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Vermont Superior Court
Orange Unit
23-CV-02848

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 REPLY TO DEFENDANT TRINI BRASSARD'S OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS

Defendant/Counterclaim Plaintiff Trini Brassard ("Counterclaim Plaintiff") argues that Plaintiff John Durkee, Executor of the Estate of Kenneth H. Blaisdell, Jr. ("Movant"), is not entitled to dismissal because: (1) Counterclaim Plaintiff is not seeking compensation for POA services, but rather is a creditor of the Decedent and therefore entitled to substantially alter Decedent's estate plans; and (2) inter-family services are not presumed to be gratuitous under Vermont law. At the close of her opposition papers, Counterclaim Plaintiff argues that denying payment for services would be "repugnant as a matter of public policy, and any such presumption, if there ever was one, should be discarded as anachronistic and calculated to lead to 'tremendous injustice.'" While these statements, made with such fervor, may cry out in Counterclaim Plaintiff's favor, *the law is reason, free from passion*[1]. Moreover, Counterclaim Plaintiff provides no legal authority in support of her request to alter decades of Vermont law.

[1] Aristotle

As a result, Counterclaim Plaintiff's opposition fails to overcome Movant's entitlement to a dismissal of the entire Counterclaim.

Legal Analysis

A motion to dismiss pursuant to Rule 12(b)(6) is granted if "it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Baldauf v. Vermont State Treasurer,* 215 Vt. 18, 24 (2021). Counterclaim Plaintiff has offered one sentence of factual allegations in support of her Counterclaim, namely that she and Decedent agreed she would be compensated from the assets of his Estate. *See* Counterclaim at ¶ 11. In analyzing whether or not these bare factual allegations entitle Counterclaim Plaintiff to relief, this fact must be analyzed using relevant legal precedent in order to determine the validity of a claim. As stated in Movant's pending motion to dismiss, Vermont law does not afford recovery for the claim based on services provided to a father from a daughter, unless the daughter can prove there was either an express agreement or a mutual understanding. *Danyew v. Power's Estate,* 84 Vt. 255 (1911).

The opposition papers clarify that Counterclaim Plaintiff's entire claim is for services provided as the Decedent's daughter, rather than his agent under a POA. Therefore, Movant relies upon prior legal authority related to the POA issues, and does not re-brief them here. Essentially, the Counterclaim is rooted in the law of contract, which relates to the Rule 12(b)(6) analysis, because greater leeway is given to novel legal claims versus this claim, which is based on established precedents that have been valid law for well over 100 years. "We are particularly wary of dismissing novel claims because '[t]he legal theory of a case should be explored in the light of facts as developed by the evidence…[n]onetheless, ***where the plaintiff does not allege a legally cognizable claim, dismissal is appropriate***." *Montague v. Hundred Acre Homestead,* *LLC,* 209 Vt. 609, 613-614 (2019) (emphasis added) (quoting *Ass'n of Haystack Prop. Owners, Inc. v. Sprague,* 145 Vt. 443, 447 (1985) and *Colby v. Umbrella, Inc.,* 184 Vt. 1, 11 (2008)). Counterclaim Plaintiff has not advanced any novel claims, and the bare factual allegations being offered fail to support her claim. As such, Movant believes that dismissal is mandated pursuant to V.R.C.P. 12(b)(6). "Furthermore, the beauty of our rules of civil procedure is that they strike a fair balance, at the early stages of litigation, between encouraging valid, but as yet underdeveloped, causes of action and ***discouraging baseless legally insufficient ones.***" *Colby v. Umbrella,* 184 Vt. at 11. (*emphasis added).*

1. **There is no evidence of express or implied contractual relationships, beyond the POA.**

Counterclaim Plaintiff, in her opposition papers, first argues that she is entitled to compensation as an agent under the POA that the Decedent executed, but then walks away from that argument to state that her claim is akin to a contractual claim between a creditor and debtor. Yet, the counterclaim fails to allege any facts in support of this assertion. The counterclaim indeed references the Decedent's farm business, but only to describe the services that Counterclaim Plaintiff chose to provide. "Decedent was adamant that he did not want to be placed in a long-term care facility and did not want to see his business sold off in pieces to pay for such care, sentiments he repeatedly expressed during his final years of his life." *See* Counterclaim at ¶ 8. The counterclaim does not allege that a written contract for services existed, and beyond the Decedent's will and his POA (his estate plans), Counterclaim Plaintiff has failed to provide or allude to evidence of an express contract proving the Decedent agreed to compensate her for operating his farm. The only remaining legal theory that could support Counterclaim Plaintiff's claim for compensation for farm operations is under the theory of *quasi-contract*.

"The law implies a promise to pay when a party receives a benefit and the retention of the benefit would be inequitable." *In re Estate of Elliot,* 149 Vt. 248, 285 (1988). Counterclaim Plaintiff has alleged facts sufficient to establish she gave the Decedent a benefit, namely assistance operating a business. However, the counterclaim ignores the fact that, as an heir, the benefit will be repaid through her inheritance. Whether or not additional compensation is just would be based on current law surrounding interfamilial services, because as the opposition motion stated, the claim for compensation for services to operate Decedent's farm is akin to a debtor/creditor relationship. As such, the validity of the entire counterclaim rests on whether or not Counterclaim Plaintiff's factual allegations related to her agreement with Decedent to provide these services rebuts the presumption in Vermont that a daughter who helps her father does so out of loyalty, duty, bonds of family, and love; and not for profit.

2. Vermont law does presume that inter-familial services are gratuitous

At the heart of Vermont's social fabric is the family unit, nurtured for generations within agrarian households who served the greater good of the family. The idea that family would only help one another for profit is antithetical to Vermont's societal norms. In fact, the Vermont Supreme Court opined that "[r]easons of public and domestic policy forbid" any change in this custom. *Danyew v. Power's Estate,* 84 Vt. 255 (1911). Nationally, most states agree as well, the exception being those states with larger urban populations. "Generally, when one party renders service to another, the latter's voluntary acceptance of the service often implies a promise to pay for the services. Between members of a family, however, the law presumes that the services were rendered gratuitously. The presumption is based on the assumption that the services were prompted by the bonds of affection, gratitude, moral obligation, and kinship, rather than by a promise of compensation." Clifford S. Fishman and Anne Toomey McKenna, 2 Jones on

Evidence §8:17 (7th ed.). This is the law in Vermont, as well as thirty-four other jurisdictions. *Id.*

In order to rebut this presumption, either an express agreement or a mutual understanding must be provable, and in this instance, factual allegations have to be pled that support one of these options. The Counterclaim includes one sentence alleging an agreement between the Decedent and herself to be "compensated from the assets of the Estate" upon his death. *See* Counterclaim at ¶ 11. These bare factual allegations do not rebut the presumption that a daughter, who is also an heir, is legally entitled to compensation beyond her inheritance. The opposition papers include new factual allegations in support of this claim, which is improperly pled, notwithstanding the procedural objection Movant raises here; these new alleged facts do not rebut the presumption that her services were gratuitous. The fact that Counterclaim Plaintiff can produce witnesses who will indicate the Decedent intended for her to receive a portion of his estate upon his death is in line with the Decedent's estate plan. Therefore, declarations alone do not validate this claim, as stated in the *Peters v. Poro's Estate* opinion after summarizing various witnesses who testified in support of *Peters* claim the Vermont Supreme Court did not find these dispositive. "When the proper test is applied to these declarations, it will be seen that they come short of any evidence of a contract." *Peters v. Poro's Estate,* 95 Vt. 95, 96 (1922).

The opposition papers claim that Vermont law does not presume that inter-family services are gratuitous. In support of this argument, reliance is made on the *Peters* case. However, the opposition papers ignore the opinion's carve-out of certain familial relationships, however. "[A]***bsent from the relationship of parent and child***… relation to blood does not rebut the ordinary presumption that valuable services are to be compensated." *Peters,* supra, 95 Vt. at 96 (emphasis added). While the opposition attempts to extend that opinion to this relationship which is parent and child, Vermont law does not. *Id.* The undisputed legal analysis is then that, "[i]t is well settled that, where services are rendered by a child to a parent, … an implied promise to pay for the services ***is not inferred*** from the mere fact that they have been performed." *Id.* (citing *Danyew*, supra).

In order to recover for inter-family services, Counterclaim Plaintiff must "show that the services were rendered either under an express contract or with a mutual understanding and expectation of payment." *Id.* (citing *Danyew*, supra; *Way's Adm'r v. Way's Estate,* 27 Vt. 625 (1855); *Ashley v. Hendee,* 56 Vt. 209 (1883); *Bliss v. Hoyt's Estate,* 70 Vt. 534 (1898); *Drown's Guardian v. Chesley's Estate,* 92 Vt. 19 (1917)). The counterclaim does not attach an express contract, nor does it refer to one. Counterclaim Plaintiff's factual allegations in support of a mutual understanding consist of one sentence. "During that time, Ms. Brassard and Decedent agreed that Ms. Brassard would temporarily forego compensation for the services that she provided to Decedent, as such compensation would not have been possible without selling business assets critical to the continued operation of the farm, and ***further agreed that she would be compensated from the assets of Decedent's estate following his death***." *See* Counterclaim at ¶ 11 (emphasis added).

While there is no bright line rule as to what facts are required to prove a mutual understanding existed, guidance has been provided by the Vermont Supreme Court. For example, if accounts were kept highlighting acceptance of services as a debt that is owed, that would rebut the presumption of gratuity. *Andrus v Foster*, 17 Vt. 556 (1845). There is no evidence of a mutual understanding to compensate Counterclaim Plaintiff from either accounts, notes, or other writings. "It was said in Westcott v. Westcott's Estate, 69 Vt. 234, that mutual expectation could be shown by the circumstances under which the services were performed, the situation and surroundings of the parties, their pecuniary circumstances, and the declarations of the party sought to be charged." *Peters,* supra*,* 95 Vt. at 96. "To support the inference the circumstances must fairly tend to show that the parties at the time of the service supposed they were dealing as debtor and creditor; that the service was for wages, and not for support or in expectation of a gratuity." *Id.* (citing *Davis v. Goodenow,* 27 Vt. 715 (1855)).

In this instance, the counterclaim describes a daughter helping her father after a medical crisis. The bare factual allegations describe an ongoing father-daughter relationship where the father expressed his end of life care to his daughter. Further, neither the counterclaim nor the opposition papers ever mention wages. The declarations alluded to in the counterclaim as well as the improperly pled opposition do not mention a debtor/creditor agreement, albeit the term is used to legally describe the relationship. The only factual allegation related to compensation in the entire counterclaim is a statement claiming that Decedent intended for her to be compensated from the assets of his Estate, i.e., that she will be an heir. This allegation is not enough to withstand dismissal. "The temptation to overreach in such claims against a decedent's estate is not be overlooked." *Id.* There is no legal authority in Vermont that, based on those circumstances, would allow a daughter to recover more than her inheritance.

<u>Conclusion</u>

The threshold question is whether or not the counterclaim includes any factual allegations that would support the claim made. While the counterclaim does describe services and care that were provided by Counterclaim Plaintiff, more is required to survive a motion to dismiss under 12(b)(6). The fact that Decedent agreed she would be "compensated" from his estate only supports his actual estate planning instruments, not this heir's attempt to take the entire Estate for herself. Movant restates its request to dismiss the entire Counterclaim with prejudice.

DATED at Woodstock, Vermont, this 25TH day of October, 2023.

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