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NO. COA11-584
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

THE ESTATE OF NAOMI L. FORMYDUVAL,
by and through her Executrix,
ANNICE F. GRANVILLE; and ANNICE F.
GRANVILLE, an Individual,
Plaintiffs-Appellants,

v.

Brunswick County
No. 09-CVS-2763

MURIEL B. YEDDO, ROY J. YEDDO,
MICHAEL FORMYDUVAL; and CHERYL C.
WILSON, in her capacity as Clerk
of Superior Court,
Defendants-Appellees.

Appeal by Plaintiffs from order entered 16 September 2010
by Judge Thomas H. Lock in Superior Court, Brunswick County.
Heard in the Court of Appeals 25 October 2011.

*EnnisColeman, L.L.P, by Nathaniel T. Coleman, for
Plaintiffs-Appellants.*

*Williamson, Walton, & Scott, LLP, by C. Martin Scott II and
Benton H. Walton, III, for Defendants-Appellees.*

McGEE, Judge.

Annice F. Granville (Ms. Granville) is the daughter of
Naomi L. Formyduval (Ms. Formyduval). Ms. Formyduval died 1
April 2009. Ms. Granville was appointed executrix of Ms.

Formyduval's estate. Ms. Formyduval's estate, by and through Ms. Granville as executrix, and Ms. Granville as an individual (Plaintiffs), filed an amended complaint dated 25 September 2009. Plaintiffs' complaint alleged various causes of action arising from alleged misconduct related to certain deeds executed by Ms. Formyduval in the 1990's.

Ms. Formyduval executed a will on 7 September 1989. Ms. Granville contends that, in this will, Ms. Formyduval left Ms. Granville all of her money, her house and associated real property, and half of Ms. Formyduval's remaining personal and real property. Ms. Formyduval executed deeds on 30 October 1998 and 7 January 1999 (the deeds) which conveyed certain interests in real property to Muriel B. Yeddo, Roy J. Yeddo and Michael Formyduval (Defendants). Plaintiffs alleged in their complaint that Ms. Formyduval was diagnosed with Alzheimer's dementia in May 1996 and was adjudicated incompetent on 12 August 1999. Ms. Granville, her brother, and Muriel Yeddo were appointed co-guardians over the person and estate of Ms. Formyduval on 3 September 1999.

Plaintiffs filed their complaint seeking to recover the interests in real property allegedly obtained by Defendants through the deeds. Plaintiffs alleged that Defendants obtained the property through fraud, duress, and undue influence, or by

taking advantage of Ms. Formyduval's lack of mental capacity. According to their brief, Plaintiffs sought to "impose a constructive trust on [the] four parcels of land [conveyed by the deeds] in favor of . . . Plaintiffs as the beneficiaries[.]" Plaintiffs also sought monetary damages.

The parties filed cross-motions for summary judgment, which were heard on 30 August 2010. In support of their motion for summary judgment, Defendants argued that Plaintiffs' complaint was barred by the statute of limitations. In an order entered 16 September 2010, the trial court entered summary judgment in favor of Defendants and denied Plaintiffs' motion for summary judgment. Plaintiffs appeal.

I. Standard of Review

We review a trial court's order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 573 (2008). Summary judgment "is appropriate only when the record shows 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.'" *Id.* (citation omitted). "In reviewing a motion for summary judgment we must look at the record in the light most favorable to the party opposing the motion." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 507, 317 S.E.2d 41, 42 (1984) (citation omitted).

In so doing, however, we must not forget that once defendants properly pleaded the statute of limitations, the burden of showing that the action was instituted within the prescribed period was placed upon plaintiff. It was, therefore, incumbent upon plaintiff to come forward with a forecast of evidence tending to show the action was started in apt time.

Id. at 507-08, 317 S.E.2d at 42-43 (citation omitted).

II. Discussion

Plaintiffs contend their complaint was timely filed because the statute of limitations in the present case was tolled because of Ms. Formyduval's period of disability. Plaintiffs argue that the "disability statute which might operate to toll the statute of limitations in the case at bar is N.C. Gen. Stat. § 1-17(a) [.]". N.C. Gen. Stat. § 1-17(a) (2011) provides:

A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the real property, when the person must commence his or her action, or make the entry, within three years next after the removal of the disability, and at no time thereafter.

Plaintiffs argue that, for the purposes of N.C.G.S. § 1-17, Ms. Formyduval was under a disability from 12 August 1999, when she was adjudicated incompetent, and that she remained

incompetent until her death on 1 April 2009. Plaintiffs also argue that the "Estate is further able to bring a claim under G.S. 1-22[.]" N.C. Gen. Stat. § 1-22 (2011) provides:

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representative or collector after the expiration of that time, and within one year from his death.

Plaintiffs assert that, because their complaint was filed within one year of Ms. Formyduval's death, the complaint was timely filed.

