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NO. COA07-1469

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2008

LUCKY DUCKS, LTD.,
Plaintiff,

v.

Guilford County
No. 05 CVS 12589

ANDRÉ LEEDS,
Defendant.

Court of Appeals

Appeal by Plaintiff from summary judgment entered 10 August 2007 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 10 June 2008.

Slip Opinion

*Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for Plaintiff-appellant.*

*Womble Carlyle Sandridge & Rice, P.L.L.C., by James M. Powell and J. Mark Sampson, for Defendant-appellee.*

ARROWOOD, Judge.

Lucky Ducks, Ltd. (Plaintiff), is a North Carolina corporation; Scott Coremin is its president, chief executive officer, and sole shareholder. Scott and his wife, Kim Coremin, were formerly employed as sales representatives for Precedent Furniture, a division of Sherrill Furniture Company. Defendant, André Leeds, is the former director of sales and marketing at Sherrill Furniture. Plaintiff appeals a summary judgment order

entered in favor of Defendant on Plaintiff's claim of unfair or deceptive trade practices. We affirm.

The pertinent factual and procedural history of this case may be summarized as follows: In October 2001 Kim and Scott Coremin were fired from Sherrill Furniture. On 12 April 2002 they filed a lawsuit against Sherrill Furniture; its chief executive officer, Ralph Williams; and another Sherrill employee, Melanie Cooper. The Defendant was not named as a party in this lawsuit. The complaint alleged that (1) Williams had sexually harassed Kim, starting in 1999; (2) the Coremins reported this to Leeds and other executives of Sherrill Furniture, but the company did nothing; and (3) in October 2001 Williams took part in a plan to have Scott and Kim fired from Sherrill Furniture. The Coremins brought claims of tortious interference with contract and unfair and deceptive trade practices against Williams and Sherrill Furniture. In addition, Kim brought claims of intentional infliction of emotional distress against Williams and Sherrill Furniture; negligent retention and supervision against Williams and Sherrill Furniture; and slander *per se* against Melanie Cooper and Sherrill Furniture. The trial court granted summary judgment for defendants on all claims, and Scott and Kim appealed to this Court.

On appeal, the plaintiffs argued, in pertinent part, that "in 2001, Williams hatched a scheme with Leeds to cancel the Coremins' contract with Sherrill Furniture Company" and that: . . .

> Williams and Andy Leeds contrived an altercation as a basis for terminating the Coremin's contract. . . . Andy Leeds came at [Scott] with his fists clenched. Scott

> Coremin put his hands up in a defensive passive motion, and Andy Leeds threw his body into Scott's hands and Andy fell backward. Andy Leeds then said, "You pushed me. You shoved me." . . . Scott Coremin said to both Williams and Leeds: "This is a setup." . . . Williams with the aid of Andy Leeds set up a contrived altercation as a pretext for terminating the Coremin's contract.

This Court affirmed the trial court in *Coremin v. Sherrill Furniture Co.*, 170 N.C. App. 697, 614 S.E.2d 607, *disc. review denied,* 360 N.C. 62, 621 S.E.2d 178 (2005), an unpublished opinion.

On 18 January 2006, Plaintiff filed suit against Defendant for unfair or deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (2007). In its complaint, which repeated many of the allegations from the earlier lawsuit, Plaintiff alleged that at the October 2001 trade show Defendant pretended to be assaulted by Scott Coremin, in order to get Scott and Kim fired from Sherrill Furniture. On 10 July 2007, Defendant moved for summary judgment, which the trial court granted on 10 August 2007. From this order, Plaintiff appeals.

Standard of Review

Summary judgment is properly granted when "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) (2007). In the instant case, we review the summary judgment order to determine whether Plaintiff's suit was barred by the pertinent statute of limitations:

> In reviewing a motion for summary judgment we must look at the record in the light most favorable to the party opposing the motion. We must also regard the papers of the party opposing the motion indulgently. In so doing, however, we must not forget that once defendants properly pleaded the statute of limitations, the burden of showing that the action was instituted within the prescribed period was placed upon plaintiff. It was, therefore, incumbent upon plaintiff to come forward with a forecast of evidence tending to show the action was started in apt time.

*Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 507-08, 317 S.E.2d 41, 42-43 (1984) (citing *Peterson v. Winn-Dixie*, 14 N.C. App. 29, 31, 187 S.E.2d 487, 488 (1972); *Page v. Sloan*, 281 N.C. 697, 704, 190 S.E.2d 189, 193 (1972); and *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985).

"'Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact.' However, where the statute of limitations is properly pled and the facts are not in conflict, the issue becomes a matter of law, and summary judgment is appropriate." *Rowell v. N.C. Equip. Co.*, 146 N.C. App. 431, 434, 552 S.E.2d 274, 276 (2001) (quoting *Pembee Mfg.,* 69 N.C. at 508, 317 S.E.2d at 43) (other citations omitted).

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Plaintiff argues that the trial court erred by granting summary judgment for Defendant. We conclude that summary judgment was properly entered, on the grounds that Plaintiff's suit was barred by the statute of limitations.

Plaintiff alleged a violation of N.C. Gen. Stat. § 75-1.1 (2007), which states in pertinent part that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Under N.C. Gen. Stat. § 75-16.2 (2007), an action for unfair or deceptive trade practices "shall be barred unless commenced within four years after the cause of action accrues." Plaintiff concedes that his unfair or deceptive trade practices claim is governed by a four year statute of limitations. "The application of any statutory or contractual time limit requires an initial determination of when that limitations period begins to run." *Register v. White*, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004).

"This Court has previously determined that a cause of action for unfair and deceptive trade practices . . . accrues when the violation occurs." *Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 475, 473 S.E.2d 382, 386-87 (1996).

> A claim [of unfair and deceptive trade practices] under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant. . . . To recover, a plaintiff must have suffered actual injury as a proximate result of the deceptive statement or misrepresentation.

*Boyce & Isley, PLLC v. Cooper,* 153 N.C. App. 25, 35-36, 568 S.E.2d 893, 901-02 (2002) (citations omitted).

Plaintiff's complaint alleges that Defendant started a conflict with Scott Coremin at the October 2001 trade show and purposely fell backwards, pretending that Scott had shoved him. Defendant then "falsely told Buddy Sherrill, the President of

Sherrill Furniture Company, that Scott Coremin had assaulted him." Plaintiff asserts that Scott and Kim were fired as a result of Defendant's feigning this assault, and that Plaintiff suffered financial damages as a consequence.

"Plaintiff's action under G.S. 75-1.1 is based on fraudulent misrepresentation. Under North Carolina law, 'an action accrues at the time of the invasion of plaintiff's right.' For actions based on fraud, this occurs at the time the fraud is discovered or should have been discovered with the exercise of reasonable diligence." *Nash v. Motorola Communications and Electronics*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989), (quoting *Rothmans Tobacco Co., Ltd. v. Liggett Group, Inc.*, 770 F.2d 1246, 1249 (4th Cir. 1985)).

In the instant case, the deceptive act that Plaintiff alleges is Defendant's pretense that Scott Coremin had shoved him. Because it was within Scott's personal knowledge that he had not assaulted Defendant, he would have "discovered" Defendant's deceptive act as soon as it occurred or, at the latest, a day or two later when the Coremins were fired. This situation is analogous to that of *Brown v. City of Pompano Beach*, 969 F. Supp. 1317, 1317-18 (S.D. Fla. 1997), in which a police officer submitted to a random drug test that came back positive for cocaine when he had not used any controlled substance. He argued that the statute of limitations was tolled until he had definitive proof that the drug screen was wrong. The Court disagreed and held that the statute of limitations accrued as soon as the officer was terminated for having received a positive test result knowing that he had not used

cocaine. *See also Rigby v. Clinical Reference Lab.*, 995 F. Supp. 1217, 1225-26 (D.C. Kan. 1998) (citing *Brown supra.*).

It is beyond dispute that Plaintiff was aware of Defendant's alleged deception at the time it occurred. In *Coremin*, this Court noted that Scott and Kimberly had brought, *inter alia*, "a claim of tortious interference with contract against Williams, alleging that Williams and Andy Leeds 'contrived an altercation [with Scott Coremin] as a basis for terminating the [plaintiffs'] contract.'" The opinion describes the October 2001 incident as follows:

> At the 2001 fall furniture market, Scott Coremin and Andy Leeds, the former Director of Sales and Marketing at Sherrill Furniture, were involved in a dispute which resulted in Scott pushing Andy up against the wall. Williams, standing in a nearby room, observed the incident and intervened. After learning of this incident two days later, Buddy Sherrill spoke to Andy Leeds about it. Immediately thereafter, Buddy notified plaintiffs that he was terminating their relationship with Sherrill Furniture.

*Id*. Scott's immediate awareness of the deception is further confirmed by his affidavit, averring in relevant part that:

> Kimberly and I were at the October 2001 furniture market[.] . . . All of a sudden, Andy Leeds came over to the table and, with his hands, shoved all of our materials off the table onto the floor[, and] . . . came toward me quickly in an angry manner, with his fists clenched indicating that he was going to hit me. . . . When I put my hands up as a defensive measure to protect myself, Andy Leeds leaned into my hands and threw himself backwards against the wall to make it appear as if I'd hit him. He yelled out that I had shoved him. . . . About two days later . . . our contract was terminated. . . . It was on that day at the October 2001 furniture market that the contract between [Plaintiff] and Sherrill Furniture Company was terminated[.]

We conclude that the statute of limitations began to run in October 2001, when Defendant allegedly feigned a simulated attack by Scott and "falsely told" the company president "that Scott Coremin had assaulted him." Plaintiff's complaint was filed in January 2006, more than four years later, and therefore is barred by the statute of limitations.

We have considered and rejected Plaintiff's argument to the contrary. Plaintiff contends that the statute of limitations did not start to run until Scott "learned in February, 2002, that [Defendant's daughter] had replaced Plaintiff Lucky Ducks, Ltd., as the sales representative[.]" Plaintiff argues that until Scott "learned" that Defendant's secret purpose was to secure a position for his daughter, Plaintiff had no "knowledge of fraudulent intent" and thus "did not have a basis for bringing a fraud case[.]" We disagree.

Plaintiff's argument assumes that the cause of action did not accrue until Plaintiff had evidence of all the elements of fraud. However, Plaintiff brought a claim for unfair or deceptive trade practices, not a "fraud case." This is a significant distinction, because the elements of these claims are not the same. "In contrast to fraud, intent is irrelevant to a claim of unfair and deceptive trade practices under N.C.G.S. § 75-1.1." *Bolton Corp. v. T. A. Loving Co.*, 94 N.C. App. 392, 411, 380 S.E.2d 796, 808 (1989) (citing *Wilder v. Squires*, 68 N.C. App. 310, 315 S.E. 2d 63 (1984)). Therefore, a suit for unfair or deceptive trade practices does <u>not</u> require proof of a defendant's motive, intent to deceive,

or bad faith. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981). In *Marshall* the trial court "determined as a matter of law that certain of defendants' misrepresentations constituted unfair or deceptive acts or practices in or affecting commerce within the meaning of G.S. 75-1.1." *Id.* at 540, 276 S.E.2d at 399. On appeal, this Court held that "bad faith was an essential element of plaintiffs' claim." *Id.* at 542, 542, 276 S.E.2d at 399. The North Carolina Supreme Court reversed and held that "in determining whether a violation of G.S. 75-1.1 has occurred, the question of whether the defendant acted in bad faith is not pertinent." *Id.* at 544, 276 S.E.2d at 400. Thus:

> It is axiomatic that proof of fraud itself necessarily constitutes a violation of the prohibition against unfair or deceptive trade practices. However, in order . . . to make out a claim under . . . [§] 75-1.1, [Plaintiff] must show only some – but not all – of the same elements essential to making out a cause of action in fraud. . . . Unlike a claim based upon fraud, proof of actual deception is not necessary. . . .Unlike the third element of proof in a fraud claim, the question 'whether the defendant acted in bad faith is not pertinent' to whether his representation violated N.C.G.S. § 75-1.1.

*Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470-71, 343 S.E.2d 174, 180 (1986) (quoting *Marshall*, 302 N.C. at 544, 276 S.E.2d at 400-01; and citing *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 97, 331 S.E.2d 677, 681 (1985); and *Johnson v. Insurance Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980)).

We conclude that summary judgment was properly entered for Defendant, on the grounds that the applicable statute of limitations had expired when Plaintiff filed its lawsuit. "If the

granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed[.]" *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citations omitted).

We also note that Defendant has disputed Plaintiff's assertion that his alleged actions were "in or affecting commerce" as that phrase has been interpreted by our appellate jurisprudence. Because we are resolving this appeal based on the applicable statute of limitations, we do not need to address whether Defendant's actions could be considered "in or affecting commerce" and we express no opinion on this issue.

For the reasons discussed above, we conclude that the trial court did not err by entering summary judgment in favor of Defendant and that its order should be

Affirmed.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).