UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-CV-80802-MARRA-JOHNSON

JANE DOE NO. 8

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.
_____/

DEFENDANT EPSTEIN'S REPLY TO PLAINTIFF'S *MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S COMPLAINT*, dated 08/12/09

Defendant EPSTEIN, by and through his attorneys, replies to Plaintiff JANE DOE No. 8's *Memorandum of Law in Opposition to Motion to Dismiss Plaintiff's Complaint*, ("memorandum"), dated August 12, 2009. In support of dismissal of Count I – "Sexual Assault and Battery" and Count III – "Coercion and Enticement to Sexual Activity in Violation of 18 U.S.C. §2422," based on the statute of limitations, Defendant replies:

Introduction

Defendant's position is that Counts I and III are each barred by the applicable statute of limitations. Since the issues in parts I and II of Plaintiff's memorandum overlap, Defendant will address those parts together in I and II herein. Part III addresses the statute of limitations for Count III, as set forth in 18 U.S.C. §2255(b).

I. Plaintiff's Complaint on its face does show the date that her claims accrued.

II. Based on the Complaint allegations, §95.11(7), Fla. Stat., does not apply to Count I – Assault and Battery; thus, such claim is time barred.

Pursuant to the allegations on the face of Plaintiff's complaint, Count I, based on Florida's common law of assault and battery, and Count III, brought pursuant to 18

U.S.C. §2255, are barred by the applicable statute of limitations. Plaintiff and Defendant are in agreement that a Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate where "it is 'apparent from the face of the complaint' that the claim is time-barred." *See generally*, La Grasta v. First Union Securities, Inc., 358 F.3d 840, 845 -846 (11th Cir. 2004).

However, contrary to Plaintiff's assertion in section I, p. 2, of her memorandum, based on the allegations of the Complaint, Plaintiff's claims alleged in Count I and III are time barred. Plaintiff now attempts to rely on the "discovery rule" in an effort to argue that the cause of action accrued at some later date; however, and significantly, there are no allegations in Count I that implicate application of the discovery rule which is codified in Florida Statute §95.11(7). Hearndon v. Graham, 767 So.2d 1179 (Fla. 2000). Hearndon dealt with the accrual of a cause of action where a plaintiff alleges that she suffered from traumatic amnesia caused by childhood sexual abuse. The Florida Supreme Court answered the following question in the affirmative:

> Where a plaintiff in a tort action based on childhood sexual abuse alleges that she suffered from traumatic amnesia caused by the abuse, does the delayed discovery doctrine postpone accrual of the cause of action?

The Hearndon plaintiff filed her complaint in 1991 against her stepfather for injuries from alleged sexual abuse committed upon her beginning in 1968 when she was 8, and continuing until 1975 when she turned 15. She further alleged that she suffered from "'traumatic amnesia,' or a related syndrome [until approximately 1988], caused by the abuses allegedly perpetrated by [the defendant], thereby explaining why earlier commencement of the action had not been possible." Id, at 1181. The plaintiff

claimed the sexual abuse caused her to suppress or lose her memory for several years. The Supreme Court noted that in reaching its decision allowing the accrual of the action to be delayed, it was not passing on the merits of whether she actually lost and then retrieved her memory, or on the reliability of any of the psychological techniques used to bring back the memories of the abuse.

As noted in Hearndon, the Florida Legislature codified the discovery rule in intentional abuse cases when it enacted §95.11(7), Fla.Statutes. §95.11(7) was found not to apply in Hearndon because the alleged sexual abuse occurred from 1968 to 1975, and the abuse was not recalled until 1988. The plaintiff filed her complaint in 1991. The statute became effective in 1992. See endnote 1 herein; Davis v. Monhanan, 832 So.2d 708, 709-10 (Fla. 2002)(The Florida Legislature has imposed a delayed discovery rule in cases of professional malpractice, medical malpractice, and intentional torts based on abuse, there is no other statutory basis for application of the delayed discovery rule to delay the accrual of a cause of action). The discussion in Hearndon remains relevant as it explains how and when the statutory discovery rule applies, and its effect on the accrual of a cause of action.

