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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-115

Filed: 6 November 2018

Pasquotank County, No. 16 CVS 414

CALEB HUDSON, Plaintiff,

v.

PASQUOTANK COUNTY; RANDY KEATON, former Pasquotank County Manager in his official and individual capacities, THE CITY OF ELIZABETH; ELIZABETH CITY MANAGER, RICH OLSON, in his official and individual capacities; HARRY CANNON, dba Mold Protection Services, Home Spec of NC, Inc., and PROFESSIONAL LABORATORIES, INC., dba PRO-LAB, Defendants.

Appeal by Defendants Pasquotank County and Randy Keaton and cross-appeal by Plaintiff from Orders entered 8 May 2017 by Judge Walter H. Godwin, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 8 August 2018.

Law Offices of F. Bryan Brice, Jr., by F. Bryan Brice, Jr., and Law Offices of Connor Bunn Rogerson Woodard & Flemming, PLLC, by Slade Rand, for Plaintiff-Appellee/Cross-Appellant.

Teague Campbell Dennis & Gorham, LLP, by Henry W. Gorham, Natalia K. Isenberg, and Lindsey B. Revels, for Defendants-Appellants/Cross-Appellees Pasquotank County and Randy Keaton.

INMAN, Judge.

Defendants Pasquotank County (the "County") and former County Manager Randy Keaton ("Keaton," collectively with the County as "Defendants")[1] appeal from the denial of a motion to dismiss plaintiff Caleb Hudson's ("Plaintiff") complaint, arguing that they are entitled to governmental immunity from suit under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Plaintiff cross-appeals the dismissal of his complaint against Keaton in his individual capacity. After careful review of the record and applicable law, we reverse the trial court's denial of Defendants' motion and affirm the dismissal as to Keaton in his individual capacity.

I. FACTUAL AND PROCEDURAL HISTORY

This appeal arises from facts and legal issues substantially similar to those addressed in *Phifer v. Pasquotank County*, No. COA17-1155, ___ N.C. App. ___, 817 S.E.2d 508, 2018 WL 3734855, 2018 N.C. App. LEXIS 728 (Aug. 7, 2018) (unpublished) ("*Pasquotank I*"). Both appeals arise from lawsuits brought by former Elizabeth City police officers alleging medical injury from exposure to toxic mold in the County's Public Safety Building (the "PSB"), and both turn on the application of governmental immunity to defeat the plaintiffs' respective claims. Because this appeal does not involve complete identity of parties with *Pasquotank I* and arose from

[1] The orders involved in this appeal and cross-appeal pertain only to Pasquotank County and Randy Keaton. As a result, our reference to "Defendants" in this opinion omits Elizabeth City, Rich Olson, Harry Cannon, and Professional Laboratories, Inc.

a different stage in the proceedings, we will briefly recite the facts alleged in Plaintiff's complaint.

From 2007 to December 2014, Plaintiff served as a police officer with the Elizabeth City Police Department. Plaintiff worked in the PSB's fingerprinting room on an almost daily basis, booking arrestees. Unknown to him, however, the PSB was contaminated with toxic mold stemming from an unaddressed water leak in the ceiling, with particularly high concentrations of mold in the rooms frequented by Plaintiff.

The County, under the direction of Keaton as County Manager, engaged in mold remediation efforts, but they were largely unsuccessful. Despite the County's and Keaton's knowledge of the contamination, police officers, including Plaintiff, were permitted to continue working in the affected areas of the PSB through 2012. The County eventually received assistance from mold experts from Duke University Medical Center, who reported severe mold issues in the PSB's fingerprinting room in mid-2013. The County then closed the fingerprinting room. In the interim, Plaintiff had developed a host of medical issues arising from his exposure to toxic mold.

Plaintiff filed suit against Defendants on 27 June 2016 for compensatory and punitive damages, alleging a premises liability claim against the County and a negligence claim against both Defendants. Defendants answered the complaint and

asserted defenses including sovereign immunity, governmental immunity, public official immunity, and lack of personal jurisdiction under Rule 12(b)(2).

Defendants moved to dismiss Plaintiff's complaint pursuant to Rules 12(b)(1)-(2), (4), and (6), arguing that governmental, sovereign, and public official immunity deprived the trial court of personal jurisdiction over Defendants, and that the allegations in the complaint failed to state a valid cause of action. Following a hearing on 30 January 2017, the trial court allowed the motion to dismiss under Rule 12(b)(6) as to Keaton in his individual capacity but denied the motion to dismiss pursuant to Rule 12(b)(2) as to the County and Keaton in his official capacity. Each party timely appealed.

