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NO. COA11-1088
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

EDWIN L. EUBANK,
Plaintiff

v.

Forsyth County
No. 10 CVS 3244

ANTOINETTE VAN-RIEL and LAW OFFICES OF
ANTOINETTE VAN-RIEL, P.A.,
Defendants

Appeal by plaintiff from order entered 28 April 2011 by
Judge Lindsay R. Davis, Jr., in Forsyth County Superior Court.
Heard in the Court of Appeals 22 February 2012.

Edwin L. Eubank, pro se, for Plaintiff-appellant.

*Craig Brawley Liipfert & Walker, LLP, by William W.
Walker, for Defendant-appellees.*

ERVIN, Judge.

Plaintiff Edwin L. Eubank appeals from an order denying his motion seeking the disqualification of the trial court; granting Plaintiff's motion to amend his complaint; granting Defendants' motion to dismiss; dismissing Plaintiff's complaint with prejudice; ruling that the voluntary dismissal taken by Plaintiff on 31 March 2011 constituted a dismissal with

prejudice; and denying Plaintiff's motion for relief from that earlier dismissal. On appeal, Plaintiff argues that the trial court erred by dismissing his claims for conversion, civil conspiracy to engage in conversion, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, deprivation of his right to due process pursuant to 42 U.S.C. § 1983, and racketeering in violation of 18 U.S.C. § 1962 on the grounds that he properly pled these claims in his complaint; that these claims are not barred by the applicable statutes of limitation; that his voluntary dismissal constituted a dismissal without, rather than with, prejudice; and that he should have been awarded relief from his voluntary dismissal. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that Plaintiff's claims for conversion, civil conspiracy to engage in conversion, breach of fiduciary duty, aiding and abetting breaches of fiduciary duty, and deprivation of his right to due process were barred by the applicable statute of limitations; that Plaintiff's complaint does not state a claim for racketeering; that Plaintiff's voluntary dismissal was not filed in good faith; and that the trial court did not err by dismissing his claims with prejudice.

I. Factual Background

"[Plaintiff] was admitted to the practice of law in the State of New York by the Second Judicial Department on March 19, 1969." *In re Eubank*, 293 A.D.2d 41, 740 N.Y.S.2d 869 (2002). In 1998, a New York attorney named Edward Klein obtained a judgment against Plaintiff "in the total amount of \$101,550." *Klein v. Eubank*, 263 A.D.2d 357, 693 N.Y.S.2d 541, 542 (N.Y. App. Div. 1st Dep't 1999). In 2002, "the [New York] Departmental Disciplinary Committee served [Plaintiff] with charges alleging that he violated Code of Professional Responsibility DR 1-102 (a) (5) (two counts) and DR 7-106 (a) . . . when he failed to give an accounting and pay a judgment awarded in the Supreme Court, New York County, and because he was held in criminal contempt in the same matter." *Eubank*, 293 A.D.2d at 42, 740 N.Y.S.2d at 870. In response, Plaintiff claimed that he "suffer[ed] from a disability by reason of mental infirmity or illness which ma[de] it impossible for him to defend himself and/or to assist his attorney in doing so." *Id.* With Plaintiff's consent, the New York Supreme Court entered an order indefinitely suspending Plaintiff from the practice of law. *Eubank*, 293 A.D.2d at 43, 740 N.Y.S.2d at 870. Subsequently, Plaintiff moved to North Carolina, from which state he has been providing "paraprofessional and technical litigation support services to attorneys."

Defendant Antoinette Van-Riel is licensed to practice law in both North Carolina and New York. In 2003, several New York residents hired Ms. Van-Riel to prosecute claims against New York businesses for unpaid wages and benefits. Plaintiff and Ms. Van-Riel entered into a written agreement in March 2004 under which Plaintiff was to provide paralegal services to Ms. Van-Riel and her law firm in the New York case and be paid "upon a time and hourly rate basis." Plaintiff provided services to Defendants pursuant to this agreement from late 2003 until at least June 2005.

