UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-80804-CIV-MARRA/JOHNSON

JANE DOE, a/k/a,
JANE DOE NO. 1,

Plaintiff,

vs.

JEFFREY EPSTEIN, HALEY ROBSON, and SARAH KELLEN,

Defendants.
_____/

MOTION TO REMAND

Plaintiff Jane Doe moves the Court to remand this action to state court for lack of subject matter jurisdiction and states as follows:

1. Although Plaintiff Jane Doe, a Florida citizen, sues Haley Robson, also a Florida citizen, in this action, Defendants removed the case to federal court on July 21, 2008, citing diversity of citizenship as the basis for federal subject matter jurisdiction.

2. Defendants claim that Haley Robson, who has described herself as Heidi Fleiss (the Hollywood madam),[1] has "nothing to do with the plaintiff's case against Mr.

[1] *See New York Post*, Oct. 1, 2007 (reporting "Some of the girls, legal documents indicate, were recruited by Haley Robson, now 21, who described herself as 'like Heidi Fleiss,' the notorious Hollywood madam."); *Palm Beach Post*, Aug. 14, 2006 (reporting that Defendant "Robson told detectives, 'I'm like a Heidi Fleiss.'").

Epstein," (Notice of Removal, DE 1, p. 3) and that Plaintiff fraudulently joined her in this action to prevent complete diversity.[2]

3. As demonstrated in Plaintiff's amended complaint, however, Defendant Robson was a vital part of the scheme to lure underage girls, including Plaintiff, to Epstein's home in order to subject them to sexual abuse and induce them to engage in lewd behavior. Defendant Robson was a key player in this scheme because she was paid by Epstein to recruit the underage girls and take them to Epstein's Palm Beach mansion. (Amended Complaint ¶¶ 11-15, DE 1, pp. 302-04). Without Defendant Robson, these girls, including Plaintiff, would not have been victimized.

4. Because the allegations in Plaintiff's amended complaint support the causes of action against Defendant Robson for civil conspiracy, intentional infliction of emotional distress, and civil RICO, Robson is a proper defendant in this action.

5. As Robson is admittedly a citizen of Florida, (Affidavit of Haley Robson, DE 1, pp. 230-31) as is Plaintiff Jane Doe,[3] (Amended Complaint ¶ 1, DE 1, pp. 301; Deposition of Jane Doe, DE 1, pp. 31-32, 5:14-18, 6:6-10) federal diversity jurisdiction does not exist in this case. *See* 28 U.S.C. §1332(a)(1) (providing that

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[2] Defendants also argue that Plaintiff named Robson as a defendant to prevent entry of a stay in this matter pursuant to 18 U.S.C. § 3509(k). The Court has since denied Defendants' motion, holding a stay of this proceeding is not warranted under either the statute or the Court's discretion. (Order Denying Motion to Stay, DE 7).

[3] Although Jane Does testified in deposition that she is a citizen of Florida, Defendants question whether she might actually be a citizen of Georgia because her mother lives in Georgia. (Notice of Removal, DE 1, pp. 7-8, n.6). Defendants fail to point out, however, that there is a question of whether Defendant Epstein is actually a citizen of Florida because he is now incarcerated in a Florida jail under an eighteen month sentence, to be followed by twelve months of community control, during which Epstein agreed he will be residing in Palm Beach, Florida. (Epstein Sentence, attached).

district courts have original jurisdiction over cases in which the matter in controversy exceeds $75,000 and is between "citizens of different States").

6. Defendants' removal of this action was, therefore, improper. Because the Court lacks diversity jurisdiction, or any other form of subject matter jurisdiction, over this matter, the Court must remand this action to Florida state court.

WHEREFORE, Plaintiff requests the Court remand this action to state court and requests Defendants be ordered under 28 U.S.C. §1447(c) to pay costs and attorney fees incurred as a result of the removal.

MEMORANDUM OF LEGAL AUTHORITY

"An action in state court may be removed to federal court when the federal courts have diversity or federal question jurisdiction. *See* 28 U.S.C. § 1441(a). When a defendant removes a case to federal court on diversity grounds, a court must remand the matter back to state court if any of the properly joined parties in interest are citizens of the state in which the suit was filed. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 126 S.Ct. 606, 613, 163 L.Ed.2d 415 (2005) (citing 28 U.S.C. § 1441(b)). Such a remand is the necessary corollary of a federal district court's diversity jurisdiction, which requires complete diversity of citizenship." *Henderson v. Washington Nat. Ins. Co.*, 454 F.3d 1278, 1281 (11th Cir. 2006).

