

SUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JANE DOE, :
: Plaintiff, :
: : 19 Civ. 8673 (KPF) (DCF)
: v. :
: DARREN K. INDYKE and RICHARD D. :
KAHN, in their capacities as the executors of :
the Estate of Jeffrey E. Epstein, :
: Defendants.
----- X

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES**

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Defendants Darren K. Indyke and Richard D. Kahn, Co-Executors of the Estate of Jeffrey E. Epstein (the “Co-Executors”), respectfully submit this memorandum of law in support of their motion to dismiss plaintiff Jane Doe’s (“Plaintiff”) claim for punitive damages pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

Plaintiff’s Complaint (ECF No. 1) asserts four personal injury causes of action against the Co-Executors and seeks, among other things, punitive damages. However, the claim for punitive damages fails as a matter of law.

New York law and public policy preclude Plaintiff’s punitive damages claim. The New York Estates, Powers and Trusts Law unequivocally provides: “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). That is the law in most U.S. jurisdictions, as reflected in the Restatement (Second) of Torts. *See Restat. (Second) Of Torts* § 908 cmt. a (“Punitive damages are not awarded against the representatives of a deceased tortfeasor.”). “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)). Because there are no facts that would render Plaintiff’s punitive damages claim proper, there is no reason to allow it to stand.

Plaintiff has never disputed that New York law bars her punitive damages claim. Rather, she attacks this motion on erroneous procedural and choice-of-law grounds. However, as explained below: (1) courts in this District have routinely dismissed punitive damages claims on motions under Rule 12; (2) courts in this District do not hesitate to strike requests for punitive

damages; (3) New York law applies because Plaintiff alleges the torts against her took place in this District; and (4) in any event, punitive damages are unavailable under the law of the United States Virgin Islands (“USVI”), where the estate is being administered.

FACTS

I. PLAINTIFF SEEKS PUNITIVE DAMAGES AGAINST AN ESTATE FOR ALLEGED PERSONAL INJURIES CAUSED BY A DECEDEDENT

Plaintiff sued the Co-Executors alleging that Jefferey Epstein, now deceased, sexually assaulted Plaintiff in his New York City residence. (Compl. at ¶¶ 3, 45.) Plaintiff asserts four personal injury causes of action based on Mr. Epstein’s alleged conduct: sexual assault; sexual battery; intentional infliction of emotional distress; and, negligent infliction of emotional distress. (*Id.* ¶¶ 69-86.) Plaintiff seeks “actual, compensatory, statutory, consequential and punitive damages.” (*Id.* ¶ 88.)

ARGUMENT

I. PLAINTIFF DOES NOT DISPUTE THAT A NEW YORK STATUTE BARS HER CLAIM FOR PUNITIVE DAMAGES

In her pre-motion letter, Plaintiff did not dispute that New York law precludes her from recovering punitive damages from the Estate. Nor could Plaintiff make such an argument.

The 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*, 224 F.R.D. at 63 (quoting *Blissett*, 940 F. Supp. at 457).

Plaintiff’s Complaint is based entirely on her alleged personal injuries. New York

General Construction Law § 37-a defines “personal injury” as including “an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another.” All of Plaintiff’s causes of action seek damages for personal injury based on Plaintiff’s core allegation that she “was sexually assaulted by Epstein countless times.” (Compl. ¶ 42.) Therefore, per NY EPTL § 11-3.2(a)(1), Plaintiff may not recover punitive damages from Mr. Epstein’s Estate as a matter of law.

II. NEW YORK LAW APPLIES TO THE ISSUE OF PUNITIVE DAMAGES BECAUSE PLAINTIFF ALLEGES THE TORTS OCCURRED IN NEW YORK

Tacitly conceding that New York law bars her punitive damages claim, Plaintiff asserts in her pre-motion letter that USVI law applies to the availability of such damages merely because Mr. Epstein’s will is being probated there. Plaintiff is wrong for two independent reasons.

First, Plaintiff alleges the acts and omissions giving rise to her causes of action occurred entirely in New York. (Compl. ¶¶ 15, 22.) Therefore, New York law—including NY EPTL § 11-3.2(a)(1)—applies to the issue of punitive damages. *See Starr Indem. & Liab. Co. v. Am. Claims Mgmt.*, No. 14-cv-0463-JMF, 2015 U.S. Dist. LEXIS 60272, *7 (S.D.N.Y. May 7, 2015) (“Because punitive damages are conduct-regulating, ‘the law of the jurisdiction where the tort occurred will generally apply.’”) (quoting *Deutsch v. Novartis Pharm. Corp.*, 723 F. Supp. 2d 521, 524 (E.D.N.Y. 2010); *Guidi v. Inter-Continental Hotels Corp.*, No. 95-CV-9006, 2003 U.S. Dist. LEXIS 6390, at *1 (S.D.N.Y. Apr. 16, 2003)).

