NO. COA11-564
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

HAROLD WAYNE MORGAN,
Plaintiff,

v. Mecklenburg County
No. 10 CVS 5505

JOSEPH HENRY CADIEU, MARION FRANCES CADIEU, JMDJ, INC., AND MECKLENBURG COUNTY,
Defendants.

Appeal by plaintiff from order entered 19 January 2011 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 October 2011.

James Patrick Galvin for Thurman, Wilson, Boutwell & Galvin, P.A., attorney for plaintiff.

Paul Hefferon for Hefferon & Hefferon, PA, attorney for defendants Cadieu and JMDJ, Inc.

Robert Adden for Ruff Bond Cobb Wade & Bethune, LLP, attorney for defendant Mecklenburg County.

ELMORE, Judge.

Harold Wayne Morgan (plaintiff) appeals an order entered 19 January 2011 granting summary judgment in favor of Joseph Henry Cadieu and Marion Frances Cadieu (together defendants Cadieu),

JMDJ, Inc. (defendant JMDJ) and Mecklenburg County (the county). After careful consideration, we affirm.

In June 1995 plaintiff purchased 6.95 acres of property (the property) located at 1030 Remount Road in Mecklenburg County. On 4 September 1998, plaintiff leased a portion of the property to Adams Outdoor Advertising for the placement of two billboards on the land. On 20 January 1999, plaintiff and Adams Outdoor Advertising signed a new lease for the two billboards. Both leases were recorded in Mecklenburg County. Under the lease terms, Adams Outdoor Advertising had the right to maintain two billboards on the property for annual terms through 30 November 2028, at a rate of $20,000.00 per year.

On 22 February 1999, plaintiff agreed to sell the property to defendants Cadieu. In that sale, plaintiff agreed to convey all of the property "except the property described in the two leases for billboard use to Adams Outdoor Advertisement." The parties also agreed to reserve an easement on the property in favor of plaintiff. At the closing on 26 August 1999, the parties slightly changed the agreement. In the new agreement plaintiff agreed to convey title of the property to defendant JMDJ in place of defendants Cadieu, but plaintiff still retained his rights to the rental portion of the property under the new

agreement. However, at the closing on 26 August 1999 the deed plaintiff executed conveyed the entire property to defendant JMDJ in fee simple, including the portions of the property with the billboards. Plaintiff's attorney reviewed all of the closing documents prior to the documents being executed by plaintiff. The fully executed deed was recorded on 31 August 1999.

Despite conveying all of his interest in the property, plaintiff continued to receive rental payments from Adams Outdoor Advertising through 2008. However, around this time the property was purchased by the county. In 2009, the county notified Adams Outdoor Advertising that it now owned the property. Adams Outdoor Advertising then paid the rental fee for 2009 to the county, rather than to plaintiff.

On 10 March 2010, plaintiff filed a complaint alleging mutual mistake of fact between plaintiff and defendant JMDJ regarding the deed executed on 26 August 1999. Plaintiff sought to have the deed reformed to reflect the original agreement between the parties, preserving plaintiff's rights to the billboards on the property. On 12 November 2010, the county filed a motion for summary judgment. On 2 December 2010, defendants Cadieu and defendant JMDJ moved for summary judgment.

On 19 January 2011, the trial court entered an order granting summary judgment in favor of all defendants. In that order, the trial court concluded that "if the plaintiff had exercised due diligence, he would have discovered what he alleges to be a mistake in or about August, 1999." Plaintiff now appeals.

Plaintiff makes three arguments on appeal: 1) that a genuine issue of material fact exists as to whether there was a mutual mistake of fact with regard to the 26 August 1999 deed, 2) that a genuine issue of material fact exists as to whether the action is barred by the applicable statute of limitations, and 3) that a genuine issue of material fact exists as to whether the county was a bona fide purchaser for value of the property. Since "[s]tatutes of limitations are inflexible and unyielding[, and] [t]hey operate inexorably without reference to the merits of plaintiff's cause of action[,]" we must first determine if the trial court erred in its determination that plaintiff's claim is barred by the statute of limitations. *Congleton v. Asheboro*, 8 N.C. App. 571, 573, 174 S.E.2d 870, 872 (1970) (quotations and citation omitted).

A three-year statute of limitations applies to an action for reformation of a deed based on mutual mistake. *See Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 654-55, 273 S.E.2d 268, 272-73

(1981) (noting that in an action for reformation of a deed based on mutual mistake a three-year statute of limitations is applicable). "Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970) (quotations and citations omitted). However, for claims based on mutual mistake the statute of limitations "begins to run from the discovery of the mistake, or when it should have been discovered in the exercise of due diligence." *Lee v. Rhodes*, 231 N.C. 602, 602, 58 S.E.2d 363, 363 (1950) (citation omitted).

Here, plaintiff executed the deed at issue on 26 August 1999. Plaintiff was represented by counsel at the time of the execution. Plaintiff's counsel reviewed the deed at the closing. Plaintiff also received copies of all of the documents from the closing. Furthermore, the deed was recorded on 31 August 1999, where it became a matter of public record. Plaintiff did not file suit for reformation of the deed until 10 March 2010, over ten years after executing the deed. Based on

these facts we conclude that had plaintiff exercised due diligence he would have discovered on or soon after the date of the closing that the deed he executed conveyed all of his interest in the property in fee simple to defendant JMDJ. Therefore, the trial court correctly determined that plaintiff's claim is barred by the applicable statute of limitations.

Next, we must analyze whether it was proper for the trial court to make this determination, or if the statute of limitations issue was a question of fact for the jury.

"Failure to exercise due diligence in discovering a mistake has been determined as a matter of law where it was clear that there was both capacity and opportunity to discover the mistake." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976) (citation omitted).

Here, in his deposition plaintiff admitted that he instructed his attorney to review the deed prior to its execution. Plaintiff also admitted that his attorney knew he wanted to retain a property interest in the billboards. Plaintiff further admitted that in addition to his attorney reviewing the deed, he also asked his real estate agent to review the deed. Plaintiff also admitted that he was given copies of all of the documents that he signed at the closing.

Based on his deposition testimony, it is clear from the record that plaintiff had both the capacity and opportunity to discover the mistake in the deed. Therefore, we conclude that the application of the statute of limitations was a question of law, and it was appropriate for the trial court to decide this issue.

In sum, we conclude that the trial court properly determined that plaintiff's claim is barred by the statute of limitations. Accordingly, the trial court did not err in entering an order granting summary judgment in favor of defendants.

Affirmed.

Judge BRYANT concurs in result.

Judge STEPHENS concurs.

Report per Rule 30(e).