No. 24-CV-273

In the

District of Columbia Court of Appeals

MATTHEW BARE

Appellant,

v.

RAINFOREST ALLIANCE, INC.,

Appellee.

Appeals from the Superior Court of the District of Columbia, Civil Division No. 2023-CAB-006898 (Hon. Carl E. Ross, Judge)

BRIEF FOR APPELLANT

PHILIP B. ZIPIN
(DC Bar No. 367362)
Zipin, Amster & Greenberg, LLC
8757 Georgia Avenue
Suite 400
Silver Spring, MD 20910
(301) 450-6900
pzipin@zagfirm.com

Counsel for Appellant

JULY 16, 2024

COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259

RULE 28 (a)(2) STATEMENT

Appellant was represented at the trial court and on appeal by Philip B. Zipin of Zipin, Amster & Greenberg, LLC. The Appellee was represented at the trial court and on appeal by Daniel E. Farrington, Esq. of Fisher & Phillips, LLP.

Appellant is neither a corporation nor a partnership.

/s/Philip B. Zipin
Philip B. Zipin

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JURISDICTIONAL STATEMENT

On November 8, 2023, Appellant Matthew Bare ("Appellant") filed his Complaint against Appellee Rainforest Alliance, Inc. ("Appellee"), in the Superior Court of the District of Columbia, for claims of (1) violation of D.C. Code § 32-1301, *et seq.* and (2) common law breach of contract, to recover wages rightfully earned and owed to him but withheld without legal justification. The Superior Court of the District of Columbia had jurisdiction over Appellant's claims pursuant to D.C. Code § 11-921.

On March 6, 2024, the Superior Court of the District of Columbia entered judgment dismissing Appellant's claims. This Honorable Court has jurisdiction over this appeal pursuant to D.C. Code § 11-721.

STATEMENT OF THE ISSUES

The issues presented in the instant appeal by Appellant are:

1. Whether the Superior Court erred as a matter of law by ruling that Appellant failed to plead allegations supporting the performance of an alleged condition precedent at the dismissal stage.
2. Whether the Superior Court erred as a matter of law by ruling that Appellant did not sufficiently allege the performance of the alleged condition precedent in stating that he fully performed his obligations under the contract.
3. Whether the Superior Court erred as a matter of law that Appellant did not sufficiently allege that Appellee waived the alleged condition precedent by preventing its occurrence.
4. Whether the Superior Court abused its discretion in not allowing Appellant to amend his Complaint and instead disposing of the case on a mere technicality.

STATEMENT OF THE CASE

On November 8, 2023, Appellant Matthew Bare ("Appellant") filed his Complaint against Appellee Rainforest Alliance, Inc. ("Appellee"), in the Superior Court of the District of Columbia, claiming (1) violation of D.C. Code § 32-1301, *et seq.* ("DCWPCL") and (2) common law breach of contract, to recover "redundancy" pay that was promised, rightfully earned, and owed to him but withheld without legal justification. A-6. On December 8, 2023, Appellee filed a Motion to Dismiss both Appellant's breach of contract claim and his DCWPCL claim. A-22. In its Motion, Appellee argued that Appellant's DCWPCL claim warranted dismissal because the redundancy pay was a discretionary payment, and therefore not covered under the DCWPCL. A-24-26. Appellee argued that Appellant's breach of contract claim warranted dismissal because (1) Appellant failed to satisfy an alleged condition precedent of executing a release agreement as required to affect Appellee's obligation to provide the redundancy pay, and (2) Appellant breached an implied duty of good faith and fair dealing by sending an email to his colleagues criticizing Appellee's management. A-26-28.

On December 20, 2023, Appellant filed an Opposition to Appellee's Motion to Dismiss ("Opposition"). A-30. In his Opposition, Appellant argued that (1) Appellee definitively obligated itself to provide Appellant redundancy pay and the

redundancy pay was therefore non-discretionary; (2) whether Appellant satisfied the alleged condition precedent of executing a release agreement was an issue to be addressed at the summary judgment stage and not the dismissal stage; (3) the execution of a release agreement was only necessary if Appellee found it "applicable," and Appellee's failure to provide any proposed release agreement to Appellant evidenced that they deemed the release agreement inapplicable; (4) Appellee waived the alleged condition precedent of the execution of a release agreement by failing to provide Appellant with any proposed release agreement; and (5) Appellant's sending an email critical of Appellee's management in no way relieved Appellee of its obligation to provide redundancy pay. A-30-36. Appellant also sought to amend the Complaint should the Superior Court find it deficient. A-36.

On March 6, 2024, the Superior Court issued an order dismissing both Appellant's breach of contract claim and his DCWPCL claim, with prejudice. A-38. The Superior Court found that the redundancy pay was non-discretionary and constituted "wages" under the DCWPCL. A-42-43. The Superior Court further accepted that a contract was entered into for the provision of redundancy pay. A-44. The Superior Court nonetheless dismissed both Appellant's DCWPCL claim and his breach of contract claim on the grounds that Appellant failed to include allegations that the alleged condition precedent, *viz*., the execution of a release

agreement, was satisfied or that it was waived by Appellee, and therefore failed to allege facts supporting that he was owed his redundancy pay. A-42-45. Despite Appellant requesting leave to amend the Complaint should it be found insufficient, the Superior Court dismissed the case with prejudice. A-36. The Superior Court did not provide any reason for denying Appellant leave to amend his Complaint. After the Superior Court's final judgment, Appellant timely filed the present appeal with this Honorable Court.

