IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-446

Filed: 6 December 2016

Nash County, No. 15 CVS 1753

REGINA RADFORD DOSS and AMY RADFORD BARRETT, as the co-administrators of the ESTATE OF TONY MARIE PRIDGEN RADFORD, Plaintiffs

v.

BRENTON D. ADAMS, BRENT ADAMS LAW OFFICES, PC, D/B/A "BRENT ADAMS & ASSOCIATES," Defendants

Appeal by plaintiffs from an order entered 7 March 2016 by Judge Cy A. Grant in Nash County Superior Court. Heard in the Court of Appeals 4 October 2016.

Law Office of David Pishko, P.A., by David Pishko, for plaintiff-appellants.

Poyner Spruill, LLP, by Cynthia L. Van Horne and E. Fitzgerald Parnell, III, for defendant-appellees.

CALABRIA, Judge.

Plaintiffs Regina Radford Doss and Amy Radford Barrett (collectively, "plaintiffs") appeal from an order dismissing their action. Because plaintiffs' action is barred by the three-year statute of limitations and four-year statute of repose, we affirm.

I. Background

Plaintiffs are co-administrators of the estate of their mother, Tony Marie Pridgen Radford ("Mrs. Radford"). According to plaintiffs, Mrs. Radford died of sepsis on 5 March 2004 as a result of negligent treatment that she received while a patient at Nash General Hospital. On 19 December 2005, Ben A. Radford ("Mr. Radford"), Mrs. Radford's husband and then-administrator of her estate, hired Brenton D. Adams ("Adams") of Brent Adams Law Offices (parties collectively, "defendants") to represent the estate in a medical malpractice and wrongful death action against the hospital. Mr. Radford paid defendants $3,000, which was deposited into defendants' trust account to pay for expenses in the case. Adams informed plaintiffs and Mr. Radford that Christy Hubbard ("Hubbard"), a paralegal, would be their primary contact at the law firm.

On 6 March 2006, Adams filed a motion in Nash County Superior Court, seeking a 120-day extension of the statute of limitations for bringing plaintiffs' claims against the hospital. The court granted the motion and extended the statute of limitations to 5 July 2006. However, Adams never filed an action, and the court entered an order closing the case on 19 September 2006. Plaintiffs were not informed that the case was closed or that no action had been filed.

Over the next nine years, Hubbard repeatedly misrepresented the status of the case to plaintiffs, falsely asserting that defendants had conducted preliminary discovery and deposed medical personnel and expert witnesses. Hubbard told

plaintiffs that the case was worth between $500,000-$1,000,000 and that defendants hoped that the hospital would make a reasonable settlement offer. In February 2015, Hubbard told plaintiff Doss that a mediation was scheduled for later that month and that the case would proceed to trial if no settlement was reached. But when Doss followed up in March, she learned that Hubbard no longer worked for the firm. She requested that Adams return her call. On 6 April 2015, Adams informed Doss that no action had ever been initiated against the hospital and refunded the estate's $3,000 from his trust account, plus $2,240 in accumulated interest. On 27 April 2015, Adams sent a copy of the case file to Doss. The only document that the file contained was the motion to extend the statute of limitations that Adams had filed in March 2006.

Plaintiffs initiated an action against defendants in Nash County Superior Court on 15 December 2015, asserting claims for: (1) legal malpractice; and (2) breach of fiduciary duty and constructive fraud. Plaintiffs also requested punitive damages. On 21 January 2016, defendants filed an answer and motion to dismiss, or alternatively, for judgment on the pleadings, on the grounds that plaintiffs' action was barred by the applicable statute of limitations and repose. Following a hearing, on 7 March 2016, the trial court entered an order granting defendants' motions and dismissing plaintiffs' action in its entirety. Plaintiffs appeal.

II. Analysis

A. Standard of Review

A "motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted). "In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Id.* (citation omitted).

B. Defendants' Motion to Dismiss

"A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citations omitted). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)).

Unlike a statute of limitations, which runs upon accrual of the underlying claim, "the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985) (citations omitted). Stated another way, "[a] statute of repose creates an additional

element of the claim itself which must be satisfied in order for the claim to be maintained." *Hargett*, 337 N.C. at 654, 447 S.E.2d at 787 (citation omitted). "If the action is not brought within the specified period, the plaintiff literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress." *Id.* at 655, 447 S.E.2d at 787 (quoting *Boudreau v. Baughman*, 322 N.C. 331, 341, 368 S.E.2d 849, 857 (1988) (internal citation omitted)).

