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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-357

Filed: 3 December 2019

Pitt County, No. 18 CVS 1548

THE LITTLE WILLIE CENTER COMMUNITY DEVELOPMENT CORPORATION, MARVIN ARRINGTON, JR. and RENEE ARRINGTON on behalf of Themselves and Other Similarly Situated, Plaintiffs,

v.

CITY OF GREENVILLE, Defendant.

Appeal by plaintiffs from order entered 14 November 2018 by Judge Jeffrey B. Foster in Pitt County Superior Court. Heard in the Court of Appeals on 16 October 2019.

de Ondarza Simmons, PLLC, by Inez de Ondarza Simmons, for plaintiffs-appellants.

McAngus, Goudelock & Courie, PLLC, by Jeffrey Donovan Keister, for defendant-appellee.

BERGER, Judge.

On November 14, 2018, the trial court granted a motion to dismiss filed by the City of Greenville (the "City") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On appeal, the Little Willie Center Community Development Corporation, *et al.* (the "Center") argues that the trial court erred when it dismissed

their complaint because (1) the City is not entitled to governmental immunity; and (2) the Center's breach of contract and negligence claims are not barred by the statute of limitations. We agree that the City is not entitled to governmental immunity. However, the Center's claims are barred by the statute of limitations.

Factual and Procedural Background

The Center is a non-profit organization that provides services for latchkey children and their families. In early 2007, the City approached the Center to negotiate a rental agreement for property to be used by the Center (the "Property"). In July 2007, the Center signed a lease with the City for $1 per year. The Center and the City renewed the lease twice, once on December 8, 2010 and again on February 12, 2013.

The Center notified the City of water leaks at the Property. In 2015, volunteers at the Center overheard City employees discussing the poor condition of the Property. The Center then requested the City to inspect the Property, but the City refused. Soon thereafter, the Center hired LRC Indoor Testing and Research ("LRC") to inspect the Property for mold contamination. LRC issued a report dated May 27, 2015 which was immediately given to the City. LRC's report identified the Property as "contaminated with the presence of actual mold growth and associated spores" and found moderate levels of mold spores in various air samples. The Center requested

that the City provide alternative locations to house the children because of the high levels of mold in the Property. The City refused.

Around mid-2015, the City posted "biological hazard" signs on the Property, and its agents wore hazmat suits while they removed the mold. The Center requested documents from the City relating to the Property, including inspections and repairs, from 2007 to 2015. The City produced a two-page summary from a 2007 inspection which indicated the presence of mold. The City then communicated with the County's Health Department regarding medical testing for the Center's minor children, volunteers, and employees. However, the Health Department did not provide medical testing.

On May 29, 2018, the Center filed a class action complaint in Pitt County Superior Court for breach of contract, unfair and deceptive trade practices, and negligence. The City's 12(b)(6) motion to dismiss was granted on November 14, 2018. That same day, the Center filed and served written notice of appeal. On appeal, the Center argues that the trial court erred when it granted the City's Rule 12(b)(6) motion to dismiss because (1) the City is not entitled to governmental immunity; and (2) its breach of contract and negligence claims are not barred by the statute of limitations.

Standard of Review

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review 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. The 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.

Stunzi v. Medlin Motors, Inc., 214 N.C. App. 332, 335, 714 S.E.2d 770, 773 (2011) (citation and quotation marks omitted). Moreover,

> [a] statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired.

Id. at 339-40, 714 S.E.2d at 776. (*purgandum*). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

Analysis

I. Governmental Immunity

The Center argues that the City is not entitled to governmental immunity because the City was engaged in a proprietary activity. We agree.

"[S]overeign immunity renders this state, including counties and municipal corporations herein, immune from suit absent express consent to be sued or waiver of the right of sovereign immunity." *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001). "Under the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Estate of Williams v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (citation and quotation marks omitted).

"[G]overnmental immunity is not without limit. Governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Id.* at 199, 732 S.E.2d at 141 (*purgandum*). A government function is "[a]ny activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good [on] behalf of the State rather than for itself." *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). Conversely, a proprietary function "is one that is commercial or chiefly for the private advantage of the compact community." *Union Cty. v. Town of Marshville*, ___ N.C. App. ___, ___, 804 S.E.2d 801, 805 (2017) (denying governmental immunity because the operation of a sewer system is a proprietary action where it sets rates, charges fees, and maintains the sewer lines), *review denied*,

___ N.C. ___, 814 S.E.2d 101 (2018). More simply, "[i]f the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing." *Britt*, 236 N.C. at 451, 73 S.E.2d at 293. "A city may be liable if the injury occurs while the agents of the city are performing a proprietary rather than a governmental function." *Rich v. City of Goldsboro*, 282 N.C. 383, 385, 192 S.E.2d 824, 826 (1972).

Our Supreme Court developed a three-step inquiry to determine if an activity is a government function or a proprietary action. "First, a court must consider whether the legislature has designated the activity as governmental or proprietary." *Bynum v. Wilson Cty.*, 367 N.C. 355, 358, 758 S.E.2d 643, 646 (2014) (citing *Williams*, 366 N.C. at 200-01, 732 S.E.2d at 141-42). "Second, 'when an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality.' " *Id.* at 358-59, 758 S.E.2d at 646 (quoting *Williams*, 366 N.C. at 202, 732 S.E.2d at 142). Third, we must consider " 'whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover

the operating costs of the service provider.' " *Id.* at 359, 758 S.E.2d at 646 (quoting *Williams*, 366 N.C. at 202-03, 732 S.E.2d at 143).

Here, the legislature has not designated whether leasing government-owned property is a government or proprietary function. N.C. Gen. Stat. § 160A-272 states that "[a]ny property owned by a city may be leased or rented for such terms and upon such conditions as the council may determine, but not for longer than 10 years." N.C. Gen. Stat. § 160A-272 (2017). However, our legislature did not specify in Section 160A-272 whether leasing city-owned property to private parties was either a governmental or proprietary function. Where the legislature fails to designate an activity as either governmental or proprietary, then the "activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality." *Williams*, 366 N.C. at 202, 732 S.E.2d at 142.

Traditionally, the activity of owning property and then leasing or renting such property is not an activity that is within the exclusive province of government. Therefore, we conclude leasing property is a proprietary activity, and the City is not entitled to governmental immunity. While the City does not charge a *substantial* fee, it does charge a fee to rent the Property. Whether a venture is profitable to the City is not relevant to our inquiry. It is not the role of the courts to second guess and substitute our judgment for the City's business decisions.

We therefore conclude that the City was engaged in a proprietary function and had waived its governmental immunity.

II. Statute of Limitations

The Center also argues that the trial court erred in applying a two-year statute of limitations on the breach of contract and negligence claims rather than applying a three-year statute of limitations to both. We disagree.

A. Breach of Contract

Our General Assembly codified the statute of limitations against local government in N.C. Gen. Stat. § 1-53 (2017). Section 1-53(1) states that "[a]n action against a local unit of government upon a *contract*, obligation or *liability* arising out of a *contract*, express or implied" must be commenced "[w]ithin two years." N.C. Gen. Stat. § 1-53(1) (2017) (emphasis added). The statute of limitations for a breach of contract claim "begins to run on the date the promise is broken." *Pickett v. Rigsbee*, 252 N.C. 200, 204, 113 S.E.2d 323, 326 (1960).

However, the Center contends the breach of contract claim was subject to a three-year statute of limitations. Under Section 1-52(2), the statute of limitations is three years for "a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it." N.C. Gen. Stat. § 1-52(2) (2017). The Center argues that N.C. Gen. Stat. § 160A-425 creates a liability which subjects

the breach of contract claim to a three-year statute of limitations under Section 1-52. Section 160A-425 states:

> When a local inspector finds any defects in a building, or finds that the building has not been constructed in accordance with the applicable State and local laws, or that a building because of its condition is dangerous or contains fire hazardous conditions, it shall be his duty to notify the owner or occupant of the building of its defects, hazardous conditions, or failure to comply with law. The owner or occupant shall each immediately remedy the defects, hazardous conditions, or violations of law in the property he owns.

N.C. Gen. Stat. § 160A-425 (2017). However, even assuming Section 160A-425 could apply, the Center failed to allege in its complaint that the City inspector discovered the condition or violation.

Alternatively, the Center argues that the three-year statute of limitations for a breach of contract claim pursuant to Section 1-52(1) should apply. However, Section 1-52(1) specifically excepts causes of action "in G.S. 1-53(1)." N.C. Gen. Stat. § 1-52(1) (2017). Thus, the plain language of Section 1-52(1) expressly states that a three-year statute of limitations will apply in causes of action "arising out of a contract" *unless* the action is pursuant to Section 1-53(1).

As stated above, Section 1-53(1) provides in part that a two-year statute of limitation applies in causes of action "against a local unit of government" that arises "out of a contract." A rental agreement "is a contract." *Wal-Mart Stores, Inc. v. Ingles*

Markets, Inc., 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003) (citation and quotation marks omitted). Thus, the statute of limitations for the Center's breach of the rental agreement is subject to the two-year statute of limitations under Section 1-53(1).

The Center discovered the mold contamination on May 27, 2015 by way of the LRC report. Because the Center did not commence this action until May 29, 2018, their claim for breach of contract is time-barred.

B. Negligence

N.C. Gen. Stat. § 1-52(16) provides that the statute of limitations for a claim of negligence is three years,

> Unless otherwise provided by law, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property *becomes apparent or ought reasonably to have become apparent* to the claimant, whichever event first occurs.

N.C. Gen. Stat. § 1-52(16) (2017) (emphasis added). The statute of limitations for a negligence action "begins to run as soon as the injury becomes apparent or should reasonably become apparent." *Hamlet HMA, Inc. v. Richmond Cty.*, 138 N.C. App. 415, 423, 531 S.E.2d 494, 499 (2000) (citation omitted).

Here, Section 1-53(1) applies to any negligence actions that arise out of the rental agreement. The Center alleges in their complaint that the mold contamination was discovered on May 27, 2015. Thus, the Center's claim for negligence is barred by the two-year statute of limitations because the Center did not commence this action until May 29, 2018.

Conclusion

For the reasons set forth herein, the trial court erred in concluding that the City was shielded by governmental immunity. However, the trial court did not err when it granted Defendant's Rule 12(b)(6) motion to dismiss because the Center's negligence and breach of contract claims are time-barred.

AFFIRMED.

Judges STROUD and DILLON concur.

Report per Rule 30(e).