

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,

Plaintiff,

v.

NRA FOUNDATION, INC. *et al.*,

Defendants.

Case No. 2020 CA 003454 B

Judge José M. López

Next Event: Initial Scheduling Conference

Date: November 6, 2020, at 10:00 a.m.

**PLAINTIFF DISTRICT OF COLUMBIA'S OPPOSITION TO DEFENDANT
NATIONAL RIFLE ASSOCIATION OF AMERICA'S MOTION TO DISMISS**

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION..... 1

LEGAL STANDARD 2

ARGUMENT..... 2

I. The District is entitled to a constructive trust under its well-pled NCA claim. 2

A. The NCA expressly allows this Court to impose a constructive trust...... 3

B. The business judgment rule does not apply to the District’s NCA claims...... 4

II. The District has stated a common law claim for a constructive trust on funds the Foundation paid to the NRA...... 6

III. The District does not have to plead that the NRA acted wrongfully to state a statutory or common law claim for a constructive trust. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Behradezaee v. Dashtara, 901 A.2d 349 (D.C. 2006)..... 5

District of Columbia v. 58th Presidential Inaugural Committee, Case No. 2020 CA 000488 B,
(D.C. Super.) Omnibus Order (Sept. 9, 2020) 3, 6, 7

District of Columbia v. Options Public Charter School, Case No. 2013 CA 006644 B (D.C.
Super.), Order (Jan. 15, 2014)..... 4, 8

Family Federation for World Peace v. Hyun Jin Moon, 129 A.3d 234 (D.C. 2015) 7

Heck v. Adamson, 941 A.2d 1028 (D.C. 2008)..... 6

Hertz v. Klavan, 374 A.2d 871 (D.C. 1977) 8

Potomac Development Corp. v. District of Columbia, 28 A.3d 531 (D.C. 2011) 2

Silberberg v. Becker, 191 A.3d 324 (D.C. 2018)..... 5

Solers, Inc. v. Doe, 977 A.2d 941 (D.C. 2009)..... 2

Summers v. Cherokee Children & Family Services, Inc., 112 S.W.3d 486 (Tenn. Ct. App. 2002)
..... 4, 5

Sundberg v. TTR Realty, LLC, 109 A.3d 1123 (D.C. 2015) 2

Statutes

D.C. Code § 29-406.30(a)..... 5

D.C. Code § 29-412.20 passim

Nonprofit Corporations Act of 2010, D.C. Code §§ 29-401.01 to 29-414.04 (2012 Repl.).. passim

Rules

Tennessee Supreme Court Rule 4(D) 4

Treatises

14 C.J.S. *Charities* § 62 7

INTRODUCTION

Plaintiff District of Columbia (the “District”), through the Office of Attorney General (“OAG”) brought this enforcement action against Defendant NRA Foundation Inc., (the “Foundation”) and Defendant National Rifle Association of America, Inc. (the “NRA”), because the Foundation set aside its own independent charitable mission and effectively ceded operational control to the NRA. The Foundation, a District of Columbia nonprofit corporation, was established to operate solely for charitable purposes.

The District alleges that the NRA has experienced financial problems in recent years, largely arising from declining membership and its own poor management and lavish spending. The NRA repeatedly turned to the Foundation’s funds to solve its financial problems, and the Foundation agreed to a series of unfair loans and management fee payments to the NRA contrary to the Foundation’s own best interests. In approving these loans, loan extensions, and management fees, the Foundation exceeded and abused its legal authority to use its assets to support its charitable mission. The Foundation also acted contrary to its nonprofit purpose by subordinating that purpose to the NRA’s financial interests. As specifically alleged in the Complaint, these patterns of conduct and their effects are continuing. The District therefore seeks a constructive trust on the Foundation’s funds held by the NRA under the Nonprofit Corporations Act of 2010, D.C. Code §§ 29-401.01 to 29-414.04 (2012 Repl.) (“NCA”) and the common law.

In its motion to dismiss, the NRA presents four arguments, none of which have merit. First, the District’s complaint plainly alleges continuing violations of the NCA, and the NRA’s contentions to the contrary ignore or misstate the District’s actual allegations. Second, this Court has broad authority to impose a constructive trust over *any* assets that are unfairly held, not just funds. Third, this Court has authority to impose a constructive trust as an equitable remedy for a violation of the common law. Fourth, the District’s actual complaint states a claim for relief, so

this Court can summarily reject the NRA's assertion that there is no possible complaint the District could prepare that could state a claim against the NRA.

