UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VE, Plaintiff, v. DARREN K. INDYKE AND RICHARD D. KAHN, AS JOINT PERSONAL REPRESENTATIVES OF THE ESTATE OF JEFFREY E. EPSTEIN, NINE EAST 71st STREET, CORPORATION, FINANCIAL TRUST COMPANY, INC., NES, LLC, Defendants.	:	Index No. 1:19-cv-07625-AJN

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

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Defendants Darren K. Indyke and Richard D. Kahn, Co-Executors of the Estate of Jeffrey E. Epstein (the "Estate"), Nine East 71st Street, Corporation ("Nine East"), Financial Trust Company, Inc. ("FTC"), and NES, LLC ("NES", and together with Nine East and FTC, the "Corporate Defendants"; and the Corporate Defendants together with the Estate, the "Defendants") respectfully submit this Memorandum of Law in Support of their Motion to Dismiss Counts I and III - V of Plaintiff VE's ("Plaintiff") First Amended Complaint[1] (the "Amended Complaint") (Doc. # 3)[2] in their entity and Count II to the extent it is time barred with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

Plaintiff's allegations, which are assumed to be true solely for purposes of this Motion, present a discernable though partially time-barred battery claim against Decedent Jeffrey E. Epstein ("Decedent") and vague, conclusory negligence claims against the three Corporate Defendants. Plaintiff alleges Decedent sexually abused Plaintiff in 2001 when she was sixteen years old. (Am. Compl. ¶ 46.) Plaintiff asserts five causes of action in her Complaint: two duplicative battery claims against the Estate (Counts I and II) and a negligence claim against each Corporate Defendant (Counts III – V, respectively). The Estate, while preserving all rights and legal positions, does not hereby seek to dismiss both claims against it in their entirety.

However, Plaintiff's first battery claim should be dismissed for two reasons. First, this claim is outside the scope of the New York Child Victims Act ("CVA") and thus completely time barred. Second, this cause of action is duplicative of and subsumed by Plaintiff's second battery claim. The second battery cause of action is itself time barred to the extent it is based on occurrences after Plaintiff turned 18.

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[1] Plaintiff amended her Complaint before completing service on Defendants.

[2] A copy of Plaintiff's Amended Complaint is attached as Exhibit A to the Declaration of Bennet J. Moskowitz submitted herewith.

The Court should also dismiss Plaintiff's negligence claims against the Corporate Defendants because they are based on threadbare recitals of the elements of negligence causes of action and conclusory statements, as well as impermissible group pleading. Plaintiff effectively concedes she did not have solid grounds to name the Corporate Defendants in this action, alleging: "[s]hould discovery reveal that any of the currently named Defendants are not the proper identity of the Companies identified as current Defendants, substitution of parties shall be requested *to ensure accuracy and correctness of pleading*." (*Id*. ¶ 15 (emphasis added).)

Plaintiff's demands for punitive damages must also be dismissed. New York Estates, Powers And Trusts Law expressly provides punitive damages shall not be awarded nor penalties adjudged in any personal injury action brought to recover damages from an estate.

I. ALLEGED FACTS

Plaintiff alleges that in 2001 a minor identified only as "Plaintiff's friend" – and not anyone else, whether an employee of any Corporate Defendant or otherwise – "recruited" Plaintiff, who was then 16 years old, to give a massage to Decedent at his personal residence. (Am. Compl. ¶¶ 47-48.) Plaintiff alleges the massage became a "sexual encounter" following which Decedent paid Plaintiff money. (*Id*. ¶¶ 59 – 62.) Plaintiff further alleges she returned to Decedent's residence "within days" where she experienced "another sexual assault" by Decedent. (*Id.* ¶ 64.).

Based on these allegations related entirely to conduct allegedly committed by Decedent, Plaintiff claims the Corporate Defendants are somehow liable to her. Plaintiff alleges without any supporting factual allegations that the Corporate Defendants "owed a duty to Plaintiff to treat her in a non-negligent manner and not to commit, or conspire to commit, or cause to be committed intentional, criminal, fraudulent, or tortious acts against Plaintiff." (*Id*. ¶ 17.)

Aside from such conclusory recitals of elements of negligence causes of action, many made "upon information and belief," labels and group pleading that lumps the Corporate Defendants together, Plaintiff does not allege any specific *facts* concerning Nine East and FTC except the following innocuous background assertions: Nine East was a New York corporation (*id*. ¶ 7) that owned or controlled Decedent's personal residence where the alleged sexual assaults took place (*id*. ¶¶ 7, 50); and FTC was a U.S. Virgin Islands Corporation conducting business in New York (*id*. ¶ 8). Further, and also excluding mere labels and conclusions, Plaintiff's sole specific factual allegations against NES are that it was a New York limited liability company whose employee escorted Plaintiff into Decedent's residence (*id*. ¶52)—but not any specific facts suggesting let alone unequivocally stating the unidentified employee witnessed or even knew about the alleged sexual assaults.

