UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIETTE BRYANT,

Plaintiff,

-against-

DARREN K. INDYKE and RICHARD D. KAHN, in their capacities as the executors of the ESTATE OF JEFFREY EDWARD EPSTEIN,

Defendants.

Case No. 1:19-cv-10479 (ALC) (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 to dismiss Plaintiff's Complaint (ECF No. 1).

PRELIMINARY STATEMENT

In her opposition brief, Plaintiff asks the Court to depart from well-established law to resuscitate her claims that expired over a decade ago. First, Plaintiff attempts to create a non-existent issue of fact – which does not alter the result of the proper legal analysis in any event – regarding her residence, which she unequivocally alleges was *not* in New York. Second, Plaintiff asks the Court to disregard basic principles of statutory interpretation and numerous cases applying CPLR §§ 213-c and 215(8)(a) to support her erroneous application of those rules. Third, Plaintiff asks the Court to disregard Second Circuit authority holding that it is Plaintiff's burden to allege "extraordinary circumstances" to toll the applicable statutes of limitations, which she fails to do here. Fourth, Plaintiff urges this Court to permit her to seek punitive damages notwithstanding that, in two other actions against the Co-Executors involving similar claims, Judge Engelmayer dismissed claims for punitive damages in the face of the very arguments Plaintiff raises here. The Court should reject Plaintiff's arguments.

ARGUMENT

I. New York's borrowing statute applies to Plaintiff's claims because her own allegations firmly establish she was not, and is not, a New York resident.

As laid out in the Co-Executors' moving papers, the New York borrowing statute requires dismissal of Plaintiff's claims to the extent that they are based on torts that allegedly occurred in France, New Mexico, and the USVI, as such claims are time-barred by the applicable laws of those

[1] Capitalized terms not defined herein have the meanings ascribed to them in the Co-Executors' moving brief (ECF No. 24).

jurisdictions. (Mov. Br. pp. 4-6.) In a failed attempt to avoid this result, Plaintiff now attempts to manufacture a fact issue regarding her residency.[2] (Op. Br. p. 15.)

Not only is this argument unsupported by case law, it is directly contradicted by Plaintiff's own allegations in her Complaint. Plaintiff argues that her "Complaint alleges that Plaintiff was a New York resident at all relevant times." (Op. Br. p. 15.) However, nowhere in her Complaint does Plaintiff claim New York domicile or residency. Rather, in addition to expressly alleging that "Plaintiff Juliette Bryant is a citizen and resident of South Africa," all other supporting facts alleged in Plaintiff's Complaint -- including that she met Decedent when he was visiting Cape Town, that she repeatedly would "travel to the United States" "for one to two weeks at a time," and that she "flew home to South Africa" (Compl. ¶¶ 16, 38, 46, & 50) -- confirm her claimed South African residency.

Plaintiff further argues that there is a factual question regarding her New York residency because "she had always wanted to live in New York, Epstein's co-conspirators got Plaintiff a visa so that she could travel to New York often, and when she visited she stayed at Epstein's New York home for one to two weeks at a time." (Op. Br. p. 15). None of these allegations, even if true, would suffice to establish Plaintiff's residency in New York under the New York borrowing statute. *See Gold v. Katz*, No. 90 CIV. 7726 (RLC), 1991 WL 237807, at *2 (S.D.N.Y. Nov. 4, 1991) ("The test for domicile has two elements: '[r]esidence in fact, coupled with the purpose to make the place of residence one's home.'" (quoting *Texas v. Florida*, 306 U.S. 398, 424 (1939)); *Bache Halsey Stuart Inc. v. Namm*, 446 F. Supp. 692, 695 (S.D.N.Y. 1978)(in determining

[2] "An individual can have only one state of residence for purposes of the borrowing statute, and that is the state of his domicile." *Bache Halsey Stuart Inc. v. Namm*, 446 F. Supp. 692, 694 (S.D.N.Y. 1978). Furthermore, "[a]n individual's residence at the time a lawsuit is commenced provides prima facie evidence of his domicile." *Willis v. Westin Hotel Co.*, 651 F. Supp. 598, 601 (S.D.N.Y. 1986). Plaintiff's Complaint expressly states that "Plaintiff Juliette Bryant is a citizen and resident of South Africa." (Compl. ¶ 16). Therefore, New York's borrowing statute applies.

residency under the borrowing statute, "[w]hat is vital is whether the Namms' Connecticut or New York residence is where they intended to maintain their home"). On their face, allegations that Plaintiff needed a visa to *visit* New York reveal her current claims of residency are nothing more than an after-the-fact concoction.

