

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-80469-CIV-MARRA/JOHNSON

JANE DOE II,

Plaintiff,

vs.

JEFFREY EPSTEIN, and
SARAH KELLEN,

Defendants.

DEFENDANT KELLEN'S ANSWER AND AFFIRMATIVE DEFENSES
TO PLAINTIFF'S FIRST AMENDED COMPLAINT

1. Admit that Plaintiff has sued Defendant Sarah Kellen (hereinafter "Defendant") in this action.

JURISDICTION AND VENUE

2. Admit that the action seeks damages in excess of \$75,000. Deny that any damages are owed.
3. Admit that the facts alleged in the complaint, if true, create venue in this Court. As to the remaining allegations in paragraph 3, Defendant asserts her Fifth Amendment privilege against self-incrimination. See DeLisi v. Bankers Ins. Company, 436 So.2d 1099 (Fla. 4th DCA 1983); Malloy v. Hogan, 84 S.Ct. 1489, 1495 (1964)(the Fifth Amendment's Self-Incrimination Clause applies to the states through the Due Process Clause of the Fourteenth Amendment - "[i]t would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in state or federal court."); 5 Fed.Prac. & Proc. Civ. 3d §1280 *Effect of Failure to Deny – Privilege Against Self-Incrimination* ("...court must treat the defendant's claim of

privilege as equivalent to a specific denial.”). See also 24 Fla.Jur.2d Evidence §592. *Defendants in civil actions*. – “... a civil defendant who raises an affirmative defense is not precluded from asserting the privilege [against self-incrimination], because affirmative defenses do not constitute the kind of voluntary application for affirmative relief” which would prevent a plaintiff bringing a claim seeking affirmative relief from asserting the privilege.

PARTIES

4. Defendant is without sufficient knowledge to admit or deny whether Plaintiff is a natural person residing in Palm Beach County, Florida. As to the remainder of the allegations in paragraph 4, Defendant asserts her Fifth Amendment privilege against self-incrimination. See DeLisi v. Bankers Ins. Company, 436 So.2d 1099 (Fla. 4th DCA 1983); Malloy v. Hogan, 84 S.Ct. 1489, 1495 (1964)(the Fifth Amendment’s Self-Incrimination Clause applies to the states through the Due Process Clause of the Fourteenth Amendment - “[i]t would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in state or federal court.”); 5 Fed.Prac. & Proc. Civ. 3d §1280 *Effect of Failure to Deny – Privilege Against Self-Incrimination* (“...court must treat the defendant’s claim of privilege as equivalent to a specific denial.”). See also 24 Fla.Jur.2d Evidence §592. *Defendants in civil actions*. – “... a civil defendant who raises an affirmative defense is not precluded from asserting the privilege [against self-incrimination], because affirmative defenses do not constitute the kind of voluntary application for affirmative relief” which would prevent a plaintiff bringing a claim seeking affirmative relief from asserting the privilege. realleges and

adopts her response in paragraph 3, above.

5. Admit that Jeffrey Epstein is a natural person, who is an adult, and who resides and/or does business in Palm Beach County, Florida. Admit that Defendant Kellen is a natural person, who is an adult. As to the remainder of the allegations in paragraph 5, Defendant asserts her Fifth Amendment privilege against self-incrimination. See DeLisi v. Bankers Ins. Company, 436 So.2d 1099 (Fla. 4th DCA 1983); Malloy v. Hogan, 84 S.Ct. 1489, 1495 (1964)(the Fifth Amendment's Self-Incrimination Clause applies to the states through the Due Process Clause of the Fourteenth Amendment - "[i]t would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in state or federal court."); 5 Fed.Prac. & Proc. Civ. 3d §1280 *Effect of Failure to Deny – Privilege Against Self-Incrimination* ("...court must treat the defendant's claim of privilege as equivalent to a specific denial."). See also 24 Fla.Jur.2d Evidence §592. *Defendants in civil actions.* - "... a civil defendant who raises an affirmative defense is not precluded from asserting the privilege [against self-incrimination], because affirmative defenses do not constitute the kind of voluntary application for affirmative relief" which would prevent a plaintiff bringing a claim seeking affirmative relief from asserting the privilege.
6. Admit that Jeffrey Epstein currently resides in Palm Beach, Florida. Defendant is without sufficient knowledge to admit or deny where Epstein claims residency.

FACTS

7. As to the allegation set forth in paragraph 7, Defendant asserts her Fifth Amendment privilege against self-incrimination. See DeLisi v. Bankers Ins. Company, 436 So.2d 1099 (Fla. 4th

DCA 1983); Malloy v. Hogan, 84 S.Ct. 1489, 1495 (1964)(the Fifth Amendment’s Self-Incrimination Clause applies to the states through the Due Process Clause of the Fourteenth Amendment - “[i]t would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in state or federal court.”); 5 Fed.Prac. & Proc. Civ. 3d §1280 *Effect of Failure to Deny – Privilege Against Self-Incrimination* (“...court must treat the defendant’s claim of privilege as equivalent to a specific denial.”). See also 24 Fla.Jur.2d Evidence §592. *Defendants in civil actions.* – “... a civil defendant who raises an affirmative defense is not precluded from asserting the privilege [against self-incrimination], because affirmative defenses do not constitute the kind of voluntary application for affirmative relief” which would prevent a plaintiff bringing a claim seeking affirmative relief from asserting the privilege.

