UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE NO. 8,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

PLAINTIFF JANE DOE NO. 8's MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff, Jane Doe No. 8, submits this Memorandum of Law in Opposition to Motion to Dismiss Plaintiff's Complaint, pursuant to S.D.Fla.L.R. 7.1(C), as follows:

INTRODUCTION

As with the related cases in this Court against Defendant Jeffrey Epstein, Plaintiff Jane Doe No. 8 alleges that she was the victim of a plan and scheme by Defendant Epstein to lure her to his Palm Beach mansion, where he sexually molested her. The Complaint in this case sets forth state law claims and a federal law claim under 18 U.S.C. §§2422 and 2255. Defendant relies exclusively on the statute of limitations as grounds for dismissal pursuant to Fed.R.Civ.P. 12(b)(6).

With respect to Plaintiff's state law causes of action for assault and battery, Defendant incorrectly applies a four-year statute of limitations. Florida Statute §95.11 is clear that a seven-year statute of limitations applies to the state law claims alleged by Plaintiff. As a result, the state law cause of action for assault and battery is timely.

In contending that Plaintiff's federal claim should be dismissed based on the statute of

limitations, Defendant wrongly assumes that this claim accrued on the date when Defendant's wrongful conduct occurred. Defendant's argument fails to recognize that the "discovery rule" is applicable, which provides that an action does not accrue until the Plaintiff knew or should have known of both her injuries *and* their cause. Given the nature of the discovery rule and the factual inquiry it necessitates in the context of childhood sexual abuse, Plaintiff's federal claim is not susceptible to dismissal on statute of limitations grounds pursuant to Fed.R.Civ.P. 12(b)(6). Accordingly, Defendant's Motion to Dismiss should be denied in its entirety.

ARGUMENT

I. DISMISSAL IS NOT WARRANTED UNDER FED.R.CIV.P. 12(b)(6) AS TO ANY OF PLAINTIFF'S CLAIMS

Defendant moves for dismissal of Counts I and III of the Complaint exclusively on grounds of statute of limitations, which is an affirmative defense. Such a dismissal "is appropriate only if its is apparent from the face of the complaint that the claim is time barred." Tello v Dean Witter Reynolds, Inc., 410 F.3d 1275, 1288 (11th Cir. 2005) (citation omitted). "This standard for dismissal can be met only if the complaint *shows the date* on which the time-barred claim accrued." Durden v. Citicorp Trust Bank, 2008 WL 2098040 *3 (M.D.Fla. 2008) (citing Avco Corp. v. Precision Air Parts, Inc., 676 F.2d 494, 495-96 (11th Cir. 1982)) (emphasis supplied). Accord Del Monte Fresh Produce Co. v. Dole Food Co., 136 F.Supp. 2d 1271, 1294 (S.D. Fla. 2001) (Gold, J.) ("[t]he absence of an indication *of the date* on which Del Monte discovered the alleged misappropriations prevents the Court from determining from the face of the complaint at what time Del Monte's actions accrued."). It is not apparent from the Complaint in this case that any of Plaintiff's claims are time barred. In particular, nowhere does the Complaint allege the date on which any of her claims accrued. Therefore, Defendant's Motion to Dismiss must be denied in its entirety.

II. COUNT I OF COMPLAINT IS NOT TIME BARRED UNDER THE SEVEN-YEAR STATUTE OF LIMITATIONS, FLA. STAT. §95.11(7)

Count I (assault and battery) and Count II (intentional infliction of emotional distress) allege claims under state law. [1] Defendant asserts that Count I should be dismissed because a four-year statute of limitations applies to that claim, and it is apparent from the face of the Complaint that Plaintiff filed her claim past this limitations period. Defendant recognizes that, for this argument to succeed, he must establish that Fla.Stat. §95.11(7), providing a seven-year limitations period after the Plaintiff reaches the age of majority for claims based on abuse, is inapplicable in this case. A review of the language of the Statute, however, and applying basic tenets of statutory construction, reveal that §95.11(7) is clearly the statute of limitations pertinent to Plaintiff's state law claims.

Section 95.11(7) provides a seven-year limitations period, as follows:

> (7) For intentional torts based on abuse. – An action founded on alleged abuse, as defined in s. 39.01, . . . 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.

The term "abuse" is defined in Fla.Stat. §39.01(2) as follows:

> "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.

