ROBLEZ V. CENTRAL NEW MEXICO CORRECTIONAL FACILITY

THOMAS ROBLEZ,
Plaintiff-Appellant,
v.
CENTRAL NEW MEXICO
CORRECTIONAL FACILITY,
Defendant-Appellee.

NO. 33,786

COURT OF APPEALS OF NEW MEXICO

December 16, 2015

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY, Violet C. Otero, District Judge

COUNSEL

Grisham & Lawless, P.A., Thomas L. Grisham, Albuquerque, NM, for Appellant

Jarmie & Associates, Mark D. Standridge, Las Cruces, NM, for Appellee

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, CYNTHIA A. FRY, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Plaintiff, Thomas Roblez, appeals the district court's dismissal of his negligence complaint against Defendant, Central New Mexico Correctional Facility (Central), based on its determination that Plaintiff failed to provide Central with actual notice of the claim

within the ninety-day time limit imposed under the New Mexico Tort Claims Act (TCA). *See* NMSA 1978, § 41-4-16(A) (1977). Plaintiff raises three issues on appeal: first, whether statements Plaintiff made in an affidavit in response to Central's motion to dismiss were inadmissible hearsay; second, whether Plaintiff should have been allowed more time to conduct discovery prior to the district court's ruling on the motion; and third, whether the issue of actual notice was a factual question that precluded dismissal. We conclude that the statements in Plaintiff's affidavit are not hearsay, Plaintiff did not preserve his discovery argument, and Plaintiff's affidavit created a factual issue that required an evidentiary hearing. Accordingly, we reverse the judgment dismissing Plaintiff's claims and remand the case to the district court for further proceedings.

BACKGROUND

{2} Plaintiff filed his negligence complaint against Central about two years after the incident occurred. Plaintiff's complaint alleged that, while incarcerated at Central, he "suffered a crush injury to his leg" caused by Central's negligence when he was "forced to move a heavy diet cart[.]" The complaint asserted that Central "had actual . . . notice of the occurrence." Central responded to the complaint by filing a motion to dismiss under Rule 1-012(B)(1) NMRA, or, in the alternative, a motion for summary judgment under Rule 1-056 NMRA. Central's motion asserted that its state agency status placed the matter within the purview of the TCA, which required Plaintiff to provide written notice of the potential claim within ninety days after the occurrence giving rise to the claim, or else show that the agency had actual notice of the occurrence. *See* § 41-4-16(A),(B). Central asserted in its motion that Plaintiff's "conclusorily pleaded . . . legal contention that '[Central] . . . had actual . . . notice of the occurrence' underlying his lawsuit" was not true, and therefore, "[P]laintiff's [c]omplaint must be dismissed for lack of notice under the TCA." Central attached two exhibits and two affidavits to its motion that concerned the lack of timely *written* notice of the occurrence. In his response to the motion, Plaintiff conceded that he did not provide timely written notice of the claim, but continued to assert that Central had actual notice of the occurrence. Plaintiff attached an affidavit to his response, stating in pertinent part,

> A lieutenant came up and said he saw the incident [involving the cart]. . . . I told him I was going to sue and he responded to me, "[I]f I were you I would sue on this matter as well." . . . After the incident, every case worker that came to me, I asked them what I can do about suing these people[.] . . . They were aware of my intent to sue on this matter very early on and continued while I was still incarcerated with them.

{3} At the hearing on the motion, the parties' counsel provided legal argument but presented no evidence. Central's attorney argued that the statements in Plaintiff's affidavit were "not enough" to provide actual notice under the TCA and contended that these statements were inadmissible hearsay. The district court granted Central's motion to dismiss based upon Plaintiff's "failure to comply with the statutory notice provisions of the [TCA]." The district court's order also stated in pertinent part, "The [c]ourt having reviewed the parties' submissions and heard the parties' arguments, . . . [finds]: . . . As

a threshold matter, Plaintiff did not meet the statutory notice requirements of the [TCA]" and that Central "did not have actual notice of Plaintiff's claims." The order did not address Central's assertion that Plaintiff's affidavit contained inadmissible hearsay. Plaintiff appeals.

DISCUSSION

A. Hearsay

{4} On appeal, Plaintiff first asserts that the statements in his affidavit "to the effect that [Plaintiff] said he was hurt and intended to sue" were not hearsay because "[t]hey were not offered to prove that he was hurt or that he intended to sue. They were offered to show actual notice had been given to Central[.]" He also argues that the statement in the affidavit describing how the lieutenant responded was not hearsay because it "was not offered to prove that in a similar situation the lieutenant would sue. It was offered in evidence for the purpose of establishing what was said at the time." We agree.

{5} We note that the district court did not expressly state in its order whether it considered the statements in Plaintiff's affidavit or disregarded them based upon Central's assertion that the statements were inadmissible hearsay. Because we are remanding this case to the district court for an evidentiary hearing, we expect that this hearsay issue will be raised again. Therefore, we proceed by assuming that the district court did not consider the statements made in Plaintiff's affidavit because it concluded those statements were inadmissible hearsay.

