No. _____ TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	From Mecklenburg County COA20-160-3

****

NOTICE OF APPEAL BASED ON DISSENT IN
NORTH CAROLINA COURT OF APPEALS
UNDER N.C. GEN. STAT. § 7A-30(2) & N.C. R. APP. P. 14

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Defendant Bank of America, N.A. hereby appeals to the Supreme Court of North Carolina from the Court of Appeals decision issued on 29 December 2022, entered with a dissent by the Hon. Chris Dillon.

The 29 December 2022 opinion and dissent by Judge Dillon are attached as EXHIBIT A. The 29 December 2022 opinion was issued after this Court, on 4 November 2022, vacated and remanded the prior decision of the Court of Appeals entered 5 October 2021, attached as EXHIBIT B. Bank of America appeals as a matter of right under N.C.G.S. § 7A-30(2) on the basis of the dissent in the 29 December 2022 opinion.

That dissent in the 29 December 2022 opinion by Judge Dillon—who also dissented from the 5 October 2021 opinion because he would have reaffirmed the unanimous panel opinion issued on 31 December 2020, attached as EXHIBIT C—was based on and embraces the following issues and premises, which Defendant will present to the Supreme Court for appellate review:

I. Did the Court of Appeals' 29 December 2022 majority err by holding that Plaintiffs, despite affirmatively pleading that Defendant wrongfully denied them loan modifications and then wrongfully foreclosed on their loans, could avoid the applicable statutes of limitation merely by alleging they were not "aware of their injury" until retaining counsel?

II. Did the Court of Appeals' unanimous 31 December 2020 opinion correctly hold that the doctrines of res judicata and collateral estoppel preclude Plaintiffs from asserting new claims premised on Defendant's allegedly wrongful loan modification denials after Plaintiffs' loans had already proceeded to completed foreclosures?

This the 24th day of January 2023.

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N.C. R. APP. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th January 2023 the foregoing **Notice of Appeal** was electronically filed and served upon each of the parties in this action by email and by depositing a copy, contained in a first-class, postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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EXHIBIT A

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-912

No. COA20-160-3

Filed 29 December 2022

Mecklenburg County, No. 18-CVS-8266

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs-Appellants,

v.

BANK OF AMERICA, N.A., Defendant-Appellee.

On remand from the Supreme Court of North Carolina, 2022-NCSC-117, vacating and remanding the decision of the Court of Appeals, 279 N.C. App. 684, 863 S.E.2d 326 (2021). Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 21 October 2021.

Robinson Elliott & Smith, by William C. Robinson, Dorothy M. Gooding, and Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellants.

McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg, and James W. McGarry, for defendant-appellee.

CARPENTER, Judge.

¶ 1 This case returned to us on remand from our Supreme Court to address whether the allegations made in Plaintiffs' complaint, if treated as true, are "sufficient to state a claim upon which relief can be granted under some legal theory." *Taylor v. Bank of Am., N.A.*, 2022-NCSC-117, ¶ 9 (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). After conducting a thorough *de novo* review of the record, we hold the trial court erred when granting Defendant's 12(b)(6) motion.

I. Facts & Procedural Background

¶ 2 We adopt the facts and procedural history of this case as described in this Court's previous opinion, while adding additional key facts considered in our *de novo* review. *See Taylor v. Bank of Am., N.A.*, 279 N.C. App. 684, 2021-NCCOA-556.

¶ 3 On 1 May 2018, eleven Plaintiffs initiated the underlying action against Defendant. On 13 March 2019, an amended complaint was filed after two of the initial Plaintiffs withdrew from the action, leaving nine Plaintiffs remaining. The remaining nine Plaintiffs are domiciled in North Carolina, Wisconsin, Michigan, Arizona, California, and Nevada.

¶ 4 Each Plaintiff sought a modification of their mortgage through Defendant's Home Affordable Modification Program ("HAMP"). Each Plaintiff communicated with loan representatives employed by Defendant regarding their respective HAMP qualification and application.

