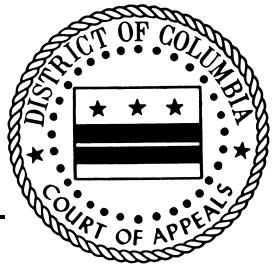
No. 23-CV-0720



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DISTRICT OF COLUMBIA
COURT OF APPEALS

CASA RUBY, INC.

Appellant,

v.

HASSAN NAVEED, *et al.*

Appellees.

On Appeal From An Order of Partial Final Judgment of the D.C. Superior Court, The Hon. Danya A. Dayson

BRIEF OF APPELLEE MIGUEL RIVERA

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April 10, 2024

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I. ISSUES PRESENTED

Whether the Superior Court erred in finding that the intent element of D.C. § 29-406.31(d)(2) requires "actual knowledge".

Whether the Superior Court erred in finding that the plain language of the statute does not support the interpretation of the intent element of D.C. Code § 29-406.31(d)(2) as encompassing the disregard of foreseeable harm, or "willful blindness".

Whether the Superior Court erred in finding that there are no facts alleged that support a conclusion or reasonable inference that the individual board members acted with actual knowledge that their inaction would cause harm to the organization.

Whether the Superior Court erred in finding that Casa Ruby did not sufficiently plead facts to state a claim for monetary relief under D.C. Code § 29-406.31(d) against the appellees.

II. STATEMENT OF THE CASE

In July 2022, the District of Columbia (the "District") filed a Complaint for Violations of the Nonprofit Corporation Act ("NCA") and Common Law against Casa Ruby Inc. ("Casa Ruby") and its founder and executive director, Ruby Corado seeking injunctive and other relief. In November 2022, The District amended its Complaint to include violations of the Wage Payment and Collection Law

("WPCL") and Minimum Wage Revision Act ("MWRA") and add defendants Casa Ruby LLC d/b/a Moxie Health ("Casa Ruby LLC"), Pneuma Behavioral Health LLC ("Pneuma Behavioral Health"), and Tigloballogistics LLC d/b/a Casa Ruby Pharmacy ("Tigloballogistics"). App. 001. In December 2022 Casa Ruby filed a Cross Complaint and Third-Party Complaint incorporating the allegations set forth in the District's First Amended Complaint. App. 037. The Cross Complaint named Ruby Corado, Casa Ruby LLC, Pneuma Behavioral Health, and Tigloballogistics. The Third-Party Complaint also alleged breach of fiduciary duty, and liability pursuant to D.C. Code § 29-406.31, by Casa Ruby's Board of Directors, including Appellee Rivera. On May 23, 2023, the Superior Court of the District of Columbia, upon consideration of Motions to Dismiss, held that Casa Ruby did not sufficiently plead facts to state a claim for monetary relief under D.C. Code § 29-406.31(d) and dismissed Appellant's Third-Party Complaint against appellees for failure to state a claim. App. 079. On August 28, 2023, Appellant filed its Notice of Appeal. App. 106.

D.C.'s Nonprofit Corporations Act, D.C. Code § 29-406.31 establishes the standard that a director shall not be liable to the nonprofit corporation or its members for any decision to take action or not to take action, or any failure to take any action, as a director. In its Third-Party Complaint, Appellant did not establish that Code § 29-406.31(d)(2) does not preclude liability.

III. STATEMENT OF FACTS

Casa Ruby was a District of Columbia nonprofit organization that provided transitional housing and other services to the LGBTQ+ community. App. 002. Casa Ruby's Executive Director Ruby Corado was a "recognized leader in the District's trans community, having bult safe spaces for some of the District's residents who needed them most. She secured millions in grants, gifts, and loans from federal and District sources, as well as from private donors." App. 006–07. In July 2022, Casa Ruby ceased program operations and the District of Columbia filed suit, subsequently amended, against Casa Ruby alleging violations of the NCA, WPCL, MWRA, and the Common Law. App. 001

IV. SUMMARY OF THE ARGUMENT

The Superior Court did not err in finding (1) that the intent element of D.C. § 29-406.31(d)(2) requires "actual knowledge", (2) that willful blindness does not support a finding of actual knowledge, (3) that there are no facts alleged that support a conclusion or reasonable inference that the individual board members acted with actual knowledge that their inaction would cause harm to the organization, and (4) that Appellant did not sufficiently plead facts to state a claim for monetary relief under D.C. Code § 29-406.31(d)(2) against the appellees.

Appellant's Third-Party Complaint did not allege facts sufficient to raise a reasonable inference that Appellee Rivera can be held liable for monetary damages

under the NCA, D.C. Code § 29-406.31(d) because (1) D.C. Code § 29-406.31(d) shields Appellee Rivera from monetary liability in this case; (2) Appellant claims monetary liability specifically under subsection (d)(2) which requires "actual knowledge" and the facts alleged by Appellant do not amount to "actual knowledge" by Appellee Rivera; and (3) Appellant's claim of willful blindness does not amount to "actual knowledge".

V. ARGUMENT

A. Standard of Review

A motion to dismiss a complaint under Rule 12 (b)(6) presents questions of law, thus the standard of review for dismissal for failure to state a claim is de novo. *Fraser v. Gottfried*, 636 A.2d 430, 433 (D.C. 1994). In its review the Court accepts all allegations as true and draws all reasonable inferences in favor of the Plaintiff. *Hillbroom v. PricewaterhouseCoopers, LLP*, 17 A.3d 566, 572 (D.C. 2011). "The only issue on review of a dismissal made pursuant to Rule 12 (b)(6) is the legal sufficiency of the complaint". *Grayson v. AT&T Corp.*, 15 A.3d 219, 229 (D.C. 2011)

B. D.C.'s Nonprofits Corporations Act, D.C. Code § 29-406.31(d), Shields Appellee Rivera From Liability in This Case.

D.C. Code § 29-406.31 sets out the standards of liability for directors / board members of nonprofit corporations, stating as follows:

(a) A director shall not be liable to the nonprofit corporation or its members for any decision to take or not to take action, or any failure to take any action, as a director, unless the party asserting liability in a proceeding establishes that:

[…]

(2) The challenged conduct consisted or was the result of:

(A) Action not in good faith;

(B) A decision:

(i) Which the director did not reasonably believe to be in the best interests of the corporation; or

(ii) As to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or

(C) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct:

(i) Which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation; and

(ii) After a reasonable expectation to such effect has been established, the director has not established that the challenged conduct was reasonably believed by the director to be in the best interests of the corporation;

(D) A sustained failure of the director to devote attention to ongoing oversight of the activities and affairs of the corporation, or a failure to devote timely attention, by making, or causing to be made, appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefor; or

(E) Receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its members that is actionable under applicable law.

D.C. Code § 29-406.31(a).

It further provides that:

> (d) Notwithstanding any other provision of this section, a director of a charitable corporation shall not be liable to the corporation or its members for money damages for any action taken, or any failure to take any action, as a director, except liability for:
>
> (1) The amount of a financial benefit received by the director to which the director is not entitled;
> (2) An intentional infliction of harm;
> (3) A violation of § 29-406.33; or
> (4) An intentional violation of criminal law.

D.C. Code § 29-406.31(d).

Because Appellant is only seeking money damages in its third-party complaint, Appellant must establish liability under D.C. Code § 29-406.31(d). The Superior Court properly found the Appellant did not.

In its Third-Party Complaint, Appellant alleged that the board members failed to hold meetings, maintain official records, or otherwise fulfill its duties regarding governance and oversight. App. 037 – 044. However, Appellant did not allege factual allegations specific to Appellee Rivera sufficient to support an inference of conclusion that Appellee Rivera (1) received any financial benefit to which he was not entitled or even that Appellee Rivera received any financial benefit at all; (2) committed any intentional infliction of harm to the organization; (3) violated D.C. Code § 29-406.33; or (4) committed an intentional violation of criminal law.

