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2011 IL App (3d) 100647-U

Order filed November 7, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

COMMERCE BANK, N.A.,)	Appeal from the Circuit Court
)	of the 9 th Judicial Circuit
Plaintiff-Appellant,)	Fulton County, Illinois,
)	
v.)	
)	Appeal No. 3-10-0647
MICHAEL WIDGER, BRIAN GRAY,)	Circuit No. 08-L-27
CHRISTOPHER CARMICHAEL,)	
DANNY LEEZER, PAUL GIBSON,)	
and KENNETH KEDZIOR,)	The Honorable
)	William C. Davis,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Carter and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Because the plaintiff's lawsuit was barred by the State Lawsuit Immunity Act, the circuit court did not have subject matter jurisdiction to rule on the merits of the plaintiff's second amended complaint. Instead, proper jurisdiction rested with the Court of Claims. Thus, the circuit court correctly granted the defendants' motion to dismiss.

¶ 2 Commerce Bank, the plaintiff and administrator of the estate of David Green, filed a second amended complaint against Michael Widger, Brian Gray, Christopher Carmichael, Danny Leezer, Paul Gibson, and Kenneth Kedzior, the defendants and Illinois State troopers, alleging negligence in the execution of a search warrant that resulted in Green's death. The defendants filed a motion to dismiss, which the circuit court granted, leading to the dismissal of the plaintiff's second amended complaint with prejudice. The plaintiff appeals, alleging that the circuit court erred when it granted the defendants' motion to dismiss because: (1) the second amended complaint sufficiently stated a cause of action; (2) the defendants' immunity was a question of fact for the jury to determine; and (3) the Illinois Constitution provides a private cause of action for its claim. Because we conclude that the State Lawsuit Immunity Act (745 ILCS 5/1 *et seq.* (West 2008)) bars the plaintiff's claims and deprives this court of subject matter jurisdiction over the cause, we affirm the circuit court's dismissal of the plaintiff's second amended complaint.

¶ 3 **FACTS**

¶ 4 The record indicates that during the execution of a search warrant on June 23, 2005, the defendants fatally shot Green. Commerce Bank, as administrator of Green's estate, filed a complaint in federal court, which alleged, among other things, a claim under 42 U.S.C. §1983, for a deprivation of Green's Fourth Amendment rights (U.S. Const., amend. IV), as well as a state law claim for wrongful death. The plaintiff voluntarily dismissed the §1983 claim depriving the federal court of jurisdiction. Declining to exercise jurisdiction over the state law claim, the federal court dismissed the cause of action.

¶ 5 The plaintiff subsequently filed a four-count, second amended complaint in the Fulton County circuit court, alleging that the defendants negligently caused Green's death. Specifically, counts one and two of the plaintiff's second amended complaint contended that the defendants negligently caused Green's death by: (1) elevating the search warrant to "high risk" status; (2) battering open the front door, using a "flash-bang device," and storming the residence with body armor and automatic assault rifles; (3) using ammunition in contravention of the Geneva Conventions; (4) cornering Green and shooting him; and (5) "using excessive force in the service of the search warrant." The claims under counts one and two were brought under the Illinois Survival Act (755 ILCS 5/27-1 *et seq.* (West 2008)), and under the Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 2008)), respectively, and counts three and four alleged that the defendants conspired to commit the allegedly negligent acts named in counts one and two. The plaintiff sought monetary damages from the defendants. Also, in the second amended complaint, the plaintiff noted that as part of their employment, the defendants had taken an oath to uphold the constitution.

¶ 6 The defendants moved to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615; 2-619 (West 2008)), alleging that the plaintiff's claims were barred by sovereign immunity and public official immunity, and that the complaint failed to plead sufficient facts to establish its claims of negligence. The plaintiff responded with a constitutional tort claim that defendants' conduct also violated the article I, section 6, of the Illinois Constitution (Ill. Const. 1970, art. I, §6). In reply, the defendants argued that the plaintiff could not assert a new constitutional tort theory in its response and asserted that only the negligence claims in the second amended complaint were properly before the court. The

defendants also contended that the Illinois Constitution did not provide a private right of action under article I, section 6.

