



Susan Inouye v. Estate of Patricia McHugo et al

DECISION ON MOTION FOR SUMMARY JUDGMENT

Susan Inouye is one of three surviving children of Patricia Bixby McHugo. She brought this case against her mother's estate and her siblings, Gregory and Nancy McHugo.¹ She asserts four claims against Gregory and Nancy: Count III – Intentional Interference with Expected Inheritance; Count IV – Intentional Interference with Performance of Contract; Count V – Unjust Enrichment; and Count VI – Constructive Trust. Gregory and Nancy move for summary judgment on all of these counts. The court grants the motion in part and denies it in part.

FACTS

The standards on a motion for summary judgment are familiar. 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, 205 Vt. 319 (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 *Alpsetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly 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)). Evidence provided by either party must be admissible. *See* V.R.C.P. 56(c). 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).

Applying this standard, the following facts emerge as both material and undisputed. Patricia Bixby McHugo ("Patricia") and John Walter McHugo ("John") married in 1946 and had three

¹ The court, when necessary, refers to individual parties by their first names to eliminate confusion. The court does not intend any disrespect toward the litigants by proceeding in this manner.

children—Susan, Gregory, and Nancy. In 1997, John and Patricia executed mutual wills in Arizona. At the time of execution, they had been divorced for approximately twenty years. The 1997 wills contained a clause stating

During the lifetime of [the surviving party], the Trustee shall pay to [the surviving party] all of the net income in convenient installments and so much of the principal as the Trustee determines, in the Trustee's sole discretion, to be necessary for the health, maintenance and support of [the surviving party] in the style and manner of living to which [the surviving party] is accustomed, taking into consideration the principal and income and other resources otherwise available to the [surviving party].

On the death of the surviving party, the entire estate was to be divided equally among the three children.

Susan was unaware of the 1997 wills until John's death in 2010. In the meanwhile, Patricia moved to Vermont, where in 2006, she executed a new will.² That will disinherited Susan.

Susan was not privy to any discussions related to Patricia's 2006 will. Patricia, however, long made clear her intent to disinherit Susan, and Susan was long aware of this intent. She has no evidence of any conversations or documentation between or among any of Nancy, Gregory, and Patricia, in which Nancy or Gregory encouraged Patricia to make a new will.

On Mar. 23, 2006, John validly executed a General Power of Attorney with a Durable provision conferring power of attorney to Gregory. On Mar. 5, 2008, one of John's doctors indicated that John would need assisted living services due to cognitive decline and impairment in activities of daily living (ADL) such as mobility, food preparation, and grooming. Gregory had begun exercising authority under the power of attorney granted by John. On Aug. 3, 2010, John died.

Upon John's death, Gregory did not create a trust in compliance with 1997 Wills provision. Rather, under his Durable Power of Attorney, Gregory continued to exercise control over various assets Patricia and John owned as joint tenants with the right of survivorship.³ This occurred both during John's lifetime and after he had deceased. The various assets over which Gregory exercised

² Whether the 2006 will was validly executed and whether it effectively revoked Patricia's 1997 will has been settled by the Vermont Supreme Court on appeal from the Probate Division. *See In re Estate of McHugo*, 2020 VT 59, 212 Vt. 519. That Court concluded that the 2006 Will was properly allowed and it validly revoked the 1997 Will under Vermont law. *Id.* ¶ 9–10.

³ Susan identified specific accounts as evidence that funds were diverted. The list of accounts is as follows: (1) three Bank of America accounts ending in 2379, 2352, and a 9980 account that is payable on death to Patricia; (2) USAA accounts ending in 3607 and 6337 where Gregory is also listed as a joint tenant; (3) Wachovia investment account ending in 8532; (4) Proctor and Gamble shares; (5) Gillette shares; and (6) Merck shares. Similarly, the stocks over which Gregory exercised control includes the following: (1) IBM Shares; (2) AT&T Shares; and (3) Comcast Shares.

control were owned jointly before John granted Gregory power of attorney.⁴ On May 7, 2016, Patricia deceased.

