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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-144

No. COA21-128

Filed 1 March 2022

Swain County, No. 20 CVS 89

SMOKY MOUNTAIN COUNTRY CLUB PROPERTY OWNERS ASSOCIATION, INC., Plaintiff,

v.

ROBERT E. DUNGAN; DUNGAN, KILBOURNE & STAHL, PA; and ALLEN STAHL & KILBOURNE, PLLC, Defendants.

Appeal by plaintiff from order entered 28 September 2020 by Judge William H. Coward in Swain County Superior Court. Heard in the Court of Appeals 1 December 2021.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, John R. Buric, and John R. Brickley, for plaintiff-appellant.

Poyner Spruill LLP, by Cynthia L. Van Horne and Karen H. Chapman, for defendants-appellees.

ARROWOOD, Judge.

¶ 1 Smoky Mountain Country Club Property Owners Association, Inc. ("plaintiff") appeals from the trial court's order granting a motion to dismiss in favor of Robert E. Dungan ("Dungan"), Dungan, Kilbourne & Stahl ("the Dungan Firm"), and Allen

Stahl & Kilbourne ("the Allen Firm") (collectively, "defendants"). Plaintiff contends the trial court erred in granting the motion to dismiss because plaintiff's claim satisfied the periods of limitation and repose prescribed in N.C. Gen. Stat. § 1-15(c). For the following reasons, we reverse the trial court's order and remand for further proceedings.

I. Background

¶ 2 Plaintiff filed a complaint against defendants on 30 April 2020, asserting legal malpractice and negligence claims.

¶ 3 Plaintiff is a nonprofit corporation that serves Smoky Mountain Country Club, a planned residential community in Whittier, North Carolina. The declarant for the community is Conleys Creek Limited Partnership ("CCLP"). Pursuant to the Declaration, CCLP granted to plaintiff and community property owners "a perpetual nonexclusive right to use certain amenities, called the Clubhouse Use Facilities[,]" which required owners to pay "mandatory amenity fees, called the Clubhouse Dues" to plaintiff, and for plaintiff to pay collected dues to CCLP "and its successors and assigns[.]" The complaint refers to this portion of the Declaration as the "Clubhouse Dues Agreement."

¶ 4 SMCC Clubhouse, LLC ("SMCC") was incorporated on 1 January 2013 "to own the Clubhouse Property, and to own, manage and operate the Clubhouse Use Facilities situated thereon, and to receive revenue in the amount of the Clubhouse

Dues collected by [plaintiff], and for any other lawful purpose and business as the Manager from time to time deems appropriate." CCLP is the managing member of SMCC, and SMCC is a successor and assignee of CCLP, accordingly assuming CCLP's rights, duties, and obligations set forth in the Clubhouse Dues Agreement.

¶ 5 On 18 June 2014, plaintiff hired Dungan and the Dungan Firm to review plaintiff's "governing documents, including but not limited to, the Articles of Incorporation, By-Laws and Amended and Restated Declaration, to advise whether the documents are (i) compliant with current NC law, and (ii) consistent with one another[,]" and to provide plaintiff with an opinion letter. Dungan was specifically hired to determine "whether [plaintiff] had an obligation to assess, bill and collect Clubhouse Dues from Owners, and thereafter remit those collected Clubhouse Dues to SMCC."

¶ 6 On 24 September 2014, plaintiff's legal committee met with Dungan seeking his legal opinion on plaintiff's obligations set forth in the Clubhouse Dues Agreement. On 29 September 2014, Dungan sent plaintiff a letter summarizing his legal opinion. In the letter, Dungan opined that plaintiff "has neither any legal obligation nor any legal right to collect Clubhouse Dues. Furthermore, by acting to collect the Clubhouse Dues, we believe that [plaintiff] could be inadvertently subjecting itself to liability under state and federal debt collection laws." Dungan expressed concern that plaintiff could be classified as a "Debt Collector" because the Clubhouse was not a

common element owned by plaintiff. Based on his analysis, Dungan recommended that plaintiff "cease its collection and enforcement efforts of Clubhouse Dues immediately."