8. As to the allegation set forth in paragraph 8, Defendant realleges and adopts her response in paragraph 7, above.
9. As to the allegation set forth in paragraph 9, Defendant realleges and adopts her response in paragraph 7, above.
10. As to the allegation set forth in paragraph 10, Defendant realleges and adopts her response in paragraph 7, above.
11. As to the allegation set forth in paragraph 11, Defendant realleges and adopts her response in paragraph 7, above.
12. As to the allegation set forth in paragraph 12, Defendant realleges and adopts her response in paragraph 7, above.

13. As to the allegation set forth in paragraph 13, Defendant realleges and adopts her response in paragraph 7, above.
14. As to the allegations in paragraph 14, Defendant realleges and adopts her response in paragraph 7, above.

COUNT I: 18 U.S.C. §2255(a) vs. DEFENDANT EPSTEIN

15. Although Count I is not alleged against Defendant as to the allegations in paragraph 15, Defendant restates and incorporates by reference her responses as set forth in paragraphs 1 through 14.
16. Not applicable to Defendant.

COUNT II: 18 U.S.C. §2255(a) vs. DEFENDANT KELLEN

17. As to paragraph 17, Defendant restates and incorporates by reference her responses as set forth in paragraphs 1 through 14.
18. Admit that Plaintiff seeks the damages stated in paragraph 18. Deny that any damages, attorney's fees, or costs are owed.

WHEREFORE, Defendant requests that the Court deny all relief sought by Plaintiff.

AFFIRMATIVE DEFENSES

1. As to Plaintiff's claim, Plaintiff actually consented to and was a willing participant in the acts alleged, and therefore, her claims are barred, or her damages are required to be reduced accordingly.
2. As to Plaintiff's claim, Plaintiff actually consented to and participated in conduct similar and/or identical to the acts alleged with other persons which were the sole or contributing cause of Plaintiff's alleged damages.
3. As to Plaintiff's claim, Plaintiff impliedly consented to the acts alleged by not objecting, and

therefore, her claims are barred, or her damages are required to be reduced accordingly.

4. As to Plaintiff's claim, Defendant reasonably believed or was told that the Plaintiff had attained the age of 18 years old at the time of the alleged acts.

5. As to Plaintiff's claim, Plaintiff's claims are barred as she said she was 18 years or older at the time.

6. As to Plaintiff's claim, Plaintiff's alleged damages were caused in whole or part by events and/or circumstances completely unrelated to the incident(s) alleged in the complaint.

7. Plaintiff's claims are barred by the applicable statute of limitations.

8. Plaintiff has failed to plead a cause of action as she does not and can not show a violation of a predicate act under the applicable version of 18 U.S.C. §2255 (2005) – the version in effect prior to the 2006 amendment, effective July 27, 2006.

9. As to Plaintiff's §2255 claim, the version of 18 U.S.C. §2255 in effect at the time of the alleged conduct applies, and, thus, the presumptive minimum damages amount should Plaintiff prove the elements of such claim is \$50,000, and not subject to any multiplier.

10. As to Plaintiff's §2255 claim, Plaintiff is entitled to only a single recovery of her actual damages. Should Plaintiff prove actual damages in an amount less than \$50,000, the applicable statutory minimum, she is entitled to a single recovery of \$50,000, regardless of the number of acts. Allowing a multiplication of the damages recoverable would be in violation of the prohibition against the recovery of duplicative damages.

11. As to Plaintiff's §2255 claim, application of the amended version of 18 U.S.C. §2255, effective July 27, 2006, would be in violation of the legal axiom against retroactive application of an amended statute, and also in violation of such constitutional principles, including but not limited to,

the “Ex Post Facto” Clause, U.S. Const. Article I, §9, cl. 3, §10, cl. 1, and procedural and substantive due process, U.S. Const. 14th Amend., 5th Amend. The statute in effect during the time of the alleged conduct applies.

12. As to Plaintiff’s §2255 claim, application of the amended version of 18 U.S.C. §2255, effective July 27, 2006, is prohibited pursuant to the vagueness doctrine and the Rule of Lenity. A criminal statute is required to give “ ‘fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.’ ” United States v. Lanier, 520 U.S. 259, 265, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (quoting McBoyle v. United States, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931)) (omission in original). The “three related manifestations of the fair warning requirement” are: (1) the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application; (2) the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered; (3) due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.

13. The applicable version of 18 U.S.C. §2255 creates a cause of action on behalf of a “minor.” Plaintiff had attained the age of majority at the time of filing this action, and accordingly, her cause of action is barred.

14. Application of the 18 U.S.C. §2255, as amended, effective July 27, 2006, is in violation of the constitutional principles of due process, the “Ex Post Facto” clause, and the Rule of Lenity, in that

in amending the term “minor” to “person” as to those who may bring a cause of action impermissibly and unconstitutionally broadened the scope of persons able to bring a §2255 claim.

15. 18 U.S.C. §2255 violates the Equal Protection Clause of the 14th Amendment under the U.S. Constitution, and thus Plaintiff’s claim thereunder is barred.

16. 18 U.S.C. §2255 violates the constitutional guarantees of procedural and substantive due process. Procedural due process guarantees that a person will not be deprived of life, liberty or property without notice and opportunity to be heard. Substantive due process protects fundamental rights. Accordingly, Plaintiff’s cause of action thereunder is barred.

WHEREFORE Defendant requests that this Court deny the relief sought by Plaintiff.

Respectfully submitted,

/s/Bruce E. Reinhart
BRUCE E. REINHART, P.A.
Florida Bar No. 0010762
250 S. Australian Avenue, Suite 1400
West Palm Beach, Florida 33401
(561) 202-6360
(561) 828-0983 (fax)
BReinhart@BruceReinhartLaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer was served on all counsel of record by CM/ECF on October , 2009.

/s/Bruce E. Reinhart
BRUCE E. REINHART