

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80893-MARRA-JOHNSON

JANE DOE,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.

_____ /

**DEFENDANT EPSTEIN'S REPLY TO PLAINTIFF JANE DOE'S
CORRECTED RESPONSE IN OPPOSITION TO EPSTEIN'S MOTION FOR
SUMMARY JUDGMENT, AND INCORPORATED MEMORANDUM OF
LAW AND, IN THE ALTERNATIVE, FOR OPPORTUNITY TO DEPOSE
EPSTEIN ON THE SUBJECT OF THE MOTION [D.E. 140, dated 4/13/10]**

Defendant, JEFFREY EPSTEIN, ("EPSTEIN"), by and through his undersigned counsel, replies to *Plaintiff JANE DOE's Corrected Response In Opposition To EPSTEIN's Motion For Summary Judgment And Incorporated Memorandum Of Law And, In The Alternative, For Opportunity To Depose Epstein On The Subject Of The Motion*, [D.E. 140, dated April 13, 2010, hereinafter "response"]. Accordingly, in reply to Plaintiff's response and in further support of Defendant's motion, EPSTEIN states:

Introduction

As discussed more fully below herein, neither the law nor the facts asserted by Plaintiff in her response prevents this Court from entering summary judgment determining that (1) the version of 18 U.S.C. §2255, effective 1999 to Jul. 26, 2006, the period of time during which EPSTEIN's alleged conduct occurred, applies to Plaintiff's claim brought pursuant to §2255; (2) the version of 18 U.S.C. § 2255 in effect when the predicate acts allegedly were committed allow only "minors" to file suit; (3) 18 U.S.C.

§2255 allows for a single recovery of the presumptive minimum damages amount against a single Defendant, and not a multiplication thereof based on the number of statutory predicate act violations or incidents or counts; and (4) Plaintiff has not and can not establish the requisite elements to state a claim under 18 U.S.C. §2255, which she attempts to assert in Count II of her First Amended Complaint [D.E. 38]. In particular, the undisputed material facts show that Plaintiff has failed to and can not establish a predicate act, under any alleged violation of 18 U.S.C. §2422(b) or 2423(b) and (e) as plead in her complaint, in order to state a cause of action pursuant to 18 U.S.C. §2255 (2005). Even if this Court grants summary judgment on the §2255 claim in Count II, various other causes of actions by Plaintiff still remain.

Defendant's Reply

1. Contrary to Plaintiff's assertion in paragraphs 6 and 7 of her response, Defendant's Statement of Material Facts and Case does not "re-characterize" the allegations of Count II of her First Amended Complaint. In Count II, Plaintiff is attempting to assert a claim pursuant to 18 U.S.C. §2255. In so doing, Plaintiff (not some other person) is required to show a violation of an enumerated criminal statute. See case law cited in Defendant's motion. As set forth in ¶¶6-7 of Defendant's motion, and ¶33 of Plaintiff's complaint, Plaintiff attempts to allege violations of 18 U.S.C. §2422(b), and 18 U.S.C. §2423(b) and (e) as the requisite predicate act in order to assert a claim pursuant to 18 U.S.C. §2255. Thus, there is no "recharacterizing" of Plaintiff's §2255 claim; Epstein is relying on what she plead in her complaint.

2. The remainder of the "material" and "additional" facts asserted by Plaintiff, do nothing to dispute the material facts, as established by JANE DOE's own deposition

testimony, that EPSTEIN never, using a facility or means of interstate commerce, knowingly persuaded, induced or enticed JANE DOE, when she was under the age of 18 years, to engage in prostitution or sexual activity for which any person can be charged with a criminal offense, or attempted to do so. See 18 U.S.C. §2422(b). Nor does this Plaintiff (not some other person) present anything that disputes the fact that EPSTEIN never attempted to or conspired to (a) knowingly transport JD in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that JD engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense; (b) travel interstate commerce or traveled into the United States, or travel in foreign commerce, for the purpose of engaging in any illicit sexual conduct with JD; (c) travel in foreign commerce, and engage in any illicit sexual conduct with JD; or (d) for the purpose of commercial advantage or private financial gain, arrange, induce, procure, or facilitate the travel of JD knowing that JD is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct. See 18 U.S.C. §2423(b) and (e).

