

STATE OF NORTH CAROLINA
DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06 CvS 0948

AZALEA GARDEN BOARD & CARE, INC.,

Plaintiff,

v.

MEREDITH DODSON VANHOY, Personal
Representative of the Estate of Ricky C.
Dodson, Deceased; LARRY S. GIBSON,
NINA G. GIBSON, DANIEL W. TUTTLE;
TIMOTHY D. SMITH; and HARVEY
ALLEN, JR.,

Defendants.

**REPLY BRIEF OF MEREDITH DODSON
TO PLAINTIFF'S BRIEF IN
OPPOSITION TO MEREDITH
DODSON'S MOTION FOR SUMMARY
JUDGMENT**

Pursuant to local rule 15.7 of this court, defendant Meredith Dodson submits the following reply to plaintiff's response to her motion for summary judgment:

NATURE OF THE CASE AND MATTER BEFORE THE COURT

This case is before the court on Meredith Dodson's motion for summary judgment, limited to a request that the case be dismissed as a matter of law for plaintiff's failure to comply with the non-claim statute, N.C. Gen. Stat. § 28A-19-3, and the statute of limitations, N.C. Gen. Stat. 1-52. The nature of this case, its procedural history, and the facts of record to be considered by the court on this motion have been adequately developed by the parties in their previous submissions. Meredith Dodson has separately objected to all of the documents filed by plaintiff with a "Notice of Intent to Use Hearsay Evidence," other than brief deposition excerpts.

ARGUMENT

I. PLAINTIFF HAS FAILED TO CARRY ITS BURDEN TO SHOW COMPLIANCE WITH THE NON-CLAIM STATUTE, N.C. GEN. STAT. § 28A-19-3

In its brief, plaintiff did not argue that it complied with the non-claim statute, or that its non-compliance should be excused, but only that Meredith Dodson has not "irrefutably shown" that the limitations period of N.C. Gen. Stat. § 28A-19-3(a) bars Azalea Garden's claims"

In essence, plaintiff argues that Meredith Dodson has failed to prove a negative; that she could not possibly have “reasonably ascertained” that Azalea Garden had an unsatisfied claim against Ricky Dodson. Plaintiff’s argument assumes, without legal support, that defendant is obligated to show that under no set of facts could plaintiff possibly demonstrate that Meredith Dodson could have “reasonably ascertained” the existence of the claim. Plaintiff’s statement of the burden of proof is erroneous.

When a defendant pleads the statute of limitations, the plaintiff is obligated to come forward with proof that the litigation was filed within the applicable statute of limitations. *See, e.g., Horton v Carolina Medicorp Inc.*, 344 N.C. 133 at 136, 472 S.E.2d 778 at 780 (1996); *Little v Rose*, 285 N.C. 724 at 727, 208 S.E.2d 666 at 668 (1974) (both *Horton* and *Little* were decided in the context of a Rule 12 motion when the burden on the defendant is generally held to be higher; in this case, the matter is before the court on summary judgment). In this case, Meredith Dodson demonstrated, and plaintiff offered no evidence in opposition to, facts unequivocally demonstrating the application of the non-claim statute. Those facts are:

1. The contract, if breached at all, was breached on August 31, 1999;
2. The predecessor to this action was filed August 30, 2002;
3. The complaint was not served on Ricky Dodson; and the chain of summonses was not kept alive;
4. Ricky Dodson died October 23, 2000;
5. Vanhoy (Dodson) caused a general notice to creditors to be published for four consecutive weeks in March 2001;
6. Ms. Vanhoy (Dodson) had no knowledge that Azalea Garden had a claim against Ricky Dodson’s estate;
7. Azalea Garden provided no written notice of any claim to Meredith Dodson or to the Clerk of Superior Court before the bar date of June 8, 2001;
8. Neither Meredith Dodson nor Martha Peddrick had any knowledge of Azalea Garden’s claims until August 2003, when the action was finally served upon them.

See defendant's memorandum in support of its motion for summary judgment pp. 2-4 and materials cited therein.

