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Torts; Immunity; Law Enforcement; Personal Jurisdiction; Summons; Dismissal

Bradley v. City of Fayetteville, 2021-NCCOA-239 (No. COA20-525, Cumberland— 6/1/2021) (***unpublished***)

- ***Holding—*** In plaintiff's appeal from order dismissing claims against defendant-City and four unnamed police officers, contending that the trial court erred by holding that he: (1) failed to properly plead that defendant-City waived governmental immunity, and (2) failed to properly serve the four unnamed officers with process, Court of Appeals holds that trial court did not err in dismissing plaintiff's claims.

- ***Key Excerpt—*** Plaintiff appealed from an order dismissing his claims against the City and four unnamed police officers, contending that the trial court erred by holding that he: (1) failed to properly plead that the City waived governmental immunity, and (2) failed to properly serve the four unnamed police officers with process. The Court held that the trial court did not err in dismissing plaintiff's claims and affirmed the trial court's order.

The Court first addressed whether plaintiff's appeal was properly before the Court. The City argued that plaintiff's appeal was interlocutory and therefore not ripe for review. The Court disagreed. Turning to the merits of the appeal, the Court rejected plaintiff's argument that the trial court erred by dismissing his claims against the City because his complaint 'alleged facts that if taken to be true, are sufficient to establish a waiver of (governmental) immunity.' The Court determined that the trial court properly dismissed plaintiff's claims because he failed to properly plead that the City waived its governmental immunity from suit. "Plaintiff's complaint does not reference governmental immunity nor the established ways in which governmental immunity can be waived. Plaintiff's complaint pleads only the facts of the interaction with the FPD responding police officers which prompted his claims. Plaintiff's complaint does not, and could not, allege that the City waived its governmental immunity. First, the City of Fayetteville did not engage in a proprietary activity through the FPD police officers executing their official duties. *See* Arrington v. Martinez, 215 N.C. App. 252,

257, 716 S.E.2d 410, 414 (2011) ('The provision of police services is a governmental function which is protected by governmental immunity[.]'). Second, Plaintiff does not allege the existence of a contract between Plaintiff and the City. Howard v. Cnty. of Durham, 227 N.C. App. 46, 50, 748 S.E.2d 1, 3 (2013) ('[I]f plaintiff properly pled a valid contract between her and [the local government entity], [the entity] would not be protected by sovereign immunity as to a claim for breach of the contract.'). Finally, there is no indication in Plaintiff's complaint, nor in the record before the Court, that the City waived its immunity through the purchase of liability insurance. [G.S.] 160A-485 (2019); *see* Price v. Davis, 132 N.C. App. 556, 559, 512 S.E.2d 783, 786 (1999). Therefore, the trial court did not err in dismissing Plaintiff's claims against the City because Plaintiff failed to allege any form of waiver of governmental immunity by the City."

The Court then turned to the claims against the four unnamed officers. Plaintiff argued that the trial court erred by dismissing his claims against these individuals, contending that the complaint alleged sufficient facts to show that tortious acts were committed outside the scope of their official duties. The Court determined that the trial court properly dismissed plaintiff's claims for a different reason, as plaintiff failed to issue process and service of process on the defendant-officers pursuant to N.C. R. Civ. P. 4. "The trial court's order dismissed Plaintiff's claims against the four unnamed officers pursuant to Rules 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure for 'insufficient process and service of process' in accordance with Rule 4. *See* N.C. R. Civ. P. 12(b)(4), (b)(5). Under Rule 4 of the North Carolina Rules of Civil Procedure, the court has personal jurisdiction over an individual defendant only where the plaintiff: (1) issues a summons directed to the defendant which informs the defendant of the case against them and notifies the defendant that they are required to appear, N.C. R. Civ. P. 4(b); and (2) serves process on the defendant in a manner which is reasonably calculated to provide the defendant with notice of the case against them, N.C. R. Civ. P. 4(j)(1). A summons must be served within sixty days of issuance or extended within ninety days of issuance. N.C. R. Civ. P. 4(c), 4(d). Failure to serve or continue a summons results in a discontinuance of the action with respect to each defendant not properly served. N.C. R. Civ. P. 4(e). 'Unless notice is given to the defendant of proceedings against him and he is thereby given the opportunity to appear and be heard or he appears voluntarily, the court has no jurisdiction to proceed to judgment even though it may have subject matter jurisdiction.' Harris v. Maready, 311 N.C. 536, 542, 319 S.E.2d 912, 916 (1984)."

