

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-80804-CIV-MARRA/JOHNSON

JANE DOE, a/k/a
JANE DOE NO. 1,

Plaintiff,

vs.

JEFFREY EPSTEIN, HALEY
ROBSON, and SARAH KELLEN,

Defendants.

/

MOTION TO DISMISS

Defendant Jeffrey Epstein, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and Rule 7.1(A) of the Local Rules for the Southern District of Florida, moves to dismiss Counts I, II and IV of plaintiff's amended complaint¹ against Defendant Jeffrey Epstein, and states as follows:

¹ The time to answer the remaining allegations of the amended complaint is tolled pending the Court's ruling on the present motion. *See Beaulieu v. Bd. of Trustees of Univ. of W. Fla.*, No. 3:07cv30/RV/EMT, 2007 WL 2020161, * 2 (N.D. Fla. July 9, 2007) (holding that defendant's partial motion to dismiss "automatically extends its time to answer . . . until after the court has ruled on [its] motion to dismiss"); *Finnegan v. Univ. of Rochester Med. Ctr.*, 180 F.R.D. 247, 249 (W.D.N.Y. 1998) (concluding "that the filing of a motion that only addresses part of a complaint suspends the time to respond to the entire complaint, not just to the claims that are the subject of the motion"); *Schwartz v. Berry College, Inc.*, No. Civ.A. 4:96CV338-HLM, 1997 WL 579166, *1 (N.D. Ga. July 3, 1997) (noting that there is significant case law to support the position that "when a defendant files a Rule 12(b) motion to dismiss, addressing only some of

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ALLEGATIONS IN PLAINTIFF'S COMPLAINT

This action arises out of the alleged assault of the plaintiff. According to the allegations in her amended complaint, the plaintiff went to Mr. Epstein's house to give him "a massage for monetary compensation" (Am. Compl. ¶ 13), where Mr. Epstein allegedly assaulted her "in violation of Chapter 800 of the Florida Statutes."² (Am. Compl. ¶ 18). To sharpen her lawsuit, the plaintiff says she is seeking damages in connection with a "conspiracy" (Am. Compl. ¶ 22), a "plan" (Am. Compl. ¶ 32), a "scheme" (Am. Compl. ¶ 32) and an "enterprise" (Am. Compl. ¶ 32) and adds two nominal defendants.

The plaintiff tries to assert claims for sexual assault (Am. Compl. ¶¶ 16-19), civil conspiracy (Am. Compl. ¶¶ 20-23) and civil RICO (Am. Compl. ¶¶ 29-34). These theories of liability, however, cannot be supported by the allegations in the amended complaint. In fact, even if everything in the amended complaint were true, recovery against Jeffrey Epstein, for Counts I, II and IV, under any formulation, is impossible under Florida law. Accordingly, these counts must be dismissed.

the claims contained in the plaintiff's complaint, the defendant is not required to file an answer until the court rules on the motion to dismiss").

² Notably, on February 20, 2008, the plaintiff was deposed in *State of Florida v. Jeffrey Epstein*, 502006CF009454AXXXMB (Fla. 15th Cir. Ct., filed Jul. 19, 2006). During that deposition, she made numerous admissions that completely undermine the allegations that she has pled in her complaint against Mr. Epstein. Regardless, for the procedural purposes of this motion only, we take her allegations as true.

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ARGUMENT

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted when a court cannot identify “each of the *material* elements necessary to sustain a recovery under some viable legal theory.” *Snow v. DirectTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006) (*quoting Roe v. Aware Woman Ctr. For Choice, Inc.*, 253 F.3d 678, 684 (11th Cir. 2001)). Moreover, a court should dismiss a complaint “when, on the basis of a dispositive issue of law, no construction of the factual allegations will support a cause of action.” *Marshall County Bd. of Educ. v. Marshal County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). “[T]o survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions” *Holt v. Crist*, No. 06-14617, 2007 WL 1156938, *2 (11th Cir. Apr. 19, 2007). As such, “conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Snow*, 450 F.3d at 1320.

