

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

IN THE MATTER OF THE ESTATE OF)	ST-11-CV-326
CHRYSTALIA MARIE BERRY)	
a/k/a MARIE CHRYSTALIA BERRY,)	ACTION FOR WILL CONTEST
Deceased.)	
_____)	

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SMITH, ALAN D., Magistrate

MEMORANDUM OPINION
(Filed: December 23, 2011)

The will contest in this matter seeks to have the entire Will declared invalid because (a) several words and a paragraph number are missing, (b) individual apartments in a single structure are devised in violation of law, (c) Berry was of unsound mind, (d) Berry executed the Will under duress, (e) the antifraud-execution formalities were not complied with, and (f) the intent of Berry is unclear in the Will. Allegations (a), (b), (e), and (f) fail to state valid claims. Although (c) and (d) constitute well-recognized grounds for a will contest, neither the Declaration nor the Amended Declaration plead sufficient facts to demonstrate the plausibility of the claim that the Will in its entirety is invalid. Therefore, the Motion for Leave to file a First Amended Declaration will be denied and the Motion to Dismiss the Declaration of Will Contest will be granted.

Procedural Posture

On September 24, 2010, Magras filed a Petition for Probate seeking to admit to probate the Last Will and Testament of Berry. On October 19, 2010, Baker filed a Declaration of Contest to invalidate the Will claiming that (1) on the first page, Paragraph 5 consists of an incomplete sentence; (2) there is no Paragraph 6; and (3) the second page begins with an incomplete sentence. Magras, as required under Super. Ct. R. 193, filed an Answer and Affirmative Defenses on July 8, 2011. On September 26, 2011, Magras filed a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted. On October 11, 2011, Baker filed an Opposition to Motion to Dismiss, and Magras filed her Reply on October 17, 2011. On October 20, 2011, Baker filed a Supplement to Opposition to Motion to Dismiss in which she attempted, without leave of court, to amend or supplement the Declaration to include several new grounds on which the Will should be declared invalid. These grounds include (1)

that Berry lacked testamentary capacity, being of unsound mind, (2) that Berry was unduly influenced by her children at the time she executed the Will, (3) that certain testamentary transfers in the Will are prohibited by law, and (4) that Berry simply did not know what she was signing when she executed the Will.

On November 3, 2011, Baker filed a Motion for Leave to File First Amended Declaration of Contest as well as the First Amended Declaration of Contest. This proposed First Amended Declaration, in addition to alleging the bases for invalidation contained in the original Declaration, states grounds for invalidation similar to those in the October 20, 2011 Supplement as well as new ones. In total, Baker alleges six bases for invalidation in her First Amended Declaration. They are: (a) several words and a paragraph number are missing, (b) individual apartments in a single structure are devised in violation of law, (c) Berry was of unsound mind, (d) Berry executed the Will under duress, (e) the antifraud-execution formalities were not complied with, and (f) the intent of Berry is unclear in the Will. On November 16, 2011, Magras filed an Opposition to Motion for Leave to File First Amended Declaration of Will Contest.

Discussion

Supplement to Opposition to Motion to Dismiss

Baker's attempt to amend the Declaration of Contest by filing the October 20, 2011 Supplement to Opposition to Motion to Dismiss was improper. It will be stricken. Fed. R. Civ. P. 15(a) governs the process for amending pleadings prior to trial. A party can amend once as a "matter of course" within the time limits provided in the rule.¹ Those time limits expired long before October 20, 2011 when Berry filed the supplement. If a party fails to file an amended pleading within the time limits specified in Rule 15(a), that party must request and obtain leave from the Court before filing an amended pleading.² Baker has never sought or obtained leave from this Court. Furthermore, the October 20, 2011 Supplement cannot be considered a "supplemental pleading" because such pleading must be limited to "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented."³ The alleged lack of testamentary capacity, undue influence, or other issues regarding the content or execution of the Will necessarily occurred before the filing of the Declaration. Therefore, Baker's Supplement to Opposition to Motion to Dismiss is stricken.

Motion for Leave to File First Amended Declaration of Contest

When faced with a motion to amend pleading, "[a] court should freely give leave when justice so requires."⁴ The Court may, however, "properly deny leave to amend where the amendment would not withstand a motion to dismiss."⁵ As discussed below, the proposed First Amended Declaration would not withstand a motion to dismiss. Therefore the Motion for Leave to File First Amended Declaration will be denied.

¹ FED. R. CIV. P. 15(a)(1).

² R. 15(a)(2).

³ R. 15(d).

⁴ R. 15(a)(2).

⁵ *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d. Cir. 1983).

