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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-103

Filed: 18 July 2017

Haywood County, No. 15 CVS 905

CHARLENE HOGUE, Plaintiff,

v.

BROWN & PATTEN, PA, DONALD N. PATTEN, Defendants.

Appeal by plaintiff from order entered 11 August 2016 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 5 June 2017.

*Charlene Hogue, pro se.*

*Brown & Patten, PA, by Donald N. Patten, for defendant-appellant Brown & Patten and pro se.*

TYSON, Judge.

Charlene Hogue (“Plaintiff”) appeals from order dismissing her complaint pursuant to Brown & Patten, PA and Donald N. Patten’s (“Defendants”) Rule 12(b)(6) motion. We affirm.

I. Factual Background

HOGUE V. BROWN & PATTEN

*Opinion of the Court*

On 22 January 2009, Plaintiff paid Defendants \$5,000.00 for legal representation for various domestic law issues to be adjudicated in the Jackson County District Court. On 28 January 2009, Defendants filed a Complaint for Spousal Support, Alimony, and Divorce from Bed and Board against Plaintiff's husband, Anthony Blankenship. The parties were married more than six years.

On 30 March 2009, Blankenship filed an answer to the initial complaint and a counterclaim for equitable distribution. Defendants asserted the couple was not legally separated, since Blankenship continued to live in the same residence as Plaintiff. On 24 November 2009, Blankenship filed an amended answer and counterclaim, in which he asserted that he and Plaintiff were separated as of 23 October 2008. Defendants did not file an amended complaint seeking equitable distribution of the marital property, but did file an equitable distribution affidavit on behalf of Plaintiff on 27 October 2010.

On 30 November 2010, Blankenship filed a complaint for divorce. On 3 January 2011, the trial court ordered Blankenship to pay Plaintiff \$325.00 per month in post-separation spousal support for a period of twelve months or until the issue of alimony was heard. On 3 January 2011, the trial court entered an order finding that Plaintiff and Blankenship had legally separated as of 23 October 2008.

Blankenship's action for divorce was granted on 11 March 2011. The order preserved the issues of alimony and equitable distribution.

*Opinion of the Court*

On 15 August 2011, Blankenship voluntarily dismissed his claim for equitable distribution. After this dismissal, the only claim remaining between the parties was Plaintiff's claim for alimony. The trial court granted Blankenship's motion for a directed verdict and dismissed the alimony claim on 30 August 2012. No further issues were pending or heard after 30 August 2012. Plaintiff received no portion of the marital estate, no alimony, and only a year of post-separation spousal support.

Plaintiff filed this action on 11 September 2015 and asserted Defendants' legal representation "fell below the applicable standard of care," including by failing to file a claim or demand for equitable distribution of the parties' marital estate. Defendants filed an answer, motion to dismiss, and asserted the statute of limitations as an affirmative defense to bar any recovery in this action. A hearing was held on the motion to dismiss on 26 July 2016. The trial court granted Defendants' motion and dismissed Plaintiff's complaint by order on 11 August 2016. Plaintiff appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Issues

Plaintiff argues the trial court erred by dismissing her complaint on the basis that the statute of limitations bars Plaintiff's claims pursuant to Rule 12(b)(6).

IV. Standard of Review

Our standard to review the trial court's order is well-established. "Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (quoting *Hooper v. Liberty Mut. Ins. Co.*, 84 N.C. App. 549, 551, 353 S.E.2d 248, 250 (1987)).

"[An affirmative] 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." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). "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." *Ventriglia v. Deese*, 194 N.C. App. 344, 350-51, 669 S.E.2d 817, 821 (2008) (citations omitted).

If the court considers matters outside the face of the complaint at a hearing on a Rule 12(b)(6) motion, the motion must be treated as seeking summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. §§ 1A-1, Rule 12(b)(6) and Rule 56(c) (2015); see *Snyder v. Freeman*, 300 N.C. 204, 207, 266 S.E.2d 593, 596 (1980) (agreeing the trial court's "dismissal on the ground

## HOGUE V. BROWN & PATTEN

### *Opinion of the Court*

of the statute of limitations was, in effect, the entry of summary judgment inasmuch as matters outside the pleadings must have been considered by [the court]”).

