VERMONT SUPERIOR COURT
Windsor Unit
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CIVIL DIVISION
Case No. 21-CV-00327

Susan Inouye v. Estate of Patricia McHugo et al

ENTRY REGARDING MOTION

Title: Motion to Dismiss Defendants Gregory McHugo and Nancy Patricia McHugo
(Motion: 1)
Filer: Erin Miller Heins
Filed Date: May 26, 2021

The motion is DENIED.

In Count III, Plaintiff Susan McHugo Inouye seeks compensatory damages for the intentional interference of all Defendants with her expected inheritance. Defendants Gregory McHugo and Nancy Patricia McHugo ("Defendants") move to dismiss this claim against them pursuant to V.R.C.P. 12(b)(6).

Alleged Facts

Plaintiff alleges the following:

Patricia and John McHugo were the parents of the parties Gregory McHugo, Nancy Patricia McHugo, and Susan McHugo Inouye. They were married in Vermont in 1946, raising their three children there before divorcing in 1978 and separately moving to Arizona.

In 1997, Patricia and John negotiated and entered into a contract to each execute a will in consideration for the other's promise to execute an identical will. The mutual wills specifically provide that "the parties have agreed not to revoke or alter these Wills except with the mutual consent of both." Each will provided that the entire estate of whichever parent was the first to die would be held in trust during the lifetime of the surviving parent, and the Trustee would pay to that surviving parent the net income necessary for that person's health, maintenance and support. The entire mutual estate, including the trust estate created by the mutual will of the first to die, together with any property of the second to die, was to be divided equally among the three children, Gregory, Susan, and Nancy.

In approximately 2005, Patricia moved back to Vermont from Arizona. In 2006, she made a new will without obtaining John's consent, as required under the 1997 mutual wills. The 2006 will executed by Patricia makes no provision for John and disinherits Susan.

Prior to the death of John McHugo, Defendants began diverting assets away from him in an attempt to take the assets outside of the contract. Purportedly acting as power of attorney, Gregory moved John into a nursing home, after which Nancy McHugo and Allen Goodline moved into the home, where they have continued to reside. In addition, Defendants added Patricia, Gregory and Nancy as joint owners of certain assets belonging to John, without his knowledge or consent. By doing so, they avoided the imposition of the trust upon John's death.

When John died in August 2019, Gregory was aware that Patricia had breached her contract by making a new will and hiding this information from Plaintiff. In response to Plaintiff's inquiries regarding John's estate, Gregory lied to Plaintiff by stating that "Dad's and Mom's wills are linked" and there was nothing to distribute to her until both John and Patricia were deceased.

By lying to Plaintiff regarding the status of the estate and Patricia's new will, Defendants were allowed more time to ensure that the joint assets of John and Patricia were diverted away from Patricia in the years leading up to her death in 2016. As a result, when Patricia died, there were only minimal assets in her name and Plaintiff was cut out of her will. The vast majority of the assets had been diverted to Gregory, Nancy, and their families.

Standard Of Review

The standard for determining a Rule 12(b)(6) motion to dismiss for "failure to state a claim upon which relief can be granted" is well established. Courts must "tak[e] all of the nonmoving party's factual allegations as true," and will dismiss a claim only when "it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Davis v. American Legion, Dept. of Vermont*, 2014 VT 134, ¶ 12, 198 Vt. 204 (quoting *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309). "Motions to dismiss for failure to state a claim are disfavored and should rarely be granted." *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575.

Analysis

Defendants first argue that the claim of intentional interference with expected inheritance should be dismissed because Vermont does not recognize such claim; Vermont courts are reluctant to create new causes of action; and the Vermont Supreme Court in *Overlock v. Central Vermont Public Service Corp.*, 126 Vt. 549 (1967) rejected a claim involving a potential future gift. Plaintiff counters that this legal theory should not be dismissed merely because of the novelty of the allegations, citing *Ass'n of Haystack Prop. Owners, Inc. v. Sprague*, 145 Vt. 443, 447 (1985); that it is a reasonable extension of similar torts accepted in Vermont; that she is entitled to plead alternative theories; and that she has sufficiently alleged her claim. In the alternative, she asserts that this court should permit her to amend her Complaint.