STATEMENT OF FACTS

This case challenges the Superior Court's granting of Appellee's Motion to Dismiss. Because this appeal pertains to the Superior Court's ruling at the dismissal stage, Appellant's allegations contained in the Complaint are assumed to be true. The following are the facts alleged by Appellant:

1. Appellant worked for Defendant for almost eight (8) years, from October 2015 until September 7, 2023. Plaintiffs job was "Lead, Markets Innovation." A-7.
2. Appellant's most recent salary was $120,000.00 per year. (*Id*.)
3. Notwithstanding a number of years of consistently excellent performance, Appellant was informed on about August 10, 2023, that his position had

become “"redundant” as a consequence of Appellee's new “Strategy and Operating Model,” launched in 2023. (*Id*.)

4. Anticipating the financial hardship the reorganization would cause certain impacted employees, Appellee instituted a policy to provide “redundancy settlement” to be made to those of Appellee’s employees who were directly impacted by the restructuring. (*Id*.)

5. Specifically, Appellee described the terms of the “redundancy settlement” as follows:

> [Appellee] will pay a redundancy settlement as set forth below, subject to the employee executing a release of claims, settlement agreement, or other similar agreement as provided by [Appellee], if and as applicable and appropriate in the relevant country. The redundancy settlement will be two weeks gross base salary per year of service, with a minimum of one month and capped at six months gross base salary ... Redundancy payments will be pro-rated to the nearest full month worked, for example, employed for 4 years and *5* months= 8 weeks + 5/12 x 2 weeks of pay.

(*Id*.)

6. Redundancy pay was expressly made subject to applicable taxes and was therefore considered “wages” by Appellee.

7. In reliance on the promise of a “redundancy settlement” payment by Appellee, on September 1, 2023, Appellant agreed to resign his employment, effective September 22, 2023, and accept the redundancy pay offered by Appellee. (*Id*.) The “redundancy payment” for all of Appellee’s employees

impacted by the policy change was two (2) weeks gross base salary per year of service, capped at six (6) months of gross base salary. (*Id*.) Appellant, having been employed by Appellee for 7 and 11/12 years, qualified for a redundancy payment to him of approximately 15.917 weeks of gross base salary. (*Id*.) At $120,000.00 per year salary, Appellant's bi-weekly gross pay was $4,615.38, which equates to $2,307.69/week. A-7-8. The "redundancy pay" owed to Appellant, therefore, was $2,307.69 (gross weekly pay) x 15.917. weeks = $36,731.54. (*Id*.) The policy further provided that a staff member who was unable to locate another position within Appellee's business would receive $1,000 "for training or coaching aimed at outplacement, career coaching, or other activities that help the employee in finding employment outside of [Appellee]." (*Id*.)

8. Over the next few days following his September 1 agreement to resign, Appellant had correspondence with Appellee confirming the amount of his redundancy payment and that his final day would be September 22, 2023. (*Id*.)
9. On September 6, 2023, Appellant emailed some of his colleagues, advising them of his departure and making some observations regarding Appellee's management. (*Id*.)

10. Appellee's management apparently was advised of these comments and did not appreciate them. (*Id*.) On September 7, 2023, Appellant was told he was being terminated from employment, prior to his announced September 22, 2023, resignation date, and was now being denied the promised redundancy payment in its entirety. (*Id*.) Appellant's termination letter was dated September 8, 2023. (*Id*.)
11. Despite proper demand therefore, Appellee failed to pay Appellant the redundancy pay wages owed to him. (*Id*.)

STANDARD OF REVIEW

A decision of the Superior Court of the District of Columbia to dismiss a complaint for failure to state a claim is reviewed *de novo*. *Atkinson v. D.C.*, 281 A.3d 568, 570 (D.C. 2022) (citing *Grayson v. AT & T Corp.*, 15 A.3d 219, 228 (D.C. 2011) (*en banc*). In reviewing a decision to dismiss a complaint for failure to state a claim, the allegations of the complaint are taken as true, and all facts and inferences are construed in favor of the plaintiff. *Id.* (citing *Grayson v. AT & T Corp.*, 15 A.3d 219, 228 (D.C. 2011) (*en banc*). To survive a motion to dismiss for failure to state a claim, "'[t]he complaint need only contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'' *Id*. (quoting *Scott v. FedChoice Fed. Credit Union*, 274 A.3d 318, 322 (D.C. 2022)).

Dismissal of a complaint for failure to state a claim upon which relief can be granted should only be awarded if "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hackman v. Safeway, Inc*., 2022 D.C. Super. LEXIS 31 at *2 (July 26, 2022) (quoting *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999) and citing Super. Ct. Civ. R. 12(b)(6)).