LEGAL STANDARD

In considering a Rule 12(b)(6) motion to dismiss, a trial court must “accept the allegations of the complaint as true, and construe all facts and inferences in favor of the plaintiff.” *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009) (quoting *In re Estate of Curseen*, 890 A.2d 191, 193 (D.C. 2006)). The test is whether the complaint has “well-pleaded factual allegations” that “plausibly give rise to an entitlement to relief,” and “detailed factual allegations are not required.” *Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). “In determining whether a complaint sufficiently sets forth a claim, the court must construe the complaint in the light most favorable to the plaintiff and must take the facts alleged in the complaint as true.” *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128 (D.C. 2015). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The Complaint meets this standard.

ARGUMENT¹

I. The District is entitled to a constructive trust under its well-pled NCA claim.

The NRA asks this Court to dismiss the District's statutory claim for a constructive trust for two reasons. First, the NRA asserts that the NCA only authorizes this court to impose a constructive trust over “compensation paid to a corporation's director, officer, or manager,” and the NRA is not a director, officer, or manager of the Foundation. NRA Mem. of P. & A. in

¹ The District assumes the Court's familiarity with the factual allegations in the Complaint, which the District summarized in the opposition to Defendant NRA Foundation's motion to dismiss filed at the same time as this opposition.

Support of Mot. to Dismiss (“NRA Mem.”) at 2, 6, 9-10. Second, the NRA asserts that the business judgment rule forecloses the District’s NCA claims. *Id.* at 11-12, 14. Neither argument is correct.

A. The NCA expressly allows this Court to impose a constructive trust.

First, the NCA expressly allows this Court to impose a constructive trust over a nonprofit corporation’s assets. The NCA provides that in a proceeding brought by the Attorney General,

The Superior Court may dissolve a nonprofit corporation, place a corporation in receivership, impose a constructive trust on compensation paid to a corporation’s director, officer, or manager, **or grant other injunctive or equitable relief with respect to a corporation:**

D.C. Code § 29-412.20(a) (emphasis added). The NRA incorrectly assumes that the statute limits the District to seeking a constructive trust over “compensation paid to a corporation’s director, officer or manager.” NRA Mem. at 2, 6, 9-10. This Court recently rejected this improper reading of the NCA in *District of Columbia v. 58th Presidential Inaugural Committee*, Case No. 2020 CA 000488 B (D.C. Super.). There, the District alleged that the 58th Presidential Inaugural Committee (“PIC”), a nonprofit corporation, violated the NCA by wasting approximately \$1 million in charitable funds in overpayment for use of event space at the Trump Hotel, a for-profit corporation. The District sought a constructive trust over funds PIC improperly paid to co-defendants Trump Organization and Trump Hotel. This Court rejected the argument the NRA makes here and concluded that the District “has adequate statutory authority to obtain the constructive trust sought in its Complaint.” *District of Columbia v. 58th Presidential Inaugural Committee*, Case No. 2020 CA 000488 B (D.C. Super.), Omnibus Order [“PIC Order”] at 14 (Sept. 9, 2020).

Judge Craig Iscoe, in another nonprofit enforcement case brought by the Attorney General, reached the same result:

While the plain language of the [NCA] statute states that a constructive trust may be imposed on “compensation paid to a corporation’s director, officer, or manager,” the statute also allows the Court to “grant other equitable relief.” The Court finds that “other equitable relief” may include imposition of a constructive trust on other funds at issue and not solely compensation paid to a corporation’s management.

District of Columbia v. Options Public Charter School, Case No. 2013 CA 006644 B (D.C. Super.) [*Options PCS*], Order at 10 (Jan. 15, 2014) (attached as Ex. 2 to District’s Opp’n to Defendant NRA Foundation’s Motion to Dismiss). In short, the NCA allows the District to seek a constructive trust over funds the Foundation improperly paid the NRA.

B. The business judgment rule does not apply to the District’s NCA claims.

The NRA also argues that the business judgment rule insulates the conduct of the Foundation from liability under the NCA. NRA Mem. at 11-12, 14. This argument is wrong as to the law and on the facts alleged here.

First, the business judgment rule has very limited (if any) applicability in the context of Attorney General enforcement cases alleging a nonprofit has acted contrary to its purposes. *See Summers v. Cherokee Children & Family Services, Inc.*, 112 S.W.3d 486, 528 (Tenn. Ct. App. 2002).² Specifically, the business judgment rule is inapplicable to alleged breaches of the directors’ fiduciary duty of *loyalty* at issue in this case. A director’s duty of loyalty is the duty to faithfully pursue the corporation’s purposes and interests, rather than their own interests, or the interests of another person or organization. *Summers*, 112 S.W.3d at 504. The duty of loyalty is precisely what the District has alleged was breached rendering the business judgment rule inapposite to this case. “[C]ourts do not typically apply the business judgment rule to duty of loyalty issues.” *Summers*, 112 S.W.3d at 528-29 (citing 3 William Meade Fletcher, et al., Fletcher

² The Tennessee Supreme Court declined to consider an appeal in *Summers*, and the decision of the Tennessee Court of Appeals was published pursuant to Tennessee Supreme Court Rule 4(D), which permits publication of significant decisions of the Tennessee Court of Appeals that meet the criteria set forth in the rule.

