

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN A. GARY,

Plaintiff-Appellant,

v

COMCAST ENTERTAINMENT GROUP, E!
NETWORKS PRODUCTIONS, L.L.C.,
HARVETTE WILLIAMS, SOUTHFIELD
POLICE, CITY OF SOUTHFIELD, and
OAKLAND COUNTY,

Defendants-Appellees,

and

DALE BROWN,

Defendant.

UNPUBLISHED

August 23, 2012

No. 304720

Oakland Circuit Court

LC No. 2011-118563-CZ

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted summary disposition to defendants. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Defendant E! Networks Productions, LLC (hereafter "E! Networks") featured plaintiff on its television program *E! Investigates: Stalkers*. Plaintiff does not dispute that the program first aired on September 9, 2009, but plaintiff claims that he did not view the program until October 1, 2009. On September 30, 2010, plaintiff sued all of the named defendants¹ for defamation on the

¹ Plaintiff sued Comcast Entertainment Group, which is not a legal entity or an official name that another entity uses to conduct business. The correct legal name of the party plaintiff intended to sue is E! Networks Productions, L.L.C.

basis of statements made on the program. E! Networks moved for summary disposition pursuant to MCR 2.116(C)(7) on the ground that the statute of limitations bars plaintiff's claim. The other defendants joined E! Networks' motion, while also raising additional grounds for summary disposition. Plaintiff moved for leave to amend his complaint and also for the trial court to take judicial notice of facts pursuant to MRE 201.

On June 1, 2011, following a summary disposition hearing, the trial court entered an order that granted summary disposition to defendants because, among other reasons, the statute of limitations bars his claim. On June 3, 2011, the trial court entered an order denying as futile plaintiff's motion to amend his complaint and entered a separate order denying as moot his motion to take judicial notice.

II. DISCUSSION

A. STATUTE OF LIMITATIONS

Plaintiff argues that the trial court erred by granting summary disposition to defendants. "We review summary dispositions *de novo*." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). Summary disposition is appropriate under MCR 2.116(C)(7) if the claim is barred by the applicable statute of limitations. *Id.* "In reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations and offers supporting documentation." *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006).

A defamation claim has a one-year statute of limitations period under MCL 600.5805(1) and (9). *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). Plaintiff does not dispute that the program first aired on September 9, 2009, or that he filed his claim on September 20, 2010. Instead, plaintiff argues that the statute of limitations did not accrue until October 1, 2009, which was the date on which plaintiff first viewed the program, i.e., when he first discovered the alleged defamation. However, absent a statutory exception, a defamation claim accrues on the day on which the alleged defamation first occurred, regardless of when plaintiff discovered the defamation or whether defendants subsequently republished the same defamatory statements.

A defamation claim accrues when "the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827.

MCL 600.5805(1) and (9) are clear and unambiguous. Our Legislature has clearly provided that a defamation claim must be filed within one year from the date the claim first accrued. The claim first accrued when the defamatory statement was made . . . *The statute does not contemplate extending the accrual of the claim on the basis of republication*, regardless of whether the republication was intended by the speaker. . . . [*Mitan*, 474 Mich at 24-25 (emphasis added).]

To the extent plaintiff suggests that his complaint was timely pursuant to MCL 600.5855, it is inapplicable. "MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed." *Trentadue v Gorton*, 479 Mich 378, 398; 738 NW2d 664 (2007) (emphasis omitted). Specifically, MCL 600.5855 provides:

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

It is clear from the trial court record, including plaintiff's own filings, that he was aware of E! Networks' intent to air the program and publish the alleged defamatory statements months before the program aired. There is nothing in the record, and plaintiff articulates no facts on appeal, to support a finding that defendants fraudulently concealed the existence of plaintiff's claim or the identity of any liable party. MCL 600.5855. Accordingly, MCL 600.5855 is inapplicable to the case and the one-year statute of limitations accrued from the date of the alleged wrong, September 9, 2009. *Mitan*, 474 Mich at 24-25; MCL 600.5827. The trial court correctly ruled that the statute of limitations bars his claim. *Nuculovic*, 287 Mich App at 61. Because this issue is dispositive, we need not consider defendants' alternate grounds for affirmance.

B. MOTION TO AMEND COMPLAINT

We disagree with plaintiff's claim that the trial court erred in denying his motion to amend his complaint.

We review a trial court's decision regarding a party's motion to amend its pleadings for an abuse of discretion. Thus, we defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. [*Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009).]

"MCR 2.118(A) sets forth the requirements for amendment of pleadings." *Id.* Specifically, MCR 2.118(A)(2) provides that "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2). However, "[o]ur Supreme Court has held that an amendment is not justified if it would be futile." *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003) (citation omitted). "A determination of futility must be based on the legal insufficiency of the claim on its face." *Id.* An amendment is also futile where the complaint remains barred the statute of limitations. See *Miller v Chapman Contracting*, 477 Mich 102, 106-108; 730 NW2d 462 (2007) (holding that the trial court correctly denied as futile the plaintiff's proposed amendment where the statute of limitations would bar the amended complaint). Here, the trial court denied plaintiff's motion on the ground of futility because the statute of limitations bars plaintiff's claim. Plaintiff's proposed amended complaint did not allege any facts that would impact the trial court's finding on that ground. Thus, the trial court properly denied plaintiff's motion to amend as futile. *Id.*; *Liggett Restaurant Group, Inc*, 260 Mich App at 138.

C. MOTION TO TAKE JUDICIAL NOTICE OF FACTS

Plaintiff also argues that the trial court erred by denying his motion to take judicial notice under MRE 201. “Taking judicial notice is discretionary. Thus, we review the trial court’s refusal to take judicial notice for an abuse of discretion.” *Freed v Salas*, 286 Mich App 300, 341; 780 NW2d 844 (2009) (citation omitted). “An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes.” *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011) (quotation omitted).²

The record reflects that the facts of which plaintiff wanted the trial court to take judicial notice were wholly unrelated to the issue of whether the statute of limitations bars plaintiff’s claim. The trial court denied plaintiff’s motion to take judicial notice because, in light of its determination that the statute of limitations barred plaintiff’s claim, the motion was moot. A trial court does not abuse its discretion if it denies a motion that is moot. See *Wiand v Wiand*, 205 Mich App 360, 369; 522 NW2d 132 (1994); *Nederlander v Nederlander*, 205 Mich App 123, 128; 517 NW2d 768 (1994). This ruling was well within the trial court’s sound discretion.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

² Although plaintiff’s statement of the question presented asserts that the trial court erred by denying his motion to take judicial notice pursuant to MRE 201 and MRE 202(b), his motion before the trial court only sought judicial notice under MRE 201 and requested that the trial court take judicial notice of various facts relating to his PPOs and trial proceedings.