Regarding leave to amend pleadings, the Superior Court Rules of Civil procedure state that the Superior Court should freely give leave [to amend a pleading] when justice so requires." Super. Ct. Civ. R. 15 (a)(3); *see also Epps v. Vogel*, 454 A.2d 320, 324-35 (D.C. 1982) (quoting the Supreme Court's decision in *Foman v. Davis*, 371 U.S. 178, 182 (1962) that leave to amend should be given freely "in the absence of any apparent or declared reason" for not permitting amendment.)

A Superior Court decision denying leave to amend a pleading is reviewed for abuse of discretion. *Rayner v. Yale Steam Laundry Condo. Ass'n*, 289 A.3d 387, 401 (D.C. 2023) (quoting *Sibley v. St. Albans Sch.*, 134 A.3d 789, 797 (D.C. 2016)). This Court examines the following five factors in determining if the Superior Court abused its discretion: (1) the number of requests to amend; (2) the length of time that the case has been pending; (3) the presence of bad faith or dilatory reasons for the request; (4) the merit of the proffered amended pleading;

and (5) any prejudice to the non-moving party. *Id*. at 401-02 (citing *Crowley v. N. Am. Telecomms. Ass'n*, 691 A.2d 1169, 1174 (D.C. 1997)); *Bennett v. Fun & Fitness, Inc.*, 434 A.2d 476, 478-79 (D.C. 1981). The absence of any "cogent reason" provided by the Superior Court for denying leave to amend a pleading will weigh in favor of a finding that the Superior Court abused its discretion. *See Crowley*, 691 A.2d at 1174.

Ultimately, "the purpose of pleadings is to put the opposing party on notice of the pleader's claims;" they are not a "game of skill" in which one misstep should result in the dismissal of a case on a technicality without the merits being heard. *Carter-Obayuwana v. Howard Univ.*, 764 A.2d 779, 787-88 (D.C. 2001) (citing numerous decisions from the Supreme Court and District of Columbia courts).

SUMMARY OF THE ARGUMENT

The Superior Court dismissed both Appellant's breach of contract claim and his DCWPL claim on the grounds that Appellant failed to plead that he either met the alleged condition precedent (the execution of a release agreement) or that the condition precedent was waived. First and foremost, numerous courts have held that the satisfaction of conditions precedent does not need to be pled, and that arguments regarding the pleading of conditions precedent are therefore not

appropriately considered at the dismissal stage. Accordingly, the Superior Court's dismissal of Appellant's claims for failure to plead the performance of the condition precedent was clearly in error. Second, even the courts that require the performance of conditions precedent to be pled have held that a general averment that the plaintiff fulfilled all obligations under the contract is sufficient. Here, Appellant alleged in his Complaint that he fully performed his obligations under the contract. Therefore, even according to this stricter approach regarding the pleading of conditions precedent, the Superior Court's dismissal of Appellant's claims was in error.

Furthermore, under the "prevention doctrine," the nonoccurrence of a condition precedent is waived by the promisor when the promisor itself prevents the condition precedent from occurring. Although courts in the District Columbia have not dealt with the "prevention doctrine" in the context of separation pay conditioned on a release agreement, numerous other courts have. In applying the "prevention doctrine", these courts have held that the condition precedent, *viz*., the execution of a release agreement, is waived when the employer prevents the release agreement from being executed. As detailed below, Appellant's allegations plausibly support that Appellee itself prevented the condition precedent's occurrence and thereby waived the condition precedent by: (1) informing Appellant that he would not receive any redundancy pay, thereby rendering the

execution of a release agreement purposeless and futile and (2) not providing Appellant with a release agreement. Therefore, the Superior Court's finding that Appellant's allegations failed to support a waiver of the condition precedent was in error.

Lastly, even when the allegations of a complaint are found to be insufficient to state a claim, leave to amend the complaint should be freely given. Here, each of the five factors that this Court examines regarding whether leave to amend should have been granted weigh in favor of granting leave to amend to address an alleged pleading deficiency. Additionally, the Superior Court did not provide any reason for its denial of leave to amend. Therefore, the Superior Court abused its discretion by denying Appellant's request for leave to amend his Complaint and disposing of the case on a mere technicality. Consequently, even if this Honorable Court finds that Appellant's allegations failed to sufficiently state a claim, this case should be remanded to allow Appellant to amend his Complaint and to ensure that this case is decided on its merits and not disposed of on a mere technicality.

ARGUMENT

I. The Superior Court Erred Because Appellant's Pleadings Were Sufficient to Avoid Dismissal Under the Pleading Standard for the Performance of Conditions Precedent.

The Superior Court dismissed both Appellant's breach of contract claim and his DCWPCL claim due to its finding that Appellant failed to plead that he performed the condition precedent of executing a release agreement. A-42-45. Courts have taken two approaches regarding the pleading standard for claims involving conditions precedent. As explained below, Appellant's pleadings were sufficient to avoid dismissal according to either approach regarding the pleading standard for conditions precedent.

