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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-115

Filed 16 July 2024

N.C. Industrial Commission, No. TA-30238

PATRICK ANDRE DEBERRY, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant.

Appeal by Plaintiff from orders entered 2 and 31 May 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 June 2024.

Patrick A. DeBerry, pro se, Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Gregory L. Rouse II, for the State.

WOOD, Judge.

Patrick DeBerry (“Plaintiff”), *pro se*, appeals the North Carolina Industrial Commission’s (the “Industrial Commission”) 2 May 2023 order dismissing his affidavit (“complaint”) for lack of subject matter jurisdiction pursuant to N.C. R. Civ. P. 12(b)(1) and for failure to state a claim pursuant to N.C. R. Civ. P. 12(b)(6). Plaintiff further appeals the Industrial Commission’s 31 May 2023 order denying Plaintiff’s motion to reconsider the Industrial Commission’s 2 May 2023 order. On

appeal, we address whether Plaintiff successfully stated a negligence claim under the North Carolina Tort Claims Act (the “Tort Claims Act”). For the reasons stated herein, we hold Plaintiff failed to state a cognizable negligence claim.

I. Factual and Procedural History

On 19 August 2008, the Durham County Superior Court entered a judgment sentencing Plaintiff to 225-279 months of imprisonment for two counts of trafficking heroin by possession, one count of trafficking heroin by delivery, one count of trafficking heroin by transportation, and one count of trafficking heroin by sale, all with offense dates in March 2007. Plaintiff was ordered to pay a mandatory fine of \$500,000.00 and \$5,400.00 in restitution.

Plaintiff filed a motion for appropriate relief.¹ On 21 March 2022, the Durham County Superior Court entered an order granting Plaintiff’s motion and amending the judgment to reflect convictions for attempted trafficking for all five offenses and to reflect one consolidated judgment for a class C felony offense, prior record level 1, imposing a sentence of 58-79 months of imprisonment. The amended judgment also removed the \$500,000.00 fine, \$5,400.00 restitution, and court costs. The court then arrested the judgment. The judgment was entered “*nunc pro tunc*” to the original sentencing date of 19 August 2008. “A *nunc pro tunc* order is an entered order with retroactive effect. *Nunc pro tunc* is defined as *now for then*. It signifies a thing is now

¹ This motion does not appear in the Record.

done which should have been done on the specified date.” *Dabbondanza v. Hansley*, 249 N.C. App. 18, 22, 791 S.E.2d 116, 119 (2016) (quotation marks and ellipsis omitted). The court ordered that certified copies of the amended judgment and commitment, along with a certified copy of the order, be provided to the North Carolina Department of Public Safety Office of Combined Records (the “Office of Combined Records”).

Plaintiff was released from prison on 24 March 2022. On 23 June 2022, Plaintiff filed with the Industrial Commission a complaint against the North Carolina Department of Public Safety. Plaintiff filed the complaint on Form T-1 pursuant to N.C. Gen. Stat. § 143-291, the Tort Claims Act. Plaintiff alleges Teresa O’Brien (“O’Brien”), Director of the Office of Combined Records, independently amended the judgment and commitment order by beginning Plaintiff’s sentence on 29 May 2017, rather than the ordered date of 19 August 2008. Plaintiff alleges that because his records do not accurately reflect the beginning of his sentencing date, he was “not given credit in the official agency records for time served.”² Plaintiff alleges his public records state he served 1,761 days rather than 4,966 days in prison, resulting in damages of \$1,000,000.00 to him. Defendant’s “Offender Information” form, dated 1 March 2021, noted a date of admission into incarceration as 19 August 2008. The

² The Full Industrial Commission noted that Plaintiff alleges O’Brien “inappropriately changed a record entry reflecting the beginning date of Plaintiff’s incarceration, which he argues had the effect of significantly under-crediting him for the time he served during his completed prison sentence.”

updated form, dated 31 August 2022, indicates a “Sentence Begin Date” of 29 May 2017. However, the same form also noted an “Admission Date” of 19 August 2008.

On 23 August 2022, Defendant submitted a motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) for failure to state a claim, alleging Plaintiff’s claim is barred by public official immunity. On 29 September 2022, Senior Deputy Commissioner of the Industrial Commission Robert J. Harris held a pre-trial conference with both parties to address the motion to dismiss. On 3 November 2022, Senior Deputy Commissioner Harris entered an order dismissing Plaintiff’s claim with prejudice, concluding that as “Director of Combined Records for Defendant, Teresa O’Brien is a public official acting within her official capacities,” and the claim is “barred by public official immunity.” On 14 November 2022, Plaintiff appealed to the full Industrial Commission. On 9 January 2023, Plaintiff also filed Form T-44, “Application for Review,” giving notice of appeal and application for review before the full Industrial Commission.