The Hearndon decision should be read in conjunction with Davis v. Monahan, 832 So.2d 708 (Fla. 2002). In Davis, the Florida Supreme Court made clear that the statutory codification of the delayed discovery rule only applies to those causes of actions enumerated in §95.11, Fla.Stat., and refused to extend the ruling in Hearndon to causes of action not based on the statutory enumerated exceptions or to causes of actions not based on allegations of childhood sexual abuse where a plaintiff has

traumatic amnesia or a repressed memory type condition. In refusing to broaden the ruling in Hearndon and apply the delayed discovery doctrine to claims for breach of fiduciary duty, conversion, civil conspiracy, and unjust enrichment, the Florida Supreme Court, Davis, supra at 712, stated:

> While we applied the delayed discovery doctrine to causes of action arising out of childhood sexual abuse and repressed memory in *Hearndon,* we did so only after considering the unique and sinister nature of childhood sexual abuse, as well as the fact that the doctrine is applicable to similar cases where the tortious acts cause the delay in discovery. We also considered the Legislature's endorsement in amending section 95.11(7), Florida Statutes (1999), to include intentional torts based on abuse and the fact that the application of the doctrine among the states is both the majority rule and modern trend. In this case, there is no modern trend or statutory endorsement, and Monahan did not allege fraud, so there was no specific allegation that Davis or Kish's actions caused Monahan's delayed discovery.

Plaintiff is correct that part of the analysis as to whether a particular claim is time barred involves an analysis as to when a particular cause of action has accrued. Under Florida law, a statute of limitations "runs from the time the cause of action accrues" which, in turn, is generally determined by the date "when the last element constituting the cause of action occurs." § 95.031, Fla. Stat.[1] *See generally* State Farm Mut. Auto. Ins. Co. v. Lee, 678 So.2d 818, 821 (Fla.1996)("[A] cause of action cannot be said to have accrued, within the meaning of the statute of limitations, until an action may be brought."); and Florida Power & Light Co. v. Allis Chalmers Corp., 85 F.3d 1514,

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[1] §95.031, Fla.Stat., provides in relevant part :

> ... the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.
>
> (1) A cause of action accrues when the last element constituting the cause of action occurs.
> ...

rehearing denied (11th Cir. 1996)(Cause of action accrues for limitations purposes when last element constituting cause of action occurs and plaintiff knew or should have discovered injury). Further, and significantly, the fact that a plaintiff does not know the full extent of his or her injury and that the most substantial damages do not occur until later date does not postpone running of limitations periods. Id. See also Penthouse North Ass'n, Inc. v. Lombardi, 461 So.2d 1350, 1352 (Fla. 1984)("A statute of limitation does not commence to run until the cause of action accrues. A cause of action does not accrue until someone has been damaged by the acts complained of.").

As alleged in the Complaint, JANE DOE NO. 8 had one "encounter with Epstein" at his Palm Beach mansion "in or about 2001" when she was "then approximately 16 years old, fell into Epstein's trap and became one of his victims." Comp. ¶9, 13-14. She further alleges that at the time of the one encounter, she "was frightened and felt trapped," and "as a result of this encounter with Epstein, [she] experienced confusion, shame, humiliation and embarrassment, and has suffered severe psychological and emotional injuries." Comp. ¶13-14. On the face of the Complaint, Plaintiff was aware that she was damaged at the time of the encounter complained.

Because Plaintiff was allegedly a minor at the time, under Florida law, Plaintiff could not have brought the action in her own right. Both Plaintiff and Defendant are in agreement that the legal disability based on one being a minor is generally removed once a person turns 18 years of age. (JD8 memorandum, fn. 2). Based on the allegations, it has been at least 8 years since Plaintiff "fell into Epstein's trap and

became one of his victims; and Plaintiff is now at least 24 years old; Plaintiff turned 18 at least 6 years ago, well pass the applicable 4 year statute of limitations.

Under Florida law, the statute of limitations for assault and battery is 4 years, §95.11(3)(o). See Defendant's Motion To Dismiss Complaint, dated July 14, 2009, [DE 8], for discussion as to why §95.11(7), Fla. Stat., does not apply to Plaintiff's Count I for "sexual assault and battery." See endnote 1 hereto for statutory text of subsection (7), including statutes referenced therein.[1]

In her memorandum, Plaintiff attempts to rely on the statutory definition of "abuse" as set forth in §39.01(2), Fla. Stat., and claims that she has "until 7 years after she reaches the age of majority to bring suit (i.e. until she is 25 years old), or within 4 years from the time she discovers both the injury and the causal relationship between the injury and abuse, whichever occurs later." As noted above, there are no allegations of repressed memory or similar type traumatic amnesia. In fact, the allegations reveal that after the alleged one encounter, Plaintiff knew immediately that she suffered damage in or about 2001, when she was 16. She could have brought the action in 2003 in her own right when she turned 18. She is now at least 24 years old.

A review of the Count I allegations establish that Plaintiff is attempting to assert a claim for Florida's common law assault and battery to which a 4 year statute of limitation applies. See Defendant's motion to dismiss. As noted in fn. 1 of her memorandum, Defendant is not seeking dismissal of Count II as in ¶24, Plaintiff tracks the language of §39.01(2), Fla. Stat., pertaining to "abuse."

If this Court were to agree with Plaintiff's position that she has adequately pled a claim based on sex abuse in Count I, (which she has not), then either Count I or Count II – Intentional Infliction of Emotional Distress is required to be dismissed as neither is "a free-standing tort" because both counts reallege the same underlying facts and damages. See Tobin v. Damian, 772 So.2d 13, fn. 1 (Fla. 4th DCA 2000). In discussing plaintiff's claim for intentional infliction of emotional distress the Court determined that it was "not a free-standing tort" because it "realleges the same facts mentioned in appellant's sexual abuse claims and fails to provide any additional facts." Citing to Fridovich v. Fridovich, 598 So.2d 65, 69-70 (Fla. 1992)(holding that no separate cause of action for intentional infliction of emotional distress existed where plaintiff merely renamed the initial cause of action and repled the same facts).

Accordingly, Count I is required to be dismissed as the applicable statute of limitations has expired. In the alternative, either Count I or Count II is required to be dismissed as they are duplicative claims as opposed to free-standing torts.

III. The Complaint on its face shows that Count III is time barred.

Count III is brought pursuant to 18 U.S.C. §2255, which contains its own statute of limitations in subsection (b). The language of §2255(b) is clear and unambiguous – "Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability."[2] Plaintiff now attempts to

[2] "The primary principle of statutory construction requires courts to give effect to the plain meaning of the words used "in their ordinary and usual sense." Caminetti v. U.S., 242 U.S. 470 (1917). To the extent possible, the rules of statutory construction require courts to give meaning

argue that the delayed discovery doctrine applies although there are no allegations in the Complaint which implicate its application.

The "delayed discovery" doctrine generally provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action. The United States Supreme Court applied the "blameless ignorance" doctrine in Urie v. Thompson, 337 U.S. 163, 170, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), thereby delaying the accrual of a cause of action until the plaintiff reasonably discovered the right of action, reasoning that "the traditional purposes of statutes of limitations ... require the assertion of claims within a specified period of time after notice of the invasion of legal rights." *Id.*

Again, the Complaint allegations are clear that Plaintiff was aware that she was an alleged "victim" as a result of the alleged one encounter with EPSTEIN in 2001, and that she allegedly suffered damages therefrom. By her own allegations she felt "frightened and trapped" at the time. There are no allegations of repressed memory or traumatic amnesia or other allegations which would delay the accrual of the cause of action. Based on the allegations of the Complaint, Plaintiff turned 18 in 2003 and, thus, she was no longer under the legal disability of being a minor. Approximately 8 years have passed since the alleged one time encounter – well pass the 6 year statute of

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to every word and clause in a statute. U.S. v. Menasche, 348 U.S. 528, 538-39 (1955); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001). Additionally, courts must reject statutory interpretations that would render portions of a statute surplusage. TRW, 534 at 31." Brotherhood of Loc. Engineers and Trainmen Gen. Comm. v. CSX Transp., Inc., 522 F.3d 1190, 1194 -1195 (11th Cir. 2008).

limitations; and approximately 6 years have passed since the legal disability of being a minor was removed – well passed the 3 year period.

WHEREFORE, Defendant requests that this Court dismiss Counts I and III of Plaintiff's Complaint with prejudice. In the alternative, Defendant requests that this Court dismiss either Count I or II with prejudice, along with Count III with prejudice.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following Service List in the manner specified by CM/ECF on this 20 day of August, 2009:

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[1] **§95.11(7), Fla. Stat.** –

(7) For intentional torts based on abuse.--An action founded on alleged abuse, as defined in s. 39.01, s. 415.102, or s. 984.03, or incest, as defined in s. 826.04, may be commenced at any time within 7 years after the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later.

§39.01(2), Fla. Stat. (2001) –

(2) "Abuse" means any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions. Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.

§415.102(1), Fla. Stat. (2001) –

(1) "Abuse" means any willful act or threatened act that causes or is likely to cause significant impairment to a vulnerable adult's physical, mental, or emotional health. Abuse includes acts and omissions.

§984.03 (2), Fla. Stat. (2001) –

"Abuse" means any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Corporal discipline of a child by a parent or guardian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child as defined in s. 39.01.