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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-114

Filed: 31 December 2020

Forsyth County, No. 19 CVS 1823

JOSEPH WESLEY NEWTON, Plaintiff

v.

JERRY L. NEWTON, III, Defendant.

Appeal by plaintiff from order entered 6 September 2019 by Judge Angela B. Puckett in Superior Court, Forsyth County. Heard in the Court of Appeals 6 October 2020.

Nelson Mullins Riley & Scarborough LLP, by Stuart H. Russell, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from the trial court's order dismissing his complaint. Because plaintiff failed to demonstrate any exception to or tolling of the applicable statute of limitations, we affirm.

I. Background

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On 15 May 2019, plaintiff filed an amended complaint alleging that in 2006 and 2007 he had obtained prior monetary judgments (“Prior Judgment(s)”) against defendant, but defendant had not paid either judgment. Plaintiff alleged he was unable to pursue his claim for renewal of the Prior Judgments until after 30 April 2009 due to defendant’s pending appeals on the Prior Judgments. Plaintiff requested “a judgment renewing the First and Second Judgments” with interest and for attorneys’ fees.

On 14 June 2019, defendant filed a motion to dismiss plaintiff’s amended complaint contending that plaintiff’s complaint should be dismissed under North Carolina Rule of Civil Procedure 12(b)(6) because plaintiff had failed “to state a claim upon which relief can be granted.” Defendant alleged that plaintiff’s claim was “an action on judgments entered on December 29, 2006, and May 10, 2007” and thus the claim “is barred by the 10 year statute of limitations contained in N.C.G.S. §1-47(1).” On 6 September 2019, the trial court allowed defendant’s motion to dismiss. Plaintiff appeals.

II. Motion to Dismiss

Plaintiff contends that the trial court erred in allowing defendant’s motion to dismiss.

A. Standard of Review

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil

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Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.

A complaint is properly dismissed pursuant to Rule 12(b)(6) when (1) the complaint, on its face, reveals that no law supports the plaintiff's claim; (2) the complaint, on its face, reveals an absence of facts sufficient to make a good claim; or (3) some fact disclosed in the complaint necessarily defeats the plaintiff's claim.

Blow v. DSM Pharmaceuticals, Inc., 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009) (citation and quotation marks omitted).

B. Statute of Limitations

Plaintiff's complaint seeks to renew the Prior Judgments. We first note that technically, there is no claim for "renewal" of a judgment. In *Raccoon Val. Inv. Co. v. Toler*, 32 N.C. App. 461, 464, 232 S.E.2d 717, 719 (1977), this Court discussed references to renewing a judgment:

The inappropriate references to the renewal of the prior judgment did not render the later judgment void. To so hold would exalt form over substance. Even our Supreme Court has on occasion spoken in terms of an action 'to renew a judgment.' See *Teele v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964); *Grady v. Parker*, 230 N.C. 166, 52 S.E.2d 273 (1949).

Since prior cases have described this claim as one for "renewal" of a prior judgment, we will also use this term for convenience. See *id.*

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Regarding limitations for judgments other than real property, North Carolina General Statute §1-47(1) provides, “Within ten years an action . . . [u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, *from the date of its entry*. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.” N.C. Gen. Stat. §1-47(1) (2019) (emphasis added).

Once the defense of expiration of the statute of limitations is raised by a defendant, and the face of the complaint shows the statute of limitations has run, the plaintiff then has the burden to show why the limitation period has not expired:

A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. Once a defendant raises a statute of limitations defense, *the burden of showing that the action was instituted within the prescribed period rests on the plaintiff*. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired. The statute of limitations defense is inflexible and unyielding, and the defendants are vested with the right to rely on it as a defense. The trial court has no discretion when considering whether a claim is barred by the statute of limitations.

.....
When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. The statute of limitations for commencement of an action upon a judgment or decree of any court of the United States, or of any state or territory thereof, is within ten years *from the date of its entry*. N.C. Gen. Stat. § 1–47(1) (2007); *see also* N.C. Gen. Stat. § 1–46 (2007) (“The periods prescribed for the commencement of actions, other than for

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recovery of real property, are as set forth in this Article.”). Pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, *a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.*

Fisher v. Anderson, 193 N.C. App. 438, 439–40, 667 S.E.2d 292, 293 (2008) (emphasis added) (citations, quotation marks, brackets, and heading omitted).

