IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-64

No. COA21-163

Filed 1 February 2022

Forsyth County, No. 20 CVS 3124

BEST CHOICE PRODUCTS, INC., Plaintiff,

v.

HENDRICK, BRYANT, NERHOOD, SANDERS & OTIS, LLP and KENNETH CASEY OTIS, III, Defendant.

Appeal by plaintiff from order entered 18 December 2020 by Judge Richard Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 17 November 2021.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for Plaintiff-Appellant

The Bomar Law Firm, PLLC, by J. Chad Bomar, for Defendants-Appellees.

CARPENTER, Judge.

¶ 1 Plaintiff, Best Choice Products, Inc. ("Best Choice"), appeals from an order (the "Order") granting Hendrick, Bryant, Nerhood, Sanders & Otis, LLP and Kenneth Casey Otis, III's ("Defendants") motion to dismiss Best Choice's complaint alleging legal malpractice. On appeal, Plaintiff argues: (1) the trial court converted Defendant's motion to dismiss into a motion for judgment on the pleadings and

erroneously granted the converted motion; (2) the relevant statute of limitations did not begin running until Best Choice suffered harm on 24 July 2017 when the Order was entered; and (3) Defendant's last act or omission occurred less than three years prior to this lawsuit. For the reasons set forth below, we reverse the Order and remand the matter to the trial court because the face of the complaint does not reveal an insurmountable bar to recovery under N.C. Gen. Stat. § 1-15(c).

I. Factual and Procedural Background

¶ 2 The record on appeal tends to show the following: prior to the lawsuit at issue, Ferrellgas, L.P. and its subsidiary Blue Rhino Global Sourcing, Inc. sued Best Choice in the United States District Court for the Middle District of North Carolina ("Prior Lawsuit"). Best Choice was represented in the Prior Lawsuit by Defendants. The plaintiffs in the Prior Lawsuit alleged Best Choice infringed on their trademark, and unfairly and deceptively sold firepits with the user manuals displaying the plaintiffs' trademark.

¶ 3 Best Choice admitted to selling a limited number of firepits with the user manuals displaying the "Blue Rhino" trademark. Best Choice alleged its net profits from the sales were $7,824.73, and it had documentation showing this figure. Best Choice alleged Defendants failed to obtain and provide this documentation, which resulted in the trial court granting summary judgment against Best Choice and awarding the plaintiffs $185,199.30.

¶ 4 On 20 July 2020, Best Choice filed its complaint against Defendants for professional malpractice. Best Choice attached to its complaint as exhibits the summary judgment order entered 24 July 2017, and an order granting sanctions on 25 January 2018 from the Prior Lawsuit. Best Choice made several allegations in its complaint relating to Defendants' negligent representation and listed specific instances in which Defendants failed to meet the standard of care in rendering legal services in the Prior Lawsuit, which it designated as "Defendants' Failures." Best Choice made the following allegations pertinent to our review:

> 33. Defendants' Failures continued in the Prior Lawsuit through the Orders referenced below, prevent Best Choice from avoiding or mitigating the adverse consequences imposed by the Orders.
>
> . . . .
>
> 43. Defendants' Failures continued through the entry of the attached Orders and prevented any possibility of avoiding, rectifying or mitigating the excessive damages and sanctions imposed on Best Choice, all of which it has paid.

¶ 5 On 21 September 2020, after an extension was granted, Defendants filed an answer, which included affirmative defenses. Defendants also filed with their answer a motion to dismiss stating the exhibits attached to the complaint revealed the three-year statute of limitations had run for each act of negligence alleged by Best Choice. On 18 December 2020, the trial court entered the Order granting Defendants' motion to dismiss. The trial court's Order stated in pertinent part:

> Having reviewed the pleadings, including the Complaint (and attachments thereto) as well as the Motion to Dismiss, *Defendants' Brief in Support of Motion to Dismiss [N.C. R. Civ. P.] 12(b)(6),* the cases and statutes cited therein, *Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss*, the cases cited therein, and having considered the arguments of counsel, the Court concludes that Plaintiff's complaint, as amended, fails to state a claim upon which relief can be granted, and therefore, the Court GRANTS Defendants' Motion to Dismiss.
>
> WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss the complaint, as amended, is GRANTED pursuant to North Carolina Rule of Civil Procedure 12(b)(6). Plaintiff's amended complaint is dismissed with prejudice.

¶ 6 On 12 January 2021, Best Choice filed a notice of appeal to this Court.

II. Jurisdiction

¶ 7 This Court has jurisdiction to address Plaintiff's appeal from the Order pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019) as a final judgment.

III. Issues

¶ 8 The issues before this Court are whether: (1) the face of the complaint discloses the statute of limitations barred a legal malpractice action against Defendants; (2) the trial court converted Defendants' motion to dismiss into a motion on the pleadings; and (3) the trial court erred in granting Defendants' motion to dismiss.

IV. Standard of Review

¶ 9 "On appeal of a [Rule] 12(b)(6) motion to dismiss, 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." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663–64 (2013) (citation omitted).

V. Motion to Dismiss

¶ 10 On appeal, Best Choice contends the trial court erred in granting Defendants' motion to dismiss the complaint because its legal negligence claim against Defendants did not accrue, and the statute of limitations did not begin to run, until Best Choice was harmed by a finding of liability in the 24 July 2017 order. Defendants argue their last act giving rise to the cause of action could not have been later than 8 January 2017, when the time to respond to the motion for summary judgment expired, and therefore, the trial court properly dismissed the complaint. After careful review, we hold the trial court erred in granting Defendants' motion to dismiss because Best Choice's cause of action may not be barred by the three-year statute of limitations set out in N.C. Gen. Stat. § 1–15(c) based on the face of the complaint.

