

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80811-MARRA/JOHNSON

C.M. A.,

Plaintiff,

v.

JEFFREY EPSTEIN and SARAH
KELLEN,

Defendants,

**DEFENDANT JEFFREY EPSTEIN'S MOTION TO DISMISS
COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION**

Defendant, JEFFREY EPSTEIN, ("EPSTEIN"), by and through his undersigned counsel, moves to dismiss Count I of Plaintiff's Complaint for failure to state a cause of action. Rule 12(b)(6), Fed.R.Civ.P. (2008). Count II is directed only to Defendant KELLEN, who has not yet been served. In support of dismissal, Defendant states:

Plaintiff, CMA, attempts to assert a cause of action against EPSTEIN in Count I of her Complaint. A review of the inadequate Complaint allegations establishes that Plaintiff has failed to state a cause of action under either common or statutory law, and thus, Count I against EPSTEIN is required to be dismissed. Rule 12(b)(6), Fla.R.Civ.P. Count I alleges in part that while Plaintiff was a minor, beginning when she was 14 –

6. On numerous occasions ..., JEFFREY EPSTEIN intentionally induced and/or seduced the Plaintiff into performing various acts of lewd and lascivious conduct and/or sexual performances in his presence. ...

7. On numerous occasions ..., JEFFREY EPSTEIN performed various acts of lewd and lascivious conduct in the presence of the Plaintiff. ...

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8. On numerous occasions ..., JEFFREY EPSTEIN touched the Plaintiff's [REDACTED] ...

9. As a result, the Plaintiff suffered mental anguish, mental pain and suffering, psychic trauma, and a loss of the capacity for the enjoyment of life.

(Plaintiff alleges in her Complaint, ¶2, that she is presently 21 years old. The suit was originally filed in Florida state court, Palm Beach County Circuit Court, on February 21, 2008.)

Count I is lacking in sufficient factual allegations to allege the necessary elements to state a cause of action either under common or statutory law. In fact, Count I fails to allege any recognizable elements. There is absolutely no reference in Count I as to whether Plaintiff is attempting to assert some type of common law cause of action or as to whether she is relying on some type of Federal or State of Florida statute that might give rise to a civil cause of action. In addition, the Complaint generally alleges that "on numerous occasions," as opposed to alleging specific dates and times. Finally, the Complaint very generally references "lewd and lascivious conduct and/or sexual performances" without any underlying factual allegations. Accordingly, Count I is subject to dismissal for failure to state a cause of action.

Supporting Memorandum of Law
Rule 12(b)(6) Motion To Dismiss

As established by the Supreme Court in Bell Atlantic Corp. V. Twombly, 127 S.Ct. 1955 (2007), a motion to dismiss should be granted if the plaintiff does not plead "enough facts to state a claim to relief that is plausible on its face." *Id.*, at 1974. Although the complaint need not provide detailed factual allegations, the basis for relief in the complaint must state "more than labels and conclusions, and a formulaic

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recitation of the elements of a cause of action will not do." Id., at 1965. Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. On a motion to dismiss, the well pleaded allegations of plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff. M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1156 (11th Cir.2006).

Significantly, the Supreme Court in Bell Atlantic Corp. V. Twombly abrogated the often cited observation that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Id. (abrogating and quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). The Supreme Court rejected the notion that "a wholly conclusory statement of claim [can] survive a motion to dismiss whenever the pleadings le[ave] open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." Id. As explained by the Supreme Court in Bell Atlantic Corp., *supra* at 1664-65:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ibid.; Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (C.A.7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if

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doubtful in fact), see, e.g., Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (" Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

In discussing Twombly, the Eleventh Circuit in Watts v. Fla. International Univ., 495 F.3d 1289, 1295 (11th Cir. 2007), noted - "The Supreme Court's most recent formulation of the pleading specificity standard is that 'stating such a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element." In order to sufficiently allege the claim, the complaint is required to identify "facts that are suggestive enough to render [the element] plausible." Watts, 495 F.3d at 1296 (quoting Twombly, 127 S.Ct. at 1965).

As jurisdiction is based on diversity, it is well settled that this Court is to apply Florida substantive law in this action. Erie R.Co. v. Tompkins, 58 S.Ct. 817 (1938).

On its face, Count I completely fails to allege either the necessary elements of any cause of action or the necessary underlying factual allegations. As quoted above, Count I makes general references to "lewd and lascivious conduct and/or sexual performances" without any specific statutory or common law reference.

Florida Statutes, Chapter 800, Title XLVI – CRIMES, entitled "Lewdness, Indecent Exposure," are criminal statutes¹. Assuming for the sake of argument that Plaintiff means to rely on these statutes, none of the statutes contained in Chapter 800 create a private right of action. See §§800.02, 800.03, 800.04, Fla. Stat. Rather, the

¹ This action began in Florida state court, Palm Beach County 15th Judicial Circuit Court, and was removed to Federal Court pursuant to a Notice of Removal filed by Defendants.

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statutes set forth acts subject to criminal prosecution and the criminal penalties therefor, if proven. See generally, Am. Home Assurance Co. v. Plaza Materials Corp., 908 So.2d 360, 374 (Fla. 2005)(“not every statutory violation carries a civil remedy”); and Miami Herald Pub. Co. v. Ferre, 636 F.Supp. 970 (S.D. Fla. 1985)(violation of Florida's criminal extortion statute does not give rise to civil cause of action for damages). According, Count I is required to be dismissed as Chapter 800, which references lewd conduct, does not create a private right of action. Mantooth v. Richards, 557 So.2d 646 (Fla. 4th DCA 1990), *per curiam*, (Dismissal of plaintiff's civil complaint affirmed where parental kidnapping statutes concerned only criminal violations and did not create a civil remedy).

As well, the Count I allegations make absolutely no reference to any viable common law cause of action; Defendant should not be required to guess or speculate as to the nature of Plaintiff's cause of action. Even if Defendant were to speculate as to the supposed cause of action, these causes of action (common law or otherwise) have not been sufficiently alleged. On its face, Count I is completely lacking as to any common law elements or the underlying factual allegations to support each element, and thus, Count I is required to be dismissed.

Finally, as noted, there are no allegations as to time regarding the alleged “numerous occasions.” Pursuant to Rule 9(f), Fed.R.Civ.P., “pleadings of time or place is material when testing the sufficiency of a pleading.”

Conclusion

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Pursuant to applicable law, Count I of Plaintiff's Complaint is required to be dismissed for failure to state a cause of action. On its face, Count I fails to allege a cause of action either under statutory or common law against Defendant EPSTEIN. Count I fails to plead any requisite elements or the necessary underlying facts.

WHEREFORE, Defendant requests that Count I of Plaintiff's Complaint be dismissed for failure to state a cause of action.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following Service List in the manner specified by CM/ECF on this 7th day of January, 2009:

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Respectfully submitted,

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