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NO. COA02-1684

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

D.M. FAIRCLOTH,
Plaintiff,

v.

Sampson County
No. 02 CVS 612

SCOTT HOWELL & CO., INC.,
Defendant.

Appeal by defendant from Order entered 24 September 2002 by Judge Gary E. Trawick in Superior Court, Sampson County. Heard in the Court of Appeals 7 October 2003.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Scott A. Miskimon and Timothy W. Howard, attorneys for plaintiff-appellee.

Penry Riemann, P.L.L.C., by J. Anthony Penry and Cynthia A. O'Neal, attorneys for defendant-appellant.

WYNN, Judge.

The issue on appeal is whether the statute of limitations barred Scott Howell & Co., Inc.'s claim for consulting fee debts arising from Senator D. M. Faircloth's unsuccessful re-election bid for the United States Senate in 1998. We answer, yes; accordingly, we uphold the trial court's judgment.

The record on appeal shows that an unincorporated association called "Faircloth for Senate Committee 1998" ("the Faircloth Committee") retained Scott Howell & Co., a Texas advertising

agency, to provide political consulting services. After the election of 1998, Scott Howell & Co. sought payment for services rendered to the campaign from the Faircloth Committee. According to Scott Howell & Co., the Faircloth Committee assured payment; however, the company did not submit an invoice for payment until 1 April 2001. Shortly thereafter, the company through its attorney, sent a letter to Senator Faircloth claiming that he was personally liable for the debt, demanding payment, and threatening to sue to recover the consulting fees.

In response, Senator Faircloth brought a declaratory judgment action to determine whether he was personally liable for the campaign debt, and asserting the statute of limitations. Scott Howell & Co. answered and counterclaimed for damages from breach of contract and *quantum meruit*. From the trial court's grant of summary judgment in favor of Senator Faircloth, Scott Howell & Co. appeals contending that an issue of fact existed as to whether Senator Faircloth should have been estopped from pleading the statute of limitations as a defense. We disagree.

Under N.C. Gen. Stat. § 1-52(1) (2001), the three-year statute of limitation for breach of contract and *quantum meruit* accrues, absent a contract stipulating otherwise, from the time the service is last provided. "Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. When, however, the statute of limitations is properly pleaded, and the facts with reference to it are not in conflict, it becomes a matter of law, and summary judgment is appropriate." *Pembee Mfg.*

Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 508, 317 S.E.2d 41, 43 (1984) (internal citations omitted). Moreover, a "statute of limitation operates as a complete defense, not for lack of merit, but for security against the attempt to assert a stale claim." *Nowell v. The Great Atlantic and Pacific Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959). However, even if a party properly pleads that the suit against him is stale, i.e., was not brought within the time prescribed by statute, "equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Id.*

In the instant case, the facts underlying the summary judgment motion are not in dispute. Scott Howell & Co.'s last services to the Faircloth Committee occurred before the election ended on 3 November 1998. Almost two years and six months after the services had been rendered, Scott Howell & Co. requested payment in writing. Although his attorney sent a demand letter to Senator Faircloth on 18 April 2001, Scott Howell & Co. did not assert legal claims against Senator Faircloth until 8 July 2002, approximately three years and seven months after the last service could have been rendered, and then, only as counterclaims to Senator Faircloth's complaint. Thus, according to the governing law, Scott Howell & Co.'s counterclaims must fail as barred by the statute of limitations.

Nonetheless, Scott Howell & Co. contend that members of the Faircloth Committee "repeatedly promised to pay . . . for its

services." Even so, this action was against Senator Faircloth personally, not the Faircloth Committee. Indeed, nothing in the record supports that an agency relationship existed between the Faircloth Committee and Senator Faircloth, such that the Faircloth Committee's promises to pay could bind Senator Faircloth personally. See *Simmons v. Morton*, 1 N.C. App. 308, 310, 161 S.E.2d 222, 223 (1968) (internal citations omitted):

An agent's authority to bind his principal cannot be shown by the agent's acts or declarations. This can be shown only by proof that the principal authorized the acts to be done or that, after they were done, he ratified them. One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract.

Thus, even if the Faircloth Committee made certain assurances to Scott Howell & Co., the record fails to show that those assurances were personally binding on Senator Faircloth. See *Nationwide Homes of Raleigh, N.C., Inc. v. First Citizens Bank and Trust Co.*, 262 N.C. 79, 81, 136 S.E.2d 202, 204 (1964) (internal citations omitted) ("One who deals with an agent must, to protect himself, ascertain the extent of the agent's authority.")

Furthermore, we hold that the record fails to show that alleged assurances by the Faircloth Committee were in writing as required by the Statute of Frauds. See N.C. Gen. Stat. § 1-26 (2001) ("No acknowledgement or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be

charged thereby . . ."). Accordingly, we uphold the trial court's grant of summary judgment in favor of Senator Faircloth.

Affirmed.

Judges TYSON and ELMORE concur.

Report per Rule 30(e).