ANALYSIS

Susan’s complaint asserts four causes of action against Gregory and Nancy. In Count III (Intentional Interference with Expected Inheritance), Susan alleges that Gregory and Nancy thwarted John’s intent that his assets be distributed equally among the three children by exercising control of John’s assets and funneling them to Patricia’s estate. In Count IV (Intentional Interference with Performance of Contract), she alleges that Gregory and Nancy frustrated the contract for mutual wills by funneling assets from John to themselves and encouraging Patricia to disinherit her. In Count V (Unjust Enrichment), she alleges that Gregory and Nancy unjustly benefited from the plan to disinherit her. Finally, in Count VI she asks the court to impose a constructive trust for her benefit over the assets and property she alleges Gregory and Nancy improperly obtained. The court addresses each claim in turn.

A. Intentional Interference with Expected Inheritance

A child is not automatically entitled to inherit from a parent, as a decedent “may expressly exclude or limit the right of an individual or a class to inherit property.” 14 V.S.A. § 301(b).

“Moreover, a testament or will is ambulatory and revocable during the lifetime of the testator.” *In re Estate of Patricia Bixby McHugo*, 2020 VT 59, ¶ 9 (internal quotations omitted). Nevertheless, “[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 is subject to liability to the other for loss of the inheritance or gift.” Restatement (Second) of Torts § 774B (1979); *see* Entry Order, at 2–5 (filed Nov. 17, 2021). In this regard,

[i]f there is a 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.

Id. § 774B, cmt. d.

To prevail on this claim, Susan would have to establish that Gregory and Nancy used “duress, fraud, or other tortious means” to convince Patricia to disinherit her in the 2006 will or to convince John to give Gregory durable power of attorney to divert assets. She lacks such proof. Susan conceded

⁴ The parties dispute whether Gregory moved these assets to Patricia’s possession or if the assets passed to her by right of survivorship. To the extent this dispute is advanced as a dispositive issue, the court cannot consider this fact. *See* V.R.C.P. 56(e). However, since the court determines this issue on other grounds, the dispute is not relevant to this decision.

that Patricia repeatedly told her on numerous occasions, prior to execution of the 2006 will, that she intended to disinherit her. Susan had communicated this fact to Gregory and John at various times. Moreover, Susan makes no accusation that Gregory used “duress, fraud, or other tortious means” to improperly receive durable power of attorney from John. Indeed, the only evidence Susan advances is two letters—one written in 1990 and one in 1992—that purportedly demonstrate that John intended that all assets be distributed equally to the children.

The parties dispute the admissibility of these letters. This dispute, however, is not material. To the extent that the letters give voice to John’s intent to distribute assets equally, they are either cumulative or irrelevant since John executed a will reflecting his intent in 1997—five years later. *Cf In re Estate of Raedel*, 152 Vt. 478, 481 (1989) (stating that the court presumes a valid will to be the expressed intent of the testator). Moreover, John’s intent towards the distribution of assets is irrelevant to Susan’s claims; it does not make it more or less likely that Gregory and Nancy used “duress, fraud, or other tortious means” to thwart that intent. While the court is bound to indulge all reasonable inferences in Susan’s favor, the inference that would be required here—that because John’s intent was to distribute assets equally three ways, Gregory and Nancy must have acted tortiously to effect a contrary result—requires too many leaps of fancy to survive even passing scrutiny.

Turning specifically to claims regarding the making of the 2006 Will, this cause of action is “limited to cases in which the actor has interfered with the inheritance or gift by means that are independently tortious in character.” Restatement (Second) of Torts § 774B (1979), cmt. c. Liability under this action does not include when a person attempts to “merely persuade[] a person to disinherit a child and to leave the estate to the persuader instead[.]” *Id.* Susan concedes that she has no information about conversations between or among Gregory, Nancy, and Patricia concerning the 2006 Will. Nor does Susan allege any supported fact that either Gregory or Nancy used “duress, fraud, or other tortious means” to deprive her of an expected inheritance. Her claim necessarily requires speculation to avoid summary judgment.

