Consolidated Appeal Nos. 22-CV-805 and 22-CV-0971

DISTRICT OF COLUMBIA
COURT OF APPEALS

C.A. HARRISON COMPANIES, LLC *et al.*,

Appellants,

v.

TRUST AGREEMENT OF STEVEN SUSHNER

Appellee

Appeal from the Superior Court of the District of Columbia
(The Honorable Hiram E. Puig-Lugo)

APPELLANTS' REPLY

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SUMMARY OF REPLY

Appellee Trust Agreement of Steven Sushner and the trial court's circumvention of D.C. Code 29-804.10 raises a pure issue of law that is subject to this Court's review. Appellants C.A. Harrison Companies, LLC, *et al.* are permitted to raise pure issues of law on appeal notwithstanding objections made before the trial court.

This appeal focuses on D.C. Code 29-804.10, and how the trial court rendered that statute meaningless by its Discovery Orders, and corresponding Default, Attorneys' Fees, and Sanctions Orders. See Exhibits A-D to Appellants' Brief. Minority members of a District of Columbia limited liability company cannot use the discovery process in a books and records case to gain access to the books and records ultimately at issue. This case involved thousands of pages of corporate records, tax returns, bank records and other documents produced electronically at multiple times beginning in 2022, as well a deposition. Sushner received these corporate records, the final relief sought, without having to follow D.C. Code 29-804.10.

Sushner is a 2.5% minority member of Plant 64 DCMC, LLC, and did not have the right to access the company's books and records through discovery requests in a single-count case under D.C. Code 29-804.10. Sushner never complied with the statutory prerequisites for access to Plant 64 DCMC's books and records under D.C.

Code 29-804.10; namely, Sushner did not show (because he could not show) a proper purpose for such records. The requirement to show a "proper purpose" is essential because minority members do not owe any fiduciary duties to other members or the company, and freely giving them access to company information risks misuse of that information. It is the specific difference between a statutory records request made by a member in a member managed limited liability company and a member in a manager managed limited liability company. Compare D.C. Code 29-804.10(a) with D.C. Code 29-804.10(b). No other owner of Plant 64 DCMC joined this process.

Sushner circumvented D.C. Code 29-804.10 by propounding discovery requests for Plant 64 DCMC's books and records. And importantly, his requests did not stop there – Susher also sought records related to the operations of third-party Innovation Lofts Associates, LLC and the Winston-Salem Project generally. None of these discovery requests are permitted in a books and records case. Nonetheless, the trial court blessed Sushner's end around D.C. Code 29-804.10 by compelling Appellants to produce the requested records (including those of third parties), and then defaulting and sanctioning Appellants for purported noncompliance. The trial court further erred by commandeering the management of Plant 64 DCMC and ordering it to replace its managing member, as well as imposing a $5,000 per day civil fine against Appellants and non-party Christopher Harrison, which fine itself

depended on work to be undertaken by a subsequent managing member to be appointed. None of these "remedies" are authorized by D.C. Code 29-804.10.

The trial court's decisions involved issues of law only. This Court is in the position to confirm that a minority member cannot bypass the merits of D.C. Code 29-804.10 by requesting discovery of the very documents sought as final relief.

As discussed above, on December 8, 2022 the trial court ordered Appellants to appoint a managing member within 30 days, or have an election to appoint a new managing member, who would then produce documents. Then it ordered Appellants to assist such new managing member in locating records by imposing a $5,000 per day civil fine. However, Sushner objected to every managing member that was subsequently appointed beginning in January 2023, the trial court required new procedures for appointment of a managing member, and Appellants continued producing additional documents on their own. Ultimately, the case was dismissed and there was never any subsequent managing member that located additional records to produce. Any civil contempt sanction inherent in the December 8, 2022 Sanctions Order is impermissibly vague, but the most reasonable interpretation thereof confirms that the predicate for a daily fine never occurred. See Exhibit B to Appellants' Brief.

Notwithstanding the foregoing, as of June 21, 2023, during the pendency of this appeal, the trial court found that Appellants had complied with its orders and dismissed Sushner's case without awarding any sanctions.

Appellants have complied fully with the trial court's orders regarding production of Plant DCMC LLC's books and records and have no further production obligations. The trial court did not end up awarding any civil fine based on its Sanctions Order. Sushner has already unfairly benefitted from the trial court's errors and has received Plant 64 DCMC's complete corporate records and more.

A corporate records inspection often takes place at a reasonable location (such as company offices), during regular business hours, and is limited in scope. See procedures and requirements D.C. Code 29-804.10(b)(2). This corporate records request metastasized into full-scale general discovery and litigation.

At this time, this Court should simply confirm that Plant 64 DCMC has no outstanding obligations, can continue managing itself, and confirm that the underlying case is over, and that any crusade for additional documents or sanctions (at least in this matter) is finished now that the case is closed.