The only competent evidence offered by plaintiff showed that Ricky Dodson, who signed all contract documents as a broker, rather than a principal, knew before he died that David Wagner and the group of buyers whom Ricky Dodson represented had a disagreement concerning the non-performance of the purchase and sale contract, and that the estate's attorney, Martha Peddrick, met on one occasion with Mr. Kean of BB&T in relation to the sale of the estate's interest in a separate facility that Ricky Dodson and Danny Tuttle owned, in Mocksville, North Carolina. Mr. Kean had the information concerning that facility in an entirely separate file. There was no evidence that Mr. Kean and Ms. Peddrick ever discussed anything concerning Azalea Garden's then unknown, and presumably unfiled, claim (Kean Depo., pp. 17-18). Last, on one occasion Dennis Maddox of Interstate Companies of America met with a paralegal at Martha Peddrick's office concerning the purchase of shares of Interstate Company of America (Maddox Depo., p. 24). There was no evidence that Mr. Maddox ever communicated with Meredith Dodson or that he communicated with either Ms. Dodson or Ms. Peddrick on any matter involving Azalea Garden (Maddox Depo.). Simply put, Azalea Garden offered no evidence contradicting Ms. Peddrick's and Ms. Dodson's affidavits that they knew nothing of Azalea Garden's claims, and offered no evidence showing that Ms. Dodson reasonably could have ascertained, upon Ricky Dodson's death in 2000, that Mr. David Wagner and Azalea Garden would assert almost two years later that Ricky Dodson (who was at all times shown on any documents as a "broker") was a "buyer" of a property for which a sale did not close in 1999. Plaintiff failed to supply the court with any evidence contradicting that provided by Ms. Dodson, and she is entitled to judgment as a matter of law because the plaintiff's claims are barred by the non-claim statute.¹ To hold otherwise would entirely frustrate the policy expressed by the non-

¹ As discussed in defendant's original brief, page 4, plaintiff formerly argued that its non-compliance with the non-claim statute was excused because it did not know Ricky Dodson had died. Apparently, plaintiff has now abandoned that argument.

claim statute: to promote the expeditious resolution of decedent's estates. The argument advanced by plaintiff would permit virtually all claims against estates to be instituted at any time within the statute of limitations, as extended by N.C. Gen. Stat. § 1-22, or to permit the timeliness of those claims to be determined by juries.

II. PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS, N.C. GEN. STAT. § 1-52

A. Ricky Dodson Never Signed Any Contract Document Under Seal.

In opposition to defendant's arguments based upon the statute of limitations, plaintiff correctly argues that its claim was not barred at the death of Ricky Dodson, and that it survived his death. The plaintiff then argued, incorrectly, that the applicable statute of limitations is ten years, based upon an assertion that the contract in question was a sealed instrument. The only contract asserted in plaintiff's complaint was that described in paragraphs 9, 11, 13, 14, and 17. The initial contract (dated May 5, 1999 and attached to the plaintiff's complaint as "plaintiff's exhibit 3") was not signed under seal, either by the purchasers (Smith and Gibson), the seller (Azalea Garden) or by the broker (Ricky Dodson). Addendum A to the contract, which was signed only by the purchasers (Smith and Gibson) and seller (Azalea Garden) was not signed under seal. The modification, Exhibit 12 to the complaint, and the document on which plaintiff sues, was signed only by Gibson and Smith (not under seal), Wagner for Azalea Garden (not under seal) and Ricky Dodson as a broker (not under seal).

The document upon which plaintiff relied, Exhibit "B" to the original contract, has no signature at all in any location, sealed or otherwise, by Ricky Dodson. Simply put, there was no evidence that Ricky Dodson ever signed any document under seal, and as argued by Timothy Smith (Smith's brief in support of his motion to dismiss) there is no evidence that the document upon which this action is brought, the contract modification, plaintiff's Exhibit 12, was executed under seal by any party.

B. The Substitution of the Estate in the Previous Action was Improper.

Plaintiff entirely misconstrued defendant's argument concerning the improper substitution of Meredith Dodson in 02 CVS 2522. Plaintiff's only response was a lengthy discussion of *Deutch v Fisher* which, as addressed in defendant's brief, was decided under a previous version of N.C. Rule of Civil Procedure 25(a). Plaintiff suggested that with the amendment of Rule 25(a), a supplemental pleading is no longer required. Plaintiff, however, failed to address the language of the amended Rule 25(a), which requires that a motion be presented to the court within the time specified for presentation of claims in N.C. Gen. Stat. 28A-19-3. The request to substitute the estate had to have been made by June 8, 2001 (the date specified in Ms. Vanhoy's general notice to creditors), and was not. In fact, the request to substitute the estate was not made until two years later.

