STATE OF VERMONT

SUPERIOR COURT Rutland Unit	CIVIL DIVISION Docket No. 596-11-17 Rdcv
Ann Marie Clifford, Ann Marie Clifford, Plaintiffs v. Delores Livak, Defendant	

DECISION ON MOTION FOR SUMMARY JUDGMENT

This case revolves around the validity of a revocable trust created by the parties' mother, the late Frances M. Russo. The parties agree that their mother created the trust and transferred all of her assets into the trust. They disagree, however, as to the terms of the trust: Plaintiff asserts that the trust must have named the two sisters as equal co-beneficiaries, while Defendant asserts that it names her alone. To the extent that Defendant may be correct, Plaintiff asserts that the trust cannot be enforced as the product of fraud or undue influence; to the extent that Defendant may be wrong, or that the trust cannot be enforced as Defendant contends, Plaintiff asserts that Defendant breached various duties as trustee. Defendant moves for summary judgment on all of Plaintiff's claims.[1]

The standard on a motion for summary judgment is so familiar that ordinarily the court need not recite it. Here, however, the extent to which the parties have met their respective burdens is dispositive. Thus, the courts sets those burdens forth below.

The initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly

[1] Plaintiff's complaint has gone through three iterations, the most recent of which purports to set forth seven causes of action. The allegations and claims bleed over one into another, and are so stated as to defy concise characterization. The description above and discussion below thus reflect the court's effort to read the complaint as well-pleaded and to avoid the prolixity and complexity that the complaint otherwise invites.

challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence must be admissible. *See* V.R.C.P. 56(c)(2),(4); *Gross v. Turner*, 2018 VT 80, ¶ 8, 195 A.3d 654 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). The court must view all evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998). Importantly here—where the parties disagree on an enormous array of facts—only facts that can affect the outcome of the litigation are material. *E.g.*, *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 14, 200 Vt. 125 (citing *In re Estate of Fitzsimmons*, 2013 VT 95, ¶ 13, 195 Vt. 94). Thus, only a dispute as to those facts will foreclose summary judgment.

Here, Defendant has met her initial burden with respect to both the existence and terms of the revocable trust. Indeed, Plaintiff concedes the existence of the trust; in opposition to Defendant's motion, Plaintiff "admit[s] that there was apparently some Trust . . . but . . . do[es] not admit it is the Trust as is claimed and proffered by Defendant." Pl.'s Mem. In Resp. and Obj. to Def.'s Mot. For Part. Summ. J. 1. To prove the terms of the trust, Defendant submits a document, Exhibit A to her Statement of Undisputed Material Facts ("SUMF"), purportedly made September 11, 1992. The document is captioned Delores Livak Revocable Living Trust ("DLRLT") and reflects a trust agreement between Ms. Russo as settlor and Defendant and Edward R. Seager as co-trustees. The signature page is missing, but Defendant has established by affidavit that she was present at Mr. Seager's office when her mother signed the original DLRLT, which Mr. Seager then retained. Exhibit F to SUMF ¶¶ 3–4. Eighteen days later, the parties and their mother together quitclaimed a parcel of real estate to the DLRLT (Defendant and Mr. Seager, Co-Trustees). Ex. L to SUMF. Many years later, in connection with the sale of real estate owned by the DLRLT, Defendant and Mr. Seager certified the creation and continued existence of the DLRLT. Ex. J to SUMF.

The question remains whether Defendant has sufficiently shown, by admissible evidence, that her Exhibit A is in fact the DLRLT. In this regard, Defendant has demonstrated that "in the early 1990s," her mother opened a DLRLT account with Morgan Stanley. Second Aff. of Delores Livak, ¶¶ 7, 12. At that time, Morgan Stanley was given a copy of the DLRLT. *Id.* ¶ 8. Many years later, when Plaintiff was urging her to "break the trust," Defendant contacted

Morgan Stanley and was sent Exhibit A. *Id.* ¶ 15–16. Notably, Exhibit A bears handwriting showing the trust's Morgan Stanley account number, as confirmed by comparison with the number shown on statements sent to Plaintiff. *Compare* Ex. A to SUMF *with* Ex. P to SUMF.

