IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-415

Filed: 15 November 2016

Bladen County, No. 15 CVS 334

SASHA-AL LEE, Plaintiff,

v.

DONALD MAC MOORE, SR., Defendant.

Appeal by plaintiff from order entered 5 November 2015 by Judge Tanya T. Wallace in the Bladen County Superior Court. Heard in the Court of Appeals 3 October 2016.

Christopher W. Livingston for plaintiff-appellant.

Alan I. Maynard for defendant-appellee.

TYSON, Judge.

Plaintiff appeals from the trial court's order, which granted Defendant's motion to dismiss Plaintiff's complaint under Rule 12(b)(6). We affirm.

I. Background

Defendant operates a home improvement and repair company doing business as All Vinyl Siding and Windows ("AVSW"). Plaintiff hired AVSW to perform repairs on his residence in or around August 2010. An employee of AVSW met with Plaintiff to discuss the repairs on 21 August 2010, and the parties entered into a written

agreement. AVSW agreed to install two entry doors and five windows, remove and replace the roof shingles, and install vinyl siding.

The cost of the labor, materials, and tax was $13,540.00. Plaintiff submitted a down payment of $6,520.00 to AVSW. Pursuant to the agreement, Plaintiff was to pay the balance owed to AVSW by monthly installments of $300.00 beginning 21 September 2010, and one final payment of $20.00. Plaintiff executed a promissory note and deed of trust to AVSW to secure payment of sums due under the agreement.

Several employees of AVSW performed work on Plaintiff's house after 21 August 2010. Plaintiff alleged AVSW poorly performed the work. Plaintiff observed water leaks in the ceiling after AVSW had replaced the roof shingles, and photographed them in September 2010. The leaks appeared during heavy rains, and originated at the skylights above the kitchen and family room. Plaintiff alleged AVSW refused to repair the roof leaks, which caused considerable damage, or to refund any of his payment or waive the remaining balance. Plaintiff continued to pay the monthly installments.

Plaintiff filed a claim with USAA Property & Casualty, his homeowners' insurance carrier, pertaining to the roof leaks and resulting interior damage. USAA assigned Gregory A. Robinson, a professional engineer, to evaluate the claim. On 6 October 2010, Mr. Robinson visited Plaintiff's house and inspected the roof. Mr. Robinson opined the roof leaks at the skylights were caused by improper installation

of the flashing. He also noted two building code violations: no building paper was installed underneath the shingles, and the plumbing vent pipe was not an adequate length. Mr. Robinson opined the shingles required removal, and new shingles, paper, and flashing needed to be installed.

Plaintiff alleges Defendant "sent some employees to correct these problems, but Defendant's employees again did not do an adequate job." Plaintiff further alleges the skylights no longer leaked, but "the roof did not look the same way as it did before."

Plaintiff began to notice water spots on the ceiling in two bedrooms in or around August 2014. Plaintiff's homeowners' insurance company paid to replace the entire roof, and Plaintiff paid the $500.00 deductible. Plaintiff's complaint alleges Defendant "still needs to repair the damage that Defendant caused to the windows and roof, . . . such as visibly curling shingles and wavy lines." Another building contractor estimated these repairs would cost at least ten thousand dollars.

Plaintiff filed a complaint against Defendant on 17 June 2015, which stated five claims for relief: (1) breach of contract/unjust enrichment; (2) fraud; (3) unfair and deceptive trade practices; (4) negligence; and (5) violation of North Carolina's Racketeer Influenced and Corrupt Organizations ("RICO") statute. Defendant timely filed an answer, and moved for a dismissal under Rule 12(b)(6). On Defendant's motion to dismiss Plaintiff's claims, the trial court determined all claims, except the

racketeering claim, were barred by the applicable statutes of limitation. The court also ruled Plaintiff had failed to state a claim for racketeering under Chapter 75D. Defendant appeals from the order of dismissal.

II. Issues

Plaintiff argues the trial court erred by: (1) dismissing Plaintiff's complaint for failure to state a claim where the statutes of limitation do not bar any of Plaintiff's claims and Plaintiff had sufficiently pled a claim for racketeering; and, (2) imposing sanctions upon either Plaintiff or Plaintiff's counsel.