Susan attempts to establish a disputed material issue here by claiming that circumstantial evidence can repair these gaps; she alludes to “suspicious circumstances” under which Patricia had executed the new will and Gregory exercised authority under the power of attorney.⁵ Pl.’s Opp’n. at 11–12 (filed Apr. 21, 2023). Susan points to *Barbagallo v. Gregory*, 150 Vt. 653 (1988), to argue that

⁵ Susan also argues that she had an expectation when the 1997 Wills were contracted for between Patricia and John. This argument relies on the application of contract principals in Patricia’s breach as opposed to the tortious conduct alleged for this count. *See* Pl.’s Opp’n, at 10 (“Even though Patricia was free to make the 2006 Will, and revoke the 1997 will, there are consequences for her doing so, and it does not diminish Susan’s expectation of inheritance that she is entitled to *under the contract*.” (emphasis added)). The court address the contract claim in the next section.

the dispute here implicates a “state of mind,” and such an implication is not ripe for summary judgment. This argument is unavailing. In sum, Susan points to the timing of the 2006 Will, the fact that Gregory had not informed John of its execution, and Gregory’s exercise of control over accounts over which John gave him control. But Susan makes no showing—as distinguished from bald accusation—how Patricia’s choice to execute the new will is attributable to conduct by Gregory or Nancy. Asserting credibility as an issue, alone, is not enough to create a disputed issue to avoid summary judgment. *See Wright & Miller*, 10A Fed. Prac. & Proc. Civ. § 2726 (4th ed.) (“The general rule is that specific facts must be produced in order to put credibility in issue so as to preclude summary judgment.” (footnote omitted)).

B. Intentional Interference with Performance of Contract

“[O]ne who intentionally intrudes to disrupt an existing contract relation may be liable in tort.” *Kneebinding, Inc. v. Howell*, 2018 VT 101, ¶ 93, 208 Vt. 578 (citing *Mitchell v. Aldrich*, 122 Vt. 19 (1960)) (internal quotations omitted). To succeed on this claim, Susan would need to show that Defendants intentionally and improperly induced Patricia not to perform under the 1997 Wills. *Gifford v. Sun Data, Inc.*, 165 Vt. 611, 612 (1996). Intent can be proven “by showing that an actor knew that interference was substantially certain to occur.” *Id.* Inducement can be demonstrated by defendants’ acts causing the nonperformance of the contract. *Id.*

Here again, Susan lacks sufficient admissible evidence to survive summary judgment. Susan’s assertion that Gregory and Nancy actively participated in the breach lacks record support. The only record citation Susan provides to support this claim is her own deposition testimony where she alleges that Patricia transferred most of her assets to Gregory and Nancy. *Compare* Pl.’s Opp’n, at 14 *with* Pl.’s Additional Statement of Facts, at ¶ 27. Even if the court accepted this at face value, it does nothing to establish or even imply what acts either Gregory or Nancy’s took to induce Patricia to breach the contract reflected in the 1997 Wills.

C. Unjust Enrichment and Constructive Trust

Susan’s final two claims against Gregory and Nancy are connected. She alleges that they were unjustly enriched based on the conduct alleged in Counts III and IV, and so seeks imposition of a constructive trust. Pl.’s Am. Compl., at 8. Though Susan pleads unjust enrichment and constructive trust separately, the court treats them together, as “the constructive trust is a tool often used by courts to prevent unjust enrichment.” *Legault v. Legault*, 142 Vt. 525, 529 (1983); *see Shattuck v. Peck*, 2013 VT 1, ¶ 11, 193 Vt. 123 (“Courts may employ constructive trusts to avoid unconscionable results and to prevent unjust enrichment.”) (citing *Weed v. Weed*, 2008 VT 121, ¶ 17, 185 Vt. 83).

