NO. COA06-1

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

DONALD BOYD MORGAN,
Plaintiff-appellant

v.

Davidson County
No. 05 CVS 2484

LEXINGTON FURNITURE INDUSTRIES, INC., d/b/a LEXINGTON HOMEBRANDS,
Defendant-appellee

Appeal by plaintiff from judgment entered 19 October 2005 by Judge Christopher M. Collier in Davidson County Superior Court. Heard in the Court of Appeals 16 August 2006.

Morgan, Herring, Morgan, Green, Rosenblutt & Gill, L.L.P., by James F. Morgan for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King, III and Kathleen A. Gleason for defendant-appellee.

CALABRIA, Judge.

Donald Boyd Morgan ("plaintiff") appeals the trial court's grant of summary judgment to Lexington Furniture Industries, Inc., d/b/a/ Lexington Homebrands ("defendant"). We affirm.

On 15 June 2003, plaintiff and defendant executed an Independent Account Management Agreement ("the contract"). Pursuant to the contract, plaintiff solicited orders from

defendant's customers within the sales territory for the products specified by the company. The contract contained an arbitration provision which stated, in pertinent part,

> *[a]ny dispute* . . . which may arise between the parties . . . in connection with this Agreement or its breach . . . *shall be submitted to arbitration*[.] Any request for arbitration must be filed . . . within 180 calendar days following the date of the incident[.]

(Emphases added). On 10 December 2004, defendant verbally notified plaintiff of its intent to terminate the contract. Five days later, on 15 December 2004, defendant sent a letter to plaintiff confirming their prior conversation regarding the decision to terminate the contract and included a formula calculating plaintiff's compensation as well as notice of payment for commissions for *bona fide* customer orders received through 10 December 2004.

On 29 September 2005, plaintiff filed an amended complaint seeking lost wages on the grounds he was wrongfully terminated. Defendant filed a motion for summary judgment contending "[p]laintiff did not take any legal action, including filing an arbitration demand, within 180 calendar days of the incident[.]" On 19 October 2005, the trial court granted defendant's summary judgment motion. Plaintiff appeals.

It should be noted that plaintiff, in assigning error to the summary judgment order, fails to include the appropriate record or transcript pages, as required by N.C. R. App. P. 10(c)(1) (2006). However, the order granting summary judgment and the notice of

appeal from that order immediately precede the record page listing the assignments of error. In this context, it is clear that the assignment of error to the summary judgment order on page 48 of the record refers to the order on page 46 and notice of appeal on page 47.

Plaintiff initially argues that the trial court erred in granting defendant's summary judgment motion. 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "When reviewing a lower court's grant of summary judgment, our standard of review is *de novo*." *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713 (2004), *disc. review denied*, 358 N.C. 545, 599 S.E.2d 409 (2004). "[W]e review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact." *BellSouth Telecomm., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724 (2005), *disc. review denied*, __ N.C. __, 615 S.E.2d 660-61 (2005).

Similarly, "[t]he trial court's conclusion that a particular dispute is or is not subject to arbitration is a conclusion of law, and is reviewable by the appellate courts *de novo*." *Hobbs Staffing Servs. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 225, 606 S.E.2d 708, 710 (2005).

Here, the issue is whether the arbitration agreement between the parties governs, and whether its terms are enforceable as a matter of law. The parties agree that the contract between them contained an arbitration clause, and that the arbitration required that a request for arbitration be filed with the American Arbitration Association within 180 calendar days "following the date of the incident complained of, or within any thirty calendar days following the end of any mediation process attempted by the parties, whichever is shorter."

In this case, the "incident complained of," namely plaintiff's termination, occurred 10 December 2004, and plaintiff did not file suit until 26 August 2005, more than 180 days after the termination. Plaintiff did not file a demand for arbitration.

North Carolina has a three-year statute of limitations for breach of contract actions. N.C. Gen. Stat. § 1-52(1) (2005). However, it is established that parties may shorten applicable statutes of limitation so long as the contractual limitation is reasonable. *Holmes & Dawson v. East Carolina Ry.*, 186 N.C. 58, 63, 118 S.E. 887, 890 (1923). Our courts have held arbitration agreements to be valid and enforceable. "North Carolina has a strong public policy favoring the settlement of disputes by arbitration." *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992).

