NO. COA13-248
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

FOOT LOCKER, INC.,
Plaintiff

v. Wake County
No. 11 CVD 13709

JASON BEST,
Defendant

Appeal by plaintiff from order entered 16 October 2012 by Judge Christine M. Walczyk in Wake County District Court. Heard in the Court of Appeals 15 August 2013.

Smith, Debnam, Narron, Drake, Saintsing & Myers, L.L.P., by Bettie Kelley Sousa, for plaintiff-appellant.

Hatch, Little & Bunn, LLP, by Justin R. Apple, for defendant-appellee.

CALABRIA, Judge.

Foot Locker, Inc. ("plaintiff") appeals from the trial court's order granting summary judgment in favor of Jason Best ("defendant"). We reverse and remand.

I. Background

In 2007, defendant was employed by plaintiff as a District Manager in North Carolina. In August of that year, plaintiff

offered defendant a position as a District Manager in Maryland. According to defendant, this offer included a promise by plaintiff to reimburse defendant for his relocation expenses. Defendant accepted the offer and communicated his acceptance to plaintiff. Defendant arrived in Maryland on 6 September 2007 and was officially transferred on 10 September 2007.

After his relocation, defendant requested reimbursement of his relocation expenses. Plaintiff responded that defendant would be eligible for reimbursement after he signed plaintiff's relocation and repayment agreement ("the Agreement"). The terms of the Agreement required defendant to, *inter alia*, reimburse plaintiff for the entirety of his relocation expenses if he did not continue his employment for more than one year. Defendant executed the Agreement on 13 September 2007.

Plaintiff provided defendant with $80,083.67 in relocation expenses. Those expenses included payment of moving expenses, temporary living expenses, assistance with the sale of defendant's home and with locating a new residence for defendant, meals, mileage, courier and wire fees, and other miscellaneous expense payments between the dates of 12 October 2007 and 26 June 2008.

On 20 August 2008, defendant sent an email to his supervisor, Reggie Truitt ("Truitt"), and informed him that defendant was resigning his position "effective September 2, 2008." According to defendant, he met with Truitt on 29 August 2008 to discuss his resignation. At the meeting, Truitt directed defendant to return his corporate laptop computer, cellular telephone, and corporate credit cards. Although Truitt informed defendant on 29 August 2008 that it was his final day of work, defendant remained a paid employee in plaintiff's payroll and employment system until 2 September 2008.

Defendant was issued his final paycheck on 30 September 2008. This check included payment through 2 September 2008. However, the funds were not disbursed to plaintiff but instead were applied as a credit towards defendant's relocation expenses, as permitted by the Agreement.

On 2 September 2011, plaintiff initiated an action against defendant in Wake County District Court seeking recovery of the remaining $77,631.35 in relocation expenses that were owed as a result of defendant's alleged breach of the Agreement. On 25 January 2012, defendant filed an answer affirmatively pleading the statute of limitations as a defense to plaintiff's claim.

The parties each filed a motion for summary judgment with supporting documentation. The motions were heard on 21 September 2012 in Wake County District Court. On 16 October 2012, the trial court entered an order granting summary judgment in favor of defendant based upon the statute of limitations. The court concluded in the order that "the latest date which [d]efendant could plausibly breach the subject contract by electing to voluntarily terminate his employment with [p]laintiff was August 29, 2008," which was more than three years before plaintiff filed its claim. Plaintiff appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* (citation omitted).

III. Statute of Limitations

Plaintiff contends that the trial court erred in granting summary judgment in favor of defendant because there are genuine issues of material fact as to whether plaintiff filed its complaint within the applicable statute of limitations. We agree.

> [I]t is well established that [w]hether a cause of action is barred by the statute of limitations is a mixed question of law and fact. The issue becomes a question of law if the facts are admitted or are not in conflict, at which point summary judgment or other trial judge rulings are appropriate. However, [w]hen the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury.

Lord v. Customized Consulting Specialty, Inc., 182 N.C. App. 635, 643, 643 S.E.2d 28, 33 (2007) (internal quotations and citations omitted). "In North Carolina, the statute of limitations for breach of contract is three years." *Coderre v. Futrell*, ___ N.C. App. ___, ___, 736 S.E.2d 784, 787 (2012). "The claim accrues at the time of notice of the breach." *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002).

