CLARK v. ALAN VESTER AUTO GROUP

06-CVS-141

SUPERIOR COURT OF NORTH CAROLINA, VANCE COUNTY

September 2, 2008

Reporter
2008 NCBC Motions LEXIS 313 *

JOHN CLARK, et al., Plaintiffs, v. ALAN VESTER AUTO GROUP, INC., et al., Defendants.

Type: Motion

Counsel

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Judges

John Jolly.

Title

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS WESTERN SURETY COMPANY AND UNIVERSAL UNDERWRITERS INSURANCE COMPANY'S MOTION TO DISMISS

Text

Rule 2.1 Exceptional

Pursuant to BCR 15, Plaintiffs hereby submit their brief in opposition to the motion to dismiss of the Defendants Western Surety Company and Universal Underwriters Insurance Company and show as follows:

FACTS

The original complaint was filed February 7, 2006 with John Clark and Servietta Hameed as the named Plaintiffs. Plaintiffs initially had summons issued and began efforts to serve all of the named Defendants via summons, however, counsel then reached an agreement to have the corporate Defendants accept service in return for the dismissal without prejudice of the individual Defendants.

On June 8, 2006, Plaintiffs moved to amend in part to add Mary Carmon as a Plaintiff, which motion was granted.

Defendants filed their Answer to the Second Amended Complaint on September 25, 2006. This Answer alleges as one of the defenses that "[t]he Plaintiff has **[*2]** failed to obtain effective service of process over the all Defendants, and the Defendant moves, pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure, that this lawsuit against him be dismissed for lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process." At the time that Answer was filed, there was no defense of lack of personal jurisdiction, insufficiency of process or insufficiency of service of process. This was because counsel had already agreed to dismiss the individual Defendants and for there to be acceptance of service for the other Defendants. The defense thus in fact had no Rule 11 basis, but the undersigned simply regarded it as a nullity and a carry-over from when the Plaintiffs had originally named individual Defendants.

On October 17, 2006, Plaintiffs filed their motion to join the two sureties as new Defendants via a third amended complaint. On Thursday, January 25, 2007, the parties attended a case management conference before the Court. The Court then entered a Case Management Order on February 7, 2007.

This Court's Case Management Order states at page four that the third amended **[*3]** complaint was deemed to be filed on February 7, 2007. The Order states at page three that **"[t]he parties stipulate that all of the defendants have been properly served with the summons and complaint**." The Order goes on to state at page four that "Defendants will have thirty (30) days to respond to the third amended complaint. Defendants reserve any and all objections or defenses to the addition of the surety bond companies alleged in the amendment, and that the parties would work cooperatively to address any issues in that

regard." The undersigned reasonably assumed that the sureties were accepting service as in the past and that the parties had stipulated to service and did not issue or serve summonses for the sureties based on these facts.

The Defendants filed their Answer to the Third Amended Complaint on February 27, 2007. It includes among other things a repetition of the same defense found in the Answer to the Second Amended Complaint: that "[t]he Plaintiff has failed to obtain effective service of process over the all Defendants, and the Defendant moves, pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure, that this lawsuit **[*4]** against him be dismissed for lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process." Plaintiffs assumed as before that this was a nullity and merely a carryover from the Answer to the Second Amended Complaint. Also on February 27, 2007 a notice of appearance was filed on behalf of "Defendants" and the notice is not styled as a limited appearance.

In short, Plaintiffs were under the impression that the sureties were not seeking to raise any service issue and that service was being accepted by agreement as it had been done previously in this case. Defendants never advised the undersigned otherwise and as noted the case management order stated that all parties stipulated to service of the complaint and to jurisdiction. Plaintiffs proceeded through discovery believing the sureties were parties in the case and were never informed otherwise.

However, defense counsel in the related *Lowery v. Vester* case pending in Federal Court more recently advised that they could not accept service for Western Surety which was the surety in that case. The case of *Ronald Lowery v. Alan Vester Motor Company, Inc.*, 5:07-cv-00134-F, Eastern District **[*5]** of North Carolina, was filed in September 2006 and subsequent to an amendment was removed to Federal Court on April 12, 2007. There was no stipulation regarding service on all the parties in that case. On May 28, 2008, a Third Amended Complaint was filed in that case naming Western Surety Company as an additional Defendant. Thereafter, defense counsel informed the undersigned that they were instructed not to accept service for the surety. Accordingly, the undersigned had a summons issued as to the surety on June 24, 2008, and served the Third Amended Complaint and the summons on the surety. It was at that time, out of an abundance of caution, that the undersigned had summonses issued in this case as to Western Surety and Universal Underwriters on July 1, 2008. Western Surety and Universal Underwriters in this case were served with the summons and the Third Amended Complaint on July 8, 2008.

ARGUMENT

1. All Parties Stipulated to Service and Jurisdiction.

As noted above, at the case management hearing in this case, the surety Defendants were represented by counsel. The Court deemed the Third Amended Complaint filed that day. The case management order expressly states at **[*6]** page three that all parties stipulated to proper service and to personal jurisdiction. Further, this stipulation applied to "all of the defendants." Defendants did not ask for change or clarification of this language in the order. Defendants were free to raise the later merits defense that the Dealer Act does not apply and so the sureties cannot be parties, but they stipulated to other defenses being waived. Indeed that waiver matches the course of conduct of the parties previously in the lawsuit. Having agreed to that stipulation, the surety Defendants should properly be found to be parties. Plaintiffs reasonably relied on these facts and the course of conduct and the sureties should not be allowed now months later to argue they were not "properly served." The language later in the case management order stating that the Defendants reserved objections and defenses to the addition of the sureties should properly be limited to merits-related defenses such as Defendants' objections against the Dealer Act claim.

2. Defendants Waived Any Defenses Based on Purported Defects in Service.

Further, under N.C.R. Civ. P. 12 the defenses of lack of jurisdiction over the person or insufficiency **[*7]** of process may be made either by a pre-answer motion or joined with one or more of the other specified defenses or objections in a responsive pleading, and unless so made the defenses are waived under Rule 12(h)(1). *See* 23A Strong's N.C. Index 4th Pleadings § 100. Here, Defendants filed their Answer to the Third Amended Complaint on February 27, 2007. At pages 25-26, the answer includes responses to Plaintiffs' specific allegations directed against the two sureties, the response to complaint P 166 referencing "the answering Defendant."

The answer also includes at page 26 a defense raised by an unidentified Defendant that "the lawsuit against him be dismissed" for lack of service. This language is identical to that found in the earlier Answer to the Second Amended Complaint. This language does not specifically identify either of the sureties as being the parties raising the defense but rather refers to "him." When the defense had been raised before it was a nullity since by agreement defense counsel had agreed to accept service in return for the dismissal of the individual Defendants. Under these facts, Plaintiffs respectfully contend that the sureties failed to adequately raise **[*8]** and preserve the service-related defenses in the Answer to the Third Amended Complaint, that the sureties are now estopped from raising that defense, and that the sureties have made a general appearance in the case. In this regard, on February 27, 2007 a notice of appearance was filed on behalf of "Defendants" and the notice is not styled as a limited appearance. Therefore it is a general appearance. A general appearance waives a defense of lack of service unless it is coupled with a pleading that properly raises the defense. See 2 Strong's N.C. Index 4th Appearance § 6. "[A]ny act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance." *Lynch v. Lynch, 302 N.C. 189, 197, 274 S.E.2d 212, 219 (1981)*.

> *N.C. Gen. Stat. § 1-75.7* provides:
>
> A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:
>
> (1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which **[*9]** to answer or otherwise plead shall not be considered a general appearance; or
>
> (2) With respect to any counterclaim asserted against that person in an action which he has commenced in the State.

Our Supreme Court has explained the purpose of the rule as follows:

> In *G.S. § 1-75.7* the legislature made the policy decision that any act which constitutes a general appearance obviates the necessity of service of summons. Obviously there are sound reasons for such a policy. In addition to the fact that courts should conserve judicial time and effort by disposing of preliminary defenses relating to personal jurisdiction before considering the merits of a controversy, to allow a party to delay raising the defense of insufficiency of service of process by securing an extension of time to plead may permit the statutes of limitations to bar a claim for relief by a plaintiff who, through no fault of his, is ignorant of the defense.

Simms v. Mason's Stores, Inc., 285 N.C. 145, 257-58, 203 S.E.2d 769, 777-78 (1974). "Other than a motion to dismiss for lack of jurisdiction virtually any action constitutes a general appearance." *Judkins v. Judkins, 441 S.E.2d 139, 140, 113 N.C.App. 734, 737 (1994)*, **[*10]** *rev. denied, 447 S.E.2d 424, 336 N.C. 781 (1994)* (*citing Jerson v. Jerson, 315 S.E.2d 522, 68 N.C.App. 738 (1984)*).

Here, Plaintiffs believed for months that the sureties were parties to the case just as were the other Defendants. The parties engaged in discovery and depositions and no contention was ever advanced that service had not been accepted or had not been waived for the sureties. Further, the Answer merely pleads the defense on behalf of "him," in a carryover from the Answer to Second Amended Complaint filed September 25, 2006. That defense in the Answer to the Second Amended Complaint was a nullity since all Defendants had either waived formal service or had been dismissed at that point in time. The defense repeated in the Answer to the Third Amended Complaint is in identical language and the undersigned once again assumed it was a nullity.