Furthermore, even if Plaintiff had also alleged in her Complaint that she was a New York resident -- which she did not do -- such an allegation would not preclude dismissal of her claims in the face of her numerous allegations establishing she was not a New York resident during the relevant time period. "'Where [the] plaintiff's own pleadings are internally inconsistent, a court is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss.'" *Whitley v. Bowden*, No. 17-cv-3564 (KMK), 2018 WL 2170313, at *11 (S.D.N.Y. May 9, 2018) (quoting *Carson Optical Inc. v. eBay Inc.*, 202 F. Supp. 3d 247, 255 (E.D.N.Y. 2016)).

Finally, even if New York's borrowing statute does not apply, for the reasons set forth in the Co-Executors' moving brief and herein, Plaintiff's claims are still untimely under New York law.

II. The 20-year limitations period in CPLR § 213-c does not apply retroactively or to torts allegedly committed outside New York.

In her opposition brief, Plaintiff argues that CPLR § 213-c, which provides a 20-year limitations period for certain civil claims based on sexual offenses that constitute specific New York penal law violations, revives her claims. Plaintiff's argument fails for at least two reasons.

First, the 20-year limitations period in CPLR § 213-c does not apply to Plaintiff's claims because they were already time-barred by 2007 at the latest, which was long before the non-retroactive 20-year limitations period in CPLR § 213-c became effective. The 20-year limitations period in CPLR § 213-c became effective as of September 18, 2019; the previous limitation period

therein was 5 years as of 2006 and 1 year before then. L. 2006, ch. 3, § 5(b). The law enacting the 20-year limitations period unequivocally states that it does not apply retroactively except "where the applicable statute of limitations in effect on the date of such act or omission has not yet expired." L. 2019, ch. 315, § 4. Here, Plaintiff's claims expired over a decade before the 20-year statute of limitations became effective—so it is inapplicable.

Second, Plaintiff's allegations of torts occurring outside New York cannot constitute violations of New York penal law that serve as necessary predicates to the application of CPLR § 213-c. *See People v. McLaughlin*, 80 N.Y.2d 466, 471 (1992) ("Because the State only has power to enact and enforce criminal laws within its territorial borders, there can be no criminal offense unless it has territorial jurisdiction"). In an attempt to avoid this well-established principle, Plaintiff argues that her claims based on torts that occurred outside New York still somehow accrued under New York law. This argument is both nonsensical and contrary to other black-letter law. *See Corcoran v. New York Power Auth.*, No. 95 CIV. 5357 (DLC), 1997 WL 603739, at *5 (S.D.N.Y. Sept. 29, 1997) ("An action for battery accrues when the nonconsensual offensive contact occurs."); *Lettis v. U.S. Postal Serv.*, 39 F. Supp. 2d 181, 204 (E.D.N.Y. 1998) ("Causes of action for assault and battery accrue immediately upon the occurrence of the- tortious act"); *Wilson v. Erra*, 94 A.D.3d 756, 756, 942 N.Y.S.2d 127, 129 (2012) ("A cause of action alleging intentional infliction of emotional distress accrues on the date of injury").

III. Plaintiff is unable to invoke CPLR § 215(8)(a) because she fails to assert a criminal indictment that arises from Decedent's alleged conduct towards her.

In her opposition brief, Plaintiff confirms her allegation is that she did not even meet Decedent until she was already an adult. Nonetheless, Plaintiff continues to urge the application of CPLR § 215(8)(a) to this action based on an Indictment charging Decedent with sex trafficking ***of minors***. However, to invoke CPLR § 215(8)(a), Plaintiff is required to assert allegations

establishing the Indictment and this lawsuit arise from the same "event or occurrence." Plaintiff fails to do this.

Instead, Plaintiff attempts to recast the Indictment as broader in scope than its contents allow. Specifically, Plaintiff takes two allegations concerning Decedent's purported actual knowledge of the age of some of the "minor victims" out of context to imply adult women were the subject of the Indictment. (Op. Br. p. 6).[3] This is disingenuous. The Indictment does not reference any adult victims. Rather, all the facts alleged in the indictment refer to Decedent's alleged conduct towards "minor girls" or "minor victims" (Indictment at ¶¶ 1-4, 6, 8, 11-15 18-19, *et seq*.); and the two counts of the indictment, for Sex Trafficking Conspiracy and Sex Trafficking, charge crimes involving minors (*id* at ¶¶ 20 & 24).

