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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-405

Filed 17 December 2024

Mecklenburg County, No. 23CVS6406

TREVOR DANIEL YOW, Plaintiff,

v.

DISPATCH & SERVICES, INC., Defendant.

Appeal by plaintiff from order entered 8 February 2024 by Judge Peter B. Knight in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2024.

Wallace & Graham, PA, by John Hughes, for plaintiff-appellant.

McAngus, Goudelock & Courie, PLLC, by Jeffrey Kuykendal and John T. Jeffries, for defendant-appellee.

FLOOD, Judge.

Plaintiff, Trevor Daniel Yow, appeals from the trial court's order granting Defendant, Dispatch & Services, Inc.'s, motion to dismiss pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. On appeal, Plaintiff contends the trial court improperly granted Defendant's Rule 12(b)(6) motion to dismiss, where Plaintiff's claims for (A) negligent hiring, retention, and supervision of Randolph; (B)

unfair and deceptive trade practices; and (C) intentional infliction of emotional distress (“IIED”), were properly pled, and legally sufficient to survive the motion to dismiss. Further, in alleging error as to the trial court’s granting of Defendant’s Rule 12(b)(1) motion to dismiss, Plaintiff argues his claims are not subject to the exclusive jurisdiction of the North Carolina Industrial Commission. Upon review, we conclude the trial court properly granted Defendant’s Rule 12(b)(6) motion to dismiss, as the face of the complaint reveals Plaintiff’s claims were insufficient to survive the motion to dismiss, and we do not reach Plaintiff’s Rule 12(b)(1) argument. We therefore affirm the trial court’s order, and dismiss Plaintiff’s Rule 12(b)(1) argument.

I. Factual and Procedural Background

Prior to 21 October 2020, Plaintiff was retained as an independent contractor truck driver for Carolina Logistic, Inc. (“Carolina Logistic”), and as of that date, Defendant was a contractor and vendor for Carolina Logistic, conducting all of Carolina Logistic’s relevant driver recruitment, driver applicant vetting, new driver intake, education and training, and driver supervision. Plaintiff was the beneficiary of an occupational policy issued by Carolina Logistic for its independent contractor truck drivers, which did not provide workers’ compensation coverage. Plaintiff was also the beneficiary of a contingent liability policy issued by Carolina Logistic for its independent contractor truck drivers, which did provide workers’ compensation coverage.

On 21 October 2020, Plaintiff was asleep in the back of a tractor-trailer combination truck operated by Marcus Randolph, who was also an independent contractor truck driver for Carolina Logistic. The truck was owned by Carolina Transportation, Inc. (“Carolina Transportation”) and was leased to Carolina Logistic. At 4:44 a.m., Randolph negligently drove the truck into the rear of another truck that was parked on the shoulder of I-40 in Arizona. Plaintiff suffered injuries as a result of the accident.

On the day of the accident, Plaintiff attempted to file in Arizona a workers’ compensation claim under the occupational policy, and on 8 January 2020, this claim was denied. Plaintiff later applied for workers’ compensation benefits in North Carolina, whereupon Carolina Logistic “acknowledge[d] and admit[ted] that [Carolina Logistic] was a statutory employer of [Plaintiff] pursuant to N.C. [Gen. Stat.] § 97-19.1 and is thus subject to the Workers’ Compensation Act[.]”

On 24 September 2021, Plaintiff filed a personal injury tort claim against Carolina Logistic, Carolina Transportation, and Randolph. On 30 September 2022, Plaintiff filed a motion to amend his complaint to add Defendant as a defendant, and on 2 February 2023, this claim was denied. Thereafter, on 10 April 2023, Plaintiff filed his initial complaint against Defendant, and on 6 June 2023, filed an amended complaint. On 10 August 2023, along with its answer to Plaintiff’s complaint, Defendant filed a motion to dismiss the complaint. On 19 October 2023, Plaintiff filed

a motion to amend his initial complaint, and on 10 November 2023, upon stipulation of the parties, Plaintiff filed a second amended complaint (the “Complaint”).

In the Complaint, Plaintiff alleged: (1) Defendant had negligently hired, retained, and supervised Randolph, where Randolph lacked a clean driving record; (2) Defendant committed unfair and deceptive trade practices in orchestrating an insurance policy scheme, whereby Plaintiff was damaged in not timely receiving proper workers’ compensation coverage; and (3) Defendant committed IIED in orchestrating the aforementioned scheme.

