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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-203

Filed: 31 December 2020

Union County, No. 18 CVS 00757

PROVIDENCE VOLUNTEER FIRE DEPARTMENT, INC., a North Carolina non-profit corporation, Plaintiff,

v.

THE TOWN OF WEDDINGTON, a North Carolina municipal corporation, PETER WILLIAM DETER, in his individual and official capacity as Mayor, and WESLEY CHAPEL VOLUNTEER FIRE DEPARTMENT, INC., a North Carolina non-profit corporation, Defendants.

Appeal by Plaintiff and Defendants from order entered 27 November 2018 by Judge Daniel A. Kuehnert in Union County Superior Court. Heard in the Court of Appeals 2 October 2019.

The Duggan Law Firm, PC, by Christopher Duggan, for Plaintiff-Appellant Providence Volunteer Fire Department, Inc.

Clawson & Staubes, PLLC, by Andrew J. Santaniello and Ryan L. Bostic, for Defendant-Appellant The Town of Weddington.

Meghann K. Burke for Defendant-Appellant Peter William Deter.

DILLON, Judge.

Opinion of the Court

Plaintiff Providence Volunteer Fire Department, Inc. (“Providence”) and Defendants The Town of Weddington (the “Town”) and Peter William Deter (the “Mayor”) appeal from an order granting in part and denying in part the Town’s and the Mayor’s motions to dismiss Providence’s complaint.

I. Background

For a number of years, Providence operated its volunteer fire department from a fire station location it owned. The station needed extensive renovations to continue its operations.

In October 2013, Providence and the Town entered into certain agreements. Under the agreements, the Town agreed to assume debt incurred by Providence for renovations to the station building and to enter into a Fire Service Agreement (the “FSA” or the “Agreement”) with Providence for a term of ten years to provide firefighting and emergency medical services to the citizens of the Town for a monthly fee paid by the Town. Also pursuant to the agreements, Providence would deed its fire station location to the Town and lease it back for one dollar (\$1.00) per year. The FSA allowed either party to terminate the lease and the FSA earlier than ten years for “the failure of either party to perform the material provisions of this Agreement (FSA) and shall include, but not limited to, the failure to meet the required service levels and transparency requirements of the Agreement.” The Town spent close to one million dollars to fund improvements to the fire station location.

Opinion of the Court

Pursuant to the agreements, Providence transferred the fire station's title to the Town, leased it back for one dollar (\$1.00) per year, and provided firefighting and emergency medical services for the Town.

In November 2013, the Mayor was elected and new members were elected to the Town Council.

On 29 April 2015, the new Town Council terminated the Town's agreement with Providence for the provision of firefighting/emergency medical services, citing concern over Providence's ability to continue providing said services. As a consequence, Providence's lease ended and Providence was required to vacate the fire station location that it had formerly owned.

Having lost its property and its contract to provide services to the Town, Providence filed this action against the Town and the Mayor alleging breach of contract, fraud, an unconstitutional taking, due process violations, and tortious interference with contract.¹

The Town and the Mayor moved to dismiss Providence's claims. A hearing was held on the motions and the trial court entered an order dismissing some, but not all of Providence's claims.

¹ Prior to bringing this action in 2018, Providence brought suit in 2015 against the Town only. The Town moved to dismiss the suit, and the trial court denied the Town's motion to dismiss. Our Court reviewed the trial court's denial of the Town's motion to dismiss. *Providence Vol. Fire Dep't v. Town of Weddington*, 253 N.C. App. 126, 800 S.E.2d 425 (2017). Thereafter, Providence sought to amend its complaint to add other parties, which was denied by the trial court. In response, Providence dismissed the 2015 action, and then brought this 2018 action.

Opinion of the Court

All parties timely appealed the order.

II. Analysis

The order being appealed is interlocutory as it does not resolve all claims, and “[g]enerally, there is no right of immediate appeal from interlocutory orders and judgments.” *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992). However, our Court may review an interlocutory order where it “deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment.” *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978).

A. Providence’s Appeal

In its present appeal, Providence argues that the trial court erred dismissing some of its claims. However, Providence concedes that the trial court’s error has not affected a substantial right. Therefore, we dismiss Providence’s appeal.

