UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TEALA DAVIES, *Plaintiff*, v. DARREN K. INDYKE and RICHARD D. KAHN, as executors of the ESTATE OF JEFFREY E. EPSTEIN, *Defendants.*	Case No. 1:19-cv-10788 (GHW) (DCF)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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The Co-Executors[1] submit this Reply Memorandum of Law in Support of their Motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss Plaintiff's Complaint (ECF No. 1).

ARGUMENT

I. This motion is procedurally proper and ripe, regardless of its title

In her opposition brief, Plaintiff argues that this motion should be denied because it is procedurally improper. Plaintiff is wrong. "[T]he technical name given to a motion challenging a pleading is of little importance." *See* C. Wright & A. Miller, 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.). The Second Circuit has expressly found: "Where the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense in a pre-answer motion to dismiss." *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989) (citations omitted). *See also Zimmelman v. Teachers' Ret. Sys.*, No. 08-cv-6958 (DAB) (DF), 2010 U.S. Dist. LEXIS 29791, at *16-17, (S.D.N.Y. Mar. 8, 2010) (Freeman, M.J.), *approved by, adopted by*, 2010 U.S. LEXIS 29783 (Mar. 26, 2010) ("a motion to dismiss on the basis that a plaintiff failed to file a timely administrative charge is analyzed under [Rule] 12(b)(6)") (citations omitted)).

Plaintiff, citing *William A. Gross Construction Assocs. v. American Manufacturers Mutual Ins.*, 600 F. Supp. 2d 587, 590 (S.D.N.Y. 2009) and *Underwood v. Roswell Park Cancer Inst.*, No. 15 Civ. 684 (FPG), 2017 WL 131740, at *11 n.8 (W.D.N.Y. Jan. 13, 2017), argues that the Court should not dismiss her time-barred claims because "the scope of discovery would remain the same." (Op. Br. p. 4.)[2] However, those cases are factually distinguishable.

William was a construction defects and delay lawsuit in which the court found that, because

[1] Capitalized terms not defined herein have the meanings given to them in the Co-Executors' moving brief (ECF No. 27).

[2] ECF. No. 32.

the issue of liability would need to be resolved regardless of ancillary motions to dismiss (*e.g.*, to dismiss indemnification claims), it made sense to let such claims proceed and revisit them after discovery. *Id*. at 590. By contrast, here, it would make no sense to permit Plaintiff to prosecute claims that her own allegations establish are time-barred.

Underwood was a Title VII lawsuit in which the court declined to dismiss claims on statute of limitations grounds because that issue depended on whether each alleged discriminatory action was a discrete, unlawful practice, an issue of fact which necessarily depended on the "specific nature" and surrounding circumstances of such actions. *Id*. at 31. Here, the issue is whether Plaintiff can demonstrate she was unable to discover the alleged abuse for years. She cannot because she alleges the opposite: she knew about the abuse when it allegedly happened to her.

As explained in the Co-Executors' moving brief, courts in this District also regularly grant motions to dismiss legally deficient claims for punitive damages. (Mov. Br. pp. 4-5.) Plaintiff's retort that such cases are "cherry-picked" (Op. Br. p. 4) is unconvincing. Plaintiff's suggestion that Judges Batts, Buchwald, and Kaplan, among others, misapplied the law, is not credible.

None of the cases cited by Plaintiff to argue otherwise involves a plaintiff impermissibly claiming punitive damages in a personal injury lawsuit against a deceased tortfeasor's estate in direct contravention of applicable law.[3] As opposed to those cases, here there are no, and will