On 8 December 2023, Defendant filed a motion to dismiss the Complaint pursuant to Rules 12(b)(1) and (6). On 8 February 2024, the trial court entered an order granting Defendant’s motion to dismiss on the grounds that, pursuant to Rule 12(b)(6), Plaintiff failed to state a claim upon which relief may be granted (the “Order”), and alternatively, pursuant to Rule 12(b)(1), that the trial court lacks subject matter jurisdiction to hear the Complaint. Plaintiff timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear Plaintiff’s appeal from the final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Standard of Review

“On appeal of a Rule 12(b)(6) motion to dismiss, this Court conducts 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.” *Podrebarac v. Horack*,

Talley, Pharr, & Lowndes, P.A., 231 N.C. App. 70, 74, 752 S.E.2d 661, 663–64 (2013) (citation omitted). We conduct such review while “view[ing] the allegations in the complaint in the light most favorable to the non-moving party[,]” and considering “whether, as a matter of law, the allegations in the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *BDM Investments v. Lenhil, Inc.*, 264 N.C. App. 282, 291, 826 S.E.2d 746, 756 (2019) (citations and internal quotation marks omitted) (cleaned up).

“While this Court takes factual allegations in the complaint as true, we are not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Id.* at 291, 826 S.E.2d at 756 (citations and internal quotation marks omitted). Dismissal pursuant to Rule 12(b)(6) is proper where one of the following three conditions is satisfied:

(1) when on its face the complaint reveals no law that supports [the] plaintiff’s claim; (2) when on its face the complaint reveals the absence of fact sufficient to make a good claim; and (3) when some fact disclosed in the complaint necessarily defeats [the] plaintiff’s claim.

Id. at 291–92, 826 S.E.2d at 756 (citation omitted).

IV. Analysis

On appeal, Plaintiff argues the trial court improperly granted Defendant’s Rule 12(b)(6) motion to dismiss, where Plaintiff’s claims for (A) negligent hiring, retention, and supervision of Randolph; (B) unfair and deceptive trade practices; and (C) IIED were properly pled, and legally sufficient to survive the motion to dismiss.

Further, as to the trial court's granting of Defendant's Rule 12(b)(1) motion to dismiss, Plaintiff argues that his claims are not subject to the exclusive jurisdiction of the North Carolina Industrial Commission. We address Plaintiff's first three claims, in turn, and as explained in further detail below, we do not reach Plaintiff's Rule 12(b)(1) argument.

A. Negligent Hiring, Retention, and Supervision

Plaintiff first argues that he sufficiently stated a claim for negligent hiring, retention, and supervision of Randolph, such that it should have survived Defendant's Rule 12(b)(6) motion to dismiss. We disagree.

Under North Carolina law, to support a claim of negligent hiring, retention and supervision against an employer, the plaintiff must demonstrate: "(1) the specific negligent act on which the action is founded"; (2) the employee's "incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred"; (3) the employer's actual or constructive notice of such unfitness or previous specific negligent acts; and (4) injury resulting from the employee's incompetency. *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (citations omitted).

As a properly-pled negligent hiring, retention, and supervision claim requires a showing of an employee's incompetency, to sustain such a claim, a plaintiff must demonstrate the existence of an employer-employee relationship between the defendant and the alleged employee. *See Foster v. Crandell*, 181 N.C. App. 152, 171,

638 S.E.2d 526, 539 (2007) (concluding that where there is no evidence the defendant employed the alleged tortfeasor, “there can be no argument that [the defendant] negligently employed or retained” the alleged tortfeasor); *see also Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48 (2005) (“[I]n certain limited situations an employer may be held liable for the negligence of its independent contractor. Such a claim is not based on vicarious liability, but rather is a direct claim against the employer based upon the actionable negligence of the employer in hiring a third party.”).