The Full Commission reviewed Plaintiff’s appeal without oral argument on 19 April 2023. On 2 May 2023, the Full Commission entered an order dismissing Plaintiff’s appeal on two grounds. The Full Commission dismissed the appeal without prejudice pursuant to N.C. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The Full Commission found that if, as alleged, O’Brien acted “independently” to usurp the power of the judiciary, such action would be an intentional tort not covered by the Tort Claims Act. Furthermore, the Full Commission found this case involves the

“administration of North Carolina’s prison facilities” which is a function of the Executive Branch and not ordinarily subject to judicial oversight. The Full Commission also dismissed Plaintiff’s complaint with prejudice pursuant to N.C. R. Civ. P. 12(b)(6) for failure to state a negligence claim under the Tort Claims Act.

On 18 May 2023, Plaintiff filed a motion to reconsider. On 31 May 2023, the Full Commission “determined that Plaintiff has not set forth sufficient grounds to reconsider” the Full Commission’s order, and it denied Plaintiff’s motion for reconsideration. Plaintiff filed a notice of appeal to this Court on 27 June 2023. On 4 August 2023, Defendant filed a motion to dismiss Plaintiff’s appeal for failure to file timely notice of appeal. On 7 August 2023, Commissioner James Gillen granted Defendant’s motion to dismiss Plaintiff’s appeal.³ On 14 August 2023, Plaintiff filed a motion to reconsider the dismissal of his appeal. On 31 August 2023, Deputy Commissioner Gillen granted Plaintiff’s motion for reconsideration, finding that Deputy Commissioners Gillen and Wanda erroneously dismissed Plaintiff’s appeal. Plaintiff’s appeal was therefore deemed timely.

II. Analysis

Plaintiff raises four issues on appeal. Plaintiff contends the Full Commission erred when it (1) barred Plaintiff’s claim due to public official immunity; (2) disregarded O’Brien’s non-compliance with a Superior Court order; (3) failed to

³ The Record also contains a second order, by Commissioner Wanda Taylor, also purporting to grant Defendant’s motion to dismiss Plaintiff’s appeal.

acknowledge new errors alleged on the Form T-44; and (4) dismissed Plaintiff's complaint for failure to state a claim. Regardless of whether public official immunity operates to bar Plaintiff's claim, we only address the Full Commission's dismissal pursuant to N.C. R. Civ. P. 12(b)(6).⁴ We hold Plaintiff has failed to state a claim pursuant to Rule 12(b)(6).

"A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint." *Forsyth Memorial Hosp., Inc. v. Armstrong World Industries, Inc.*, 336 N.C. 438, 442, 444 S.E.2d 423, 425 (1994). This Court must determine whether, as a matter of law, "the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory." *Id.* 336 N.C. at 442, 444 S.E.2d at 425–26 (brackets omitted). A "pleading shall contain a plain statement of the claim" to give the court and the parties notice of the transactions or occurrences from which the pleader is entitled to relief. *FCX, Inc. v. Bailey*, 14 N.C. App. 149, 151, 187 S.E.2d 381, 382 (1972) (citing N.C. R. Civ. P. 8(a)).

A complaint is to be construed liberally. *Highland Paving Co., LLC v. First Bank*, 227 N.C. App. 36, 39, 742 S.E.2d 287, 291 (2013). Nevertheless, a complaint must "state enough to give the substantive elements of a legally recognized claim" or it will be dismissed pursuant to Rule 12(b)(6). *Id.* at 44, 742 S.E.2d at 293. Therefore, "vague and conclusory pleading is not encouraged" by this Court. *Smith v. State*, 289

⁴ As noted *supra*, the Full Commission dismissed Plaintiff's claim without prejudice pursuant to Rule 12(b)(1) and with prejudice pursuant to Rule 12(b)(6).

N.C. 303, 332, 222 S.E.2d 412, 430 (1976). A complaint must be dismissed when “it reveals that no law supports it, that an essential fact is missing, or a fact is disclosed which necessarily defeats it.” *Loren v. Jackson*, 57 N.C. App. 216, 220, 291 S.E.2d 310, 313 (1982).

While a *pro se* complaint is held to “less stringent standards” than a complaint drafted by an attorney, courts do not “conjure up” facts to support conclusory allegations. *Id.* at 225, 291 S.E.2d at 315–16. Furthermore, a court cannot “write in allegations that are not there under the guise of the rule of liberal construction.” *Reliance Ins. Co. v. Morrison*, 59 N.C. App. 524, 526, 297 S.E.2d 187, 188 (1982).

