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January 24, 2020

ECF

Hon. Lorna G. Schofield
Thurgood Marshall
United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Jane Doe 1000 v. Darren K. Indyke and Richard D. Kahn, in their capacities as the executors of the Estate of Jeffrey Edward Epstein, 19-cv-10577-LGS-DCF*

Dear Judge Schofield:

We represent Defendants Darren K. Indyke and Richard D. Kahn, Co-Executors of the Estate of Jeffrey E. Epstein (together, the "Co-Executors"), in the referenced action. We write pursuant to Your Honor's Individual Rule III(C)(2) to request a conference on and to explain the bases for the Co-Executors' anticipated motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff Jane Doe 1000's ("Plaintiff") Complaint (ECF No. 1). We propose this briefing schedule: moving brief by February 24, 2020; opposition brief by March 25, 2020; and reply brief by April 8, 2020.

1. Plaintiff is a New Jersey resident who alleges Decedent committed torts against her in or around 1999 in New York and Florida; Plaintiff's causes of action expired nearly two decades ago.

Plaintiff, a New Jersey citizen and resident, alleges that, in or about 1999, Mr. Epstein ("Decedent"), now deceased, committed sexual offenses against her in New York and Florida (Compl. ¶¶ 16, 38, 50, 55.) Plaintiff asserts two causes of action -- battery and intentional infliction of emotional distress -- and demands punitive damages. (*Id.* ¶¶ 49-59, p. 13.)

Plaintiff does not allege she was a minor when Decedent sexually abused her in or around 1999. Therefore, Plaintiff's claims are time-barred.

New York's borrowing statute, CPLR § 202, provides that, when a non-N.Y. resident such as Plaintiff sues on causes of action accruing outside N.Y., the complaint must be timely under the statute of limitations ("SOL") of both N.Y. and the jurisdiction where the claim accrued.¹

Plaintiff's causes of action expired by in or about: 2003 per FL's 4-year SOL (Fla. Stat. § 95.11 (3)(O)); and 2000 or 2002 per N.Y.'s 1- or 3-year SOL (CPLR §§ 214(5), 215(3)).

¹ "In diversity cases in New York, federal courts apply ... C.P.L.R. § 202." *Commerzbank AG v. Deutsche Bank Nat'l Tr. Co.*, 234 F. Supp. 3d 462, 467 (S.D.N.Y. 2017) (citation omitted).

Hon. Lorna G. Schofield
January 24, 2020
Page 2



2. Plaintiff's attempts to plead around the statutes of limitations fail.

Plaintiff erroneously alleges her claims are timely per CPLR § 213-c or § 215(8)(a), her claims were equitably tolled, and that the Co-Executors are equitably estopped from asserting an SOL defense. (Compl. ¶¶ 12-15.) Each of these arguments fails as a matter of law.

First, neither CPLR § 213-c nor § 215(8)(a) applies here. The 20 year SOL in CPLR § 213-c became effective as of September 18, 2019; the SOL was 5 years as of 2006 and 1 year before then. (L. 2006, ch 3, § 5(b).) However, the 20-year SOL does not apply retroactively except "where the applicable [SOL] in effect on the date of such act or omission has not yet expired." L. 2019, ch. 315, §4. Therefore, CPLR § 213-c cannot revive Plaintiff's long-expired claims.

Separately, CPLR § 215(8)(a) provides: "Whenever it is shown that a criminal action against the same defendant has been commenced *with respect to the event or occurrence from which a claim governed by this section arises*, the plaintiff shall have at least one year from the termination of the criminal action ... to commence the civil action" (emphasis added). Decedent's criminal indictment (the "Indictment") attached to Plaintiff's Complaint does not concern Plaintiff's allegations. Rather, the Indictment charges Decedent sexually abused "minor girls" from 2002 to 2005 (Compl., Ex. A at ¶¶ 1, 20), stating throughout that it concerns sex trafficking of "minors." (*Id.* ¶¶ 2 - 4, 6, 8, 11- 15, 18 - 20, 22.)

Plaintiff does not allege she was a minor. Further, she alleges the torts against her occurred in the 1990's. Therefore, this action and the Indictment arise from entirely different occurrences.