Plaintiff contends the statute of limitations did not begin to run until the completion of the appellate review of the Prior Judgments on 30 April 2009, instead of the on the date of entry of the Prior Judgments on 29 December 2006 and 17 May 2007. Plaintiff’s arguments for using the later date come from a wide variety of sources and cases. We address plaintiff’s contentions in condensed form as they are not applicable to the issue on appeal:

- Plaintiff spends a large portion of his brief explaining when an action “accrues” or is “final,” but North Carolina General Stat. §1-47(1) is a limitations statute that specifically starts to run “from the date of entry” of a judgment, regardless of when an action accrues or is final for other purposes or other types of limitation statutes. *See* N.C. Gen. Stat. §1-47(1). Plaintiff has cited the inapposite case of *Raftery v. Wm. C. Vick Const. Co.*, 291 N.C. 180, 184, 230 S.E.2d 405, 407 (1976), which addresses a claim in which the accrual of the action is controlling, specifically a wrongful death claim based upon negligence. *Id.* (“Obviously, the plaintiff could not bring an action for the wrongful death

of her intestate until he died. She did so within two years from his death. Consequently, the action is not barred by GS 1—53(4), the statute of limitations relating specifically to actions for wrongful death.”).

- Plaintiff addresses when a trial court loses jurisdiction to an appellate court, but even during the appeal of the Prior Judgments, plaintiff could have executed on the judgment as there was no stay in place. *See Babb v. Graham*, 190 N.C. App. 463, 660 S.E.2d 626 (2008) (affirming no stay in prior related case); *see* N.C. Gen. Stat. § 1-289.
- Plaintiff further contends the prior pending action doctrine prohibited him from acting earlier. But the prior pending action doctrine prohibits plaintiff from *twice* seeking recovery from defendant for the same actions, not from bringing an action upon the Prior Judgments or execution on the Prior Judgments.¹
- Plaintiff attempts to distinguish *Fisher* on *facts* that differ from his own case, but fails to note that the applicable *law*, North Carolina General Statute §1-47, is the same, and *Fisher* stated “[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. The statute of limitations for commencement of

¹ “Pursuant to that doctrine, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action. The doctrine applies where the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded.” *Greene v. Tr. Services of Carolina, LLC*, 244 N.C. App. 583, 591, 781 S.E.2d 664, 670 (2016) (citations, quotation marks, and brackets omitted).

an action upon a judgment or decree of any court of the United States, or of any state or territory thereof, is within ten years *from the date of its entry.*” *Fisher*, 193 N.C. App. at 439–40, 667 S.E.2d at 293 (emphasis added).

- Plaintiff contends this case presents a mixed question of law and fact, but the application of the statute of limitations is a legal question. *See id.* There is no dispute regarding the relevant facts in this case regarding the date of entry of the Prior Judgments.
- Last, plaintiff turns to equitable estoppel, claiming defendant allegedly induced him not to act to enforce the Prior Judgments sooner, but plaintiff had already received his Prior Judgments. Plaintiff has not pled any action by defendant which actively prevented him from seeking to execute upon legally binding Prior Judgments or renewing them sooner.² Again, plaintiff was free to execute upon his Prior Judgments, even during the former appeal, as there was no stay in place, and he was also free to renew the Prior Judgments before the statute of limitations ran. *See* N.C. Gen. Stat. § 1-289.

² “The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. *The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.*” *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628–29 (1990) (emphasis added).

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It is plaintiff's "burden of showing that the action was instituted within the prescribed period[.]" and the prescribed period was "within ten years from the date of [the Prior Judgements] entry." *Fisher*, 193 N.C. App. at 439–40, 667 S.E.2d at 293. Accordingly, plaintiff's 2019 attempt to renew the 2006 and 2007 Prior Judgments came too late as it was beyond the 10-year limitation. *See* N.C. Gen. Stat. § 1-47(1). Plaintiff's arguments are overruled.

III. Conclusion

We affirm the trial court order dismissing plaintiff's complaint.

AFFIRMED.

Chief Judge MCGEE and Judge ARROWOOD concur.

Report per Rule 30(e).