¶ 7 The court conducted a hearing on the defendant's motion to dismiss. The defendants contended that they were immune from liability, that the plaintiff failed to plead sufficient facts to support a cause of action, and that the plaintiff did not have a state constitutional claim because it did not properly bring this claim in the second amended complaint. The defendants also noted that they had previously filed a demand for bill of particulars, to which the plaintiff had responded. The defendants claimed that in that response, the plaintiff had cited only the Illinois State Police investigative report that had "exonerated" the defendants from wrongdoing in Green's death as the factual basis for its claim that the defendants were negligent by using excessive force during the execution of the search warrant. The plaintiff, on the other hand, contended that it had presented sufficient facts to survive the motion to dismiss, and that those facts were sufficient to state a cause of action in its second amended complaint.

¶ 8 The court took the matter under advisement, and granted the defendants' motion to dismiss. The court found that the plaintiff's claims were barred by public official immunity; that the plaintiff failed to plead sufficient facts to show that the defendants breached a duty or that the defendants' acts were the proximate cause of the Green's injuries; and that any constitutional tort claim could not survive because any claim under the federal constitution was barred by collateral estoppel, and because the Illinois constitution did not provide a private cause of action for an alleged violation of article I, section 6. The court did not rule on whether sovereign immunity barred the plaintiff's claims. The plaintiff appealed.

¶ 9 ANALYSIS

¶ 10 On appeal, the plaintiff claims that the circuit court erred when it granted the defendants' motion to dismiss because: (1) its second amended complaint sufficiently stated a cause of action; (2) the defendants' immunity was a question of fact for the jury to determine; and (3) the Illinois Constitution provided a private cause of action for its tort claim. The defendants, on the other hand, contend that the circuit court properly dismissed the plaintiff's second amended complaint because it was barred by public official immunity, failed to state a valid cause of action for negligence, did not assert a claim based on the Illinois Constitution, and, even if it had, such claim would be barred by lack of a private right of action, and that sovereign immunity also barred the plaintiff's claim and deprived the court of subject matter jurisdiction to adjudicate the instant cause of action. For the reasons that follow, we conclude that the State Lawsuit Immunity Act (745 ILCS 5/1 *et seq.* (West 2008)), bars the plaintiff's claims, and deprives the circuit court and this court of subject matter jurisdiction over the instant cause of action. Thus, we affirm the circuit court's dismissal of the plaintiff's second amended complaint.

¶ 11 The Illinois Constitution of 1970 abolished sovereign immunity "[e]xcept as the General Assembly may provide by law." Ill. Const. 1970, art. XIII, §4. The Illinois legislature enacted the State Lawsuit Immunity Act (the Immunity Act), which provides that the State of Illinois "shall not" be made a defendant or party in any court except as provided in, *inter alia*, the Court of Claims Act (705 ILCS 505/1 *et seq.* (West 2008)). Consequently, the Court of Claims has exclusive jurisdiction to hear certain matters, including "[a]ll claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit." 705 ILCS 505/8(d) (West 2008).

¶ 12 The Immunity Act not only bars claims that name the State as a defendant, but it also

bars certain actions against individual state employees. *Currie v. Lao*, 148 Ill. 2d 151 (1992). Thus, "[t]he determination of whether an action is in fact a suit against the state turns upon an analysis of the issues involved and the relief sought, rather than formal designation of the parties." *Currie*, 148 Ill. 2d at 158.

¶ 13 The supreme court has articulated three criteria for courts to consider to determine whether an action against a State employee is truly an action against the State. Specifically, an action is one against the State when there are: (1) no allegations that the State employee acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed by the employee to the public independently of his state employment; and (3) the actions of which the plaintiff complains involve matters ordinarily within that employee's normal and official functions. *Healy v. Vaupel*, 133 Ill. 2d 295 (1990); see also *Jenkins v. Lee*, 209 Ill. 2d 320 (2004).

