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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 22-1028

Filed 2 January 2024

Durham County, No. 21-CVS-1592

REBECCA R. DAVIS and

MATTHEW M. DAVIS, Plaintiffs,

v.

HAYES HOFLER, P.A., and

R. HAYES HOFLER, III, Defendants.

Appeal by plaintiff from order entered 1 September 2022 by Judge Josephine Kerr-Davis in Durham County Superior Court. Heard in the Court of Appeals 26 April 2023.

*Fiduciary Litigation Group, by Thomas R. Sparks and Catherine C. Bryant, for the plaintiff-appellant.*

*Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for the defendant-appellee.*

STADING, Judge.

Plaintiffs Rebecca and Matthew Davis appeal from an order entered 1 September 2022 dismissing their malpractice complaint against defendants Hayes

Hofler, P.A., and R. Hayes Hofler, III, as barred by the statute of limitations. Based on the foregoing reasons, we reverse the trial court's order.

**I. Background**

In the suit underlying the malpractice matter before us, plaintiffs, on behalf of themselves and others, enlisted the legal services of defendants Hayes Hofler, P.A. and R. Hayes Hofler, III (collectively “defendant Hofler”). Defendant Hofler, acting on behalf of plaintiffs, filed a lawsuit on 8 February 2017. That case dealt with changes made to the trust of Jeannette B. Davis (“decedent”), as well as the creation of a new trust for the decedent. The parties relevant to the underlying suit are: decedent (trustor of the trust); plaintiff Rebecca Davis (decedent's daughter-in-law); plaintiff Matthew Davis (decedent's grandson); and defendant Janet Rizzo (“Rizzo”) (decedent's daughter). Plaintiffs disputed changes that Rizzo made to the original trust, and the creation of a new trust benefiting Rizzo. The complaint in the underlying suit alleged that Rebecca Davis was suing on decedent's behalf, even though decedent was alive at the time and had not been declared incompetent.

In February and March 2017, decedent and Rizzo responded to the complaint with Rule 12(b)(6) motions to dismiss—alleging that plaintiffs failed to state a claim. In response, defendant Hofler, on plaintiffs' behalf, moved to continue or stay proceedings to gather additional information about decedent's incapacity. On 28 March 2017, decedent petitioned to be removed as a represented plaintiff and to intervene as a defendant, which the trial court granted. The trial court also denied

the motion to continue or stay proceedings and granted the 12(b)(6) motions.

Following the dismissal, on 4 April 2017, defendant Hofler filed a motion, pursuant to Rule 60, seeking a petition for adjudication of incompetency and appointment of a guardian. The trial court denied that motion on 12 May 2017. Defendant Hofler, on plaintiffs' behalf, appealed to this Court on 7 June 2017. Rizzo and decedent moved to dismiss the appeal as untimely.

On 7 November 2017, defendant Hofler filed a second Rule 60 motion with the trial court on plaintiffs' behalf, again seeking relief from the initial dismissal. That same day, defendant Hofler requested that this Court extend the time to respond to the motions to dismiss to allow the trial court to rule on his second Rule 60 motion. On 9 November 2017, this Court gave defendant Hofler until 30 November 2017 to respond to the motions to dismiss the appeal. On 17 November 2017, defendant Hofler asked this Court for an additional extension of time until the trial court issued a ruling on the second Rule 60 motion. This Court denied defendant's request.

In the interim, decedent moved to Georgia—where Rizzo petitioned to have decedent declared incompetent. In December 2017, defendant Hofler petitioned in North Carolina to have decedent declared incompetent and Matthew Davis appointed as the guardian. In light of the Georgia proceeding, on 12 July 2018, the North Carolina court dismissed the petition with prejudice and relinquished jurisdiction. A Georgia court later found decedent incompetent and appointed Rizzo as her guardian/conservator. Plaintiffs claim they incurred legal fees litigating the Georgia

petition as a result of defendant Hofler not seeking an adjudication of incompetency while decedent lived in North Carolina.

On 21 August 2018, this Court granted Rizzo's and decedent's motion to dismiss the appeal. Defendant Hofler then petitioned our Supreme Court for review, which was denied. Following the denial, the only remaining matter was the second Rule 60 motion before the trial court. On 24 May 2019, defendant Hofler moved to stay or continue the hearing to gather additional evidence. On 6 June 2019, the trial court denied both motions. Subsequently, decedent and Rizzo filed a motion for attorney's fees seeking more than \$160,000 from plaintiffs. Soon thereafter, decedent passed away.