¶ 7 On 27 September 2014, plaintiff sent a letter to all owners in Smoky Mountain Country Club informing them that plaintiff "will no longer bill for or collect the monthly fee for Clubhouse Dues." On 22 October 2014, SMCC sent a letter to all owners, stating that "[i]t is foolhardy to believe that . . . [plaintiff] and those Owners who refuse to pay Clubhouse Dues, will be allowed to [do] so without legal action being taken against them."

¶ 8 Plaintiff filed claims against SMCC seeking a declaratory judgment that the Clubhouse Dues Agreement was null and void and for repayment of all Clubhouse Dues improperly collected and paid to SMCC, while SMCC filed a counterclaim against plaintiff seeking damages for breach of the Clubhouse Dues Agreement. On 29 April 2015, SMCC moved to dismiss plaintiff's claims, and the Honorable Tanya T. Wallace entered an order granting SMCC's motion to dismiss. On 25 August 2015, plaintiff moved for summary judgment on SMCC's claim, and on 26 January 2016, the Honorable Marvin P. Pope, Jr., entered an order granting plaintiff's motion for summary judgment and dismissing SMCC's claim. On 29 January 2016, plaintiff filed a timely appeal from Judge Wallace's order, and, on 2 February 2016, SMCC filed a timely appeal from Judge Pope's order.

¶ 9 On 5 September 2017, this Court issued a unanimous opinion affirming Judge Wallace's order and reversing Judge Pope's order, holding that the Clubhouse Dues Agreement was valid and enforceable and that plaintiff was authorized by and under the Planned Community Act ("PCA") to perform its obligations under the Clubhouse Dues Agreement. *Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.*, 255 N.C. App. 236, 254, 805 S.E.2d 147, 158-59 (2017). Plaintiff had argued that N.C. Gen. Stat. § 47F-3-102(1) "only allows an association to assess dues for 'common elements' and that the Clubhouse is *not* a common element." *Id.* at 246, 805 S.E.2d at 154 (emphasis in original). This Court concluded that in addition to powers enumerated by N.C. Gen. Stat. § 47F-3-102, the Declaration "form[s] the basis for the legal authority for the planned community to act so long as the declaration is not inconsistent with the provisions" of the PCA. *Id.* (quotation marks omitted) (alteration in original). Because the Declaration "specifically authorizes [plaintiff] to assess its homeowners for the Clubhouse Dues, and since the Act does not proscribe the granting of this power to an association," this Court overruled plaintiff's argument. *Id.* at 247, 805 S.E.2d at 154. This Court remanded to the trial court for a jury trial on the issues of breach and damages. *Id.* at 254, 805 S.E.2d at 158-59.

¶ 10 Defendants continued to represent plaintiff after this Court issued its opinion. In the complaint, plaintiff alleged that Dungan "never recommended" that plaintiff

"begin assessing, billing and collecting Clubhouse Dues from Owners," nor advised plaintiff "of the legal and economic risks and/or consequences of failing to do so."

¶ 11 On 6 May 2019, the matter came on for remand trial, Judge Coward presiding. SMCC presented evidence, and at the advice of counsel plaintiff did not present any evidence. The jury awarded SMCC damages in the amount of $5,149,921.94, and on 31 May 2019, Judge Coward entered judgment against plaintiff in the amount of $7,071,054.46, consisting of the principal sum plus prejudgment interest in the amount of $1,921,132.52. Defendants' representation of plaintiff concluded upon the entry of judgment.

¶ 12 Following plaintiff's complaint, defendants filed a responsive pleading and motion to dismiss pursuant to Rule 12(b)(6) on 2 July 2020 and an additional motion to dismiss on 4 August 2020. Defendants argued that plaintiff's claims were barred by the three-year limitations and four-year repose periods prescribed by N.C. Gen. Stat. § 1-15(c).

¶ 13 Defendants' motion to dismiss came on for hearing on 14 September 2020, Judge Coward presiding. Defendants argued that plaintiff's claims should be barred by the statute of repose, or alternatively that defendants did not act negligently. On 28 September 2020, the trial court entered an order granting defendants' motion to dismiss because "the Complaint fails to state a claim upon which relief can be granted."