The Court observed that plaintiff filed the complaint and issued the summons on July 23, 2019, and that the summons did not list any of the four individual officers by name; rather, it was directed only to "Fayetteville Police Department responding officers (2011hrs 11SEP18)." The Court further observed that the summons was delivered to the municipal attorney and an FPD records supervisor. "No summons was ever served on any individual officer. When the trial court entered the order dismissing Plaintiff's claims on 17 January 2020—well over ninety days after Plaintiff issued the summons—there was no information in the record before the court which showed that the individual officers had been named and notified of Plaintiff's claims. The trial court never obtained personal jurisdiction over any of the responding FPD police officers. Therefore, the court did not err by determining that the action had been discontinued with respect

to the four unnamed officers and dismissing Plaintiff's claims." (In a footnote, the Court noted, "Proper service under Rule 4 specifies that service of a summons and complaint must be delivered to the city's manager, mayor, or clerk—not to the city attorney or a representative of the police department. *See* N.C. R. Civ. P. 4(j)(5). However, the City chose to waive proper service and sought dismissal based on governmental immunity in this case.")

- ***Synopsis*—** Appeal by plaintiff from January 2020 order. Opinion by Judge Griffin, with Judge Inman and Judge Wood concurring.

Nota Bene (N.B.)— Other Recent Decision of Note

Torts; 42 U.S.C. 1983; New Trial; Jury Instruction; Harmless Error Lambert v. Town of Sylva (Lambert II), 272 N.C. App. 292 (No. COA19-727, Jackson— 7/7/20), *disc. review denied, appeal dismissed*, ___ N.C. ___, (No. 362P20, 4/16/21) (This is the second time the case is on appeal: in Lambert I, 259 N.C. App. 294, 307, 816 S.E.2d 187, 197 (2018), the Court granted plaintiff a new trial on his claims alleged under 42 U.S.C. § 1983 for violations of constitutional rights and for wrongful termination in violation of public policy. On remand and following a new trial, the jury returned a verdict in defendant-Town's favor. Plaintiff appealed from the trial court's July 2018 judgment consistent with the jury verdict. Here, the Court of Appeals affirmed the trial court's judgment. The Court held that the trial court's jury instruction did not amount to reversible error. "It is true the trial court likely could have more clearly delineated Plaintiff's Section 1983 Claim for violation of his federal constitutional rights from Plaintiff's additional claims sounding in North Carolina law and policy. In effect if not in substance, however, the trial court's instruction asked the jury to consider if there is a 'direct causal link' between Defendant's termination of Plaintiff and the alleged constitutional deprivation. [Canton v.] Harris, 489 U.S. [378] at 385, 103 L. Ed. 2d [412] at 424 [(1989)]. Implicit in the jury verdict here is the finding there was no constitutional harm to Plaintiff, a requisite for a violation of Section 1983 and for municipal liability under Monell [v. Dept. of Soc. Servs. of City of N.Y., 436 U.S. 658, 56 L. Ed. 2d 611 (1978)]. *See* [Los Angeles v.] Heller, 475 U.S. [796] at 799, 89 L. Ed. 2d. [806] at 810-11 [(1986) (*per curiam*)]. Thus, even assuming it was error for the trial court to decline to instruct the jury on the question of whether Defendant's alleged constitutional 'deprivation resulted from [municipality's] official policy or custom[,]' the jury verdict finding Plaintiff's filing to run for sheriff was not a substantial or motivating factor in his termination renders any error harmless. Outlaw [v. Johnson], 190 N.C. App. [233] at 243, 660 S.E.2d [550] at 559 [(2008)] ('Even assuming *arguendo* that the trial court erred by failing to give Defendants' requested jury instruction, we find that any such error was harmless error in light of the jury verdict.')." (Appeal by plaintiff from July 2018 judgment. No prejudicial error. Court of Appeals' opinion by Judge Hampson, with Judge Bryant and Judge Collins concurring. Discretionary review denied, appeal dismissed by the Supreme Court of North Carolina.))