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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-160

Filed: 31 December 2020

Mecklenburg County, No. 18 CVS 8266

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs,

v.

BANK OF AMERICA, N.A., Defendant.

Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2020.

*Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding, Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellant.*

*McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg and James W. McGarry, for defendant-appellee.*

YOUNG, Judge.

Where plaintiffs' complaint, on its face, demonstrated that the statute of limitations had expired, and failed to demonstrate a basis for tolling the statute, the

trial court did not err in granting defendant's motion to dismiss on the basis of the statute of limitations. Where at least some of plaintiffs' allegations stemmed from purportedly wrongful foreclosures, the trial court did not err in granting defendant's motion to dismiss such claims on the bases of *res judicata* and collateral estoppel. Plaintiffs failed to preserve the issue of amending their pleadings with timely motion or objection, and we therefore decline to address such issue. We affirm the order of the trial court granting defendant's motion to dismiss and denying plaintiffs' motion for partial summary judgment.

I. Factual and Procedural Background

On 1 May 2018, Chester Taylor III, Ronda and Brian Warlick, Lori Mendez, Lori Martinez, Crystal Price, Jeanette and Andrew Aleshire, Marquita Perry, Whitney Whiteside, Kimberly Stephan, Keith Peacock, and Zelmon McBride (collectively, plaintiffs) brought the underlying action against Bank of America, N.A. (defendant). In the complaint, each plaintiff outlined their own individual experience with defendant, through which defendant allegedly enacted a "fraudulent scheme" on homeowners seeking Home Affordable Modification Program (HAMP) modifications to their mortgages. Under HAMP, homeowners who agreed to participate in the program were offered the opportunity to modify their home mortgage debt. Plaintiffs alleged that defendant secretly formed a scheme to preclude eligible applicants, such as plaintiffs, from receiving permanent HAMP modifications. Plaintiffs further

alleged that the running of any statute of limitations was tolled by defendants' fraudulent concealment of their business practices. Plaintiffs alleged that they suffered damages consisting of the time and money spent on filing multiple copies of required documents with defendant, and the ultimate foreclosures of their homes when their HAMP modifications were denied. Plaintiffs raised claims for common law fraud, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, and unfair and deceptive trade practices. Plaintiffs additionally sought punitive damages. On 13 March 2019, plaintiffs filed an amended complaint, alleging common law fraud, fraudulent concealment, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, unfair and deceptive trade practices, and negligence, and seeking punitive damages.

On 11 April 2019, defendant filed a motion to dismiss the amended complaint or, in the alternative, to strike impertinent allegations and sever misjoined claims. The motion noted that while the complaint listed separate factual allegations pertinent to each plaintiff, the actual claims did not plead with particularity each plaintiff's alleged harm; that the complaint failed to show actual false statements made by defendant; that the complaint on its face was barred by the statute of limitations; that the complaint was barred by the doctrines of *res judicata* and collateral estoppel as these issues had already been litigated in foreclosure proceedings; and that the complaint included allegations copied from filings in

another lawsuit. On 12 April 2019, plaintiffs filed a motion for partial summary judgment, alleging that courts had previously entered judgments against defendant for defendant's misconduct, and therefore that the doctrines of *res judicata* and collateral estoppel precluded relitigation of the issue of defendant's fraud.

On 3 October 2019, the trial court entered an order on defendant's motion to dismiss or strike and plaintiffs' motion for partial summary judgment. The court concluded that plaintiff's claims were barred by the applicable statutes of limitation, and that the claims of all plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel. Accordingly, the court granted defendant's motion to dismiss, and denied plaintiffs' motion for partial summary judgment.

Plaintiffs appeal.

## II. Motion to Dismiss

In their first and second arguments, plaintiffs contend that the trial court erred in granting defendant's motion to dismiss on the bases of the statute of limitations and *res judicata* and collateral estoppel. We disagree.

### A. Standard of Review

"This Court must conduct 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.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Statute of Limitations

In its order, the trial court held that plaintiffs’ claims were barred by the applicable statute of limitations. On appeal, plaintiffs contend that this was error.

From the face of plaintiffs’ amended complaint, we can derive the following facts: The HAMP program was implemented in March of 2009; the federal government sued defendant, resulting in a consent judgment in April of 2012 and a settlement in August of 2014; and a multi-district class action was filed in 2011, although ultimately dismissed. Plaintiffs alleged harms ranging from 2009 through 2014, but all asserted that they “did not know” and “could not have reasonably discovered” that they had actionable claims until retaining counsel in 2016 and 2017.