Plaintiff is correct that the 1977 amendment to Rule 25 removed from Rule 25 language requiring notice to the personal representative of a request that they be substituted as a party-defendant in a pending action, but as recognized in *Dixon v Hill*, 174 N.C. App. 252, 620 S.E.2d 715, *disc. rev. denied*, 627 S.E.2d 619 (2006); *cert. denied* 126 S.Ct. 2972 (2006), action taken by a court adverse to the interest of the personal representative, without proper notice to the personal representative, is invalid. In *Dixon*, the Court of Appeals found that an order issued substituting an estate or personal representative in February 2000 was ineffective, when the personal representative did not at that time exist and had not been served, and thus, summary judgment motion ruled upon by the court after the purported substitution, and before the personal representative became involved, had to be reversed. Thus, although Rule 25 no longer requires prior notice of a motion to substitute to a personal representative, fundamental fairness, due process and North Carolina law still so require.

CONCLUSION

In opposing Meredith Dodson's motion for summary judgment, plaintiff misstates the relative burdens of the parties. Plaintiff suggests that Meredith Dodson must affirmatively exclude every possibility that she, or her attorney, could have learned of Ricky Dodson's

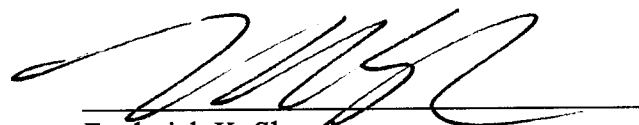
contacts with the Azalea Garden transaction, and that their denials, under oath, of any knowledge of the claims of Azalea Garden are somehow insufficient. Plaintiff offers two deposition excerpts that tend to show only that someone from estate counsel's office at one time spoke to someone else who might have had knowledge that the Azalea Garden transaction existed, and nothing more. Plaintiff has failed to show that there is any issue as any material fact, and defendant is entitled to judgment as a matter of law on all claims based on plaintiff's failure to comply with the non-claim statute, N.C. Gen. Stat. § 28A-19-3.

Plaintiff also argues that signatures by persons other than Ricky Dodson, to a document other than that sued upon by plaintiff, now render the agreement actually sued upon by plaintiff a contract "under seal" binding Ricky Dodson, therefore subject to the ten year statute of limitations. This, argues plaintiff, excuses plaintiff's failure to properly commence this action, to keep the chain of summonses alive, to properly substitute the estate, or to give the estate proper notice of the claims. Plaintiff's argument is neither supported by their pleadings, nor by the facts in this case.

Finally, plaintiff has offered no reason (apart from their argument that the N.C. Gen. Stat. § 28A-19-3 time limits does not bar their claim) to excuse their non-compliance with the provisions of Rule 25(a) of the North Carolina Rules of Civil Procedure, and North Carolina law.

For all of these reasons, judgment as a matter of law should be entered for Meredith Dodson and the estate of Ricky Dodson, on all claims asserted by the plaintiff in this action.

This the 20 day of September, 2007.



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CERTIFICATE OF COMPLIANCE

The signature of defendant Meredith Dodson's attorney below also certifies that, in compliance with the requirements of Rule 15.8 of *The General Rules of Practice and Procedure for the North Carolina Business Court*, the word count for the Reply Brief of Meredith Dodson to Plaintiff's Brief in Opposition to Meredith Dodson's Motion for Summary Judgment is less than 3,750 words as reported by the word processing program used to generate defendant Meredith Dodson's Reply Brief.

This the 20 day of September, 2007.



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CERTIFICATE OF SERVICE

I certify that the **REPLY BRIEF OF MEREDITH DODSON TO PLAINTIFF'S BRIEF IN OPPOSITION TO MEREDITH DODSON'S MOTION FOR SUMMARY JUDGMENT** was served upon the parties to this action by mailing a copy thereof by first-class, postage pre-paid mail to the following counsel of record:

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