Under these facts, Plaintiffs respectfully contend that Defendants failed to properly assert any defense based on lack of service of process, that Plaintiffs reasonably believed no issuance of a summons was necessary, and that Defendants are properly barred and estopped from now raising the defenses **[*11]** found in their motion to dismiss.

3. In the Alternative, Plaintiffs Met the Statute of Limitations, or, there is an Issue of Fact in that Regard.

In the event the Court finds that Defendants did not waive the subject defenses, Plaintiffs show that once a complaint is filed, a summons must be issued "forthwith, in any event within 5 days," under the North Carolina Rules of Civil Procedure. *See* N.C.R. Civ. P. 4(a). If summons is not issued by the court clerk within five days

of the filing of the complaint, the action abates. *Glover Const., Co. v. North Carolina Dept. of Transp., 177 N.C.App. 286, 628 S.E.2d 260 (Table)* (2006) (citing *Roshelli v. Sperry, 57 N.C.App. 305, 308, 291 S.E.2d 355, 357 (1982)*. Once the action abates, the action can be revived as of the date of the issuance of a proper summons. *Glover, supra* (citing *Stokes v. Wilson and Redding Law Firm, 72 N.C.App. 107, 112, 323 S.E.2d 470, 474 (1984)*, rev. denied, *313 N.C. 612, 332 S.E.2d 83 (1985))*.

Here, Plaintiffs filed the third amended complaint on February 7, 2007. Under Rule 4(a), the action was subject to dismissal upon motion **[*12]** by the surety defendants after February 14, 2007 (five days not counting weekends), but before the issuance of proper summons. No such motion was made. A proper summons was issued in this case on July 1, 2008. The effect of the issuance of the July 1, 2008 summons was to revive the action on the date of issue.

Defendants claim that because of the late service of process, the claims are time-barred under the three-year statute of limitations under *N.C. Gen. Stat. § 1-52(1)*, and cite the case of *Bernard v. Ohio Cas. Ins. Co., 79 N.C.App. 306, 339 S.E.2d 20 (1986)*. There the Court found:

> It is not disputed that Ohio Casualty was the surety for Truck Sales, the principal, under a motor vehicle dealer surety bond governed by *N.C.Gen.Stat. Sec. 20-288(e)* (Cum.Supp.1985). The applicable statute of limitations is *N.C.Gen.Stat. Sec. 1-52(1)* (1983), prescribing a three-year period. Ohio Casualty argues that **the statutory period begins to run when the wrong or injury occurs or when the plaintiff discovers the wrong or injury**. The wrong or injury in this case occurred when Truck Sales sold to Bernard a tractor with an engine later discovered to be less powerful **[*13]** than Truck Sales represented it to be. **The very latest date we can say Bernard discovered the wrongful action of Truck Sales was when Bernard filed a complaint against Truck Sales on 14 February 1979**.

79 N.C.App. at 307-08, 339 S.E.2d at 21 (emphasis added).

Here, Plaintiff John Clark purchased his vehicle from Defendant Alan Vester Enterprises, LLC d/b/a Alan Vester Auto Mart of Selma on July 19, 2003. However, Mr. Clark had no way of knowing at that time that the CFA scheme existed or was illegal. CFA was only documented on internal forms never shown to consumers. Mr. Clark had no way of knowing that Vester used a CFA in his deal or accounted for it as such, and furthermore it now appears that Vester subsequently destroyed and spoliated the cover sheet with that CFA entry. Vester told customers including Mr. Clark that their procedure was entirely lawful. At the time of the sale, Vester told him that the representation of a cash down payment of $ 2000 was perfectly acceptable as a rebate. In fact, Vester continues to maintain that its entire CFA practice and use of false down payments was a completely legal "rebate" scheme. It was only after Mr. Clark **[*14]** heard about the NC DMV investigation and consumer claims of fake down payments on the news that he realized and discovered that Vester engaged in fraud with regard to the down payment in his motor vehicle purchase. That was when he "discovered" that Vester had apparently used a CFA in his sale. Accordingly, here, the earliest Mr. Clark should be deemed to have known of the actual illegality and fraud with regard to the down payment was upon viewing the news reports in November 2005 and subsequently contacting counsel who filed the original complaint on February 7, 2006. Those dates are within three years of July 2008. At a minimum, an issue of fact is raised by these circumstances. [1]

[*15]