[3] *See Range v. 535 Broadway Grp. LLC*, No. 17 Civ. 0423 (WHP), 2019 WL 4182966, at *7 n.4 (S.D.N.Y. Sept. 3, 2019) (ADA action); *Hunter v. Palisades Acquisition XVI*, No. 16 Civ. 8779 (ER), 2017 WL 5513636 (S.D.N.Y. Nov. 16, 2017) (FDCPA action); *Farina v. Metro. Transp. Auth.*, No. 18-cv-1433 (PKC), 2019 WL 3966163 (S.D.N.Y. Aug. 21, 2019) (putative class action related to E-Z Pass cashless tolling); *Weyant v. Phia Grp. LLP*, No. 17-cv-8230 (LGS), 2018 WL 4387557 (S.D.N.Y. Sept. 13, 2018) (putative class action against health plan administrator and agent); *Grimes-Jenkins v. Consol. Edison Co. of New York*, No. 16 Civ. 4897 (AT) (JCF), 2017 WL 2258374 (S.D.N.Y. May 22, 2017), *report and recommendation adopted by*, 2017 WL 2709747 (S.D.N.Y. June 22, 2017) (anti-discrimination lawsuit); *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 522, 536 (S.D.N.Y. 2013) (FDCPA lawsuit); *Doe v. Montefiore Med. No. Ctr.*, 12-cv-686 (CM), 2013 WL 624688 (S.D.N.Y. Feb. 19, 2013) (negligence and breach of fiduciary duty action); *Willman v. Zelman & Assocs., LLC*, No. 11-cv-1216 (KBF), 2012 WL 811512, at *5 (S.D.N.Y. Mar. 12, 2012) (age discrimination lawsuit); *Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, No. 03-cv-3748 (DAB), 2006 WL 278138, at *15 (S.D.N.Y. Feb. 2, 2006) (commercial lawsuit); *Denton v. McKee*, 332 F. Supp. 2d 659, 667 (S.D.N.Y. 2004) (First Amendment lawsuit); *Cohen v. Davis*, 926 F. Supp. 399, 405 (S.D.N.Y. 1996) (personal injury action ***not*** against tortfeasor's estate).

never be any, facts entitling Plaintiff to punitive damages. (*See* Op. Br. pp. 4-6.) Therefore, unlike in those actions, here there is no reason to permit the punitive damages claim to stand.

Even if the Court were to treat this motion as one to strike pursuant to Rule 12(f), it should still be granted. Courts in this District routinely grant motions to strike punitive damages including at the pleadings stage. *See, e.g.*, *In re Merrill Lynch Auction Rate Sec. Litig.*, 851 F. Supp. 2d 512, 544 (S.D.N.Y. 2012) (granting defendant's motion to strike sections of complaint asserting punitive damages); *Cerveceria Modelo, S.A. de C.V. v. USPA Accessories LLC*, No. 07-cv-7998 (HB), 2008 U.S. Dist. LEXIS 28999, at *21-22 (S.D.N.Y. Apr. 10, 2008) ("Because Defendant has failed to allege that Plaintiff's conduct was egregious and directed at the public generally, its claim for punitive damages cannot proceed."); *Nash v. Coram Healthcare Corp.*, No. 96-cv-0298 (LMM), 1996 U.S. Dist. LEXIS 9101, at *15 (S.D.N.Y. June 27, 1996) (granting motion to strike punitive damages prayer from the Complaint).

Citing *Burrell v. State Farm & Cas. Co.*, 226 F. Supp. 2d 427 (S.D.N.Y 2002), and *Orietview Techs, LLC v. Seven For All Mankind, LLC*, No. 13-cv-0538 (PAE), 2013 WL 4016302 (S.D.N.Y. Aug. 7, 2013), Plaintiff argues that, even if this motion is deemed one to strike, it should be denied. (Op. Br. p. 4.) However, those cases are factually distinguishable. In *Burrell*, homeowners sued an insurer and others alleging Fair Housing Act and RICO violations. 226 F. Supp. 2d at 431. *Orietview* was a patent infringement lawsuit. 2013 WL 4016302, at *1-2. Such actions have no bearing on this personal injury action against a deceased tortfeasor's estate.

II. Plaintiff invokes inapplicable limitations statutes and tolling principles

As an initial matter, Plaintiff ignores that, under CPLR § 202, her Complaint must be timely under New York law ***and*** the law of the jurisdictions where the alleged torts occurred. Plaintiff's arguments in her opposition brief about why her claims are timely under Florida, N.M. and USVI

law fail to address that her claims are still untimely under N.Y. law. (Mov. Br. p. 3.)[4]

In her opposition brief, Plaintiff argues her claims based on alleged abuse occurring in N.M. are timely because she has yet to disclose it to a licensed medical or mental health care provider, which would trigger the limitations period under N.M. Stat. § 37-1-30(A)(2). Plaintiff is wrong for at least two reasons.

First, because her cause of action expired long before the current version of N.M. Stat. § 37-1-30(A)(2) became effective on April 6, 2017, Plaintiff is not entitled to avail herself of it. *See In re Venie,* 2017-NMSC-018, 395 P.3d 516 (Sup. Ct. N.M. 2017) (distinguishing cases such as this, in which a cause of action expires before the enactment of a new limitations period, from cases in which a new limitations period extends the time to bring a cause of action before the prior limitations period had expired such that a defendant has no vested right in the statute of limitations defense based on the prior limitations period).[5] Rather, Plaintiff is only entitled to invoke the prior version of N.M. Stat. § 37-1-30(A)(2), which provides that an action for damages based on personal injury caused by childhood sexual abuse must be commenced "three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person, as established by competent medical or psychological testimony." Plaintiff's Complaint establishes she knew she was abused and injured in 2002. (Compl. ¶¶ 42-45.) Therefore, her claims expired 15 years ago.

