

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

CURTIS J. NEELEY, JR., MFA

PLAINTIFF

V.

CASE NO. 5:09-cv-05151

**NAMEMEDIA, INC.;
NETWORK SOLUTIONS, INC.;
and GOOGLE, INC.**

DEFENDANTS

REPLY TO RESPONSE OPPOSING MOTION FOR DISMISSAL DKT 104

Network Solutions, LLC (“Network Solutions”) files this Reply to Plaintiff’s Response Opposing Motion for Dismissal Dkt 104 (Doc #118). Plaintiff initially stated that he completely agreed with Network Solutions’ Motion. *See* Doc. # 112 at 3. He then filed a Response. While he fails to address most of the substantive points in Network Solutions’ Motion to Dismiss and Brief, he attempts to address the single issue of the statute of limitation, urging that an “equitable tolling” principle applies. He further attempts to introduce extraneous evidence and facts not alleged in his Complaint. As set forth herein, the Court should disregard these arguments and dismiss Plaintiff’s Complaint for the reasons set forth previously in this record.

First, Plaintiff argues the doctrine of equitable tolling as a basis for extending the time within which he was required to have filed his Complaint against Network Solutions. In doing so, he appears to contend that a statute of limitations does not commence running until a plaintiff discovers his claim. Plaintiff’s argument is contrary to the well-established law of Arkansas, pursuant to which courts have many times ruled

that the statute of limitations “begins to run, in the absence of concealment of the wrong, when the wrong occurs, not when it is discovered.” *Adams v. Wolf*, 73 Ark. App. 347, 43 S.W.3d 757 (2001), citing *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994); *see also, Paine v. Jefferson Nat’l Life Ins. Co.*, 2008 WL 4809824, *5-*6 (E.D.Ark. 2008) (citing other cases). Plaintiff does not allege that Network Solutions in any way fraudulently concealed any facts surrounding the expiration of the domain names at issue, which occurred in 2003.

Even if the Complaint were somehow read to imply fraudulent concealment (which it should not be), the standard in Arkansas for establishing such tolling is high. “There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the Plaintiff’s cause of action concealed or perpetrated in a way that it conceals itself.” *Chalmers v. Toyota Motor Sales, U.S.A., Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996). The Arkansas Supreme Court has held numerous times that mere allegations of concealment are not enough to toll the statute of limitations. If the Plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have knowledge of it. *Norris v. Bakker*, 320 Ark. 629, 633, 899 S.W. 2d 70, 72 (1995). Allegations of fraud must be made with particularity. *See* Fed. R. Civ. P. 9(b). Ignorance on the plaintiff’s part is not enough to suspend the statute of limitations. *Paine*, at *6. Plaintiff simply has not pled facts which would support a finding of equitable tolling.

Plaintiff significantly understates the standard for establishing equitable tolling in a federal court.¹ Network Solutions should not have to perform Plaintiff’s research for

¹ Plaintiff cites wikipedia.org for the proposition that he must merely establish due diligence. Wikipedia is an “openly-editable” “free-content” encyclopedia which is “written collaboratively by largely anonymous Internet users who write without pay.” <http://en.wikipedia.org/wiki/Help:About>. It is not recognized mandatory or persuasive federal court precedent.

him. It should be undisputed, however, that federal courts do not automatically apply the doctrine of equitable tolling. *See Wright & Miller, Federal Practice and Procedure, Civil* § 1056. Even if the theory were available, case law requires a showing of “extraordinary circumstances,” usually including misconduct by the Defendant which prevents the plaintiff from learning of his claim. *Id.* In the Eighth Circuit it has been held that such extreme circumstances exist “only when some fault on the part of the defendant has caused the plaintiff to be late in filing, or when other circumstances, external to the plaintiff and not attributable to his actions, are responsible for the delay.” *Kidd v. United States*, 2010 WL 1170115, *1 (W.D.Mo. 2010) quoting *Flanders v. Graves*, 299F.3d 974, 977 (8th Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003). Plaintiff has not alleged in his Complaint or demonstrated in his brief any basis for applying the doctrine. To the extent he complains about circumstances surrounding the expiration of his domain name registrations, those expirations occurred in 2003. The next alleged conduct by Network Solutions allegedly took place “recently” prior to the filing of this action. *See* Doc. #53 at ¶ 4. Thus, the Court should not indulge Plaintiff on this point.

On top of failing to demonstrate how equitable tolling would apply to these claims, Plaintiff’s Response incorporates hearsay, unauthenticated documents relating to conversations allegedly held on some unverified “forum” on the Internet. Network Solutions objects to any consideration of Exhibit A to Doc #119. The pending Motion to Dismiss is appropriately based upon the allegations in Plaintiff’s Complaints. Until facing the Court’s previous Order dismissing claims against Google and NameMedia based upon the statute of limitations, and further facing Network Solutions’ Motion to Dismiss, Plaintiff had not asserted any facts which would result in a tolling of the statute

of limitations. Plaintiff should further be bound by his previous statement to this Court that he agrees with Network Solutions' Motion to Dismiss. For the reasons set forth in Network Solutions' Motion to Dismiss and Brief in Support, the Court should dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted,

NETWORK SOLUTIONS, LLC.,
Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will send notification of such filing to the following:

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I hereby certify that I have mailed the document by the United States Postal Service to the following non CM/ECF participants:

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