Plaintiff next tries to expand the scope of CPLR § 215(8)(a)'s "event or occurrence" requirement. However, the cases cited in the Co-Executors' moving brief confirm that, even where it is undisputed that the subject criminal indictment concerns the civil plaintiff and the same kind of conduct alleged in the plaintiff's civil complaint, CPLR § 215(8)(a) still does not apply where the indictment and civil action arise from different events or occurrences. (*See* Mov. Br. pp. 7-10.) Plaintiff's attempt to distinguish these cases on the ground that they "focused on events that occurred on specified dates" (Op. Br., p. 8) is based on Plaintiff's dubious assertion that, because the Indictment at issue here "was not limited to a specific day or discrete event" (*id.*, p. 10), anyone alleging she suffered the same type of misconduct described in the Indictment is free to invoke CPLR § 215(8)(a). Such a reading is s contrary to basic

[3] The full sentences in the Indictment which Plaintiff references are as follows: "JEFFREY EPSTEIN, the defendant, knew that many of his New York victims were underage, including because certain victims told him their age;" and "JEFFREY EPSTEIN, the defendant, knew that certain of his victims were underage, including because certain victims told him their age." (Indictment at ¶¶ 11 & 17.)

principles of statutory interpretation prohibiting a reading of a statute that would render its words meaningless (see 97 NY Jur Statutes § 185), the case law cited in the Co-Executors' moving brief, a plain reading of the Indictment and common sense.[4]

IV. Plaintiff fails to meet *her* burden to *allege* "extraordinary" circumstances sufficient to invoke equitable estoppel or tolling.

Plaintiff misstates the pleading burden with respect to equitable estoppel and tolling, asserting that "Defendants have failed to meet their burden of showing that [she] will be unable to invoke equitable estoppel and equitable tolling." (Op. Br. p. 1.) Plaintiff has it backwards. As explained in the Co-Executors' moving brief, the burden is on ***Plaintiff*** to sufficiently allege "extraordinary circumstances" to invoke these doctrines. (Mov. Br. pp. 1, 12-15.)

In her opposition brief, Plaintiff does not address many of the cases that the Co-Executors cite on this point, but rather attempts to buttress her Complaint by painting a slightly more detailed (but still insufficient) picture of why she waited 15 years to bring this action. However, Plaintiff's Complaint is controlling. In her Complaint, Plaintiff does not allege: any particularized acts by Decedent that prevented her from exercising her rights; that Decedent made a misrepresentation to her and had reason to believe she would rely on it; or that she reasonably relied on any misrepresentation by Decedent to her detriment.

Excluding vague allegations concerning Decedent's alleged misconduct directed at some unidentified set of alleged victims that does not include Plaintiff (*see, e.g.*, Compl. ¶ 26 ("[Decedent] utilized his seemingly unlimited power, wealth, and resources… intimidate and manipulate his victims"),[5] Plaintiff primarily alleges her impressions and emotions between

[4] Plaintiff also once again relies on *Kashef v. BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019), notwithstanding that the Co-Executors already demonstrated that it is distinguishable from this action. (Mov. Br. p. 10.)

[5] Many of Plaintiff's allegations are cut-and-pasted from the complaints of other plaintiffs represented by the same counsel and lack any ascribed basis other than Plaintiff's impression of Decedent's wealth.

2002 and 2004, rather than Decedent's conduct. (*Id.* ¶ 44, 45, 48.) Not a single case Plaintiff cites supports a finding that such allegations satisfy the "extraordinary circumstances" pleading burden required to invoke estoppel or tolling. To the contrary, the cases Plaintiff cites are either inapplicable[6] or confirm her allegations fall short of that threshold.[7]

While Plaintiff claims that "Epstein attempted to keep in contact with Juliette through e-mail over the years" following Plaintiff's cutting ties with him in 2004, she cites to two emails that neither contain threats nor misrepresentations—hardly "extraordinary circumstances." In any event, the cited emails, which are dated to 2016 and 2019, cannot serve as justification for Plaintiff's failure to pursue her claims for the more-than-ten-year gap between when she "cut ties" with Decedent and when she corresponded with him.

V. Judge Engelmayer recently dismissed two other plaintiffs' punitive damages claims as a matter of law, rejecting the very arguments Plaintiff raises here.

