

Troutman Sanders LLP
875 Third Avenue
New York, New York 10022

troutman.com



Bennet J. Moskowitz
bennet.moskowitz@troutman.com

January 21, 2020

ECF

Hon. Gregory H. Woods
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *Teala Davies v. Darren K. Indyke and Richard D. Kahn, as Executors of the Estate of Jeffrey E. Epstein, 1:19-cv-10788 (GHW) (DCF)*

Dear Judge Woods:

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 Rules 1(A) and 2(C)(i) to set forth the grounds for the Co-Executors' anticipated motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the time-barred claims and punitive damages demand in Plaintiff Teala Davies' Complaint (ECF No. 1).

1. Plaintiff alleges torts occurring over 15 years ago in NY and other jurisdictions.

Plaintiff, who claims Arizona residency, alleges that Mr. Epstein, now deceased, sexually assaulted her from 2002 to 2004 in Florida, New Mexico, New York, the U.S. Virgin Islands ("USVI") and France. (Compl. ¶¶ 4, 12, 17, 29, 34, 59-61.) Plaintiff alleges causes of action for battery, assault, and intentional infliction of emotional distress (*Id.* ¶¶ 71 – 82.) Plaintiff seeks, among other things, "punitive damages in an amount to be determined." (*Id.* p. 12.)

2. Plaintiff's causes of action are partially time-barred.

CPLR § 202 provides that, when a non-New York resident such as Plaintiff sues on a cause of action accruing outside New York, the complaint must be filed timely under the statute of limitations of both New York *and* the jurisdiction where the cause of action accrued. A claim that is untimely under one or both of the two jurisdictions must be dismissed.

Plaintiff turned 18 at some point in 2003. (Compl. ¶ 34.) Plaintiff alleges she was sexually assaulted by Mr. Epstein until 2004, *i.e.*, when Plaintiff was an adult (Compl. ¶¶ 34, 59-

61). Accordingly, excluding Plaintiff's alleged torts subject to the New York Child Victims Act,¹ if any, Plaintiff's causes of action sounding in battery must be commenced within one year of accrual (CPLR § 215(3)); or, if Plaintiff's claims sound in personal injury, within three years (CPLR § 214(5)). Therefore, under New York law, Plaintiff's claims arising from her alleged sexual abuse expired in 2007 at the latest.

Plaintiff's claims based on alleged torts occurring outside New York also expired long ago, including torts that occurred while she was a minor, as follows: (Florida) for torts occurring while she was a minor, the later of within 7 years after she reached age of majority (*i.e.*, by 2010), within 4 years after she left the dependency of Mr. Epstein (2008 at the latest),² or within 4 years from the time she discovered both the injury and the causal relationship between the injury and the abuse (Fla. Stat. § 95.11(7));³ and, after Plaintiff reached age of majority, within 4 years (*i.e.*, sometime in 2007) (Fla. Stat. § 95.11 (3)(O)); (New Mexico) for torts occurring while she was a minor, the later of the "first instant" of Plaintiff's 24th birthday (*i.e.*, sometime in 2009) or 3 years from the date that Plaintiff first disclosed her childhood sexual abuse to a licensed medical or mental health care provider in the context of receiving health care (N.M. Stat. § 37-1-30) (plaintiff alleges she never made such a disclosure (Compl. ¶ 67)); and, after Plaintiff reached age of majority, 3 years (*i.e.*, in 2006) (N.M. Stat. § 37-1-8); (USVI) when Plaintiff turned 23 (*i.e.*, sometime in 2008) (5 V.I.C. §§ 31(5)(A), 36(a)(1)).

Although Plaintiff suggests she is only suing on claims based on torts that occurred while she was still a minor (Compl. ¶ 69), she also alleges Mr. Epstein abused her "for years" (*Id.* at ¶ 29). The Court is not required to reconcile Plaintiff's contradictory allegations. See *Whitley v. Bowden*, No. 17-CV-3564 (KMK), 2018 WL 2170313, at *11 (S.D.N.Y. May 9, 2018) ("a court is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss." (citation omitted)).