¶ 5 According to sworn declarations made by its employees, Defendant employed a common strategy of delaying HAMP applications by "claiming that documents were incomplete or missing when they were not, or simply claiming the file was 'under review' when it was not." Defendant's employees were instructed to "inform homeowners that modification documents were not received on time, not received at all, or that documents were missing, even when, in fact, all documents were received in full and on time." Defendant's employees "witnessed employees and managers change and falsify information in the systems of record." One employee of Defendant stated that he was instructed to participate in a "blitz," during which his team "would decline thousands of modification files . . . for no reason other than the documents were more than 60 days old."

¶ 6 Each Plaintiff had their mortgage foreclosed after applying for and being denied a HAMP modification. Plaintiffs allege they are victims of a fraudulent scheme exacted by Defendant.

II. Standard of Review

¶ 7 The sole issue we consider is whether the trial court erred by granting Defendant's motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. "Our review of the grant of a motion to dismiss under Rule 12(b)(6) . . . is de novo." *Bridges*, 366 N.C. at 541, 742 S.E.2d at 796; *See Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 75, 752 S.E.2d 661, 663 (2013)

(stating that the court should liberally construe the legal theory under which the requested relief was made.). "We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.'" *Id.* at 541, 742 S.E.2d at 796 (quoting *Coley v. State*, 360 N.C. 593, 631 S.E.2d 121, 123 (2006)).

III. Analysis

¶ 8 At the heart of the underlying matter is whether Plaintiffs' claims are barred by the statute of limitations. In North Carolina a cause of action for a fraud claim must be brought within three years and "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2021). Discovery means either the actual discovery, or when the fraud should have been discovered in the exercise of "reasonable diligence under the circumstances." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (citing *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965)). Generally, the appropriate date of discovery of "alleged fraud or negligence—or whether [the plaintiff] should have discovered it earlier through reasonable diligence—is a question of fact for a jury, not an appellate court." *Piles v. Allstate Insurance Co.*, 187 N.C. App. 399, 405, 653 S.E.2d 181, 186 (2007); *see Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001) (reasoning that

when "evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury.").

¶ 9 Here, we hold the trial court erred in granting Defendant's 12(b)(6) motion. Upon review of Plaintiffs' complaint, taking the allegations therein as true, we determine that there are sufficient facts alleged to suggest Plaintiffs remained unaware of Defendant's alleged fraudulent scheme for many years and that they each suffered a resulting harm. Further, the determination of *when* Plaintiffs became aware of the fraud will be dispositive of whether the applicable statute of limitations had expired prior to Plaintiffs bringing their claims. For that reason, we hold that Plaintiffs' complaint sufficiently alleged enough information to withstand a motion to dismiss for failure to state a claim. *See* N.C. R. Civ. P. 12(b)(6).

¶ 10 The dissent states the statute of limitations ceased to be tolled at the time Plaintiffs' homes were foreclosed. This issue may be appropriate to address on a subsequent motion for summary judgment. The determination of *when* Plaintiffs became aware of the alleged fraud may also be appropriate to consider at a later procedural stage—but has no bearing at this juncture—as Plaintiffs have sufficiently pleaded a cause of action, treating all pled allegations as true, to survive dismissal pursuant to N.C. R. Civ. P. 12(b)(6). *See Bridges*, 366 N.C. at 541, 742 S.E.2d at 796. As such, we hold the trial court erred in granting Defendant's 12(b)(6) motion.

IV. Conclusion

¶ 11 We conclude the trial court erred by granting Defendant's 12(b)(6) motion to dismiss. Thus, we reverse the trial court's dismissal of Plaintiffs' complaint and remand for further proceedings.

REMANDED.

Judge JACKSON concurs.

Judge DILLON dissents by separate opinion.

No. COA20-160-3 – *Taylor v. Bank of America, N.A.*

DILLON, Judge, dissenting.

¶ 12 I dissent for the reasoning stated in my dissent in *Taylor v. Bank of America*, 279 N.C. App. 684, 863 S.E.2d 326 (2021) (Dillon, J., dissenting). As I stated in that dissent, I conclude that the statute of limitations ceased to be tolled, if at all, by the time each plaintiff became aware of his/her injury, that is, when his/her home was foreclosed upon. And since the complaint alleges when the foreclosures took place and that they took place more than three years before the complaint was filed, I conclude that dismissal pursuant to Rule 12(b)(6) was appropriate.