I. Count I Fails to State a Cause of Action For Assault Recognized by Florida Law.

The plaintiff attempts to plead a cause of action against Mr. Epstein for “sexual assault” based on a “violation of Chapter 800 of the Florida Statutes”³ for the “lewd and lascivious acts committed by Epstein upon Jane Doe.” (Am. Compl.

³ Chapter 800, Florida Statutes, is entitled, “Lewdness; Indecent Exposure.”

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¶ 18.) The plaintiff cannot assert a cause of action for “violation of Chapter 800, Florida Statutes” because there is ***no private right of action*** under that Chapter. *See generally Am. Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 374 (Fla. 2005) (observing that “not every statutory violation carries a civil remedy” (*citing Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 852 (Fla. 2003)). *See also, e.g., Miami Herald Publ’g Co. v. Ferre*, 636 F. Supp. 970 (S.D. Fla. 1985) (King, C.J.) (holding that violation of Florida’s criminal extortion statute does not give rise to a civil cause of action for damages).

Where a plaintiff brings a civil action pursuant to a criminal statute that provides no civil remedy, her complaint is properly dismissed for failure to state a cause of action. *See Mantooth v. Richards*, 557 So. 2d 646, 646 (Fla. 4th DCA 1990) (per curiam) (affirming dismissal of plaintiff’s claim for parental kidnapping where “the mentioned statutes concern only criminal violations ***and do not afford a civil remedy***”) (citation omitted) (emphasis added). Accordingly, the plaintiff’s claim for sexual assault against Mr. Epstein, pursuant to a violation of Chapter 800, Florida Statutes, must be dismissed.

Should the Court look beyond the plain language of the plaintiff’s amended complaint and construe Count I as a claim for common-law assault, that claim would also fail. As the court explained in *Lay v. Kremer*, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982), an assault is “an intentional, unlawful offer of corporal injury

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to another by force, or force unlawfully directed toward another under such circumstances as to create a fear of imminent peril, coupled with the apparent present ability to effectuate the attempt.” An assault thus requires “an affirmative act—a threat to use force, or the actual exertion of force.” *Sullivan v. Atl. Fed. Sav. & Loan Assoc.*, 454 So. 2d 52, 54 (Fla. 4th DCA 1984) (affirming dismissal of assault claim where there was no affirmative act).

In this case, there is no such affirmative act. The plaintiff does not allege that Mr. Epstein used force or even threatened to use force. Indeed, the only statements that Mr. Epstein is alleged to have said to the plaintiff are “to remove her clothes,” “to sit on his back” and “to continue giving him a massage.” (Am. Compl. ¶ 13.) These allegations fall far short of an “offer of corporal injury by force.”

Accordingly, because the plaintiff has failed to plead a cause of action for assault recognized in Florida, Count I against Mr. Epstein must be dismissed.

II. Count II Fails Because Plaintiff Claims No Actionable Underlying Tort or Wrong.

As a general rule, “[a]n actionable conspiracy [under Florida law] requires an actionable underlying tort or wrong.” *Wright v. Yurko*, 446 So. 2d 1162, 1165 (Fla. 5th DCA 1984). A narrow exception to the general rule exists where “the plaintiff can show some peculiar power of coercion possessed by the conspirators by virtue of their combination.” *Churruga v. Miami Jai-Alai, Inc.*, 353 So. 2d 547, 550 (Fla. 1977). “Where the concerted acts of the defendants do not create a

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greater harm than if the acts were committed by one person . . . , there can be no recovery” under a claim for independent conspiracy. *Martin v. Marlin*, 529 So. 2d 1174, 1179 (Fla. 3d DCA 1988). Clearly, this case is governed by the general rule because only one person could have caused the plaintiff’s injuries.

Here, the plaintiff’s claim under Count II (civil conspiracy) fails because it derives exclusively from Count I (violation of Chapter 800, Florida Statutes). *See Buchanan v. Miami Herald Publ’g Co.*, 230 So. 2d 9, 12 (Fla. 1969) (holding that where Count I of the complaint had failed to state a cause of action for malicious prosecution, there could be no civil conspiracy claim in Count II “based on the allegations of Count I”). As noted above, the plaintiff cannot prevail on Count I because the statute she expressly pleads as its basis, Chapter 800, Florida Statutes, provides no civil remedy.