> When determining whether a complaint is sufficient to withstand a Rule 12(b)(6) motion to dismiss, the trial court must discern whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal

> theory. When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery.

Carlisle v. Keith, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citations and internal quotation marks omitted). A complaint is properly dismissed pursuant to Rule 12(b)(6) when the complaint discloses some fact which "necessarily defeats the plaintiff's claim." *Id.* at 681, 614 S.E.2d at 547 (citation omitted). "A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff's claims if the bar is disclosed in the complaint." *Id.* at 681, 614 S.E.2d at 547 (citation omitted).

¶ 11 The relevant statute of limitations provides in pertinent part:

> (a) Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.
> . . .
> (c) Except where otherwise provided by statute, *a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action*: . . . Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

N.C. Gen. Stat. § 1-15 (2019) (emphasis added); *see Nationwide Mut. Ins. Co. v.*

Winslow, 95 N.C. App. 413, 415, 382 S.E.2d 872, 873 (1989) ("When the cause of action for [legal malpractice] accrues, the three-year period under the applicable statute of limitations . . . begins to run.").

¶ 12 We find the analysis and holding in *Southeastern Hospital Supply* controlling in the case *sub judice*. *Se. Hosp. Supply Corp. v. Clifton & Singer*, 110 N.C. App. 652, 430 S.E.2d 470 (1993), *aff'd*, 335 N.C. 764, 440 S.E.2d 275 (1994). In *Southeastern Hospital Supply,* the plaintiff sued its former counsel for negligent representation. *Id.* at 653, 430 S.E.2d at 471. The plaintiff's complaint alleged defendants failed to produce documents during discovery which resulted in the court striking plaintiff's answer. *Id*. at 653, 430 S.E.2d at 471.

¶ 13 The complaint further alleged default judgment was entered on 1 March 1988, defendants negligently represented plaintiff through 9 March 1988, and the defendants' negligence precluded plaintiff from presenting its defense, causing plaintiff to owe damages. *Id*. at 653, 430 S.E.2d at 471. This Court ruled,

> [t]aking plaintiff's allegations as true, defendants' last wrongful act may have occurred as late as 9 March 1988. As a result, the cause of action may not have accrued until that time. Therefore, the action, which commenced on 25 February 1991, might not be barred by the three year statute of limitations under [N.C. Gen. Stat.] § 1–15(c), and was improperly dismissed pursuant to Rule 12(b)(6).

Id. at 653, 430 S.E.2d at 471.

¶ 14 Here, like in *Southeastern Hospital Supply*, Best Choice alleged in its complaint Defendants' malpractice continued until the entry of the final order on 24 July 2017. *See id*. at 653, 430 S.E.2d at 471. The last act of Defendants giving rise to the cause of action may have occurred as late as 24 July 2017 based upon the allegations in the Complaint, and as a result, the cause of action may not have accrued until that time. *See* N.C. Gen. Stat. § 1-15. Although the order attached to the complaint as an exhibit discloses specific dates which may be helpful in determining the last act giving rise to Best Choice's cause of action, we do not find the dates dispositive in our determination of whether the motion to dismiss was properly granted. In treating the allegations in the complaint as true, we cannot say Best Choice failed to state a claim upon which relief could be granted. *See Carlisle*, 169 N.C. App. at 681, 614 S.E.2d at 547 (stating a complaint is sufficient to withstand a Rule 12(b)(6) motion to dismiss when "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory"). We conclude Best Choice's claim may not be barred by the three-year statute of limitations for legal malpractice actions based upon the allegations in the Complaint and was improperly dismissed pursuant to Rule 12(b)(6). *See Se. Hosp. Supply Corp.*, 110 N.C. App. at 654, 430 S.E.2d at 471; N.C. Gen. Stat. § 1-15(c).

¶ 15 In holding Best Choice's complaint was improperly dismissed, we make no determination as to the timing of Defendants' "last act" as it relates to the statute of limitations. Although it is likely this determination could be made pursuant to a Rule 12(c) analysis or at a Rule 56 summary judgment hearing, the facts as stated in the complaint do not "necessarily defeat[ ]" Best Choice's claim pursuant to Rule 12(b)(6). *See Carlisle*, 169 N.C. App. at 681, 614 S.E.2d at 547. Because it is clear from the language of the trial court's order that the decision to dismiss was made pursuant to Rule 12(b)(6)—not pursuant to the trial court converting the motion and making a determination pursuant to Rule 12(c)—we hold the trial court erred in granting Defendants' motion to dismiss pursuant to Rule 12(b)(6). Nothing in this opinion precludes the trial court from addressing this matter pursuant to Rule 12(c) or Rule 56, should such motions come before it.

VI. Conclusion

¶ 16 The trial court erred in granting Defendants' motion to dismiss pursuant to Rule 12(b)(6) because Best Choice's complaint states a claim upon which relief could be granted. The trial court is not precluded from addressing this matter pursuant to Rule 12(c) or Rule 56 in the event such motions are brought before it. The order granting Defendants' motion to dismiss is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

Judges TYSON and INMAN concur.

Report per Rule 30(e).