EXHIBIT B

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-556

No. COA20-160-2

Filed 5 October 2021

Mecklenburg County, No. 18-CVS-8266

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs-Appellants,

v.

BANK OF AMERICA, N.A., Defendant-Appellee.

Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard originally in the Court of Appeals 21 October 2020, with an unpublished opinion filed 31 December 2020. Plaintiffs' petition for rehearing was granted 10 March 2021. This opinion supersedes and replaces the 31 December 2020 opinion previously filed in this matter.

Robinson Elliott & Smith, by William C. Robinson, Dorothy M. Gooding, and Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellants.

McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg, and James W. McGarry, for defendant-appellee.

CARPENTER, Judge.

¶ 1 This matter was previously heard by this Court on 21 October 2020, and a decision was rendered in *Taylor v. Bank of America, N.A.*, __ N.C. App. __, 852 S.E.2d 447 (2020). Pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, this Court granted plaintiffs' petition for rehearing to consider whether the trial court erred in granting defendant's motion to dismiss and denying plaintiffs' motion for partial summary judgment. We reverse and remand for further findings of fact and conclusions of law.

I. Factual and Procedural Background

¶ 2 Plaintiffs Chester Taylor III, Ronda and Brian Warlick, Lori Mendez, Lori Martinez, Crystal Price, Jeanette and Andrew Aleshire, Marquita Perry, Whitney Whiteside, Kimberly Stephan, Keith Peacock, and Zelmon McBride (collectively, "Plaintiffs")[1] are homeowners residing in various states, including North Carolina,[2] who each sought modification to their home mortgages under the Home Affordable Modification Program ("HAMP"). Defendant Bank of America, N.A. ("Defendant") is a Delaware Corporation with its principal place of business in Charlotte, North

[1] Plaintiffs Crystal Price and Whitney Whiteside were part of the original suit but appear not to be part of this appeal, as their names are not listed on the Appellants' brief.

[2] Chester Taylor is the only Plaintiff who is alleged to reside in North Carolina. Ronda and Brian Warlick, Lisa Mendez, Lori Martinez, and Keith Peacock live in California. Jeanette and Andrew Aleshire live in Wisconsin, but their mortgage was on a home in Minnesota. Marquita Perry lives in Arizona. Kimberly Stephen lives in Michigan. Zelmon McBride lives in Nevada.

Carolina.

¶ 3 Multiple lawsuits, including one brought by the Federal Government and forty-nine states, were subsequently filed against Defendant for the fraudulent HAMP scheme between 2011 and 2014. A multi-district litigation case, *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, M.D.L. No. 10-2193-RWZ, was filed in 2011 and included class action cases from across the country. The Massachusetts District Court denied class certification of the multi-district case concluding, while the claims may be meritorious, "they rest on so many individual factual questions that they cannot sensibly be adjudicated on a classwide basis." Thus, individual borrowers would have to file individual lawsuits to recover damages resulting from Defendant's fraudulent practices regarding HAMP loan modifications.

¶ 4 On 1 May 2018, Plaintiffs brought this joint underlying action against Defendant, with each Plaintiff outlining their own individual experience with Defendant between the years 2009 and 2014. On 11 April 2019, Defendant filed a motion to dismiss the amended complaint or, in the alternative, to strike impertinent allegations and sever misjoined claims. The motion noted, in pertinent part, that the complaint on its face was barred by the statute of limitations, and the claims were "subject to dismissal under the doctrines of *res judicata* and/or collateral estoppel because the issues involved in this litigation have already been litigated[.]"

¶ 5 On 3 October 2019, the trial court granted Defendant's motion to dismiss. In a short order, the court concluded Plaintiffs' claims were "barred by the applicable statutes of limitation," and "the claims of all Plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel."[3] On 31 December 2020, this Court affirmed the decision of the trial court. This Court granted Plaintiffs' petition for rehearing on 10 March 2021.