Second, Plaintiff is not permitted to avail herself of parts of NY EPTL § 11-3.2(a)(1) while disregarding others. Plaintiff is only permitted to bring her causes of action against the Estate because of the first sentence of NY EPTL § 11-3.2(a)(1):

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. This section extends to a cause of action for wrongfully causing death and an action therefor may be brought or continued against the personal representative of the person liable therefor.

NY EPTL § 11-3.2(a)(1) (emphasis added).

By arguing New York law does not apply to the issue of punitive damages, however, Plaintiff effectively asks the Court to apply the first sentence of § 11-3.2(a)(1), permitting her to bring this case, but to disregard the very next sentence precluding punitive damages. In *Blissett*, the Court expressly rejected such an “anomalous situation.” 940 F. Supp. at 457 (“[I]t would be an anomalous situation indeed if plaintiff were allowed to proceed with this section 1983 action against the estate of Casey because of section 11-3.2(a)(1), while at the same time he was allowed to recover relief in the form of punitive damages, which clearly is beyond the scope of relief which that statute authorizes.”).

III. EVEN IF USVI LAW APPLIES – WHICH IT DOES NOT – PUNITIVE DAMAGES ARE STILL UNAVAILABLE

Even if USVI law applies, an award of punitive damages would not be available against Mr. Epstein’s Estate. In 2011, the Supreme Court of the USVI effectively instructed USVI courts to apply what is now known as a “*Banks* analysis” to determine U.S.V.I. common law. *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011). The *Banks* analysis includes consideration of three non-dispositive factors: (1) whether any USVI courts have previously adopted a particular rule; (2) the position taken by a majority of courts of other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the USVI. *Gov’t of Virgin Islands v. Connor*, No. S. CT. CIV. 2013-0095, 2014 WL 702639, at *1 (V.I. Feb. 24, 2014).

Applying the *Banks* factors here demonstrates that USVI courts would adopt the rule in the Restatement (Second) of Torts—which is also followed in the majority of United States

jurisdictions, including New York—and hold that punitive damages are not available against a deceased tortfeasor's estate.

1. Banks factor one: previously, USVI courts favorably cited the Restatement section that precludes punitive damages against estates.

USVI courts have favorably recited the Restatement's rule precluding punitive damages against a decedent tortfeasor's estate. *See, e.g., Hamilton v. Dowson Holding Co.*, 51 V.I. 619, 628 (D.V.I. 2009); *Booth v. Bowen*, No. CIV. 2006-217, 2008 WL 220067, at *5 (D.V.I. Jan. 10, 2008). In these cases, the U.S. District Court of the Virgin Islands considered the inverse of the issue here, *i.e.*, whether the personal representatives of an estate may obtain punitive damages in an action arising from the decedent's wrongful death. In determining that punitive damages were not available under such circumstances, the courts cited the Restatement, which provides that “[p]unitive damages are not awarded against the representatives of a deceased tortfeasor nor, ordinarily, in an action under a death statute.” *Restat. (Second) of Torts* § 908 cmt. a (emphasis added). Accordingly, this *Banks* factor favors the Estate.

2. Banks factor two: a majority of U.S. jurisdictions do not permit an award of punitive damages based on the wrongful acts of a decedent.

This *Banks* factor overwhelmingly supports the Estate's position. The majority of U.S. jurisdictions do not permit an award of punitive damages against the personal representatives of an estate based on the actions of the deceased tortfeasor. *See Crabtree v. Estate of Crabtree*, 837 N.E.2d 135, 138 (Ind. 2005) (“The majority view denies punitive damages.”); 2 Linda L. Schlueter, *Punitive Damages* § 20.4 (7th ed. 2015) (“[A] majority of jurisdictions will not award punitive damages against a deceased tortfeasor’s estate.” (citing Alec A. Beech, *Adding Insult to Death: Why Punitive Damages Should Not Be Imposed Against a Deceased Tortfeasor’s Estate in Ohio*, 49 Akron L. Rev. 553 (2016))); Timothy R. Robicheaux and Brian H. Bornstein, *Punished, Dead Or Alive: Empirical Perspectives on Awarding Punitive Damages Against*

Deceased Defendants, 16 Psych. Pub. Pol. and L. 393, 398 (2010) (“The Restatement (Second) of Torts (1965) is one authority stating that punitive damages should not follow the death of a wrongdoer, and the majority of courts considering the issue have provided rulings consistent with this position.”).