Under Virgin Islands law, a will contest is a specific type of declaratory judgment action which can be brought by “[a]ny person interested under a . . . will, . . . [to] have determined any question of . . . validity arising under the instrument.”⁶ Generally, the procedure in a declaratory judgment action is the same as in any ordinary civil action.⁷ The procedure for will contests is governed by Super. Ct. R. 193, which provides that “the contest . . . shall come on for hearing in the same manner as a civil action.” Therefore, when considering a motion to dismiss a declaration of will contest, the Court must use the same analysis it would use in any other civil action.

Super. Ct. R. 22 states that “[a] civil action is commenced by filing a complaint with the court.” The Virgin Islands Supreme Court has determined that under R. 22 the “[t]he adequacy of a complaint is governed by the general rules of pleadings set forth in Fed. R. Civ. P. 8.”⁸ In response to the U.S. Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*⁹ and *Ashcroft v. Iqbal*,¹⁰ the Virgin Islands Supreme Court has promulgated the following three-pronged analysis for Virgin Islands courts to utilize when considering R. 12(b)(6) motions to dismiss:

First, “the court must take note of the elements a plaintiff must plead to state a claim” so that the court is aware of each item the plaintiff must sufficiently plead.¹¹ . . . Second, “the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth.”¹² These conclusions can take the form of either legal conclusions couched as factual allegations or “naked [factual] assertions devoid of further factual enhancement.”¹³ . . . Finally, “where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.”¹⁴ If there are sufficient remaining facts that the court can draw a “reasonable inference that the defendant is liable” based on the elements noted in the first step, then the claim is plausible.”¹⁵ . . . The plausibility determination is a “context-based” determination which should be guided by the court’s “judicial experience and common sense.”¹⁶ Plausibility requires that the plaintiff allege facts that are more than simply “consistent with a defendant’s liability” and must permit the court to infer more than the mere possibility of misconduct.”¹⁷

Therefore, this Court must apply the foregoing analysis to Baker’s Amended Declaration of Contest.

⁶ V.I. CODE ANN. tit. 5, § 1262 (1997).

⁷ See FED. R. CIV. P. 57.

⁸ *Joseph v. Bureau of Corrections*, 2011 WL 1304605, *2 (V.I. Sup. Ct. Mar. 7, 2011) (quoting *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 499 (Sup. Ct. 2008)).

⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁰ *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

¹¹ *Joseph*, 2011 WL 1304605, at *2 (quoting *Santiago v. Warminster Tp.*, 2010 WL 5071779, *4 (3d Cir. Dec. 14, 2010)).

¹² *Id.*

¹³ *Joseph*, 2011 WL 1304605, at *2 (quoting *Santiago*, 2010 WL 5071779, at *4-5).

¹⁴ *Joseph*, 2011 WL 1304605, at *2 (quoting *Santiago*, 2010 WL 5071779, at *4).

¹⁵ *Joseph*, 2011 WL 1304605, at *2 (quoting *Santiago*, 2010 WL 5071779, at *7).

¹⁶ *Joseph*, 2011 WL 1304605, at *2 (quoting *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009)).

¹⁷ *Id.*

Missing Words and Number

Baker first contends that the Will is invalid because two sentences are incomplete and a paragraph number is missing. The first step of the *Joseph* analysis requires an examination of the Declaration to determine the cause of action and what elements must be pled. Typically, actions to invalidate a will are based on undue influence, fraud, incapacity or revocation. Baker argues that, because of the missing words and number, the Will “cannot accomplish the last wishes of . . . Marie Chrystalia Berry as to the complete and intended disposition of her assets, and therefore is invalid.”¹⁸ She does not, however, cite any legal authority that supports her argument that such omissions present grounds for a declaration that the entire Will is invalid. Nor has the Court found such authority. More importantly, however, in instances where there are ambiguities in a will, including omissions and blanks, construction of the document, rather than a declaration of invalidity, is the appropriate remedy.¹⁹ Virgin Islands law provides for this remedy in its declaratory judgment act.²⁰

“The controlling consideration in determining the meaning of a donative document is the donor’s intention. The intention is given effect to the maximum extent allowed by law.”²¹ Importantly, Virgin Islands courts recognize that ascertaining and giving effect to a testator’s intention is the “cardinal rule of will construction.”²² “The single issue in a will contest is whether the writing produced is the will of the testator. Any ground which, if proved, would invalidate the will, including undue influence, incapacity, fraud or revocation, may state a cause of action.”²³ The absence of certain words and a paragraph number do not erode the otherwise clear intent of Berry. Therefore, it would be inappropriate for the Court to declare the entire Will invalid because of potential ambiguities regarding no more than two testamentary gifts. Since Baker has failed to show a recognized cause of action, the Court need not continue its analysis under *Joseph*. Accordingly, the Court must conclude that the two incomplete sentences, missing words, and a missing paragraph number in the Will fail to establish a valid will contest and that any Declaration, based on these claims, would not withstand a R 12(b)(6) motion to dismiss.