A. Arguments Regarding Conditions Precedent are not Properly Considered at the Dismissal Stage and, Even if They Are, a General Averment that All Obligations Under the Contract Were Performed is Sufficient to Avoid Dismissal.

Under Superior Court Rule of Civil Procedure 9(c), "In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity." Although there is sparse case law within the District of Columbia regarding this rule, numerous other courts have conducted in-depth analyses regarding rules of civil procedure identical to Superior Court Rule of Civil Procedure 9(c). Relevant case law supports reversal on this point.

The courts analyzing the issue have taken two different approaches. *See Kaiser Trucking v. Liberty Mut. Fire Ins. Co.*, 981 N.W.2d 645, 653-54 (S.D. 2022) (listing cases detailing the two approaches); *Garcia v. Certain Underwriters at Lloyd's*, 2018 U.S. Dist. LEXIS 19513 at *6-7 (S.D. Al. Feb. 6, 2018) (same); *Mendez v. Bank of America Home Loans Servicing, LP*, 840 F. Supp. 2d 639, 648-49 (E.D.N.Y. 2012) (same); *see also Dicroce v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 140314 at *16 (E.D.N.Y. Sep. 26, 2014) (listing differing approaches and declining to dismiss contract claim for failure to plead performance of condition precedent due to law on the matter being unsettled).

The first approach is that the plaintiff is not required to plead the performance of conditions precedent **at all**. *See e.g. Cezair v. JPMorgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 120645 at *32 (D. Md. Aug. 29, 2014) (holding that Rule 9(c) does not require that conditions precedent be pled but merely sets forth the manner in which it may be pled); *Brown Family Trust, LLC v. Dick's Clothing & Sporting Goods, Inc.*, 2014 U.S. Dist. LEXIS 19949 at *7-8 (S.D. Ohio Feb. 18, 2014) (same); *Nat'l Labor College, Inc. v. Hillier Group Architecture N.J., Inc.*, 2012 U.S. Dist. LEXIS 112248 at *15 (D. Md. Aug. 9, 2012) (same); *Mendez*, 840 F. Supp. 2d at 648-49 (same); *Shim v. PNC Bank, N.A.*, 2010 U.S. Dist. LEXIS 96101at *5-6 (D. Haw. Sep. 14, 2010) (same). Rather, the nonperformance of a condition precedent is an affirmative defense. *See Basanite Indus., LLC v. Upstate*

Custom Prods., LLC, 2024 U.S. Dist. LEXIS 94475 at *19 (S.D. Fl. May 28, 2024); *SH Franchising, LLC v. Newslands Homecare, LLC*, 2019 U.S. Dist. LEXIS 14378 at *17-18 (D. Md. Jan. 28, 2019) (citing *United States ex rel. Tusco, Inc. v. Clark Constr. Grp., LLC*, 235 F. Supp. 3d 745, 753 (D. Md. 2016). As follows, arguments pertaining to the non-performance of conditions precedent are only appropriate at the dismissal stage when it is clear from the face of the complaint that there was a condition precedent and that it was not performed. *Basanite Indus., LLC*, 2024 U.S. Dist. LEXIS 94475 at *19; *SH Franchising, LLC*, 2019 U.S. Dist. LEXIS 14378 at *17-18.

The second approach requires a general averment that the conditions precedent have been met. *See e.g. Addison v. Metro. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 166258 at *3-4 (N.D. Ill. Jan. 21, 2010); *Westernbank P.R. v. Kachkar*, 2009 U.S. Dist. LEXIS 126405 at *88-89 (D.P.R. Dec. 10, 2019); *Baraliu v. Vinya Capital, L.P.*, 2009 U.S. Dist. LEXIS 35712 at *5 (S.D.N.Y. Mar. 31, 2009). However, even under this approach, the pleading standard is minimal, and a statement that the plaintiff fully performed their obligations under the contract or that the contract is in full force and effect is sufficient to survive dismissal. *See e.g. Staley v. FSR Int'l Hotel Inc.*, 2024 U.S. Dist. LEXIS 75123 at *11-12 (S.D.N.Y. Apr. 19, 2024) (citing *Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1124 (9th Cir. 1998)); *Arco Nat'l Constr., LLC v. MCM Mgmt. Corp.*, 2021 U.S. Dist. LEXIS

172573 at 48-49 (D. Md. Sep. 10, 2021) (citing 2 MOORE'S FEDERAL PRACTICE, § 9.04[1] (3d ed. 1997)); *United States ex rel. Tusco, Inc.*, 235 F. Supp. 3d at 753 (D. Md. 2016).

B. Under Either Approach, Appellant's Complaint was Sufficiently Pled as to Avoid Dismissal.

Here, under either approach, the Complaint was sufficiently pled as to avoid dismissal. Applying the first approach, the Complaint certainly does not state that Appellant failed to perform a condition precedent to payment of the redundancy pay. A-6-11. Therefore, Appellee's arguments regarding whether Appellant satisfied the condition precedent could not properly be considered at the dismissal stage. *Basanite Indus., LLC*, 2024 U.S. Dist. LEXIS 94475 at *19; *SH Franchising, LLC*, 2019 U.S. Dist. LEXIS 14378 at *17-18.

