

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-140

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

JAMES LOWELL BARBOUR,

Plaintiff

v.

Cumberland County
No. 08 CVS 0942

DOUGLAS T. DINKEL, as
EXECUTOR of the ESTATE OF
WILLIAM THURMAN BARBOUR and as
TRUSTEE of the WILLIAM THURMAN
BARBOUR TRUST,

Defendant

Appeal by plaintiff from order and judgment entered 8 October 2008 by Judge Robert F. Floyd, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 1 September 2009.

Ortiz & Schick, PLLC, by Michael R. Ortiz and Heather E. Carpenter, for plaintiff-appellant.

McCoy Weaver Wiggins Cleveland Rose Ray, PLLC, by Jim Wade Goodman, for defendant-appellee.

CALABRIA, Judge.

James Lowell Barbour ("plaintiff") appeals an order and judgment granting summary judgment and dismissing the action in favor of Douglas T. Dinkel ("defendant"), executor of the estate of William Thurman Barbour. Plaintiff's action was barred by the statute of limitations. We affirm.

The forecast of evidence taken in the light most favorable to the plaintiff tended to show that on 1 July 1989, plaintiff's father, William Thurman Barbour ("decedent"), executed two promissory notes ("the notes") to plaintiff in amounts of \$100,000.00 and \$250,000.00, respectively. Each note had a rate of 6 per cent interest per year and the repayment periods indicated both were "due and payable upon demand." At the time decedent gave plaintiff the notes, plaintiff understood that the notes were repayment for the harm that had been caused to plaintiff's business, Barbour Homes, Inc., and for plaintiff's forbearance in filing an action against decedent.

On 23 July 2007, decedent died, survived by his spouse and plaintiff. On 17 October 2007, plaintiff filed a Claim Against Estate ("the claim") for both notes in the total amount of \$733,926.02. In the claim, plaintiff stated that "no payment has been made by [decedent] on either note and that there are no set offs against the same to the knowledge of [plaintiff]." On 6 November 2007, defendant, as executor of decedent's estate, filed a Notice of Rejection of Claim. On 30 January 2008, plaintiff filed a complaint in Cumberland County Superior Court to, *inter alia*, contest the rejection of the claim. Plaintiff attached copies of the notes to the complaint as Exhibit A and also a copy of a check as Exhibit B from decedent to plaintiff.¹ The check was dated 7 August 1997 in the amount of \$50,000.00, and was

¹On 23 September 2008, plaintiff filed a Partial Voluntary Dismissal without Prejudice of his other claims, and they are not pertinent to this appeal.

incorporated by reference in the complaint. In the lower left-hand corner of the check, the word "loan" appeared in the memorandum section. According to the complaint, decedent paid the amount of \$50,000.00 as a partial payment of the debt evidenced by the two notes in Exhibit A.

On 10 September 2008, defendant filed a Motion for Summary Judgment and the supporting affidavit of Charles S. Hester ("Hester"), former president of Lexington Homes, Inc. On 29 September 2008, the trial court held a hearing on defendant's motion based on (1) plaintiff's claim on the notes was barred by the statute of limitations; and (2) plaintiff offered no consideration for the notes. Plaintiff presented an affidavit opposing defendant's motion. On 8 October 2008, the trial court entered an Order and Judgment granting defendant's motion for summary judgment, dismissing plaintiff's action, and ordering plaintiff to pay costs. Plaintiff appeals.

Plaintiff argues that the trial court erred in granting summary judgment in favor of defendant because there were genuine issues of material fact as to whether plaintiff's action was barred by the statute of limitations.

Summary judgment shall be rendered 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) (2007). "All such evidence must be considered in the light most

favorable to the non-moving party." *In re Will of Priddy*, 171 N.C. App. 395, 397, 614 S.E.2d 454, 456 (2005). "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

The promissory notes entered into by decedent are negotiable instruments governed by Article 3 of the Uniform Commercial Code ("UCC"), N.C. Gen. Stat. § 25-3-101 (2007) *et seq.* *First Commerce Bank v. Dockery*, 171 N.C. App. 297, 300, 615 S.E.2d 314, 316 (2005). If a promissory note is payable on demand, the time limitation is determined by whether or not a demand was made.