Devise of Certain Real Property

Baker next petitions the Court to declare the Will invalid because it provides for the devise of individual apartments in a multiple-apartment building. Again, this is not a recognized basis for a will contest as it does not put the testator’s intentions in question. This is especially true in regards to all other devises under the Will. Nevertheless, similar to the missing words and numbers issue, this problem may be addressed through construction of the Will. In previous matters where individual apartments or floors of a dwelling have been devised, the Court has construed the will.²⁴ Again, since Baker has failed to articulate a recognized cause of action, the Court cannot identify any elements that must be pled and will end the *Joseph* analysis.

¹⁸ Emphasis removed.

¹⁹ See 80 AM. JUR. 2D *Wills* § 1118 (2011).

²⁰ See V.I. CODE ANN. tit. 5, §§ 1262, 1264(c).

²¹ RESTATEMENT (THIRD) OF PROPERTY § 10.1 (2003).

²² *Estate of Paroliticci*, 42 V.I. 71, 74-75 (Terr. Ct. 2000).

²³ *In re Estate of Ellis*, 923 N.E.2d 237, 240 (Ill. 2009) (citing *Hall v. Eaton*, 631 N.E.2d 805 (Ill. App. Ct. 1994)).

²⁴ E.g. *Estate of Joseph*, No. ST-96-PB-58 (Super. Ct. Sept. 18, 2006).

Unsound Mind

Baker asserts that the Will is invalid because Berry lacked testamentary capacity. Unlike the first two grounds for the contest, this is a well-recognized basis. Accordingly, the Court must first determine what elements Baker must plead to state a cause of action to invalidate a will due to lack of testamentary capacity. Two sections of the Virgin Islands probate code apply. One is applicable to real property and the other to personal property. With respect to real property, “[a]ll persons, except idiots, persons of unsound mind and persons under eighteen years of age, may devise . . . by last will and testament”²⁵ For personal property, “[e]very person of the age of eighteen years or upwards, of sound mind and memory, and no others, may give and bequeath . . . by will in writing.”²⁶ The key terms in these statutes are “sound mind” and “unsound mind”, neither of which is defined. In the absence of any definitions, the court in the *Estate of Savin* looked to case law from Florida, which defined “sound mind” as having three elements: “[(1)] the ability of the testator to ‘mentally understand in a general way the nature and extent of the property to be disposed of, and [(2)] the testator’s relation to those who would naturally claim a substantial benefit from the will, as well as [(3)] a general understanding of the practical effect of the will as executed.”²⁷ Accordingly, Baker’s Declaration must plead facts sufficient to show it is plausible that Berry lacked at least one of these capacities.

Baker’s Declaration must, therefore, do more than merely plead that Berry was not of “sound mind” or was of “unsound mind”. Such allegations “are merely conclusions that do not receive the assumption of truth”, conclusions this Court is obliged to disregard.²⁸ Baker’s Declaration alleges only that Berry did not read the Will prior to execution because if she had read it, she would have discovered missing words and paragraph number. This allegation is a mere conclusion, unsupported by any fact, and is irrelevant to this issue of unsound mind. Therefore, it will not be considered further. The Court will review the remaining factual allegations of unsound mind to determine whether relief is plausible.

As best the Court can determine, the remaining factual allegations in the Amended Declaration are: (1) that the attesting witnesses of the Will did not attest that Berry was “mentally competent” during execution and (2) that the testator was “subsequently” incapacitated. The Court must now determine whether these facts, assumed to be true, give rise to a plausible claim for relief. In other words, Baker must show, based on the two stated facts, that it is plausible Berry was incapable of understanding the extent of her property and the objects of her natural bounty as well as understanding how the Will disposes of her property. These are insufficient to establish plausibility because Baker carries the burden of proving unsound mind.²⁹ If absence of proof of unsound mind was determined sufficient, the burden would *de facto* be placed on Magras. This would, of course, be improper. Similarly, Berry’s incapacity after execution, regardless of its nature, is irrelevant. The critical issue is whether the testator was of sound mind at the time of execution³⁰ and not whether she subsequently became incapacitated. Therefore, the facts alleged in her Amended Declaration would not be insufficient to survive a R. 12(b)(6) motion to dismiss.

²⁵ V.I. CODE ANN. tit. 15, § 2 (1996).

²⁶ § 7.

²⁷ *Estate of Savin*, 39 V.I. 91, 100 (Terr. Ct. 1998).

²⁸ *Joseph*, 2011 WL 1304605, at *6.

²⁹ RESTATEMENT (THIRD) OF PROPERTY § 8.1 cmt. f.

³⁰ § 8.1 cmt. c.

Duress

Although not explicit, Baker also asserts that the Will is invalid because Berry executed the Will under duress. This is another well-accepted basis for a will contest. To establish a cause of action for duress, three elements must be shown: “[(1)] [a] wrongdoer threatened to perform or did perform a wrongful act that [(2)] coerced the donor into making a donative transfer that [(3)] the donor would not otherwise have made.”³¹ Again, these are the elements to which Baker must plead facts to support.

The only fact alleged in the Amended Declaration in support of duress is that the attesting witnesses did not attest that Berry executed the Will free from duress. While this allegation is not sufficient to survive a R. 12(b)(6) motion, the Court will consider it and proceed to the plausibility prong of the test.

At best, the Amended Declaration asserts that some unnamed wrongdoer, presumably one of Berry’s children, engaged in an act or threatened to commit some act that coerced her into executing the Will containing testamentary gifts that she would not otherwise have made. Like with the claim of unsound mind, the burden of proof is with Baker, the contestant, to provide that persons or a person committed an act or acts that were coercive.³² If the Court was to find that the absence of proof of no duress was sufficient to establish plausibility, the burden would *de facto* be placed on Magras. Since this would be improper, Baker’s duress claim also fails under the R. 12(b)(6) analysis.

Improper Execution of Will

Baker next challenges the Will by alleging that Magras failed to prove that the Will was executed in compliance with the statutory antifraud formalities. Specifically, Baker has doubt that Berry declared the Will to be her last will and testament. This is not a proper basis for a will contest. Should it be raised, this issue may be considered when the Court is faced with whether to admit the Will to probate. At that time, in accordance with Super. Ct. R. 194, Magras will have the opportunity, though attesting witness affidavits, interrogatories, or testimony to prove that such formalities were complied with.

Unclear Intent in the Will

Finally, Baker simply states that the Will does not clearly state Berry’s intent. There is no stated cause of action and therefore there are no elements for the Court to begin the *Joseph* analysis with. Again, this may be a case where Baker may wish to have the Will construed rather than declared invalid.

Based on the foregoing analysis of Baker’s allegations as alleged in the Amended Declaration, the Court finds that it fails to state a claim on which relief can be granted and would not withstand a R. 12(b)(6) motion to dismiss. Therefore, Baker’s Motion for leave to file an Amended Declaration will be denied.

³¹ § 8.3(d).

³² § 8.3 cmt. b.

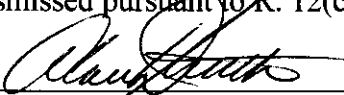
Defendant's Motion to Dismiss the Original Declaration

Having determined that none of the claims in the Amended Declaration would survive a R. 12(b)(6) motion, the Court is left with only the original Declaration and Magras' Motion to Dismiss pursuant to R. 12(b)(6). "A motion asserting any [defense under Fed. R. Civ. P. 12(b)] must be made before pleading if a responsive pleading is allowed."³³ In this matter, the Court notes that the Motion to Dismiss was made after the Answer was filed. Accordingly, the Court will treat the Motion to Dismiss as a Fed. R. Civ. P. 12(c) Motion for Judgment on the Pleadings.³⁴ Again, the only basis for invalidating the Will alleged in the original Declaration is the absence of words and a number, which the Court has already disposed of. Further analysis is not required because, the analysis, under R. 12(c), is the same as under R. 12(b)(6).³⁵ Accordingly, the Court will grant the Motion to Dismiss.

Conclusion

Baker's Amended Declaration fails to state a claim sufficient to survive a R. 12(b)(6) motion to dismiss because all of her claims, except those of unsound mind and duress, do not state valid causes of action and corresponding elements. In regards to the unsound mind and duress claims, the facts pled in the Declaration and the Amended Declaration are not sufficient for the Court to find that relief may be plausible. Therefore, Baker's Motion for Leave to file an Amended Declaration is denied, and the Declaration of Contest is dismissed pursuant to R. 12(c).

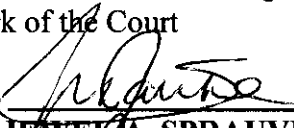
DATED: December 23, 2011



ALAN D. SMITH
Magistrate of the Superior Court
of the Virgin Islands

ATTEST:

VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

BY: 

JEWEL A. SPRAUVE

Court Clerk Supervisor 12/23/11

³³ FED. R. CIV. P. 12(b).

³⁴ STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 449 (2010 ed. 2009).

³⁵ *Id.*