Here, while Defendant conducted all of Carolina Logistic’s relevant driver recruitment, driver applicant vetting, new driver intake, education and training, and driver supervision, there is nothing in the pleadings that indicates either Plaintiff or Randolph were contractual employees of, or independent contractors for, Defendant. Rather, in his Complaint, Plaintiff asserted that Defendant cannot “raise worker’s compensation exclusivity as a bar to this lawsuit, since Carolina Logistic was the *statutory employer* [under N.C. Gen. Stat. § 97-19.1 (2023)], not Dispatch.” (Emphasis added). Randolph was retained as a truck driver for Carolina Logistic by the same contractual means as Plaintiff, and treating the facts alleged in the Complaint as true, Carolina Logistic was therefore also the “statutory employer” of Randolph. *See BDM Investments*, 264 N.C. App. at 291, 826 S.E.2d at 756. As such, the Record reveals no contractual employer-employee relationship between Defendant and Randolph. *See Foster*, 181 N.C. App. at 171, 638 S.E.2d at 539.

Despite the pleadings revealing no employer-employee relationship between Defendant and Randolph, Plaintiff attempts to distinguish the facts of this case from those of prior opinions, wherein our appellate courts found no employer-employee relationship existed between the defendant and alleged tortfeasor. Plaintiff specifically contends Defendant owed a duty of care to Plaintiff, as Defendant was “engaged in driver recruitment, vetting, application approval and hiring drivers to work at Carolina Logistic[.]” Plaintiff, however, cites no binding North Carolina law in support of this contention; it is not the duty of this Court to develop an argument for an appellant, and we will not do so here. *See id.* at 171, 638 S.E.2d at 539 (“[O]ur Supreme Court has . . . reminded this Court that ‘[i]t is not the role of the appellate courts . . . to create an appeal for an appellant’ by addressing an issue not raised or argued by the appellant.” (quoting *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005))); *see also State v. Earls*, 234 N.C. App. 186, 192, 758 S.E.2d 654, 658 (2014) (“It is not the role of this Court to craft [a] defendant’s argument for him.” (citation omitted)); N.C. R. App. P. 28(b)(6) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be treated as abandoned.”).

Upon our de novo review of the Record, viewing the Complaint’s allegations in the light most favorable to Plaintiff, we conclude the face of the Complaint reveals the absence of a contractual employer-employee relationship between Carolina Logistic and Randolph, which is required to make a properly-pled negligent retention

and supervision claim, and Plaintiff's disclosure that Carolina Logistic was his—and therefore Randolph's—"contractual employer" necessarily defeats Plaintiff's claim. *See BDM Investments*, 264 N.C. App. at 291–92, 826 S.E.2d at 756; *see also Podrebarac*, 231 N.C. App. at 74, 752 S.E.2d at 663–64. Accordingly, as it concerns this claim, we affirm the trial court's Order.

B. Unfair and Deceptive Trade Practices

Plaintiff next argues his claim that Defendant is "properly liable to Plaintiff for damages due to its direction of an unfair and deceptive insurance scheme" was sufficient to survive Defendant's Rule 12(b)(6) motion to dismiss. We disagree.

"The elements of a claim for unfair or deceptive trade practices in violation of N.C. Gen. Stat. §75-1.1 [(2023)] . . . are: (1) an unfair or deceptive act or practice or an unfair method of competition; (2) in or affecting commerce; (3) that proximately causes actual injury to the plaintiff or to his business." *Rev O, Inc. v. Woo*, 220 N.C. App. 76, 81, 725 S.E.2d 45, 49–50 (2012) (citation and internal quotation marks omitted). "Although it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those facts constitute an unfair or deceptive practice." *Id.* at 81, 725 S.E.2d at 49–50 (citation and internal quotation marks omitted) (cleaned up).

Here, Plaintiff contends Defendant deliberately implemented a scheme that, which deprived Plaintiff of obtaining his workers' compensation benefits, and this scheme constituted a deceptive act or practice, as "North Carolina by statute requires

employers of truck drivers to give them full workers' compensation benefits even if the drivers are 'independent contractors.'" The statute that sets forth this requirement is N.C. Gen. Stat. § 97-19.1(a) of the Workers' Compensation Act ("WCA"), which provides, in relevant part:

Any principal contractor, intermediate contractor, or subcontractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor or truck tractor trailer licensed by the United State Department of Transportation and who has not secured the payment of compensation in the manner provided for employers set forth in [N.C. Gen. Stat. §] 97-93 for himself personally and for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident arising out of and in the course of the performance of the work covered by such contract.

N.C. Gen. Stat. § 97-19.1(a) (emphasis added).