¶ 14 Plaintiff filed notice of appeal on 2 November 2020.

II. Discussion

¶ 15 Plaintiff argues the trial court erred in granting defendants' motion to dismiss because plaintiff presented sufficient allegations to satisfy the periods of limitation and repose prescribed by N.C. Gen. Stat. § 1-15(c). Defendants argue that the "last act" giving rise to the cause of action was Dungan's advice to stop assessing Clubhouse Dues in September 2014, and accordingly plaintiff's cause of action is barred by both the statutes of limitation and repose.

A. Standard of Review

¶ 16 "The standard of review of an order granting a 12(b)(6) motion 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." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted). "On a motion to dismiss, the complaint's material factual allegations are taken as true." *Id.* (citation omitted).

> 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.

Id. (citation omitted). We 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." *Id.*, 752 S.E.2d at 663-64 (citation omitted).

B. Motion to Dismiss

¶ 17 "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.' " *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citing *Shell Island Homeowners Ass'n. Inc. v. Tomlinson,* 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999)). "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." *Id.* (citation and quotation marks omitted). A complaint is properly dismissed pursuant to Rule 12(b)(6) "when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Id.* (citation and quotation marks 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.* (citation omitted).

¶ 18 "N.C. Gen. Stat. § 1-15(c) governs legal malpractice claims, and establishes a three-year statute of limitations and a four-year statute of repose." *Goodman v. Holmes & McLaurin Attorneys at Law,* 192 N.C. App. 467, 473, 665 S.E.2d 526, 531

(2008) (citation omitted).

> 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[.]

N.C. Gen. Stat. § 1-15(c) (2021). Additionally, "nothing herein shall be construed to reduce the statute of limitation in any such case below three years[,]" and "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[.]" *Id*. "The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the alleged wrong accrues." *White by Brown v. White*, 76 N.C. App. 127, 129, 331 S.E.2d 703, 704 (1985) (citation omitted).

¶ 19 "A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citation omitted).

¶ 20 In *Southeastern Hospital Supply*, this Court considered the question of whether a plaintiff's action for legal negligence, commenced on 25 February 1991, was barred by the statute of limitations where the trial court "entered an order striking [plaintiff's] answer for failure to appropriately respond to discovery." *Southeastern Hosp. Supply Corp. v. Clifton & Singer*, 110 N.C. App. 652, 653, 430 S.E.2d 470, 471 (1993), *aff'd*, 335 N.C. 764, 440 S.E.2d 275 (1994). In the complaint,

"[p]laintiff alleged that defendants' negligent representation continued through 9 March 1988." *Id.* at 654, 430 S.E.2d at 471. This Court, "[t]aking plaintiff's allegations as true," determined that "defendants' last wrongful act may have occurred as late as 9 March 1988." *Id.* Accordingly, the action "might not be barred by the three year statute of limitations under G.S. § 1-15(c), and was improperly dismissed pursuant to Rule 12(b)(6)." *Id.*

¶ 21 We also take note of a recently filed unpublished opinion addressing a similar question under similar facts. In *Best Choice Products*, this Court applied the principles set out in *Southeastern Hospital Supply* to determine that the plaintiff's complaint was improperly dismissed. *Best Choice Products, Inc. v. Hendrick, Bryant, Nerhood, Sanders & Otis, LLP*, 2022-NCCOA-64, ¶ 14 (unpublished). The *Best Choice Products* Court did not make a determination as to the timing of the defendants' "last act" and limited the holding to the trial court's grant of the motion to dismiss. *Id.* ¶ 15. Although *Best Choice Products* is not controlling, it is instructive in our approach to the case *sub judice*.