The plaintiff makes several arguments in support of his contention that the trial court erred by determining that the arbitration provision was binding and in turn entering a summary

judgment order. Plaintiff argues that he was forced to delay filing his complaint because the defendant refused to provide plaintiff with a copy of the employment contract. There is no evidence in the record supporting this argument, and we will thus not consider it on appeal. "In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal . . . ." N.C. R. App. P. 9(a) (2006). Further, because plaintiff signed the contract, he is charged with knowledge of its contents.

> It is the duty of one signing a written instrument to inform himself of its contents before executing it, if he has the ability and opportunity to do so, and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by showing that he was ignorant of its contents or failed to read it.

Harrison v. Southern R. Co., 229 N.C. 92, 95, 47 S.E.2d 698, 700 (1948). "[A] signed paper writing demonstrates full knowledge and assent as to what is contained therein." *Park v. Merrill Lynch*, 159 N.C. App. 120, 126, 582 S.E.2d 375, 380 (2003).

Plaintiff further argues that the reasonableness of the provision requiring any dispute to be submitted to arbitration within 180 days remains a genuine issue of material fact, and that the trial court erred by entering the summary judgment order. Plaintiff's argument is misplaced, as the determination of whether a contractually-shortened statute of limitations is reasonable calls for a legal rather than factual conclusion. *Badgett v. Fed. Express Corp.*, 378 F. Supp. 2d 613, 623 (M.D.N.C. 2005).

In *Badgett*, the United States District Court for the Middle District of North Carolina considered the issue of whether North Carolina courts would uphold as reasonable a clause in an employment contract requiring all claims against the employer to be brought within six months of the action in question. The court stated, "Reasonableness is not subject to well-defined or commonly accepted tests or standards, but usually depends on all the facts and circumstances of a particular case." *Id.*

> North Carolina has several six-month statutes of limitations affecting claims by employees. North Carolina statutes require employees bringing employment discrimination claims under the Persons with Disabilities Protection Act to bring civil actions within 180 days. *See* N.C. Gen. Stat. § 168A-12. Employees believing they have been discriminated against because of their AIDS or HIV status are limited to a 180-day period. *See id.* § 130A-148(i). So too are employees who are wrongfully discharged for instituting a worker's compensation claim. *See id.* § 1-55. A similar period limits the time an employee can file complaints of discrimination with the North Carolina Department of Labor. *See id.* § 95-242.

Id. at 625.

The *Badgett* court's analysis of North Carolina law is instructive, and demonstrates that North Carolina does not consider a 180-day filing limit to be *per se* unreasonable. In the instant case, the parties agreed that any dispute arising out of the plaintiff's employment would be submitted to arbitration within six months of the incident in question. The plaintiff's knowledge of the contract's contents are established by his signature, and his bargaining power is demonstrated by his changing the terms of the

contract by crossing out some sentences and altering the contents of others. These changes, which relate to the term of the agreement and the termination provisions, are initialed by the plaintiff. Given the plaintiff's apparent bargaining power, the public policy favoring arbitration agreements, the fact that our courts routinely allow parties to contractually shorten statutes of limitation, and the fact that our legislature has, in certain employment-related cases, required parties to file grievances within 180 days of the incident complained of, we cannot find the present arbitration agreement to be unreasonable. The agreement allowed the plaintiff to file for arbitration within six months of his termination, and allowed subsequent appeal to our state's courts if he was not satisfied with the arbitrator's decision. Because plaintiff failed to file his dispute within the contractually-agreed upon time, his claim is barred by the statute of limitations.

The plaintiff raises additional arguments in his reply briefs, and these arguments will not be considered on appeal, as they have not been properly presented to this Court. "A reply brief is 'intended to be a vehicle for responding to matters raised in the appellees' brief' and is 'not intended to be — and may not serve as — a means for raising entirely new matters.'" *Newsome v. N. C. State Bd. Of Elections*, 105 N.C. App. 499, 504, 415 S.E.2d 201, 203-04 (1992) (quoting *Animal Protection Soc'y v. N.C.*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989)).

Plaintiff next argues that the trial court erred by entering judgment dismissing his action. Although we have already determined that summary judgment was properly granted, we note that the plaintiff's second assignment of error has not been properly made, and will not be considered on appeal.

North Carolina Rule of Appellate Procedure 10(c)(1) (2006) states, in pertinent part: "[e]ach assignment of error . . . shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." The plaintiff's second assignment of error states as follows:

> 2. The Trial Court erred and committed reversible error by signing and entering the Judgment that dismissed the action without recovery by Plaintiff.

