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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-836

Filed: 16 April 2019

N.C. Industrial Commission, I.C. No. TA-26020

JONATHAN E. BRUNSON, Plaintiff,

v.

THE OFFICE OF THE GOVERNOR OF NORTH CAROLINA, ET AL., Defendants.

Appeal by plaintiff from order filed 12 October 2017 by Special Deputy Commissioner Brian Liebman and order filed 7 May 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 April 2019.

Jonathan E. Brunson, plaintiff-appellant, pro se.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

ARROWOOD, Judge.

Jonathan E. Brunson (“plaintiff”) appeals from orders from the North Carolina Industrial Commission (“Industrial Commission”) dismissing his claims against defendants under the North Carolina Tort Claims Act (“Tort Claims Act”), N.C. Gen. Stat. §§ 143-291, *et seq.*, and denying his motions for entry of default and default judgment. After careful review, we affirm.

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I. Background

On 21 November 2016, plaintiff filed a claim with the Industrial Commission pursuant to the Tort Claims Act. Although the affidavit setting forth the substance of that claim is absent from the record, it appears from the Industrial Commission's orders that plaintiff alleged that agents or employees of the Office of the Governor of North Carolina, as well as the Office of the Twelfth Judiciary, the Cumberland County Clerk of Court, the Office of the District Attorney for the Twelfth Prosecutorial District, the Office of the Public Defender for the Twelfth Defender District, the Cumberland County Sheriff's Office, the North Carolina Department of Health and Human Services, the North Carolina Department of Public Safety, the North Carolina Department of Justice, the Office of the North Carolina General Assembly, and the State of North Carolina (collectively "defendants"), breached their duty to him by violating his Sixth Amendment rights to confront witnesses and to an impartial jury, as well as to his Fourteenth Amendment rights to due process of law and equal protection. Plaintiff further alleged that sections of the state statute governing grand jury proceedings, N.C. Gen. Stat. § 15A-623 (2017), are unconstitutional, and that defendants negligently violated their duties by passing the law, enforcing the law, empaneling a grand jury under the law, indicting plaintiff pursuant to the law, prosecuting and convicting him pursuant to the indictment,

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imprisoning him pursuant to the conviction, and defending against his post-conviction efforts to overturn his conviction.

On 14 December 2016, defendants filed a motion to dismiss and motion to stay discovery. Defendants' motion to dismiss alleged, among other things, that the Industrial Commission did not have subject matter jurisdiction over plaintiff's action because his claims alleged intentionally tortious conduct or violations of the North Carolina and United States Constitutions, whereas the Tort Claims Act permits causes of actions in negligence cases only. *See* N.C. Gen. Stat. § 143-291(a) (2017). Defendants further noted that plaintiff's challenge to his criminal conviction constituted an impermissible collateral attack.

On 22 December 2016, plaintiff filed a motion for leave to file an amended tort claim. On 27 February 2017, plaintiff filed motions for entry of default and default judgment. On 26 June 2017, defendants filed a motion for leave to amend their response, along with an amended response to plaintiff's affidavit. However, these motions are missing from the record.

Plaintiff's and defendants' motions came on for hearing on 29 September 2017 before Special Deputy Commissioner Brian Liebman. By order filed 12 October 2017, the deputy commissioner denied plaintiff's motions for entry of default and default judgment and granted DOJ's motion to dismiss with prejudice.

Plaintiff appealed that order to the Full Commission. In an order filed 7 May 2018, the Full Commission affirmed the deputy commissioner's order, holding, *inter alia*, that the Industrial Commission lacked subject matter jurisdiction over plaintiff's claims. The Full Commission further determined, as an additional basis for dismissal of plaintiff's claim, that plaintiff had failed to state a claim upon which relief may be granted. Plaintiff gave notice of appeal on 31 May 2018.¹

II. Analysis

Plaintiff argues on appeal that the Industrial Commission erred: (1) by dismissing his claim against defendants; and (2) by denying his declaration for entry of default and motion for default judgment. We disagree.

Defendant first argues that the Industrial Commission erred by dismissing his claim. We are not persuaded.

The Tort Claims Act gives the Industrial Commission limited jurisdiction to hear "tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State[.]" N.C. Gen. Stat. § 143-291(a), and to determine

whether or not each individual claim arose as a result of

¹ We note that plaintiff has given notice of appeal from both the deputy commissioner's decision and order and the Full Commission's order. However, this Court only reviews orders issued by the Full Commission, not the deputy commissioner, and only "for errors of law . . . under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2017); *see also Coulter v. Catawba Cty. Bd. of Educ.*, 189 N.C. App. 183, 188, 657 S.E.2d 428, 432 (2008) (limiting review to the decision and order of the Full Commission).

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the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Id.