The Complaint in this case alleges "abuse" under the broad definition of §39.01. Specifically, Count I alleges willful acts (Complaint ¶¶ 8-13, 18-19); resulting in physical, mental or sexual injury (Complaint ¶¶ 13,17); that cause or are likely to cause the child's physical, mental or emotional

[1] Defendant did not move for dismissal of Count II.

health to be significantly impaired (Complaint ¶¶ 14, 20). Under §95.11(7), therefore, the Plaintiff has until seven years after she reaches the age of majority to bring suit (*i.e.* until she is 25 years old), or within four years from the time she discovers both the injury and the causal relationship between the injury and abuse, whichever occurs later. Accordingly, the statute of limitations cannot expire before the Plaintiff's 25th birthday, and her Count I claim is timely under §95.11(7).

Defendant nonetheless asserts that the pertinent limitations provision is §95.11(3)(o), providing a four-year limitation period, not §95.11(7). Section 95.11(3)(o), lists causes of action subject to a four-year limitations period, as follows:

> An action for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or any other intentional tort, ***except as provided in subsections (4), (5), and (7).***

(Emphasis supplied). Section 95.11(3)(o), by its express terms, is subject to an exception, as provided in § 95.11(7). The plain meaning of this language is that an intentional tort claim alleging "abuse" against a child, as described in Fla.Stat. §39.01, is controlled by §95.11(7), which trumps §95.11(3)(o). The seven-year limitations period (or four years after discovery) thus applies in this case. See H.T.E. v. Tyler Technologies, Inc., 217 F.Supp. 2d 1255, 1259 (M.D. Fla. 2002) (where language of a statute is clear and unambiguous, the statute must be given its plain and obvious meaning).

Defendant nonetheless seems to argue that §95.11(3)(o) applies because it expressly references the intentional torts of assault and battery, ignoring that the Complaint at issue alleges "abuse" as defined in Florida Statute §§95.11(7) and 39.01(2). This is a strained and plainly incorrect construction of the language in §§95.11(3)(o) and 95.11(7). Defendant essentially contends that only a claim of "abuse" would be controlled by §95.11(7), while other intentional torts would

necessarily fall under §95.11(3)(o). However, as one Court has recognized, there is no Florida cause of action for abuse, and §95.11(7) did not create one. Zlotogura v. Geller, 681 So.2d 778 (Fla. 3d DCA 1996). Accordingly, if §95.11(7) is to have any meaning, it necessarily must encompass claims of assault and battery and other intentional torts involving "abuse" upon a child as defined in §39.01(2).

Even assuming that §§95.11(3)(o) and 95.11(7) were ambiguous, it is a basic rule of statutory construction that two sections are to be read *in para materia*, such that all sections are given effect and are read as a consistent whole. H.T.E., 217 F.Supp. 2d at 1259. Doing so in this case compels the conclusion that the seven-year limitation of §95.11(7) applies to Plaintiff's Count I claim. Defendant's Motion to Dismiss Count I must accordingly be denied.

III. THE COMPLAINT DOES NOT SHOW ON ITS FACE THAT PLAINTIFF'S COUNT III CLAIM IS TIME BARRED

Count III of the Complaint alleges a claim of coercion and enticement to sexual activity against a minor in violation of 18 U.S.C. §2422. A victim who suffers personal injuries as a result of a violation of this statutory provision is granted a private right of action under 18 U.S.C. §2255. A limitations provision is included on this statute at subsection (b), which provides that a claim is barred unless it is brought "within six years after the rights of action first accrues or in the case of a person under a legal disability, not later than three years after disability."[2] The pertinent issue, then, for purposes of this statute of limitations, where the victim is over the age of 21, is when the action accrued. Defendant Epstein *assumes* in his Motion to Dismiss that the action accrued on the date

[2] Under Florida law, a person is under a disability as a minor until age 18. See Fla. Stat. §743.07.

when Epstein's sexual misconduct occurred.[3] That assumption is incorrect under federal law and the allegations of the Complaint.

A claim does not necessarily accrue when the wrongful conduct occurs. Rather, the "discovery rule" applies to accrual of federal causes of action. See White v. Mercury Marine, 129 F.3d 1428, 1435 (11th Cir. 1997) (noting that use of word "accrue" indicated approval of discovery rule in statute of limitations in accordance with federal precedents adopting discovery rule). Under this rule, an action accrues "when the plaintiff knew or should have known *of his injury and its cause*."[4] Id. (emphasis supplied). See also Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980) (in a case analyzing accrual under federal law for a civil rights claims under 42 U.S.C. §1983, noting that the Supreme Court in United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352 (1979), "has rejected the standard which would allow the statute of limitations to *commence running before the plaintiff was or should have been aware of the causal connection between his injury and the acts of defendants*") (emphasis supplied). Accord Diaz v. United States, 165 F.3d 1337, 1340 (11th Cir. 1999) (in wrongful death case under Federal Tort Claims Act (FTCA), holding that claim accrues when the plaintiff knows or should have known both of the decedent's death and its causal connection to the government); Stoleson v. United States, 629 F.2d 1265, 1270-71(7th Cir. 1980)

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[3] The Motion to Dismiss asserts that "it has been at least 8 years since the alleged conduct by EPSTEIN, well past the six year statute of limitations, thus requiring dismissal of Count III." (Motion to Dismiss, p. 4).