III. Dismissal of Plaintiff's Complaint on Statute of Limitations Grounds

Plaintiff argues the trial court erred by determining all of his claims against Defendant, except RICO, were barred by the statutes of limitation and by dismissing those claims pursuant to Rule 12(b)(6). We disagree.

A. Standard of Review

"A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff's claims if the bar is disclosed in the complaint." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citing *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)). "On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* 'whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]'" *Christmas v. Cabarrus*

Cnty., 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009).

> In order to overcome such a motion, a plaintiff is not required to "conclusively establish" any factual issue in the case. Rather, the only question properly before a court reviewing a Rule 12(b)(6) motion is whether "the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true."

Feltman v. City of Wilson, 238 N.C. App. 246, 256, 767 S.E.2d 615, 622 (2014) (quoting *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428, *appeal dismissed and disc. review denied*, 361 N.C. 425, 647 S.E.2d 98 (2007)) (emphasis omitted).

B. Three and Four-Year Statutes of Limitation

The statute of limitations to file actions on contracts, negligence, and fraud is three years. N.C. Gen. Stat. §§ 1-52(1), (9) and (16) (2015). The statute of limitations for claims of unfair and deceptive trade practices is four years. N.C. Gen. Stat. § 75-16.2 (2015). Plaintiff's complaint was filed outside of four years from the time after Defendant performed any work on Plaintiff's house.

"Under the common law, a cause of action accrues at the time the injury occurs, 'even in ever so small a degree.'" *Pembee Mfg. Corp. v. Cape Fear Construction Co.*, 313 N.C. 488, 492, 329 S.E.2d 350, 353 (1985) (quoting *Matthieu v. Gas Co.*, 269 N.C. 212, 215, 152 S.E.2d 336, 339 (1967)). The common law rule is modified by statute:

> Unless otherwise provided by law, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Except as provided in G.S. 130A-26.3, no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-52 (16) (2015); *see also* N.C. Gen. Stat. § 1-50(a)(5)(f) (2015) ("For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant.").

"[A]s soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury." *Pembee*, 313 N.C. at 493, 329 S.E.2d at 354 (citation omitted). Plaintiff had three or four years respectively, to file suit on these claims from the point in time at which the damage from Defendant's work became apparent or reasonably should have become apparent. *Id*.

Plaintiff argues the damage caused by Defendant's defective remediation attempts in October 2010 was not apparent until August 2014, when he observed water spots on the ceiling in two bedrooms, and his complaint was timely filed within

the applicable statutes of limitation. Plaintiff's complaint alleges he observed leaks, which originated at the skylights in the kitchen and living room, by September 2010. Plaintiff's complaint further alleges in October 2010, he learned Defendant had improperly installed the flashing and shingles. Plaintiff claims Defendant "sent some employees to correct these problems," but they "again did not do an adequate job." Plaintiff observed water spots on the ceiling in two bedrooms in August 2014, and his homeowners' insurance carrier paid for a separate company to replace the entire roof, less his $500.00 deductible. He claims damages remain from Defendant's work.

Defendant relies upon our Supreme Court's decision in *Pembee* to assert Plaintiff's claims are barred by the statute of limitations. In *Pembee,* the plaintiff hired the defendant to construct a manufacturing building in 1973. *Id.* at 489, 329 S.E.2d at 351-52. The plaintiff observed leaks in the roof two months after occupying the building, and the defendant returned to make repairs to the roof. *Id*. at 489, 329 S.E.2d at 352.

For a five-month period beginning in late 1976, the plaintiff complained of leaks in many spots in the roof. *Id*. In April 1980, the plaintiff's engineer discovered "'blistering' throughout the entire roof, [which] had resulted from the entrapment of moisture in the several layers of roofing material." *Id*. at 490, 329 S.E.2d at 352. The plaintiff filed a complaint against the defendant in November 1981. The trial court determined the claims were barred by the statute of limitations. *Id*.

The Supreme Court explained the roof leaks were "discovered and recurr[ing] repeatedly" and held the plaintiff, "although perhaps not aware of the extent of [the] damage, knew that its roof was defective . . . ." *Id.* at 493, 328 S.E.2d at 354. The plaintiff was placed "on inquiry as to the nature and extent of the problem," so that the statute of limitations began to run as to all related claims by at least 1977. *Id.* The Supreme Court declined to recognize a distinction between the leaks in the roof and the blistering caused by entrapment of moisture, and determined all the plaintiff's claims were time-barred. *Id.* at 493-94, 329 S.E.2d at 354-55.