A. Accrual Date

Plaintiff first contends that the trial court incorrectly determined the accrual date of its breach of contract claim. In

the instant case, the Agreement, which provided the basis for plaintiff's claim, stated in relevant part:

> If you elect to voluntarily terminate employment with [plaintiff] during the 12-month period immediately following the effective date of: (a) the commencement of your employment or (b) the transfer of your employment, you will be required to repay [plaintiff] in full for any funds paid to you or on your behalf for your relocation. A prorated amount is due if your voluntary termination occurs within your second year . . . .
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> . . .
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> This repayment will be due and payable immediately upon your voluntary termination. By accepting relocation benefits from [plaintiff], you agree to authorize [plaintiff], at its option, to deduct the balance of any relocation benefits which you do not repay from any compensation owed to you including, but not limited to, wages, vacation pay, severance pay, bonuses, commissions or other compensation, in the event you voluntarily terminate your employment within 24 months from the effective date . . . .

It is undisputed that defendant tendered his resignation letter to plaintiff via email on 20 August 2008, that plaintiff received the email on 21 August, and that the email indicated that the resignation would be effective 2 September 2008. The trial court concluded that plaintiff's breach of contract claim first accrued when plaintiff received this resignation email,

since it provided plaintiff with notice that defendant had "elected to voluntarily terminate his employment. . . ." Since defendant sent the email more than three years prior to the filing of plaintiff's complaint, the court additionally concluded that the complaint was time-barred.

Contrary to the trial court's conclusion, plaintiff's claim did not accrue at the time it received plaintiff's resignation. The Agreement, by its terms, allowed defendant to elect to voluntarily terminate his employment. The purpose of the Agreement was to contractually obligate defendant to reimburse plaintiff for his relocation expenses if he chose to resign. Since this repayment obligation was only "due and payable immediately upon [defendant's] voluntary termination," defendant could not breach the Agreement until he failed to reimburse plaintiff for his relocation expenses at the time of his termination. Defendant's resignation email included the date his resignation would take effect but gave no indication that he did not intend to reimburse plaintiff for his relocation expenses. Therefore, plaintiff's breach of contract claim could not have accrued at the time the email was received, since plaintiff had no reason to believe defendant would breach the Agreement at that time. Consequently, the trial court

erroneously concluded that plaintiff's claim had accrued when it received defendant's resignation email.

B. Date of Termination

Plaintiff's breach of contract claim only accrued upon defendant's failure to reimburse it for his relocation expenses when he terminated his employment. Since there is no dispute that defendant never fully reimbursed plaintiff for these expenses, the relevant date for determining the application of the statute of limitations is the date that defendant's employment was actually terminated. While the trial court concluded that 29 August 2008 was defendant's undisputed final day of employment, our review of the record leads us to conclude that the parties presented conflicting evidence as to when defendant's voluntary termination actually occurred.

At the summary judgment hearing, defendant submitted his own affidavit in which he averred that he met with Truitt on 29 August 2008. Defendant also asserted that at that meeting, he was directed to relinquish his corporate laptop, corporate cellular telephone, and corporate credit cards "because it was my final day of employment with Plaintiff." Finally, defendant averred that "Friday, August 29, 2008 was my final day of

employment with Plaintiff and that I did not work for Plaintiff, in any capacity, after August 29, 2008."

In support of its own summary judgment motion, plaintiff provided an affidavit from Michael S. Fasnacht ("Fasnacht"), a retail controller for plaintiff who was familiar with plaintiff's employment records. Fasnacht averred that, according to plaintiff's records, defendant had terminated his employment in writing, effective 2 September 2008. In addition, defendant had been paid wages through that date. Finally, in its response to defendant's request for admissions, plaintiff denied that Truitt met with defendant on 29 August 2008 and informed defendant that it was his last day of employment.