3. None of the “facts” presented by Plaintiff show that there was ever a telephone, e-mail, text, or other form of a “use of a facility or means of interstate commerce” between JANE DOE and EPSTEIN (or other person for that matter) in which sexual activity with EPSTEIN was explicitly discussed. Plaintiff devotes much time and space to factual allegations pertaining to persons other than JANE DOE and much time and space speculating as to the purpose of EPSTEIN’s plane flights. See ¶9 of response. There are no facts presented by Plaintiff which show that the intent of EPSTEIN’s travels was for the specific purpose of engaging in illicit sexual conduct with Plaintiff.

4. What is material and relevant to JANE DOE's §2255 claim, as discussed in Defendant's motion and the case law cited therein, are the facts specific to JANE DOE. In addition to testifying that there were not any telephone or other form of electronic communications between her and EPSTEIN in which sexual activity was discussed as to her, JANE DOE also testified that she never traveled anywhere with EPSTEIN, by plane or otherwise.

5. The deposition testimony of Plaintiff attached to her response details JANE DOE's version of what occurred between EPSTEIN and her when she was at his Palm Beach mansion. See depo. pages 539 – 600. JANE DOE, when examined by her own attorney, testified that she was brought to the mansion by [REDACTED] on her first visit; she [REDACTED] See depo. pages 601-611 attached to Plaintiff's response. JANE DOE stated "I was told that Jeffrey Epstein wanted me to come work for him and that he wanted me to be there at a certain date and time." (Response, p. 601). There is no testimony that sexual activity or illicit sexual conduct was ever specifically mentioned. See case law cited in Defendant's motion wherein the communications between the defendant and "minor" were sexually explicit, making it clear as to the intent of the defendant and the purpose of the interstate travel.

6. Plaintiff also can not rely on EPSTEIN's assertion of his Fifth Amendment privilege to counter the undisputed material facts as established by Plaintiff's own deposition testimony entitling EPSTEIN to summary judgment on Count II of Plaintiff's complaint for her inability to establish a requisite predicate act. See Securities & Exchange Comm. V. Keith Group of Companies, Inc., 1998 WL 1670405 (S.D. Fla. 1998). Once the movant, EPSTEIN, has met his burden under Rule 56, the burden shifts

to the nonmoving party, JANE DOE, who “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Id.*, citing Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Plaintiff “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Id.* Courts may not draw adverse inferences based on the assertion of the 5th Amendment privilege where it is the sole basis for Plaintiff’s prima facie case. See generally, U.S. v. Premises Located at Route 13, 946 F.2d 749, 756 (11th Cir. 1991). In other words, Plaintiff must come up with evidence, not simply rely on Defendant’s constitutional right in refusing to testify, to establish the facts she claims create a material issue of fact. JANE DOE has not done that. Rather, the undisputed material facts and applicable law establish that JANE DOE, by her own testimony, is unable to prove the elements of the requisite statutory criminal predicate acts relied upon in attempting to pursue a claim under §18 U.S.C. §2255. See Part IV of Defendant’s motion for summary judgment (combined).

7. Plaintiff’s argument in support of retroactive application of the amended version of 18 U.S.C. §2255 also fails. See Response, Part I, pp. 12-21. Plaintiff completely ignores the case law cited to in Defendant’s motion which makes clear that the version of the statute in effect at the time of the alleged conduct applies. See Defendant’s Motion, Discussion of Law, Part I, pp. 8-19.

8. Like EPSTEIN, Plaintiff also cites on the United States Supreme Court case of Landgraf v. USI Film Products, 511 U.S. 244, 280, (1994), as a landmark decision in determining whether or not a statute violates constitutional principles against retroactivity. Further supporting the argument set forth by Defendant, Plaintiff describes

the following language from the Landgraf decision as “a two step process for resolving retroactivity issues,” (Response, p. 13):

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, **increase a party's liability for past conduct**, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

9. Plaintiff's assertion that “EPSTEIN failed to discuss (or even acknowledge) this two step process,” is flat wrong. Plaintiff is either attempting to mislead the Court or simply did not read Defendant's motion. Landgraf is discussed extensively in EPSTEIN's motion. See Part I.B. and I.C. wherein Defendant first discusses the fact that there is no express intent that the amended statute is to apply to past conduct. Plaintiff's discussion in her response of the history and purpose behind 18 U.S.C. §2255 and the assertion that “Congress specifically intended for the law to apply retroactively to *her* (Masha) even though she had already been abused and had already filed suit under §2255,” (Response, p. 14), is not even supported by the Congressional Record cited by Plaintiff. Again, had Congress wanted the statute to apply retroactively, it could have easily stated such intent. 18 U.S.C. §2255, as amended, eff. July 27, 2006, “contains no such express command” of application to past conduct. See Landgraf, quoted above. Thus, as quoted by Plaintiff, and discussed by Defendant in his motion, one of the determining factors the Court must address is whether the statute would **increase a party's liability for past conduct**? Plaintiff completely ignored this language in

