

/s/ Laura Faircloth
Circuit Court Judge
Ref. Code: 18W7CF10

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CC-02-2017-C-529
Berkeley County Circuit Clerk
Virginia Sine

In the Circuit Court of Berkeley County, West Virginia

Estate of Cody Lawrence Grove,)
Plaintiff,)
)
vs.))
)
Joshua David Zombro,)
West Virginia Regional Jail and)
Correctional Facility Authority,)
PrimeCare Medical of West Virginia, Inc.)
Thomas J. Weber, Esq., CEO,)
Defendants)
)

Case No. CC-02-2017-C-529

ORDER DENYING DEFENDANT JOSHUA DAVID ZOMBRO'S MOTION TO DISMISS

This matter is before the Court upon the appearance of Plaintiff, by counsel; upon the appearance of Defendant Joshua David Zombro, by counsel; upon the Defendant Zombro's Motion to Dismiss; upon Plaintiff's opposition thereto; and upon the papers and proceedings read and had herein.

Whereupon, after considering the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

I. Findings of Fact

This matter arises from the suicide of Cody L. Grove on December 8, 2015, while in the custody of the Defendant West Virginia Regional Jail and Correctional Facility Authority (WVRJCFJA) at the Eastern Regional Jail (ERJ) in Martinsburg, West Virginia, and while under the supervision of Defendant Joshua David Zombro, a former correctional officer and employee of Primecare Medical of WV, Inc..

Defendant Zombro argues that the Plaintiff can prove no set of facts by which Zombro could be found liable and filed a Motion to Dismiss Plaintiff's First Amended

Complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure arguing: (1) Defendant Zombro is entitled to qualified immunity; (2) Violations of the West Virginia Constitution are not actionable; and (3) Plaintiff's claims against Defendant Zombro in his official capacity fail because no pre-suit notice was provided to him.

II. Conclusions of Law

The trial court, in appraising the sufficiency of a complaint on a motion to dismiss for failure to state a claim, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Syllabus Point 3, *Chapman v. Kane Transfer Company*, 160 W.Va. 530, 236 S.E.2d 207 (1997).

If the complaint states a claim upon which relief can be granted under any legal theory, a motion to dismiss for failure to state a claim must be denied. *John W. Lodge Distributing Co. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978).

A plaintiff is not required to set out all facts upon which the claim is based. Rule 8 of the West Virginia Rules of Civil Procedure requires clarity, not detail. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). The plaintiff's burden in resisting a motion to dismiss is a relatively light one. *McCormick v Walmart Stores, Inc.*, 215 W.Va. 679, 600 S.E.2d 576 (2004).

Motions to dismiss are viewed with disfavor because the complaint is to be construed in the light most favorable to the plaintiff and its allegations are to be taken as true. *Sturm v. Board of Educ. of Kanawha County*, 223 W.Va. 277, 672 S.E.2d 606 (2008). Further, only matters contained in a pleading can be considered on a motion to dismiss. *Riffle v. C.J. Hughes Construction Co.*, 226 W.Va. 581, 703 S.E.2d 552 (2010).

4 In the matter before this Court, the Plaintiff has set forth a sufficient basis to deny Defendant Zombro's Motion to Dismiss. The Court finds that the Plaintiff has set forth in its First Amended Complaint sufficient facts to put Defendants on notice of the nature of Plaintiff's claims. The Plaintiff has provided sufficient clarity so that the Defendants can understand the nature of Plaintiff's factual claims and legal theories of the action.

Furthermore, the Court agrees with the Plaintiff that it is not a matter of expertise upon which a reasonably prudent person would need to rely in being able to understand what protocols were or were not violated in allowing a person under the custody and control of WVRJCFA to hang himself while he was under a suicide watch. The Certificate of Merit was filed on July 17, 2018 in accordance with the Court's Order, and the Court does not find that the failure of the Plaintiff to have filed it sooner in any way prejudiced the rights of the WVRJCFA. In this Court's judgment, it merely states the obvious which is a legislative exemption from filing a Certificate of Merit.

Accordingly, for the foregoing reasons, Defendant Joshua David Zombro's Motion to Dismiss is denied.

The Clerk shall transmit attested copies of this Order to all counsel and any self-represented parties of record.

/s/ Laura Faircloth
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.