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NO. COA08-322

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

JOHN EDWARD PUGH,
Plaintiff,

v.

Randolph County
No. 06 CVS 1574

ALAN RAY WILLIAMS,
Defendant.

Court of Appeals

~~Appeal by Defendant from judgment entered 30 October 2007 by~~
Judge Lindsay R. Davis, Jr., in Randolph County Superior Court.
Heard in the Court of Appeals 22 September 2008.

Moser Schmidly & Roose, by Richard G. Roose, for Plaintiff-Appellee.

Gavin, Cox, Pugh & Wilhoit, LLP, by Alan V. Pugh and Darren C. Allen, for Defendant-Appellant.

STEPHENS, Judge.

On 23 August 2004, Plaintiff John Edward Pugh filed a two-count complaint against Defendant Alan Ray Williams. Plaintiff alleged that (I) Defendant had failed to provide an accounting of the proceeds from the parties' joint venture for logging operations operated from 1998 until 2001, and (II) Defendant had forged Plaintiff's endorsement on several checks and fraudulently and maliciously converted the money from the checks for Defendant's use.

Defendant filed an answer denying the allegations on 27 October 2004. Plaintiff filed notice of voluntary dismissal without prejudice on 5 August 2005.

On 20 July 2006, Plaintiff re-filed the identical complaint. On 30 August 2006, Defendant filed an answer denying the allegations and interposing the affirmative defenses of laches and the statute of limitations. A jury trial was held on 19 and 20 March 2007. At the close of Plaintiff's evidence, Defendant moved for a directed verdict on the grounds that the statute of limitations had expired and that there was insufficient evidence. The trial court denied Defendant's motion based on the statute of limitations, denied Defendant's motion for a directed verdict for insufficient evidence as to Count I of the complaint, and granted Defendant's motion for a directed verdict for insufficient evidence as to Count II. On the sole issue submitted to the jury, the jury found that Plaintiff and Defendant "agree[d] to operate as a joint venture for logging operations on timber bought or found by the [D]efendant[.]" The trial court entered judgment on the jury's verdict and ordered that an accounting be conducted to determine the profits and liabilities of each party incurred during the joint venture. Defendant moved for judgment notwithstanding the verdict and alternatively for a new trial. These motions were denied. From the trial court's judgment, Defendant appeals.

The sole issue on appeal is whether Count I of Plaintiff's complaint, alleging that "Defendant never provided [an]

accounting of proceeds despite Plaintiff's repeated requests that he do so[,]” is barred by the statute of limitations. We conclude that it is not.

Background

In 1998, Plaintiff and Defendant entered into a joint venture to cut and transport timber. Plaintiff testified that, pursuant to their oral agreement, (1) Plaintiff was to receive \$10 per ton for all timber cut and a base salary of \$400 per week, (2) Defendant was to receive \$100 for every load of wood that he took to market, (3) after the land owners were paid, the parties would split the remaining profits, and (4) Defendant would keep track of the money and pay the appropriate share of profits to Plaintiff. In 2001, Plaintiff received a Form 1099 from Ingram Wood Yards, Inc. (“Ingram”) indicating that Plaintiff had been paid approximately \$46,378 by Ingram in the year 2000. Plaintiff testified that although he had not received any money from Ingram during 2000, he paid taxes on the income reflected on the Form 1099. He contacted Ingram to obtain copies of checks issued by Ingram to him. Plaintiff testified that “it took me about a year to get them [sic] checks, front side and back side[,]” during which time he continued to work with Defendant according to the agreed-upon arrangement. Ultimately, Plaintiff received copies of 17 checks issued to him by Ingram. Plaintiff testified that he spoke to Defendant in the beginning of 2002 about the checks, but was unable to obtain an accounting from

Defendant regarding his share of the profits. Plaintiff's lawsuit thus follows.

I. North Carolina Rule of Appellate Procedure 28(b)(6)

We first address Plaintiff's contention that Defendant's appeal should be dismissed for failure to provide a concise statement of the applicable standard of review, in violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

Although Defendant's brief did not include a concise statement of the applicable standard of review, Defendant timely filed a Motion to Add Addendum to Appellant's Brief detailing the applicable standard of review. As this Court granted Defendant's motion by Order entered 9 July 2008, Plaintiff's argument is dismissed.

II. Statute of Limitations

Defendant asserts that the trial court erred in denying Defendant's motion for a directed verdict and motion for judgment notwithstanding the verdict based on laches and the expiration of the statute of limitations.

Preliminarily, we note that Defendant failed to present any argument or authority in his brief supporting his contention based on laches. This argument is thus deemed abandoned pursuant to Rule 28(b)(6) of the Rules of Appellate Procedure.

"Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has

not expired." *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citations omitted).

An action for breach of contract ordinarily must be brought within three years from the time of the accrual of the cause of action. N.C. Gen. Stat. § 1-52 (2007). Additionally, Rule 41(a) of the North Carolina Rules of Civil Procedure provides in part that

an action . . . may be dismissed by the plaintiff without order of court [] by filing a notice of dismissal at any time before the plaintiff rests his case Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2007). Thus, a plaintiff's voluntary dismissal without prejudice under Rule 41(a)(1) "effectively extend[s] the statute of limitations by allowing plaintiffs to refile their complaint against defendants within one year." *Brisson v. Santoriello*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000). The running of the statute of limitations must be computed from the time a cause of action accrues. *Lewis v. Godwin Oil Co.*, 1 N.C. App. 570, 162 S.E.2d 135 (1968). "Generally, a cause of action accrues when the right to institute a suit arises." *Finova Capital Corp. v. Beach Pharm. II, Ltd.*, 175 N.C. App. 184, 188, 623 S.E.2d 289, 291 (2005) (citation omitted). The right to institute a suit based

on breach of contract arises "on the date the promise is broken." *Id.* (quotation marks and citation omitted).

In this case, Plaintiff filed his first complaint on 23 August 2004. Plaintiff filed a notice of voluntary dismissal on 5 August 2005. Plaintiff re-filed the identical complaint on 20 July 2006, within the one-year limit imposed by Rule 41(a)(1). Accordingly, we must determine whether Plaintiff carried his burden of showing that his cause of action accrued on or after 23 August 2001, within three years of the date Plaintiff filed his original complaint.

At trial, Plaintiff testified that in 2001, before April 2001, he received a 1099 form from Ingram for money allegedly paid to Plaintiff during 2000. Plaintiff had not received the money indicated on the 1099 form, and contacted Ingram to get copies of the checks. Plaintiff continued working in the joint venture during the year it took him to obtain copies of the checks. After receiving copies of the checks, at the beginning of 2002, Plaintiff spoke with Defendant regarding the 1099 form, but was unable to obtain an accounting from Defendant regarding his share of the profits.

As Plaintiff's sole remaining cause of action is for Defendant's breach of a contractual promise to provide an accounting of the proceeds from the parties' joint venture, the cause of action accrued upon Defendant's failure to do so. Accordingly, the cause of action did not accrue until the

beginning of 2002, well within three years of the filing of Plaintiff's first complaint on 23 August 2004.

The judgment of the trial court is

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).