II. ARGUMENT

a. Legal Standard: Plaintiff's legal conclusions and contradictory allegations are not accepted as true.

Although the Court must normally accept as true all well-pleaded factual allegations in a complaint and draw all inferences in a plaintiff's favor, those principles are inapplicable to legal conclusions. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 556 (2007)). Thus, a pleading that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (2007). Moreover, "'[w]here [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)).

b. Plaintiff's first battery claim (Count I) is time barred and must be dismissed.

Plaintiff's first cause of action, which asserts a claim for battery separate and apart from her claim for battery in violation of NY Penal Law § 130, expired over a decade ago. Under New York law, actions for battery must be commenced within one year (CPLR § 215(3)); and actions for personal injury must be commenced within three years (CPLR § 214(5)). However, because Plaintiff alleges she was a minor at the time of the alleged battery, her time to file her battery claim was tolled until she turned eighteen. CPLR § 208.

Plaintiff alleges the battery against her occurred in 2001 when she was sixteen years old. (Compl. at ¶¶ 46-47, 51, 92.) Therefore, Plaintiff turned eighteen in 2003. Plaintiff's battery claim expired in 2004 (or, if considered a claim for personal injury, in 2006), long before she filed this action in August 2019.

The CVA does not alter this result. The CVA created a one-year 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" could be filed despite otherwise having expired. CPLR § 214-g (emphasis added). Thus, the CVA does not revive causes of action unless they are based on NY Penal Law §130 offenses. *Id*. Plaintiff's Count I for battery, which is distinct from Plaintiff's claim for battery in violation of NY Penal Law § 130, is untimely and must be dismissed.

c. Plaintiff's first battery claim must be dismissed because it is duplicative of Plaintiff's second battery claim.

Even assuming Count I states a NY Penal Law § 130 offense, which it does not, it must be dismissed as entirely duplicative of Count II. *See Price v. L'Oreal USA, Inc.*, 17-cv-0614, 2017 U.S. Dist. LEXIS 165931, at *12 (S.D.N.Y. Oct. 5, 2017) ("Defendants' motion to dismiss the unjust enrichment claim under New York law (see Count V) is granted because it is

duplicative of the other claims."). Counts I and II are based on the same alleged occurrences and seek the same relief. Therefore, it would serve no legitimate purpose to permit Plaintiff to pursue both claims. Count I should be dismissed for this additional reason.

d. Plaintiff's negligence claims against the Corporate Defendants must be dismissed because they are based on conclusory statements and impermissible group pleading—not *facts*.

Plaintiff failed to allege "enough *facts*" to state any negligence claim against the Corporate Defendants "that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added). It is well-settled that Plaintiff must demonstrate grounds for relief beyond mere "labels and conclusions." *Id.* at 555. Rather, to state a claim, Plaintiff's Complaint must set forth "[f]actual allegations [that are] … enough to raise a right to relief above the speculative level." *Id.* "Though the Court must accept the factual allegations of a complaint as true, it is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Swan Media Grp., Inc. v. Staub*, 841 F. Supp. 2d 804, 806 (S.D.N.Y. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Additionally, "[w]here a complaint names multiple defendants, that complaint must provide a plausible factual basis to distinguish the conduct of each of the defendants. … A plaintiff cannot merely lump all the defendants together in each claim and provide no factual basis to distinguish their conduct." *Ochre LLC v. Rockwell Architecture Planning & Design*, 12-cv-2837, 2012 U.S. Dist. LEXIS 172208, at *16-17 (S.D.N.Y. Nov. 28, 2012) (citing *Atuahene v. City of Hartford*, 10 Fed. App'x 33, 34 (2d Cir. 2001)).

With respect to the allegations against the Corporate Defendants, and as explained more fully below, Plaintiff has not made factual allegations sufficient to "raise the right to relief above the speculative level." *See Twombly*, 550 U.S. at 555. Besides generic conclusions that the

Corporate Defendants "provided the opportunity" (Compl. ¶ 23), "collaborat[ed]" (*id*. ¶ 40), gave "the necessary assistance" (*id*. ¶ 41) and the like, there are no alleged *facts* describing what any of the Corporate Defendants' employees or other agents did or failed to do that was negligent or how such negligence proximately caused Plaintiff's alleged damages. Further, most of Plaintiff's allegations about the Corporate Defendants impermissibly lump their conduct together. (*See, e.g.*, *id*. ¶¶ 23, 37-44, 62-63.) The Corporate Defendants cannot reasonably prepare a response to such conclusory, vague claims, which are hereby further addressed in turn.

i. Plaintiff's "negligent security" claim against Nine East (Count III) must be dismissed because it is based on labels and conclusions and is contradicted by Plaintiff's own allegations.