The New York case settled on 6 January 2006. Plaintiff had told Ms. Van Riel about the judgment that Mr. Klein had obtained against him during their initial discussions regarding Plaintiff's work for Defendants. After the settlement was reached, Ms. Van Riel contacted Mr. Klein, offered to pay him what she owed Plaintiff, and cooperated with Mr. Klein's efforts to execute against certain funds that Ms. Van Riel owed Plaintiff.

On 18 July 2006, Plaintiff filed a complaint against Defendants in Forsyth County File No. 06 CVS 5142 in which he asserted five claims stemming from an alleged breach of the agreement between Plaintiff and Defendants. In November 2006, Ms. Van-Riel contacted Mr. Klein and offered to pay him whatever

money she owed to Plaintiff. Subsequently, Mr. Klein began execution proceedings against Plaintiff in New York and North Carolina. On 26 December 2006, Defendants informed Plaintiff that they had paid \$30,019.65 to Mr. Klein, an action to which Plaintiff "immediately objected." On 9 June 2008, Plaintiff dismissed his complaint in File No. 06 CVS 5142 without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1).

On 26 April 2010, Plaintiff filed a complaint asserting the same five contract-based claims that had been alleged in his complaint in File No. 06 CVS 5142 and adding nineteen additional claims based on allegations that Defendants had participated in a "scheme" between Defendants and Mr. Klein. On 10 August 2010 and 4 November 2010, Defendants filed answers denying the material allegations of Plaintiff's complaint, asserting various affirmative defenses, and moving to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted pursuant to N.C. R. Civ. P. 12(b)(6). Defendants restated their dismissal motions on 8 March 2011. Plaintiff served a motion to amend his complaint on 18 March 2011.

Defendants' dismissal motion and Plaintiff's amendment motion came on for hearing before the trial court during the 21 March 2011 civil session of Forsyth County Superior Court. On 30 March 2011, the trial court informed both parties that it had

granted Defendants' dismissal motion and directed Defendants' counsel to present a proposed order embodying this ruling. On 31 March 2011, before Defendants' counsel had submitted a proposed dismissal order to the trial court, Plaintiff filed a "Notice Of Voluntary Dismissal Pursuant To N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)." On 1 April 2011, Defendants filed a motion seeking a determination of the effect of Plaintiff's filing. On 18 April 2011, Plaintiff served a motion in which he requested the trial court to disqualify himself from further participation in this case and sought leave to withdraw the notice of dismissal.

The various motions filed by the parties were heard by the trial court during the 25 April 2011 term of Forsyth County Superior Court. On 28 April 2011, the trial court entered an order (1) denying Plaintiff's disqualification motion; (2) granting Plaintiff's amendment motion; (3) granting Defendants' dismissal motion and dismissing Plaintiff's amended complaint with prejudice; (4) determining that Plaintiff had dismissed his action with prejudice; and (5) denying Plaintiff's request for relief from his voluntary dismissal. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

"The standard of review of an order granting a [motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] 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. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper 'when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.'" *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (citing *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002), and *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001), and quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)), *disc. review denied*, 361 N.C. 425, 647 S.E.2d 98 (2007), *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007). On appeal from an order granting a motion to dismiss for failure to state a claim, this Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's

ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation omitted).

B. Scope of Issues to be Determined on Appeal

Although the trial court dismissed Plaintiff's complaint, which asserted twenty-four claims against Defendants, in its entirety, Plaintiff only challenges the dismissal of the following claims:

VI (Tortious Conversion);
VII (Conspiracy to Convert or Cause Conversion);
XI (Breaches of Fiduciary Obligations);
X (Aiding and Abetting Breach of Fiduciary Obligations);
XI (Breach of Fiduciary Duty and Loyalty, etc.)
XVI (42 U.S.C. § 1983 - Conspiracy, Deprivation of Due Process);
XVII (42 U.S.C. § 1988 -- Attorneys' Fees);
XIX (Racketeering 18 U.S.C. § 1962(c); and
XX (Racketeering Conspiracy 18 U.S.C. § 1962(d)).

As a result, our review of the trial court's order will be limited to an analysis of the validity of its decision to dismiss those claims.