Summary judgment is proper where “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, Rule 56(c) (2013); *see Draughon v. Harnett Cnty. Bd. Of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) *aff’d per curiam*, 358 N.C. 131, 591 S.E.2d 251 (2004).

On appeal, this Court views the evidence in the light most favorable to the nonmoving party. *Williams v. Habul*, 219 N.C. App. 281, 289, 724 S.E.2d 104, 109 (2012). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

Here, the trial court considered matters outside the face of the pleadings. Our review of the trial court’s order is appropriate under a summary judgment standard. *See Williams v. Advanced Auto Parts, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 795 S.E.2d 647, 651 (2017) (“[A] Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court.”).

### V. Analysis

HOGUE V. BROWN & PATTEN

*Opinion of the Court*

The statute of limitations to assert claims for legal malpractice is three years, which begins to run “at the time of the occurrence of the last act of the defendant giving rise to the cause of the action[.]” N.C. Gen. Stat. § 1-15(c) (2015).

This Court has further noted that the action “accrues from the date of the last act of the defendant, not from the date when the attorney-client relationship either begins or ends.” *Ramboot, Inc. v. Lucas*, 181 N.C. App. 729, 733, 640 S.E.2d 846, 847 (2007) (citation and internal quotation marks omitted); see *Carlisle*, 169 N.C. App. at 683-84, 614 S.E.2d at 548-49 (declining to extend the statute of limitations to accrue from continued representation following the alleged acts of malpractice).

“This determination as to the last act giving rise to an action for malpractice is a conclusion of law appropriate for the trial judge to make based on the facts presented, such as the dates of relevant events in the attorney-client relationship.” *Ramboot*, 181 N.C. App. at 734, 640 S.E.2d at 848.

Similar to the present case, in *Teague v. Isenhower*, 157 N.C. App. 333, 334, 579 S.E.2d 600, 602 (2003), the dispositive issue on appeal was whether the statute of limitations barred the plaintiff’s legal malpractice claims. This Court determined that the date of accrual in legal malpractice cases is unique to the plaintiff’s various claims. *Id.* at 336-37, 579 S.E.2d at 603-04 (applying different accrual dates to the plaintiff’s alleged alimony and equitable distribution claims).

We are left to determine whether Defendants' last act, which gave rise to the present cause of action, occurred less than three years before Plaintiff filed this action on 11 September 2015. If Defendants' "last act" occurred more than three years prior to 11 September 2015, Plaintiff's claim is barred by the three-year statute of limitations.

A. General Malpractice Claim

Plaintiff's brief does not assert specific claims of what actions or lack thereof constituted Defendants' general negligence. In her brief, Plaintiff simply states Defendants "ignore[d] the other claims asserted in Plaintiff's complaint, which were general claims of misrepresentation throughout the course of Defendants' representation of Plaintiff." This is the extent of Plaintiff's argument asserting any general legal malpractice on the part of Defendants.

By asserting a conclusory statement without citation to any authority, Plaintiff fails to make any actual argument in her brief and abandons her argument. N.C. R. App. P. 28(b)(6); *Hackos v. Goodman, Allen & Filetti, PLLC*, 228 N.C. App. 33, 40, 745 S.E.2d 336, 341 (2013) (holding plaintiff abandoned her argument where she failed to meet the requirements of N.C. R. App. P. 28(b)(6)); *see also Rorrer v. Cooke*, 313 N.C. 338, 362, 329 S.E.2d 355, 370 (1985) (holding a conclusory statement was deficient in that it was not based upon specific facts and "does not aver that but for

[the attorney's] negligence [the plaintiff] would have prevailed in her suit"). Plaintiff has abandoned her claim on this issue. *Id.*

B. Equitable Distribution

1. Statute of Limitations

Plaintiff's complaint for legal malpractice contains only one specific allegation, which asserts Defendants failed to submit timely filings for equitable distribution on behalf of Plaintiff.