[I]f demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.

N.C. Gen. Stat. § 25-3-118(b) (2007).

In the instant case, decedent issued the notes payable to plaintiff in amounts of \$100,000.00 and \$250,000.00, respectively, on 1 July 1989. Since each note stated that it was "due and payable upon demand," it must be determined whether or not plaintiff demanded payments on the notes. If plaintiff demanded payment, then plaintiff had six years from the date of the demand to commence an action to enforce decedent's obligations on the notes.

The notes were executed by decedent on 1 July 1989. Plaintiff filed a Notice & Demand to decedent with the Cumberland County

Register of Deeds on 2 December 1999, stating that "[d]emand is hereby made" on the notes. On 17 October 2007, plaintiff filed the claim against decedent's estate for the debts evidenced by the notes. On 30 January 2008, plaintiff filed a complaint against defendant seeking payment of the notes. Since plaintiff filed a demand in 1999, under N.C. Gen. Stat. § 25-3-118(b) (2007), he would have had to commence an action to enforce decedent's obligations on the notes within six years of the demand. Specifically, he would have had to file the complaint on or before 2005. He failed to do so. Plaintiff's demand could only extend the statutory period for six years. Without a demand or evidence of payment, the statutory period expired after ten years. Either way, plaintiff's claim is barred by the statute of limitations unless he presented evidence that the statute was tolled.

Plaintiff contends that statements made by decedent reaffirming the debt toll the statute of limitations. To support his contention, plaintiff cites to our Supreme Court's holding in *Kirby v. Mills*, 78 N.C. 124, 24 Am.Rep. 460 (1878). The Kirby Court found that a new oral promise or acknowledgment of a debt evidenced by a promissory note could allow a party to recover on the note if the promise or acknowledgment was "an express promise to pay a certain debt absolutely or conditionally, or such an admission of facts that such promise may be inferred." *Id.* at 125, 24 Am.Rep. at 461.

However, N.C. Gen. Stat. § 1A-1, Rule 56(e) (2007) states:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth

such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

N.C. Gen. Stat. § 8C-1, Rule 601(c) (2007) ("the Dead Man's Statute") states in relevant part:

Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event...shall not be examined as a witness in his own behalf or interest...against the executor, administrator or survivor of a deceased person...concerning any oral communication between the witness and the deceased person....

"To the extent the challenged affidavit contains averments which would violate Rule 601(c) if admitted as evidence at a later trial, we assume the trial court properly disregarded them." *Forbis*, 361 N.C. at 526, 649 S.E.2d at 387.

In the instant case, plaintiff made the following statements in his affidavit about cash payments from decedent:

10. At the time he gave me these cash payments, [decedent] *told me* that these payments were to be applied towards the debt evidenced by the Notes, specifically, towards the interest on the Notes.

11. [Decedent] *told me* at numerous times prior to his death that I would get paid for the debt secured by the Notes when [decedent] died.

(Emphases added). These statements are clearly offered by plaintiff against decedent's executor. More importantly, the statements concern oral communications between the party-witness and the decedent. Therefore, the statements about cash payments from decedent violate the Dead Man's Statute, are presumed to have been properly disregarded by the trial court, and we need not consider them here.

We hold that plaintiff's claim was barred by the statute of limitations. Plaintiff's remaining assignment of error was not addressed in his brief to this Court and is therefore deemed abandoned. N.C. R. App. P. 28(b)(6) (2009); *Powers v. Tatum*, ___ N.C. App. ___, ___, 676 S.E.2d 89, 96 (2009). We affirm the trial court's grant of summary judgment in favor of defendant.

Affirmed.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).