C. Statute of Limitations

"A statute of limitation or repose may be the basis of a [dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] if on its face the complaint reveals the claim is barred by the statute." *Cage v. Colonial Building. Co.*, 337 N.C. 682, 683-84,

448 S.E.2d 115, 116 (1994) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985)) (other 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. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *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), and *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)).

N.C. Gen. Stat. § 1-52 provides, in pertinent part, that a three-year statute of limitations is applicable to claims based "(1) [u]pon a contract, obligation or liability arising out of a contract[,]. . . (4) [f]or taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery[, or (5)] . . . for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." In addition, "[a]llegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) [(2011)]." *Toomer v. Branch Banking & Tr. Co.*, 171 N.C.

App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005)). "This Court has [also] applied the three-year limitations period of N.C. Gen. Stat. § 1-52(5) to a civil conspiracy claim." *Carlisle v. Keith*, 169 N.C. App. 674, 685, 614 S.E.2d 542, 549 (2005) (citing *Norlin Indus., Inc. v. Music Arts, Inc.*, 67 N.C. App. 300, 306, 313 S.E.2d 166, 170, *cert. denied*, 311 N.C. 403, 319 S.E.2d 273 (1984)). For that reason, Plaintiff's conversion and breach of fiduciary duty claims are also subject to a three-year statute of limitations. Finally, "the United States Supreme Court has . . . ruled that claims under 42 U.S.C. § 1983 will be governed by the statute of limitations applicable to general negligence claims in the state where the claim arose." *Fowler v. Valencourt*, 334 N.C. 345, 351, 435 S.E.2d 530, 534 (1993) (citing *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989)). Thus, we conclude that Plaintiff's claims alleging conversion, civil conspiracy to engage in conversion, breach of fiduciary duty, "aiding and abetting" breach of fiduciary duty, and deprivation of his right to due process pursuant to 42 U.S.C. § 1983 are all subject to a three-year statute of limitations.

According to N.C. Gen. Stat. § 1-15(a), "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued[.]" "In

general, a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises[.]'" *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 465, 655 S.E.2d 850, 857 (quoting *Motor Lines, v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962) (internal citation omitted), *disc. review denied*, 362 N.C. 481, 665 S.E.2d 738 (2008)).

In his complaint, Plaintiff alleged, among other things,¹ that:

111. . . . Van-Riel first approached Klein in or about November 2006, and offered to pay to Klein whatever money she owed to Eubank.

. . . .

113. . . . [On] November 30, 2006 Klein issued an "execution," . . . pursuant to New York Civil Practice Law and Rules (hereinafter "CPLR") §§5225 and 5230 - a legal process which attorneys in New York may issue . . . which the attorney then delivers to a Sheriff or a New York City Marshal, who can then "levy" on property or money of the judgment debtor, held by the garnishee[.]

¹Plaintiff's complaint is more than 80 pages long, contains almost 400 separate factual allegations, and attempts to assert approximately two dozen claims. In view of the length and complexity of Plaintiff's complaint, we quote only those allegations that are necessary to determine whether Plaintiff's complaint was filed within the period specified by the applicable statute of limitations.

114. . . . Klein named Van-Riel as the person indebted to Eubank, . . . stating that she was indebted to Eubank, and directing any Marshal to levy upon those debts.

115. . . . Klein faxed that first execution to . . . [Van-Riel] on or about November 30, 2006[.] . . .

. . . .

117. . . . Van-Riel thereafter requested that the execution be changed to name Van-Riel P.A. instead of Van-Riel[.]

. . . .

120. . . . Van-Riel P.A. received . . . a substantial portion of the settlement sometime in . . . December, 2006[.]

121. . . . Van-Riel P.A. . . . deposited the money in special attorney's trust accounts for Van-Riel P.A. . . ., designating \$30,019.65 as money owed to Eubank.

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123. . . . Van-Riel then informed Klein that Van-Riel P.A. had the money and . . . made arrangements with Klein to . . . accept service of the execution and levy[.]

124. . . . [O]n December 7, 2006, . . . Klein issued a new execution . . . naming Van-Riel P.A. as the garnishee, which on December 8, 2006 Klein delivered to a New York City Marshal[.]