Regarding the second approach, Appellant pled in the Complaint that "[Appellant] fully performed his obligations under his contract with [Appellee] for redundancy pay." A-10. Even under the second approach, this language constitutes a sufficient pleading as to avoid dismissal. *Staley*, 2024 U.S. Dist. LEXIS 75123 at *11-12; *Arco Nat'l Constr.*, 2021 U.S. Dist. LEXIS 172573 at *48-49; *United States ex rel. Tusco, Inc.*, 235 F. Supp. 3d at 753.

As stated *supra*, the Superior Court dismissed both Appellant's breach of contract claim and his DCWPCL claim on the grounds that Appellant failed to

plead the satisfaction of the condition precedent. A-42-45. However, as stated *supra*, Appellant's pleading was sufficient according to either approach adopted by courts regarding the pleading standard for conditions precedent. Under the first approach, the Superior Court **should not have given any consideration** to Appellee's arguments regarding whether the condition precedent was satisfied at the dismissal stage. Under the second approach, Appellant's pleading that he fully performed his obligations under the contract was sufficient to avoid dismissal. As follows, the Superior Court's grounds for dismissal were improper and the dismissal of Appellant's claims was in error.

II. Alternatively, the Superior Court Erred Because Appellant Alleged Facts Plausibly Supporting that Appellee Waived the Condition Precedent by Preventing its Occurrence.

Alternatively, the Superior Court's dismissal of Appellant's breach of contract claim and DCWPCL claim was in error because Appellant alleged facts plausibly supporting that the condition precedent of the execution of a release agreement was waived by Appellee. As explained below, Appellee's informing Appellant that he was not entitled to redundancy pay and its failure to provide Appellant with a proposed release agreement were sufficiently preventative of the execution of a release agreement to constitute a waiver pursuant to the "prevention doctrine."

A. The Nonoccurrence of the Condition Precedent of the Execution of a Release Agreement is Waived When the Employer Prevents the Agreement's Occurrence.

The District of Columbia recognizes what is commonly referred to as the "prevention doctrine." *See In re Estate of Drake*, 4 A.3d 450, 454 (D.C. App. 2010); *Aronoff v. Lenkin Co.*, 618 A.2d 669, 682-83 (D.C. App. 1992); *Reiman v. International Hospitality Group*, 558 A.2d 1128, 1132 (D.C. App. 1992). Under the "prevention doctrine," the nonoccurrence of a condition precedent to a promisor's contractual duties is waived when the promisor prevents the condition precedent from occurring. *See Aronoff*, 618 A.2d at 682-83 (listing cases and citing CORBIN ON CONTRACTS § 767 (1960) and RESTATEMENT (SECOND) OF CONTRACTS § 245 (1981)). The rationale underlying the "prevention doctrine" is that when a promise is made with a condition precedent, there is an implied promise that the promisor will act in good faith and not prevent the performance of the condition or make it more difficult. *In re Estate of Drake*, 4 A.3d at 455 n. 18, n. 21; *Aronoff*, 618 A.2d at 682-83; *R. A. Weaver & Assocs. v. Haas & Haynie Corp.*, 663 F.2d 168, 176 (D.C. Cir. 1980).

For the "prevention doctrine" to apply, the promisor does not need to completely foreclose the occurrence of the condition precedent. *R. A. Weaver & Assocs.*, 663 F.2d at 176. Rather, the promisor need only substantially hinder the condition precedent from occurring. *Id.*; *see also Aronoff*, 618 A.2d at 682-83

(applying *R. A. Weaver & Assocs*). Furthermore, "[w]hile active interference of the promisor which 'substantially hinders . . . occurrence' of a condition will excuse the condition and cause the promisor's performance to become due, a failure to cooperate in performance can also suffice." *Aronoff*, 618 A.2d at 682-83 (listing cases and citing RESTATEMENT (SECOND) OF CONTRACTS § 245). It is implied that the promisor will extend reasonable cooperation in fulfilling the condition to make way for the promise. *Aronoff*, 618 A.2d at 682-83; *Hais v. Smith*, 547 A.2d 986, 987-88 (D.C. 1988); *Blake Constr. Co. v. C.J. Coakley Co.*, 431 A.2d 569, 576 (D.C. 1981); *Minmar Builders, Inc. v. Beltway Excavators, Inc.*, 246 A.2d 784, 787-88 (D.C. 1968); *Horlick v. Wright*, 104 A. 2d 825, 827 (D.C. 1954).

The "prevention doctrine" does not require the promisee to show that the condition precedent would have occurred if not for the promisor's lack of cooperation. *See In re Estate of Drake*, 4 A.3d at 454 (citing *Aronoff*, 618 A.2d at 682). Rather, the promisee need only show that the nonoccurrence of the condition precedent was "fairly attributable" to the promisor's conduct. *Id*. (citing *Aronoff*, 618 A.2d at 683 n. 25).