On account of the motion for attorney's fees, plaintiffs sued defendant Hofler on 8 February 2021. In their complaint, plaintiffs alleged that defendant Hofler committed professional negligence and breach of contract. Plaintiffs claimed that defendant Hofler charged them over \$150,000 in legal fees and expenses. Defendant Hofler, responded with a 12(b)(6) motion to dismiss, contending that plaintiffs' claims failed as a matter of law because plaintiffs filed their lawsuit after the statute of limitations expired. In December 2021, plaintiffs filed an amended complaint, which provoked another 12(b)(6) motion from defendant Hofler, arguing that the complaint was untimely and outside the statute of limitations. Plaintiffs filed a response, maintaining that their complaint was timely under the limitations period and before the statute of repose's expiration.

On 11 April 2022, the trial court held a hearing on the motion to dismiss. Defendant Hofler argued that he did not owe plaintiffs a continuing duty, as that standard only applies in medical malpractice cases. He also argued that his last act was either: (1) the filing of the initial complaint on 8 February 2017, or (2) when the court dismissed the complaint on 28 March 2017. Plaintiffs noted that the continuing course of duty doctrine does not apply in attorney malpractice/negligence cases, but the statute of limitations runs upon the date of the attorney's last act giving rise to the negligence. Plaintiffs argued defendant Hofler's last act was the filing of the motion to stay or continue hearing—on 24 May 2019—which would be within the statute of limitations. On 31 August 2022, the trial court entered an order dismissing plaintiffs' amended complaint with prejudice. Plaintiffs now appeal the trial court's order of dismissal.

## **II. Jurisdiction**

The trial court's grant of defendant's 12(b)(6) dismissal motion is a final order and there are no other claims pending. Therefore, this Court has jurisdiction to hear this appeal under N.C. Gen. Stat. § 7A-27(b) (2023).

## **III. Analysis**

Plaintiffs argue that the trial court erred in granting defendants' motion under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2023).

The motion to dismiss under [Rule] 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as admitted,

and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

*Kohn v. Firsthealth Moore Reg'l Hosp.*, 229 N.C. App. 19, 21, 747 S.E.2d 395, 397 (2013) (citing *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)).

It is well-settled that a claim may be dismissed under Rule 12(b)(6) when one of the following is satisfied: (1) the complaint, on its face, reveals that no law supports the claim; (2) the complaint, on its face, reveals the lack of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citation omitted). “It is also proper under a Rule 12(b)(6) motion to determine whether the applicable statute of limitations bars the plaintiff’s claims if such bar appears on the face of the complaint.” *State of North Carolina v. Petree Stockton, LLP*, 129 N.C. App. 432, 440, 499 S.E.2d 790, 795 (1998) (citation omitted). We review Rule 12(b)(6) dismissals *de novo*. *Id.*

“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). “The action accrues at the time of . . . the last act of the defendant giving rise to the cause of action.” *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 664 (2013) (citation and internal quotation marks omitted). “Continuing representation of a client by an attorney

following the last act of negligence does not extend the statute of limitations.” *Id.* (citing *Chase Dev. Grp. v. Fisher, Clinard & Cornwell, PLLC*, 211 N.C. App. 295, 304, 710 S.E.2d 218, 225 (2011)).

On appeal, defendant Hofler contends that his “last act” was the trial court’s 28 March 2017 order dismissing the complaint under 12(b)(6). Thus, defendant Hofler asserts that plaintiffs’ 8 February 2021 complaint is untimely because it is outside of the three-year limitations period. Plaintiffs counter that neither the filing of the 2017 complaint (as defendant Hofler argued before the trial court), nor its dismissal, could have been defendant Hofler’s “last act” for the limitations period. To the contrary, they assert that defendant Hofler’s last act “from which his negligence stems” was the filing of the motion to stay or continue on 24 May 2019, within the three-year limitations period.

Construing plaintiffs’ complaint in accordance with the governing legal standards and accepting the factual allegations as true, we agree. *See Wray v. City of Greensboro*, 370 N.C. 41, 46, 802 S.E.2d 894, 898 (2017) (noting that Rule 12(b)(6) “affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss.”); *Teague v. Isenhower*, 157 N.C. App. 333, 338, 579 S.E.2d 600, 604 (2003) (measuring the statute of limitations from the last alleged negligent acts at trial, not the later appellate representation for which there were no allegations of negligence), *disc. rev. denied*, 357 N.C. 470, 587 S.E.2d 347 (2003). In this case, defendant Hofler took several remedial steps on plaintiffs’ behalf following the 8

February 2017 complaint and 28 March 2017 12(b)(6) dismissal. *See Carle v. Wyrick, Robbins, Yates & Ponton, LLP*, 225 N.C. App. 656, 661, 738 S.E.2d 766, 771 (2013). In other words, he continued to seek relief on plaintiffs' behalf to overturn the 12(b)(6) dismissal of the complaint, which leads us to conclude that neither the filing of the complaint nor the trial court's 28 March 2017 dismissal were defendant Hofler's "last act" for limitations purposes. "To determine when the last act or omission occurred[,] we look to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied." *Carle*, 225 N.C. App. at 661, 738 S.E.2d at 771. None of those factors are present at the complaint's filing or the 28 March 2017 dismissal of the complaint under 12(b)(6).