Count III fails to state a claim because, aside from labels and conclusions, the Complaint is devoid of any facts concerning Nine East except that it owned real property where torts against Plaintiff allegedly took place—hardly enough to "raise the right to relief above the speculative level." *See Twombly*, 550 U.S. at 555. Though far from clear, Plaintiff's legal theory against Nine East appears to be that, because Nine East owned Decedent's New York residence where the alleged torts took place, Nine East is necessarily liable to Plaintiff for Decedent's alleged conduct. This is not the law in New York. *See* 85 NY Jur Premises Liability § 212 (2) ("Generally, the law does not impose a duty to control the conduct of third persons to prevent them from harming others even where, as a practical matter, the defendant could have exercised such control.").

Moreover, to sufficiently allege a "negligent security" cause of action, the Plaintiff must allege facts establishing: (i) Nine East owed Plaintiff a duty; (ii) Nine East breached that duty; and (iii) injury to Plaintiff substantially caused by that breach. *Sofia v. Esposito*, 17-cv-1829, 2018 U.S. Dist. LEXIS 60947, at *10 (S.D.N.Y. Apr. 10, 2018) (quoting *Pasternack v. Lab. Corp. of Am. Holdings*, 807 F.3d 14, 19 (2d Cir. 2015)). Other than conclusions reciting these

elements, which are insufficient to state a claim, *Iqbal*, 556 U.S. at 678, Plaintiff does not allege any facts establishing Nine East owed her a duty, how Nine East breached any duty or how any such breach caused Plaintiff's alleged damages.

There are no allegations connecting Plaintiff's visits to Decedent's personal residence with any negligence on the part of any employees or other agents of Nine East. Plaintiff does not even identify any such employees or agents.

To the contrary, Plaintiff alleges her "friend," not someone acting on behalf of Nine East, caused Plaintiff to visit the real property owned by Nine East. (Compl. ¶¶ 47, 51-61.) Plaintiff further alleges that she returned to the real property "within days" (*id.* ¶¶ 64-72) without claiming that was at a specific person's behest.

Plaintiff also alleges the "opulence of the mansion … facilitated [Plaintiff's] further cooperation with Decedent." (*Id.* ¶ 63.) Such allegations are inconsistent with any suggestion that Nine East is liable to Plaintiff due to actions of Nine East's agents. The Court is not obligated to reconcile or accept Plaintiff's contradictory allegations as true. *Whitley*, 2018 WL 2170313, at *11 (S.D.N.Y. May 9, 2018). Accordingly, Count III for negligent security against Nine East must be dismissed for failure to state a claim.

ii. Plaintiff's negligence claim against FTC (Count IV) must be dismissed because it is also based on labels and conclusions and is otherwise contradicted by Plaintiff's own allegations.

Plaintiff's negligence claim against FTC is similarly deficient. Plaintiff's legal theory concerning FTC appears to be that, because FTC employed Decedent when the alleged torts took place, FTC is necessarily liable to Plaintiff—*i.e.*, negligent supervision of an employee. Under

New York law, in addition to the elements of negligence,[3] a plaintiff alleging negligent supervision must show: (1) the tortfeasor and the defendant were in an employee-employer relationship; (2) the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence; and (3) the tort was committed on the employer's premises or with the employer's chattels. *Man Zhang v. City of N.Y.*, 17-cv-5415, 2019 U.S. Dist. LEXIS 163485, at *14 (S.D.N.Y. Sep. 19, 2019) (citing *Green v. City of Mount Vernon*, 96 F. Supp. 3d 263, 297 (S.D.N.Y. 2015); *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir. 2004)).

As with Count III, Count IV is supported by nothing more than mere labels and conclusions regarding FTC's so called negligent conduct. For example, Plaintiff alleges the sexual assaults occurred "during the course and scope of employment for [FTC]" (Compl. ¶ 111) without asserting *factual* allegations as to how or why that was the case.

Plaintiff failed to allege any facts beyond labels and conclusions establishing FTC owed Plaintiff any duty, breached that duty and that such breach injured her. Nor does Plaintiff allege specific facts showing FTC knew or should have known Decedent's propensity for the conduct that allegedly caused Plaintiff's injuries.