Second, even assuming the current version of N.M. Stat. § 37-1-30(A)(2) applies – which

[4] One of the N.Y. CVA predicates is a NY Penal Law § 130 offense. Plaintiff's alleged torts occurring outside New York do not qualify. *See* 1 Kamins, Mehler, Schwartz & Shapiro, New York Criminal Practice, Second Ed., § 2.07 (Matthew Bender) ("It is axiomatic that the prosecution of a criminal action must rely on a necessary nexus between the alleged crime and the geographic jurisdiction of the court.")

[5] Accordingly, the N.M. Court of Appeals previously held that a statutory amendment to § 37-1-30 applied where the amendment was enacted before the original limitations period expired. *See Grygorwicz v. Trujillo*, 2006 NMCA 89 (N.M. Ct. App. June 13, 2006).

it does not – Plaintiff concedes she has failed to disclose her alleged abuse to a licensed medical or mental health care provider, which is a necessary condition precedent to its application. (*See* Op. Br. 6.) Plaintiff's claim based on New Mexico law must be dismissed on that basis alone.

Plaintiff next argues her claims have not run under Fla. Stat. Ann. § 95.11(7) because she has "not yet discovered 'the causal relationship between the injury and the abuse.'" (Op. Br. 7 (citing Fla. Stat. Ann. § 95.11(7).) Plaintiff is wrong about this as well. Fla. Stat. Ann. § 95.11(7) only applies where a plaintiff alleges she was unable to discover her abuse and its effects, such as due to memory loss or a lack of access to records. *See Davis v. Monahan*, 832 So. 2d 708, 710 (Sup. Ct. Fl. 2002) ("In *Hearndon*, we applied the delayed discovery doctrine to the plaintiff's cause of action … for injuries resulting from childhood sexual abuse.… Although the Legislature did not specifically provide for delayed accrual, we reasoned that in the narrow circumstance of lack of memory in childhood sexual abuse cases, the doctrine was appropriate because the lack of memory was caused by the abuser." (citing *Hearndon v. Graham*, 767 So. 2d 1179 (Sup. Ct. Fla. 2000)). Plaintiff makes no such allegations.

Omar ex rel. Cannon v. Lindsey, 243 F. Supp. 2d 1339, 1347 (M.D. Fla.), aff'd, 334 F.3d 1246 (11th Cir. 2003), which Plaintiff cites in support of her invocation of Fla. Stat. Ann. § 95.11(7), confirms it is inapplicable to this action. In *Omar*, a minor (at the time of the alleged torts and lawsuit) foster-child who was under the care of the Florida Department of Children and Families ("DCAF") since he was two years old alleged that, until DCAF produced his records to him in 2001, he had no meaningful opportunity to discovery who was responsible for abuse he had suffered. *See Omar*, No. 02-cv-01063, Compl. (ECF No. 18) at ¶¶ 4, 177-179 (Oct. 15, 2002). Here, Plaintiff alleges she knew exactly who abused her when she was 17 and into adulthood and that she suffered from such abuse including when it occurred.

Plaintiff's ambiguous allegation intended to plead around the statute of limitations – that she is "just beginning to process" the "full extent" of her injuries caused by Decedent due to abuse occurring over 15 years ago including when she was an adult – is not a basis to invoke Fla. Stat. Ann. § 95.11(7), which is intended to protect victims of childhood sex abuse who are unable to discern and thus assert their legal claims. Plaintiff cites no legal authority establishing otherwise.

Nor is Plaintiff's "full extent" allegation a basis to invoke the USVI "discovery rule." "[T]he present case is not one of those exceptional cases where the injury or its cause was not immediately known to the victim, as is required for application of the 'discovery rule' to the statute of limitations." *Santiago v. V.I. Hous. Auth.*, 57 V.I. 256, 298 (U.S.V.I. Sup. Ct. 2012) (Swan, A.J., concurring). The USVI Supreme Court has recognized this issue may be decided on the pleadings. *Id.* at 272.