The Hon. Paul A. Engelmayer recently dismissed punitive damages claims on the pleadings in two other actions against the Co-Executors involving claims similar to those Plaintiff raises in this action. *See e.g.*, *Doe v. Indyke,* No. 19-cv-10758 (PAE), 2020 WL 2036707, at *1 (S.D.N.Y.

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[6] Plaintiff's reliance on *Davis v. Jackson*, No. 15-CV-5359 (KMK), 2016 WL 5720811, at *11 (S.D.N.Y. Sept. 30, 2016)—to support her assertion that reasonable fear of retaliation "may be sufficient" to warrant equitable tolling (Op. Br. p. 17)—is misleading. In that action, the court granted a *pro se* prisoner leave to allege facts sufficient to show he pursued his claims with reasonable diligence. *Id*. at *39. However, the Court was clear that its findings were based on plaintiff's incarceration and *pro se* status. *See id*. at *35, 39 ("*in the prison context*, reasonable fear of retaliation may be sufficient"; "given Plaintiff's *pro se* status … the Court is hesitant to dismiss [his] claims"). As Plaintiff is neither a prisoner nor proceeding *pro se*, *Davis* is inapplicable.

[7] In *Funk v. Belneftekhim*, No. 14-CV-0376 (BMC), 2019 WL 3035124 (E.D.N.Y. July 11, 2019), which Plaintiff also cites, the court found the plaintiffs "alleged extraordinary circumstances that could warrant the application of equitable tolling: they were drugged, kidnapped, flown to Belarus, held captive, and tortured for 383 and 483 days, respectively." *Id*. at *2. There are no such allegations here. The other cases Plaintiff cites likewise support the conclusion she has not met her burden to allege extraordinary circumstances. *See Gotlin v. Lederman*, No. 05-CV-1899 (ILG), 2006 WL 1154817, at *30 (E.D.N.Y. Apr. 28, 2006) (plaintiffs in medical malpractice action alleged defendants failed to provide them with, and intentionally and fraudulently attempted to discourage and prevent them from obtaining, their medical records); *Gen. Stencils, Inc. v. Chiappa*, 219 N.E.2d 169, 171 (N.Y. 1966) (plaintiff was allowed to invoke equitable estoppel against a bookkeeper who had used his position to carefully conceal his theft of the plaintiff's money); *Brown v. Parkchester S. Condos.*, 287 F.3d 58, 59 (2d Cir. 2002) (employee argued his medical condition prevented him from timely filing his complaint); *Guobadia v. Irowa*, 103 F. Supp. 3d 325, 341 (E.D.N.Y. 2015) (plaintiff filed her lawsuit less than a year after leaving a home where she was allegedly forced to work without pay as a servant).

Apr. 28, 2020) (granting motion to dismiss punitive damages against the Co-Executors); *Doe 15 v. Indyke*, No. 19-cv-10653 (PAE), 2020 WL 2086194, at *1 (S.D.N.Y. Apr. 30, 2020) (same). In doing so, Judge Engelmayer correctly rejected each of the arguments Plaintiff asserts here in support of her request to continue to pursue her legally deficient claim for punitive damages.

First, Judge Engelmayer rejected the argument that a motion to dismiss a legally deficient claim for punitive damages on the pleadings is procedurally improper: "where punitive damages have been unavailable as a matter of law, courts have not hesitated to dismiss prayers for such damages at the threshold." *Doe,* 2020 WL 2036707, at *3; *see also Doe 15,* 2020 WL 2086194, at *1. "[A]mple authority permits striking prayers for punitive damages where such relief is unavailable as a matter of law." *Id.* at *4 (citing *In re Merrill Lynch Auction Rate Sec. Litig.*, 851 F. Supp. 2d at 544).[8]

Discarding the "conceptual debate" between motions filed under Rule 12(b)(6) and Rule 12(f), Judge Engelmayer further concluded that the Court could in any event dismiss claims for punitive damages *sua sponte* under Rule 12(f) because: "With numerous personal injury actions pending against the Epstein estate as a result of the recent enactment of the New York Child Victims Act, there is value in clarifying—for the parties and settlors—the damages available in actions where the law permits a sure answer on this point." *Doe*, 2020 WL 2036707, at *5. The same practical wisdom applies here.