Federal Courts are obligated to construe removal statutes very strictly, and "all doubts about jurisdiction should be resolved in favor of remand to state court." *Univ. of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999) (citing *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994), and *Coker v. Amoco Oil*

Co., 709 F.2d 1433 (11th Cir. 1983)). "A presumption in favor of remand is necessary because if a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to resolve controversies in its own courts." *American Tobacco Co.*, 168 F.3d at 411.

Defendants have removed this action even though Plaintiff named Haley Robson, a citizen of Florida, as a defendant because they claim Plaintiff's joinder of Defendant Robson was done fraudulently in order to avoid federal jurisdiction. "In a removal case alleging fraudulent joinder, the removing party has the burden of proving that either: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court." *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1989) (citing *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989)). "The burden of the removing party is a 'heavy one.'" *Id.* (quoting *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. Unit A 1981)).

"To determine whether the case should be remanded, the district court must evaluate the factual allegations in the light most favorable to the plaintiff and must resolve any uncertainties about state substantive law in favor of the plaintiff." *Id.* (citing *B., Inc.*, 663 F.2d at 549). The Court may not "weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law." *Id.* "'If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.'" *Id.* (quoting *Coker v. Amoco Oil Co.*, 709

F.2d 1433, 1440-41 (11th Cir. 1983)). This protects a plaintiff's right to select the forum of his lawsuit and the manner in which to prosecute the suit, and avoids exposing the plaintiff to the possibility of prosecuting the suit to conclusion only to learn the federal court lacked jurisdiction on removal. *Id*. (citing *Parks v. The New York Times Co.*, 308 F.2d 474, 478 (5th Cir.1962); *Cowart Iron Works, Inc. v. Phillips Constr. Co., Inc.*, 507 F.Supp. 740, 744 (S.D. Ga. 1981)).

Here, Defendants argue that removal is proper because Plaintiff cannot state a cause of action against Defendant Robson under Florida law. Viewing the allegations of the amended complaint in the light most favorable to Plaintiff, it is clear that there is at least *a possibility* that Plaintiff can recover against Defendant Robson under Florida law for each of the counts in the amended complaint—civil conspiracy, intentional infliction of emotional distress, and civil RICO. Joinder of Defendant Robson in this action was therefore proper, which requires remand of this action to Florida state court.

a. Plaintiff has a cognizable cause of action for civil conspiracy against Defendant Robson .

"The elements of a civil conspiracy are: (a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts performed pursuant to the conspiracy." *Walters v. Blankenship*, 931 So. 2d 137, 140 (Fla. 5th DCA 2006) (citing *Florida Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562 (Fla. 5th DCA 1993)). As Defendants point out, there muse be an "actionable underlying tort or wrong" for an actionable conspiracy claim. *Wright v. Yurko*, 446 So. 2d 1162, 1165 (Fla. 5th DCA 1984).

Plaintiff has grounded her conspiracy claim on the tort of sexual assault alleged in Count I of her amended complaint. In this count, Plaintiff alleges that Defendant Epstein *tortiously* assaulted her and states that the assault was committed in violation of Chapter 800 of the Florida Statutes. (Amended Complaint ¶¶ 17-18, DE 1, pp. 304-05). Under Florida law, sexual assault is an intentional tort. *See Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 917 (11th Cir. 2004) ("Florida law equates sexual battery with an intentional tort."). This is true regardless of whether Defendant Epstein's violation of Chapter 800 of the Florida Statutes also creates a private right of action, which is a matter of first impression in Florida. Thus, Plaintiff has a cognizable cause of action for civil conspiracy against Defendant Robson.

b. Plaintiff has a cognizable cause of action for intentional infliction of emotional distress against Defendant Robson.

"The elements of the tort of intentional infliction of emotional distress are: (1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result; (2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community; (3) the conduct caused emotion[al] distress; and (4) the emotional distress was severe." *Gallogly v. Rodriguez*, 970 So. 2d 470, 471 (Fla. 2d DCA 2007) (citing *LeGrande v. Emmanuel*, 889 So. 2d 991, 994-95 (Fla. 3d DCA 2004)).

Here, Plaintiff has alleged that Defendant Robson used false pretenses to lure her (a 14-year old girl) to the mansion of Defendant Epstein and physically took her to Epstein so that he could subject her to sexual abuse and lewd behavior. Defendant

Robson recruited Plaintiff, as she had done numerous others, under the belief that Plaintiff was economically disadvantaged and would be unlikely to contact authorities after being sexually assaulted and abused by Defendant Epstein. Defendant Robson was paid by Defendant Epstein only after the sexual assault and abuse were completed. And, Defendant Robson knew that Plaintiff would be severely emotionally traumatized after the abuse. (Amended Complaint ¶¶ 9, 11, 15, 24-28, DE 1, pp. 302-03, 304, 306). These allegations are enough to demonstrate Plaintiff has a cognizable cause of action for intentional infliction of emotional distress against Defendant Robson because they amount to conduct that would be viewed as outrageous by any reasonable person.