Unjust enrichment as a cause of action rings in equity. *See id.* at 531 (“the equitable doctrine of unjust enrichment rests upon the principle that a man shall not be allowed to enrich himself unjustly at the expense of another” (internal quotations omitted)). “Under the doctrine of unjust enrichment, a party who receives a benefit must return the benefit if retention would be inequitable.” *Kellogg v. Shushereba*, 2013 VT 76, ¶ 22, 194 Vt. 446. (internal quotations omitted) (citing *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 41, 178 Vt. 244). “[T]he inquiry is whether, in light of the totality of circumstances, it is against equity and good conscience to allow defendant to retain what is sought to be recovered.” *Legault*, 142 Vt. at 531. Given the court’s conclusion with respect to Counts III and IV, there can be no conclusion that Gregory and Nancy somehow acted inequitably and so were unjustly enriched. Rather, Susan’s unjust enrichment claims can succeed, if at all, based only on Patricia’s alleged conduct.

In *Legault*, the Vermont Supreme Court analyzed whether the trial court properly imposed a constructive trust on funds held by the defendant. *Id.*, at 529. In that case, the plaintiff gave his spouse sums of money over a period of time on the understanding that they were being deposited in a plaintiff-spouse joint account. *Id.*, at 528. The spouse instead deposited the money in joint accounts held with the defendant. *Id.* When the spouse deceased, the defendant moved the money to a private account. *Id.* The trial court, finding that a portion of the money was unjustly given to the defendant, imposed a constructive trust on those funds. On appeal, the defendant argued that imposing the constructive trust was error, as there was no confidential relationship between her and plaintiff. *Id.* at 529. The Court posited the unjust enrichment question as “not whether the money has been received by the party, of which she could not have compelled the payment, but whether she can now, with a safe conscience, ex aequo et bono, retain it.” *Id.* (citing *McGann v. Capital Savings Bank & Trust Co.*, 117 Vt. 179 (1952)) (internal brackets omitted). The Court noted that it was plaintiff’s intent and understanding that the funds would be held in a plaintiff-spouse joint account. *Id.* The Court then concluded, given the facts, “the trial court properly ruled that it would be inequitable for defendant, *now in possession of the money*, to retain it.” *Id.* (emphasis added).

The court here is faced with the same proposition. Susan alleges that Patricia’s wrongful conduct deprived her of an inheritance now in the possession of Defendants. Thus, it stands to reason that Susan could maintain the unjust enrichment action based on these alleged facts. *See Beldock v. VWSD, LLC*, 2023 VT 35, ¶ 68 (“Whether a party has been unjustly enriched is a question of fact; however, whether a claim for unjust enrichment can be maintained, given certain facts, is a legal question”); *cf McLaren v. Gabel*, 2020 VT 8, ¶ 32, 211 Vt. 591 (concluding that the lack of a written

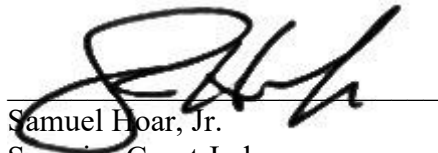
agreement showing contractual privity was irrelevant in an unjust enrichment case because “an unjust enrichment theory does not require any agreement.”).

The argument for summary judgment primarily rests on the assertion that Susan cannot establish that Gregory and Nancy’s taking pursuant to the 2006 Will is inequitable or unjust. Def.’s Mot, at 15–16. The court is unconvinced. The parties validly dispute whether the 2006 Will constitutes a breach of the 1997 Wills. *See In re Estate of McHugo*, 2020 VT 59, 212 Vt. 519. Moreover, it is undisputed that Gregory and Nancy benefited from the 2006 Will. And even if there is no evidence that Gregory or Nancy acted wrongfully, equally, they have not alleged, much less shown, that they did anything to merit unequal treatment in Patricia’s will. Therefore, a factfinder could reasonably conclude that the totality of circumstances favors a finding that Gregory and Nancy were unjustly enriched by Patricia’s conduct. Accordingly, the court cannot resolve this dispute on summary judgment.

ORDER

The Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Counts III and IV are dismissed with prejudice. All other claims remain.

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Samuel Hoar, Jr.
Superior Court Judge