4 The case of Smith v. Husband, 376 F.Supp. 2d 603 (E.D.Va. 2005) is inapposite. While that case was brought under 18 U.S.C. §2255 for a violation of 18 U.S.C. §2251, alleging sexual exploitation of a minor for the purpose of producing a sexually explicit videotape, the plaintiff did not argue the discovery rule. Rather, the plaintiff contended that the continuing violation rule applied to toll the statute of limitations, which the Court rejected. As a result, the Court never considered application of the discovery rule.

(holding that claim under FTCA did not accrue until the plaintiff had knowledge of a causal connection "to tie together" the breach of duty and her injury); Skwira v. United States, 344 F.3d 64, 76-83 (1st Cir. 2003), cert. denied, 542 U.S. 903 (2004) (holding that discovery rule, requiring that accrual does not occur before the plaintiff knew or should have known of injury and its causal connection to the defendant, applies outside the medical malpractice context).

In a case where a minor is sexually abused, or wrongfully enticed or coerced into sexual activity by an adult, the victim is unlikely in the exercise of reasonable diligence to be (i) immediately aware of her injuries given the subtle and pernicious effects of childhood sexual abuse; or (ii) able to connect those injuries to the defendant's misconduct. See Doe v. Paukstat, 863 F.Supp. 884, 890-91 (E.D. Wis. 1994) (noting that application of discovery rule in case of childhood sexual abuse is "amorphous", and holding that when cause of action for abuse accrues is a question for the trier-of-fact); cf. R.L. v. Voytac, 971 A.2d 1074 (N.J. 2009) (holding that "it is necessary to consider all relevant facts and circumstances", including expert psychological testimony, in applying discovery rule to claim of childhood sexual abuse, and that the issue is "when the injured party in fact discovered, or when a reasonable person subjected to child sexual abuse should have discovered, that the claimed injury was causally related to the asserted child abuse by the defendant"). The determination of when the limitations period accrues under the discovery rule, in a case involving the defendant's sexual misconduct with a minor, therefore, requires a detailed and complex factual inquiry. The date of accrual certainly is not obvious nor is it otherwise alleged in the Plaintiff's Complaint.[5] As a result, Count III cannot be dismissed under Fed.R.Civ.P. 12(b)(6) on the basis of

[5] As discussed in §I above, dismissal under Fed.R.Civ.P. 12(b)(6) on statute of limitations grounds is only appropriate when the date of accrual is alleged in the complaint itself.

the statute of limitations.[6]

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that Defendant's Motion to Dismiss be denied in its entirety.

Dated: August 12, 2009.

Respectfully submitted,

By: s/ Stuart S. Mermelstein

Stuart S. Mermelstein (FL Bar No. 947245)
ssm@sexabuseattorney.com
Adam D. Horowitz (FL Bar No. 376980)
ahorowitz@sexabuseattorney.com
MERMELSTEIN & HOROWITZ, P.A.
Attorneys for Plaintiff Jane Doe 8
18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Tel: 305-931-2200
Fax: 305-931-0877

[6] It would also be inappropriate to dismiss this case on limitations grounds because Defendant has argued in one of the related cases that 18 U.S.C. §2255 requires a prior federal conviction. (See Jane Doe 101 v. Epstein, case no. 09-CV-80591, Motion to Dismiss First Amended Complaint, p. 15, §II(A), DE 29). If that argument were correct then the Plaintiff's claim in Count III has not yet accrued. Defendant should not be heard to whipsaw the Plaintiffs and take such inconsistent positions in these related cases.

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Stuart S. Mermelstein

SERVICE LIST
DOE vs. JEFFREY EPSTEIN
CASE NO.: 09-CV-80802-MARRA/JOHNSON
United States District Court, Southern District of Florida

Jack Alan Goldberger, Esq.
jgoldberger@agwpa.com

Robert D. Critton, Esq.
rcritton@bclclaw.com

/s/ Stuart S. Mermelstein