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126. . . . [Van-Riel] accepted service of the execution and levy from Marshal Barsch [on] . . . December 11, 2006[.]

127. . . . [O]n December 15, 2006, [Van Riel] transmitted by FedEx overnight a check, drawn on the attorney's trust account of The Law Offices of Antoinette L. Van-Riel, P.A., in the amount of \$30,019.65, payable to the Marshal Barsch, with a covering letter stating that the \$30,019.65 was the full amount she had determined defendants owed to Eubank.

128. On December 18, 2006, Klein also filed a judgment in this Court as a foreign judgment based upon the New York judgment, Case No. 06 CVS 8935, service of which was made on Eubank by the Forsyth County Sheriff on December 27, 2006.

129. Eubank was unaware of these activities until December 26, 2006, when Eubank received a letter from counsel for Van-Riel informing him that the money had been so paid[.]

130. Eubank immediately objected, including on the grounds that Klein proceeded under the wrong provision of the CPLR, and on the grounds that he had not served a notice required under either provision[.]

131. Thereupon, Van-Riel and Klein set about to . . . correct[] this defect[.]

132. . . . [D]efendants and Klein agreed that Klein would return the \$30,019.65 to Van-Riel P.A.[.]

133. . . . Van-Riel and Klein agreed that . . . [Van-Riel would] accept a new levy and execution, on behalf of Van-Riel P.A., following which Van-Riel would cause Van-Riel P.A. to re-pay the \$30,019.65 to the Marshal.

134. . . . Klein returned approximately \$28,575 of the \$30,019.65 to Van-Riel P.A. on February 23, 2007, by check . . . and on the same date Marshal Barsch delivered a check to Van-Riel P.A., by Express Mail, in the approximate amount of \$1,425[.]

135. . . . Klein transferred the money back to Van-Riel P.A., subject to the express condition and agreement by Van-Riel that she would cause Van-Riel P.A. to return the money to the Marshal, in due course, wherein Klein stated:

"We are returning these monies, pursuant to our understanding that you will cooperate with another execution. Thank you very much. Regards."

. . . .

140. On March 6, 2007 . . . [Klein] extend[ed] the 90-day life of [the] December 7 execution, by a document captioned "Re-Issued Execution", again naming Van-Riel P.A., with its North Carolina address, as garnishee.

141. Klein delivered the "Re-issued" Execution to Marshal Barsch on March 7, 2007, pursuant to which Marshal Barsch, on March 8, 2007, then issued a "Re-Issued" Levy.

. . . .

143. . . . [O]n March 8, 2007, . . . Van-Riel accepted service of this "Re-Issued" Execution and the "Re-Issued" Levy, from Marshal Barsch[.]

. . . .

146. Upon learning . . . of the acceptance by Van-Riel of the service of the re-issued levy and execution, and the apparent intention of Van-Riel to cause Van-Riel P.A. to pay the \$30,019.65 (+/-) back to Klein, Eubank objected to Van-Riel, and demanded that the money not be paid to Klein.

147. . . . [D]efendants and Klein . . . agreed that he would commence a proceeding in New York, . . . [to] obtain an order directing Van-Riel P.A. to pay the money to Klein.

148. . . . [On] March 21, 2007 Klein then commenced in New York . . . a special proceeding . . . captioned "Edward E. Klein, Petitioner vs. The Law Offices of Antoinette L. Van-Riel, P.A., Respondent."

149. Klein and Van-Riel P.A. sought an order or judgment therein directing Van-Riel P.A. to pay to Klein all money then owed, or thereafter owed, by Van-Riel P.A. to Eubank, including \$30,019.65.

. . . .

151. . . . [O]n April 18, 2007 . . . Klein transmitted by email to Van-Riel . . . [an] affidavit to be . . . returned to Klein, for the purposes of accepting service of Klein's papers in the proceeding and admitting Klein's allegations in his Petition.

152. On April 19, Van-Riel transmitted the affidavit back to Klein, duly sworn to[.]

. . . .

157. . . . [On] April 23, 2007 . . . Justice DeGrasse entered an order directing

that Van Riel P.A. pay the money which Van-Riel P.A. then owed to Eubank, to Klein.