II. Jurisdiction

¶ 6 Appeal lies in this Court as a matter of right pursuant to N.C. Gen. Stat. § 7A-27(b)(3) (2019).

III. Issue

[3] At the time of this action, there were 13 other pending actions brought on the basis of very similar complaints that raised essentially identical claims that were pending in this case. *See* Aiello, Jetta, et al. v. Bank of America, N.A., 18-CVS-14833; Allred, Amy, et al. v. Bank of America, N.A., 18-CVS-20373; Beams, Lisa, et al. v. Bank of America, N.A., 18-CVS-20374; Bizzell, Gwendaline, et al. v. Bank of America, N.A., 18-CVS-14835; Bowman, Wanda, et al. v. Bank of America, N.A., 18-CVS-14834; Gotts, Erin, et al. v. Bank of America, N.A., 18-CVS-14739; Jackson, Darlene, et al. v. Bank of America, N.A., 18-CVS-16675; Jobe, Kelly, et al. v. Bank of America, N.A., 18-CVS-21455; Martin, Cynthia, et al. v. Bank of America, N.A., 18-CVS-14738; Reardon, Christopher and Larissa, et al. v. Bank of America, N.A., 18-CVS-16676; Smith, Melba, et al. v. Bank of America, N.A., 18-CVS-20375; Taylor III, Chester, et al. v. Bank of America, N.A., 18-CVS-8266; Tyler III, Charles, et al. v. Bank of America, N.A., 18-CVS-22406. The trial court heard background information about the above-titled action as well as the other cases referred to here. The parties in these cases agreed that this case would serve as the first case for briefing on Defendant's motion to dismiss and related motions, so the trial court order applied to Plaintiffs for this case and all pending cases. Discovery in all 13 pending cases was stayed pending the trial court's disposition of the Taylor motion.

¶ 7 The sole issue on appeal is whether the trial court erred in granting Defendant's motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the claims were barred under the statute of limitations, and the claims were precluded based on *res judicata* and collateral estoppel.

IV. Standard of Review

¶ 8 "Our review of the grant of a motion to dismiss under Rule 12(b)(6) . . . is de novo." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). "We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.'" *Id.* at 541, 742 S.E.2d at 796 (quoting *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006)).

V. Discussion

¶ 9 Here, the trial court's order granting Defendant's motion to dismiss stated, in pertinent part:

> THIS MATTER came on for hearing before the undersigned, who has been assigned by the Chief Justice to preside over this exceptional case pursuant to Rule 2.1 of the General Rules of Practice . . . The Court having reviewed the record, including the Complaint, motions, briefs and attached exhibits, along with cited case law, and having heard arguments of counsel for the parties on May 29, 2019; and the Court having concluded based on the foregoing that all Plaintiffs' claims are barred by the applicable statute of limitation, and further that the claims of all Plaintiffs who were parties to foreclosure proceedings are barred by the doctrines of *res judicata* and collateral estoppel[.]

The order appealed from does not state the specific grounds for the trial court's grant of Defendant's motion to dismiss. Nor does the transcript reveal any findings made by the trial court. There is no indication that the trial court did a choice of law analysis, that it considered facts only within the amended complaint, or that it was appropriate to consider Plaintiffs' claims together when the underlying facts established a failed class action based on "so many individual factual questions." The order granting Defendant's motion to dismiss does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether the trial court correctly granted Defendant's motion.

¶ 10 As we cannot determine the reason behind the grant, we cannot conduct a meaningful review of the trial court's conclusions of law, and we must accordingly reverse and remand the order for further findings. "On remand, the trial court may hear evidence and further argument to the extent it determines in its discretion that either or both may be necessary and appropriate." *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006). Thereafter, the court is to enter a new order containing findings that sustain its determination regarding the validity and applicability of the statute of limitations or *res judicata* determinations. However, because this case is at the pleadings stage, the findings must not include facts outside the four corners of the amended complaint. *See Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775,

796 S.E.2d 120, 123 (2017) (noting it is well established that at the motion to dismiss stage, the trial court and this Court "may not consider evidence outside the four corners of the complaint[.]").