Defendants' characterization of Plaintiff's claim of intentional interference with expected inheritance as a "new cause of action" is somewhat misleading. The Restatement (Second) of Torts first included this claim more than 40 years ago, as follows:

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

Restatement (Second) of Torts § 774B (1979). Although such a claim is "unprecedented" in Vermont jurisprudence, throughout the years, it has not been uncommon for the Vermont Supreme Court to adopt the claims, standards, and approaches recognized by the Restatement (Second) of Torts. See, e.g., *Skaskiw v. Vermont Agency of Agriculture*, 2014 VT 133, ¶ 11, 198 Vt. 187 (adopting the conditional privilege recognized by Restatement (Second) of Torts § 598A for communications made by an inferior state officer in the performance of official duties, including between government officers and communications made to individuals outside the government); *Dalmer v. State*, 174 Vt. 157, 164 (2002) (adopting the Restatement (Second) of Torts 286 (1965), defining the elements of a safety statute or regulation that may establish the standard of care); *Limoge v. People's Trust Co.*, 168 Vt. 265, 268-69 (1998) (acknowledging that in *Silva v. Stevens*, 156 Vt. 94 (1991) the Court had "adopted" the Restatement (Second) of Torts definition of negligent misrepresentation in transactions involving a pecuniary interest); *Derosia v. Liberty Mutual Ins. Co.*, 155 Vt. 178, 182-83 (1990) (formally adopting Restatement (Second) of Torts § 324A, "delineat[ing] when an undertaking to render services to another may result in liability to a third person").

At times, the Vermont Supreme Court's discussion surrounding the adoption of a particular claim under the Restatement has been lengthy, involving reference to the caselaw of external jurisdictions and the general principles or policy concerns underlying such claim. See *Birchwood*, 2015 VT 37, ¶¶ 14-16. In other instances, the Court has applied the provisions of a particular Restatement in its analysis without addressing whether they align with Vermont common law or the caselaw of neighboring states, or any other possible reasons for adopting them. For example, in *Silva*, the defendants argued that the trial court should have instructed the jury that a reasonable person standard applied when determining whether plaintiffs justifiably relied on the alleged misrepresentations made by defendants. 156 Vt. at 108. The Court explained that "[t]he tort of negligent misrepresentation requires that the plaintiff show 'justifiable reliance upon the information' provided by the alleged tortfeasor," cited Restatement (Second) of Torts § 552(1) (1977) without comment, and agreed that "'justifiable reliance' connotes an objective standard." *Id.*

Similarly, in *Stone v. Town of Irasburg*, the Court reviewed the trial court's grant of summary judgment as to the plaintiff's claim against the Town for tortious interference with performance of office, concluding that the Town was entitled to judgment on other grounds. 2014 VT 43, ¶ 64, 196 Vt. 356. In its analysis, the Court first stated that "[t]ortious interference generally refers to interference with performance of an existing contract or a prospective contractual relationship[,]" citing Restatement (Second) of Torts § 766 (2013). *Id.* ¶ 66. The Court further cited section 766 in explaining that, "[u]nder this tort, a person is liable if he 'intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract." *Id.* The Court pointed out that there was no such claim as "tortious interference with performance of office," but nevertheless applied the analogy of tortious interference in the employment context. *Id.* In doing so, the Court concluded that the plaintiff had failed to meet the elements of that tort where plaintiff had failed to allege interference by a third party. *Id.* ¶ 67.

While the Vermont Supreme Court does not always adopt Restatement provisions when presented with the opportunity to do so, see *Sweezey v. Neel*, 2006 VT 38, 179 Vt. 507 (declining to adopt Restatement (Third) of Property: Servitudes § 4.8(3) because potential negatives demanded caution before abandoning established law foreclosing unilateral relocation of established

easements), this court is not persuaded that any reluctance to create new causes of action necessarily adheres when deciding whether to adopt a claim set forth in the Restatement.[1] Intentional interference with inheritance is a reasonable extension of similar torts that have been accepted in Vermont, including tortious interference with contract. See *Kneebinding, Inc. v. Howell*, 2018 VT 101, 208 Vt. 578 (explaining the standard for intentional interference with performance of contract by third person).[2]

Overlock v. Central Vermont Public Service Corp., 126 Vt. 549 (1967) does not determine the outcome of this case for two notable reasons. First, *Overlock* predated the addition of section § 774B to the Restatement in 1979. See Restatement (Second) of Torts § 774B, Reporter's Note ("This Section is new."). Second, *Overlock* did not involve mutual wills providing for distribution of the mutual estate to the children of the testators agreeing not to revoke or alter the wills without the consent of the other party. In *Overlock*, the plaintiff lineman was alleged to have become totally and permanently disabled after falling from a tree. *Id.* at 549. The plaintiff alleged that certain persons decided to take up a collection for his benefit, but that a duly authorized agent of the defendant had induced them not to do so by promising that the defendant would take care of the plaintiff for the rest of the plaintiff's life. *Id.* The plaintiff alleged that those persons, in justifiable reliance on the defendant's promise, ceased efforts to take up the collection, and, as a result, the plaintiff lost the expected proceeds of the collection. *Id.* The Vermont Supreme Court pointed out that the pleadings in *Overlock* did not demonstrate a contractual relationship and that the defendant had not been charged with wrongful interference with any such relationship between the plaintiff and another party. *Id.* at 551.