Defendants argue that Plaintiff is barred from recovering for intentional infliction of emotional distress under Florida law because she went to Defendant Epstein's home with the intent to give him a massage for monetary compensation when it is a crime (a misdemeanor), under section 480.047, Florida Statutes, to practice massage without a license. They claim Plaintiff cannot "recover damages flowing from her own illegal conduct." (Notice of Removal, DE 1, p. 16).

First, Plaintiff's damages do not flow from her conduct in giving Defendant Epstein a massage without a license. Defendants Epstein, Kellen, and Robson engaged in a scheme to lure underage girls to Epstein's mansion in order for Epstein to sexually abuse them. Plaintiff's damages resulting from Defendants making her a victim to their intentional, outrageous, and criminal conduct in no way flow from her decision as a 14-year old girl to make some extra money by giving a massage.

Furthermore, it is not a universal rule in Florida that any Plaintiff engaged in any criminal action, no matter how trivial, is barred from recovering damages suffered in

connection with that conduct. "The defense of *in pari delicto* is not woodenly applied in every case where illegality appears somewhere in the transaction; since the principle is founded on public policy, it may give way to a supervening public policy." *Kulla v. E.F. Hutton & Co., Inc.*, 426 So. 2d 1055, 1057 n. 1 (Fla. 3d DCA 1983). "'The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.'" *Id.* (quoting *Goldberg v. Sanglier*, 96 Wash.2d 874, 639 P.2d 1347, 1353-54 (1982)). The fact that Florida law gives the trial court the discretion to apply the doctrine of *in pari delicto*, considering that all ambiguities must be resolved in favor of Plaintiff, does not take away from the fact that Plaintiff has a cognizable cause of action for intentional infliction of emotional distress against Defendant Robson.

c. Plaintiff has a cognizable cause of action for civil RICO against Defendant Robson.

Finally, Defendants argue that Plaintiff does not have a cognizable cause of action for civil RICO under section 772.104, Florida Statutes, because she was not directly injured by the Defendants' scheme. In Count IV of the amended complaint, Plaintiff alleges that Defendants engaged in a pattern of criminal activity in which Defendant Robson found and delivered underage girls to Defendant Epstein in order for Epstein to "solicit, induce, coerce, entice, compel or force such girls to engage in acts of prostitution and/or lewdness." (Amended Complaint ¶ 32, DE 1, p. 307). She also alleges that she

was a victim of Defendants' scheme because she was one of the underage girls found and delivered to Defendant Epstein by Defendant Robson and that she endured Epstein's actions as he tried to get her to engage in, and forced upon her, acts of prostitution and lewdness. (Amended Complaint ¶ 33, DE 1, pp. 307-308). Plaintiff, who was a victim of Defendants' scheme, was directly harmed by the scheme and it is damages for this harm that she seeks in Count IV of the amended complaint. *Cf. Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc.*, 881 So. 2d 565, 570 (Fla. 3d DCA 2004) (holding plaintiff has standing to sue for civil RICO when her injuries flow directly from commission of the predicate acts, which means "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme"). Because Plaintiff was a target of Defendants' scheme and was harmed by their actions in carrying out the scheme, Plaintiff has a cognizable cause of action for civil RICO against Defendant Robson.

CONCLUSION

Plaintiff has cognizable causes of against Defendant Robson, a Florida citizen, for civil conspiracy, intentional infliction of emotional distress, and civil RICO. Because Plaintiff has a *possibility* of recovering against Defendant Robson under her amended complaint, Defendants have failed to meet their burden of demonstrating that Robson was fraudulently joined in this action. As the parties lack complete diversity of citizenship, the Court lacks subject matter jurisdiction over this matter and should remand this case to Florida state court.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1.A.3

On August 18, counsel for Plaintiff conferred with counsel for the Defendants in a good faith effort to resolve the issues raised in this motion, but was unable to do so.

_s/ *Spencer T. Kuvin*_____
Spencer T. Kuvin (Florida Bar Number 089737)

Certificate of Services

I hereby certify that on August 18, 2008, 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 on August 18, 2008, on all counsel of record or pro se parties identified on the attached Service List in the manner specified, via transmission of Notices of Electronic Filing generated by CM/ECF.

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