

**UNITED STATES BANKRUPTCY  
COURT DISTRICT OF  
MAINE**

In re:  Terrance J. McClinch,  Debtor	Chapter 11 Case No. 18- 10568
Joseph A. Palsa, in his Capacity as Trustee Under the Arthur L. McClinch Trust Dated April 3, 1981,  Plaintiff  v.  Terrance J. McClinch,  Defendant	Adv. Proc. No. 20-1004

**ORDER AUTHORIZING LIMITED DISCOVERY**

The Plaintiff filed a Motion to Dismiss Counterclaims with Prejudice [Dkt. No. 50] (the “MTD”), and the Defendant filed a timely Objection [Dkt. No. 64]. Three days prior to the scheduled hearing on the MTD, the Plaintiff submitted the Declaration of Kyle G. DeValerio, Esq. [Dkt. No. 71-1]. Mr. DeValerio’s declaration represents an effort to authenticate four documents, all of which appear to have been issued by the Fairfield (Connecticut) Probate Court.

At a hearing on the MTD on August 20, 2020, the Defendant urged the Court to strike the DeValerio declaration on two grounds. First, the Defendant contends that the declaration was not timely filed under D. Me. LBR 9013-2. Second, the Defendant contends that the documents attached to the declaration are not properly considered by the Court in ruling on a motion under Fed. R. Civ. P. 12(b)(6). In an attempt to put a finer point on it, the Defendant argued that the Plaintiff could “save the documents for summary judgment or trial and then raise the issues again.”

While the Defendant's attempt to stave off a dismissal of his counterclaims is understandable, the Court sees things differently. Perhaps there is room to question the timing of the filing of the DeValerio declaration or to argue about the propriety of considering the documents appended to that declaration in connection with a motion to dismiss. But the result of any such questioning should not be a denial of the motion to dismiss with an inexorable march through expensive discovery, motion practice, and trial, particularly when a more targeted approach may cure any unfair prejudice to the Defendant from the timing of the filing and, at the same time, foster a just, speedy and inexpensive determination of the Defendant's counterclaim and at least one of the affirmative defenses raised by the Plaintiff.

The Court issues this order under Fed. R. Civ. P. 16(b). The parties are authorized to conduct limited discovery with respect to the following factual questions:

1. Whether the Defendant was afforded an opportunity to participate in the Connecticut Probate Proceedings;
2. Whether, and if so, when the Defendant received notice of the existence of the Connecticut Probate Proceedings;
3. What, if any, documents were sent to Defendant in connection with the Connecticut Probate Proceedings;
4. Whether the Defendant actually received documents sent to him in connection with the Connecticut Probate Proceedings; and
5. Any other aspect of the Connecticut Probate Proceedings that is, or may be, material to the Plaintiff's request for a dismissal of the Defendant's counterclaim on res judicata grounds.<sup>1</sup>

All such discovery must be completed on or before November 2, 2020. Discovery requests must be initiated sufficiently in advance of the deadline such that responses can be timely provided prior to the discovery deadline. No other discovery with respect to the Defendant's counterclaims is permitted at this point.

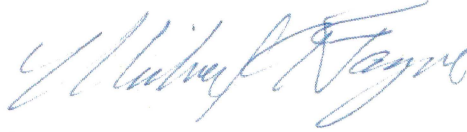
The Plaintiff is authorized to file a supplement to the MTD on or before November 16, 2020. The Defendant is authorized to file a supplement to his objection to the MTD on or before November 30, 2020. The supplements should be limited to facts that are, or may be, material to the Plaintiff's res

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<sup>1</sup> As used in this order, the term "Connecticut Probate Proceedings" means and refers to any and all proceedings in the courts of the State of Connecticut related, in any way, to (i) the estate of Arthur L. McClinch; (ii) the Arthur L. McClinch Trust Dated April 3, 1981; or (iii) the Fund A Trust.

judicata argument. After the supplements have been filed, the Court will issue a ruling on the MTD.

Date: August 24, 2020

A handwritten signature in blue ink, appearing to read "Michael A. Fagone", written over a horizontal line.

Michael A. Fagone  
United States Bankruptcy Judge  
District of Maine