Our Court distinguished *Pembee* in *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 714 S.E.2d 438 (2011). In *Williams*, the plaintiffs hired the defendant to construct a beachfront home in 2002. *Id.* at 8, 714 S.E.2d at 443. Shortly after moving into the home in 2003, the plaintiffs noticed water leaking in through the doors on the second level. *Id.* at 9, 714 S.E.2d at 443. The defendant dispatched a subcontractor to perform repairs. The subcontractor assured the plaintiffs the needed repairs had been made, and sprayed the area with water to show no leakage occurred. *Id.* In August 2004, the plaintiffs noticed water damage around the area, where the defendant had recently replaced a broken window. *Id.*

In late 2005, the plaintiffs again discovered water was entering the home through the second floor doors. *Id.* The defendant assured the plaintiffs they would repair the problem. The defendant's subcontractor returned to the house in February

2006, and assured the plaintiffs the problem was fixed. *Id.* at 9, 714 S.E.2d at 443-44. The plaintiffs were "confident" during this time the defendant was making "every effort to fix" the issues related to water leaking in their home. *Id.* at 9, 714 S.E.2d at 444.

In 2007, the plaintiffs observed a water stain on a bedroom ceiling. *Id.* at 10, 714 S.E.2d at 444. The defendant dispatched a subcontractor to make the necessary repairs. *Id.* In March 2008, the plaintiffs observed water leaking into the same window the defendants had replaced in 2004. *Id.* at 10, 714 S.E.2d at 444. They hired a company to perform an inspection of the house, and learned of numerous structural construction defects. *Id.* In October 2008, the plaintiffs sued the defendant and alleged numerous instances of faulty construction. *Id.* at 2, 714 S.E.2d at 439.

This Court determined the plaintiffs were not "put on notice of the alleged defects in the doors and windows of their residence in the same manner and to the same extent as was the plaintiff in *Pembee*." *Id.* at 11, 714 S.E.2d at 444. In *Pembee*, the roof leaks were "recur[ing] repeatedly," whereas in *Williams*, "only a handful of leaks occurred on an intermittent basis over the course of several years," and in almost every instance, the defendant assured the plaintiff the leaks had been corrected. *Id.* at 11, 714 S.E.2d at 445.

The facts of this case appear to be more analogous to *Pembee* than *Williams*. In *Williams*, the plaintiff did not learn of the building's structural defect until after

the statute of limitations period had run. Plaintiff in this case was aware within two months of Defendant's work that it was defective and did not comply with the building code. Also, in *Williams*, the plaintiff was assured the leak problems were corrected each time the subcontractor returned to make repairs. Here, Plaintiff's complaint does not allege Defendant made any assurances upon performing the repairs in October 2010.

Plaintiff's complaint also alleges the roof "did not look the same" after Defendant made the repairs. Although Plaintiff claims the entire roof was replaced by a different company in August 2014, he alleges he "still needs to repair the damage that Defendant caused to the windows and roof, . . . such as visibly curling shingles and wavy lines," which is estimated to cost at least ten thousand dollars. Plaintiff's complaint fails to allege whether these problems became apparent before or after the statute of limitations period ran, or how Defendant's work in 2010 could have caused new shingles to curl. In October 2010, after the engineer rendered an opinion about Defendant's installation of the shingles and flashing, Plaintiff was placed "on inquiry as to the nature and extent of the problem." *Pembee,* 313 N.C. at 493, 328 S.E.2d at 354. Plaintiff does not allege the nature of the repairs Defendant made after the engineer inspected the property, or whether any assurances were made. The trial court's dismissal of these claims is affirmed.

IV. RICO Claim

Plaintiff's complaint alleges Defendant violated the provisions of North Carolina's RICO statute set forth in Chapter 75D. The trial court determined Plaintiff's claim fell within RICO's five-year statute of limitations, but Plaintiff had failed to state a RICO claim under Rule 12(b)(6). We agree.