B. The Town and the Mayor’s Appeals²

The Town and the Mayor each contend that the order *denying*, in part, their motions to dismiss affects their substantial right of immunity. Indeed, the issue of immunity “represents a substantial right, as ‘the entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is

² Providence has filed a motion in our Court to dismiss portions of the Town’s and the Mayor’s appeals based on the appeals being interlocutory. This motion is resolved by our holdings in this opinion. Providence has also filed a motion in our Court designated “Plaintiff’s Motion to Strike Town and Deter’s Reply Brief.” We deny that motion and consider the matters addressed in the reply brief.

Opinion of the Court

erroneously permitted to go to trial.’ ” *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (emphasis in original) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). In our analysis below, we only address whether the Town and the Mayor are immune from suit for the surviving claims. We do not address whether the Town or the Mayor were entitled to a dismissal for any other reason besides immunity.

1. Fraud Claim Against the Town

In its complaint, Providence alleged that the Town committed both fraud in the inducement and actual fraud.

The Town argues that it is immune from Providence’s fraud claim as it enjoys governmental immunity, citing *Herring v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 137 N.C. App. 680, 685, 529 S.E.2d 458, 462 (2000), in which we found that “constructive fraud [is] a viable tort claim subject to the doctrine of sovereign immunity.”³

³ A panel of our Court briefly discussed the Town’s governmental immunity in the appeal of the 2015 case. *See Providence*, 253 N.C. App. at 136-37, 800 S.E.2d at 433-34. Our Court stated that we were required to take the allegation that “the Town’s function in entering into the purchase agreement with lease back dated August 19, 2014 . . . with [Providence] is proprietary in nature and as such the Town can be sued by [Providence] for the causes of action stated herein” as true because “[t]his allegation was unchallenged by the Town through any evidence submitted in support of its motion [to dismiss].” *Id.* at 137, 800 S.E.2d. at 433.

In its complaint in this present 2018 case, Providence also alleged that the Town’s actions were proprietary in nature. However, in its motion to dismiss and answer, the Town expressly denied Providence’s allegation. Thus, we are not bound by the allegation. As such, we fully analyze the Town’s argument that it was carrying out a governmental, rather than a proprietary, function.

Opinion of the Court

Governmental immunity provides “a county or municipal corporation” shelter “from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.” *Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep’t*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (internal citations omitted). However, “governmental immunity covers *only* the acts of a municipality or a municipal corporation *committed pursuant to its governmental functions*.” *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (emphasis added).

In the present case, the Town argues that contracting with a third party to provide fire protection services in its jurisdiction is a *governmental* function. Indeed, our Court has held that “[i]t is undisputed that [the fire department] is entitled to governmental immunity for conduct performed in the course of fighting a fire.” *Pruett v. Bingham*, 238 N.C. App. 78, 85, 767 S.E.2d 357, 363 (2014). However, the action that Providence claims is fraudulent is *not* providing fire protection services, but rather purchasing and leasing back real estate.

Based on our review of our General Statutes, we conclude that the act of a town entering into contracts for the provision of firefighting services is governmental in nature. Section 69-25.6 of our General Statutes provides that “[m]unicipal corporations are hereby empowered to make contracts to carry out the purposes of

Opinion of the Court

this Article [concerning rural fire protection].” N.C. Gen. Stat. § 69-25.6 (2013). And Section 69-25.8 states in pertinent part that:

Any county, municipal corporation or fire protection district performing any of the services authorized by this Article shall be subject to the same authority and immunities as a county would enjoy in the operation of a county fire department within the county, or a municipal corporation would enjoy in the operation of a fire department within its corporate limits.

Id. § 69-25.8.

This is not to say that a town, acting in a governmental function, is immune from suit for the breach of those contracts. *See Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). And certainly a theory for a breach is that the contracting governmental entity has breached its contractual duty of “good faith and fair dealing.” *See Blondell v. Ahmed*, 247 N.C. App. 480, 483, 786 S.E.2d 405, 407 (2016) (noting that in every contract there is an implied covenant of good faith and fair dealing), *aff’d per curiam*, 370 N.C. 82, 804 S.E.2d 183 (2017). But the question here is whether the Town may be sued *in tort* of fraud. And since the Town was engaged in a governmental function and has otherwise not waived its immunity, we must reverse the trial court’s denial of the Town’s motion to dismiss the fraud claims.

2. Fraud Against the Mayor

The Mayor similarly argues that the trial court erred “when it held that [he] was not entitled to personal immunit[y] for Providence’s fraud . . . claim [] against

Opinion of the Court

him in his individual capacity.” We review such alleged error *de novo*. *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017).