As a preliminary matter, we note that multiple plaintiffs are residents of states other than North Carolina and suffered their purported harms elsewhere. Pursuant to North Carolina law, the applicable statutes of limitations for these claims are those which apply in those states, not that of North Carolina. *See e.g. United Virginia Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 321, 339 S.E.2d 90, 94 (1986) (holding that the substantive law of the state where the last act occurred giving rise to the purported injury governed the alleged unfair and deceptive trade practices action).

Even assuming *arguendo* that North Carolina’s statute of limitations applies to these claims, plaintiffs’ complaint fails on its face. The applicable statute of limitations for relief on the grounds of fraud or mistake is three years from discovery of the fraud or mistake. N.C. Gen. Stat. § 1-52(9) (2019). This Court has held that “discovery” means “either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence.” *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003).

Plaintiffs contend that whether a plaintiff should have discovered fraud in the exercise of due diligence is a question of fact for a jury. It is true that this is ordinarily the case. However, that truism comes with a caveat. This Court has held that “[w]hether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury *when the evidence is not conclusive or is conflicting*.” *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976) (emphasis added). When the evidence is not in dispute, our Courts have been able to address this issue as a matter of law. *See Darsie*, 161 N.C. App. at 548, 589 S.E.2d at 397 (holding that “where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the fraud but failed to do so, the absence of reasonable diligence is established as a matter of law”).

Plaintiffs' claims all allege roughly the same set of facts: that they applied for HAMP modification, that they were asked to submit paperwork, that they were asked to resubmit paperwork, that they were asked to make trial payments after the trial payment period had concluded, and that they were denied relief after believing that they had done everything required of them. These issues ranged from 2009 through 2014. They all claim that they did not realize that these were actionable harms until speaking to attorneys in 2017. Yet by 2011, as acknowledged in plaintiffs' complaint, defendant was already defending lawsuits for its practices.

It is clear, from the face of the complaint, that plaintiffs knew something was wrong with their applications at the time. It is likewise clear that, had plaintiffs engaged in some simple research, they would have heard about the ongoing litigation involving defendant's business practices. "[O]ur courts have determined that a plaintiff cannot simply ignore facts which should be obvious to him or would be readily discoverable upon reasonable inquiry." *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 161-62, 665 S.E.2d 147, 151 (2008).

Plaintiffs contend that defendant's fraud prevented them from learning that something was amiss, and therefore precluded their duty to inquire. It is true that, in a confidential relationship, "when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting or discovering the fraud, he is under no duty to make inquiry until something occurs to excite his

suspicious.” *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 208 (1951) (citation and quotation marks omitted). However, plaintiffs’ complaint does not allege that defendant in any way prevented plaintiffs from learning the truth. Taking plaintiffs’ complaint as true, defendant merely insisted that plaintiffs’ HAMP applications were proceeding, but by 2014 denied them all. This did not preclude plaintiffs from taking prompt action in 2014, or indeed anytime before 2017. It did not preclude plaintiffs from discovering defendant’s ongoing litigation.

It is clear that plaintiffs bore a duty to inquire into the business practices which caused them concern. However, they did not file their complaint until 2018. Even if we were to give plaintiffs the benefit of the doubt and extend the statute of limitations from the last possible date of their interactions with defendant, that happened in 2014. That means that plaintiffs had until 2017 to file their complaint. They did not, and thus ran afoul of the statute of limitations.

We therefore hold that the trial court did not err in granting defendant’s motion to dismiss on the basis of the statute of limitations.

C. *Res Judicata* and Collateral Estoppel

The trial court also held that the claims of all plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel. This follows the logic that those proceedings would have already litigated



plaintiffs' rights as to the properties that were foreclosed as a result of defendant's purported fraud. On appeal, plaintiffs contend that this was error.

"The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are companion doctrines which have been developed by the Courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999) (citation and quotation marks omitted).

Under the doctrine of *res judicata* or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996); *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). The doctrine prevents the relitigation of "all matters ... that were or should have been adjudicated in the prior action." *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556. Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. *McInnis*, 318 N.C. at 433-34, 349 S.E.2d at 560; *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001), *aff'd per curiam*, 355 N.C. 485, 562 S.E.2d 422 (2002). Whereas *res judicata* estops a party or its privy from bringing a subsequent action based on the "same claim" as that litigated in an earlier action, collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent

action is based on an entirely different claim.

*Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

As a preliminary matter, plaintiffs argue that the trial court erred in applying *res judicata* and collateral estoppel to those plaintiffs who went through a non-judicial foreclosure proceeding. However, as this matter was not raised before the trial court, it was not preserved, and we will not consider it for the first time on appeal. N.C.R. App. P. 10(a)(1).

Plaintiffs further allege that there is not an identity between the foreclosure claims and the current litigation. Plaintiffs note that those were claims where plaintiffs' properties were foreclosed, whereas the instant litigation seeks relief for defendant's fraud.

However, again viewing the complaint on its face, while it is true plaintiffs sought damages for "the costs of sending their HAMP applications and financial documents" and "the loss of time" from doing same, it is clear that the bulk of their damages come from "the loss of their homes and the equity in those homes[.]" Moreover, in their factual allegations of wrongdoing, plaintiffs include allegations that defendant "committed fraud in the discharge of its foreclosure procedures[.]" resulting in "loss of homes due to improper, unlawful, or undocumented foreclosures." It is therefore abundantly clear that at least some portion of plaintiffs' complaint is the allegation that defendant's fraud resulted in plaintiffs' foreclosure.

Our Supreme Court has held that “subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*.” *Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993). Even assuming *arguendo* that some portions of plaintiffs’ complaint allege conduct independent of and apart from the foreclosure of plaintiffs’ properties, it is clear that some portion of the complaint – a significant portion – is premised upon the notion that the foreclosures themselves were wrongful. Repackaging that allegation as a claim for fraud is nonetheless prohibited under the doctrines of *res judicata* and collateral estoppel. Accordingly, we hold that any portions of plaintiffs’ complaint alleging that they were wrongfully foreclosed upon were barred.

For this reason, we hold that the trial court did not err in granting defendant’s motion to dismiss on the bases of *res judicata* and collateral estoppel.

### III. Motion to Amend

In their third argument, plaintiffs contend that the trial court erred in dismissing the complaint without first granting plaintiffs leave to amend. We hold that this error is unpreserved, and dismiss such argument.

Plaintiffs contend that Rule 15(a) of the North Carolina Rules of Civil Procedure states that leave to amend shall be given when justice so requires. We acknowledge that this is so; the Rules provide that a party may amend his pleading

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once as a matter of course before responsive pleadings are served, or any time within 30 days; that he may amend his pleading by leave of the court or by written consent of the adverse party; and that “leave shall be freely given when justice so requires.” N.C.R. Civ. P. 15(a).

However, in the instant case, plaintiffs contend that the trial court “erred in dismissing [plaintiffs’] claims with prejudice, without giving an additional opportunity to amend their complaint.” What plaintiffs do not contend, and what the record does not show, is that plaintiffs filed a motion to amend the complaint after this dismissal was announced. While the Rules of Civil Procedure are clear, the Rules of Appellate Procedure are equally clear:

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.

N.C.R. App. P. 10(a)(1).

Plaintiffs failed to make a timely motion to amend their complaint. As such, this issue is not preserved for appeal.

Even had the issue been so preserved, however, plaintiffs could show no error. This Court has held that “our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion.” *Delta Envtl.*

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*Consultants of N.C., Inc. v. Wyson & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999). This Court has further held that “[r]ulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court; that discretion is clearly not abused when granting the motion would be a futile gesture.” *Lee v. Keck*, 68 N.C. App. 320, 326, 315 S.E.2d 323, 328 (1984).

As we have held above, plaintiffs’ claims were barred by the statute of limitations. As such, amendment of plaintiffs’ complaint would have been a futile gesture; no change to their factual allegations would alter the legal bar of the statute of limitations. Even had plaintiffs properly raised and preserved the issue of amending the pleadings, the trial court would not have abused its discretion in denying such a motion.

IV. Conclusion

Plaintiffs’ complaint, on its face, showed the span of time between plaintiffs’ reasonable discovery of their cause of action and the filing of the complaint. The undisputed evidence shows no basis for plaintiffs’ allegation that they were somehow fraudulently prevented from discovering their harm prior to the expiration of the statute of limitations. Accordingly, we hold that the trial court did not err in granting defendant’s motion to dismiss on that basis. Moreover, plaintiffs’ complaint clearly attempts, at least to some degree, to relitigate the issues of plaintiffs’ respective foreclosures. Inasmuch as those have already been litigated and settled, the trial

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court did not err in granting defendant's motion to dismiss on the basis of *res judicata* and collateral estoppel. And although we decline to address the issue of amending the pleadings as such issue is unpreserved, we note in dicta that the trial court would not have abused its discretion in denying such a motion.

AFFIRMED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).