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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-66

No. COA21-327

Filed 1 February 2022

Wake County, No. 20 CVS 3548

ALBERTA ANN CHALILEH and MATTHEW REZA CHALILEH, Plaintiffs,

v.

JOEL JON JENKINS, Defendant.

Appeal by Plaintiff from Order entered 26 February 2021 by Judge George Collins in Wake County Superior Court. Heard in the Court of Appeals 15 December 2021.

Austin Law Firm, PLLC, by John S. Austin, for Plaintiffs-Appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1

Alberta Ann Chalileh and Matthew Reza Chalileh (Plaintiffs) appeal from an Order entered 26 February 2021 granting Defendant's Motion to Dismiss pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. The Record before us tends to reflect the following:

¶ 2

On 6 December 2017, Plaintiffs filed a Complaint alleging Negligence in the Operation of a Motor Vehicle, Loss of Consortium, and Loss of Personal Property—claims stemming from a motor vehicle collision on 9 December 2014. On 5 March 2019, Plaintiffs filed a Notice of Voluntary Dismissal without Prejudice dismissing the Complaint. On 9 March 2020, Plaintiffs filed a new Complaint based on the same claims. The following day, on 10 March 2020, Governor Cooper declared a state of emergency in response to the rapid spread of COVID-19 in North Carolina, and on 14 March 2020, Governor Cooper ordered the closure of public schools and limited in-person gatherings. In the midst of the spread of COVID-19, Defendant filed an Answer to Plaintiff's Complaint on 6 April 2020.

¶ 3

Subsequently, Defendant filed a Motion to Dismiss Pursuant to Rule 41(a)(1) on 14 December 2020. In support of this Motion, Defendant contended the new Complaint, filed on 9 March 2020, was filed four days after the one-year time limit mandated by Rule 41, and the new Complaint was barred by the three-year statute of limitations for personal injury. On 26 February 2021, the trial court issued an Order granting Defendant's Motion to Dismiss and ordering Plaintiffs' Complaint be dismissed with prejudice. Plaintiffs filed written Notice of Appeal from the Order on 26 March 2021.

Issue

¶ 4 The sole issue on appeal is whether the trial court properly dismissed Plaintiffs' Complaint with prejudice because it is barred by the statute of limitations.

Analysis

¶ 5 Plaintiffs contend the trial court improperly dismissed Plaintiffs' Complaint because Alberta Ann Chalileh (Plaintiff) suffered from extreme anxiety due to the rapid spread of COVID-19, and this anxiety created a mental disability that tolled the statute of limitations. "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). Nevertheless, "issues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001).

¶ 6 At the outset, we note Plaintiff failed to make the argument pertaining to her mental disability before the trial court, did not present any evidence of her disability to the trial court, and has failed to cite to any evidence in the Record in support of her assertions of disability; therefore, this issue is not properly before this Court. In any event, the timeline of events leads us to conclude the trial court properly dismissed Plaintiffs' Complaint.

¶ 7 The statute of limitations for personal injury arising out of negligence is three

years. N.C. Gen. Stat. § 1-52(16) (2019). However, Rule 41(a)(1) allows:

[s]ubject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court 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 unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2020). Thus, under Rule 41, “when a claim is voluntarily dismissed without prejudice by a plaintiff, the plaintiff may reinstitute the claim within one year.” *Sweet v. Boggs*, 134 N.C. App. 173, 175, 516 S.E.2d 888, 890 (1999). If the claim is filed within the year following the dismissal, “[t]he second claim will relate back and avoid the bar of the statute of limitations.” *Id.*

¶ 8 In addition to the one-year tolling provision provided for by Rule 41, the statute of limitations may also be tolled by a mental disability pursuant to N.C. Gen. Stat. § 1-17(a). N.C. Gen. Stat. § 1-17(a) states:

A person entitled to commence an action who is at the time the action accrued either (1) Within the age of 18 years; or (2) Insane: or (3) Incompetent as defined in G.S. 35A-1101(7) or (8) may bring his action within the time herein limited, after the disability is removed

¶ 9 The appropriate test for establishing an adult incompetent or insane is whether the adult has the “mental competence to manage one’s own affairs.” *Cox v. Jefferson-Pilot Fire and Casualty Co.*, 80 N.C. App. 122, 125, 341 S.E.2d 608, 610,

cert. denied, 317 N.C. 702, 347 S.E.2d 38 (1986).

¶ 10 Here, Plaintiffs timely filed their personal injury claim on 6 December 2017 for injuries arising from the automobile accident on 9 December 2014. Subsequently, Plaintiffs filed a Notice of Voluntary Dismissal without Prejudice dismissing the Complaint on 5 March 2019. Thereafter, pursuant to Rule 41, Plaintiffs had until 5 March 2020, one year after the dismissal, to timely file a new Complaint based on the claims arising from the accident on 9 December 2014. However, Plaintiffs did not file their Complaint until 9 March 2020, four days after the one-year time extension provided for by Rule 41. Thus, the Complaint was barred by the three-year statute of limitations for personal injury because it was not filed by 9 December 2017; and the second claim did not relate back to the previous filing on 6 December 2017 because Plaintiffs did not file within one year following the voluntary dismissal on 5 March 2019.

¶ 11 Furthermore, Plaintiffs have failed to show any evidence in the Record or cite to any law in support of their contention that the pandemic created extenuating circumstances that relieves Plaintiffs from strict application of the statute of limitations. Indeed, Governor Cooper did not declare a state of emergency until 10 March 2020, five days beyond the date Plaintiffs' Complaint should have been filed, and our Supreme Court did not begin extending filing deadlines until 19 March 2020, fourteen days beyond the date Plaintiffs' Complaint should have been filed.

Therefore, without any evidence in the Record tending to show Plaintiff was suffering from a mental disability that would have tolled the statute of limitations, or indeed, any evidence tending to show the state was in a state of emergency at the time of the deadline on 5 March 2020 or subsequent filing on 9 March 2020, Plaintiffs' Complaint was barred by the three year statute of limitations and the trial court did not err in granting Defendants' Motion to Dismiss.

Conclusion

¶ 12 Accordingly, for the foregoing reasons, we conclude the trial court did not err in granting Defendants' Motion to Dismiss and affirm the Order dismissing the Complaint with prejudice.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).