II. ANALYSIS

A. Appellate Jurisdiction

Although a denial of a motion to dismiss is an interlocutory order, and interlocutory orders are generally not subject to appeal, "[a] party may . . . immediately appeal a denial of a motion to dismiss based on lack of personal jurisdiction." *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 383, 677 S.E.2d 203, 206 (2009) (citing N.C. Gen. Stat. § 1-277(b) (2007)). "[A]n appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable." *Data General Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46

(2001) (citations omitted). The denial of Defendants' 12(b)(2) motion for lack of personal jurisdiction is therefore properly before us.

As for Plaintiff's cross-appeal, we note that he has failed to include a Statement of Grounds for Appellate Review as required by our Rules of Appellate Procedure. N.C. R. App. P. 28(b)(4) (2018). Generally speaking, such a cross-appeal is not subject to immediate appellate review. *See, e.g., Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729 (2015) (noting that the plaintiff's cross-appeal of a dismissal of an individual defendant pursuant to Rule 12(b)(6) "is interlocutory and not immediately appealable[,]" but allowing review where the order was certified pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)). Defendants, however, have not moved to dismiss Plaintiff's cross-appeal, and this Court may exercise its discretion to review an otherwise unappealable interlocutory order where doing so would "avoid 'fragmentary appeals.' " *Providence Volunteer Fire Dep't v. Town of Weddington*, ___ N.C. App. ___, ___, 800 S.E.2d 425, 430 (2017) (quoting *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 530-31, 534 S.E.2d 247, 251-52 (2000)). Because the parties have fully briefed Plaintiff's cross-appeal and both appeals involve the legal issue of governmental immunity, we exercise our discretion to hear Plaintiff's cross-appeal.

B. Standards of Review

Our review of an order denying a motion to dismiss pursuant to Rule 12(b)(2) "depends upon the procedural context confronting the [trial] court." *Banc of America*

Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). When the movant submits affidavits in support of the motion:

> the "allegations [in the complaint] can no longer be taken as true or controlling and plaintiff[] cannot rest on the allegations of the complaint." In order to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence).

Id. at 693-94, 611 S.E.2d at 182-83 (quoting *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615-16, 532 S.E.2d 215, 218 (2000)) (citations omitted) (alterations in original).

We acknowledge that Plaintiff's complaint was verified, and therefore would normally present a situation akin to a motion on dueling affidavits. *Banc of America*, 169 N.C. App. at 694, 611 S.E.2d at 183. The allegations in Plaintiff's verified complaint pertaining to personal jurisdiction, however, are either conclusions of law or are made "[u]pon information and belief[.]" The latter allegations, though they are part of a verified complaint, are not treated as evidentiary, as they are not based on the "personal knowledge" required to consider a verified complaint as an affidavit. *See, e.g., Asheville Sports Properties, LLC v. City of Asheville,* 199 N.C. App. 341, 345, 683 S.E.2d 217, 220 (2009). Similarly, legal conclusions in affidavits do not constitute evidence. *See, e.g., Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349

(2004) (" 'Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.' " (quoting 3 Am. Jur. 2d, *Affidavits* § 13)); *see also Green v. Kearney*, 203 N.C. App. 260, 268, 690 S.E.2d 755, 762 (2010) (noting that a complaint must "allege *facts* that, if taken as true, are sufficient to establish a waiver by the State of [governmental] immunity" (internal quotation marks and citation omitted) (emphasis added)). In light of this case law and considering Plaintiff's failure to introduce any other evidence bearing on Defendants' personal jurisdiction arguments, we hold the above statement of the standard of review most equates to the procedural posture before us.

"When this Court reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.' " *Banc of America*, 169 N.C. App. at 694, 611 S.E.2d at 183 (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). Conclusions of law derived from those findings are subject to *de novo* review. *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 278, 646 S.E.2d 129, 133 (2007).

As for Plaintiff's cross-appeal, we review orders on a motion to dismiss pursuant to Rule 12(b)(6) *de novo*. *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007). We will affirm a dismissal under Rule 12(b)(6) where: "(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." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

C. Defendants' Appeal

Defendants argue that the trial court erred in concluding that it had personal jurisdiction over them, issues of governmental immunity notwithstanding. Reviewing the parties' respective briefs, the arguments raised pertaining to Defendants' appeal appear substantially identical to those advanced in *Pasquotank I*.[2] As noted *supra*, the only competent evidence introduced below demonstrates that Defendants did not waive sovereign immunity through the purchase of insurance policies that expressly carved out any waiver of sovereign immunity.[3] *Pasquotank I*,

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[2] At the hearing before the trial court, Plaintiff's counsel, who also represented the *Pasquotank I* plaintiff, acknowledged these similarities, stating the cases are "based on similar facts but a little bit different. The occurrences are in the same buildings and some of the issues are the same with respect to sovereign immunity[.]" The Defendants' attorney, who represented the appellants in *Pasquotank I*, stated that insurance policy documents produced in connection with the 12(b)(2) motion were "the same as the records we served in [*Pasquotank I*], if I'm not mistaken, because the allegations against the county are the same here as they were in [*Pasquotank I*] and they cover the same time period." Further, Plaintiff's counsel expressly asked the trial court to consider evidence submitted in *Pasquotank I* before ruling on Defendants' motions to dismiss. This appeal is so inseparable from *Pasquotank I* that, of the 89 pages of trial transcript included in the record, 58 consist of a hearing on a summary judgment motion filed in *Pasquotank I*.

