VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-02848

John Durkee, Executor of the Estate of H. Blaisdell, Jr. v. Trini Brassard, et al

ENTRY REGARDING MOTION

Title: Motion to Dismiss Defendant Trini Brassard's 1st Amended Counterclaim for Allowance of Claims (Motion: 4)
Filer: Richard J. Windish
Filed Date: September 20, 2023

In this case, Plaintiff John Durkee, Executor for the Estate of Kenneth H. Blaisdell, Jr., has filed a complaint against Decedent Mr. Blaisdell's daughter, Defendant Trini Brassard (Daughter) for breach of fiduciary duty, conversion, trespass to chattels, embezzlement, and fraud while serving as an agent for Decedent (Father) under a power of attorney that was executed on July 18, 2013, and terminated upon Father's death on April 10, 2021. Executor seeks equitable remedies and an award of monetary damages sufficient to restore the alleged losses to the Estate. Daughter has asserted a counterclaim seeking compensation for alleged business management and caregiver services. She alleges that she provided these services according to an enforceable agreement with Father. Although not clearly framed as such by Daughter, the implication is that the agreement was part of Father's estate planning.

Executor seeks Rule 12(b)(6) dismissal of Daughter's counterclaim, arguing that it fails as a matter of law under the since-repealed Vermont Durable Power of Attorney Act because that Act prohibits an agent from receiving compensation unless explicitly so permitted in the power of attorney. 14 V.S.A. § 3504 (repealed July 1, 2023). Executor further contends that there is no evidence of express or implied contractual relationships beyond the power of attorney that would entitle Daughter to compensation.

Procedural Standard

Motions to dismiss for failure to state a claim pursuant to V.R.C.P. 12(b)(6) "assume the truth of a pleading's factual allegation and test only its legal sufficiency." *Amy's Enterprises v. Sorrell*, 174 Vt. 623, 625 (2002) (citation omitted). In Vermont, "[a] court should grant a motion to dismiss for failure to state a claim only when 'it is beyond doubt that there exist no facts or circumstances that would entitle [the plaintiff] to relief.'" *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10, 209 Vt. 514 (citation omitted).

Allegations in the Counterclaim

Daughter alleges as follows. After Father suffered a stroke, on July 18, 2013, he executed a General Power of Attorney granting Daughter the authority to conduct his financial affairs. From July 18, 2013, until Father's death on April 10, 2021, Daughter spent substantial time providing for both personal care and business management services for Father's benefit. She "agreed to provide [Father] with the daily care he required and to take on a greater role in the everyday management of [Father's] business to allow for its continued operation." She and Father "agreed that [Daughter] would temporarily forego compensation for the services she provided to [Father] … and further agreed that she would be compensated from the assets of [Father's] estate following his death."

Based on the alleged agreement, Daughter filed written claims to Executor in the probate proceeding: $432,000.00 for management services and $425,383.56 for caregiver services. Executor disallowed those claims, which Daughter has asserted here in her counterclaim.

Analysis

A. Compensation for services provided under the power of attorney

The parties agree that Daughter served as agent for Father under the power of attorney (POA) and that Father died on April 10, 2021, the date the POA terminated. They disagree as to which POA statute applies, the now-repealed one or the current one. Executor argues that the now-repealed statute applies, and under it Daughter cannot be compensated for her services performed as Father's agent. The Uniform Durable Power of Attorney Act did not permit such compensation unless expressly authorized. 14 V.S.A. § 3504(d) (repealed July 1, 2023) (requiring an explicit term for the agent to compensate herself with funds of property belonging to the principal for duties performed under a power of attorney). There is no such allegation.

Daughter argues that the current Vermont Uniform Power of Attorney Act applies, and it would permit such compensation without an express term permitting it. See 14 V.S.A. § 4012. The new statute became effective well after the termination of the POA. As to applicability, she relies on this provision:

> § 4063. Effect on existing powers of attorney
>
> Except as otherwise provided in this chapter, on July 1, 2023:
> (1) this chapter applies to a power of attorney created before, on, or after July 1, 2023;
> (2) this chapter applies to a judicial proceeding concerning a power of attorney commenced on or after July 1, 2023;
> (3) this chapter applies to a judicial proceeding concerning a power of attorney commenced before July 1, 2023 unless the court finds that application of a provision of this chapter would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and
> (4) an act done before July 1, 2023 is not affected by this chapter.

14 V.S.A. § 4063.

Generally, retroactive application of a statute is prohibited and any exception to it must be explicit. 1 V.S.A. § 214; *A.B. v. S.U.*, 2023 VT 32, ¶ 21 (citation omitted). When the meaning of the text of a statute or a section is not clear, its title or heading may be used to discern the legislature's intent. See, e.g., *Dubin v. United States*, 599 U.S. 110, 120–21, 143 S. Ct. 1557, 1567 (2023) (citations omitted).

Vermont's Uniform Power of Attorney Act replaced the Uniform Durable Power of Attorney Act as of July 1, 2023. The heading of § 4063 of the new statute expressly indicates that the section is referring to *existing* powers of attorney. Nothing in the statute implies that it was intended to resurrect a long since terminated POA for purposes of providing compensation to the agent that no one could have anticipated at the time. Daughter's argument to the contrary is untenable and would likely be entirely unworkable in practice.

Daughter's authority to act as Father's agent was terminated upon his death,[1] more than two years before the new statute became effective. It thus was not existing under 14 V.S.A. § 4063 for purposes of the new statute. The old statute applies. The old statute required an express term permitting compensation to the agent. There is no allegation of any such term. Thus, Daughter cannot claim compensation pursuant to the POA.

B. Compensation for services not performed under the power of attorney

Daughter in fact asserts that her claims for compensation (or much of them) do not arise out of the power of attorney but from a separate agreement with Father; she does not, however, spell out the legal theory on which she relies. Executor argues that there is no evidence of any express or implied contractual relationship beyond the power of attorney. He contends that any benefit received by Father will be compensated by her inheritance, and that any express agreement or mutual understanding must be shown to rebut the presumption of gratuitousness of inter-family services in Vermont.

Both parties cite *Peters v. Poro's Estate*, 96 Vt. 95 (1922). In that case, the Supreme Court of Vermont ultimately held that "*[a]side from the relationship of parent and child*, or one similar to it, relation by blood does not rebut the ordinary presumption that valuable services are to be compensated." *Peters v. Poro's Estate*, 96 Vt. 95 (1922) (emphasis added). It appears that the closeness of the relationship between the service recipient and provider is a determinative factor in the analysis. See *id.* (where the test for the rebuttal of the presumption was "whether the parties have once so stood related to each other that the one rendering services could not exact payment therefor of the other") (citing *Briggs v. Briggs' Estate*, 46 Vt. 571, 578 (1922)); see also Restatement (Second) of Contracts § 21 (1981) ("Where the family relation is not close, valuable services rendered in the home may make binding an express or implied promise to pay for the services; but even in such cases it would often be understood that there is no legal obligation while the agreement is entirely executory on both sides.").

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[1] Under both the new and old statutes, a power of attorney terminates upon the death of the principal. 14 V.S.A. § 4010(a)(1); 14 V.S.A. § 3507(a)(3) (repealed July 1, 2023).

However, in *Knott v. Pratt*, 158 Vt. 334 (1992), where the Supreme Court examined the merits of a daughter's claim against her father's estate, the Court did not address the closeness of the relationship. Instead, it examined the case under the quasi-contract theory as established in *Wilson v. Alexander*, 139 Vt. 279 (1981):

> Under the theory of quasi contract[,] the law raises a promise to pay when a party receives a benefit and the retention of the benefit would be inequitable. This fictitious promise exists without regard to, indeed sometimes contrary to, the intentions of the party bound.

Knott v. Pratt, at 337 (quoting *Wilson*, at 280). In *Knott*, the daughter lived on the father's property, cared for it as "labor of love," and had received money for its maintenance as well as for her own living expenses from the father and from sale of timber on the property. *Id.* at 337–38. No evidence as to the father's promise to pay the daughter for her care and management of the property was presented. *Id.* The court concluded that in light of the totality of circumstances, the daughter was not entitled to compensation for care, management, and maintenance of property. *Id.*

Here, Daughter claims to have taken care of Father and his business for over seven years according to the terms of an agreement. She asserts that, according to that agreement, she waited until Father's death to seek compensation, implying that there may have been an estate planning motive at work. While Executor argues that there is no evidence of any such agreement, a Rule 12(b)(6) motion does not call upon the opposing party to come forward with evidence.

Conclusion

Assuming the truth of the counterclaim's factual allegations, the motion to dismiss must be DENIED because the court cannot conclude that "it is beyond doubt that there exist no facts or circumstances that would entitle "the counterclaim plaintiff" to relief." *Montague*, 2019 VT 16 at ¶ 10(citation omitted).

Electronically signed this December 5, 2023 at 10:14 PM pursuant to V.R.E.F. 9(d).

Elizabeth D. Mann

Elizabeth D. Mann
Vermont Superior Court Judge