Here, Plaintiff purports to bring a negligence claim arising under the Tort Claims Act. Negligence claims under the Tort Claims Act are “determined by the same rules as those applicable to private parties.” *Bolkhir v. North Carolina State University*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). A plaintiff must sufficiently allege: (1) defendant owed plaintiff a duty of care; (2) defendant’s named employee breached that duty; (3) this breach was the actual and proximate cause of plaintiff’s injury; and (4) plaintiff suffered damages as a result of such breach. *Becker v. N.C. Dept. of Motor Vehicles*, 177 N.C. App. 436, 439, 628 S.E.2d 446, 449 (2006).

The fourth element requires a plaintiff sufficiently allege he or she suffered actual damages. “[I]t is an elementary principle that all damages must flow directly and naturally from the wrong, and that they must be certain both *in their nature* and in respect to the cause from which they proceed.” *People’s Center, Inc. v. Anderson*,

32 N.C. App. 746, 748, 233 S.E.2d 694, 696 (1977) (emphasis added). A plaintiff cannot recover damages by proving “only that the defendant has unlawfully violated some duty” he or she owed to the plaintiff. *Id.* A plaintiff must “go further and prove the *nature and extent* of the damage suffered.” *Id.* at 748, 233 S.E.2d at 696 (emphasis added). If the damages are left to speculation, recovery is barred. *Id.*

Plaintiff alleges (1) Defendant owed Plaintiff a duty of reasonable care to electronically record his sentence start date as 19 August 2008; (2) Defendant breached this duty by electronically recording the sentence start date as 29 May 2017; (3) Defendant was the actual and proximate cause of the breach as Defendant was responsible for record-keeping; and (4) Plaintiff suffered damages of \$1,000,000.00 because his record does not accurately indicate the duration of his incarceration; Plaintiff specifically alleges that “the official agency records [do] not show that [he] suffered an over[-]detention of . . . 3,205 days of imprisonment.”

Plaintiff argues that the damage occurred because his criminal record does not match the duration of time Plaintiff actually served in prison. At the hearing on Defendant’s motion to dismiss, Deputy Commissioner Harris questioned Plaintiff about the nature of his complaint and the alleged damages. Plaintiff argued that the “judgment was not honored” and Plaintiff was “not credited” for days spent in prison. However, Plaintiff did not explain in his complaint nor in that hearing how a record incorrectly denoting how long he spent in prison would result in current or future

injury. Plaintiff does not allege that a legal right had been invaded for which Plaintiff would be entitled to damages.

A review of the Record reflects that Plaintiff was initially sentenced to 225-279 months of imprisonment, which is approximately 6,750 to 8,370 days. After Plaintiff filed his motion for appropriate relief, the court granted it on 21 March 2022, and he was resentenced to 58-79 months, which is approximately 1,740 to 2,370 days. The judgment was arrested, and he was released from prison a few days later on 24 March 2022. Plaintiff is correct in his assertion that because the judgment was entered “*nunc pro tunc*” to the original sentencing date of 19 August 2008, the official records should state a “Sentence Begin Date” of 19 August 2008. As 29 May 2017 to 24 March 2022 is approximately 1,761 days, presumably, the date of 29 May 2017 was used by the Office of Combined Records to place the duration of Plaintiff’s imprisonment within the days authorized by the new sentence, although Plaintiff was actually incarcerated from 19 August 2008 to 24 March 2022, approximately 4,966 days.

However, Plaintiff has failed to allege *how* he was damaged by the Office of Combined Records’ use of 29 May 2017 as the “Sentence Begin Date.” Although Plaintiff alleges O’Brien’s “negligent conduct” caused him damages in the amount of \$1,000,000.00, Plaintiff did not “prove” (nor allege any facts pertinent to) “the nature” of the damage he allegedly suffered. *Anderson*, 32 N.C. App. at 748, 233 S.E.2d at 696. This Court cannot conjure facts or create allegations which Plaintiff did not present upon appeal. *Loren*, 57 N.C. App. at 225, 291 S.E.2d at 315–16.

Because Plaintiff failed to explain how Defendant's alleged breach caused damages in the amount of \$1,000,000.00, a necessary element of a negligence claim, his complaint was properly dismissed. *Becker*, 177 N.C. App. at 439, 628 S.E.2d at 449.

III. Conclusion

A claim for recovery under a theory of negligence requires a plaintiff to allege actual damages stemming from an injury as well as the "nature and extent" of such damages. *Anderson*, 32 N.C. App. at 748, 233 S.E.2d at 696. Because Plaintiff failed to do so, he failed to state a negligence claim under the Tort Claims Act. Accordingly, Plaintiff's complaint was properly dismissed, and we affirm the decision of the Full Commission.

AFFIRMED.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).