While admittedly circumstantial, this evidence is sufficient to establish the admissibility of Exhibit A under Rule 1004 of the Vermont Rules of Evidence. Defendant has sufficiently established that the original was lost or destroyed. *See* Second Aff. of Delores Livak, ¶¶ 20–21. It is also sufficient to establish its authenticity under Rule 901. A combination of circumstances support this conclusion. There is no evidence of any trust document other than Exhibit A. Nothing about the condition of Exhibit A raises any suspicion as to its authenticity; it was found in a place where, if authentic, it likely would be; and it has been amply shown to have been in existence, and in that place, for more than 20 years. *See* V.R.E. 901(b)(8). Moreover, comparison of Exhibit A with the quitclaim deed created nearly contemporaneously by the same law firm (Exhibit L) reveals stylistic similarities. While these similarities alone would not be sufficient to establish authenticity, when combined with the other circumstances noted in this and the foregoing paragraphs, they reinforce the conclusion that Exhibit A is precisely what it purports to be.

Defendant's papers thus sufficiently establish the existence and terms of the DLRLT to shift the burden to Plaintiff to bring forth evidence that raises a dispute in this regard. In this effort, Plaintiff has fallen short. She has not identified a single piece of admissible evidence that in any way calls into doubt the authenticity of Exhibit A. Instead, her affidavit is a catalogue of hearsay: "It was always my understanding . . . "; "This understanding was reinforced at various times by statements made by my Father . . . "; "I understood from my Mother . . . "; "Our Mother . . . trusted that . . . "; "It is also a fact that had been well known in our family . . . "; "Nevertheless, it still remained our Mother's wish articulated on many occasions . . . ." Plaintiff supplements these hearsay assertions with inadmissible statements of her own beliefs at various times and irrelevant assertions—many of these founded substantially on hearsay—regarding the character and quality of familial relationships.

Plaintiff's attack on the authenticity of Exhibit A thus rests not on admissible evidence but instead on the premise that the court must view all evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable doubts and inferences. While this premise is indisputable, it is equally indisputable that to be "reasonable," any doubts or inferences themselves must be more than suspicions or speculation. *Cf. State v. Wisowaty,* 2015 VT 97, ¶ 16, 200 Vt. 24 ("A factfinder 'may draw rational inferences to determine whether

disputed ultimate facts occurred,' but those inferences 'must add up to more than mere suspicion,' and 'the [factfinder] cannot bridge evidentiary gaps with speculation.' ") (quoting *State v. Durenleau*, 163 Vt. 8, 12–13 (1994)); *cf. also Bernasconi v. City of Barre*, 2019 VT 6, ¶ 11 (" 'Evidence which . . . raises a mere conjecture, surmise[,] or suspicion is an insufficient foundation for a verdict,' and thus where the jury could only find for the plaintiff by relying on speculation, the defendant is entitled to judgment.") (quoting *Fuller v. Rutland*, 122 Vt. 284, 289 (1961)). Given the complete lack of any evidence to suggest that Exhibit A is not what it purports to be, Plaintiff's dispute in this regard is not genuine; instead it is founded entirely on "conjecture, surmise, or suspicion." This is not enough to create a triable issue. Rather, Defendant is entitled to a declaration that Exhibit A is in fact the DLRlT.

This declaration, of course, does not end the inquiry. Plaintiff has made a collateral attack on the DLRLT: she asserts that it was procured by undue influence or outright fraud and misrepresentation. Vermont caselaw defines undue influence as "[a]ny species of coercion, whether physical, mental, or moral, which subverts the sound judgment and genuine desire of the individual." *Landmark Trust (USA), Inc. v. Goodhue*, 172 Vt. 515, 524–25 (2001) (quoting *In re Everett's Will*, 105 Vt. 291, 315 (1993)). Generally, the party claiming undue influence has the burden of proof, but the burden shifts to the defendant "when there are suspicious circumstances surrounding the execution of the relevant documents." *Id.* at 525. The Vermont Supreme Court has recognized that suspicious circumstances typically arise when a fiduciary relationship exists between donor and beneficiary, as in the contexts of "guardian and ward, attorney and client, spiritual advisers and persons looking to them for advice—in fact, all relations of trust and confidence in which the temptation and opportunity for abuse would be . . . great." *Id.* (quoting *In re Estate of Raedel*, 152 Vt. 478, 483 (1989).