In this case, following the 28 March 2017 12(b)(6) dismissal, defendant Hofler took several steps on plaintiffs' behalf in furtherance of the legal theories advanced in the initial complaint. For example, after the initial dismissal, defendant Hofler filed a Rule 60 motion, seeking relief from the dismissal order, as well as a petition for adjudication of incompetency of decedent and for appointment of a guardian. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (noting that Rule 60(b) provides for relief from a judgment or order for various reasons, including mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, and "[a]ny other reason justifying relief from the operation of the judgment."). The trial court denied that motion on 12 May 2017, and defendant Hofler appealed on 7 June 2017—again seeking relief from the

28 March 2017 dismissal. Then, defendant Hofler filed a second Rule 60 motion with the trial court on 7 November 2017, again seeking relief from the initial 28 March 2017 dismissal. On 21 August 2018, this Court granted Rizzo’s and decedent’s motions to dismiss the appeal. Defendant Hofler then petitioned our Supreme Court for review, which was denied. Following the denial, on 24 May 2019, defendant Hofler requested that the trial court permit time to amend the second Rule 60 motion to add new evidence for consideration, which was also denied. Defendant Hofler’s efforts—after the 28 March 2017 order of dismissal—show a continued pursuit of the legal theories asserted in the complaint from which plaintiffs’ malpractice claim arises.

While the “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[.]” we conclude that neither the filing of the complaint nor the 28 March 2017 dismissal were the last act—especially when viewed within the lens of 12(b)(6). *Ramboot, Inc. v. Lucas*, 181 N.C. App. 729, 734, 640 S.E.2d 845, 848 (2007) (footnote omitted); see *Se. Hosp. Supply Corp. v. Clifton & Singer*, 110 N.C. App. 652, 654, 430 S.E.2d 470, 471 (1993), *aff’d*, 335 N.C. 764, 440 S.E.2d 275 (1994) (“Plaintiff alleged that defendants’ negligent representation continued through 9 March 1988. Taking 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 G.S. § 1–15(c), and was improperly dismissed pursuant to Rule 12(b)(6).”), *aff’d*, 335 N.C. 764, 440 S.E.2d 275 (1994).

Further, if a “claimant’s loss is not readily apparent to the claimant at the time of its origin, and . . . is discovered or should reasonably be discovered by the claimant two or more years after . . . the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made.” *Bolton v. Crone*, 162 N.C. App. 171, 173, 589 S.E.2d 915, 916 (2003) (citation omitted). Considering the time-lapse for appellate consideration, as well as the Rule 60 motions—both of which stemmed from the initial 12(b)(6) dismissal—plaintiffs’ injury may not have been apparent to them until July 2018 when the North Carolina court ceded jurisdiction to Georgia. *See Garrett v. Winfree*, 120 N.C. App. 689, 695, 463 S.E.2d 411, 415 (1995) (“[T]he first cause of action began to accrue in February 1984, the point immediately after which defendant was no longer legally able to fulfill his continuing duty to plaintiff.”); *Carle*, 225 N.C. App. at 661, 738 S.E.2d at 771. Or, when viewing the facts in a light most favorable to plaintiffs, their injury may not have become apparent until this Court dismissed the 12(b)(6) appeal on 21 August 2018. As a third option, plaintiffs’ injury may not have crystalized until the trial court dismissed the second Rule 60 motion on 6 June 2019. *See id.*

#### IV. Conclusion

Our *de novo* determination of the trial court's dismissal beckons us to a different conclusion than that of the trial court: the time bar of the limitations period is not apparent from the face of the complaint. We hold that when viewing plaintiffs' complaint construed appropriately through the lens of Rule 12(b)(6), it does not disclose facts necessary to conclude that the statutory timeclock bars it. Accordingly, we reverse the trial court's order dismissing the action and remand for further proceedings.

REVERSED AND REMANDED.

Judges HAMPSON and CARPENTER concur.

Report per Rule 30(e).