3. *Banks* factor three: Post-*Banks*, USVI courts have favorably applied Restatement Section 908 to questions regarding punitive damages.

The third *Banks* factor weighs strongly in favor of the Estate as well. Post-*Banks*, USVI Courts have already found that Section 908 of the Restatement is “the soundest rule for the Virgin Islands with respect to the imposition of an award of punitive damages.” *Pappas v. Hotel on the Cay Time-Sharing Ass’n*, 69 V.I. 3, 15 n.8 (U.S.V.I. Super. Ct. 2015) (citing *Davis v. Christian*, 46 V.I. 557 (D.V.I. App. Div. 2005), *Isaac v. Crichlow*, 63 V.I. 38, 2015 V.I. LEXIS 15 (V.I. Super. Ct. 2015), *St. Thomas House, Inc. v. Barrows*, 15 V.I. 435 (V.I. Terr. Ct. 1979), *Brandy v. Flamboyant Inv. Co., Ltd.*, 24 V.I. 249 (V.I. Terr. Ct. 1989), and *Thomas v. Rijos*, 780 F. Supp. 2d 376, 380 (D.V.I. 2011)); *Powell v. Chi-Co’s Distrib.*, No. ST-13-TOR-14, 2014 V.I. LEXIS 21, at *5 n.13 (U.S.V.I. Super. Ct. Apr. 3, 2014) (“Applying a *Banks* analysis, the Court finds that Restatement (Second) of Torts § 908(2) reflects the common law of this jurisdiction.”).

* * *

In conclusion, every *Banks* factor favors the Estate: (1) pre-*Banks*, USVI courts expressed approval for the general rule that punitive damages cannot be recovered against a wrongdoer’s estate; (2) the majority of courts from other jurisdictions preclude punitive damages against a wrongdoer’s estate; and (3) post-*Banks*, USVI courts have held that Section 908 of the Restatement of Torts (Second) represents the soundest rule for the USVI with respect to the availability of punitive damages.

IV. THIS MOTION IS PROCEDURALLY PROPER

a. Courts in this District routinely dismiss punitive damages claims on Rule 12(b)(6) motions.

Plaintiff's pre-motion letter also argues that a motion to dismiss punitive damages is more properly styled a motion to strike. However, courts in this District regularly grant motions to dismiss punitive damages. *See, e.g., The Cookware Co. (USA), LLC v. Austin*, No. 15 Civ. 5796, 2016 U.S. Dist. LEXIS 177691, at *17 (S.D.N.Y. Dec. 8, 2016) (Batts, J.) (granting motion to dismiss claim for punitive damages without leave to replead because allegations regarding defendant's bad faith conduct were conclusory and did not rise to the required level of malice); *SJB v. N.Y.C. Dep't of Educ.*, No. 03 Civ. 6653, 2004 U.S. Dist. LEXIS 13227, at *25-26 (S.D.N.Y. July 14, 2004) (Buchwald, J.) (granting motion to dismiss punitive damages claims because punitive damages were not statutorily available); *Kunica v. St. Jean Fin.*, 97 Civ. 3804, 1998 U.S. Dist. LEXIS 11867, at *26 (S.D.N.Y. July 29, 1998) (Sweet, J.) (granting motion to dismiss claim for punitive damages because even if conduct alleged in complaint was true, it did not rise to the level necessary to award punitive damages); *Purdy v. Consumers Distrib. Co.*, 648 F. Supp. 980, 981, 984 (S.D.N.Y. 1986) (Cedarbaum, J.) (granting motion to dismiss claim for punitive damages); *see also Gemerek v. Buffalo Sewer Auth.*, No. 99-CV-0879E(M), 2001 U.S. Dist. LEXIS 7167, *14 (W.D.N.Y. May 21, 2001) (granting motion to dismiss punitive damages). Judge Kaplan, whom Plaintiff references in her pre-motion letter, has granted a motion to dismiss punitive damages. *See Blasetti v. Pietropolo*, 213 F. Supp. 2d 425, 431-32 (S.D.N.Y. 2002) ("The motion ... to dismiss the complaint is granted to the extent that plaintiff's claim for punitive damages ... is dismissed.").

Fed. R. Civ. P. 12(f) provides for motions to strike "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The Estate does not contend that

Plaintiff's request for punitive damages is redundant, immaterial, impertinent or scandalous. Rather, Plaintiff's claim for punitive damages fails as a matter of law.

b. Even if the Court deems this Motion a motion to strike, it should grant the relief requested.