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159. . . . Klein faxed and mailed a copy of [the] April 23, 2007 Order to Van-Riel on April 26, 2007.

160. . . . Van Riel immediately upon being informed by Klein of the order, sent the \$30,087.98 back to Klein, by bank wire transfer, from the special Eubank escrow account of Van-Riel P.A.[.]

As a result, in light of these allegations, it is clear that Plaintiff has explicitly alleged in his complaint that:

1. On 30 November 2006, Mr. Klein issued an execution in which he "named Van-Riel as the person indebted to Eubank" and "direct[ed] any Marshal to levy upon those debts."
2. Defendants received settlement funds in December, 2006 when Defendants deposited the money in an account "designating \$30,019.65 as money owed to Eubank."
3. On 7 December 2006, Mr. Klein issued an execution naming Van-Riel P.A. as the garnishee, and Ms. Van-Riel accepted service of the execution and levy on 11 December 2006.
4. On 15 December 2006, Ms. Van Riel sent a check, drawn on the trust account of The Law Offices of Antoinette L. Van-Riel, P.A., in the amount of \$30,019.65, payable to the Marshal with a letter stating that the \$30,019.65 was the full amount she owed Plaintiff.
5. On 26 December 2006, Plaintiff "received a letter from counsel for Van-Riel

informing him that the money had been so paid[.]”

In light of these allegations, we conclude that Plaintiff’s claims accrued on 26 December 2006, when he was specifically informed that Defendants had paid to Mr. Klein monies to which Plaintiff claims to be entitled. Accordingly, Plaintiff’s complaint, which was not filed until 26 April 2010, was barred by the three year statute of limitations.

In urging us to reach a contrary conclusion, Plaintiff argues that his claims against Defendants arise from a “continuing wrong,” so that they did not accrue until 26 April 2007.² As we understand Plaintiff’s brief, this argument rests on his allegations that, after Mr. Klein had executed against the funds that Defendants owed Plaintiff and after Defendants had responded to the levy by sending the money owed to Plaintiff to Mr. Klein, Mr. Klein and Ms. Van-Riel decided that, in order to ensure compliance with the applicable requirements of New

²The parties have both briefed this case as if the operative date against which to measure the running of the statute of limitations for purposes of the claims that Plaintiff seeks to revive on appeal is the date of the filing of the second complaint. We need not, for that reason, consider whether the filing and dismissal of the initial complaint, in which none of the claims upon which Plaintiff relies on appeal were or could initially have been asserted, has any effect upon the proper analysis of the statute of limitations issue before the Court. *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d. 360, 361 (2005) (stating that “[i]t is not the role of the appellate courts . . . to create an appeal for the appellant”).

York law, Mr. Klein would temporarily return the money to Defendants, who would, in turn, transfer the money back to Mr. Klein pursuant to court order. According to Plaintiff, this revised transaction rendered Defendants' activities a "continuing wrong," so that the claims that Plaintiff seeks to assert against Defendants did not accrue until 26 April 2007, when Defendants sent the money back to Mr. Klein in accordance with the arrangement outlined above. We do not find Plaintiff's argument persuasive.

The "continuing wrong doctrine" is "an exception to the general rule that a claim accrues when the right to maintain a suit arises." . . . "A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." In determining whether a plaintiff suffers from a continuing violation, we consider "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged."

Amward Homes, Inc. v. Town of Cary, 206 N.C. App. 38, 56-57, 698 S.E.2d 404, 418 (2010) (quoting *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008), *disc. review denied*, 363 N.C. 257, 676 S.E.2d 900 (2009), and *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003) (internal citations omitted)), *aff'd by an equally divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011). The appellate courts in this jurisdiction have applied the "continuing wrong"

doctrine to situations such as (1) multiple separate lawsuits filed against a party on the basis of an unlawful local ordinance, *Blue Cross*, 357 N.C. at 178-81, 581 S.E.2d at 423-24 (2003); (2) a party's refusal to make a series of salary payments as they become due, *Marzec v. Nye*, 203 N.C. App. 88, 93-97, 690 S.E.2d 537, 542-44 (2010); and (3) a trustee's refusal to make a number of separate distributions. *Babb*, 190 N.C. App. at 481, 660 S.E.2d at 637-38. As a result, the "continuing wrong" doctrine applies to multiple separate obligations stemming from the same essential contractual or legal obligation.