VI. Conclusion

¶ 11 For the foregoing reasons, the trial court's grant of Defendant's motion to dismiss is reversed and the matter remanded for further factual findings and conclusions of law in accordance with this opinion.

REVERSED AND REMANDED.

Judge JACKSON concurs.

Judge DILLON dissents in a separate opinion.

Report per Rule 30(e).

DILLON, Judge, dissenting.

¶ 12 I was on the panel which issued the original opinion in this appeal, reported at *Taylor v. Bank of America, N.A.*, ___ N.C. App. ___, 852 S.E.2d 447 (2020). I continue to believe that Judge Bell got it right. My vote continues to be to affirm the order of the trial court. Accordingly, I dissent.

¶ 13 I write separately to address the statute of limitations issue.

¶ 14 Judge Bell dismissed the complaint, in part, based on her conclusion that the allegations show the claims contained therein were time-barred. *See Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (holding that a statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion when apparent from "the face of the complaint" that the action was not timely filed).

¶ 15 In their complaint, Plaintiffs essentially allege that they suffered harm when Defendant fraudulently refused to modify their respective mortgages under the Home Affordable Modification Program ("HAMP") though they each qualified for a loan modification under HAMP. However, they did not file the complaint until 2018, more than three years after they were denied their modifications.

¶ 16 Plaintiffs, though, argue that the statute of limitations was tolled until they could have reasonably discovered the fraud. However, Plaintiffs admit in their complaint that the complaint was not filed until more than three years after their respective homes were foreclosed upon; that is, without Defendant modifying their respective mortgages.

¶ 17 I conclude that the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place. By that time, Plaintiffs became aware that Defendant would not be modifying their respective loans. Indeed, our Supreme Court has held in a case involving fraud and breach of contract claims that the statute begins to run at least by the time the plaintiff becomes aware of the injury. *See Christenbury Eye v. Medflow*, 370 N.C. 1, 9, 802 S.E.2d 888, 894 (2017)*; see also United States v. Kubrick*, 444 U.S. 111, 123 (1979) (recognizing that the discovery rule applies to when the injury is known, not when the legal rights are known, and that the discovery rule includes the duty to seek "advice . . . as to whether he has been legally wrong").

¶ 18 It is evident from the face of the complaint that Plaintiffs did not bring suit until more than three years after they became aware of their injury—when their respective properties were foreclosed upon. They learned they might have a legal claim for fraud only after they had consulted attorneys years later. They should have sought legal advice once they suffered their injury. They did not. Accordingly, I conclude that Judge Bell ruled correctly, noting that her dismissal orders are consistent with a number of dismissal orders from across the country involving similar claims, as referenced in Defendant's brief. I vote to affirm Judge Bell's order.

EXHIBIT C

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-160

Filed: 31 December 2020

Mecklenburg County, No. 18 CVS 8266

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs,

v.

BANK OF AMERICA, N.A., Defendant.

Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2020.

Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding, Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellant.

McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg and James W. McGarry, for defendant-appellee.

YOUNG, Judge.

Where plaintiffs' complaint, on its face, demonstrated that the statute of limitations had expired, and failed to demonstrate a basis for tolling the statute, the

trial court did not err in granting defendant's motion to dismiss on the basis of the statute of limitations. Where at least some of plaintiffs' allegations stemmed from purportedly wrongful foreclosures, the trial court did not err in granting defendant's motion to dismiss such claims on the bases of *res judicata* and collateral estoppel. Plaintiffs failed to preserve the issue of amending their pleadings with timely motion or objection, and we therefore decline to address such issue. We affirm the order of the trial court granting defendant's motion to dismiss and denying plaintiffs' motion for partial summary judgment.

