

STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 23-CV-02848

JOHN DURKEE, EXECUTOR OF)
THE ESTATE OF KENNETH H.)
BLAISDELL, JR.,)
Plaintiff,)
v.)
TRINI BRASSARD, COURTNEY)
BRASSARD, BRIAN FALZO, DANIEL)
BRASSARD, AND BRASSARD)
SUGARWORKS AND MAPLE)
SUPPLY, LLC,)
Defendants.)

**PLAINTIFF'S V.R.C.P. 12(b)(6) MOTION TO DISMISS
DEFENDANT TRINI BRASSARD'S
FIRST AMENDED COUNTERCLAIM FOR ALLOWANCE OF CLAIMS**

NOW COMES Plaintiff John Durkee, Executor of the ESTATE OF KENNETH H. BLAISDELL, JR., ("Estate"), by and through counsel PRIMMER, PIPER, EGGLESTON & CRAMER, PC, and pursuant to V.R.C.P. 12 (b)(6), hereby MOVES this Honorable Court to DISMISS Defendant Trini Brassard's First Amended Counterclaim (the "Counterclaim"), for failure to state a claim upon which relief may be granted. In support of this motion, Plaintiff submits the within Memorandum of Law, and further hereby states as follows.

Introduction

This action arises out of Plaintiff John Durkee, Executor for the Estate of Kenneth H. Blaisdell, Jr.'s claims that Defendants owe the Estate damages arising from a series of financial transactions initiated by Defendant Trini Brassard while serving as an agent under a Durable Power of Attorney for Decedent Kenneth H. Blaisdell, Jr. ("Decedent") executed July 18, 2013 and terminated April 21, 2021. The pending Counterclaim asserts that Defendant/Counterclaim

Plaintiff Trini Brassard is entitled to payment for her services as said agent as well as for caregiving services she provided to Decedent, her father. Ms. Brassard is seeking \$432,000.00 for management services as said agent, and \$425,383.56 for caregiver services. Plaintiff does not dispute the procedural filing of these claims, and agrees that these claims should be pursued in the Civil Division for judicial efficiency and economy. However, in making this agreement, Plaintiff/Counterclaim Defendant reserves all other rights related to these claims, and Plaintiff/Counterclaim Defendant asserts that the Counterclaim fails as a matter of law.

Factual Background

In or around July, 2013, Decedent suffered a stroke, after which time he needed assistance with his care and finances. *See* Counterclaim at ¶ 6. A few days after the Decedent suffered this stroke on July 18, 2013, he executed a General Power of Attorney (“POA”), and named Defendant Trini Brassard as his agent. *Id.* The Counterclaim does not allege that the POA document itself specifically granted Defendant Trini Brassard the right to compensation¹. Defendant Trini Brassard (along with other family members) helped the Decedent after his stroke, but has failed to allege that there is a written document from Decedent that states it was his intention to pay her for these caregiving services. In fact, the Counterclaim merely states that “[f]rom July 18, 2013, until Decedent’s death on April 10, 2021 . . . Ms. Brassard and Decedent agreed that Ms. Brassard would temporarily forego compensation for the services that she provided to Decedent . . . and further agreed that she would be compensated from the assets of Decedent’s estate following his death.” *See* Counterclaim at ¶ 10 - 11.

¹ In fact, the POA does not contain such a provision. *See* General Power of Attorney dated July 18, 2013 (“POA”), attached as **Exhibit D** to *Motion for Writ of Attachment, Affidavit of Executor John Durkee* filed June 30, 2023.

Memorandum of Law

Under both Vermont statutory and common law, this Counterclaim should be dismissed for failure to state a claim pursuant to V.R.C.P. 12(b)(6). An agent under a 2013 Vermont Durable Power of Attorney was only permitted to receive compensation if the instrument expressly states compensation is permissible. 14 V.S.A. § 3504 (repealed July 1, 2023). A person who gives care to another and seeks compensation for these services posthumously can only succeed if “there is evidence of a mutual expectation to pay for these same services.” *See In re Peters’ Estate*, 116 Vt. 32, 38 (1949); *Westcott v. Westcott’s Estate*, 69 Vt. 234 (1896); *Sawyer v. Hebard’s Estate*, 58 Vt. 375 (1886). Neither is true in this instance, which is why the Executor disallowed both claims, and opposed the *Petition for Allowance of Claims* filed in the Orange Probate Unit. *See* Counterclaim at ¶ 16. Defendant/Counterclaim Plaintiff Trini Brassard’s Counterclaim asserts no new facts that would support her claim; as such, the Counterclaim should be dismissed as a matter of law.

1. Pursuant to V.R.C.P. 12(b)(6), Defendant/Counterclaim Plaintiff’s claim should be dismissed for failure to state a claim upon which relief may be granted.

The standard of review for V.R.C.P. 12(b)(6) motions to dismiss was succinctly articulated by the Vermont Supreme Court in *Levinsky v. Diamond*, 140 Vt. 595 (1982): “[t]he purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is ‘to test the law of a claim, not the facts which support it.’” 140 Vt. at 600 (quoting *Niece v. Sears Roebuck & Co.*, 293 F.Supp. 792, 794 (N.D. Okl. 1968)). In *Levinsky*, the court further stated, “[t]he court’s attention, therefore, is to be directed toward determining whether the bare allegations of the complaint constitute a statement of a claim under V.R.C.P. 8(a).” *Id.* Rule 8 requires pleadings be clear, concise, and direct as well as based on the pleader’s knowledge, information, and belief.

V.R.C.P. 8(a) and (b). A pleading which fails under Rule 8 should be dismissed under V.R.C.P. 12(b)(6). *Id.*

Defendant/Counterclaim Plaintiff has asserted one claim in the Counterclaim, for allowance of claims pursuant to 14 V.S.A. § 1206. Plaintiff/Counterclaim Defendant is entitled to a dismissal of this Counterclaim, because the Counterclaim as advanced is not supported by the facts alleged by Defendant/Counterclaim Plaintiff.

2. 14 V.S.A. § 3501 et seq. applies.

Prior to July 1, 2002, a power of attorney executed in Vermont was valid under common law, after which time the legislature created a statutory framework for Vermont power of attorney transactions. *See* 14 V.S.A. § 3501 (repealed July 1, 2023) (citing S. 224, 2001 Adj. Sess., No. 135 § 2 (2002)). The title of the bill presented to the Vermont legislature was *An Act Relating to Reports of Abuse, Neglect and Exploitation of Elderly and Disabled Adults* which included this newly created statutory framework. *Id.* The new legislative framework was unequivocal about agent compensation, “[n]o agent may compensate him or herself for duties performed under a power of attorney with funds or property belonging to the principal unless the terms of the power of attorney explicitly provide for compensation.” 14 V.S.A. § 3504 (repealed July 1, 2023).

On July 1, 2023, this act was repealed and replaced by the *Vermont Uniform Power of Attorney Act* which substantively changed the obligation of a principle to compensate their named agent(s) under a Vermont Durable Power of Attorney. *Compare*, 14 V.S.A. § 3504 with 14 V.S.A. § 4012. Presently, the legislative framework provides that, “unless the power of attorney otherwise provides, an agent is entitled ... to compensation that is reasonable under the circumstances.” 14 V.S.A. § 4012. Importantly, the brand new legislative authority expressly

states that specific provisions of this new law will not apply to a judicial proceedings commenced before July 1, 2023, if “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.” 14 V.S.A. § 4063(2). Defendant/Counterclaim Plaintiff filed her *Petition for Allowance of Claims* with the Orange Probate Unit on March 8, 2022. See Counterclaim at ¶ 16. The instant action was filed June 30, 2023.

Moreover, Decedent executed the relevant POA on July 18, 2013. The Decedent died April 21, 2021, at which time the POA was terminated by operation of law. *Wells v. Foss*, 81 Vt. 15, 69 A. 155 (1908) (“The law is established beyond question that the death of the principal instantly terminates the power of the agent, unless coupled with an interest, and that all subsequent dealings with the agent are void and of no effect.”). Therefore, for the duration of this POA’s existence, the now repealed statute applied. The counterclaim amount sought would substantially alter the Decedent’s estate plans. See Counterclaim at ¶ 11 (“[S]he would be compensated from the assets of Decedent’s estate following his death.”). It would be wholly inequitable to apply the brand new statute in this instance where the parties relied upon current law when enacting the POA; the POA was governed by the repealed statute for the entire length of its validity; and the claims made by the former agent now Defendant/Counterclaim Plaintiff were done so under the repealed statute. As such, 14 V.S.A. § 3501 *et seq.* should be applied to this counterclaim.

3. 14 V.S.A. § 3504 requires express language related to agent compensation.

As previously stated, an agent under a Vermont power of attorney had the authority to act “only to the extent such authority is given under the terms of the power of attorney.” 14 V.S.A.

§ 3504 (repealed July 1, 2023) (current version at 14 V.S.A. §§ 4031 – 4041). Ms. Brassard is seeking sizeable compensation (\$432,000.00) from the Estate for work she undertook, because the Decedent asked her to serve as his Agent. However, he did not expressly state in writing that she would be paid for these services, which is why these claims must be disallowed. Under Vermont law “[n]o agent may compensate him or herself for duties performed under a power of attorney with funds or property belonging to the principal unless the terms of the power of attorney explicitly provide for compensation.” *Id.*

Ms. Brassard is bound by the former POA statute as well as relevant common law. It is well settled law that acts of an agent are governed by the applicable law at the time, as “any exercise of authority under the POA which occurs after the statute’s effective date must conform with the entire statute.” *In re Estate of Lovell*, 190 Vt. 99, 104 (2011). In this instance, any authority granted to Defendant/Counterclaim Plaintiff terminated on April 21, 2021, when the principal died. All acts by Ms. Brassard were during the time period when the former POA statute was valid. Therefore, Ms. Brassard has no legal basis to assert her counterclaim for management services/agent compensation, because the POA instrument did not permit the agent to receive said compensation. As such, this Counterclaim should be dismissed.

4. There is neither expressed nor an implied agreement to pay for caregiving.

Ms. Brassard’s Counterclaim for compensation for caregiving services provided to Decedent also fails to state a claim upon which relief may be granted. The legal standard for caregiver claims in Vermont requires the party who makes a claim to prove that “the decedent expected to pay for the services and that the claimant expected payment.” *In re Peters’ Estate*, 116 Vt. 32, 38 (1949). A claimant can only satisfy their burden “by way of evidence of the circumstances under which these services were performed, the relative situations of the parties

and their financial circumstances.” *In re Boisvert’s Estate*, 135 Vt. 69, 72 (1977). The proof of a mutual understanding cannot be derived from Ms. Brassard’s own testimony about what the Decedent wanted, as this evidence is excluded by Vermont’s “Dead Man’s” statute, 12 V.S.A. § 1602. “A party shall not be allowed to testify in his or her own favor where the other party to the contract ... is dead” *Id.*

Generally speaking, it is assumed that when a family member offers caregiving services to another family member, it is a gift, and not a service for which compensation would be sought. “It is well settled that, where services are rendered by a child to a parent, or by a parent to a child, an implied promise to pay for the services **is not inferred** from the mere fact that they have been performed.” *Peters v. Poro’s Estate*, 96 Vt. 95, 96 (1922) (citing *Danyew v. Power’s Estate*, 84 Vt. 588 (1911)) (emphasis added)². Vermont case law has few exceptions to this rule; however, where there are exceptions, they do not apply to Ms. Brassard’s situation. The rule established by this line of cases does not preclude recovery in every circumstance where family members are claiming compensation for caregiving; however, each claim must rebut the presumption in order to succeed³. Yet, the cases which do permit claims by family for caregiving have evidence showing the caregivers’ intent to seek compensation for their services while their family member is still alive.

Ms. Brassard’s Counterclaim for caregiving services fails plead any plausible facts that she and Decedent had an express agreement for her to receive compensation for caregiving

² A daughter claiming title to deceased mother’s property in *Danyew* presented evidence that at the time the daughter was providing assistance to her mother, the daughter made statements about her perceived right to mother’s property. However, the Vermont Supreme Court ruled these statements alone were not enough to cross the threshold from parent-child relationship to creditor-debtor where other evidence of a ledger showing daughter’s contribution in monetary terms; a written statement from the deceased mother supporting daughter’s claim or a legal contract supporting the claim were entirely absent.

³ For example, a husband cannot avoid supporting his ill wife during her lifetime and then refuse to pay a claim made against his wife’s estate by her mother and father who were charged with caring for their dying daughter after her husband dropped her at their doorstep. *Hall v. Fletcher*, 99 Vt. 199 (1925).

services. Ms. Brassard's counterclaim pleads facts which are not sufficient to support these claims, namely conversations she had with Decedent. Absent other factual allegations proving this in support of her Counterclaim, it should be dismissed.

Vermont case law often turns on the fact of whether or not the family member who offered the care was disinherited, but even in those line of cases, some additional element of proof about intent of the parties to pay for services must be present. *Westcott v. Westcott's Estate*, 69 Vt. 234 (1896). Here, the Counterclaim is devoid of such allegations – only an assertion that there was a verbal agreement that Ms. Brassard would be compensated out of the assets of the estate upon the death of Decedent. This fails under the law, as stated above.

Conclusion

Defendant/Counterclaim Plaintiff Trini Brassard's counterclaim against Plaintiff fails to state any plausible factual allegations upon which relief may be granted. Ms. Brassard has certainly provided services and care; however, that fact alone does not warrant payment of more than \$850,000.00. The counterclaim failed to introduce any new factual allegations that would support these claims against the Estate. The Counterclaim fails to state a claim against Plaintiff upon which relief may be granted and should therefore be dismissed on its face.

WHEREFORE, for all the foregoing reasons, and pursuant to V.R.C.P. 12(b)(6), Plaintiff hereby respectfully MOVES this Honorable Court to DISMISS Defendant/Counterclaim Plaintiff's counterclaim, and further requests all such other relief as this Court deems just and appropriate, including but not limited to costs and attorneys' fees.

DATED at Woodstock, Vermont, this 20TH day of September, 2023.

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