Plaintiff's undue influence assertion founders on the same reef as her direct attack on the DLRLT: she has adduced not a single piece of admissible evidence in support of her argument. There is no direct evidence of "any species of coercion"; nor is there circumstantial evidence, apart from Plaintiff's inadmissible assertion that it is inconceivable that Ms. Russo cannot have intended to treat her daughters unequally. Equally, there is no proof that Defendant and Mrs. Russo were in any kind of formal fiduciary relationship that would give rise to an inference of suspicious circumstances. The most that apparently can be said is that Ms. Russo was "a strong woman, but she looked for guidance," Dep. of Anne Marie Clifford 23:5–6, Ex. E to Def.'s MSJ, and that Defendant managed Ms. Russo's finances in the last decade of her life, Dep. of Anne Marie Clifford 27:20–24, Ex. I to Def.'s MSJ. The first of these observations falls well short of

establishing anything resembling a fiduciary relationship. The second speaks only to the relationship between Defendant and Ms. Russo nearly ten years after the trust was made. Thus, it helps not the least in demonstrating a fiduciary relationship at the time the trust was made. That, of course, is the pertinent lens for any undue influence inquiry. Thus, there is no competent evidence of any undue influence.

Closely allied with Plaintiff's undue influence claim are her claims that Defendant somehow defrauded or made intentional misrepresentations to Ms. Russo and Plaintiff. Exactly how this fraud was perpetrated does not fully appear; as best as can be inferred from the papers, Plaintiff alleges that Defendant falsely represented that the DLRLT set up the two siblings as equal co-beneficiaries. Plaintiff has failed, however, to adduce any admissible evidence, much less clear and convincing evidence, to meet her burden of proof.

The elements of a fraud claim are: "(1) intentional misrepresentation of a material fact; (2) that was known to be false when made; (3) that was not open to the defrauded party's knowledge; (4) that the defrauded party acts in reliance on that fact; and (5) is thereby harmed." *Estate of Alden v. Dee*, 2011 VT 64, ¶ 32, 190 Vt. 401. A claim of intentional misrepresentation requires "an intentional misrepresentation of existing fact, affecting the essence of the transaction, so long as the misrepresentation was false when made and known to be false by the maker, was not open to the defrauded party's knowledge, and was relied on by the defrauded party to his damage." *Silva v. Stevens*, 156 Vt. 94, 102 (1991) (quoting *Union Bank v. Jones*, 138 Vt. 115, 121 (1980)). Generally, fraud is not presumed, and the party alleging fraud must show some "affirmative act, or concealment of facts by one with knowledge and a duty to disclose." *Standard Packaging Corp. v. Julian Goodrich Architects, Inc.* 136 Vt. 376, 381 (1978). This duty to disclose may arise "from the relations of the parties, such as that of trust or confidence, or superior knowledge or means of knowledge." *Cheever v. Albro*, 138 Vt. 566, 571 (1980) (quoting *Newell Bros. v. Hanson*, 97 Vt. 297, 303–04 (1924)). Whether denominated fraud or intentional misrepresentation, proof of such a claim must be made by clear and convincing evidence. *Estate of Alden*, 2011 VT 64, ¶ 32.

At the core of either a fraud or misrepresentation claim is proof of a statement that was knowingly false when made. All of Plaintiff's claims in this regard—not only with respect to the formation of the DLRLT but with respect to Defendant's conduct as trustee—founder on the failure of such proof. At oral argument on this motion, the court inquired as to any evidence that Defendant knew, at any time prior to receiving a copy of Exhibit A, that she was the sole beneficiary of the DLRLT, and allowed Plaintiff additional time to submit such evidence.

Plaintiff's subsequent submission is another catalogue, this time of tautological syllogisms, all reaching the same conclusion: Defendant "clearly had to have known." Other than the mere existence and contents of the DLRLT, however, there is no evidence to support this supposedly self-evident conclusion. Defendant herself has sworn that she had no such knowledge. The various circumstances suggested by Plaintiff—that Defendant was a co-trustee, that she attested in 2003 to the establishment and continued existence of the trust, and that "Defendant was designated in December 2010 as being the sole insured Annuitant of no small portion of the property of what Defendant claims to be the corpus of said trust"—fall well short of supporting any reasonable inference of knowledge. At best, they "add up to [no] more than mere suspicion." *State v. Durenleau*, 163 Vt. 8, 12 (1994). This would be insufficient to meet a burden of proof by a preponderance of the evidence; *a fortiori*, it falls well short of clear and convincing evidence.