I. Factual and Procedural Background

On 1 May 2018, Chester Taylor III, Ronda and Brian Warlick, Lori Mendez, Lori Martinez, Crystal Price, Jeanette and Andrew Aleshire, Marquita Perry, Whitney Whiteside, Kimberly Stephan, Keith Peacock, and Zelmon McBride (collectively, plaintiffs) brought the underlying action against Bank of America, N.A. (defendant). In the complaint, each plaintiff outlined their own individual experience with defendant, through which defendant allegedly enacted a "fraudulent scheme" on homeowners seeking Home Affordable Modification Program (HAMP) modifications to their mortgages. Under HAMP, homeowners who agreed to participate in the program were offered the opportunity to modify their home mortgage debt. Plaintiffs alleged that defendant secretly formed a scheme to preclude eligible applicants, such as plaintiffs, from receiving permanent HAMP modifications. Plaintiffs further

alleged that the running of any statute of limitations was tolled by defendants' fraudulent concealment of their business practices. Plaintiffs alleged that they suffered damages consisting of the time and money spent on filing multiple copies of required documents with defendant, and the ultimate foreclosures of their homes when their HAMP modifications were denied. Plaintiffs raised claims for common law fraud, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, and unfair and deceptive trade practices. Plaintiffs additionally sought punitive damages. On 13 March 2019, plaintiffs filed an amended complaint, alleging common law fraud, fraudulent concealment, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, unfair and deceptive trade practices, and negligence, and seeking punitive damages.

On 11 April 2019, defendant filed a motion to dismiss the amended complaint or, in the alternative, to strike impertinent allegations and sever misjoined claims. The motion noted that while the complaint listed separate factual allegations pertinent to each plaintiff, the actual claims did not plead with particularity each plaintiff's alleged harm; that the complaint failed to show actual false statements made by defendant; that the complaint on its face was barred by the statute of limitations; that the complaint was barred by the doctrines of *res judicata* and collateral estoppel as these issues had already been litigated in foreclosure proceedings; and that the complaint included allegations copied from filings in

another lawsuit. On 12 April 2019, plaintiffs filed a motion for partial summary judgment, alleging that courts had previously entered judgments against defendant for defendant's misconduct, and therefore that the doctrines of *res judicata* and collateral estoppel precluded relitigation of the issue of defendant's fraud.

On 3 October 2019, the trial court entered an order on defendant's motion to dismiss or strike and plaintiffs' motion for partial summary judgment. The court concluded that plaintiff's claims were barred by the applicable statutes of limitation, and that the claims of all plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel. Accordingly, the court granted defendant's motion to dismiss, and denied plaintiffs' motion for partial summary judgment.

Plaintiffs appeal.

II. Motion to Dismiss

In their first and second arguments, plaintiffs contend that the trial court erred in granting defendant's motion to dismiss on the bases of the statute of limitations and *res judicata* and collateral estoppel. We disagree.

A. Standard of Review

"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).

B. Statute of Limitations

In its order, the trial court held that plaintiffs' claims were barred by the applicable statute of limitations. On appeal, plaintiffs contend that this was error.

From the face of plaintiffs' amended complaint, we can derive the following facts: The HAMP program was implemented in March of 2009; the federal government sued defendant, resulting in a consent judgment in April of 2012 and a settlement in August of 2014; and a multi-district class action was filed in 2011, although ultimately dismissed. Plaintiffs alleged harms ranging from 2009 through 2014, but all asserted that they "did not know" and "could not have reasonably discovered" that they had actionable claims until retaining counsel in 2016 and 2017.

As a preliminary matter, we note that multiple plaintiffs are residents of states other than North Carolina and suffered their purported harms elsewhere. Pursuant to North Carolina law, the applicable statutes of limitations for these claims are those which apply in those states, not that of North Carolina. *See e.g. United Virginia Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 321, 339 S.E.2d 90, 94 (1986) (holding that the substantive law of the state where the last act occurred giving rise to the purported injury governed the alleged unfair and deceptive trade practices action).

Even assuming *arguendo* that North Carolina's statute of limitations applies to these claims, plaintiffs' complaint fails on its face. The applicable statute of limitations for relief on the grounds of fraud or mistake is three years from discovery of the fraud or mistake. N.C. Gen. Stat. § 1-52(9) (2019). This Court has held that "discovery" means "either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003).