The legislative purpose is explicitly set forth in the RICO statute, which states:

> It is not the intent of the General Assembly that this Chapter apply to isolated and unrelated incidents of unlawful conduct but only to an interrelated pattern of organized unlawful activity, the purpose or effect of which is to derive pecuniary gain. Further, it is not the intent of the General Assembly that legitimate business organizations doing business in this State, having no connection to, or any relationship or involvement with organized unlawful elements, groups or activities be subject to suit under the provisions of this Chapter.

N.C. Gen. Stat. § 75D-2(c) (2015).

To state a viable claim under the RICO Act, "(1) an innocent person must allege (2) an injury or damage to his business or property (3) by reason of two or more acts of organized unlawful activity or conduct, (4) one of which is something other than mail fraud, wire fraud, or fraud in the sale of securities, (5) that resulted in pecuniary gain to the defendant[s]." *Gilmore v. Gilmore*, 229 N.C. App. 347, 356, 748 S.E.2d 42, 49 (2013) (citation and quotation marks omitted). Plaintiff claims his pecuniary loss was by reason of Defendant's criminal act of obtaining property by false pretenses and either mail fraud or wire fraud.

Plaintiff's complaint wholly fails to allege "connection to, or any relationship or involvement with organized unlawful elements, groups or activities." N.C. Gen. Stat. § 75D-2(c). Allowance of Plaintiff's claim under Rule 12(b)(6) would be contrary to the express legislative purpose of the RICO statute. The trial court properly dismissed Plaintiff's RICO claim.

V. Rule 7(b)(1)

Plaintiff argues the trial court erred by considering Defendant's statute of limitations defense and dismissing the complaint when Defendant failed to affirmatively plead such defense by written motion pursuant to Rule 7(b)(1) of the Rules of Civil Procedure. We disagree.

The rule provides:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2015).

The statute of limitations defense may be asserted by motion or in the responsive pleading, and can be the basis for dismissal under Rule 12(b)(6), if the face of the complaint discloses Plaintiff's claim is so barred. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b); *Carlisle,* 169 N.C. App. at 681, 614 S.E.2d at 547.

In Defendant's Answer, under the heading "First Defense," Defendant states: "Plaintiff's Complaint fails to state a claim for relief and should be dismissed pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure." Under the heading "Tenth Defense," Defendant's Answer states: "The Plaintiff [sic] specifically and affirmatively pleads the statute of limitations as a bar to the Plaintiff's complaint."

Plaintiff argues he was "surprised" at the hearing by Defendant's assertion of the statute of limitations as grounds for dismissal of his complaint. However, Defendant served an answer in which, although with a misnomer, he pled Rule 12(b)(6) and the statute of limitations as defenses to Plaintiff's claims. Plaintiff' has failed to show any prejudice and his argument is overruled.

VI. Attorney's Fees and Sanctions

Plaintiff argues the trial court erred by imposing sanctions. In the notice of appeal, Plaintiff's counsel states "Plaintiff and Counsel, Christopher W. Livingston, also appeal any order imposing attorney fees or other sanctions on either or both persons." The trial court determined the "matter should be re-calendared on November 30th, 2015 to hear the Defendant's claim for attorney's fees." The trial court apparently did not issue any sanctions or attorney's fees. No order on attorney's fees or sanctions appears within the record. In the absence of any ruling in the record, Plaintiff and his counsel have no standing before this Court on any sanctions issue. This argument is dismissed.

VII. Conclusion

Plaintiff failed to show he had inadequate notice of Defendant's asserted statute of limitations defense. All of Plaintiff's claims, other than violation of the RICO Act, were filed outside of the applicable statutes of limitation.

Plaintiff has failed to meet his burden to show the alleged damages did not become apparent, or should not reasonably have become apparent, within the statute of limitations period to allow him to proceed pursuant to the "discovery rule" set forth in N.C. Gen. Stat. § 1-52(16). *Pembee*, 313 N.C. at 493-94, 329 S.E.2d at 354. The trial court correctly dismissed those claims under Rule 12(b)(6).

The facts alleged in Plaintiff's complaint do not state a claim for a violation of North Carolina's RICO Act. The trial court did not err in dismissing this claim under Rule 12(b)(6). No sanctions issue is pending before us. The order of the trial court is affirmed.

AFFIRMED.

Chief Judge MCGEE and Judge DIETZ concur.

Report per Rule 30(e).