The claims that Plaintiff has attempted to assert in this case, however, rest on a single alleged wrong: the fact that, instead of paying Plaintiff for his services, Defendants contacted Mr. Klein and transferred the funds that Defendants owed to Plaintiff for the purpose of satisfying a preexisting judgment. At its essence, Plaintiff's complaint alleges that Defendants contacted Mr. Klein in November 2006; that Mr. Klein issued an execution against the money that Defendants allegedly owed Plaintiff on 30 November 2006; that Defendants accepted service of the levy on 11 December 2006; that Defendants transferred \$30,019.65 to the Marshal for delivery to Mr. Klein on 15 December 2006; and that Defendants informed Plaintiff that

they had taken these actions no later than 26 December 2006. Although Mr. Klein apparently determined that strict compliance with the procedures required by New York law would be most appropriately achieved by temporarily transferring the money back to Defendants "subject to the express condition and agreement by Van-Riel that she would cause Van-Riel P.A. to return the money to the Marshal, in due course," this arrangement was, as the allegations of Plaintiff's complaint make clear, nothing more than a "shell game" intended to ensure compliance with applicable legal requirements. Although Plaintiff contends that "the payment of the \$30,019.65 by Defendants to Klein on April 26, 2007, was a distinct and separate act," the extent to which Defendants engaged in "distinct and separate" acts does not determine the applicability of the "continuing wrong" doctrine, and Plaintiff has not cited any decisions of this Court, the Supreme Court, or any other court that support this proposition. As a result, we have no difficulty concluding that the temporary transfer of money from Mr. Klein to Defendants and back was part of the single wrong allegedly committed by Defendants, did not constitute a separate tortious act, and did not have the effect of tolling the applicable statute of limitations, so that the trial court did not err by dismissing as time-barred Plaintiff's

claims for conversion, civil conspiracy to engage in conversion, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and deprivation of due process pursuant to 42 U.S.C. § 1983.

D. Racketeering Claim

In addition to the claims that we have discussed above, Plaintiff asserted a claim against Defendants pursuant to 18 U.S.C. § 1961 *et seq.* (the Racketeer Influenced Corrupt Organization Act, or "RICO"). Although RICO lacks a statute of limitations, the United States Supreme Court has held that RICO actions are subject to a four year statute of limitations, stating that:

we conclude that there is a need for a uniform statute of limitations for civil RICO, . . . and that the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the 4-year statute of limitations . . . the most appropriate limitations period for RICO actions.

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121, 133-34 (1987). As a result, Plaintiff's RICO claim was not time-barred by the statute of limitations given that he filed his complaint on 26 April 2007, a date less than four years after the point in time at which his claim accrued. Even so, we conclude that the trial court did not err by dismissing Plaintiff's RICO claim

given that the RICO-related portions of his complaint fail to state a claim.

"Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922[-923], for the purpose of 'seeking the eradication of organized crime in the United States.'" *Beck v. Prupis*, 529 U.S. 494, 496, 120 S. Ct. 1608, 1611, 146 L. Ed. 2d 561, 565 (2000). "RICO attempts to accomplish these goals by providing severe criminal penalties for violations of [18 U.S.C.] § 1962 . . . and also by means of a civil cause of action for any person 'injured in his business or property by reason of a violation of section 1962.'" *Beck*, 529 U.S. at 496-97, 120 S. Ct. at 1611, 146 L. Ed. 2d at 566. 18 U.S.C. § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]" "[18 U.S.C. §] 1961(1) contains an exhaustive list of acts of 'racketeering,' commonly referred to as 'predicate acts,'" "includ[ing] extortion, mail fraud, and wire fraud[.]" *Beck*, 529 U.S. at 497 n.2, 120 S. Ct. at 1612 n.2, 146 L. Ed. 2d at 566 n.2. However, "RICO 'does not cover all instances of wrongdoing' and is, instead, 'a unique cause of action that is concerned with eradicating organized,

long-term, habitual criminal activity.'" *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 353 (8th Cir. 2011) (quoting *Gamboa v. Velez*, 457 F.3d 703, 705 (7th Cir. 2006)). According to 18 U.S.C. § 1964(c), "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Although the relevant statutory language explicitly refers to the federal district courts, "state courts have concurrent jurisdiction over civil RICO claims." *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S. Ct. 792, 794, 107 L. Ed. 2d 887, 894, *rehearing denied*, 495 U.S. 915, 110 S. Ct. 1942, 109 L.Ed.2d 305 (1990).