N.C. Gen. Stat. § 50-11(e) (2015) provides that "an absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution under G.S. § 50-20 unless the right is asserted prior to judgment of absolute divorce."

While Defendants filed an equitable distribution affidavit on behalf of Plaintiff in October 2010, no separate equitable distribution claim was ever filed. Defendants failed to assert Plaintiff's equitable distribution claim, either prior to Blankenship's voluntary dismissal of his equitable distribution claim on 15 August 2011, or prior to the 11 March 2011 entry of judgment for the parties' absolute divorce. Thus, the 11 March 2011 judgment of absolute divorce barred Plaintiff from filing an equitable distribution claim from that date forward. N.C. Gen. Stat. § 50-11(e).

The entry of this judgment constitutes the "last act" of Defendants giving rise to a cause of action, because that was the latest date to preserve Plaintiff's equitable distribution claim. *See Teague*, 157 N.C. App. at 336, 579 S.E.2d at 603. As more

*Opinion of the Court*

than three years passed between the 11 March 2011 entry of judgment and the filing of this action on 11 September 2015, Plaintiff's complaint is barred by the statute of limitations. *See* N.C. Gen. Stat. § 1-15(c).

2. Equitable Estoppel

Plaintiff argues Blankenship should have been equitably estopped from voluntarily dismissing his equitable distribution claim, and that this error casts doubt upon when the last act or omission of Defendants occurred. However, even if we were to presume, without deciding, that Blankenship should have been estopped from dismissing his equitable distribution claim, Plaintiff's malpractice claim against Defendants would still fail to fall within the statute of limitations.

Under Plaintiff's theory, the date that Blankenship dismissed his equitable distribution claim, 15 August 2011, would serve as the "last act or omission" contributing to Defendants' alleged legal malpractice. Plaintiff made no allegations in her complaint that Defendants had committed legal malpractice by failing to appeal in the underlying divorce case between Plaintiff and Blankenship, and only alleged that "Defendants mishandled Plaintiff's legal representation by failing to submit filings for [e]quitable [d]istribution for Plaintiff." Thus, Plaintiff's malpractice claim "relate[s] only to [D]efendants' representation at the trial court level[.]" *Teague*, 157 N.C. App. at 336, 579 S.E.2d at 603.

*Opinion of the Court*

By the date of Blankenship's dismissal of his equitable distribution claim, 15 August 2011, Plaintiff knew or "should have known [D]efendants had allegedly failed to present certain information," *id.*, or raise certain claims, such as Plaintiff's own claim for equitable distribution. *See id.* (upholding a trial court's dismissal of a legal malpractice claim "arising out of the alleged mishandling of [an] equitable distribution claim" where the last act or omission of the defendants occurred more than three years before the filing of the malpractice claim).

Plaintiff's legal malpractice claim arising out of the alleged mishandling of the equitable distribution claim arose no later than 15 August 2011. Any legal malpractice claim arising from Defendants' trial court representation of Plaintiff in this matter should have been filed prior to 15 August 2014.

Regardless of whether the statute of limitations began to run on 11 March 2011 or 15 August 2011, Plaintiff's filing of this action on 11 September 2015 occurred more than three years after the date of accrual after either event and bars Plaintiff's ability to recover in this action. N.C. Gen. Stat. § 1-15(c).

While Defendants' actions may have precluded Plaintiff from timely asserting her equitable distribution claim, Plaintiff's failure to timely assert her claims against Defendants is fatal to her proving her case and seeking recovery.

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are . . . intended to require that litigation be initiated within the prescribed time or not at all.

*Opinion of the Court*

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: Hard cases must not make bad law.

*Hackos*, 228 N.C. App. at 43, 745 S.E.2d at 342-43 (citations and quotation marks omitted)). In light of the statute and case precedents, the trial court correctly dismissed Plaintiff's complaint. Plaintiff's arguments are overruled.

VI. Conclusion

Plaintiff filed this action on 11 September 2015, after the statute of limitations had lapsed. The trial court did not err in dismissing Plaintiff's complaint pursuant to Rule 12(b)(6) or under Rule 56(c). The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).