We first address Plaintiffs' argument that Ms. Formyduval remained incompetent from 12 August 1999 until her death. Ms. Formyduval was declared incompetent by the Brunswick County Clerk of Superior Court on 12 August 1999. A guardian was appointed for Ms. Formyduval on 3 September 1999. In *Fox v. Health Force, Inc.*, 143 N.C. App. 501, 547 S.E.2d 83 (2001), this Court held that the appointment of a guardian starts the running of the applicable statute of limitations when a potential plaintiff would otherwise be entitled to tolling based on a disability under N.C.G.S. § 1-17. We noted:

Because [the incompetent plaintiff] was not yet adjudicated incompetent, although in fact she clearly was, the statute of limitations was tolled. Once her guardian was appointed to represent her interests, the limitation period began to run from the

time of the appointment. Thus, the trial court correctly designated [the date the guardian was appointed] as the first day of the limitation period.

Id. at 507, 547 S.E.2d at 87 (citations omitted). Assuming, *arguendo*, that Ms. Formyduval was under a disability from the time of the execution of the deeds to the time of her death, her guardian was appointed on 3 September 1999. Thus, pursuant to *Fox*, any applicable statutes of limitation began running on 3 September 1999 because that was the date on which her guardian was appointed.

Under N.C. Gen. Stat. § 1-22, when "a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representative or collector after the expiration of that time, and within one year from his death." Thus, those causes of action alleged in Plaintiffs' complaint that expired *prior* to Ms. Formyduval's death would not qualify for exemption under N.C.G.S. § 1-22. Any causes of action for which the statute of limitations would have expired *after* Ms. Formyduval's death would qualify under N.C.G.S. § 1-22.

In their complaint, Plaintiffs alleged the following claims: lack of mental capacity; constructive fraud; undue influence; duress; tortious interference with prospective

advantage; malicious and wrongful interference with the making of a will; civil conspiracy; constructive trust; and injunctive relief. Plaintiffs assert in their brief that: "The Estate of Naomi L. Formyduval is not time barred from any of the causes of action asserted in the complaint." However, the only cause of action Plaintiffs actually mention in their argument, and for which they argue an applicable statute of limitations, is "constructive trust[.]" Because Plaintiffs cite authority in support of, and pursue, only one argument, any potential arguments concerning any of the other causes of action set forth in Plaintiffs' complaint are deemed abandoned. N.C.R. App. P. 28 (b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Plaintiffs contend their constructive trust is "clearly governed by the ten-year limitations period of G.S. 1-56." In determining what statute of limitations applies to Plaintiffs' constructive trust claim, we find informative the reasoning in *Emanuel v. Emanuel*, 78 N.C. App. 799, 338 S.E.2d 620 (1986). In *Emanuel*, this Court determined that N.C. Gen. Stat. § 1-38 provided the appropriate statute of limitations applicable to a complaint alleging a cause of action labeled "constructive trust" but which was based on the validity of deeds. *Id.* at

800, 338 S.E.2d at 621. "The trial court found that plaintiff's complaint alleged a cause of action against defendants for fraud and/or undue influence, and that plaintiff's claim for punitive damages was grounded in that claim." *Id.* In *Emanuel*, this Court noted that the plaintiff "contend[ed] that her complaint set[] forth a cause of action for the imposition of a constructive trust governed by a ten-year statute of limitations. The trial court concluded that plaintiff's action was one based on fraud and/or undue influence." *Id.* We concluded that both the plaintiff and the trial court were incorrect and held "that neither plaintiff nor the trial court have relied upon the appropriate statute of limitations, but that even so the trial court properly granted defendants' motion for summary judgment." *Id.* Our Court held:

Plaintiff's complaint alleges a cause of action to set aside a deed based on her incompetence at the time of the execution of the deed. The deed of one *non compos mentis*, that is of one who is incompetent or insane, is voidable and not void.

Assuming the deed to be voidable, the possession under it, as color of title merely, in the absence of any indication of imperfection or infirmity apparent upon its face, would ripen into a good title after the expiration of seven years, unless within three years after the "coming of sound mind" . . . , the person so entitled commence his suit. . . ."

The cause of action to set aside a deed accrues upon the execution of the deed. A cause of action to set aside a deed executed by a person *non compos mentis* must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later.

In the case at bar plaintiff brought her action seven years and approximately one month after the execution of the deed, and approximately four and one-half years after plaintiff admits the disability was removed. Thus, plaintiff's cause of action is barred by the appropriate statute of limitations as herein set forth.

Id. at 800-01, 338 S.E.2d at 621 (citations omitted). Implicit in this holding is a conclusion that N.C.G.S. § 1-38 is an appropriate statute of limitations for an action that is characterized as a constructive trust, but that seeks to set aside deeds to real property. *See id.*

In the present case, Plaintiffs' claims for constructive trust and for constructive fraud are both directed at the alleged impropriety involved in the execution of the deeds. Plaintiffs filed their complaint more than seven years after the appointment of Ms. Formyduval's guardian, and Ms. Formyduval did not die prior to the expiration of the statute of limitations. N.C.G.S. § 1-22 does not apply to Plaintiffs' complaint. Plaintiffs' claim for constructive trust was not timely filed

and the trial court properly granted Defendants' summary judgment motion with respect thereto.

Affirmed.

Judges HUNTER, Robert C. and CALABRIA concur.

Report per Rule 30(e).