This assignment of error violates Rule 10(c)(1) since it does not state a legal basis upon which the error is predicated. *See May v. Down East Homes of Beulaville, Inc.*, __ N.C. App. __, __, 623 S.E.2d 345, 346 (2006). Furthermore, Rule 10(c)(1) also states "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error . . . with clear and specific record or transcript references." However, plaintiff's second assignment of error violates this rule since it is unaccompanied by record or transcript references. *See Munn v. N.C. State Univ.*, 360 N.C. 353, 359, 626 S.E.2d 270, 271 (2006), *rev'g per curiam for reasons stated in* __ N.C. App. __, __, 617 S.E.2d 335, 339 (2005) (Jackson, J., dissenting). Based on the aforementioned rule violations, we dismiss this assignment of error. *See Viar*, 359 N.C. at 401, 610 S.E.2d at 360; *Munn*, 360

N.C. at 354, 626 S.E.2d at 271. Accordingly, the judgment of the trial court remains undisturbed.

Affirmed.

Judge JACKSON concurs.

Judge GEER concurs in a separate opinion.

Report per Rule 30(e).

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Defendant.

GEER, Judge, concurring.

I concur fully in the majority opinion's conclusion that plaintiff failed to demonstrate that the six-month time limitation in the contract is unreasonable. In arguing unreasonableness, plaintiff relies solely on defendant's failure to supply him with a copy of his employment contract. He points to no other circumstances that would justify holding the six-month time limitation to be unreasonable and does not contend the provision otherwise violates North Carolina public policy. I write separately only to emphasize the narrowness of this decision.

I agree with the majority opinion that any delay in voluntarily supplying plaintiff with a copy of his employment contract is not a sufficient basis for disregarding the six-month time limitation. Plaintiff negotiated, reviewed, and signed the contract only 18 months before he was terminated. I cannot conclude that it is unreasonable to expect plaintiff to remember the terms of his contract sufficiently to assert a claim within six months of his termination. Indeed, plaintiff's brief on appeal

states that "[a]lthough Morgan was not given a copy of the employment agreement, it was his understanding that the parties had specifically deleted the termination without cause provision." That deletion is at the heart of plaintiff's claim.

In other words, plaintiff did recall the terms of his contract pertinent to his claims. His lack of confirmation of his recollection of those terms cannot, without more, support his argument that the time limitation is unreasonable. Significantly, plaintiff cites no authority supporting such a position. Plaintiff has not, however, offered any other justification for finding the time limitation unreasonable.[1]

If this Court were to accept plaintiff's argument, we would, as a practical matter, effectively eviscerate most contractual time limitations. A party could demand that the opposing party voluntarily produce certain documents relevant to his or her claim and, then, if the opposing party declined to engage in voluntary production, argue that the time limitation was unreasonable because of the withholding of documents. Since plaintiff's argument hinges exclusively on defendant's failure to voluntarily produce documents, I cannot perceive of any basis for overturning the trial court's entry of summary judgment.

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[1]Plaintiff argues in passing that "the court should have determined that summary judgment was inappropriate without further discovery and/or because material issues of fact are in dispute." The record does not, however, indicate that he sought any relief under N.C.R. Civ. P. 56(f) (allowing a party to submit an affidavit in support of a request that the trial court defer ruling on a summary judgment motion until after completion of discovery). Further, plaintiff does not identify any specific factual issues that are in dispute regarding the time limitation.

Finally, I feel compelled to point out that I am not certain the reasonableness of the time limitation is a question properly decided by the courts given the parties' contract. Ordinarily, the sole question for the trial court and this Court would be whether the parties' contract contained an enforceable arbitration agreement. If so, the trial court would compel arbitration. At that point, it would be the responsibility of the arbitrator to rule on the reasonableness of any limitations in the contract. *See Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 455, 531 S.E.2d 874, 876 ("In considering a motion to compel arbitration, the trial court should determine (1) the validity of the contract to arbitrate and (2) whether the subject matter of the arbitration agreement covers the matter in dispute. Once the court answers these questions in the affirmative, the parties must take up all additional concerns with the arbitrator." (internal citations and quotation marks omitted)), *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000).

Nevertheless, defendant did not move to compel arbitration, plaintiff has expressed no interest in arbitrating, and the parties have not addressed the authority of this Court to decide the reasonableness of the time limitation. In light of the positions of the parties, I believe the majority has properly gone ahead and addressed the reasonableness issue.