the issue as purely a determination of whether the employee-employer relationship between plaintiff and defendant is a contractual one and reasons that that alone determines the waiver of defendant's immunity, I believe that the record before the trial court was sufficient to determine that plaintiff could not establish a valid contractual agreement with defendant City

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of Greensboro on the issue central to this action, the provision of a legal defense as a condition of employment. Moreover, there is no indication of an express waiver or an applicable insurance provision. Thus, I would hold the trial court was correct in concluding that defendant City of Greensboro, a municipality, did not waive its governmental immunity to plaintiff's suit. Therefore, I would affirm the order of the trial court granting defendant's motion to dismiss plaintiff's complaint. Accordingly, I dissent.