Pursuant to N.C. Gen. Stat. § 1-15(c) (2015), professional malpractice claims are subject to a three-year statute of limitations and a four-year statute of repose. *Goodman v. Holmes & McLaurin*, 192 N.C. App. 467, 473, 665 S.E.2d 526, 531 (2008) (citing *Fender v. Deaton*, 153 N.C. App. 187, 189, 571 S.E.2d 1, 2 (2002)). The statute provides, in pertinent part:

> [A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action[.] . . . [I]n no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]

N.C. Gen. Stat. § 1-15(c). To determine "the last act of the defendant giving rise to the cause of action[,]" *id.*, courts "look to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied." *Carle v. Wyrick, Robbins, Yates &*

Ponton, LLP, 225 N.C. App. 656, 661, 738 S.E.2d 766, 771 (2013); *see also id.* at 665, 738 S.E.2d at 772 (concluding that "the last act giving rise to [the] plaintiffs' claim took place on 10 June 2005 because at that point [the] defendants' role in the transaction was complete and nothing could have been done to remedy the alleged omissions").

In the instant case, plaintiffs assert that defendants' "last act" occurred on 6 April 2015, when Adams "finally admitted the truth" to plaintiffs and returned the estate's $3,000 from his trust account with the accumulated interest. We disagree.

This case is predicated on the loss of plaintiffs' cause of action against the hospital, not on defendants' retention of the estate's funds. In their complaint, plaintiffs allege that the estate lost "valuable claims" against the hospital "[a]s the direct and proximate result" of defendants' negligence, thereby entitling plaintiffs to more than $10,000 in compensatory damages. Plaintiffs argue on appeal that the forfeiture of the wrongful death action "was only one part of the loss" caused by defendants' professional negligence, and the estate also suffered economic harm as a result of defendants' "wrongful retention" of the trust funds. However, the complaint contains no allegation of such damages.

Taking the facts and allegations in the complaint as true, Mr. Radford retained defendants "to represent the [e]state in connection with claims for medical malpractice and wrongful death against Nash Hospital." By Adams's motion, the

statute of limitations on that action was extended until 5 July 2006; after that date, plaintiffs' claims against the hospital were time-barred, and "nothing could have been done to remedy the alleged omissions." *Id.* Adams's failure to timely file that action gave rise to plaintiffs' legal malpractice claim against defendants. Therefore, defendants' "last act" occurred, and the instant action accrued, on 5 July 2006, the last date that Adams could have asserted the estate's claims against the hospital. Accordingly, plaintiffs' legal malpractice action was barred by the statute of limitations on 5 July 2009 and by the statute of repose on 5 July 2010.

Plaintiffs contend that "the doctrine of equitable estoppel should prevent . . . defendants from asserting the statute of repose in order to avoid responsibility for their misconduct." This Court rejected this argument in *Goodman v. Holmes & McLaurin*, a case that involved "particularly egregious" actions by the defendant-attorney. 192 N.C. App. at 475, 665 S.E.2d at 532. We explained:

> This Court has consistently refused to apply equitable doctrines to estop a defendant from asserting a statute of repose defense in the legal malpractice context, and the line of cases addressing this issue specifically state that "[N.C. Gen. Stat.] § 1-15(c) contains a four year statute of repose, and equitable doctrines do not toll statutes of repose." . . . *Hargett v. Holland* established that the statute of repose is an element of the claim itself, whereas the statute of limitations is an affirmative defense to which estoppel may apply. Based upon this distinction, this Court has refused to apply principles of equity to the bar imposed by the statute of repose contained in N.C. Gen. Stat. § 1-15(c).

Id. at 474-75, 665 S.E.2d at 532 (citing *Hargett*, 337 N.C. at 654-55, 447 S.E.2d at 787) (additional internal citations omitted).

Plaintiffs acknowledge *Goodman*, but they "respectfully urge this Court to re-consider and reject" the decision. This we may not do. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.") *Goodman* has not been overturned; therefore, we are bound by its precedent. *Id.*

III. Conclusion

Plaintiffs' legal malpractice action accrued on 5 July 2006, the last date that Adams could have timely asserted the estate's claims against the hospital. Since plaintiffs did not file the action until 15 December 2015, their claims are barred by N.C. Gen. Stat. § 1-15(c)'s three-year statute of limitations and four-year statute of repose. Therefore, we affirm the trial court's dismissal of plaintiffs' action.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).