After conducting extensive research, Appellant has not found any decisions from District of Columbia courts discussing the "prevention doctrine" under circumstances similar to this case. However, numerous other jurisdictions have

discussed the "prevention doctrine" being applied under similar circumstances. For example, in *Zarling v. Abbott Labs.*, 2021 U.S. Dist. LEXIS 116200 (D. Minn. June 22, 2021), the employee's entitlement to severance pay upon termination promised to him in his employment agreement was conditioned on the employee signing a separation and release agreement in the form and manner required by the employer. *Id.* at 5. Upon terminating his employment, the employer sent the employee a separation and release agreement that did not merely effectuate a waiver of all claims, but purported to preclude the employee from receiving the promised severance pay. *Id*. The employee refused to sign the agreement due to it precluding him from receiving severance pay; the employer thereafter refused to provide the severance pay. *Id*. at 6-7. The employee filed suit seeking recovery of his severance pay.

The employer moved to dismiss the claim on the grounds that the condition precedent of an executed separation and release agreement was not fulfilled. *Id*. at 16. The employee countered that the nonoccurrence of a separation and release agreement was caused by the employer because it had prevented the condition precedent from being met by presenting him with a patently unreasonable release agreement and putting him in an untenable position: if he did not sign the agreement required by the employer, he would not receive severance pay; if he did sign the agreement required by the employer, he would be signing away his right to

receive severance pay. *Id*. Applying the "prevention doctrine," the court denied the employer's motion to dismiss because it could reasonably be concluded that the employer prevented the agreement from occurring. *Id*. at 17.

In *Stroh v. DataMark, Inc.*, 2007 U.S. Dist. LEXIS 23629 (D. Utah Mar. 29, 2007), the employee's entitlement to severance pay upon resignation was conditioned on the employee resigning for a "good reason" and executing a severance and release agreement substantially in the form that the employer attached to his employment contract. *Id*. at 4. Upon his resignation, the employee was not given his severance pay and he proceeded to file a suit to recover the severance pay. *Id*. at 2.

The employer requested summary judgment, arguing that the employee was not entitled to severance pay because he had not performed the condition precedent of executing the severance and release agreement. *Id*. at 3. The employee countered that the employer prevented him from signing the agreement because – after he told the employer's president that he was willing to sign the agreement – the president responded that the employer had no obligation to provide severance pay because his resignation was not for "good reason." *Id*. at 5-6. Applying the "prevention doctrine," the court denied summary judgment because a reasonable juror could find that the employer prevented the release agreement from being

executed by telling the employee that he was not entitled to severance pay due to his resignation not being for a "good reason." *Id*. at 7.

In *Bock v. Computer Assocs. Int'l, Inc.*, 2000 U.S. Dist. LEXIS 5753 *rev'd on other grounds* (N.D. Ill. Mar. 23, 2000), the employee's entitlement to severance pay upon termination was conditioned on the execution of a release agreement, "in a form satisfactory to the [employer], releasing any and all claims arising out of [the] employment (other than claims made … under any employee benefit plans or executive compensation plans of the [employer], or enforcement of [the] Agreement)." *Id*. at 26-27. However, upon termination, the employee was provided with a release agreement by the employer that **did require him** to waive his claims under employee benefit plans, executive compensation plans, and the employment agreement. *Id*. at 27. The employee refused to sign the release agreement and was not given his severance pay. *Id*. at 8. He proceeded to file suit seeking recovery of his severance pay and moved for summary judgment. *Id*. at 2.

The employer argued that the employee was not entitled to severance pay due to not meeting the condition precedent of executing a release agreement. *Id*. at 26. The employee countered that the employer prevented the execution of an agreement by providing a different agreement than the one referenced in the employment contract. *Id*. Applying the "prevention doctrine," the court granted the employee summary judgement because the employer prevented the release

agreement from occurring by providing a release agreement that was different from what it had promised would be provided. *Id*.

Although not expressly using "prevention doctrine" language, numerous other courts have held that, when separation pay is conditioned on the execution of a release agreement, the employer cannot avoid its duty to provide the pay due to the nonexecution of the agreement when the employer itself prevents the release agreement from occurring. *See Leblanc v. Bedrock Petroleum Consultants*, 2021 U.S. Dist. LEXIS 170270 at *18-19 (S.D. Tex. June 3, 2021) (denying employer's motion to dismiss because the nonoccurrence of the release agreement was arguably caused by the employer providing a different release agreement than the one the employer stated would be provided); *Maguire v. Employee Health Ins. Mgmt.*, 2018 Mich. Cir. LEXIS 4309 at *7 (Oakland Ct'y Cir. Dec. 19, 2018) (denying employer's motion for summary judgment because the nonoccurrence of the release agreement was arguably caused by the employer's proposed release agreement not being in good faith); *Cannon v. Block Inc.*, 2010 Ga. Super. LEXIS 1529 at *10-11 (Ga. Super. Feb. 24, 2010) (denying employer's motion for summary judgment because the nonoccurrence of the release agreement was arguably caused by the employer's proposed release agreement not being in good faith); *Rosewood Property Co. v. Hardy*, 1995 Tex. App. LEXIS 3401 at *16-17 (Tex. App.—Dallas Aug. 10, 1995, no pet.) (mem. op.) (employer could not rely on

nonoccurrence of release agreement to avoid providing severance pay when the employer never provided the employee with a release agreement).

B. Appellant Alleged Facts Plausibly Supporting that the Nonoccurrence of the Execution of a Release Agreement was Fairly Attributable to Appellee's Conduct.

Appellant alleged facts plausibly supporting that Appellee prevented or substantially hindered the condition precedent of an execution of a release agreement. In his Complaint, Appellant alleged the following facts: (1) His redundancy pay was conditioned on the execution of a release agreement *to be provided by Appellant*; (2) Upon tendering his resignation, Appellant confirmed with Appellee that he would be receiving his redundancy pay; (3) Prior to the effective date of his resignation, Appellee terminated Appellant's employment and told him that he would not receive any redundancy pay. A-7-8. Additionally, in his Opposition, Appellant clarified that Appellee did not even provide him with a proposed release agreement, a fact which the Superior Court took notice of in its Order. A-34, 43-44.

Taken as true, these alleged facts clearly support the conclusion that Appellee prevented the execution of a release agreement from occurring. First and foremost, regardless of whether Appellee provided Appellant with a proposed release agreement, Appellee caused the nonoccurrence of the execution of a release agreement by informing Appellant that he would not receive redundancy pay.

Once Appellant was informed that he would not receive redundancy pay, the execution of a release agreement would have been purposeless and futile.[1] Because the representation made by Appellee rendered the execution of a release agreement purposeless and futile, it was Appellee's actions that caused the nonoccurrence of a release agreement.

Stroh is instructive here. In *Stroh*, the court found that a reasonable juror could find that the employer prevented the execution of a release agreement by informing the employee that – regardless of the execution of a release agreement - he was ineligible for his separation pay. *Id*. at 7. The court stated that the employee being informed that he was ineligible for his separation pay regardless of the execution of a release agreement could reasonably be found to have dissuaded him from executing a release agreement. *Id*.

Here too, the allegation that Appellee notified Appellant that he would not be receiving redundancy pay plausibly supports the conclusion that Appellee dissuaded Appellant from executing a release agreement, thereby preventing the agreement's occurrence. As stated, the execution of a release agreement was

[1] The reason for Appellant to execute a release agreement was to allow him to receive redundancy pay. Since Appellee refused to pay the redundancy pay, it would have been futile for Appellant to provide a release agreement himself, even if one drafted by and even signed by Appellant would have contained standard release language.

rendered purposeless and futile once Appellee informed Appellant that he was not eligible for redundancy pay. Notably, the *Stroh* decision was on summary judgment; it is *a fortiori* that the facts of *Stroh* – which are substantially similar to the facts here - are sufficient to avoid dismissal.

Additionally, as stated in the Opposition, Appellee failed to provide Appellant with a proposed release agreement. A-34. Since the condition precedent required the execution of a release agreement **to be provided by Appellee**[2], Appellee's failure to provide a proposed release agreement foreclosed the possibility of a release agreement being executed and thereby waived the condition precedent. *Rosewood Property Co.*, 1995 Tex. App. LEXIS 3401 at *16-17 (nonoccurrence of condition precedent of a release agreement did not absolve employer of promise to provide severance pay when employer failed to provide employee proposed release agreement).

As stated *supra*, the Superior Court dismissed both Appellant's breach of contract claim and DCWPCL claim on the grounds that Appellant failed to allege facts supporting a satisfaction of the condition precedent or its waiver. A-42-45. However, as explained, the facts alleged by Appellant provide ample support that Appellee waived the condition precedent through preventing its occurrence. As

[2] A-7.

follows, the Superior Court's grounds for dismissal were improper and the dismissal of Appellant's claims was in error.

III. The Superior Court Abused its Discretion in Denying Appellant Leave to Amend his Complaint and Dismissing the Case on a Technicality.

A. The Five Factors This Honorable Court Examines in Determining Whether the Superior Court Abused its Discretion in Denying Leave to Amend the Complaint all Weigh in Favor of a Finding of Abuse of Discretion.

Lastly, even assuming Appellant's allegations failed to plausibly support his claims, the Superior Court abused its discretion by not allowing Appellant to amend his Complaint to correct any pleading deficiency. In Appellant's Opposition, he specifically requested leave to amend the Complaint should the allegations be deemed insufficient to support his claims. A-36. Despite this request, the Superior Court dismissed the case with prejudice, thereby not allowing the Complaint to be amended. A-45. The Superior Court did not articulate any reason for not permitting Appellant to amend his Complaint.

