

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-628  
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

H. ESTES RIGSBEE, JR.,  
Plaintiff,

v.

Onslow County  
No. 13 CVS 3660

W. KEITH WALSH, LLC,  
Defendant.

Appeal by plaintiff from order entered 27 January 2014 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 23 October 2014.

*Daughtry, Woodard, Lawrence & Starling, by W. Joel Starling, Jr., for plaintiff-appellant.*

*Mewborn & DeSelms, Attorneys at Law, by Brett J. DeSelms, for defendant-appellee.*

GEER, Judge.

Plaintiff H. Estes Rigsbee, Jr. appeals from an order granting defendant's motion for summary judgment on plaintiff's claim for unjust enrichment alleging that he entered into a land sale contract based on a mistake of fact. On appeal, plaintiff primarily argues that there was a genuine issue of material fact

as to whether his claim was barred by the applicable three-year statute of limitations period, set out in N.C. Gen. Stat. § 1-52(9) (2013). Although plaintiff contends that whether he used reasonable diligence to discover the mistake was a question for the trier of fact, plaintiff contractually waived his right to examine the property and perform due diligence. The statute of limitations, therefore, ran from the date he signed his contract. Since he did not file suit until more than three years later, his claim is barred by the statute of limitations, and we affirm.

#### Facts

In May 2010, plaintiff and defendant entered into an agreement for the purchase and sale of real estate ("the Agreement"). The Agreement, which was a form contract, included a metes and bounds legal description of the property as well as a tax parcel identification number. The legal description indicated that the parcel was 6.3 acres in size. Defendant signed the Agreement on 13 May 2010 and plaintiff signed it on 20 May 2010; both parties initialed the legal description.

The Agreement required plaintiff to pay \$50,000.00 in earnest money and for closing to occur on or before 14 November 2010. The form agreement included a provision authorizing the buyer to conduct all inspections he deemed necessary, including

surveying the property, from the contract date through the end of the "Examination Period." If plaintiff provided notice prior to the expiration of the Examination Period that he chose not to purchase the property, then the Agreement would terminate and plaintiff would receive a return of the earnest money. The Agreement also specified that after the contract date, "Buyer shall, at Buyer's expense, cause a title examination to be made of the Property before the end of the Examination Period." In the event that plaintiff uncovered any problems with defendant's title that defendant was not able to cure, plaintiff would also be entitled to return of his earnest money. However, on the line of the form provided for defining the Examination Period, the parties had entered: "5/13/2010 -- Buyer is familiar with property and declines an examination period."

On or about 18 October 2010, plaintiff discovered that the property described in the Agreement did not include land that abutted a highway and that was necessary in order to build a subdivision on the parcel. Plaintiff refused to close, contending that there was a mistake regarding the identity of the property being conveyed. Subsequently, plaintiff contacted defendant and requested that defendant return the earnest money. Defendant refused to do so.

On 23 September 2013, plaintiff filed suit in Onslow County Superior Court seeking a declaratory judgment of his rights as to the earnest money as well as asserting a claim for unjust enrichment. Plaintiff alleged that he "entered into the Agreement based upon a mistaken belief or assumption" and "[b]ut for said mistake, Plaintiff would not have entered into the Agreement because Plaintiff would not have been able to develop the subdivision without access to [the highway]." On 25 November 2013, defendant filed an answer that asserted that plaintiff's claims were barred by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(9) because it was "a cause of action based upon mistake."

Defendant filed a motion for summary judgment. At the summary judgment hearing on 13 January 2014, plaintiff argued that, as a matter of law, his claims were not barred by N.C. Gen. Stat. § 1-52(9) because there was a material dispute as to whether his discovery of the mistake on 18 October 2010 was made with reasonable diligence. On 27 January 2014, the trial court entered an order granting defendant's motion for summary judgment on the ground that "the statute of limitations [N.C. Gen. Stat. § 1-52(9)] bars Plaintiff's claims." Plaintiff timely appealed to this Court.

Discussion

On appeal from the grant of summary judgment,

[T]he standard of review . . . is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is proper 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. We review orders granting or denying summary judgment using a *de novo* standard of review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the [trial court].