{6} We review the admission of evidence for an abuse of discretion. *State v. Flores*, 2010-NMSC-002, ¶ 25, 147 N.M. 542, 226 P.3d 641. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *Id.*(internal quotation marks and citation omitted). Hearsay is "a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Rule 11-801 (C) NMRA. But "if an out-of-court statement is offered in evidence merely for the purpose of establishing what was said at the time, and not for the truth of the matter, the testimony is not hearsay." *State v. Reyes*, 2002-NMSC-024, ¶ 29, 132 N.M. 576, 52 P.3d 948 (recognizing that, "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted" (internal quotation marks and citation omitted)), *abrogated on other grounds by*, *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806 . Furthermore, "[e]xtrajudicial statements or writings may properly be received into evidence, not for the truth of the assertions therein contained, . . . but for such legitimate purposes as that of establishing knowledge, belief, good faith, reasonableness, motive, effect on the hearer or reader, and many others." *State v. Rosales*, 2004-NMSC-022, ¶ 16, 136 N.M. 25, 94 P.3d 768 (emphasis, internal quotation marks, and citation omitted). And "the evidence must have some proper probative effect upon or relevancy to an issue in the case in order to be admissible."

State v. Bullcoming, 2010-NMSC-007, ¶ 34, 147 N.M. 487, 226 P.3d 1, *rev'd on other grounds*, *Bullcoming v. New Mexico*, ___ U.S. ___, ___, 131 S. Ct. 2705, 2719 (2011).

{7} Here, Plaintiff's statements that he told the lieutenant and several caseworkers that he was going to sue Central were not hearsay because they were offered into evidence merely for the purpose of establishing that a conversation about the incident between Plaintiff and the lieutenant and caseworkers took place; it was not offered to prove that Plaintiff truly intended to sue. *See Reyes*, 2002-NMSC-024, ¶ 29. Plaintiff's statements that the lieutenant "said he saw the incident" and responded to Plaintiff by saying, "[I]f I were you I would sue on this matter as well" were also not hearsay. The lieutenant's response was not offered to prove that the lieutenant would sue Central if he were in Plaintiff's position. Instead, it was offered to establish that the lieutenant heard Plaintiff's statements and thus had actual knowledge of the occurrence and the potential for litigation over it. *See id.*; *Rosales*, 2004-NMSC-022, ¶ 16. And each of the statements in Plaintiff's affidavit is relevant to the issue of actual notice. *Bullcoming*, 2010-NMSC-007, ¶ 34. Under these circumstances, we conclude that the district court's exclusion of these statements, assuming they were indeed excluded, was "against the logic and effect of the facts and circumstances of the case" and "clearly untenable or not justified by reason." *See Flores*, 2010-NMSC-002, ¶ 25.

B. Discovery

{8} Plaintiff next asserts that he "was never given an opportunity to conduct any meaningful discovery" to develop further facts about whether Central had actual notice. Plaintiff states that he served interrogatories and requests for production on Central on February 26, 2014, the day before the scheduled hearing on the motion. Plaintiff asserts that, had he received a response to these requests, "he would have had far more information with regard to actual notice[,]" and that "[b]y filing an immediate motion to dismiss in lieu of an answer to the complaint, . . . [Central] avoided any opportunity for the Plaintiff to conduct . . . discovery."

{9} Plaintiff did not raise this argument in the district court. Although he propounded his discovery requests upon Central the day before the motion hearing, he did not ask the district court at the hearing to allow time for Central to respond to these requests before deciding the motion. He also did not state in his response to Central's motion that he needed time to conduct discovery concerning the issue of actual notice. Under these circumstances, we decline to address the discovery issue because Plaintiff raises it for the first time on appeal and does not assert that any exceptions to the preservation rule apply in this case. *See* Rule 12-216 NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.] . . . This rule shall not preclude the appellate court from considering jurisdictional questions or, in its discretion, questions involving: (1) general public interest; or (2) fundamental error or fundamental rights of a party."); *Muse v. Muse*, 2009-NMCA-003, ¶ 50, 145 N.M. 451, 200 P.3d 104 (declining to consider an appellant's arguments made for the first time on appeal).

C. Actual Notice

{10} Plaintiff asserts that his affidavit was "sufficient, at a minimum, to create an issue of fact with regard to actual notice" and that the district court should not have disposed of the actual notice issue without a trial. For reasons we state below, we agree that Plaintiff's affidavit created an issue of fact as to whether Central received actual notice and conclude that this issue must be resolved by an evidentiary hearing prior to trial.

