UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80119-MARRA/JOHNSON

JANE DOE NO. 2,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, Jane Doe No. 2, ("Jane" or "Jane Doe"), by and through her undersigned counsel, files this Memorandum in Response to Defendant's Motion to Dismiss, and states as follows:

1. Defendant, Jeffrey Epstein is alleged to have sexually abused Jane Doe when she was a minor. The Complaint is in two Counts: Count I is labeled "Sexual Assault", and alleges an intentional tort based on the actions of Jeffrey Epstein; Count II alleges the tort of intentional infliction of emotional distress based on the same factual allegations. Defendant Epstein has moved to dismiss only Count I of the Complaint, contending that Plaintiff has failed to state a claim. Simultaneously herewith, Plaintiff intends to file an Amended Complaint which substantially revises Count I and moots the Defendant's Motion to Dismiss.[1]

2. In any event, the Complaint sufficiently alleged a claim for sexual assault and battery.

[1] The Amended Complaint also adds as Count III a federal claim against Defendant Epstein under 18 U.S.C. §§2422 and 2255. Under Fed.R.Civ.P. 15(a), a party may amend the pleading once as a matter of course before being served with a "responsive pleading". Defendant has not to date filed a "responsive pleading" in this case within the meaning of Fed.R.Civ.P. 7(a). It is established in the courts of the Eleventh Circuit that a motion to dismiss is not a "responsive pleading" and does not affect a plaintiff's right to amend the pleading once as a matter of course. Williams v. Board of Regents, 477 F.3d 1282, 1291 (11th Cir. 2007).

The gravamen of the claims in Count I is set forth in paragraph 16 of the Complaint: "Epstein tortiously assaulted Jane Doe sexually. Epstein's acts were intentional, unlawful, offensive and harmful."

3. Count I does not purport to be brought under the criminal statutes.[2] Whether a Complaint states a claim for relief is not based on labels or conclusions; rather it is determined by the *factual allegations*, which "must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombley, 127 5. Ct. 1955, 1965 (2007). Here, the factual allegations establish an intentional tort claim for sexual assault and battery.[3] See Paul v. Holbrook, 696 So.2d 1311 (Fla. 5th DCA 1997) ("[a] battery consists of the infliction of a harmful or offensive contact upon another with the intent to cause such contact or the apprehension that such contact is imminent"); Scelta v. Delicatessen Support Services, Inc., 57 F.Supp. 2d 1327, 1358-59 (M.D. Fla. 1999) (allegation that defendant attempted to put his hands down plaintiff's dress, and that there was an actual and intentional touching, sufficient to state a claim for battery); Hogan v. Tavzel, 660 So.2d 350 (Fla. 5th DCA 1995) (tortfeasor may be liable for battery for infecting another with a sexually transmitted disease); see also **Restatement (Second) of Torts** *Assault*, § 21 (1965) (stating that an assault occurs when a person "acts intending to cause a harmful or offensive contact with the person of the other, or an imminent apprehension of such contact, and the other is thereby put in such imminent apprehension").

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[2] Chapter 800 of the Florida Statutes is mentioned in the Complaint (¶18) because conduct against a person in violation of the criminal laws of the State generally give rise to a civil claim for intentional tort. Count I does not purport to bring a separate civil claim for violation of a strictly criminal statute.

[3] Assault and battery are closely related common law intentional torts that are commonly alleged together. See Herzfeld v. Herzfeld, 781 So.2d 1070 (Fla.2001) (noting that plaintiff alleged intentional tort of "assault and battery" based on allegations of sexual abuse). Sullivan v. Atlantic Federal Savings & Loan, 454 So.2d 52 (Fla. 4th DCA 1984) (holding that a cause of action for assault and battery cannot be based entirely on an omission).

4. Epstein's conduct as alleged in this case of masterbating during the massage, directing the Plaintiff to remove her clothes, and touching the Plaintiff, constitutes the intentional tort of assault and battery. Accordingly, even if the Complaint had not been amended, it sufficiently alleges facts establishing an assault and battery.

Based on the foregoing, Defendant's Motion to Dismiss is moot, and, in any event, not well founded, and therefore should be denied.

Dated: September 22, 2008.

Respectfully submitted,

By: s/ Jeffrey M. Herman .

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 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 this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jeffrey M. Herman .

SERVICE LIST
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United States District Court, Southern District of Florida

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