

14-1264

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOREA M. MARPLE,

2014 NOV -3 AM 11:30

Plaintiff,

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

v.

CIVIL ACTION NO. 14-C-731
JAMES C. STUCKY, JUDGE

WEST VIRGINIA BOARD of EDUCATION
and L. WADE LINGER, Jr.,

Defendants.

ORDER

On September 3, 2014, the parties appeared in person and by counsel pursuant to notice of a hearing on Defendant's Motion to Dismiss Under Rule 12(b)(6) of the West Virginia Rules of Procedure.

The Court reviewed the filings of the parties on the issues presented and heard the argument of counsel thereon.

STANDARD OF REVIEW

A trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the Complaint unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Syl. Pt. 3, Chapman v. Kane Transfer, 160 W.Va. 530 236 S. E. 2d 207 (1977). The complaint is to be construed in light most favorably to the plaintiff. Price v. Halstead, 177 W.Va. 592 355 S. E. 2d 380 (1987), and Chapman, Id. at 538. Also see Highmark West Virginia v. Jamie, 221 W.Va. 487 at 491.

"All the pleader is required to do is set forth sufficient information to outline the elements of her claim or to prevent inference to draw that these elements exist."

The trial court should not dismiss a claim merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on pleadings. John W. Lodge Distributing v. Texaco, 161 W.Va. 603, 605 245 S. E. 2d 157 (1978), Highmark v. Jamie, Id. at 491, and Dunn v. Consolidation, 180 W.Va. at 694 376 S. E. 2d 485 (1989).

As stated succinctly by Professor Cleckley in Litigation Handbook on West Virginia Rules of Civil Procedure - Fourth Edition, pgs. 385-386:

“If the complaint alleges sufficient facts, it must survive a Rule 12(b)(6) motion to dismiss even if it appears that recovery is very remote and unlikely. A trial court, in appraising the sufficiency of a complaint on a Rule (b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his/her claim which would entitle him/her to relief.”¹

Of specific application of these principles to the present case is the holding in Morgan v. Fagan, 176 W.Va. 196, the Supreme Court of Appeals reversed the decision of the circuit court which had dismissed the initialing Complaint under Rule 12(b)(6) of an at-will state employee and holding:

“Thus the government cannot dismiss an employee on charges that call into question her good name, or that imposes stigma upon an employee which could foreclose her freedom to pursue other employment opportunities, without providing the employee notice of the charges against her and a hearing in which the factual basis of the charges can be contested.”

Accordingly, the court makes the following Findings of Fact and Conclusions of

¹As with all recitations in Professor Cleckley's work, each is abundantly annotated with case citations. Those are not stated here or elsewhere in the order but consideration was given to the strength of quoted passages as supported by these authorities.

Law resulting in the directives of this order.

FINDINGS OF FACT

Causes of action alleged in the Complaint:

As stated in *Cleckley, supra*, p. 386; "Although a plaintiff's burden in resisting a motion to dismiss is a relatively light one, the plaintiff, is still required at a minimum to set forth sufficient information to outline the elements of his/her claim."

A copy of the Complaint is appended for reference to the terms of this order. As a predicate to each count in the Complaint five plus pages recite extensively the factual basis for all Counts.

Defendants' motion does not deny the existence and viability of each cause of action alleged but offers defenses to each. In order, the claims are:

Count 1: Plaintiff claims a deprivation of her rights to Due Process of Law when deprived of her liberty and property rights as set ut in the West Virginia Constitution and interpreted by the West Virginia Supreme Court of Appeals free of the violations of the implaced open meeting laws. A full factual basis for the claim is found in the Complaint read in its entirety.

Count 2: Alleged is a violation of the elementary principle that all contracts including that of plaintiffs employment – oral or written include a provision for good faith and fairness of all parties free of arbitrary action. A full factual basis for the claim is found in the Complaint read in its entirety.

Count 3: Defamation in its most common terms is alleged in this count with reference to the precise language forming its foundation. A full factual basis for the claim is found in the Complaint read in its entirety.

Count 4: By the employed language specifically identified, plaintiff claims to have been placed in a false light – a basic, recognized cause of action in this state. A full factual basis for the claim is found in the Complaint read in its entirety.

Count 5: An exact reference to a claim arising from a provision of the West Virginia Constitution is alleged. A full factual basis for the claim is found in the Complaint read in its entirety.

Count 6: A demand that defendants presently provide a venue for plaintiff to redress her illegal termination with full due process ingredients. A full factual basis for the claim is found in the Complaint read in its entirety.

Each count specifically alleges a viable cause of action on which plaintiff can prevail.

Aside from the assessment of a stated factual predicate for an identified, established cause of action, Professor Cleckley identifies another source for consideration of this motion. (P. 388)

“In an appropriate case, an affirmative defense may be adjudicated on a motion to dismiss for failure to state a claim. Two conditions must be met for such a dismissal. First, the facts that establish the defense must be definitively ascertainable from the allegations of the complaint, the documents (if any) incorporated therein, matters of public record, and other matters of which the court may take judicial notice. Second, the facts so gleaned must conclusively establish the affirmative defense.”

Neither of these measures allow a consideration of affirmative defenses pled here. The single such defense of “immunity” is not available since it is prohibited by statutory prohibition since defendants are covered by insurance for the wrongs alleged in the Complaint the

coverage of which is acknowledged to control any recovery.²

The defendants in this action are named insured under a policy of insurance provided by the West Virginia Board of Risk and Insurance Management under the authority of Chapter 29, Article 12; and Chapter 33, Article 30 of the West Virginia Code. W. Va. Code §29-12-5(a)(4) states:

“Any policy of insurance purchased or contracted for by the board shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits: Provided, That nothing herein shall bar a state agency or state instrumentality from relying on the constitutional immunity granted the State of West Virginia against claims or suits arising from or out of any state property, activity or responsibility not covered by a policy or policies of insurance: Provided, however, That nothing herein shall bar the insurer of political subdivisions from relying upon any statutory immunity granted such political subdivisions against claims or suits.”

In neither their answer nor their motion to dismiss have the defendants asserted that they are not insured for their conduct as alleged in the plaintiff's complaint. Therefore, to the extent that the defendants' answer and motion to dismiss purport to assert the sovereign immunity created by West Virginia Constitutional Article VI, section 35, they violate the express terms of §19-12-5(a)(4) as well as the provisions of the insurance policy. See, e. g. Clark v. Dunn, 195 W. Va. 272, S.E.2d 376 (1995).

CONCLUSIONS of LAW

The allegations in the Complaint taken as a whole support the various counts of claims and are not subject to the application of the pending motion.

²Not only did counsel for defendants fail to deny this coverage at the hearing upon invitation to do so, but that coverage has now been publicly acknowledged.

HOLDING

Accordingly it is hereby ORDERED that the Defendant's Motion to Dismiss Under Rule 12(b)(6) of the West Virginia Rules of Procedure is DENIED.

Pursuant to Rule 46 of the West Virginia Rules of Civil Procedure the objections and exceptions of respective parties to all rulings of the Court adverse to their position are here noted and preserved to the extent that at the time of the ruling it was made known to the Court the action such party desired the Court to take or the objection to the actions of the Court and the grounds therefore.

ENTER:

11-3-2014

DATE

James C. Stucky

JAMES C. STUCKY, JUDGE

PRESENTED BY:

Timothy N. Barber

TIMOTHY N. BARBER (WVSB #231)
Counsel for Plaintiff
P. O. Box 11746
Charleston, West Virginia 25339
(304) 744-4400

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10th
DAY OF November 2014
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA