UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KATHLEEN NUCCIO,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 93-363-P-DMC**
	)	
LUKE A. NUCCIO,	)	
	)	
Defendant	)	

MEMORANDUM DECISION ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

The plaintiff in this diversity action seeks compensatory and punitive damages from her father, the defendant, for the intentional infliction of emotional distress in connection with her allegations that during her childhood the defendant repeatedly and severely abused her sexually. Conceding for purposes of the summary judgment motion that he sexually abused the plaintiff from the time she was three years old until she reached the age of 13, the defendant nonetheless contends that because the plaintiff reached the age of 21 in 1970 her claim is barred by the applicable statute of limitations. Accordingly, the defendant has moved for summary judgment. The plaintiff's position is that she repressed all memory of the sexual abuse until 1992 and that the limitation period should be tolled because of her mental illness, or, in the alternative, that the defendant should be

[1] Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

equitably estopped from asserting a statute of limitations defense. For the reasons discussed below, I must grant the defendant's summary judgment motion.

I. Summary Judgment Standards

Summary judgment is appropriate only if ``the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining of this burden is met, the court must view the record in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id*. at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is ``material" if it may affect the outcome of the case; a dispute is ``genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Facts and Procedural History

The plaintiff alleges that during her minority and while she lived with the defendant, he intentionally, repeatedly and severely abused her sexually. Applying the appropriate summary judgment standards, the following facts emerge: Although the plaintiff is unable to provide the

exact dates of the sexual abuse, her earliest memories of it involve incidents that took place when she was about three years old and her last memory of sexual abuse involves an incident that took place when she was 13.[2] These incidents occurred on her family's farm in New Jersey, with the exception of one incident that took place while on vacation at a beach in New Jersey. The defendant does not contest any of these facts.

The plaintiff was born on July 1, 1949. Thus, at the time she filed her complaint, she was 44 years of age and it had been approximately 31 years since the most recent of the incidents that form the basis of her cause of action occurred. She repressed all memory of the sexual abuse until some time after April 1992. When she was approximately three the defendant drowned kittens in her

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[2] The plaintiff has provided the following haunting description:

> I remember being at the shore and my father taking me back in the ocean to clean the sand out of my bathing suit and I remember him fondling my genitals. At the farm in New Jersey, I remember my father, the night before my first Holy Communion, came into my bed and had sexual intercourse with me. I was seven years old. I remember another occasion when I was ten and my father was on top of me and inserted his penis into my mouth and ejaculated. I remember an occasion when I was around 8 or 9 when my father took me behind the barn and performed oral sex on me. I also have memories of my father fondling me with his hand until I had an orgasm.

Plaintiff's Answers to Defendant's Interrogatories, appended as unmarked exhibit to Defendant's Motion for Summary Judgment (Docket No. 8), & 10.

presence, and killed the family dog and buried it in her presence. When she was nine or ten the defendant threatened to kill her with a chisel if she ever told anyone about the sexual abuse. She suffered frequent beatings and verbal abuse by the defendant throughout her childhood, including an incident at age five or six in which the defendant forced her head down the toilet of an outhouse, and an incident when she was 17 in which he struck her on the ear and she required surgery.

According to James Maier, M.D., the psychiatrist who examined the plaintiff at her request in connection with this proceeding, the threats associated with the defendant's sexual abuse of the plaintiff, together with his specific acts of violence toward her or in her presence, combined with his ``general violent nature," contributed substantially to what the psychiatrist describes as ``the traumatic amnesia which both prevented her from remembering the sexual abuse and seeking a remedy before the amnesia was removed." Affidavit of James Maier, M.D., Exhibit 1 to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (Docket No. 12), & 4. Moreover, since 1970, the plaintiff has been treated on both an inpatient and outpatient basis for numerous psychological afflictions, including depression, multiple personality disorder and post traumatic stress disorder.

Despite these problems, the plaintiff graduated from high school in the top 15 percent of her class, received her bachelor's degree in 1972 and earned her masters in social work in 1973. She received her doctorate from Bryn Mawr College in 1987. Since earning her masters, she has held a variety of professional posts, including work as a college professor, caseworker, trainer, research associate and consultant. She cites stress or workplace pressure as a reason for leaving four of the positions she has held, depression as the reason she left one teaching post and mental illness as the

reason she discontinued a consulting assignment in 1993. As of April 1994 the plaintiff was on medical leave from her tenured position as an associate professor at the University of Minnesota.

In addition to pursuing a career as a social worker and college professor, the plaintiff has three times purchased a home either by herself or with a partner. Despite her mental illnesses, she has also been able to rent apartments, purchase and maintain automobiles, pay her bills, maintain bank accounts, write and publish scholarly articles, work on political campaigns and take part in intimate relationships.

The plaintiff repressed all memory of her father's sexual abuse until some time after April 1992 when a dream she had about her father began the process of recalling the painful memories of her childhood. She filed her complaint in this court on December 22, 1993.

Upon answering and denying the plaintiff's material allegations, the defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, contending that the plaintiff's claim was barred by the applicable statute of limitations. Defendant's Motion to Dismiss with Incorporated Memorandum of Law (Docket No. 5). I denied the motion, concluding that issues surrounding the plaintiff's asserted mental incapacity, and the possibility that such incapacity would toll the limitation period, required further factual development. Memorandum Decision on Defendant's Motion to Dismiss (Docket No. 7). The defendant thereafter filed a motion for summary judgment, relying on the plaintiff's deposition and answers to interrogatories to support his contention that he is entitled to judgment as a matter of law.

III. Legal Analysis

In a case such as this one, where jurisdiction is based on diversity and the action stems from incidents that took place outside the district, as a choice-of-law matter Maine courts would apply the Maine statute of limitations and this court is bound to follow the same choice-of-law rule. *Carlson v. Rice*, 832 F. Supp. 17, 18 n. 2 (D. Me. 1993). In 1991 the Maine Legislature provided that causes of action based on sexual acts with a person under the age of majority must be commenced within 12 years after the cause of action accrues, or within six years of the time the person discovers or reasonably should have discovered the harm, whichever occurs later. 14 M.R.S.A. ' 752-C. However, the Legislature explicitly declared that section 752-C would apply only to actions based on torts committed after the effective date of the provision and to actions for which the claim had not already been barred by the previous statute of limitations. P.L. 1991, ch. 551 ' 2.

In *McAfee v. Cole*, 637 A.2d 463 (Me. 1994), the Law Court confronted a case that, like the instant one, involved sexual abuse of a minor that occurred prior to the effective date of section 752-C. The court held that there was ``no question'' that the statute of limitations was tolled until at least the plaintiff's 18th birthday in 1974, and that on the date the plaintiff turned 18 the longest applicable statute of limitations pursuant to Maine law was six years and there was no applicable discovery rule.[3] *Id*. at 466. As in *McAfee*, this case involves sexual acts that took place more than six years before the plaintiff had attained her majority, and prior to the adoption of a discovery rule applicable to such cases. Accordingly, the defendant urges the court to apply the *McAfee* rule and determine that by 1976, or six years after the plaintiff attained her majority, her claims were time-barred pursuant to the applicable statute of limitations.

[3] The Legislature added a three-year discovery rule to the statute of limitations governing sexual acts with minors in 1989. *See* P.L. 1989, ch. 292.

The plaintiff seeks to distinguish *McAfee* by contending, first, that her mental illness should toll the applicable limitation period until the memory of the defendant's wrongs reemerged. Under Maine law, if a person entitled to bring an action is ``mentally ill," the limitation period does not begin to run until ``after the disability is removed." 14 M.R.S.A. ' 853. The *McAfee* court determined that the plaintiff in that case had not preserved the issue of mental illness, but noted in dicta that mental illness under section 853 ``refers to an *overall inability* to function in society that prevents plaintiffs from protecting their legal rights." *McAfee*, 637 A.2d at 466 (emphasis in original) (citing, *inter alia, Smith v. Smith*, 830 F.2d 11, 12 (2d Cir. 1987)). *Smith*, decided pursuant to a similar tolling provision in New York law, involved a case with facts similar to the instant one. The plaintiff was suffering from post traumatic stress disorder that caused her to repress all memory of childhood sexual abuse at the hands of her father. The Court of Appeals for the Second Circuit reasoned that this was not enough to render the plaintiff insane for tolling purposes because only an overall inability to function prevents a litigant from asserting her legal rights. *Cf. Anonymous v. Anonymous*, 584 N.Y.S. 2d 713, 718 (Sup. Ct. Suffolk Cty. 1992) (expert opinion that defendant has never been able to function on her own and was ``functionally disabled" sufficient to require evidentiary hearing on question of insanity).

The plaintiff contends that the medical history she has presented is sufficient to generate a factual issue as to whether she suffered from an overall inability to function in society. I disagree. Viewing the facts in the light most favorable to the plaintiff, there may have been brief, discrete periods since the plaintiff attained her majority during which the state of her mental health was such that she was unable to assert her legal rights. But in light of the three academic degrees she successfully pursued over the period, as well as the numerous professional responsibilities she has

successfully discharged, and in view of the evidence of her daily functioning in an ordinary manner, it cannot be said that the plaintiff has been unable to function in society in the overall sense contemplated by *McAfee* and *Smith*. I therefore conclude that the plaintiff's mental health cannot operate to toll the period of limitation for the present action.

The plaintiff also seeks to distinguish *McAfee* by raising an argument not made in that case. The plaintiff contends that, notwithstanding the lack of a discovery rule, there is a genuine issue of material fact concerning whether the defendant should be equitably estopped from raising a defense based on the statute of limitations. In support of this contention, the plaintiff makes two arguments. First, she asserts that the defendant induced her to forego her cause of action through his threat to kill her with a chisel if she ever disclosed the abuse, a threat he reinforced by committing acts of violence against her and in her presence. Second, she contends that there is a causal link between the threats and the process whereby she repressed the memory of the sexual assaults so as to warrant an estoppel.

In Maine, ``[p]roper application of equitable estoppel rests on a factual determination that the declaration or acts relied upon must have induced the party seeking to enforce the estoppel to do what resulted to [her] detriment and what [s]he would not otherwise have done." *F.S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856, 860 (Me. 1992) (citation omitted). The Law Court has recognized that estoppel may be applied to bar a defendant from successfully raising a statute of limitations defense. *Vacuum Systems, Inc. v. Bridge Construction Co.*, 632 A.2d 442, 444 (Me. 1993); *Dugan v. Martel*, 588 A.2d 744, 746 (Me. 1991); *Hanusek v. Southern Maine Medical Center*, 584 A.2d 634, 636 (Me. 1990).

> The gist of an estoppel barring the defendant from invoking the defense of the statute of limitations is that the defendant has conducted himself in a manner which actually

> induces the plaintiff not to take timely legal action on a claim. The plaintiff thus relies to [her] detriment on the conduct of the defendant by failing to seek legal redress while the doors of the courthouse remain open to [her].

Hanusek, 584 A.2d at 636 (quoting *Townsend v. Appel*, 446 A.2d 1132, 1134 (Me. 1982). As the Law Court explained in *Townsend*,

> [o]nly upon a demonstration that the plaintiff had in fact intended to seek legal redress on [her] claim during the prescriptive period can [her] failure to file suit be specifically attributed to the defendant's conduct. If, on the other hand, the evidence does not indicate that the plaintiff intended to bring suit, even if the defendant's conduct otherwise satisfies the principles of equitable estoppel, the defendant should not be estopped from asserting the bar.

Id. The party seeking to assert equitable estoppel bears the burden of establishing the necessary facts. *Id*.

This court has no difficulty in concluding that, during the period in which the plaintiff lived with the defendant, his violent, threatening and coercive behavior was sufficient to induce the plaintiff not to take legal action on her claim. At issue here, however, is the 23-year period from the date the plaintiff reached her majority, leaving her parents' home for college soon thereafter, and the date on which she filed her complaint. If, as the plaintiff asserts, she had no memory of the sexual assaults throughout this period, then logic dictates that she could not have been immobilized by the threatening behavior of the defendant from taking legal action in response to the assaults, no matter how the threat he administered may have continued to loom into her adulthood. In other words, with respect to the threats and attendant violence of the defendant, there is no evidence that the plaintiff otherwise intended to bring suit. Moreover, even if the record disclosed such evidence, the record also lacks anything to suggest that the plaintiff lived in conscious fear of the defendant after she ceased living with him, and that such a fear had the effect of preventing her from asserting her legal rights. *See Overall v. Klotz,* 846 F. Supp. 297, 300-301 (S.D.N.Y. 1994) (defendant father's threats

of physical violence not a valid basis for tolling limitation period based on duress where plaintiff-daughter ceased living with him in 1949, had contact with him thereafter, and repressed all memory of defendant's sexual abuse of her during childhood).

The plaintiff also contends, however, that estoppel is warranted because the defendant's behavior indirectly caused her to eschew filing suit by inducing the repression of her memories of the abuse. It has become widely understood in recent years that a child, having been sexually abused by a parent on whom the child depends for the provision of life's necessities as well as nurturance, will often find the pain of being abused by a parental figure so unbearable that she will repress the memory because she is otherwise powerless to confront it. *See generally* J. S. Silberg, Comment, *Memory Repression: Should it Toll the Statutory Limitations Period in Child Sexual Abuse Cases?*, 39 Wayne L. Rev. 1589 (1993). The question before the court is not whether a person whose childhood and adolescence were marred by such unspeakable traumas deserves a believing and compassionate response from her community when the repressed memories come to light during adulthood. The question is whether acts that induce repression of memory in an abused child should, as a matter of law, estop the actor from asserting the statute of limitations as a bar to an action based on the memory, once recovered.