The RICO claim that Plaintiff attempted to assert in his complaint is predicated on Defendants' alleged "scheme to defraud" him using the United States mail, interstate travel, and "extortion under" N.C. Gen. Stat. § 14-118.4. Although Plaintiff contends that, "as far as the [racketeering] conduct is concerned, the entire complaint is devoted to such conduct," we do not believe that his pleading describes conduct that rises to the level of racketeering.

In his complaint, Plaintiff alleges that Ms. Van Riel had a "a plan to obtain [his] services, promising and agreeing to pay for them, but never intending to do as agreed," and that, in furtherance of this scheme, Ms. Van Riel lured Plaintiff into performing services for her by "giving [him] a false sense of security" and then "abruptly terminating" their working relationship and refusing to pay him the money he was owed. Plaintiff also alleges that Defendants "threatened" to pay Mr. Klein the money owing to Plaintiff and used the United States Postal Service, e-mail, interstate travel, and proceedings conducted in the courts of the State of New York to carry out this "threat." In essence, Plaintiff contends that Ms. Van Riel contacted Mr. Klein, informed him of the existence of assets with which he might satisfy a part of the judgment that he had obtained against Plaintiff, and cooperated with Mr. Klein's attempt to levy against those assets. Plaintiff does not dispute that Mr. Klein had been awarded a judgment against him in an amount in excess of \$100,000 or that Defendants paid the money at issue here to Mr. Klein consistently with procedures authorized by New York law. Although Plaintiff alleges that Defendants acted with an improper motive for the purpose of avoiding paying Plaintiff the full value of the work that he had performed for them, such allegations, even if true, would not

establish that Defendants engaged in racketeering. Plaintiff has not cited any authority tending to suggest that a racketeering claim may be predicated on a party's decision to inform a judgment creditor of the existence of assets belonging to a judgment debtor with which the judgment creditor's claim might be partially satisfied, and we have not identified any such authority during the course of our own research. As a result, we conclude that Plaintiff's complaint fails to state a claim for racketeering and that the trial court did not err by dismissing Plaintiff's RICO claim.

E. Voluntary Dismissal

Finally, Plaintiff argues that the trial court erred by ruling that his "Notice Of Voluntary Dismissal Pursuant To N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)" "was ineffective to dismiss the action without prejudice and was, therefore, with prejudice." In reaching this conclusion, the trial court determined that Plaintiff was not entitled to voluntarily dismiss his complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) on the grounds that Plaintiff did not attempt to dismiss his complaint until after Plaintiff had "rested his case" and that this attempted dismissal was ineffective based on the reasoning adopted by this Court in *Troy v. Tucker*, 126 N.C. App. 213, 484 S.E.2d 98 (1997). On appeal, Plaintiff argues that (1)

Troy noted that the trial court had the option to order the dismissal "stricken as a nullity" and should not, for that reason, be interpreted as limiting the court's authority to declare a dismissal not to have been taken with prejudice; (2) the line of cases holding that a party had "rested his case" for purposes of N.C. Gen. Stat. § 1A-1, Rule 41(a) after a summary judgment hearing at which the party has an opportunity to present evidence "should not be extended" to hearings addressing a motion to dismiss filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); and (3) the trial court erred by failing to grant him relief from the dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). After carefully reviewing the record, we conclude that Plaintiff's dismissal was a nullity, a development which allows the trial court's decision to dismiss Plaintiff's complaint on the merits to stand.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) provides, in pertinent part, that

. . . [A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case[.] . . . 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[.]