Plaintiff's allegation against FTC made "upon information and belief" -- that "at times other employees of the Defendant corporation were coordinating these sexually explicit massages for Epstein to engage in during business hours, while he was within the course and scope of his employment for Defendant" -- fails to rescue Plaintiff's cause of action against FTC. In addition to being conclusory and thus otherwise failing to satisfy the pleading standards set forth in *Twombly* and *Iqbal*, Plaintiff's allegation does not raise a right to relief above

[3] As explained above, under New York law, a plaintiff must establish the following elements to state a claim for negligence: (i) a duty owed to the plaintiff by the defendant; (ii) breach of that duty; and (iii) injury substantially caused by that breach. *Sofia*, 2018 U.S. Dist. LEXIS 60947 at *10.

speculation. *See Gilford v. NYS Office of Mental Health*, No. 17-CV-8033 (JPO), 2019 U.S. Dist. LEXIS 38450, at *14 (S.D.N.Y. Mar. 11, 2019) ("No matter what the pleading standard is, her complaint must at least contain enough factual allegations *that are not made upon information and belief* to 'raise a right to relief above the speculative level.'" (emphasis added) (citing *Twombly*, 550 U.S. at 555)).

Plaintiff's allegations are also inconsistent with her legal theory that FTC is somehow liable for Decedent's misconduct. Plaintiff alleges the torts occurred on Nine East's premises, not FTC's premises. Further, Plaintiff alleges Decedent sexually abused Plaintiff "intentionally and for no legitimate purpose and for his own gratification," (*id.* ¶ 72)—not that Decedent performed the sexual acts in the course or scope of his employment by FTC. As explained above, the Court is neither obligated to reconcile nor accept such contradictory allegations as true. *Whitley*, 2018 WL 2170313, at *11 (S.D.N.Y. May 9, 2018).

The most plausible reading of the Complaint is that FTC's employment of Decedent had nothing to do with his alleged sexual assaults of Plaintiff. Without factual allegations explaining how FTC acted negligently or how that negligence proximately caused Decedent's alleged injuries, the Complaint does not plausibly state a claim against FTC. Therefore, Count IV must be dismissed.

iii. Plaintiff's negligence claim against NES (Count V) must be dismissed because it is based on conclusory allegations made largely "upon information and belief."

Plaintiff's claims against NES are especially deficient. Plaintiff's allegations against NES are comprised of vague assertions made "upon information and belief" (*see, e.g.*, Compl. ¶ 130 ("Upon information and belief, the employees of Defendant, NES, were compensated to primarily, if not exclusively, procure or maintain each young female masseuse"; *see also id.* ¶¶ 127 – 129, 131) and conclusory recitals of elements of an unspecified negligence cause of action

(*see, e.g.*, Compl. ¶ 139 ("Defendant's negligence was a proximate cause of the sexual offenses committed against Plaintiff in violation of Article 130 of the NY Penal Law."); *see also id.* ¶¶ 132 – 138, 140).

Aside from labels and conclusions, Plaintiff fails to allege facts establishing the elements of a negligence claim against NES. Thus, Plaintiff does not allege facts establishing NES owed her a duty or breached such a duty. *Sofia*, 2018 U.S. Dist. LEXIS 60947 at *10. Nor does Plaintiff allege any facts explaining how anything an NES employee or agent did or failed to do proximately caused Plaintiff's alleged damages. *Id.*

The only non-background fact Plaintiff alleges as to NES is a single ambiguous allegation that one of its employees "escorted" Plaintiff into Decedent's residence before the first sexual assault occurred. (*Id.* ¶52.) Plaintiff neither identifies the employee nor alleges the employee saw or otherwise knew about the alleged sexual assault.

Plaintiff's allegations are also incompatible with a cause of action against NES. Plaintiff alleges two instances of sexual assault by Decedent. Plaintiff claims her "friend," not an NES employee, recruited Plaintiff to visit Decedent when the first assault allegedly occurred. (*Id.* ¶ 47.) Plaintiff alleges the second assault took place "within days," without alleging any intervening factor such as conduct by an NES employee or otherwise. (*Id.* ¶ 64.) As the Complaint does not plausibly allege NES acted negligently or how such negligence was the proximate cause of Plaintiff's alleged injuries sustained as a result of alleged sexual assault committed by Decedent, Count V must also be dismissed for failure to state a claim.

e. Plaintiff's claims for punitive damages must be dismissed because they are precluded by NY EPTL § 11-3.2.

Plaintiff may not recover punitive damages in this action as a matter of law. New York Estates, Powers And Trusts Law provides: "No cause of action for injury to person or property is

lost because of the death of the person liable for the injury. 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*." NY EPTL § 11-3.2 (a)(1) (emphasis added). "Also, 'there is a strong policy against the assessment of punitive damages against an estate on account of wrongful conduct of the decedent.'" *Graham v. Henderson*, 224 F.R.D. 59, 63 (N.D.N.Y. 2004) (quoting *Blissett v. Eisensmidt*, 940 F. Supp. 449, 457 (N.D.N.Y. 1996)).

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court grant their Motion to Dismiss in its entirety together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 29, 2019

Respectfully submitted,

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