Taking this evidence in the light most favorable to plaintiff, there is a genuine issue of material fact as to when defendant's employment terminated after his voluntary resignation. Plaintiff's evidence tends to show that defendant remained in plaintiff's payroll and employment system until 2 September 2008 and that defendant was never informed that his employment was terminated prior to that date. Plaintiff's complaint was filed within three years of 2 September 2008, and thus, if a jury were to credit plaintiff's evidence of defendant's termination date, the complaint would have been

filed within the applicable statute of limitations. Accordingly, the trial court erred when it granted summary judgment in favor of defendant based upon the statute of limitations because there is a genuine issue of material fact as to when defendant's employment was terminated and when plaintiff's breach of contract claim accrued.

C. Partial Payment

Plaintiff also argues that the initial accrual date of defendant's breach is immaterial because the application of defendant's final paycheck towards his reimbursement expenses on 30 September 2008 constituted a partial payment that created a new date from which the statute of limitations began to run. Plaintiff is correct that a partial payment on a debt can toll the statute of limitations. *See Andrus v. IQMax, Inc.*, 190 N.C. App. 426, 428, 660 S.E.2d 107, 109 (2008). However, this tolling is only applicable when the partial payment is

> made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. Such a payment is given this effect on the theory that it amounts to a voluntary acknowledgment of the existence of the debt.

Pers. Earth Movers, Inc. v. Buckland, 136 N.C. App. 658, 661, 525 S.E.2d 239, 240 (2000)(citation omitted). Plaintiff contends that defendant's execution of the Agreement, in which he agreed "to authorize [plaintiff], at its option, to deduct the balance of any relocation benefits which you do not repay from any compensation owed to [defendant]," constituted defendant's acknowledgement of his debt to plaintiff. Plaintiff is mistaken. The Agreement was executed before defendant's alleged breach. Thus, there could be no "voluntary acknowledgement of the existence of the debt" by defendant when he executed the Agreement, since he owed no debt to plaintiff at that time. Moreover, there is no evidence that defendant offered any additional acknowledgement of the existence of the debt after he terminated his employment. Ultimately, plaintiff's use of defendant's compensation to offset his debt, based upon the preexisting Agreement, simply does not create "such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance." *Id.* Thus, this offset does not affect the determination of the accrual date of plaintiff's breach of contract claim. This argument is overruled.

D. Equitable Estoppel

Plaintiff additionally contends that the trial court should have granted summary judgment in its favor as to defendant's statute of limitations defense because equitable estoppel precluded defendant from asserting that his employment was terminated prior to the effective date defendant provided in his resignation email.

"[A] defendant may properly rely upon a statute of limitations as a defensive shield against 'stale' claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit." *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998). However, there is no evidence in the record before us that plaintiff ever raised the issue of equitable estoppel before the trial court.[1] Consequently, we will not consider it for the first time on appeal. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd.*

[1] The record on appeal does not include a transcript of the summary judgment hearing, and thus we are unable to determine if plaintiff raised this issue orally at that hearing. Nonetheless, "[a]ppellate review is based solely upon the record on appeal; it is the duty of the appellant[] to see that the record is complete." *Joines v. Moffitt*, ___ N.C. App. ___, ___ 739 S.E.2d 177, 182 (2013)(citation omitted). Accordingly, "[t]his Court will not engage in speculation as to what arguments may have been presented . . . ." *Id.* (citation omitted).

of Adjustment, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001)("[I]ssues and theories of a case not raised below will not be considered on appeal."). This argument is overruled.

IV. Breach of Contract

Finally, plaintiff contends that if it is determined that its claim was filed within the applicable statute of limitations, it was entitled to summary judgment on its breach of contract claim. However, plaintiff provides absolutely no legal authority of any kind in support of this argument. Accordingly, we deem this argument abandoned pursuant to N.C.R. App. P. 28(b)(6) (2013) (An appellant's brief "shall contain citations of the authorities upon which the appellant relies."); *see also Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."). This argument is overruled.

V. Conclusion

By the express terms of the Agreement, plaintiff's breach of contract claim did not accrue until defendant failed to repay his relocation benefits at the time his employment was voluntarily terminated. Therefore, the trial court erred by granting summary judgment in favor of defendant because there is

a genuine issue of material fact regarding the actual date of defendant's termination. We reverse the trial court's summary judgment order and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).