Therefore, she cannot prevail on her claim for conspiracy (Count II) to violate Chapter 800, Florida Statutes (Count I), and Count II of the amended complaint must be dismissed against Mr. Epstein.

III. Count IV Cannot Stand Because Plaintiff Fails to Claim a Direct Injury Resulting from a Violation of a RICO Predicate Act.

Section 772.104, Florida Statutes (“Civil Remedies for Criminal Practices”) allows someone to bring a civil RICO claim only if “he or she has been injured *by reason of* any RICO violation. § 772.104, Fla. Stat. (2007) (emphasis added). The injury must be a *direct result* of a racketeering activity or RICO predicate act.

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See Baisch v. Gallina, 346 F.3d 366, 373 (2d Cir. 2003) (“[A] plaintiff does not have standing if he suffered an injury that was indirectly (and hence not proximately) caused by the racketeering activity or RICO predicate acts, even though the injury was proximately caused by some non-RICO violations committed by the defendant.”). Thus, an injury allegedly caused by a non-RICO violation is insufficient to state a claim for civil RICO. *See id.*

Here, the allegations in Count IV, even if they are true, do not add up to a civil RICO claim because the plaintiff’s alleged injury was not caused by the violation of a RICO predicate act. The plaintiff alleges that she was injured “[a]s a direct and proximate result of Epstein’s assault on Jane Doe,” “in violation of Chapter 800 of the Florida Statutes.” (Am. Compl. ¶¶ 18-19.) ***Chapter 800 of the Florida Statutes is not a RICO predicate act.*** See § 772.102(a), Fla. Stat. (2003) (listing Florida’s RICO predicate acts). By her own admission, the plaintiff’s alleged injury was caused by a non-RICO violation. As a result, her claim cannot stand.

In a doomed attempt to avoid this fatal flaw in her claim, the plaintiff lists a series of violations rooted in Florida’s prostitution statutes. (Am. Compl. ¶ 31.) According to the amended complaint, the defendants participated in a criminal enterprise . . . or conspir[acy]” (Am. Compl. ¶ 30) over an unspecified length of time “to repeatedly find and bring [Jeffrey Epstein] underage girls . . . in order for

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Epstein to solicit, coerce, entice, compel, or force such girls in acts of prostitution and/or lewdness.” (Am. Compl. ¶ 32). The alleged “pattern of criminal activity” comprises violations of Chapter 796, Florida Statutes—the chapter that proscribes various crimes of prostitution.⁴

These allegations, however, do not tie directly into the plaintiff’s alleged injuries – her alleged assault “in violation of Chapter 800 of the Florida Statutes.” (Am. Compl. ¶ 18.) Indeed, the plaintiff’s alleged injury has nothing to do with the facilitation of prostitution, or more succinctly, the violation of Florida’s prostitution laws. Accordingly, the plaintiff’s claim must fail because there is no proximate cause between the purported “pattern of criminal activity” and the plaintiff’s alleged injuries.

Because the amended complaint does not satisfy the direct-injury requirement under Florida’s RICO law, the plaintiff has failed to allege a cause of action against Jeffrey Epstein for violation of section 772.103, Florida Statutes. Thus, Count IV of the amended complaint must be dismissed.

Conclusion

For the reasons set forth herein, Defendant Jeffrey Epstein respectfully requests that Counts I, II and IV of the plaintiff’s amended complaint be dismissed.

⁴ The amended complaint alleges a “pattern of criminal activity” comprising the following criminal violations: §§ 796.03, 796.07(2)(f), 796.07(2)(h), 796.045, and 796.04, Fla. Stat. (Am. Compl. ¶ 31.)

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

Undersigned counsel has conferred in good faith with counsel for the plaintiff, who opposes the relief requested in this motion.

/s/ Michael R. Tein
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 4, 2008, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all individuals on the following 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 counsel or parties who are not authorized to receive Notices of Electronic Filing.

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