Plaintiffs contend that whether a plaintiff should have discovered fraud in the exercise of due diligence is a question of fact for a jury. It is true that this is ordinarily the case. However, that truism comes with a caveat. This Court has held that "[w]hether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury *when the evidence is not conclusive or is conflicting*." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976) (emphasis added). When the evidence is not in dispute, our Courts have been able to address this issue as a matter of law. *See Darsie*, 161 N.C. App. at 548, 589 S.E.2d at 397 (holding that "where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the fraud but failed to do so, the absence of reasonable diligence is established as a matter of law").

Plaintiffs' claims all allege roughly the same set of facts: that they applied for HAMP modification, that they were asked to submit paperwork, that they were asked to resubmit paperwork, that they were asked to make trial payments after the trial payment period had concluded, and that they were denied relief after believing that they had done everything required of them. These issues ranged from 2009 through 2014. They all claim that they did not realize that these were actionable harms until speaking to attorneys in 2017. Yet by 2011, as acknowledged in plaintiffs' complaint, defendant was already defending lawsuits for its practices.

It is clear, from the face of the complaint, that plaintiffs knew something was wrong with their applications at the time. It is likewise clear that, had plaintiffs engaged in some simple research, they would have heard about the ongoing litigation involving defendant's business practices. "[O]ur courts have determined that a plaintiff cannot simply ignore facts which should be obvious to him or would be readily discoverable upon reasonable inquiry." *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 161-62, 665 S.E.2d 147, 151 (2008).

Plaintiffs contend that defendant's fraud prevented them from learning that something was amiss, and therefore precluded their duty to inquire. It is true that, in a confidential relationship, "when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting or discovering the fraud, he is under no duty to make inquiry until something occurs to excite his

suspicions." *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 208 (1951) (citation and quotation marks omitted). However, plaintiffs' complaint does not allege that defendant in any way prevented plaintiffs from learning the truth. Taking plaintiffs' complaint as true, defendant merely insisted that plaintiffs' HAMP applications were proceeding, but by 2014 denied them all. This did not preclude plaintiffs from taking prompt action in 2014, or indeed anytime before 2017. It did not preclude plaintiffs from discovering defendant's ongoing litigation.

It is clear that plaintiffs bore a duty to inquire into the business practices which caused them concern. However, they did not file their complaint until 2018. Even if we were to give plaintiffs the benefit of the doubt and extend the statute of limitations from the last possible date of their interactions with defendant, that happened in 2014. That means that plaintiffs had until 2017 to file their complaint. They did not, and thus ran afoul of the statute of limitations.

We therefore hold that the trial court did not err in granting defendant's motion to dismiss on the basis of the statute of limitations.

C. *Res Judicata* and Collateral Estoppel

The trial court also held that the claims of all plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel. This follows the logic that those proceedings would have already litigated

plaintiffs' rights as to the properties that were foreclosed as a result of defendant's purported fraud. On appeal, plaintiffs contend that this was error.

"The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are companion doctrines which have been developed by the Courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999) (citation and quotation marks omitted).

> Under the doctrine of res judicata or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996); *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). The doctrine prevents the relitigation of "all matters ... that were or should have been adjudicated in the prior action." *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556. Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. *McInnis*, 318 N.C. at 433-34, 349 S.E.2d at 560; *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001), *aff'd per curiam*, 355 N.C. 485, 562 S.E.2d 422 (2002). Whereas res judicata estops a party or its privy from bringing a subsequent action based on the "same claim" as that litigated in an earlier action, collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent

> action is based on an entirely different claim.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

As a preliminary matter, plaintiffs argue that the trial court erred in applying *res judicata* and collateral estoppel to those plaintiffs who went through a non-judicial foreclosure proceeding. However, as this matter was not raised before the trial court, it was not preserved, and we will not consider it for the first time on appeal. N.C.R. App. P. 10(a)(1).

Plaintiffs further allege that there is not an identity between the foreclosure claims and the current litigation. Plaintiffs note that those were claims where plaintiffs' properties were foreclosed, whereas the instant litigation seeks relief for defendant's fraud.

