

BAUCOM'S NURSERY CO. v. MECKLENBURG COUNTY, 89 N.C. App. 542 (1988)
366 S.E.2d 558

BAUCOM'S NURSERY COMPANY, A CORPORATION v. MECKLENBURG COUNTY, NORTH
CAROLINA, CARLA E. DUPUY, CHAIRMAN AND MEMBER OF THE BOARD OF COUNTY
COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA, AND T. RODNEY AUTREY, JOHN
G. BLACKMON, GEORGE HIGGINS, PETER KEBER, BARBARA LOCKWOOD AND ROBERT
L. WALTON, MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG
COUNTY, NORTH CAROLINA

No. 8726SC1046

North Carolina Court of Appeals

Filed 5 April 1988

APPEAL by plaintiff from Snepp (Frank W.), Judge. Judgment entered 13 August
1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10
March 1988.

Boyle, Alexander, Hord and Smith, by B. Irvin Boyle, for plaintiff-appellant.

Ruff, Bond, Cobb, Wade & McNair, by James O. Cobb, for defendants-appellees.

SMITH, Judge.

Plaintiff previously instituted an action against defendant County and its
commissioners involving an interpretation of this same zoning ordinance as it
was written before the 6 December 1982 amendment. See *Baucom's Nursery Co. v.
Mecklenburg Co.*, 62 N.C. App. 396, 303 S.E.2d 236 (1983). Before this Court
filed its opinion in the prior case, the ordinance, which was then the subject
of litigation, was amended. This amended ordinance is the subject of the present
controversy.

Plaintiff assigns as error (1) the trial court's conclusion that there is no
genuine issue of material fact, and (2) the trial court's conclusion that the
defendants are entitled to summary judgment as a matter of law. Summary judgment
is appropriate "if the pleadings, depositions, answers to interrogatories, and
admissions on file, together with the affidavits, if any, show that there is no
genuine issue as to any material fact and that any party is entitled to a
judgment as a matter of law." G.S. 1A-1, Rule 56(c). Summary judgment is an
appropriate means of raising the defense of a statute of limitation if the
statute is properly before the court. *Pembee Mfg. Corp. v. Cape Fear Constr.
Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985); *Marshburn v. Associated Indemnity
Corp.*, 84 N.C. App. 365, 353 S.E.2d 123, disc. rev. denied, 319 N.C. 673, 356
S.E.2d 779, reconsideration dismissed, 320 N.C. 170, 358 S.E.2d 53 (1987). A
defendant may also properly utilize summary judgment when a plaintiff has failed
to allege a claim for relief. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355
(1985); *Colonial Building Co. v. Justice*, 83 N.C. App. 643, 351 S.E.2d 140
(1986), disc. rev. denied, 319 N.C. 402, 354 S.E.2d 711 (1987).

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[1] The undisputed facts in this cause conclusively show that the amended
ordinance was adopted on 6 December 1982. Plaintiff filed this action in the
Superior Court of Mecklenburg County on 18 May 1987. G.S. 153A-348, the statute
of limitation for actions involving the invalidity of a county zoning ordinance,
provides "[a] cause of action as to the validity of any zoning ordinance, or
amendment thereto, adopted under this Part or other applicable law shall accrue
upon adoption of the ordinance, or amendment thereto, and shall be brought
within nine months as provided in G.S. 1-54.1." This statute has not been
previously applied by this Court; however, G.S. 160A-364.1 which is almost
identical to G.S. 153A-348 except that it applies to municipalities, has been

utilized by this Court to bar attacks on municipal zoning ordinances. In re Appeal of CAMA Permit, 82 N.C. App. 32, 345 S.E.2d 699 (1986); Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, disc. rev. denied, 318 N.C. 417, 349 S.E.2d 600 (1986). We hold that G.S. 153A-348 is an absolute bar to plaintiff's attack on the validity of the amended zoning ordinance. The period of time between the enactment of the amended zoning ordinance and the institution of this action was approximately four and one-half years. We note that the validity of G.S. 153A-348 is not at issue and therefore we do not address this question.

[2] We next address plaintiff's alleged causes of action for actual and punitive damages occurring as a result of the enactment and enforcement of the amended zoning ordinance. In this regard, the county, as a governmental agency, exercises the police power of the State and is thus exempt from liability under the common law rule of governmental immunity. Orange County v. Heath, 14 N.C. App. 44, 187 S.E.2d 345 (1972); Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970), cert. denied, 277 N.C. 727, 178 S.E.2d 831 (1971). The individual county commissioners are likewise engaged in the performance of a governmental function in either enacting or enforcing the amended zoning ordinance. Thus, they also are protected from liability by the doctrine of governmental immunity. Robinson v. Nash County, 43 N.C. App. 33, 257 S.E.2d 679 (1979). However, a county in this State may waive governmental immunity by purchasing liability insurance. G.S. 153A-435; Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2 (1988). Plaintiff, in the case at bar, fails to allege or present any

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evidence that Mecklenburg County has liability insurance. Thus, summary judgment was appropriate.

[3] Further, with regard to the claim for punitive damages, it has been held that such damages may not be recovered from a governmental agency unless expressly provided for by statute. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982). There is no statute in this State which specifically authorizes the recovery of punitive damages from a county. For the reasons herein stated, the trial court is affirmed.

Affirmed.

Judges EAGLES and COZORT concur.