

VERMONT SUPERIOR COURT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 111-5-12 Oecv

Bonnie L. Avery
Plaintiff

v.

Stephen Magowan et al.
Defendant

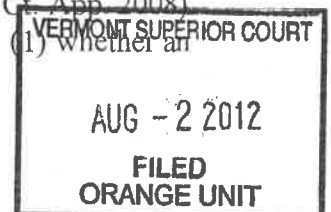
DECISION ON MOTION TO DISMISS

This action is a second complaint seeking a declaration of the existence of an attorney-client relationship and an order compelling production of the legal file from Defendants. An earlier action (27-2-11 Oecv) seeking the same relief was dismissed by order of May 16, 2011. Defendants have moved for the dismissal of the instant action on the basis that the reasons for the dismissal of the earlier case still exist. Plaintiff opposes the motion.

The earlier action was dismissed on the basis that the Probate Division had primary jurisdiction over the litigation and that granting the relief requested by the Plaintiff would allow access to the records by Plaintiff which the Probate Division had already determined she was not entitled to review. Thus this Court dismissed the action without prejudice, granting leave for the Plaintiff to again file for declaratory relief in the Probate Division or in this Court "after the probate dispute has finished."

Motions to dismiss are not favored, and are rarely granted. *Gilman v. Maine Mutual Fire Ins. Co.*, 2003 VT 55, ¶ 14, 175 Vt. 554 (mem.). The purpose of a motion to dismiss is to test the law of the case, not the facts which underlie the complaint. *Kane v. Lamothe*, 2007 VT 91, ¶ 14, 182 Vt. 241. In considering a motion to dismiss, the court assumes all factual allegations in the complaint to be true and gives the benefit of all reasonable inferences to the non-moving party. *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999). A motion to dismiss should not be granted unless it is beyond doubt that there exist no facts or circumstances which would entitle the plaintiff to relief. *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446-47 (1985).

The determination of the existence of an attorney-client relationship is proper in a declaratory judgment action. See 12 V.S.A. § 4711 ("Superior courts within their jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."); see also *Arpaio v. Citizen Pub. Co.*, 211 P.3d 8 (Ariz. Ct. App. 2008) (party filed "a declaratory judgment action asking the trial court to determine: (1) whether an attorney-client relationship existed in these circumstances . . .").



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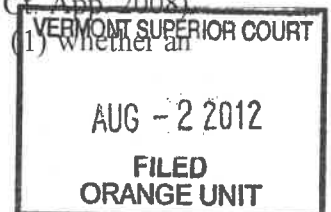
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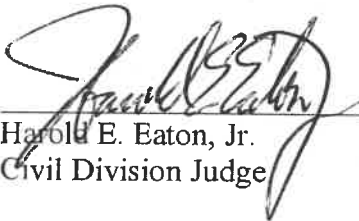
However, the earlier dismissal was clear that the declaratory action could not be re-filed "until the probate dispute has finished." Plaintiff seeks to parse this order by claiming that the discovery issue and "virtually all other issues in the probate litigation" were resolved by a comprehensive settlement agreement. Consequently, Plaintiff argues there is no impediment to re-filing the declaratory action at this time.

The probate action is under appeal to this Court (196-9-11 Oecv). Although there has now been a merger of the various trial courts into a single Superior Court, the Civil Division continues to sit as a higher court of probate. The county courts (now Civil Division) sit in probate appeals as a higher probate court with power to try the identical matter involved in the subject of the appeal, and not to revise the errors of the probate court merely. *Whitton v. Scott*, 120 Vt. 452 (1958); *In re Delligan's Estate*, 110 Vt. 294 (1939). On appeal from the probate court, the county court sits as a higher court of probate with coextensive jurisdiction. *In re Cartmell's Estate*, 120 Vt. 234 (1958).

The probate action is under appeal to this court. The prior order of the Court stated the relief requested in the declaratory action could be sought anew once the probate action was finished. It is not.

The Motion to Dismiss is **GRANTED**, without prejudice. This action may be reinstituted in this Court or in the Probate Division once the probate dispute has finished.

Dated at Chelsea this 1st day of August, 2012.


Harold E. Eaton, Jr.
Civil Division Judge