However, again viewing the complaint on its face, while it is true plaintiffs sought damages for "the costs of sending their HAMP applications and financial documents" and "the loss of time" from doing same, it is clear that the bulk of their damages come from "the loss of their homes and the equity in those homes[.]" Moreover, in their factual allegations of wrongdoing, plaintiffs include allegations that defendant "committed fraud in the discharge of its foreclosure procedures[,]" resulting in "loss of homes due to improper, unlawful, or undocumented foreclosures." It is therefore abundantly clear that at least some portion of plaintiffs' complaint is the allegation that defendant's fraud resulted in plaintiffs' foreclosure.

Our Supreme Court has held that "subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*." *Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993). Even assuming *arguendo* that some portions of plaintiffs' complaint allege conduct independent of and apart from the foreclosure of plaintiffs' properties, it is clear that some portion of the complaint – a significant portion – is premised upon the notion that the foreclosures themselves were wrongful. Repackaging that allegation as a claim for fraud is nonetheless prohibited under the doctrines of *res judicata* and collateral estoppel. Accordingly, we hold that any portions of plaintiffs' complaint alleging that they were wrongfully foreclosed upon were barred.

For this reason, we hold that the trial court did not err in granting defendant's motion to dismiss on the bases of *res judicata* and collateral estoppel.

III. Motion to Amend

In their third argument, plaintiffs contend that the trial court erred in dismissing the complaint without first granting plaintiffs leave to amend. We hold that this error is unpreserved, and dismiss such argument.

Plaintiffs contend that Rule 15(a) of the North Carolina Rules of Civil Procedure states that leave to amend shall be given when justice so requires. We acknowledge that this is so; the Rules provide that a party may amend his pleading

once as a matter of course before responsive pleadings are served, or any time within 30 days; that he may amend his pleading by leave of the court or by written consent of the adverse party; and that "leave shall be freely given when justice so requires." N.C.R. Civ. P. 15(a).

However, in the instant case, plaintiffs contend that the trial court "erred in dismissing [plaintiffs'] claims with prejudice, without giving an additional opportunity to amend their complaint." What plaintiffs do not contend, and what the record does not show, is that plaintiffs filed a motion to amend the complaint after this dismissal was announced. While the Rules of Civil Procedure are clear, the Rules of Appellate Procedure are equally clear:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1).

Plaintiffs failed to make a timely motion to amend their complaint. As such, this issue is not preserved for appeal.

Even had the issue been so preserved, however, plaintiffs could show no error. This Court has held that "our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion." *Delta Envtl.*

Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999). This Court has further held that "[r]ulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court; that discretion is clearly not abused when granting the motion would be a futile gesture." *Lee v. Keck*, 68 N.C. App. 320, 326, 315 S.E.2d 323, 328 (1984).

As we have held above, plaintiffs' claims were barred by the statute of limitations. As such, amendment of plaintiffs' complaint would have been a futile gesture; no change to their factual allegations would alter the legal bar of the statute of limitations. Even had plaintiffs properly raised and preserved the issue of amending the pleadings, the trial court would not have abused its discretion in denying such a motion.

IV. Conclusion

Plaintiffs' complaint, on its face, showed the span of time between plaintiffs' reasonable discovery of their cause of action and the filing of the complaint. The undisputed evidence shows no basis for plaintiffs' allegation that they were somehow fraudulently prevented from discovering their harm prior to the expiration of the statute of limitations. Accordingly, we hold that the trial court did not err in granting defendant's motion to dismiss on that basis. Moreover, plaintiffs' complaint clearly attempts, at least to some degree, to relitigate the issues of plaintiffs' respective foreclosures. Inasmuch as those have already been litigated and settled, the trial

court did not err in granting defendant's motion to dismiss on the basis of *res judicata* and collateral estoppel. And although we decline to address the issue of amending the pleadings as such issue is unpreserved, we note in dicta that the trial court would not have abused its discretion in denying such a motion.

AFFIRMED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).