Plaintiff also pleads interference with an inheritance expectancy. Our Supreme Court has not yet recognized this cause of action. The Restatement (Second) of Torts § 774B imposes liability for intentional interference with an inheritance or gift on "[o]ne 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." The Restatement specifically notes that liability under this tort is limited to cases in which the defendant has interfered by independently tortious means, such as fraud, duress, defamation, abuse of fiduciary duty, forgery, alteration, or suppression of a donative document. *Id.* cmt. c. Legitimately persuading a person to disinherit a child in favor of the persuader, however, is not considered independently tortious. *Id.* Furthermore, a claimant must establish with a reasonable amount of certainty that but for tortious interference, the bequest or devise would have been in effect at the time of the testator's or settlor's death. *Id.* cmt. d. The discussion above makes clear that Plaintiff can meet her burden as to none of these elements. Thus, this is not the case in which to predict whether the Court would recognize such a tort.

The remainder of Plaintiff's claims are premised on the existence of a trust that operated for the joint benefit of the two sisters. That trust, however, has not been proved. Rather, the discussion above makes clear that the Exhibit A and the DLRLT are one and the same. The undisputed evidence further makes clear that the trust was valid and remained in effect until Ms. Russo's death. Then, by its own terms, the trust "shall terminate and [Defendant] shall receive title to all the Trust property for her own use and enjoyment." Exhibit A, Article VI. Defendant having been at all times the sole beneficiary of the trust, she owed Plaintiff no fiduciary duty. Nor has Plaintiff shown any evidence on which any other duty might rest.

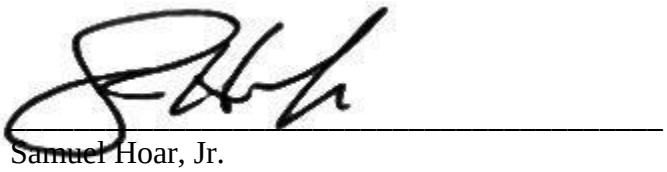
ORDER

Defendant's Motion is granted; the case is **dismissed with prejudice**. Lest there be any confusion as to the court's ruling and the basis therefor as to each of Plaintiff's claims, the court will briefly address each in turn:

1. Plaintiff's Preamble evidently sets forth her First Cause; this is an omnibus claim that aggregates and elides the various theories addressed above. It is **dismissed** for the reasons set forth in the discussion above.
2. Plaintiff's Second Cause alleges fraud and undue influence in the creation of the DLRLT followed by fraud against Plaintiff. As shown above, there is no evidence to support these allegations. Thus, this cause is **dismissed**.
3. Plaintiff's Third Cause alleges a fraudulent conveyance in March 2017 of a trust asset by Defendant to herself. At that time, however, the trust had ceased to exist, and the asset was Defendant's to do with as she pleased. Moreover, Plaintiff had no interest in the trust, and therefore no standing to complain as to any transactions undertaken by Defendant as either trustee or beneficiary. Thus, this cause is **dismissed**.
4. Plaintiff's Fourth Cause sets forth a claim for intentional misrepresentation. It is unclear to what extent this claim is not completely redundant of virtually identical allegations contained in the Preamble (First Cause). In any event, there is no evidence of any knowing misstatements. Thus, this cause is **dismissed**.
5. Plaintiff's Fifth Cause sets forth a claim for breach of fiduciary obligations. As shown above, however, Defendant never owed Plaintiff any fiduciary obligation, under the DLRLT or otherwise. Thus, this cause is **dismissed**.
6. Plaintiff's Sixth Cause sets forth a claim for conversion. As far as appears, however, the assets supposedly converted were at all times assets of the DLRLT. There has been no showing that any such assets were converted during the life of the settlor; upon her death, they became irrevocably the property of Defendant. In any event, Plaintiff never having been a beneficiary of the trust, she has no standing, in her individual capacity, to assert a claim for conversion. Any claim for conversion made in her representative capacity on behalf of the estate must be premised on a conversion during Ms. Russo's lifetime. There being no evidence of such a transfer, this cause is **dismissed**.
7. Plaintiff's Seventh Cause sets forth a claim for intentional interference with expectation of inheritance. The Vermont Supreme Court has not recognized this cause

of action. Moreover, Plaintiff has adduced no evidence to support such a claim. Thus, this cause is **dismissed**.

Electronically signed on February 01, 2019 at 12:23 PM pursuant to V.R.E.F. 7(d).



Samuel Hoar, Jr.
Superior Court Judge