As discussed above, Plaintiff himself asserted in the Complaint that Carolina Logistic was Plaintiff's "statutory employer," and nothing in the pleadings indicates that Plaintiff was an independent contractor, or subcontractor, of Defendant. *See BDM Investments*, 264 N.C. App. at 291–92, 826 S.E.2d at 756; *see also Podrebarac*, 231 N.C. App. at 74, 752 S.E.2d at 663–64; *Foster*, 181 N.C. App. at 171, 638 S.E.2d at 539. As such, regardless of whether Defendant was a principal contractor, intermediate contractor, or subcontractor of Carolina Logistic, Defendant had no duty

to “secure[] the payment of compensation” to Plaintiff, and, as a matter of law, Defendant’s failure to do so did not constitute an “unfair or deceptive act or practice[.]” *See Rev O, Inc.*, 220 N.C. App. at 81, 725 S.E.2d at 49–50; *see also* N.C. Gen. Stat. § 97-19.1(a).

Plaintiff, however, contends in his reply brief that Defendant’s duty to Plaintiff is not demarcated by N.C. Gen. Stat. § 97-19.1(a), where “the actual issue is whether Defendant engaged in unfair and deceptive trade practices, for the purposes of this claim for relief.” As this Court has provided, “a reply brief is not an avenue to correct the deficiencies contained in the original brief[.]” and we therefore will not consider this contention on appeal. *State v. Dinan*, 233 N.C. App. 694, 698–99, 757 S.E.2d 481, 485 (2014) (citations omitted); *see also* N.C.R. App. P. 28(b)(6). Moreover, nowhere in the Complaint did Plaintiff make this contention, and our appellate review is limited to consideration of the pleadings. *See Podrebarac*, 231 N.C. App. at 74, 752 S.E.2d at 663–64. The face of the Complaint reveals the absence of law and fact sufficient for Plaintiff to make a good claim for unfair and deceptive trade practices, and as it concerns this claim, we affirm the trial court’s Order. *See BDM Investments*, 264 N.C. App. at 291–92, 826 S.E.2d at 756; *see also* N.C. Gen. Stat. § 97-19.1(a).

C. Intentional Infliction of Emotional Distress

Plaintiff finally argues his claim that Defendant committed IIED against Plaintiff in directing an unfair and deceptive insurance scheme was sufficient to survive Defendant’s Rule 12(b)(6) motion to dismiss. We disagree.

“The essential elements of IIED are (1) extreme and outrageous conduct by the defendant (2) which is intended to and does in fact cause (3) severe emotional distress.” *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002) (citation and internal quotation marks omitted). “The determination of whether the conduct alleged was intentional and was extreme and outrageous enough to support such an action is a question of law[.]” *Id.* at 21, 567 S.E.2d at 408 (citation and internal quotation marks omitted).

Here, Plaintiff cites no binding North Carolina law in support of his IIED argument, and as discussed above, Defendant had no duty to secure the payment of compensation to Plaintiff. *See Rev O, Inc.*, 220 N.C. App. at 81, 725 S.E.2d at 49–50; *see also Foster*, 181 N.C. App. at 171, 638 S.E.2d at 539; N.C. Gen. Stat. § 97-19.1(a); N.C.R. App. P. 28(b)(6). Accordingly, as a matter of law, Defendant’s alleged failure to secure this compensation was not extreme and outrageous conduct tending to support an IIED claim, and as such, we affirm the trial court’s Order. *See Guthrie*, 152 N.C. App. at 21, 567 S.E.2d at 408; *see also BDM Investments*, 264 N.C. App. at 291–92, 826 S.E.2d at 756.

As the trial court properly granted Defendant’s Rule 12(b)(6) motion to dismiss, we do not reach Plaintiff’s Rule 12(b)(1) argument, which is dismissed.

V. Conclusion

Upon review, we conclude the trial court properly granted Defendant’s Rule 12(b)(6) motion to dismiss, as the face of the Complaint reveals Plaintiff’s claims for

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negligent hiring, retention, and supervision of Randolph; unfair and deceptive trade practices; and IIED were insufficient to survive the motion to dismiss. We therefore affirm the trial court's Order. Further, as the trial court properly granted Defendant's motion to dismiss under Rule 12(b)(6), we do not reach Plaintiff's Rule 12(b)(1) argument, and that argument is dismissed.

AFFIRMED In Part, and DISMISSED In Part.

Judges TYSON and GORE concur.

Report per Rule 30(e).