In the case before us, the Industrial Commission properly determined that it lacked subject matter jurisdiction over plaintiff's claims that defendants violated his constitutional rights, because these claims are not based on negligence. *See* N.C. Gen. Stat. § 143-291(a); *see also Medley v. N.C. Dep't of Correction*, 330 N.C. 837, 843-44, 412 S.E.2d 654, 658-59 (1992) (distinguishing between claims of a constitutional nature and claims for negligence). "Where there is no jurisdiction of the subject matter the whole proceeding is void *ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose." *State v. Daniels*, 224 N.C. App. 608, 613, 741 S.E.2d 354, 359 (2012) (citing *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941)), *appeal dismissed, disc. review denied*, 366 N.C. 565, 738 S.E.2d 389 (2013).

As an additional ground for dismissal, the Industrial Commission also found that plaintiff had failed to state a claim for negligence. We note, however, that the record does not include plaintiff's affidavit containing his claims. "It is the duty of the appellant to ensure that the record is complete." *Hicks v. Alford*, 156 N.C. App.

384, 389-90, 576 S.E.2d 410, 414 (2003) (citation omitted). Where the record is incomplete, we will not speculate as to error by the Commission.

Plaintiff next argues that the Industrial Commission erred by denying his declaration for entry of default and motion for default judgment. Plaintiff contends that he was entitled to judgment by default where the record demonstrates defendant failed to answer the complaint within 30 days after service. We disagree.

Entry of default judgment and default judgment are reviewed for abuse of discretion. *N.C. Nat'l Bank v. McKee*, 63 N.C. App. 58, 61, 303 S.E.2d 842, 844 (1983). "Abuse of discretion exists when the challenged actions are manifestly unsupported by reason." *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (citation and internal quotation marks omitted). "In exercising its discretion the trial court should be guided by the consideration that default judgments are disfavored by the law." *N.C. Nat'l Bank*, 63 N.C. App. at 61, 303 S.E.2d at 844 (citation omitted).

N.C. Gen. Stat. § 143-297 provides that upon the filing of an affidavit per the Tort Claims Act,

[t]he department, institution or agency of the State against whom the claim is asserted shall file answer, *demurrer* or other pleading to the affidavit within 30 days after receipt of copy of same setting forth any defense it proposes to make in the hearing or trial, and no defense may be asserted in the hearing or trial unless it is alleged in such answer, except such defenses as are not required by the Code of Civil Procedure or other laws to be alleged.

N.C. Gen. Stat. § 143-297 (2017) (emphasis added). In *Newgent v. Buncombe Cty. Bd. of Educ.*, this Court stated,

[i]f, however, “the claim, upon its face, shows that the State department or agency sought to be charged is not liable, then the Commission may end the proceeding.” Prior to the enactment of our Rules of Civil Procedure, the proper way to take advantage of this defect was by demurrer. Under our Rules of Civil Procedure, “ [a] motion to dismiss “for failure to state a claim upon which relief can be granted [pursuant to Rule 12(b)(6)]” is the modern equivalent of a demurrer.’ ”

Newgent v. Buncombe Cty. Bd. of Educ., 114 N.C. App. 407, 411, 442 S.E.2d 158, 160 (1994) (Orr, J., dissenting) (alteration in original) (citations omitted), *rev’d per curiam for reasons stated in dissent*, 340 N.C. 100, 455 S.E.2d 157 (1995). “A motion under Rule 12(b)(6) performs substantially the same function as a demurrer for failure to state facts sufficient to constitute a cause of action.” *Hodges v. Wellons*, 9 N.C. App. 152, 157, 175 S.E.2d 690, 693 (1970).

In this matter, defendant filed a motion to dismiss pursuant to Rule 12(b)(6), which the appellate courts have deemed the modern day equivalent of a demurrer and the proper way to end the proceedings where the claim shows on its face that the State agency or department cannot be liable, within the 30 days allowed by N.C. Gen. Stat. § 143-297, to “file answer, demurrer or other pleading” Thus, defendant was not required to file an answer.

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This is also consistent with the North Carolina Rules of Civil Procedure. Pursuant to Rule 12(a)(1) of the Rules of Civil Procedure, a defendant is required to “serve his answer within 30 days after service of the summons and complaint upon him.” N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2017). However, a defendant may make a motion pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted “before pleading if a further pleading is permitted.” N.C. Gen. Stat. § 1A-1, Rule 12(b). When a defendant files such a motion, no responsive pleading is required until 20 days after notice of the Court’s action in ruling on the motion. N.C. Gen. Stat. § 1A-1, Rule 12(a)(1)(a); *see also Pate v. N.C. Dep’t of Transp.*, 176 N.C. App. 530, 533, 626 S.E.2d 661, 664 (stating “the North Carolina Rules of Civil Procedure apply in tort claims before the Commission, to the extent that such rules are not inconsistent with the Tort Claims Act, in which case the Tort Claims Act controls”) (citation omitted), *disc. review denied*, 360 N.C. 535, 633 S.E.2d 819 (2006).

Thus, we conclude that the Industrial Commission did not err by dismissing plaintiff’s claim, and defendants were not required to file an answer. Consequently, we further conclude the Industrial Commission did not abuse its discretion by denying plaintiff’s motions for entry of default and default judgment. The Industrial Commission’s 7 May 2018 order is affirmed.

AFFIRMED.

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Judges BRYANT and TYSON concur.

Report per Rule 30(e).