In its Third-Pary Complaint, Appellant did not allege any exception for liability under Subsection (d). App. 037 – 044. Not until Appellant filed a supplemental opposition motion to the motions to dismiss did Appellant explicitly

raise Subsection (d)(2) intentional infliction of harm, alleging that the board members lack of oversight / failure to act amounted to intentional infliction of harm. APP. 066 – 078.

Because Appellant is only seeking money damages from the individual Defendants and the D.C. NCA precludes it from doing so, it would in fact be legally impossible for it to recover.

C. The Superior Court's Interpretation of Subsection (d)(2) Requiring *Actual* Knowledge is Consistent with The Model Act and The Sole Persuasive Authority Found in the District of Columbia District Court Opinion *Bronner* and Should be Upheld.

The Superior Court first considered the appropriate *mens rea* to apply to D.C. Code § 29-406.31(d)(2) and with no controlling D.C. Court of Appeals case, appropriately turned to a District of Columbia District Court case which interpreted D.C. Code § 29-406.31(d)(2) using the Model Nonprofit Act (the "Model Act")., which contains nearly identical language to the District's NCA. *Bronner v. Duggan*, 317 F. Supp. 3d 284 (D.D.C. 2018).

The Model Nonprofit Act states "a director's conduct rises to the level of intentional infliction of harm if the director (1) intends the conduct, (2) with the knowledge that the conduct will cause harm." *Id* at 292. Thus, the inquiry becomes whether the Third-Party Complaint set forth sufficient allegations to support a conclusion or reasonable inference that the board members inaction was (1) intended and (2) was done with the requisite knowledge that it would cause harm to Casa

Ruby. Furthermore, as discussed in Section D, whether the second prong of the inquiry, "knowledge", can be satisfied by allegations of conduct (or no conduct) amounting to willful blindness.

Although Mr. Rivera disagrees that the inaction was intended, the Superior Court found the allegations in the Complaint to be sufficient to allow a conclusion or reasonable inference that the failure to exercise oversight was intentional. Thus, the first part of the prong is satisfied.

As for the second prong, appropriately, the Superior Court, following the District Court's analysis in *Bronner*, first looked to the legislative intent and plain language of the statue. Here, the Court found that "the language of the statue refers to an "intentional" infliction of harm, rather than a "knowing" infliction of harm". App. 090. The Court further referenced the District Court's opinion in *Bronner* that, "[t]he use of the word "intentional", rather than a less precise term such as "knowing, is meant to refer to the specific intent to perform, or fail to perform, the act with *actual* knowledge that the director's action, or failure to act, will cause harm, rather than a general intent to perform the acts which cause the harm". *Bronner v. Duggan*, 317 F. Supp. 3d 284, 292 (D.D.C. 2018)(emphasis added)(citing the Model Act §2.02(c) cmt. 2-12-13). App. 090 – 091. Accordingly, the Model Act explicitly requires "actual knowledge". App. 091. Thus, the Superior Court found that the intent element of D.C. § 29-406.31(d)(2) requires "actual knowledge".

The Superior Court's reliance on the District Court case and the Model Act is reasonable and appropriate. This Court should find the Superior Court's interpretation of subsection (d)(2)'s intent requirement is supported by the context of the structure of the statute itself in requiring actual knowledge and reaffirm.

D. The Complaints' Allegations of Willful Blindness Does Not Support a Finding of Actual Knowledge.

The Superior Court's analysis regarding the types of conduct that support a finding of actual knowledge is not unduly restrictive, but well-analyzed and supported.

In analyzing whether in the second prong of the inquiry (discussed above) "actual knowledge" can be satisfied by allegations of conduct (or no conduct) amounting to willful blindness. Here, the Superior Court again turned to the District Court Case *Bronner* and the Model Act and determined that "actual knowledge" rather than "willful blindness" or some other form of imputed knowledge", is required. App. 090 – 091.

Moreover, the Superior Court considered Appellant's cited case law*, Global-Tech Appliances, Inc. v. SEB S.A*., 563 U.S. 754 (2011) and noted a significant difference, *Global-Tech* was interpretating a statute that included a "knowing" rather than an "intentional" *mens rea* requirement. App. 091. Nonetheless, the Court applied the analysis and explicitly recognized "willful blindness" as a type of knowledge. This fact is not lost on the Superior Court. Ultimately, the Superior

Court, found *Global-Tech* highlighted the distinction between an "intentional" and "knowing" *mens rea* requirement and supported its conclusion that subsection (d)(2) requires actual knowledge and intent. App. 091.

Ultimately, the Superior Court properly found that the plain language of the statute does not support the interpretation of the intent element of D.C. Code § 29-406.31(d)(2) as encompassing the disregard of foreseeable harm, or "willful blindness". App. 090 – 091

E. Taking the Facts Alleged in the Complaints as True, the Appellees' Alleged Conduct Does Not Constitute Actual Knowledge.

In addition to the analysis above, the Superior Court went a step further and indulged the "willful blindness" argument and determined even if adopted, "the conduct of the board members as alleged could not form the basis of a cause of action for money damaged under subsection (d)(2). App. 093.

The Superior Court turned again to *Global-Tech* in which the United States Supreme Court states that the willful blindness doctrine is comprised of two requirements. First, the defendant must subjectively believe that there is a high probability that a fact exists. Second, the defendant must take deliberate actions to avoid learning of that fact. These requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 756 (2011). Moreover, *Global-Tech* highlighted the flawed test applied by the lower courts, where (1) it permitted a

finding of knowledge when there was merely a "known risk" that the induced act(s) were infringing and (2) by requiring only "deliberate indifference" to that risk, instead of requiring active efforts by an inducer to avoid knowing about the infringing nature of the activities. *Id* at 770 App. 093.

Furthermore, Merriam-Webster's Dictionary defines willful blindness as a "deliberate failure to make a reasonable inquiry of wrongdoing despite suspicion or an awareness of the high probability of its existence." NOTE: Willful blindness involves conscious avoidance of the truth and gives rise to an inference of knowledge of the crime in question. "Willful blindness." Merriam-Webster.com Legal Dictionary, Merriam-Webster, https://www.merriam-webster.com/legal/willful%20blindness. Accessed 5 Apr. 2024.

Appellant alleges the following facts: the Defendants violated the NCA by failing to maintain a lawfully constituted Board of Directors, failed to maintain control and oversight of the Corporation, permitted Ruby Corado to have exclusive control and access to bank and PayPal accounts in the name of Casa Ruby, and permitted Ruby Corado to misappropriate hundreds of thousands of dollars of Casa Ruby funds without Board oversight. However, Appellant does not allege specific facts that Mr. Rivera intentionally with knowledge, rather than negligently, inflicted harm on Casa Ruby.

Further, Appellant cites three cases to further its argument, *Unicolors*, *Intel*, and *Marion*. Appellant's Brief at 16. However, these cases support the Superior Court's finding.

In *Unicolors,* Defendant H&M sought a judgment as a matter of law, arguing that Petitioner, Unicolors could not maintain an infringement suit because Unicolors knowingly included inaccurate information on its registration application, rendering its copyright registration invalid. *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, 142 S. Ct. 941, 943 (2022). In response, Unicolors argued that because it did not know when it filed its application that it had failed to satisfy a specific requirement, its registration remained valid under the code's safe harbor provision. *Id*.

The Supreme Court in *Unicolors* recognized that "case law and the dictionary instruct that "knowledge" has historically "meant and still means the fact or condition of being aware of something"". *Id*. The Court determined that "if Unicolors was not aware of the legal requirement that rendered information in its application inaccurate, it could not have included the inaccurate information "with knowledge that it was inaccurate". *Id*. The same applies here, if Mr. Rivera was not aware of Ruby Corado's financial mismanagement and harmful actions towards Casa Ruby, Mr. Rivera could not have provided no oversight with knowledge that his inaction would have caused harm.

In *Intel*, Original Plaintiff, Sulyma, sued Intel alleging that Intel had managed his retirement plans imprudently. *Intel Corp. Inv. Policy Comm. V. Sulyma*, 140 S. Ct. 768, 772 (2020). Petitioners, Intel Corp. sought summary judgment, arguing that Sulyma's suit was untimely because he filed it more than three years after Intel had disclosed their investment decisions to him. *Id*. The Supreme Court held Sulyma does not necessarily have "actual knowledge" under the relevant code requiring actual knowledge of information contained in disclosures that he received but does not read or cannot recall. *Id*. The Supreme Court further held "to meet … actual knowledge requirement, the [party] must in fact have become aware of that information". *Id.* Moreover, *Intel* specifies that the addition of "actual" before "knowledge" signals that the knowledge must be more than hypothetical and that "Congress has repeatedly drawn the same "linguistic distinction". As demonstrated in *Intel*, merely having access to information does not amount to "actual knowledge" if there is no awareness of that information.

Lastly in *Marion*, Marion as receiver for two entities under investigation by the SEC sued Bryn Mawr Trust Company ("BMT") for multiple counts, including aiding and abetting fraud. *Marion v. Bryn Mawr Tr. Co*., 288 A.3d 76, 79 (Pa. 2023). BMT argued that aiding and abetting fraud as a cause of action is not recognized and should be dismissed, in the alternative if a cause of action for aiding and abetting fraud is recognized, the court should apply the "actual knowledge" standard, which

Plaintiff, Marion, does not meet. *Id* at 81. The Pennsylvania Supreme Court recognized aiding and abetting fraud as a cause of action under Pennsylvania law and determined the knowledge standard to be "actual knowledge" of the underlying fraud. *Id* at 84, 89-90. In its analysis of the "actual knowledge" standard, the Court stated that there must be awareness of facts that made the primary conduct wrongful. *Id* at 91 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM §28 cmt. c). *Marion* again emphasizes the significance of awareness to meet the standard of "actual knowledge".

As the Superior Court correctly found, even if willful blindness constituted actual knowledge, Appellant's allegations could only amount to indifference to the known risks of inaction and not willful blindness and thus, not actual knowledge. App. 093. Appellant's allegations do not allege Mr. Rivera had a subjective belief that there was a high probability of Ruby Corado's alleged malfeasance, or that he deliberatively and consciously avoided the truth or learning the truth. As the Superior Court simply put, "the facts alleged with regard to the board members make out a basis for negligence, or even recklessness rather than willful blindness". App. 093.

F. Upholding the Superior Court's Order Would Not Set an Alarming Precedent.

If a complaint sufficiently alleges facts that board members have actual knowledge that their conduct or lack of conduct could cause harm to the organization

and are deliberately engaging in conduct or lack of conduct, that would be enough to sufficiently plead liability under subsection (d)(2). The Superior Court's Order does not limit that standard.

VI. CONCLUSION

D.C. Code § 29-406.31 automatically limits liability of a director of a charitable corporation in connection with certain actions or inactions of the director. Appellant did not sufficiently plead facts to state a claim for monetary relief under D.C. Code § 29-406.31(d) against the appellees. The Superior Court's ruling in granting Appellee's motions to dismiss was correct and must be affirmed.

Dated: April 10, 2024

Respectfully submitted,

By: ___*/s/ Marlon Griffith*_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2024, true and correct copies of the foregoing Brief of Appellee Miguel Rivera were served upon all counsel of record via the Court's e-filing system and electronic mail.

/s/Marlon Griffith
Marlon Griffith

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Marlon Griffith
Signature

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No. 23-CV-0720
Case Number(s)

April 10, 2024
Date