Landgraf. Raising the presumptive minimum from \$50,000 to \$150,000 (should a plaintiff prove the elements of her §2255 claim, including that she suffered personal injury resulting in actual damages), would certainly increase EPSTEIN's liability for past conduct. Plaintiff herself refers to the minimum damages presumption as a "penalty" further advancing the position taken by EPSTEIN that the amended version of the statute does not apply. (Response, p. 28).

10. Plaintiff's response also fails to specifically address all of the case law cited by Defendant in support of his position that the version of §2255 in effect at the time of the alleged EPSTEIN's conduct involving JANE DOE applies. See Defendant's motion.

11. Regarding Plaintiff's position that she "is entitled to a recovery for each violation committed against her," (Response, pp. 27-29), 18 U.S.C §2255 clearly states that –

Any minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee. Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than \$50,000 in value.

12. The minimum damage is simply a floor on damages. Nothing prevents a Plaintiff from proving that her actual damages are higher. Reading a multiplier into the statute on a per incident or per violation basis creates a windfall for a Plaintiff with no tie in to the actual damages suffered. The purpose of an award of damages to a person who "suffers personal injury" is to make that person whole again – not to duplicate or multiply her damages. As discussed in Defendant's motion, nothing prevents JANE DOE from proving that her actual damages caused by Defendant's alleged conduct are more than \$50,000.00. Again, Congress **could have** very easily written into the statute, as it has

done in other statutes, that a minor “who suffers personal injury ... shall recover actual damages such minor sustains Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than \$50,000 in value *for each violation proven.*” The plain language of the statute contains no such provision.

13. Defendant’s position that the applicable version of the statute allows only for a minor to bring suit, and the supporting case law is set forth in detail in his motion. Defendant stands on his position and case law in his motion, and Plaintiff’s argument requires no reply.

14. Finally, this Court should not delay ruling on this motion as suggested by Plaintiff. There is nothing that deposing EPSTEIN would add to the positions advanced by Defendant. Again, Plaintiff cannot simply rely on the Court applying an adverse inference to prove the elements of her case. See case law cited above. Defendant EPSTEIN’s motion is based on Plaintiff’s own testimony. It is important that this Court rule on this motion so that EPSTEIN can continue to prepare for trial knowing what claims remain against him, knowing what version of §2255 applies and how the Court will interpret it, and so that EPSTEIN can properly prepare for his opening/closing statements, and questioning of witnesses. Such ruling is necessary such that EPSTEIN (and the Court) will know what jury instructions should look like, what the jury verdict will look like, and so on. A definitive ruling will aid both parties as they prepare for trial. As well, resolution of these issues may further assist in attempting to resolve this case, in that the parties have already mediated this case.

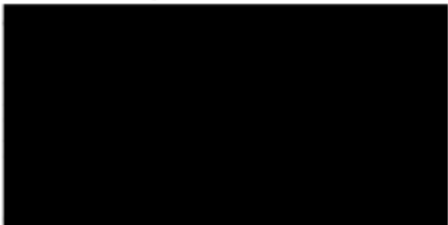
WHEREFORE, Defendant requests that this Court enter the summary judgments sought herein. Defendant further requests an award of his attorney's fees and costs in defending this claim.

By: /s/ Robert D. Critton, Jr.
ROBERT D. CRITTON, JR., ESQ.
Florida Bar No. 224162

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 via transmission of Notices of Electronic Filing generated by CM/ECF on this 22nd day of April, 2010:

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Respectfully submitted,

By: /s/ Robert D. Critton, Jr.
ROBERT D. CRITTON, JR., ESQ.

[REDACTED]

MICHAEL J. PIKE, ESQ.

[REDACTED]

BURMAN, CRITTON, LUTTIER &
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[REDACTED]

(Co-Counsel for Defendant Jeffrey Epstein)