This Court examines the following five factors in determining if the Superior Court abused its discretion: (1) the number of requests to amend; (2) the length of time that the case has been pending; (3) the presence of bad faith or dilatory reasons for the request; (4) the merit of the proffered amended pleading; and (5) any prejudice to the non-moving party. *Rayner*, 289 A.3d at 401-02; *Crowley*, 691

A.2d at 1174; *Bennett*, 434 A.2d at 478-79. The absence of any "cogent reason" from the Superior Court for denying leave to amend a complaint will weigh in favor of a finding that the Superior Court abused its discretion. *See Crowley*, 691 A.2d at 1174.

Each of the five factors weighs in favor of an abuse of discretion in this case. Regarding the first factor, Appellant only requested leave to amend his Complaint once, and only if the Court deemed the Complaint to be deficient. Regarding the second factor, the case had only been pending for approximately one (1) month when Appellant sought leave to amend. Furthermore, the case was in its infancy; only the Complaint, Appellee's Motion to Dismiss and Appellant's Opposition to Appellee's Motion to Dismiss had been filed. No discovery had been conducted. Regarding the third factor, Appellant's request for leave to amend the Complaint was not made in bad faith or for a dilatory purpose. Regarding the fourth factor, Appellant could easily amend the Complaint to make it indisputably sufficient to state a breach of contract claim and a DCWPCL claim (according to the trial judge) by simply adding a single sentence stating, "Defendant waived the condition precedent of the execution of a release agreement by informing Appellant that he was not eligible for redundancy pay and/or by failing to provide Appellant with a release agreement." Lastly, regarding the fifth factor, because this case had just

been instituted, there would have been no prejudice in allowing Appellant to amend the Complaint.

Because all five factors weigh in favor of Appellant being allowed to amend his Complaint, the trial court's denial of Appellant's request to amend constituted an abuse of discretion. *See Taylor v. D.C. Water & Sewer Auth.*, 957 A.2d 45, 52-53 (D.C. 2008) (finding abuse of discretion when all five factors weighed in favor of granting leave to amend); *Crowley*, 691 A.2d at 1174 (same). Additionally, the absence of any articulated reason for the trial court's denial of Appellant's request to amend weighs in favor of a finding of an abuse of discretion. *See Crowley*, 691 A.2d at 1174.

B. It is Improper for this Case Not to be Heard on its Merits Due to a Mere Pleading Technicality.

Not allowing Appellant to amend his Complaint would be the epitome of dismissing a claim on a technicality -- a notion that this Honorable Court has staunchly and repeatedly rejected. *See Carter-Obayuwana*, 764 A.2d at 787; *Epps*, 454 A.2d at 325 n. 8 (citing *Keith v. Washington*, 401 A.2d 468, 470 (D.C. 1979) and stating that the principal that a case should be decided on its merits and not on technicalities should be considered in determining whether leave to amend should be granted). As explained *supra*, it is readily apparent that the alleged condition precedent of the execution of a release agreement was preempted by Appellee

informing Appellant that he would not receive redundancy pay and by Appellee not providing a proposed release agreement to Appellant. Under these circumstances, dismissing the case without the merits being considered because the technicality of Appellant not making specific pleadings regarding the alleged condition precedent would be to "exalt form over substance." *See Recreonics Corp. v. Aqua Pools, Inc.*, 638 F. Supp. 754, 758 (D.S.C. 1986) (holding that dismissal on the grounds that the plaintiff did not specifically plead fulfillment of a condition precedent when the defendant's conduct preempted the condition precedent from occurring would be to "exalt form over substance"). At a minimum, Appellant should be allowed to amend his Complaint to specifically allege Appellee's waiver of the condition precedent through its conduct.[3]

CONCLUSION

For the above stated reasons, the Superior Court's dismissal of Appellant's claims should be reversed. This Court should find as a matter of law that the Complaint was adequately pled and should not have been dismissed. Additionally, this Court should find that Appellant's allegations provided plausible support that

[3] It should be noted that the fact that Appellant requested leave in his Opposition and not through a separate Motion for Leave does not change the analysis of whether the Superior Court abused its discretion by denying Appellant leave to amend. *See Keith*, 401 A.2d at 471-72 (finding abuse of discretion despite leave for amend being requested in an Opposition to a Motion to Dismiss and not a separate Motion for Leave).

Appellee waived the condition precedent of the execution of a release agreement through its conduct. Alternatively, should this Court find that Appellant's allegations failed to sufficiently state a claim, this Court should nonetheless remand the case to allow Appellant to amend his Complaint, thereby preventing this case from being disposed of on a mere technicality.

Respectfully submitted,

/s/ *Philip B. Zipin*
Philip B. Zipin, Esq. Bar No. 367362
Zipin, Amster & Greenberg, LLC
8757 Georgia Avenue, Suite 400
Silver Spring, Maryland 20910
Phone: 301-587-9373
Email:pzipin@zagfirm.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July 2024, a true and correct copy of this document was served via this Court's ECF system upon:

Daniel E. Farrington, Esq.
FISHER & PHILLIPS LLP
1401 New York Avenue NW, Suite 400
Washington, D.C. 20005
Counsel for Defendant Rainforest Alliance, Inc.

/s/ Philip B. Zipin
Philip B. Zipin