IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-920

No. COA21-767

Filed 29 December 2022

Catawba County, No. 20 CVS 1183

GARY GANTT d/b/a GANTT CONSTRUCTION, Plaintiff,

v.

CITY OF HICKORY, Defendant.

Appeal by Plaintiff from judgment entered 15 July 2021 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 10 August 2022.

*Milberg Coleman Bryson Phillips Grossman, PLLC, by James R. DeMay, Daniel K. Bryson, Scott C. Harris, and John Hunter Bryson, for Plaintiff-Appellant.*

*Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper and Timothy D. Swanson, for Defendant-Appellee.*

CARPENTER, Judge.

¶ 1 Gary Gantt d/b/a Gantt Construction ("Plaintiff") appeals from an order entering summary judgment for the City of Hickory ("City") and dismissing Plaintiff's claims with prejudice. On appeal, Plaintiff argues his claims were not barred by the statute of limitations, and the City's impact fees for water and sewer service were

unlawful, thus entitling him to summary judgment. After careful review, we conclude Plaintiff's claims do not relate back to the filing of his original complaint; therefore, Plaintiff's claims are barred by the statute of limitations, and the trial court did not err in granting summary judgment for the City.

## I. Factual and Procedural Background

¶ 2 On or around 1996, the City began charging capacity fees on new water and sewer connections. Capacity fees, also known as impact fees, are a one-time charge assessed against new development to recover a proportional share of the cost of existing water and sewer facilities. The fees were collected at the time of the customer's application for new water and sewer services, typically ten days before the City commenced water and sewer services. Revenue from the capacity fees was deposited into the City's general water and sewer operating fund for "future expansion or future water and sewer systems."

¶ 3 On 20 July 2017, the North Carolina General Assembly enacted House Bill 436 to address fee inconsistences among public providers, including calculation methodologies and implementation. The law provided specific guidelines that public water and sewer providers were required to follow to charge capacity fees or System Development Fees. House Bill 436 went into effect 1 October 2017, but a grace period was provided through 30 June 2018 to allow public providers to update fees in accordance with the new procedures and conditions.

¶ 4 On 14 November 2016, Plaintiff was required to pay water capacity fees of $504.00 and sewer capacity fees of $544.00 for a property located in Hickory, North Carolina, as a condition of the City furnishing water and sewer service to the property. Plaintiff commenced the 19-CVS-106 action, with Gantt Construction Co. identified as the plaintiff, seeking a refund, on behalf of Plaintiff and a putative class of all natural persons, corporations, and other entities who at any time from 11 January 2016 through 30 June 2018 paid capacity charges to the City pursuant to the schedule of fees and/or Code of Ordinances adopted by the City. The complaint in the 19-CVS-106 action was filed on 11 January 2019, within three years of Plaintiff's payment on 14 November 2016, the date he alleges his injury occurred and his claim arose. On 18 February 2020, Plaintiff voluntarily dismissed the original action without prejudice, and he refiled a complaint on or about 28 April 2020 asserting identical claims.

¶ 5 Gantt Construction Co., a "corporation organized and existing under the laws of the State of Texas with its principal place of business in Texas[,]" was the named plaintiff in the first two complaints, filed 11 January 2019 and on or about 28 April 2020, respectively. Gary Gantt's 18 February 2020 affidavit indicated Gantt Construction Co. maintained a physical office in Hickory, North Carolina. A Texas corporation named Gantt Construction Co. does exist; however, it is not owned, operated, or otherwise affiliated with Gary Gantt. Gary Gantt operates his

construction business as a sole proprietorship—filing tax returns for his business under his individual name—not a corporate entity. Deposition testimony also established that Gary Gantt never filed an assumed business name certificate to transact business in North Carolina as Gantt Construction.

¶ 6 On 11 December 2020, after Gary Gantt's deposition testimony revealed the Texas corporation did not pay the capacity fees in question, Plaintiff filed a motion to amend the complaint to substitute the name of the plaintiff to "Gary Gantt d/b/a Gantt Construction." The trial court granted the motion by order entered on 12 January 2021, and Plaintiff filed an amended complaint on 13 January 2021. Also on 11 December 2020, Plaintiff filed a motion for class certification, which was amended on 29 January 2020, heard on 15 February 2021, and granted in part on 22 February 2021.

¶ 7 Plaintiff filed a motion for summary judgment on 30 April 2021, which the City simultaneously opposed and moved that judgment be entered in its favor as the non-moving party per Rule 56(c). The trial court entered an order granting summary judgment for the City on 15 July 2021. On 19 July 2021, Plaintiff filed timely notice of appeal.

## II. Jurisdiction

¶ 8 This Court has jurisdiction over a final judgment of the trial court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

## III. Issue

¶ 9 The sole issue on appeal is whether the trial court erred in granting summary judgment for the City.

## IV. Analysis

¶ 10 Plaintiff advances a two-step analysis on appeal in support of his argument that his claims relate back to the original action and are not barred by the applicable statute of limitations. First, his refiling of a complaint raising identical claims within one year of the voluntary dismissal of his first complaint entitles him to relation back under Rule 41(a). Second, his amendment of the named Plaintiff in the action from "Gantt Construction Co." to "Gary Gantt d/b/a Gantt Construction" relates back to the original complaint under Rule 17(a). After careful review, we conclude Plaintiff's claims do not relate back under Rule 41(a).