Even if the Court deems this Motion a motion to strike pursuant to Fed. R. Civ. P. 12(f), it should still grant the relief requested. *See C. Wright & A. Miller, 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.)* (“[T]he technical name given to a motion challenging a pleading is of little importance inasmuch as prejudice to the nonmoving party hardly can result from treating a motion that has been inaccurately denominated a motion to strike as a motion to dismiss the complaint.”).

Contrary to Plaintiff's assertions in her pre-motion letter, motions to strike punitive damages are not disfavored. Courts in the Second Circuit, including in this District, routinely grant motions to strike punitive damages at the pleadings stage. *See, e.g., In re Merrill Lynch Auction Rate Sec. Litig.*, 851 F. Supp. 2d 512, 544 (S.D.N.Y. 2012) (granting defendant's motion to strike sections of first amended complaint asserting punitive damages); *Nash v. Coram Healthcare Corp.*, No. 96 Civ. 0298 (LMM), 1996 U.S. Dist. LEXIS 9101, at *15 (S.D.N.Y. June 27, 1996) (“The motion to strike the punitive damages prayer from the Complaint is granted.”); *Cerveceria Modelo, S.A. de C.V. v. USPA Accessories LLC*, No. 07 Civ. 7998 (HB), 2008 U.S. Dist. LEXIS 28999, at *21-22 (S.D.N.Y. Apr. 10, 2008) (“Because Defendant has failed to allege that Plaintiff's conduct was egregious and directed at the public generally, its claim for punitive damages cannot proceed.”); *Ladenburg Thalmann & Co. v. Imaging Diagnostic Sys.*, 176 F. Supp. 2d 199, 207 (S.D.N.Y. 2001) (granting motion to strike punitive damages because plaintiff did not allege egregious conduct in complaint); *see also Brady v. Port Auth.*, Nos. 87 CV 2702 (NG)(CLP), 93 CV 1679 (NG)(CLP), 95 CV 0442 (NG)(CLP), 1998

U.S. Dist. LEXIS 16548, at *9 (E.D.N.Y. Oct. 15, 1998) (granting Port Authority’s motion to strike plaintiff’s claims for punitive damages).

None of the cases cited in Plaintiff’s pre-motion letter held that motions to strike punitive damages were disfavored or “time-wasters”; in fact, none of them involved motions to strike punitive damages at all. Plaintiff’s first case, *Wine Mkts. Int’l v. Bass*, 177 F.R.D. 128, 133 (E.D.N.Y. 1998), involved a motion to strike all references to price-fixing in the complaint as immaterial because the price-fixing claims had been dismissed. The *Wine Markets* court observed that motions to strike “portions of a complaint” are disfavored because they are often sought by the movant as a dilatory tactic. *Id.* Notwithstanding its observation, the court granted the motion to strike in part. *Id.* at 135.

Plaintiff’s second case, *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, No. 93 CIV 6876 LMM, 200 WL 1876916, at *1 (S.D.N.Y. Dec. 22, 2000), involved a motion to strike affirmative defenses. The court summarily held that Rule 12(f) motions were disfavored, citing *American Buying Insurance Services, Inc. v. S. Kornreich & Sons, Inc.*—a case involving a motion to strike portions of a complaint that were deemed irrelevant. 944 F. Supp. 240, 250 (S.D.N.Y. 1996).

Finally, Plaintiff’s third case, *Carmona v. Spanish Broad. System, Inc.*, No. 08 Civ. 4475, 2009 WL 890054, at *10 (S.D.N.Y. Mar. 30, 2009), involved a motion to strike an “immortal” paragraph in the complaint. The court acknowledged that motions to strike are often disfavored but also addressed the motion on the merits, denying it because the paragraph in question had “possible bearing” on the allegations in the complaint and at any rate did not prejudice defendants.

Here, the Estate does not seek merely to strike an insufficient defense or immaterial

portion of Plaintiff's complaint. Rather, the Estate asks this Court to strike an improper claim for punitive damages that is unavailable by statute and otherwise, and which thus can and should be disposed of on the pleadings.

Nor is the Estate's motion a dilatory tactic. On the contrary, removing Plaintiff's punitive damages demand will serve to streamline the issues here. The only "time-waster" would be if Plaintiff were permitted to seek to conduct discovery to support a prohibited claim for punitive damages. Further, if Plaintiff decides not to take part in the Epstein Victims' Compensation Program, striking the improper punitive damages request will substantially help the parties appropriately value their respective positions and thus aid in settlement.

CONCLUSION

Based on the foregoing, the Co-Executors respectfully request that the Court grant their motion to dismiss Plaintiff's claim for punitive damages with prejudice or, alternatively, strike that claim, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 15, 2020

Respectfully submitted,

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