DE NOVO STANDARD OF REVIEW APPLIES TO PURE ISSUES OF LAW

This Court "review[s] issues of statutory interpretation de novo." Bridgforth v. Gateway Georgetown Condo., Inc., 214 A.3d 971, 974 (D.C. 2019) (citing Facebook, Inc. v. Wint, 199 A.3d 625, 628 (D.C. 2019)).

This case is about whether Sushner was entitled to Plant 64 DCMC records in discovery for a case brought under D.C. Code 29-804.10. No matter the facts, the answer is no. This is a pure issue of law.

The trial court's subsequent Default, Attorneys' Fees, and Sanctions Orders all arise from the trial court's error in issuing the Discovery Orders. These orders gave Sushner his final relief without having to meet any of the statutory prerequisites.

This is not a typical case about harsh sanctions subject to an abuse of discretion standard. This case is about Sushner and the trial court running an entire books and records case without considering the limits and protections of D.C. Code 29-804.10.

REPLY

I. Sushner and the Trial Court's Fundamental Misunderstanding of D.C. Code 29-804.10 is a Purely Legal Issue that is Appropriate for Appeal.

"The appellate court may consider a new issue that is purely one of law." City Ctr. Real Estate, LLC v. 1606 7th St. NW, LLC, 263 A.3d 1036, 1047 (D.C. 2019). Further, it is well established that "[p]arties cannot waive the correct interpretation of the law by failing to invoke it." Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2101 n.2 (2015) (citing EEOC v. FLRA, 106 S. Ct. 1678 (1986)).

As recently as May, 25, 2023, the United States Supreme Court reaffirmed this principle in Dupree v. Younger, 143 S. Ct. 1382 (2023). In Dupree the Court squarely addressed why parties need not preserve legal arguments the same way they need to preserve fact based arguments. Mainly because "resolution of a pure question of law…is unaffected by future developments in the case." Id. at 643. Objections to facts introduced into evidence need to be preserved so a reviewing Court can determine how and why a trial court ruled the way it did down the line. Contrastingly, the law in most cases does not change. D.C. Code 29-804.10 is the same today, as it was when Sushner filed the complaint. Appellants did not and could not waive the application of D.C. Code 29-804.10 in a case brought solely under D.C. Code 29-804.10.

Likewise, in City Ctr. Real Estate, LLC, supra, this Court addressed the statutory interpretation of the Tenant Opportunity to Purchase Act (TOPA) even though the legal arguments raised by the parties were not previously raised before the trial court. This Court specifically noted, "we may consider a new issue that is purely one of law, particularly if the factual record is complete" and cited "judicial efficiency" in its decision to address whether certain individuals were tenants under TOPA. Id. at 1047.

Here, whether Sushner as a minority member is entitled to Plant 64 DCMC's books and records at the discovery stage is a purely legal question. There are no

factual questions because this case never proceeded to any fact finding stage. Sushner was granted final relief without having to make any showing despite statutory requirements. Addressing the legal issues presented by Appellants in the negative will promote judicial efficiency by stopping Sushner from continuing his crusade for documents or sanctions without having made any showing of proper purpose under D.C. Code 29-804.10.

II. Rule 46 Permits Appellants to Raise Issues of Law Involving the Interpretation of D.C. Code 29-804.10.

Rule 46 states, "Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made."

Here, the trial court did not hold a hearing in connection with its Default Order or Attorneys' Fees Order before issuing the same on October 13, 2022. See Exhibit C to Appellants' Brief. Appellants did not have a fair opportunity to show that they had complied with the Discovery Orders nor argue the protections of D.C. Code 29-804.10.

When Appellants were finally given the opportunity to present these arguments before the trial court, they did so. See Status Report filed June 15, 2023. Upon consideration thereof, the trial court dismissed Sushner's case and did not award sanctions. This ruling happened after this appeal was filed.

At this time, given the trial court's dismissal, Appellants seek only for this Court to confirm that Sushner is not entitled to even more documents or sanctions in connection with this lawsuit.

III. Susher Concedes That He Did Not Show a Proper Purpose Before Accessing Plant 64 DCMC's Corporate Books and Records.

Whether this Court adopts the Delaware standards outlined by Appellants, the Connecticut standards outlined by Appellee, or creates a hybrid standard – Sushner was required to show some proper purpose before gaining access to Plant 64 DCMC's records. See Maitland v. Int'l Registries, LLC, 2008 Del. Ch. LEXIS 70 *6 (Del. Ch. June 6, 2008); Benjamin v. Island Mgmt., 341 Conn. 189 (2021). In fact, Sushner concedes that at the very least he was required to make a prima facie showing of proper purpose to the trial court. See Appellee's Brief at 31. That did not happen in this case.

Appellants agree that Sushner's burden of proof should not be cumbersome, and the right to inspect should not be denied to a minority member who seeks the information for legitimate purposes. However, the "proper purpose" requirement was intentionally adopted by the Council in D.C. Code 29-804.10. The Revised Uniform Limited Liability Company Act (RULLCA), upon which the District's Limited Liability Company Act is based, imposed a "proper purpose" requirement in particular to protect companies from minority members with no fiduciary duties

who may misuse corporate information for personal reasons, for embarrassment, to use against other members or even to the detriment of the company.

In this case, notwithstanding the minimal nature of Sushner's burden, he did not meet it. The trial court never had any hearing to determine Sushner's purpose whatsoever. The trial court's failure to make any determination regarding Sushner's proper purpose before granting him final relief via discovery requests directly contradicts D.C. Code 29-804.10.

IV. Sushner Does Not Address Why This Court Should Permit Minority Members to Circumvent D.C. Code 29-804.10 Through the Discovery Process.

Conspicuously absent from Susher's 60-page opposition is any discussion about why this Court should permit minority members in the District of Columbia to file a case under D.C. Code 29-804.10, and obtain final relief via discovery. Sushner also fails to address how D.C. Code 29-804.10 entitles him to books and records of third-party entities, of which he is not a member.

With respect to this issue, this Court should be persuaded by the Delaware authorities cited by Appellants in their Opening Brief. See Jones & Assocs. v. District of Columbia, 797 F. Supp. 2d 129, 135 (D.D.C. 2011)(District of Columbia courts have often looked to Delaware for guidance on matters of corporate law); Handler v. Centerview Partners Holdings L.P., No. 2022-0672-SG, 2023 Del. Ch. LEXIS 40 *12-13 (Ch. Feb. 13, 2023)("a plaintiff may not bypass the merits of her demand by

requesting in discovery the very documents she seeks as final relief"); Maitland at 6 ("Maitland [could not] use the discovery process in a books and records case to gain access to the books and records ultimately at issue").

Sushner may have had a low burden to show a proper purpose, but this case never reached that point. The trial court erred by granting the Discovery Orders, which effectively granted Sushner final relief. In other contexts, a small minority owner in Sushner's position would be deemed an inadequate representative to pursue documents that were presumably of general interest to owners. See Petersen v. Federated Dev. Co., 416 F. Supp. 466 at n.6 (S.D.N.Y. 1976) (bare minority owner an inadequate representative for derivative purposes).

V. Despite its Earlier Errors, The Trial Court Dismissed Sushner's Case on June 21. Also, Sushner Has Received a $228,045 Distribution in Return for his $50,000 Investment.

There are no issues remaining for resolution before this Court. After Appellants filed their Opening Brief, the trial court held a hearing on June 21, 2023, ruled that Appellants had fully complied with its Discovery and Default Orders, and dismissed Sushner's case. The trial court did not award any sanctions in conjunction with its Sanctions Order in its June 21, 2023 ruling.

Given that the case is dismissed, Appellants do not move this Court to remand this case for further litigation. They simply seek confirmation that the case is over

and given the trial court's errors, Sushner does not have the right to reopen the matter for further litigation.

Appellants should be permitted to elect their own managing member and continue business without further interference from Sushner or the trial court.

VI. The Purported Daily Sanction Order Is Impermissibly Vague, Depends on Subsequent Events That Are in Dispute, and the Case Was Dismissed without a Sanction Award, Making the Matter Moot

On December 8, 2022, the trial court also required Plant 64 DCMC to appoint a managing member within 30 days, or have an election to appoint a new managing member, who would then produce documents, and then ordered Appellants to assist such new managing member in locating records by imposing a $5,000 daily fine. However, Appellee objected to every managing member that was subsequently appointed beginning in January 2023, the trial court required new procedures for appointment of a managing member, and Appellants continued producing additional documents on their own. Ultimately, the case was dismissed and there was never any subsequent managing member that located additional records to produce. The predicate for the imposition of a sanction never occurred.

At this stage, given the developments in early 2023 as to various attempts to appoint a new managing member, the mythological Oracle of Delphi probably would provide conflicting interpretations of how to interpret this sanctions provision, which is impermissibly vague.

As a practical matter the Court, metaphorically, wanted to light a fire under the Appellants to produce documents to resolve the matter. Appellants did so, and the trial court dismissed the case without awarding any sanctions. Appellees seem now to claim, for the first time, that a sanction should have been levied as of January 7, 2023, but the trial court never so held. The trial court never actually awarded any sanction and the case has been dismissed. Notably, the Appellees have not appealed that final dismissal.

Any civil contempt sanction inherent in the December 8, 2022 Order is impermissibly vague, but the most reasonable interpretation thereof confirms that the predicate for a daily fine never occurred.

Given the confusing record, the Court should vacate any daily sanction order as impermissibly vague.

CONCLUSION

This Court has the discretion to review the purely legal questions presented by Appellants in their opening brief. Sushner and the trial court were not permitted to bypass the requirements of D.C. Code 29-804.10 and obtain final relief via the discovery process.

At this time, the trial court has dismissed this litigation given Appellants' compliance with its orders. This Court should confirm that this case is over, that the

sanction order was improper and impermissibly vague, and that Appellants are not subject to further litigation in this case over any document production or sanctions.

Dated: July 27, 2023.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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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/ George R.A. Doumar	Consolidated Appeal Nos. 22-CV-805 and 22-CV-0971
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