¶ 11 "Our standard of review on appeal of a grant of summary judgment is *de novo*." *Ahmadi v. Triangle Rent A Car, Inc.*, 203 N.C. App. 360, 362, 691 S.E.2d 101, 103 (2010) (citing *Forbis v. Neal,* 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). Entry of summary judgment is appropriate "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." N.C. Gen. Stat. § 1A-1, R. 56(c) (2021). "Summary judgment, when appropriate, may be rendered against the moving party." *Id.*

¶ 12 An order granting summary judgment "based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom." *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001) (citation and internal quotations omitted).

¶ 13 An action "for the recovery of an unlawful fee, charge, or exaction collected by a county, municipality, or other unit of local government for water or sewer service or water and sewer service" has a three-year statute of limitations. N.C. Gen. Stat. § 1-52(15) (2021).

¶ 14 Here, Plaintiff's claims arose on 14 November 2016, meaning his claims must have been brought on or before 14 November 2019 to avoid being time-barred, in the absence of a meritorious tolling argument. *See* N.C. Gen. Stat. § 1-52(15).

A. Relation Back under Rule 41(a)

¶ 15 Plaintiff argues that under Rule 41, his second complaint, filed on or about 28 April 2020 and amended with leave of court on 13 January 2021, relates back to the original complaint filed on 11 January 2019 and voluntarily dismissed on 18 February 2020, for purposes of tolling the three-year statute of limitations. The City recognizes that Rule 41 may be invoked where a subsequent complaint relates back

to an action previously dismissed without prejudice, but argues it may only be utilized if the second action involves the same parties. We agree with the City.

¶ 16 North Carolina Rule of Civil Procedure 41(a) provides, in relevant part,

> (a) Voluntary dismissal; effect thereof.--
> (1) By Plaintiff; by Stipulation. . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, R. 41(a) (2021).

¶ 17 "To benefit from the one year extension of the statute of limitation [in Rule 41], the second action must be substantially the same, involving the same parties, the same cause of action, and the same right . . . ." *Cherokee Ins. Co. By & Through Weed v. R/I, Inc.*, 97 N.C. App. 295, 297, 388 S.E.2d 239, 240 (1990) *disc. review denied,* 326 N.C. 594, 393 S.E.2d 875 (1990) (citations and internal quotations omitted); *see Royster v. McNamara*, 218 N.C. App. 520, 531, 723 S.E.2d 122, 130 (2012) (quoting *Holley v. Hercules, Inc.,* 86 N.C. App. 624, 628, 359 S.E.2d 47, 50 (1987) ("'Rule 41(a)(1) extends the time within which a party may refile suit after taking a voluntary dismissal when the refiled suit involves the same parties, rights and cause of action as in the first action.'")).

¶ 18 In the instant case, two separate and distinct legal entities have filed pleadings as the named Plaintiff: "Gantt Construction Company[,] . . . a corporation organized

and existing under the laws of the State of Texas with its principal place of business in Texas[,]" filed complaints on 11 January 2019 and on or about 28 April 2020; meanwhile, "Gary Gantt d/b/a Gantt Construction" filed the amended complaint with leave of court on 13 January 2021. It is "well established" under the law that to benefit from the one year extension provided by Rule 41 following the first and only voluntary dismissal, the refiled suit must involve the "'same parties[.]'" *Renegar v. R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 84, 549 S.E.2d 227, 232 (2001) (citing *Cherokee Ins. Co.,* 97 N.C. App. at 297, 388 S.E.2d at 240).

¶ 19 "Gary Gantt d/b/a Gantt Construction" is neither a corporation nor incorporated under the laws of Texas. Accordingly, we conclude that Plaintiff cannot avail himself of relation back under Rule 41(a), because the second action does not involve the "same parties" as the first. *See Cherokee Ins. Co.,* 97 N.C. App. at 297, 388 S.E.2d at 240. Since the subsequent complaint was not filed until on or about 28 April 2020, after 14 November 2019—the last date Plaintiff could have timely brought his action—Plaintiff's claims are barred by the statute of limitations. *See* N.C. Gen. Stat. § 1-52(15).

B. Plaintiff's Additional Arguments

¶ 20 We decline to reach Plaintiff's class action tolling argument, raised for the first time in his reply brief. *See Est. of Giddens*, 270 N.C. App. 282, 286, 841 S.E.2d 302, 305 (2020) ("[A]ppellants may not raise new arguments for the first time in their reply

briefs."). Having concluded Plaintiff's claims do not relate back under Rule 41(a) and are consequently barred by the applicable three-year statute of limitations, we do not reach Plaintiff's additional theories of relief.

## V. Conclusion

¶ 21 Gary Gantt did not bring this action within the applicable statute of limitations; therefore, the trial court did not err in concluding no genuine dispute of material fact existed with respect to Plaintiff's claims. Accordingly, we affirm the order of the trial court entering summary judgment for the City and dismissing Plaintiff's claims with prejudice.

AFFIRMED.

Judges MURPHY and JACKSON concur.

Report per Rule 30(e).