Second, Judge Engelmayer rejected Mary Doe's and Jane Doe 15's attempts to apply United States Virgin Islands law to the issue of punitive damages, finding that the law of the place

[8] *See also* C. Wright & A. Miller, 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.) ("the technical name given to a motion challenging a pleading is of little importance inasmuch as prejudice to the nonmoving party can hardly result from treating a motion that has been inaccurately denominated as a motion to strike as a motion to dismiss the complaint"); *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 first amended complaint asserting punitive damages); *Nash v. Coram Healthcare Corp.*, No. 96 Civ. 0298 (LMM), 1996 U.S. Dist. LEXIS 9101, at *15 (S.D.N.Y. June 27, 1996) ("The motion to strike the punitive damages prayer from the Complaint is granted.").

of the torts governs. *Doe*, 2020 WL 2036707, at *5-6; *Doe 15*, 2020 WL 2086194, at *2 (S.D.N.Y. Apr. 30, 2020). As established in the Co-Executors' moving brief, none of the jurisdictions where Plaintiff alleges the torts occurred permits punitive damages against a deceased tortfeasor's estate. (ECF No. 24 pp. 16-18.)

Moreover, Plaintiff here, like Mary Doe and Jane Doe 15, ignores *Blisset v. Eisensmidt*, 940 F. Supp. 499, 457 (N.D.N.Y. 1996). That well-reasoned decision establishes that Plaintiff may not have the Court simultaneously apply the first sentence of E.P.T.L. § 11-3.2(a)(1)—the portion of the statute permitting her to bring this action against the Co-Executors—but disregard the very next sentence precluding punitive damages. *See Blisset*, 940 F. Supp. at 457. To quote Judge Engelmayer, it would be "problematic for [Plaintiff] to cherrypick within that provision, invoking the part that authorizes a personal injury suit against an executor while disclaiming the balance, which delimits the recovery available in such a suit." *Doe*, 2020 WL 2036707, at *6 (S.D.N.Y. Apr. 28, 2020) (citing *Blisset*, 940 F. Supp. at 457).[9]

Third, Judge Engelmayer ruled that the choice-of-law debate (*i.e.*, New York law vs. USVI law) is "academic." *Id.* at *7. "That is because, while the USVI does not have a statute on point and USVI courts have not squarely resolved the issue, it is likely that USVI common law would not permit an award of punitive damages against an estate." *Id*. *See also Doe 15*, 2020 WL 2086194 *2 (S.D.N.Y. Apr. 30, 2020) ("Doe does not have any stronger argument than did Mary Doe that USVI law applies … or, if it did, that it would permit such damages").

[9] Like the plaintiffs in Mary Doe and Doe 15, Plaintiff also erroneously relies on *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). Even under the framework of *Adelson*, the place where a tort occurs has the greater interest in applying its laws and policies on punitive damages. Further, and as Judge Engelmayer found, *Adelson* is inapposite where, as here, the current lawsuit "does not build on a prior litigation in, or [is not] based on the law of, the USVI." *See Mary Doe*, 2020 WL 2036707, at *7.

Plaintiff in this action misapplies the *Banks* analysis factors, which USVI courts use to determine common law. *See Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 979 (2011). As Judge Engelmayer found, a proper *Banks* analysis demonstrates: (Factor 1) "USVI courts have repeatedly cited the Restatement (Second) of Torts § 908 favorably"; (Factor 2) consistent with the Restatement, most U.S. jurisdictions do not permit an award of punitive damages against a tortfeasor's estate; and (Factor 3) USVI courts appear comfortable with the majority rule. *Doe*, 2020 WL 2036707, at *8.

Plaintiff's remaining arguments fail for the same reasons applied by Judge Engelmayer in *Mary Doe and Jane Doe 15*. Plaintiff argues that, because the USVI Attorney General seeks punitive damages against the Estate in an unrelated civil racketeering lawsuit, punitive damages are allowed under USVI law. (Opp. at 22, n.9.) "But the decision by a government lawyer to attempt to obtain such damages in a high-profile case involving allegations of extreme conduct . . . do not speak to the question that the third *Banks* factor assays: which rule of law best durably servers the USVI's interests." *Doe v. Indyke,* 2020 WL 2036707, at *8.

Separately, Plaintiff's reliance on *Crabtree ex rel. Kemp v. Estate of Crabtree*, 837 N.E.2d 135, 139 (Ind. 2005), is misplaced. The court in that action held "Indiana law does not permit recovery of punitive damages from the estate of a deceased tortfeasor."

CONCLUSION

For the reasons stated above and in their moving brief (ECF No. 24), the Co-Executors respectfully request that the Court grant their motion to dismiss, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 26, 2020

Respectfully submitted,

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