[3] Plaintiff's brief posits that, due to the existence of an interlocal agreement between the County, Camden County, and Elizabeth City requiring the entities to purchase premises liability coverage, an undisclosed insurance policy different from those produced by Defendants waiving governmental immunity may exist. We see no basis for such conjecture in the record. We also note that the trial court denied a motion to continue made by Plaintiff at the hearing and declined to resolve an open discovery issue, suggesting that the trial court believed it possessed sufficient evidence from

2018 WL 3734855 at *2, 2018 N.C. App. LEXIS 728 at *5. Plaintiff admitted that Defendants operated the PSB for a governmental purpose. "Governmental immunity applies . . . to those acts 'committed pursuant to [a] governmental function[ ].' " *Id.* at *2 (quoting *Estate of Williams v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012)). Plaintiff's remaining arguments are substantially identical to those made and rejected in *Pasquotank I.* 2018 WL 3734855 at *2-4, 2018 N.C. App. LEXIS 728 at *4-8. Consistent with our decision in that case, we hold that the trial court erred in concluding it possessed personal jurisdiction over Defendants.

D. Plaintiff's Cross-Appeal

Plaintiff argues that the trial court erred in dismissing his complaint against Keaton in his individual capacity. Defendants counter, asserting that public official immunity insulates Keaton from individual liability for the claims as pled in the verified complaint. We agree that public official immunity defeats Plaintiff's claim and affirm the trial court's 12(b)(6) order.

> Public official immunity precludes suits against public officials in their individual capacities and protects them from liability "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by

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the verified complaint and affidavits to make a definitive ruling on Defendants' 12(b)(2) motion. *See also Banc of America*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83 ("In order to determine whether there is evidence to support an exercise of personal jurisdiction, the court . . . considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence)." (citation omitted)).

> virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]"

Fullwood v. Barnes, ___ N.C. App. ___, ___, 792 S.E.2d 545, 550 (2016) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)). A public official is therefore immune from suit absent allegations that "the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012) (citations omitted). Our Supreme Court has held that a public official "acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty *and which he intends to be prejudicial or injurious to another*." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) (citation omitted) (emphasis added).

A plaintiff filing suit against a public official must do more than allege malice to state a valid claim. "It is well established that 'a conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion.' " *Mitchell v. Pruden*, ___ N.C. App. ___, ___, 796 S.E.2d 77, 83 (2017) (quoting *Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997)).

Plaintiff's complaint alleges no malice on the part of Keaton; indeed, the word "malice" and its derivations are entirely absent from the pleading. While there are conclusory allegations that Keaton's conduct was "grossly negligent, wanton, willful and reckless[,]" the complaint alleges no facts supporting a conclusion that Keaton's

conduct was "intend[ed] to be prejudicial or injurious to another." *Grad*, 312 N.C. at 313, 321 S.E.2d at 890 (citation omitted). And, although the complaint alleges "[t]his action arises out of intentional and knowing, or alternatively negligent endangerment of [Plaintiff] to unsafe and toxic working environments in the . . . PSB and the Elizabeth City Police Department Building[,]" there are no factual allegations alleging such intentional conduct by Keaton. We acknowledge that constructive intent—*i.e.,* engaging in reckless conduct manifestly indifferent to the consequences risking life or serious bodily injury—may give rise to a showing of malice by a public official. *Wilcox*, 222 N.C. App. at 291, 730 S.E.2d at 232. But the complaint does not allege that Keaton acted with such intent. While Plaintiff specifically alleged "Elizabeth City acted intentionally" and engaged in conduct "so egregious and reckless that the willfulness and wantonness was equivalent in spirit to show actual intent[,]" no such allegations were leveled at Keaton. As a result, Plaintiff's allegations "are legally insufficient to overcome defendant's public official immunity[,]" *Mitchell*, ___ N.C. App. at ___, 796 S.E.2d at 83, and we affirm the trial court's dismissal of Plaintiff's complaint against Keaton in his individual capacity.

III. CONCLUSION

For the foregoing reasons, we reverse the trial court's order denying Defendants' motion to dismiss pursuant to Rule 12(b)(2) and remand for entry of an order dismissing Plaintiff's complaint against them, including against Keaton in his

official capacity. We affirm the trial court's order dismissing Keaton in his individual capacity.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).