¶ 22 In this case, plaintiff alleged, among other points, that defendants were negligent in their legal representation of plaintiff after this Court "issued its opinion on September 5, 2017[,]" by failing to advise plaintiff to take remedial action with respect to the Clubhouse Dues. The trial court dismissed plaintiff's claim on the basis that "the Complaint fails to state a claim upon which relief can be granted." Taking

plaintiff's allegations as true, however, the last act of defendants giving rise to the cause of action may have occurred as late as 5 September 2017. Plaintiff's complaint was filed on 30 April 2020, which is within the three-year statute of limitations period. Based on plaintiff's pleadings, it was improper for the trial court to conclude that plaintiff had failed to state a claim upon which relief can be granted. Accordingly, we conclude that plaintiff's claim may not be barred by N.C. Gen. Stat. § 1-15(c) and was improperly dismissed pursuant to Rule 12(b)(6).

¶ 23 Because our holding is limited to the facial allegations within plaintiff's complaint, we do not make a determination as to the timing of defendants' "last act" which may be properly considered in further proceedings. *See Best Choice Products, Inc.*, ¶ 15.

III. Conclusion

¶ 24 For the foregoing reasons, we reverse the trial court's order granting defendants' motion to dismiss and remand for further proceedings.

REVERSED AND REMANDED.

Judge GRIFFIN concurs.

Judge TYSON concurs in the result with separate opinion

Report per Rule 30(e).

TYSON, Judge, concurring in the result with separate opinion.

¶ 25 I agree with the majority's opinion to reverse the trial court's order granting defendants' motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021) and to remand for further proceedings. I write separately to note the standard of review for our Court to review a motion to dismiss when defendants allege statutes of limitation and repose.

I. N.C. Gen. Stat. § 1-15(c)

¶ 26 Defendants argue plaintiff's claims for professional malpractice are barred by the three-year statute of limitations and four-year statute of repose periods, as prescribed by N.C. Gen. Stat. § 1-15(c), which provides, *inter alia*:

> 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(c) (2021) (emphasis supplied).

¶ 27 "The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the alleged wrong accrues." *White v. White*, 76 N.C. App. 127, 129, 331 S.E.2d 703, 704 (1985) (citing *F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 250 S.E.2d 693 (1979)). N.C. Gen. Stat. § 1-15(c) "creates, among other things,

a statute of repose which is not measured from the date of injury, but [from] the date of the last act of the defendant giving rise to the cause of action or from substantial completion of some service rendered by defendant." *Garrett v. Winfree*, 120 N.C. App. 689, 693, 463 S.E.2d 411, 414 (1995) (citation and quotation marks omitted).

¶ 28 "Continuing representation of a client by an attorney following the last act of negligence does not extend the statute of limitations." *Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC*, 211 N.C. App. 295, 304, 710 S.E.2d 218, 225 (2011). In *Teague v. Isenhower*, this Court held the proper measure of the statute of limitations began from the last alleged negligent act at trial, not the subsequent appellate representation of the client where there were no allegations of negligence. *Teague v. Isenhower*, 157 N.C. App. 333, 338, 579 S.E.2d 600, 604 (2003).

¶ 29 Out Supreme Court stated: "Once a defendant raises a statute of limitations defense [in a 12(b)(6) motion], 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*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citations omitted).

¶ 30 "If the action is not brought within the specified period, the plaintiff literally has no cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress." *Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 474, 665 S.E.2d 526, 531 (2008) (citation and

internal quotation marks omitted).

II. Rule 12(b)(6) Motion

¶ 31 "A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (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.*" *Carlisle v. Keith*, 169 N.C. 674, 681, 614 S.E.2d 542, 547 (2005) (emphasis supplied) (citation omitted). "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." *Id.* (citation omitted).

¶ 32 Plaintiff has not alleged defendants' representation at this Court was negligent. *Chase Dev. Grp.,* 211 N.C. App. at 304, 710 S.E.2d at 225. Plaintiff alleges a negligent act or omission following defendant's representation at this Court. In the face of defendants' motion to dismiss and answer and defendants' subsequent motion to dismiss, plaintiff alleges a last act of defendants as late as 5 September 2017, which is within the statute of limitations prescribed by N.C. Gen. Stat. § 1-15(c).

¶ 33 The majority's opinion concludes plaintiff's claim may not be barred by N.C. Gen. Stat. § 1-15(c) because of the inclusion of this date in pleading. Nothing precludes the revisiting of the issue upon further proceedings upon remand.