Other courts have declined to invoke equitable estoppel in cases where the plaintiff did not repress the conduct but had been induced by the abuser to view the child sexual abuse as appropriate adult behavior. For example, in *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991), the complaint alleged that a clergyman abused the plaintiff as a child and ``invoked God as supporting the conduct in which he allegedly engaged." *Id*. at 324. The court observed:

> [W]hat really stopped plaintiff from suit in this case was his alleged failure to comprehend the reality and meaning of what had happened. Plaintiff, in other words,

> was affected by the enduring consequences of the alleged abuse.... this is better viewed as a basis for the invocation of a discovery rule rather than equitable estoppel or fraudulent concealment.

Id. at 330 (quoting *Basile v. Covenant House*, 575 N.Y.S. 2d 233 (Sup. Ct. N.Y. Cty. 1991). In *Smith*, the Second Circuit noted the plaintiff's concession that she had not repressed the memory of the abuse, and rejected her assertion of equitable estoppel based on a contention that, as the court described it, ``because of the traumatic emotional and psychiatric effect suit would have on her, she was in effect precluded from bringing suit." *Smith*, 830 F.2d at 12, 13.

> This post-traumatic neurosis, as its name implies, was an unintended consequence of the assaults for which she now seeks damages. It did not result from a separate and independent wrong. The doctrine of equitable estoppel usually comes into play when some conduct by a defendant after his initial wrongdoing has prevented the plaintiff from discovering or suing upon the initial wrong.

Id. at 13 (citation omitted).

The plaintiff seeks to distinguish *Schmidt* by noting the absence in that case of any threats by the defendant or of evidence that the plaintiff repressed the memory of the abuse. But *Schmidt* should be read more broadly as standing for the proposition that a plaintiff's failure to understand that she has a cause of action for sexual abuse, whether that failure is allegedly the result of the pernicious assertion of religious authority as in that case, or whether the failure is allegedly caused by memory repression induced by the abuse and attendant threats as in this case, is not a proper basis for an estoppel. Similarly, although the instant case can be distinguished from *Smith* because the allegations here include separate conduct by the defendant, after his initial wrongdoing, that operated to prevent the plaintiff from discovering or suing on the initial wrong, there is nothing in this record

to suggest that the repression of the plaintiff's memory was anything but an unintended consequence of the plaintiff's behavior. *Smith* stands for the proposition that unintended consequences of tortious behavior cannot serve as the basis for an estoppel; the defendant must have committed acts ``that were designed to place the [plaintiff's] claim outside the limitation period." *Id*. As noted above, to the extent that the record suggests that the defendant intended his threats and other behavior to prevent the plaintiff from filing suit, the attempted coercion was a direct one that ceased to be effective once the plaintiff was no longer living with the defendant and otherwise under his control. In sum, I agree with the observation in *Schmidt* that the emergence of repressed memories of sexual abuse is best addressed, if at all, by the invocation of a discovery rule. Such a rule applies in Maine to sexual abuse occurring today, but, pursuant to *McAfee*, is not available to plaintiffs who suffered abuse prior to the legislative adoption of the rule.

I note, finally, that the plaintiff cites *Bither v. Packard*, 115 Me. 306 (1916), a case that antedates the Law Court's recognition of equitable estoppel as a basis for tolling the statute of limitations. In *Bither*, the Law Court permitted an otherwise time-barred action by a plaintiff for money had and received against the plaintiff's uncle, in connection with a contract that the plaintiff testified he executed ``under fear of financial downfall and destruction induced by the threats of the defendant." *Id*. at 309. In the context of discussing fraud as an equitable basis for judicial interference with an unconscionable contract, *see id*. at 314, the court noted that

> [i]n the case of fraud as a general rule, the party defrauded must act with promptness on discovery of the fraud. But in case of that species of fraud involving undue influence or oppression time does not begin to run against the injured party until he is emancipated from the dominion under which he stood at the date of the transaction. *The objection of time is removed so long as the dominion or undue influence which vitiated the transaction is in full force.*

Id. at 315 (emphasis added). To the extent that the limited discussion of fraud in *Bither* can be extended to the more expansive question of when a defendant may be estopped from pleading the statute of limitations as a defense, it suffices to reiterate my earlier observation that there is no basis in the record for concluding that the plaintiff remained under the defendant's coercive influence during the years that followed her emancipation from her parents' home.

Viewing the facts in the light most favorable to the plaintiff, I conclude that she was not mentally ill within the meaning of section 853, nor does she set forth a valid basis for estopping the defendant from asserting the statute of limitations as a defense to this action. Therefore, the most recent date on which the plaintiff's cause of action could have accrued was on the date in 1970 that she attained her majority, which places the cause of action outside even the longest limitation period available pursuant to Maine law. Accordingly, although the conduct alleged by the plaintiff and conceded by the defendant for purposes of his summary judgment motion is without doubt reprehensible, the defendant's motion for summary judgment must be, and therefore is, ***GRANTED***.

Dated at Portland, Maine this 14th day of October, 1994.

David M. Cohen
United States Magistrate Judge