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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-660

Filed 02 May 2023

Mecklenburg County, No. 21 CVS 2751

ISMAEL VIDALES VASQUEZ, Plaintiff,

v.

DUBAI, LLC AND FIESTA AZTECA, INC., A/K/A DUBAI NIGHTCLUB, A/K/A DUBAI NIGHT LIFE, EMMANUEL MARTINEZ, INDIVIDUALLY, CINDRY MARTINEZ, INDIVIDUALLY, BEE VEE, LLC AND B.V. BELK PROPERTIES, INC., Defendants.

Appeal by plaintiff from order entered 14 March 2022 by Judge Athena Brooks in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 April 2023.

*Butler, Quinn & Hochman, PLLC, by Ian A. McIntyre and Brian R. Hochman, for plaintiff-appellant.*

*Hedrick Gardner Kincheloe & Garofalo LLP, by Kristy D'Ambrosio, David L. Levy, and Linda Stephens, for defendant-appellees Bee Vee, LLC and B.V. Belk Properties, Inc.*

*Williford Law, by Jackson Williford, for defendant-appellees Dubai, LLC, and Fiesta Azteca, Inc., a/k/a Dubai Nightclub, a/k/a Dubai Sports Bar & Grill, a/k/a Dubai Night Life; Emmanuel Martinez, individually, and Cindry Martinez, individually.*

ARROWOOD, Judge.

Ismael Vidales Vasquez (“plaintiff”) appeals from the trial court’s order

granting motions to dismiss for Emmanuel Martinez, Cindry Martinez, Bee Vee, LLC, B.V. Belk Properties, Inc., Dubai, LLC, and Fiesta Azteca, Inc., a/k/a Dubai Nightclub, a/k/a Dubai Sports Bar & Grill, a/k/a Dubai Night Life (collectively “defendants”). Plaintiff contends the trial court erred in granting motions to dismiss pursuant to Rule 12(b)(6), Rule 12(b)(7), and Rule 19A. For the following reasons, we affirm the dismissal under Rule 12(b)(7) and Rule 19, and therefore do not reach plaintiff’s additional claim.

I. Background

In early March 2018, plaintiff was a patron of Dubai Nightclub, a club located within a shopping center. Around 2:00 a.m. the club closed, and after plaintiff exited the club, but while he was still in the shopping center parking lot, he was “struck and run over” by a Dodge Challenger. As a result, plaintiff suffered serious injuries.

Plaintiff filed this complaint on 26 February 2021, against the owners and operators of the nightclub in question, Dubai, LLC, and Fiesta Azteca, Inc., a/k/a Dubai Nightclub, a/k/a Dubai Sports Bar & Grill, a/k/a Dubai Night Life, Emmanuel Martinez, Cindry Martinez (collectively “Dubai defendants”), and the owners and operators of the shopping center within which the club was located, Bee Vee, LLC and B.V. Belk Properties, Inc. Plaintiff asserted claims of negligence, arguing that Dubai defendants forced intoxicated club patrons out at closing time into the parking lot of the shopping center without security, when they knew the immediate vicinity was “a high crime area.” Furthermore, plaintiff contended the owners and operators

of the shopping center knew or should have known of Dubai defendants’ practices but failed to “reasonably protect patrons of the [s]hopping [c]enter.” However, plaintiff acknowledged that his injuries were the result of being “[s]uddenly and without warning . . . struck and ran over” by “an unknown person [in] a Dodge Challenger automobile[.]”

Dubai defendants answered, denying the allegations, and asserting multiple defenses, including contributory negligence, expiration of the statute of limitations, failure to state a claim upon which relief could be granted, and failure to join a necessary party. Bee Vee, LLC and B.V. Belk Properties, Inc. answered, denying all allegations, asserting multiple affirmative defenses, and asserting crossclaims against Dubai defendants for indemnification, contribution, and breach of contract. Dubai defendants asserted multiple defenses to the crossclaims and raised their own crossclaims against Bee Vee, LLC and B.V. Belk Properties, Inc. in response. Bee Vee, LLC and B.V. Belk Properties, Inc. timely denied the claims.