The Dealer Act under which the surety bonds were issued prohibits dealers from "[w]illfully defrauding any retail buyer, to the buyer's damage, or any other person in the conduct of the licensee's business." *N.C. Gen. Stat. § 20-294(4)*. Likewise it prohibits dealers from "[u]sing unfair methods of competition or unfair deceptive acts or practices." *N.C. Gen. Stat. § 20-294(6)*. Courts have held that Dealer Act and unfair and deceptive claims are tolled until the discovery of the underlying fraud and misconduct. *Ferris v. Haymore, 967 F.2d 946, 950 (4th Cir. 1992)* (three-year limitation of actions by purchaser of automobile with tampered odometer accrued against dealership under North Carolina motor vehicle dealer suretyship statute when fraud was discovered); *Liner v.*

[1] As to Mr. Clark's separate allegation and claim that Vester also falsified his income, he was aware of this near the time of the deal since his employer informed him that the employer had been contacted with regard to income that was incorrect. However, there is no evidence he was aware of the use of CFA and that Vester's "rebate" for the down payment was fraudulent. Accordingly, the false down payment claim should not be barred.

DiCresce, 905 F.Supp. 280 (M.D.N.C. 1994) (for actions under Unfair and Deceptive Trade Practices Act based on fraud, cause of action accrues at time fraud is discovered or should have been discovered with reasonable diligence); Neugent v. Beroth Oil Co., 149 N.C.App. 38, 560 S.E.2d 829 (2002), *rev. denied*, *356 N.C. 675, 577* (genuine issue of material **[*16]** fact as to point at which motor fuel dealer could have determined that motor fuel jobber engaged in unfair and deceptive trade practices and that jobber's actions constituted fraud precluded summary judgment for jobber on statute of limitations defenses); Piles v. Allstate Ins. Co., 653 S.E.2d 181, 186, N.C.App. (2007) ("we find that the trial court erred by finding as a matter of law that her claims are time-barred by the relevant statutes of limitations. The date of Ms. Piles's discovery of the alleged fraud or negligence-or whether she should have discovered it earlier through reasonable diligence-is a question of fact for a jury, not an appellate court."); Nash v. Motorola Communications and Electronics, 96 N.C.App. 329, 331, 385 S.E.2d 537, 538 (1989) ("Plaintiff's action under G.S. 75-1.1 is based on fraudulent misrepresentation. Under North Carolina law, 'an action accrues at the time of the invasion of plaintiff's right.' For actions based on fraud, this occurs at the time the fraud is discovered or should have been discovered with the exercise of reasonable diligence.") (*quoting* Rothmans Tobacco Co ., Ltd. v. Liggett Group, Inc., 770 F.2d 1246, 1249 (4th Cir. 1985)). **[*17]**

The discovery rule is based on principles of fairness. Here, the evidence reflects that the cover sheet for Mr. Clark's deal file which would have tracked the existence of the fake down payment as a CFA entry, has been destroyed and spoliated. It is equitable and fair to apply the discovery rule on these facts.

"Discovery" means "actual discovery or the time when the fraud should have been discovered in the exercise of due diligence." Spears v. Moore, 145 N.C.App. 706, 708, 551 S.E.2d 483, 485 (2001). Accrual begins "at the time of discovery regardless of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." Forbis v. Neal, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (*quoting* Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 304, 271 S.E.2d 385, 392 (1980)). "Ordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Id.* Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. Jack H. Winslow Farms, Inc. v. Dedmon, 171 N.C.App. 754, 756, 615 S.E.2d 41, 43, **[*18]** *rev. denied*, *360 N.C. 64, 621 S.E.2d 625 (2005)*. "When the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury." Everts v. Parkinson, 147 N.C.App. 315, 319, 555 S.E.2d 667, 670 (2001). Here, at a minimum there is a jury issue in this regard. [2]

[*19]

CONCLUSION

Plaintiffs respectfully request that Defendants' motion to dismiss judgment be denied.

CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to BCR 15 that the word count of this brief is less than 7,500 words. [3,447]

This the 2nd day of September, 2008.

/s/ John Hughes, Esq.
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 2nd day of September, 2008, served a copy of the foregoing

[2] Plaintiff Mary Carmon purchased her vehicle from Defendant Alan Vester Nissan, Inc. d/b/a Alan Vester Automotive of Greenville on April 24, 2004. Ms. Carmon also received later two flyers from Defendants Alan Vester Nissan, Inc. and Alan Vester Enterprises, LLC respectively. As to Ms. Carmon, Plaintiffs agree that absent a finding that Defendants cannot now raise the subject defenses, her individual claim with regard to her vehicle purchase where she did not receive a gift or credit card, falls outside of the limitations period as to the sureties, since she was aware of the fraud and complained to the Attorney General not long after the purchase. As to her claim based on the mailers, since that claim is brought under the FCRA and is not tied to vehicle purchases, the claim does not invoke the Dealer Act or surety bonds.

document upon all counsel of record as follows.

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