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NO. COA13-349
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

DR. NGOMO OKITENBO,
Plaintiff,

v.

Mecklenburg County
No. 12 CVS 15454

CHARLOTTE MECKLENBURG SCHOOLS,
Defendant.

Appeal by plaintiff from order entered 6 December 2012 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 August 2013.

The Law Firm of Ross S. Sohm, PLLC, by Ross S. Sohm, for plaintiff-appellant.

Margaret M. Manos, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff Dr. Ngomo Okitenbo appeals from the trial court's order dismissing his complaint against Charlotte-Mecklenburg Board of Education ("CMS") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We affirm.

On 15 August 2012, plaintiff filed a *pro se* complaint alleging wrongful termination. Plaintiff filed an amended

complaint on 3 December 2012, adding claims for a violation of procedural due process, negligence, a violation of N.C.G.S. § 115C-325(m) (governing teacher employment contracts), tortious interference with employment, and fraud.

In his complaint, plaintiff alleges that in January 2002, he began working at Albemarle Road Middle School as a French language teacher. On or about 1 June 2005, Principal Betty Bauknight contacted plaintiff to discuss an email communication between him and a female student in which plaintiff stated to the student "you know how much I like you." Plaintiff denied any improper romantic relationship with the student. Plaintiff alleges that he was coerced by CMS's Employee Relation Specialist to sign a resignation form.

Plaintiff alleges that CMS's Human Resource Department and Principal Bauknight informed him, upon his inquiry about his employment prospects, that he was deemed ineligible for rehire throughout the school system. He then sent two written requests to Superintendent Dr. Haithcock and Barbara Jenkins in the HR department attempting to rescind his resignation and appeal his eligibility status. Plaintiff was informed by the HR department that he did not have the right to appeal his eligibility to the Board of Education. Plaintiff contends that he continued to request information concerning his employment eligibility with

CMS, apply for positions, and seek an appeal of his employment status with the Board of Education.

CMS moved to dismiss all of plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. A hearing on defendant's motion to dismiss was held on 4 December 2012, and an order of dismissal was filed on 6 December 2012 on the basis that the statutes of limitation had run on all the claims. Therefore, plaintiff failed to state a claim upon which relief could be granted. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred by granting defendant's motion to dismiss. When reviewing a motion to dismiss, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Plaintiff first argues that defendant should be equitably estopped from asserting a statute of limitation defense as to each claim. However, plaintiff failed to preserve the issue of equitable estoppel for appeal. Plaintiff did not plead estoppel in his complaint. Moreover, plaintiff failed to include a

transcript of the motion to dismiss hearing in the record on appeal where he allegedly raised the equitable estoppel issue. The record contains no indication that plaintiff raised the issue of equitable estoppel in opposition to defendant's motion to dismiss. The North Carolina Rules of Appellate Procedure provide that appellate review is based solely upon the record on appeal, the verbatim transcript of the proceedings, if one is designated, and any other items filed pursuant to Rule 9. N.C.R. App. P. 9. It is well settled that the appellant bears the burden of ensuring that the record on appeal is complete and contains all materials necessary for understanding the issues presented on appeal. See *McLeod v. Faust*, 92 N.C. App. 370, 371, 374 S.E.2d 417, 418 (1988). The record in this case contains nothing to demonstrate whether the trial court was presented with this issue, and a party may not raise an issue for the first time on appeal. See *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 364 (2008) (citing N.C.R. App. P. 10 drafting comm. cmt., ¶ 2 reprinted in 287 N.C. 698, 700-01 (1975)).

Even if the issue of equitable estoppel had been properly preserved for appeal, the facts alleged by plaintiff do not support the application of the doctrine. "In order for equitable estoppel to bar application of the statute of

limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant." *Jordan v. Crew*, 125 N.C. App. 712, 720, 482 S.E.2d 735, 739 (citing *Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987)), *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997). Plaintiff has not alleged reliance upon any misrepresentation by defendant that prevented him from filing his action within the applicable statute of limitation. At best, plaintiff alleges reliance upon defendant's representation that plaintiff could not appeal his unemployment status to the Board of Education. However, plaintiff's inability to appeal to the Board of Education did not preclude him from seeking judicial relief in the courts before the statutes of limitation expired. Thus, the doctrine of equitable estoppel does not defeat defendant's motion to dismiss and this argument is overruled.

Plaintiff next argues that his claims are not time barred because of defendant's continuing violation of N.C.G.S. § 115C-325(m)(2) by refusing to rehire plaintiff. Section 115C-325(m)(2) prohibits a school board from refusing to renew a probationary teacher's contract for arbitrary, capricious, discriminatory, or for personal or political reasons. N.C. Gen. Stat. § 115C-325(m)(2) (2011). Like the equitable estoppel

issue, the issue of the continuing violation doctrine has not been preserved for appeal because there is nothing in the record to indicate whether plaintiff presented the issue to the trial court.

Even if plaintiff had properly preserved the issue for appeal, the doctrine does not apply to the present case. The continuing wrong doctrine is an exception to the general rule that a claim accrues when the injury occurs, and provides that the statute of limitation does not start running "until the violative act ceases." *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003). For the continuing wrong doctrine to apply, the plaintiff must show a continuing violation by the defendant that is "'occasioned by continual unlawful acts, not by continual ill effects from an original violation.'" *Id.* (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)).

In *Ward*, the County of San Diego Human Care Services Program refused to promote the plaintiff and the plaintiff resigned. 650 F.2d at 1146. The plaintiff filed a complaint after the relevant statute of limitation had passed, alleging various civil rights violations. *Id.* The plaintiff argued that his complaint alleged a continuing violation, which tolled the statute of limitation. *Id.* The Ninth Circuit disagreed and

held that continuing non-employment resulting from an original action is not a continuing violation. *Id.* at 1147. Similarly, plaintiff's allegations in the present case constitute continuing ill effects of the alleged coercion to resign and do not amount to continuing violations of N.C.G.S. § 115C-325(m)(2).

Accordingly, for the foregoing reasons, we affirm the trial court's order dismissing plaintiff's complaint.

Affirmed.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).