¶ 14 Even if the three criteria are not met, an action is deemed to be against the State when a judgment for the plaintiff could operate either to control the actions of the State or subject it to liability. *Management Association v. Board of Regents*, 248 Ill. App. 3d 599 (1993); see also *Postich v. Henrichs*, 267 Ill. App. 3d 236 (1994). Thus, if a judgment could operate the control the actions of the State or subject it to liability, then the action is actually a claim against the State, even if the suit names the State employee in his or her individual capacity. *Kawaguchi v. Gainer*, 361 Ill. App. 3d 229 (2005). If the rule were otherwise, a plaintiff could circumvent the State's immunity by naming only an individual State employee as the defendant in a lawsuit that could operate to control the State's actions. *Currie*, 148 Ill. 2d 151.

¶ 15 We review a circuit court's determination to grant a motion to dismiss *de novo*. *Zahl v. Krupa*, 365 Ill. App. 3d 653 (2006). We may affirm the determination of the circuit court on any basis supported by the record. *Cwik v. Giannoulis*, 237 Ill. 2d 409 (2010).

¶ 16 Applying the three aforementioned criteria, we conclude that the plaintiff's claims are truly claims against the State. Thus, neither the circuit court, nor this court, has subject matter jurisdiction to consider the plaintiff's second amended complaint, as it is barred by the Immunity Act.

¶ 17 First, we consider whether the plaintiff alleged that the State employees acted outside the scope of their employment when they allegedly committed the wrongful acts. In *Management Association*, 248 Ill. App. 3d 599, another district of this appellate court noted that an act is outside of the scope of employment if the plaintiff shows that the defendants were acting on their own personal animosity or malice, and not in what the defendants believed to be in the best interest of their employer. Here, the plaintiff has not alleged that the defendants acted beyond the scope of their authority when they executed the instant search warrant. Rather, the plaintiff's second amended complaint only asserts claims of negligence and an allegation that the defendants used "excessive force." At no point in the complaint does the plaintiff specifically allege that the precise force used by the defendants was motivated by the defendants' personal animosity or malice towards Green, or that the defendants did not believe they were not acting in the best interest of the Illinois State police when they executed the search warrant. Thus, the plaintiffs have not alleged that the defendants acted beyond the scope of their authority when they executed the search warrant in this particular instance.

¶ 18 Concerning the second prong, the plaintiff alleges that the duty breached by the defendants was "to refrain from using excessive force in the service of the search warrant." Under this prong, a suit will be barred by the Immunity Act if the employee's duty derives solely from his State employment; however, if the duty exists independent of the State employment, sovereign immunity would not bar a negligence action in the circuit court. *Jinkins*, 209 Ill. 2d 320; see also *Hickey v. Huber*, 263 Ill. App. 3d 560 (1994). While the plaintiff contends that the defendants had a duty to refrain from using excessive force in the service of the instant search warrant, it has not alleged that the duty that led to execution of the instant search warrant arose outside of the defendants' employment as Illinois State troopers. Thus, the second amended complaint fails to support a finding that the defendants acted out of any duty other than that arising from their employment as State troopers.

¶ 19 The last criteria is whether the actions of which the plaintiff complains involve matters ordinarily within the employee's normal and official functions. Under this criteria, courts have considered whether the matter was "a uniquely governmental function." See *Cortright v. Doyle*, 386 Ill. App. 3d 895, 905 (2008). In this case, we conclude that the execution of a search warrant, and actions ancillary thereto, certainly involve matters within a State trooper's normal and official functions, and is a uniquely governmental function.

¶ 20 Overall, the plaintiff is attempting to bring suit against the defendants based on their execution of a search warrant--a duty imposed solely by virtue of their employment with the state--in order to establish negligence and obtain monetary damages. Thus, were this suit to proceed in the circuit court, it has the potential to control the actions of the state by restraining the manner in which police execute search warrants and subjecting the state to liability.

Consequently, we agree with *Management Association of Illinois*, 248 Ill. App. 3d 616, that “[n]egligence claims are clearly within the [Court of Claims] Act” and conclude that based on the facts and allegations in the second amended complaint, this case is properly brought before the Court of Claims, and not a circuit court of this state. Thus, because neither this court, nor the circuit court, has subject matter jurisdiction to consider the merits of the plaintiff’s second amended complaint (see *Postich*, 267 Ill. App. 3d 236), we affirm the circuit court’s determination to grant the defendant’s motion to dismiss.

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, we affirm the circuit court’s decision granting the defendants’ motion to dismiss.

¶ 23 Affirmed.