Therefore, Plaintiff's claims based on torts occurring in New York after she reached majority, as well as her claims based on torts occurring in New Mexico, Florida and the USVI – regardless of whether she was a minor at the time – must be dismissed.

¹ The Child Victims Act created a one-year window period in which civil claims alleging damages "suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law *committed against a child less than eighteen years of age*" may be filed despite the statute of limitations having already run. CPLR § 214-g (emphasis added).

² Plaintiff alleges Mr. Epstein "cast her out" in 2004. (Compl. ¶¶ 59-61.) Therefore, Plaintiff could not have depended on him after that time.

³ Plaintiff's allegations that she is only now beginning to "process" her injuries (Compl. ¶¶ 65, 68) is not equivalent to alleging tolling due to her belated *discovery* of such injuries. She makes no such allegation.

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

Courts in this District regularly grant motions to dismiss claims for punitive damages. See, e.g., *The Cookware Co. (USA), LLC v. Austin*, No. 15 Civ. 5796, 2016 U.S. Dist. LEXIS 177691, at *17 (S.D.N.Y. Dec. 8, 2016) (Batts, J.) (granting motion to dismiss claim for punitive damages without leave to replead because allegations regarding defendant's bad faith conduct were conclusory and did not rise to required level of malice); *SJB v. N.Y.C. Dep't of Educ.*, No. 03 Civ. 6653, 2004 U.S. Dist. LEXIS 13227, at *25-26 (S.D.N.Y. July 14, 2004) (Buchwald, J.) (granting motion to dismiss punitive damages claims because punitive damages were not statutorily available); *Blasetti v. Pietropolo*, 213 F. Supp. 2d 425, 431-32 (S.D.N.Y. 2002) (Kaplan, J.) ("[the] claim for punitive damages ... is dismissed.").

Here, Plaintiff's claim for punitive damages must be dismissed as a matter of law because none of the jurisdictions where the alleged torts against Plaintiff occurred permit punitive damages against the personal representatives of a decedent tortfeasor's estate. See *Poindexter v. Zacharzewski*, 18-civ-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."); *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 of deceased tortfeasors."); NY EPTL § 11-3.2 (a)(1) ("For any injury, 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.*" (emphasis added)). That is also the law in most U.S. jurisdictions, as reflected in the Restatement (Second) of Torts. See *Restat. (Second) Of Torts* § 908 cmt. a ("Punitive damages are not awarded against the representatives of a deceased tortfeasor."). See also *Powell v. Chi-Co's Distrib.*, No. ST-13-TOR-14, 2014 V.I. LEXIS 21, at *5 n.13 (U.S.V.I. Super. Ct. Apr. 3, 2014) (Section 908(2) of the Restatement (Second) of Torts "reflects the common law of this jurisdiction").^{4,5}

⁴ USVI courts apply a "*Banks* analysis" to determine U.S.V.I. common law. *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011). The *Banks* analysis includes consideration of three factors: (1) whether any USVI courts have previously adopted a particular rule; (2) the position taken by a majority of courts of other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the USVI. *Gov't of Virgin Islands v. Connor*, No. S. CT. CIV. 2013-0095, 2014 WL 702639, at *1 (V.I. Feb. 24, 2014). Each *Banks* factor favors the Estate: (1) pre-*Banks*, USVI courts expressed approval for the general rule that punitive damages cannot be recovered against the personal representatives of a wrongdoer's estate (see, e.g., *Hamilton v. Dowson Holding Co.*, 51 V.I. 619, 628 (D.V.I. 2009) (considering the inverse issue)); (2) a majority of courts from other jurisdictions preclude punitive damages against the personal representatives of a wrongdoer's estate (2 Linda L. Schlueter, *Punitive Damages* § 20.4 (7th ed. 2015)); and (3) post-*Banks*, USVI courts have held Restatement § 908 represents the soundest rule for the USVI (see *Powell*, *supra*).

⁵ French law does not recognize punitive damages. See 2 Linda L. Schlueter, *Punitive Damages* § 22.4 (7th ed. 2015) (citing Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept*, 74 Def. Coun. J. 320 (2007)).

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Respectfully submitted,

s/Bennet J. Moskowitz

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