*Hyatt v. Mini Storage on the Green*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 763 S.E.2d 166, 169 (2014) (internal citations and quotation marks omitted).

On appeal, plaintiff first argues that summary judgment was inappropriate under N.C. Gen. Stat. § 1-52(1). N.C. Gen. Stat. § 1-52(1) provides a limitations period of three years for an action "[u]pon a contract, obligation or liability arising out of a contract, express or implied[.]" Plaintiff argues that because the action here is one of unjust enrichment, it is governed by the limitations period under N.C. Gen. Stat. § 1-52(1). See *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 85, 712 S.E.2d 221, 228 (2011) ("A claim for unjust enrichment must be brought within three years of accrual under subsection 1 of section 1-52.").

Plaintiff contends that he is entitled to proceed on his claim of unjust enrichment since defendant was in a fiduciary relationship with him based on the fact defendant held the earnest money in escrow pursuant to the terms of the Agreement. Plaintiff contends that, under N.C. Gen. Stat. § 1-52(1), the limitations period did not begin to run until on or after 18 October 2010, when he made a demand to defendant for, and defendant refused, the return of the earnest money. In support of this contention, plaintiff cites *Efird v. Sikes*, 206 N.C. 560, 562, 174 S.E. 513, 513-14 (1934), for the proposition that "[i]t is well settled that where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and refusal."

However, plaintiff made no argument to the trial court that N.C. Gen. Stat. § 1-52(1) applied. It is well established that plaintiff is not allowed to "'swap horses between courts in order to get a better mount.'" *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). We, therefore, decline to address plaintiff's arguments regarding N.C. Gen. Stat. § 1-52(1).

The issue before the trial court was whether plaintiff's

claim was barred by the statute of limitations set out in N.C. Gen. Stat. § 1-52(9). That provision sets out a limitations period of three years for an action "[f]or relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." *Id.* Under the "discovery rule" in N.C. Gen. Stat. § 1-52(9), the limitations period is tolled "until the aggrieved party discovers or, through the exercise of reasonable diligence, should discover the mistake." *Stratton*, 211 N.C. App. at 82, 712 S.E.2d at 226.

Plaintiff contends that summary judgment was inappropriate under N.C. Gen. Stat. § 1-52(9) because there was a material factual dispute as to whether his discovery of the mistake on 18 October 2010 was within the period of reasonable diligence. "When a discrepancy or mistake in a deed or other document should be discovered in the exercise of reasonable diligence depends upon the circumstances of each case and is ordinarily a question of fact for the jury, particularly when the evidence is inconclusive or conflicting. But where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the mistake or discrepancy but failed to do so the absence of reasonable diligence is established as a matter of law." *Grubb Props., Inc. v. Simms*

*Inv. Co.*, 101 N.C. App. 498, 501, 400 S.E.2d 85, 88 (1991) (internal citation omitted).

A party foregoes any claim based on a mistake of fact if he waived any inquiry or investigation into the allegedly mistaken fact. See *Moreno Mut. Irr. Co. v. Beaumont Irr. Dist.*, 94 Cal. App. 2d 766, 782, 211 P.2d 928, 938 (1949) ("Where a party enters into a contract ignorant of a fact but meaning to waive all inquiry into it, or waives an investigation after attention has been called to it, there is no mistake in the legal sense." (quoting 17 C.J.S. *Contracts* §§ 135, 144)). Because of this, when a party waives the right of investigation into a material fact, he, as a matter of law, fails to discover the mistake with reasonable diligence.

Here, plaintiff had the capacity and opportunity to investigate any mistake or discrepancy in the title regarding the property described in the Agreement. Yet, by entering into the Agreement and waiving his due diligence period -- notably, because the Agreement stated plaintiff was "familiar" with the property -- plaintiff expressly waived the opportunity to investigate. Because plaintiff discovered the mistake after he waived the contractual investigation period for doing so, the mistake was, as a matter of law, not discovered with reasonable diligence. We conclude that plaintiff's action was brought more



than three years after the date his cause of action accrued, and his cause of action was barred by N.C. Gen. Stat. § 1-52(9). We, therefore, affirm the trial court's grant of summary judgment in favor of defendant.

Affirmed.

Judges STROUD and BELL concur.

Report per Rule 30(e).