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[1] *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, 209 Vt. 514 does not assist Defendants. While the Vermont Supreme Court in that case does state that "where the plaintiff does not allege a legally cognizable claim, dismissal is appropriate," *id.* ¶ 11, the facts alleged and legal issues involved—in which the plaintiff failed to plead facts showing that the defendant therapeutic residential community had a duty to prevent resident from harming him—are simply not analogous to the instant case.

[2] Indeed, given that "[c]ourts generally enforce mutual wills through contract law[,]" *In re Estate of McHugo*, 2020 VT 59, ¶ 11, it is not clear to this court that intentional interference with performance of contract by third person under Restatement (Second) of Torts § 766 would *not* be applicable. Notably, in *Kneebinding*, the Vermont Supreme Court explained:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

2018 VT 101, ¶ 93. Although the Court cited *Williams v. Chittenden Tr. Co.*, 145 Vt. 76, 80 (1984), the language reiterates Restatement (Second) of Torts § 766, verbatim. The Court further explains that "'[t]he cause of action is for pecuniary loss resulting from the interference,' but the plaintiff may also recoup for consequential losses, emotional distress, or actual harm to reputation[,]" citing comment t of the Restatement (Second) of Torts § 766.

By contrast, the allegations in the instant case are that Plaintiff's parents made mutual wills ultimately providing that both the estate of the second to die and the trust estate of the first to die would be divided equally among the three children, including Plaintiff, and that Patricia made a new will in violation of the terms of the mutual wills. Assuming, for the purposes of this motion, that the earlier mutual will was enforceable, unlike the circumstances in *Overlock*, Plaintiff has adequately pled a contractual relationship between the parents, as well as claims of wrongful interference by Defendants with Plaintiff's expected inheritance.

Defendants assert, in the alternative, that Plaintiff has not properly stated a claim for intentional interference with expected inheritance pursuant to Restatement (Second) of Torts § 774B because she has inadequately pled that she had an expectancy of inheritance or a reasonable certainty that the expectancy of inheritance would have been realized but for the interference by defendants. Def.'s Brief at 9. "By law," Defendants argue, "Plaintiff could not have an expectancy of inheritance because Patricia had a right to change her will and disinherit Plaintiff." *Id.* at 10.

Although Defendants are correct that a person may revoke a will, *McHugo*, 2020 VT 59, ¶ 9, this fact would render "complete certainty" an impossibility, but complete certainty is not required. Rather:

> [i]f there is *reasonable certainty* established by proof of a high degree of probability that the testator would have made a particular legacy or would not have changed it if he had not been persuaded by the tortious conduct of the defendant and there is no evidence to the contrary, the proof may be sufficient that the inheritance would otherwise have been received.

Restatement (Second) of Torts § 774B, cmt. d (emphasis added).

Although Plaintiff has alleged that Defendants diverted the assets of their father, she has not raised allegations pertaining to any tortious conduct on the part of Defendants that "persuaded" their mother to "ma[k]e a particular legacy" or to have changed the original legacy. Because the case is in the early pleadings stage, Defendants would not be prejudiced by an amendment to the pleadings. Thus, the court will allow Plaintiff leave to amend the Complaint. See *Colby v. Umbrella, Inc.*, 2008 VT 20, 4, 184 Vt. 1 (citing *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 513 (1972)) ("In considering motions under Rule 15(a), trial courts must be mindful of the Vermont tradition of liberally allowing amendments to pleadings where there is no prejudice to the other party.").

The court is unable to conclude that the allowance of the underlying will forecloses Plaintiff's ability to pursue her claim against Defendants. It has been long established in Vermont that "an order of the probate division allowing a will addresses only a very specific set of issues related to whether the instrument is or is not the will of the testator and whether it is otherwise valid." *In re Est. of Holbrook*, 2016 VT 13, ¶ 15, 201 Vt. 254, 260–61 (citing *Everett v. Wing*, 103 Vt. 488, 492 (1931); *Woodruff v. Taylor*, 20 Vt. 65, 73 (1847); 14 V.S.A. § 5). Here, while the Probate Division's allowance of the underlying will may have determined that it was the valid instrument of Patricia McHugo, the issue of whether Defendants' conduct interfered with her original intended will scheme naming Plaintiff as a beneficiary has never been adjudicated, nor was any tort claim arising from such alleged circumstances within the jurisdiction of the Probate Division. 4 V.S.A. §

35 sets forth a comprehensive list of matters over which the Probate Division has jurisdiction and tort claims are not included.

In light of all the above, the court concludes that dismissal is not warranted.

ORDER

Based on the foregoing,

Defendants' motion to dismiss is *denied.*

Plaintiff's motion to amend Count III is *granted.*

An Amended Complaint is due by December 15, 2021.

Electronically signed pursuant to V.R.E.F. 9(d) on November 17, 2021 at 9:46 AM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge

Vermont Superior Court
Filed 11/17/21
Windsor Unit