New York courts apply CPLR § 215(8)(a) narrowly. *See Christodoulou v. Terdeman*, 262 AD2d 595, 596 (2d Dept. 1999) (CPLR § 215(8)(a) applied only to claims based on events of February 26, 1993 and December 28, 1993, because it was only in connection with events of those two days that criminal prosecution was commenced against defendant); *Gallina v. Thatcher*, No. 52980/2017, 2018 N.Y. Misc. LEXIS 8435 (Sup. Ct. Dutchess Cnty. Oct. 23, 2018) (CPLR § 215(8)(a) inapplicable where incidents charged in criminal action and those alleged in civil action occurred on different dates); *McElligott v. City of N.Y.*, 15-cv-7107 (LGS), 2017 U.S. Dist. LEXIS 201829, at *13 (S.D.N.Y. Dec. 7, 2017) (CPLR § 215(8)(a) inapplicable to claims against civil defendants not charged as co-defendants in criminal action, notwithstanding same events gave rise to both actions). Plaintiff alleges a far more tenuous connection to the Indictment than the criminal-civil links unsuccessfully asserted in those cases.

Second, even if CPLR § 213-c and § 215(8)(a) apply, which they do not, Plaintiff's claims for torts committed outside N.Y. are still untimely per FL's SOL and CPLR § 202.

Third, Plaintiff fails to meet her burden to allege extraordinary circumstances sufficient to justify tolling or equitable estoppel. Equitable tolling is only applied where a plaintiff is "prevented in some *extraordinary way* from exercising h[er] rights." *Viti v. Guardian Life Ins. Co. of Am.*, 10-cv-2908 (ALC) (MHD), 2012 U.S. Dist. LEXIS 189633, at *30 (S.D.N.Y. Oct. 5, 2012), *adopted by*, 2013 U.S. Dist. LEXIS 174145 (S.D.N.Y. Dec. 11, 2013) (emphasis added) (citations omitted). Under this doctrine, a court may, "under *compelling circumstances*, make *narrow exceptions* to

Hon. Lorna G. Schofield
January 24, 2020
Page 3



the statute of limitations ... "to prevent inequity." *Id.* (emphasis added) (citations omitted). "That the doctrine is to be employed only sparingly -- in 'extraordinary' and 'compelling' circumstances -- is reflected in the fact that the plaintiff bears the burden of persuasion to show that tolling is justified." *Id.* (emphasis added) (citing *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000)). A late-filing party seeking equitable tolling must also demonstrate she acted with "reasonable diligence" in pursuing her claims during the period she seeks to toll. *Id.* at *32 (citation omitted). Equitable estoppel only applies where a plaintiff knows her cause of action exists but the defendant's conduct causes her to delay in bringing her lawsuit. *Yesh*, 2010 U.S. Dist. LEXIS 101744, at *5 (citation omitted). Equitable estoppel requires a plaintiff to show: (i) the defendant made a definite misrepresentation of fact and had reason to believe the plaintiff would rely on it; and (ii) the plaintiff reasonably relied on the misrepresentation to her detriment. *Id.* (citation omitted). Tolling is inappropriate where, as here, a plaintiff fails to articulate any acts by a defendant that prevented the plaintiff from timely commencing suit. *Id.* at *6 (citation omitted).

Plaintiff's threadbare allegations of "deception," "threats" and the like (Compl. ¶14) do not establish "extraordinary" circumstances justifying tolling. Nor has Plaintiff alleged (i) that Decedent made a misrepresentation to her and had reason to believe she would rely on it, or (ii) that Plaintiff reasonably relied on it to her detriment.

3. Plaintiff's claim for punitive damages fails as a matter of law.²

Plaintiff's punitive damages claim must be dismissed as a matter of law because neither Florida law nor New York law permits punitive damages against a decedent tortfeasor's estate. See *Poindexter v. Zacharzewski*, 18-14155, 2018 U.S. Dist. LEXIS 189861, at *6 (Nov. 5, 2018 S.D. Fla.) ("Florida law prohibits recovery of punitive damages from the estate of a wrongdoer who is deceased."); NY EPTL § 11-3.2 (a)(1) ("an action may be brought or continued against the personal representative of the decedent, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury."). That is the law in most jurisdictions, as reflected in the Restatement. See *Restat. (Second) Of Torts* § 908 cmt. a (punitive damages not available against representatives of deceased tortfeasor).

Respectfully submitted,

s/Bennet J. Moskowitz

Bennet J. Moskowitz

² Courts in this District regularly dismiss punitive damages claims. See *The Cookware Co. (USA), LLC v. Austin*, 15-5796, 2016 U.S. Dist. LEXIS 177691, at *17 (S.D.N.Y. Dec. 8, 2016) (dismissing punitive damages claim without leave to replead); *SJB v. N.Y.C. Dep't of Educ.*, 03-6653, 2004 U.S. Dist. LEXIS 13227, at *25-26 (S.D.N.Y. Jul. 14, 2004) (dismissing punitive damages claims not statutorily available).