Absolute immunity is granted to local elected officials if: (1) “they were acting in a legislative capacity at the time of the alleged incident; and (2) their acts were not illegal acts.” *Vereen v. Holden*, 121 N.C. App. 779, 782, 468 S.E.2d 471, 473 (1996). For example, our Court has held that conditional use permitting is legislative in nature and, therefore, is an action covered by immunity. *Stephenson v. Town of Garner*, 136 N.C. App. 444, 450, 524 S.E.2d 608, 613 (2000) (“So long as the acts are legislative in nature, immunity may extend to ‘voting, . . . and . . . every other act resulting from the nature, and in the execution, of the office.’”) (quoting *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)).

The Mayor argues that “[p]utting issues on an agenda, stating a position on an agenda item requiring [city c]ouncil action, then abstaining from voting in compliance [with] Town ordinances are acts that are part and parcel of being mayor and squarely fit within the sphere of legislative activity.” In so arguing, the Mayor cites and likens the present case to *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), in which the United States Supreme Court concluded that individual city council members acted legislatively when voting for an ordinance that, in turn, terminated the plaintiff’s employment with the town, stating that “[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it.”

Opinion of the Court

Id. at 54. The Court stated that a city council's termination of the plaintiff "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents" and, thus, was "undoubtedly legislative." *Id.* at 55-56.

Bogan is, indeed, instructive to the case at hand. The Mayor, in his official role, had a duty to set agenda items and state a position on agenda items, including the Town Council's consideration of provision of fire services and agreements with Providence. Here, although some of the alleged actions happened before the Mayor's election, *there is no fraud claim without the legislative actions that occurred after his election.* This claim is subject to legislative immunity because the allegations of fraud under Providence's complaint cannot be subdivided into actions the Mayor took before his election and actions taken after his election; for purposes of immunity, the alleged tort was not complete until after the Mayor's election and is based upon a legislative action.

The damage for which Providence seeks recourse is the termination of its contract to provide fire services for the Town of Weddington, an action approved by a vote of the Town Council; the Mayor did not vote on this action. Providence would have no claim whatsoever without the alleged actions of the Town and the Mayor after the Mayor's election, and Defendants were "acting in a legislative capacity" in voting to terminate the contract. *Vereen*, 121 N.C. App. at 782, 468 S.E.2d at 473.

Opinion of the Court

And the contract which obligated Providence to deed its fire station property to the Town was entered before the Mayor was elected and was approved by a different town council. Nor were the actions of the Town and the Mayor in regard to the vote to terminate the contract “illegal acts.” *Id.* at 782, 468 S.E.2d at 473.

Providence’s claim includes over 100 paragraphs of factual allegations, but the essence of its fraud claim against the Mayor is this: while he was campaigning for office, before his election, he made misrepresentations of his intentions regarding the provision of fire protection services for the Town, and after his election, the Town Council voted to have another department provide fire protection services from the building previously owned by Providence. Even assuming that a candidate for a legislative or executive office could commit actionable fraud by promising one thing while campaigning and then pursuing a different path after election — a proposition that would invite a flood of fraud claims against elected officials at all levels — Providence’s alleged claims in this case against the Mayor should have been dismissed based upon legislative immunity. Thus, we reverse the trial court’s order as to the claims against the Mayor.

3. Constitutional Claims

The Town and the Mayor argue that the trial court erred in only partially granting their motions to dismiss Providence’s 42 U.S.C. § 1983 claims. However, they argue that they were entitled to a dismissal on Rule 12(b)(6) grounds, contending

Opinion of the Court

that Providence has failed to demonstrate a deprivation of a federally-protected right to its property and interests. Thus, we dismiss this portion of the Town's and the Mayor's appeals, as their arguments are not based on immunity. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982) ("The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12(b)(6), Rules of Civil Procedure, G.S. 1A-1, is an interlocutory order from which no immediate appeal may be taken.").

III. Conclusion

We reverse the trial court's order as to its denial of the motions to dismiss the fraud claims against the Town and the Mayor. We dismiss Providence's appeal as it does not allege a deprivation of a substantial right. And we dismiss the portions of the Town's and the Mayor's appeals regarding Providence's constitutional claims. We remand to the trial court for further proceedings on the remaining claims.

AFFIRMED IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED.

Judges STROUD and YOUNG concur.

Report per Rule 30(e).