In *Santiago*, the plaintiff argued that the trial court had erred in granting a motion to dismiss based on statute of limitations grounds because the "environmental discovery rule" – a claim-specific counterpart of the general discovery rule invoked by Plaintiff here – applied. *Id*. at 272. The Supreme Court held the discovery rule did not toll the statute of limitations, finding:

> The discovery rule is not applicable … ***In her complaint***, Santiago asserts that she witnessed Stanley open a bucket of Red Hot Sewer Solvent and pour its contents into a sewer pipe outside her home. Santiago further claims that upon inhaling the fumes from the sewer solvent her eyes, nose and throat began to burn; she started vomiting; and she sustained physical injuries. ***Based on her own assertions***, Santiago was both aware of her alleged injures and their cause on the date they occurred, October 23, 2001.

Id. at 273 (emphasis added).

In this action, Plaintiff alleges that: Decedent sexually abused her and destroyed her life (Compl. ¶¶ 4-7); that "[w]hen [Decedent] inflicted these sexual assaults on [her] … her body froze up, and she began crying" (*id*. ¶ 53); that, "[b]y 2004, [she] felt despair and isolation"; and that,

after Decedent "cast her out" in 2004, she "sank into alcoholism and other self-harm" (*id*. ¶ 63). Accordingly, much like the plaintiff in *Santiago*, Plaintiff's own allegations establish that she was "aware of her alleged injuries and their cause" long before she filed this lawsuit.

The cases Plaintiff cites to support her invocation of the discovery rule confirm it only applies where, unlike here, a plaintiff is unable to pursue her claims until a belated fact discovery. *See Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir. 1989) (issue was when plaintiff knew he had become sick because of asbestos exposure); *Hill v. Gov't Emples. Ret. Sys.*, 1118/1992, 1993 V.I. LEXIS 23, at *1 (Feb. 22, 1993) (issue was when plaintiff knew of the permanency or her physical disability following automobile accident for purposes of applying for disability benefits).

III. Plaintiff disregards black-letter law establishing punitive damages are barred here.

Plaintiff does not argue that Florida, N.M. or N.Y. law permits her claim for punitive damages. Therefore, should the Court find the laws of those jurisdictions apply, this motion should be granted.

Nor does Plaintiff cite any legal authority justifying a departure from the black-letter choice-of-law principle holding that the law of the place of an alleged tort applies to issues regarding punitive damages, which are conduct regulating. (Mov. Br. p. 5.) Plaintiff's central premise used to gin up a (feeble) connection to the USVI is that Decedent "purposefully availed himself of the benefits of USVI estate law." (Op. Br. at p. 11.) Plaintiff's assertion is based on newspaper articles and other non-binding sources that do not overcome the fact that, per her Complaint, N.Y. has a much stronger connection to this lawsuit than the USVI: Plaintiff chose to sue here (which is only possible pursuant to the same N.Y. statute that prohibits punitive damages against a deceased tortfeasor's estate);[6] Plaintiff alleges N.Y. "was the epicenter" of Decedent's

[6] Plaintiff largely ignores *Blissett v. Eisensmidt*, 940 F. Supp. 449, 457 (N.D.N.Y. 1996). That is because it establishes

wrongdoing (Compl. ¶ 23); and Plaintiff alleges Decedent resided in N.Y. during a "substantial portion" of the time relevant to this lawsuit, resided in N.Y. when he died, conducted "substantial" business operations in N.Y., and owned or controlled "numerous companies" with a principal place of business in N.Y. as well as real property here (*id.* ¶¶ 18-27).

The USVI has no interest in applying its laws on punitive damages, which in any event are the same as Florida, N.M. and N.Y., to alleged torts that took place in those locations. The fact that Decedent's estate is being probated in the USVI 16 years after the alleged tortious conduct took place is a connection much weaker than the one deemed "tenuous" in *Nat'l Jewish Democratic Council v. Adelson*, No. 18 Civ. 8787 (JPO), 2019 U.S. Dist. LEXIS 168675, (S.D.N.Y. Sept. 30, 2019), on which Plaintiff heavily relies. Even under the framework of *Adelson*, Florida, N.M. and N.Y., ***not*** the USVI, have the greater interests in applying their laws to torts that allegedly occurred there.