Having previously concluded that Plaintiff's claims for conversion, civil conspiracy to engage in conversion, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and deprivation of his right to due process pursuant to 42 U.S.C. § 1983 were time-barred and that Plaintiff had failed to state a racketeering claim, the trial court's order dismissing those claims with prejudice would preclude further litigation of those claims unless Plaintiff's "voluntary dismissal without prejudice" was to be given effect.

In *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986), the Supreme Court addressed the "question [of] whether a plaintiff may file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to Rule 41(a)(1) and held that:

an affirmative response to this question would amount to an endorsement of a violation of the spirit as well as the letter of the North Carolina Rules of Civil Procedure. . . . Although it is true that Rule 41(a)(1) does not, on its face, contain an explicit prerequisite of a good-faith filing . . . [,] we find such a requirement implicit in the general spirit of the rules, as well as in the mandates of Rule 11(a).

Estrada, 316 N.C. at 323, 341 S.E.2d at 542, *superseded by statute in part on other grounds as stated in Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989). The logic set forth in *Estrada* was subsequently discussed in *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), in which the Supreme Court stated that:

The Rule 41(a) voluntary dismissal . . . "offers a safety net to plaintiff or his counsel who are either unprepared or unwilling to proceed with trial the first time the case is called." . . . The only limitations are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.

Brisson, 351 N.C. at 597, 528 S.E.2d at 572-73 (quoting 2 G. Gray Wilson, *North Carolina Civil Procedure* § 41-1, at 33 (2d ed. 1995)). Finally, in *Maurice v. Motel Corp.*, 38 N.C. App. 588, 591-92, 248 S.E.2d 430, 432 (1978), this Court held that:

Can a plaintiff defeat a motion for summary judgment by taking a voluntary dismissal after a hearing on the summary judgment motion where plaintiff introduces evidence and after the court signs the summary judgment but before it is filed with the clerk? The answer is "no." . . . To rule otherwise would make a mockery of summary judgment proceedings.

Thus, this Court has clearly held that a dismissal taken for the purpose of defeating a substantive decision about to be rendered by a trial court is of no effect.

The record in this case clearly shows that, on 30 March 2011, the trial court notified the parties that it had granted Defendants' dismissal motion and directed Defendants' counsel to prepare an order to that effect for the court's signature. Plaintiff's "voluntary dismissal" was filed on the following day, a point in time after Plaintiff knew that the trial court had ruled against him on the merits of Defendants' motion and prior to the entry of a formal dismissal order. The timing of Plaintiff's motion permits no conclusion other than that he was attempting to prevent the trial court from dismissing his complaint. A voluntary dismissal taken under these circumstances cannot possibly be said to have been taken in good faith, so that "[t]he purported voluntary dismissal by plaintiffs is void and is hereby vacated." *Maurice*, 38 N.C. App. at 592, 248 S.E.2d at 433.³ In light of this conclusion, we

³We do not, of course, wish to be understood as holding that a litigant acts in bad faith on every occasion in which he or she takes a voluntary dismissal without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) after receiving notice that a trial judge intends to grant a dismissal motion or enter summary judgment in favor of his or her opponent. Although Plaintiff clearly acted in bad faith in this instance, there may be circumstances in which a voluntary dismissal without prejudice taken after the trial court has announced its decision with

need not consider whether a party may be deemed to have "rested his case" at the end of a hearing on a motion lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) so as to preclude that party from taking a voluntary dismissal without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1).

III. Conclusion

Thus, for the reasons discussed above, we conclude that Plaintiff's claims, with the exception of his RICO claim, were not timely filed; that that portion of his complaint purporting to assert a civil RICO claim failed to state a claim for which relief could be granted; and that his purported voluntary dismissal should be stricken as a nullity, thereby leaving the trial court's dismissal order intact. As a result, the trial court's order dismissing Plaintiff's complaint with prejudice should be, and hereby is, affirmed.

AFFIRMED.

Judges CALABRIA and THIGPEN concur.

Report per Rule 30(e).

respect to the merits of a dispositive motion may not constitute bad faith. As a result, the extent to which voluntary dismissals taken under a different set of circumstances should or should not be deemed to have been taken in bad faith must be determined on an individualized basis in future cases.