{11} The standard of review that applies to Rule 1-012(B)(6) motions—that "we accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party"—does not always apply when reviewing the district court's decision on a Rule 1-012(B)(1) motion to dismiss for lack of subject matter jurisdiction. *South v. Lujan*, 2014-NMCA-109, ¶¶ 7-8, 336 P.3d 1000 (internal quotation marks and citation omitted). The standard of review depends on whether the movant has mounted a "facial" or a "factual" attack. *Id.* ¶ 8. In reviewing a facial attack, we must accept all of the allegations in the complaint as true, but in a factual attack, "a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations." *Id.* (internal quotation marks and citation omitted). "Because at issue in a factual [Rule] 1–012(B)(1) motion is the district court's . . . very power to hear the case[,] . . . the district court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* (alterations, internal quotation marks, and citation omitted). In addressing factual challenges, the district court may "allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 1–012(B)(1)" without converting the motion into one for summary judgment under Rule 1-056. *Id.* ¶ 9 (alteration, internal quotation marks, and citation omitted); *see Lopez v. State*, 1996-NMSC-071, ¶ 16, 122 N.M. 611, 930 P.2d 146 ("The legislature has made actual notice of the occurrence an issue that may be the determinative factor in a given suit, and certainly one worthy of an evidentiary hearing for the court to determine whether, from the totality of circumstances known to the governmental entity charged with fault in the occurrence, a reasonable person would have concluded that the victim may claim compensation. Because under Section 41-4-16(B) actual notice is a jurisdictional question and separate from the ultimate issue of liability, whether the facts give rise to a reasonable inference that a claim may be filed is a threshold inquiry to be resolved by the court.").

{12} "As a general rule, whether or not notice has been given or received is a question of fact to be determined by the trier of fact." *Smith v. State ex rel. N.M. Dep't of Parks & Recreation*, 1987-NMCA-111, ¶ 15, 106 N.M. 368, 743 P.2d 124. "Actual notice to the governmental entity [under the TCA] involves actual notice that litigation is likely to ensue, not simply actual notice of the occurrence or accident." *Powell v. N.M. State Highway & Transp. Dep't*, 1994-NMCA-035, ¶ 8, 117 N.M. 415, 872 P.2d 388. "The governmental entity that is to receive notice is the particular agency that caused the alleged harm." *Id.* ¶ 9 (internal quotation marks and citation omitted). "[I]t is not sufficient to show that some other state governmental agency or employee had actual notice of

the accident." *Id.* ¶ 15. This Court has previously recognized that "the notice requirement is satisfied when actual notice of an accident has been given to an agent of the public entity within the ninety-day period" of the occurrence and the likelihood that litigation may ensue. *Smith*, 1987-NMCA-111, ¶ 19.

{13} In *Smith*, six people died in a boating accident on Elephant Butte Reservoir. *Id.* ¶¶ 1-2, 5. When the personal representative of the decedents' estates sued the state's parks and recreation department, the department moved to dismiss the complaint, contending that no written or actual notice had been given within ninety days of the incident that it was likely to be sued. *Id.* ¶¶ 2-3. In opposition to the motion, the personal representative filed an affidavit stating that within ninety days of the incident he had told several representatives of the department, including the boating supervisor, the park superintendent, and a park ranger, that he felt their negligence was a cause of the decedents' deaths and that he would likely initiate legal proceedings against them. *Id.* ¶ 5. This Court concluded that this affidavit was sufficient to raise a factual issue concerning whether actual notice was given to the department, and it reversed the district court's order awarding summary judgment to the department. *Id.* ¶¶ 20, 22.

{14} Like the personal representative in *Smith*, Plaintiff asserted in his affidavit that within ninety days of the incident he told a lieutenant, who was presumably an agent of Central, that he was going to sue Central over the incident. Plaintiff's affidavit also stated that he told several caseworkers about the incident and his desire to file suit, but the affidavit is unclear whether those caseworkers were agents of Central. Under these circumstances, we conclude that Plaintiff's affidavit raised a factual issue as to whether Central received actual notice. *See id.* ¶¶ 15, 20. As a result, the district court must hold an evidentiary hearing, after which it shall enter findings of fact and conclusions of law on the issue of whether Central received actual notice. *See Lopez*, 1996-NMSC-071, ¶ 16; *see also Lujan*, 2014-NMCA-109, ¶ 11 ("Where factual determinations are essential to a district court's ruling but are inadequately developed for appeal, this Court may remand for entry of findings of fact because[,] as an appellate court, we will not originally determine the questions of fact." (alteration, internal quotations marks, and citation omitted)); *In re Begay*, 1988-NMCA-081, ¶ 17, 107 N.M. 810, 765 P.2d 1178 (recognizing that Rule 1-052(A) NMRA does not require the entry of findings of fact and conclusions of law when ruling on a motion, but stating the Court's preference for express findings of fact where ruling on the motion necessarily involves resolution of factual issues because "[i]n the absence of factual findings or some statement by the . . . court explaining the basis for its decision (including any factual determinations supporting the decision), a reviewing court is unable to decide an appeal without great difficulty"). The district court's determinations in its order that "Plaintiff did not meet the statutory notice requirements of the Tort Claims Act" and that Central "did not have actual notice of Plaintiff's claims" are insufficient because they are general legal conclusions that require factual findings supported by sufficient evidence in the record. *See In re Begay*, 1988-NMCA-081, ¶ 17; *see also State v. Cantrell*, 2008-NMSC-016, ¶ 26, 143 N.M. 606, 179 P.3d 1214 (recognizing that factual findings must be supported by sufficient evidence).

CONCLUSION

{15} We reverse the district court's judgment and remand this case to the district court to conduct further proceedings consistent with our holding stated above.

{16} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

CYNTHIA A. FRY, Judge