On 30 December 2021, Dubai defendants filed a motion to dismiss the claims pursuant to North Carolina Rules of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) and 12(b)(7) (“Rule 12(b)(7)”), arguing that plaintiff failed to join Michel Alonzo Contador (“Mr. Contador”), a necessary party and the driver of the car that struck plaintiff. Dubai defendants further contended that Mr. Contador could not be added, as the statute of limitations for a negligence claim against him had expired, necessitating dismissal. In support of their motion, Dubai defendants included the law

enforcement incident report, which listed the offense as aggravated assault, and stated in the narrative that an “unknown . . . male struck several people with his vehicle . . . before fleeing the scene.” On 12 January 2022, Bee Vee, LLC and B.V. Belk Properties, Inc. joined and adopted the motion.

The matters came on for a hearing in Mecklenburg County Superior Court on 24 February 2022, Judge Brooks presiding. At the hearing, defendants argued the complaint should be dismissed pursuant to Rule 12(b)(7) and Rule 19A (“Rule 19”) because plaintiff failed to include Mr. Contador, “the individual that actually ran over . . . plaintiff,” as a necessary party. Defendants further argued that because they were “jointly and severally liable[,]” failure to add Mr. Contador would be prejudicial.

Defendants Bee Vee, LLC and B.V. Belk Properties, Inc., also argued a motion to dismiss under Rule 12(b)(6), claiming that the criminal act of Mr. Contador severed “the causal nexus between the[ir] alleged conduct . . . and any damages to the plaintiff[.]” Defendants also denied being on notice regarding violent crime in the area and argued that even if they were, plaintiff’s injury was not foreseeable since it was a traffic incident.

By contrast, plaintiff argued Mr. Contador was not a necessary party, since plaintiff was making “separate and distinct negligent security claims against” defendants, and because North Carolina is a joint and several liability state, plaintiff can choose which joint tortfeasors to sue. Furthermore, plaintiff argued that although Mr. Contador did hit plaintiff with a vehicle, he “was actually charged with

assault with a deadly weapon with intent to inflict serious injury[.]” meaning this was not merely “a motor vehicle accident” as defendants claimed.

On 14 March 2022, the trial court entered an order granting defendants Bee Vee, LLC and B.V. Belk Properties, Inc.’s motion to dismiss under Rule 12(b)(6), denying Dubai defendant’s motion to dismiss pursuant to Rule 12(b)(6), and granting defendants’ motion to dismiss under Rule 12(b)(7). Plaintiff filed a notice of appeal on 23 March 2022.

## II. Discussion

On appeal, plaintiff raises two issues. First, plaintiff claims the trial court erred in granting defendants’ motion to dismiss for failure to join a necessary party pursuant to Rule 12(b)(7). Second, plaintiff contends the trial court erred in granting defendants Bee Vee, LLC and B.V. Belk Properties, Inc.’s motion to dismiss for failure to state a claim upon which relief could be granted.

### A. Rule 12(b)(7) Motion

Plaintiff first argues the trial court erred in granting defendants’ motion to dismiss under Rule 12(b)(7) because Mr. Contador is not a necessary party, as the claims against defendants are “entirely separate, distinct, and independent” from any claims against Mr. Contador. We disagree.

“The denial of a motion to dismiss for failure to join a necessary party is reviewed as a question of law.” *State ex. rel. Regan v. Wasco, LLC*, 269 N.C. App. 292, 302, 837 S.E.2d 565, 571 (citation omitted), *disc. review denied*, 374 N.C. 744, 842

S.E.2d 589 (Mem) (2020). “[W]e review the trial court’s conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.” *Id.* (citation and internal quotation marks omitted).