Plaintiff's reliance on *Adelson* is based on an apparent misinterpretation of that action. In *Adelson*, the National Jewish Democratic Council and its chair sued Sheldon G. Adelson for damages based on Adelson's prior filing of a defamation suit against them in the same court pursuant to Nevada law. *Id*. at *1-2. The court had dismissed Adelson's prior action pursuant to Nevada's anti-SLAPP statute, which has its own punitive damages provision. *Id*. at *1-2, 11. In the action against Adelson, the court held that Nevada had a much stronger interest in applying its punitive damages law because Adelson had previously attempted to use Nevada's defamation law to chill First Amendment rights. *Id*. at *14. By contrast, "New York's interest [was] relatively attenuated" in the second action because "[i]ts sole connection to this suit [was] that the suit was

Plaintiff may not have the Court simultaneously apply the first sentence of E.P.T.L. § 11-3.2(a)(1), permitting her to bring this case in the first place, but to disregard the very next sentence precluding punitive damages. *See id*. at 457.

filed here." Id. at *15. Here, the situation is the opposite given the strong N.Y. contacts stated above. Other cases Plaintiff cites are distinguishable or support the Co-Executors' argument.[7]

a. Plaintiff's *Banks* analysis and supporting arguments are erroneous.

Plaintiff's response to the Co-Executors' *Banks* analysis is that "USVI case law makes clear that the USVI permits punitive damages against any defendant 'for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.'" (Op. Br. p. 13.) Plaintiff misses the point. The issue here is not whether the USVI permits punitive damages generally. Rather, the issue is whether a proper *Banks* analysis shows the USVI adopts the majority position by precluding the recovery of punitive damages ***against a deceased tortfeasor's estate***. As established in the Co-Executors' moving brief, every *Banks* factor favors the estate on this question. (Mov. Br. pp. 7-8.)

Plaintiff's arguments against the Co-Executors' *Banks* analysis are erroneous. First, Plaintiff argues that, unless a jurisdiction enacts a statutory prohibition on punitive damages against a tortfeasor's estate, this Court should find the jurisdiction does not have such a prohibition. Plaintiff is wrong. Many jurisdictions among the majority have judicially adopted the prohibition. *See* Alec A. Beech, *COMMENT: Adding Insult to Death: Why Punitive Damages Should Not Be Imposed Against a Deceased Tortfeasor's Estate in Ohio*, 49 Akron L. Rev. 553, 564 (2016) (thirteen states and D.C. have judicially adopted the majority view).

Second, Plaintiff contends that the USVI A.G.'s request for punitive damages in a lawsuit against Decedent's estate means the third *Banks* factor weighs in Plaintiff's favor. However, even

[7] *See James v. Powell*, 19 N.Y.2d 249, 259-60 (1967) (applying N.Y. law to punitive damages against party who sought to prevent collection of N.Y. judgment because N.Y. had strongest interest in protecting its judgment creditors); *Fed. Hous. Fin. Agency v. Ally Fin. Inc.*, No. 11-cv-7010 (DLC), 2012 WL 6616061, at *5 (S.D.N.Y. Dec. 19, 2012) ("It can hardly be disputed that [N.Y.] and Minnesota, within whose borders the primary conduct allegedly took place, have a stronger interest"); *King v. Car Rentals, Inc.*, 29 A.D.3d 205, 212 (2d Dep't 2006) (applying N.J. law in car accident case because the vehicle was owned by a N.J. domiciliary and registered, insured and rented there); *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 195 (1985) (N.J. law applied to injuries "inflicted" there).

where an attorney general purports to interpret a law -- and here the USVI AG did no such thing -- the Supreme Court has warned against accepting such interpretation as authoritative. *See Stenberg v. Carhart*, 530 U.S. 914, 940, 120 S. Ct. 2597, 2614 (2000) ("[O]ur precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law.").

Third, Plaintiff argues the availability of punitive damages in this action would further the USVI's rationales for awarding punitive damages – *i.e.*, to punish wrongdoers and for deterrence. Yet, a majority of jurisdictions have already deemed that rationale inapplicable after the tortfeasor dies. *See, e.g.*, *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").

Fourth, Plaintiff contends there are no "innocent heirs" in this matter. However, this argument is based on pure speculation and otherwise unsupported by any legal authority.

Fifth, Plaintiff asks the Court to create new law by holding Decedent's suicide was an attempt to avoid punitive damages and, therefore, punitive damages should be permitted. This is also speculation. Moreover, the only legal authority Plaintiff cites to support this argument is *dicta* from an Indiana state law case in which that state joined the majority of jurisdictions holding that "Indiana law does not permit recovery of punitive damages from the estate of a deceased tortfeasor." *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 139 (Ind. 2005).

CONCLUSION

For the reasons stated above and in their moving brief, the Co-Executors respectfully request that the Court dismiss Plaintiff's Complaint with prejudice to the extent it is time-barred and Plaintiff's claim for punitive damages, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 7, 2020

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