

STATE OF MICHIGAN
COURT OF APPEALS

GEORGIA RUTH CRAWFORD-CAMBELL,
a/k/a GEORGIA C. CAMBELL,

UNPUBLISHED
July 26, 2011

Plaintiff-Appellee,

v

No. 296590
Wayne Circuit Court
LC No. 08-105546-CZ

GEORGE W. CRAWFORD, JR.,

Defendant-Appellant.

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

In this defamation action, defendant appeals as of right the order dismissing plaintiff's cause of action and denying his motion for sanctions. We affirm.

Defendant argues that the trial court erred in not finding plaintiff's defamation claim to be frivolous and in failing to impose sanctions against plaintiff. We disagree.

A trial court's determination whether a claim was frivolous will not be reversed on appeal unless it is clearly erroneous. *Attorney General v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

"Under Michigan law, a party that maintains a frivolous suit . . . is subject to sanctions under applicable statutes and court rules." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 404; 700 NW2d 432 (2005); see MCL 600.2591; MCR 2.114(E), (F); MCR 2.625(A)(2). A claim is "frivolous" if the party's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party, the party had no reasonable basis to believe that the facts underlying its legal position were true, or the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a).

To determine if a claim is frivolous, the claim must be evaluated at the time it was made. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). The court must examine "the particular facts and circumstances of the claim involved." *Id.* at 95. The purpose of imposing sanctions is "to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to

serve an improper purpose.” *Van Sickle*, 266 Mich App at 405 (quotation marks and citation omitted). However, sanctions should not be used to “penalize[] a party whose claim initially appears viable but later becomes unpersuasive.” *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991).

Defendant first argues that plaintiff’s defamation claim was frivolous because plaintiff had no reasonable basis to believe that the facts underlying the claim were true. Plaintiff submitted an affidavit and emails that supported the allegations that defendant made defamatory statements that were false. Specifically, plaintiff averred that her mother told her that defendant said that plaintiff stole money from her father. Based on the record, plaintiff had a reasonable basis to believe that the facts underlying her defamation claim were true.

Defendant next argues that plaintiff’s defamation claim was frivolous because the complaint was filed after the limitations period expired. The limitations period for a defamation claim is one year. MCL 600.5805(9); *Mitan v Campbell*, 474 Mich 21, 24-25; 706 NW2d 420 (2005). Plaintiff filed her complaint on March 3, 2008. Contrary to defendant’s assertion, the complaint did not allege that the alleged defamatory statements were made in December 2006.¹ In an affidavit, plaintiff averred that defendant made the alleged defamatory statements after her previous lawsuit against defendant was dismissed. The record establishes that the previous lawsuit was dismissed in May 2007. Plaintiff also specifically averred that defendant made the alleged defamatory statements in the year preceding the filing of the present lawsuit. In addition, plaintiff submitted an email from defendant, dated February 3, 2008, in which defendant told her that she needed to confess her “illegal acts.” Based on the record, the trial court did not clearly err in rejecting defendant’s argument that plaintiff’s defamation claim was frivolous because it was filed after the limitations period expired.²

Defendant also appears to argue that plaintiff’s defamation claim was frivolous because it was barred by either res judicata or collateral estoppel. A claim may be frivolous if barred by res judicata or collateral estoppel. See *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 221; 561 NW2d 854 (1997).

¹ The complaint alleged that in December 2006 plaintiff informed defendant of the joint bank accounts that she had opened. The complaint then alleged, in a separate paragraph, that defendant, after being informed of the whereabouts of the money belonging to the parties’ father, made defamatory statements about plaintiff.

² We note that defendant did not properly raise a statute of limitations defense below. Affirmative defenses, such as a statute of limitations defense, must be stated in a party’s responsive pleading. MCR 2.111(F)(3). “[A] defendant waives a statute of limitations defense by failing to raise it in his first responsive pleading.” *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008). A defendant may cure his failure to raise an affirmative defense in the first responsive pleading by amending the pleading. Here, defendant did not assert a statute of limitations defense in his first responsive pleading, which was his answer and affirmative defenses. Although he raised the defense in his motion for summary disposition and motion to dismiss, he never amended his first responsive pleading.

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to the facts or evidence in a prior action. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). “Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies.” *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). Res judicata does not apply if the facts change or new facts develop. *In re Hamlet (After Remand)*, 225 Mich App 505, 519; 571 NW2d 750 (1997), overruled in part on other grounds *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000).

Defendant asserts that res judicata bars plaintiff’s complaint because “the Complaint . . . had been previously dismissed with prejudice in a prior action” (emphasis deleted). In the prior action, plaintiff alleged that defendant fraudulently withdrew funds from their father’s bank accounts. Defendant counterclaimed, alleging that plaintiff engaged in several fraudulent transactions and converted thousands of dollars from their father’s bank accounts. The action concluded with the entry of a stipulated order of dismissal with prejudice. Here, the trial court found that plaintiff’s defamation claim was based on statements made after the dismissal of the prior action. This finding was not clearly erroneous. Plaintiff averred that defendant made the alleged defamatory statements after the prior action was dismissed, and submitted emails from defendant to support the averment. Accordingly, because plaintiff’s defamation claim was based on alleged statements made after the dismissal of the prior action, the trial court did not clearly err in rejecting defendant’s argument that plaintiff’s defamation claim was frivolous because it was barred by res judicata.

In addition, the trial court did not clearly err in rejecting defendant’s argument that plaintiff’s defamation claim was barred by collateral estoppel. Collateral estoppel “precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.” *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). Collateral estoppel “requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.” *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). Because the parties stipulated to the dismissal of the prior action, no issue was actually and necessarily litigated. Accordingly, the prior action did not bar plaintiff’s defamation claim.

Affirmed.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher