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January 24, 2020

Plaintiff shall file a letter response by January 31, 2020.

ECF

Dated: January 28, 2020
New York, New York

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



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

Re: *Annie Farmer v. Darren K. Indyke and Richard D. Kahn, in their capacities as the executors of the Estate of Jeffrey Edward Epstein, and Ghislaine Maxwell, 19-cv-10475-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 above-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 the time-barred claims and demand for punitive damages in Plaintiff Annie Farmer's ("Plaintiff") Complaint (ECF No. 1). We propose the following 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 Texas resident who alleges Decedent committed torts against her in the 1990's, primarily in New Mexico; Plaintiff's causes of action based on torts in New Mexico expired by 1999.

Plaintiff, a Texas citizen and resident, alleges that, in 1995 and/or 1996, when she was 16, Mr. Epstein ("Decedent"), now deceased, committed sexual offenses against her in New York and New Mexico. (Compl. ¶¶ 1, 18, 53-54, 58, 67.) Plaintiff asserts three causes of action – battery, false imprisonment and intentional infliction of emotional distress – and demands punitive damages. (*Id.* ¶¶ 79-94, p. 18.)

New York's borrowing statute, CPLR § 202, provides that when a non-New York resident such as Plaintiff sues on causes of action accruing outside New York (here, New Mexico), the complaint must be timely under the statute of limitations of both New York *and* the jurisdiction where the claim accrued.¹ New Mexico law provides a 3-year statute of limitations for claims sounding in personal injury (N.M. Stat. § 37-1-8); and minors have 1-year from reaching the age of majority to commence such actions (N.M. Stat. § 37-1-10).

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).

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Therefore, under New Mexico law, Plaintiff's causes of action based on events occurring there expired by sometime in 1999. Per CPLR § 202, those claims, including Plaintiff's cause of action for false imprisonment in its entirety, are untimely.

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

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

First, CPLR § 215(8)(a) does not apply here. 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 in New York and Florida. (Compl., Ex. A at ¶¶ 1, 2.)

Plaintiff alleges the torts against her occurred in 1995 and/or 1996, mostly in New Mexico. Therefore, this action and the Indictment arise from 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 § 215(8)(a) applies, which it does not, Plaintiff's claims for torts occurring in New Mexico are still untimely per N.M. Stat. § 37-1-8 and CPLR § 202.

Third, Plaintiff failed to meet her burden to allege extraordinary circumstances sufficient to justify equitable tolling or 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 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

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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. ¶16) 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.

Plaintiff’s own allegations refute any notion that she was prevented from exercising her rights. Rather, Plaintiff’s allegations establish she was both willing and able to come forward about the alleged wrongdoing—she disclosed it long ago to *Vanity Fair Magazine* (*Id.* ¶ 75). There is no “extraordinary” basis to toll the statute of limitations or estop the Co-Executors from asserting a statute of limitations defense given these allegations.

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. Neither New Mexico law nor New York law permits punitive damages against a decedent tortfeasor’s estate. See *Jaramillo v. Providence Wash. Ins. Co.*, 117 N.M. 337, 346 (N.M. 1994) (“punishment and deterrence are not accomplished by enabling recovery of punitive damages from the estate”); 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).