“Necessary parties *must* be joined in an action.” *Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 451, 183 S.E.2d 834, 837 (1971) (emphasis in original). “The term ‘necessary parties’ embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy.” *N.C. Dep’t of Transp. v. Stagecoach Vill.*, 174 N.C. App. 825, 827-28, 622 S.E.2d 142, 144 (2005) (citation and internal quotation marks omitted), *disc. review denied*, 360 N.C. 483, 630 S.E.2d 929 (Mem) (2006). A necessary party is one who is “‘united in interest’ with another party to the action. A person is ‘united in interest’ with another party when that person’s presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court.” *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272, *disc. review denied*, 297 N.C. 454, 256 S.E.2d 807 (Mem) (1979). Still, dismissal is only proper under Rule 12(b)(7) when there is a defect that “cannot be cured.” *Bailey v. Handee Hugo’s, Inc.*, 173 N.C. App. 723, 728, 620 S.E.2d 312, 316 (2005) (citing *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E.2d 19, 22, *cert. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981)) (internal quotation marks and brackets omitted).

By contrast, “[a] proper party is one whose interest may be affected by a decree,

but whose presence is not essential in order for the court to adjudicate the rights of others.” *N.C. Dep’t of Transp.*, 174 N.C. App. at 828, 622 S.E.2d at 144 (citation omitted). “It is ordinarily within the discretion of the court to permit proper parties to intervene.” *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (citation omitted). Here, plaintiff and defendants agree that Mr. Contador cannot be joined, as the statute of limitations for plaintiff’s claim against him has run, but the parties disagree as to whether Mr. Contador is a necessary party.

Plaintiff argues that Mr. Contador’s liability will not be implicated by defendant’s negligence since “Mr. Contador’s intentional tort or grossly negligent tort” is separate and distinct from defendants’ negligence. However, this argument is undercut by plaintiff’s contention that defendants are not prejudiced by Mr. Contador’s absence since they can seek contribution from him.

Here, Mr. Contador is a necessary party as he has a “material interests in the subject matter of [the] controversy” that “will be directly affected by an adjudication of the controversy[,]” since defendants can seek contribution from him if plaintiff receives a judgment in his favor. *See N.C. Dep’t of Transp.*, 174 N.C. App. at 827-28, 622 S.E.2d at 144 (citation and internal quotation marks omitted). Accordingly, defendants and Mr. Contador are “united in interest” since Mr. Contador’s absence prejudices his rights and those of defendants’ involved in the case. *Ludwig*, 40 N.C. App. at 190, 252 S.E.2d at 272.

However, if Mr. Contador is a necessary party, dismissal for failure to join a

necessary party is still only proper when there is a defect that cannot be cured. *Bailey*, 173 N.C. App. at 728, 620 S.E.2d at 316 (citation omitted). In *Bailey v. Handee Hugo's, Inc.*, this Court affirmed the trial court's dismissal of the plaintiff's case pursuant to Rule 12(b)(7) as the plaintiff failed to join "the responsible party" and "[t]here was no way for the court to cure the defect" since the statute of limitations had run on the plaintiff's action against the necessary party. *Id.* at 727-28, 620 S.E.2d at 316. In *Bailey*, plaintiff was "injured in a slip and fall" at Handee Hugo's, Inc. and filed a complaint against two companies, neither of which "was the party who operated the premises where the incident occurred." *Id.* at 724, 728, 620 S.E.2d at 314, 316. We find this case controlling.

In *Bailey*, the negligence was related to a slip and fall on the business premises, therefore the owner and operator of the business was a necessary party. *Id.* Here, plaintiff's injury is the result of being "struck and ran over" by "an unknown person [in] a Dodge Challenger automobile[.]" and therefore, Mr. Contador, who was operating the vehicle that hit plaintiff, is a necessary party. *See id.* While we acknowledge plaintiff's argument that normally joint tortfeasors "are not necessary parties and [plaintiff] cannot be compelled to pursue them[.]" plaintiff cites no case law or statute which states that joint tortfeasors can *never* be necessary parties. *Charnock v. Taylor*, 223 N.C. 360, 363, 26 S.E.2d 911, 914 (1943).

We sympathize with plaintiff's position and acknowledge the seriousness of his injuries, but we find Mr. Contador was a necessary party that can no longer be added



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to the case, and this has resulted in a defect which cannot be cured, necessitating dismissal of plaintiff's case against defendants under *Bailey*. Therefore, we affirm dismissal in favor of defendants under Rule 12(b)(7). Accordingly, we do not reach plaintiff's second issue on appeal.

III. Conclusion

For the foregoing reasons, we affirm dismissal in favor of defendants.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).