Cyclopedia of the Law of Private Corporations § 387.60). In short, allegations that a nonprofit has abandoned its purpose fall under the “duty of loyalty” umbrella and fully outside the business judgment rule defense. *Id.*

Courts have recognized that in the context of Attorney General enforcement cases, the business judgment rule is not a defense against allegations that a nonprofit corporation has “abandoned its charitable purposes.” *Id.* at 530. Here, the District has specifically alleged a series of acts and omissions that, considered together, show that the Foundation’s board of directors allowed the nonprofit to abandon its purpose, making the business judgment rule wholly inapplicable. Compl. ¶¶ 36-50, 55, 63-64; *see also* D.C. Code § 29-406.30(a)(c)-(d).

Second, the business judgment rule only applies when individual officers or directors face personal liability for business decisions. *Summers*, 112 S.W.3d at 528-29; *see also Silberberg v. Becker* 191 A.3d 324, 337-38 (D.C. 2018). The District has not named any individual officers or directors as defendants.

Third, even if this court were to reject the *Summers* analysis and conclude that the business judgment rule did apply to breaches of the duty of loyalty, it is simply a presumption which the plaintiff can overcome by alleging that the director’s decision was tainted by self-interest, or that directors acted in bad faith, or fraudulently. *Behradezaee v. Dashtara*, 901 A.2d 349, 362 (D.C. 2006). This can include, for instance, allegations that “directors appeared on both sides of a transaction.” *Id.* Allegations that “the board or officers paid salaries to individuals who performed services of little or no benefit to the corporation” can also overcome the presumption. *Silberberg*, 191 A.3d at 338. Here, the District has alleged all these circumstances, with specificity. Compl. ¶¶ 37-40, 44, 60-61.

For these reasons, and those set forth in the District's Opposition to the Foundation's Motion to Dismiss at 15-22, this Court should deny the NRA's motion to dismiss the District's claim for injunctive and equitable relief, including a constructive trust, on funds paid by the Foundation to the NRA (Count IV).³

II. The District has stated a common law claim for a constructive trust on funds the Foundation paid to the NRA.

The District also asks this Court for injunctive and equitable relief, including a constructive trust on funds paid by the Foundation to the NRA, pursuant to its common law enforcement authority (Count V). The NRA seeks dismissal of this claim for two reasons. First, the NRA asserts that a constructive trust is a remedy rather than an independent cause of action. Second, the NRA claims that the District lacks standing to seek a constructive trust over funds the Foundation paid to the NRA. NRA Mem. at 8. These arguments are without merit.

First, the District of Columbia Court of Appeals has recognized a cause for action for a constructive trust. *See, e.g. Heck v. Adamson*, 941 A.2d 1028, 1031 (D.C. 2008) (referring to the plaintiff's claim as "a claim for entitlement to a constructive trust"). Accordingly, this Court recently rejected this very argument. *PIC Order* at 20 (rejecting defendants' arguments that the constructive trust claim should be dismissed because a constructive trust is a remedy rather than a cause of action). The District's choice of terminology in describing its separate claims for

³ The NRA also argues that the District has no statutory authority to impose a constructive trust over funds held by the NRA because the District has not pled its entitlement to relief under the NCA. NRA Mem. at 9-14. The NRA's argument rehashes the Foundation's arguments regarding the purported insufficiency of the District's factual allegations and repeats the argument that the District has not pled a continuing violation. Like the Foundation, the NRA relies on a narrow reading of the District's actual claims and allegations, and an alternative construction of the facts, to try to make its case. For the convenience of the Court, the District refers the Court to (and incorporates here) the entirety of the District's Opposition to the Foundation's Motion to Dismiss on the sufficiency of the allegations here and the pleading of a continuing violation.

relief does not provide a basis to dismiss any of its claims, or to conclude that the District cannot ask this Court to impose a constructive trust over funds the Foundation paid to the NRA.

Second, the NRA argues that the District lacks standing to seek a constructive trust because NRA's financial exploitation of the Foundation does not injure the District. NRA Mem. at 8. This argument misunderstands the nature of nonprofits as having public purposes and administering public funds and misconstrues the District's authority to bring this enforcement claim to protect the public interest. Indeed, at common law, the Attorney General was the only party provided standing to enforce misuse of charitable funds. 14 C.J.S. *Charities* § 62.⁴ Consistent with that general charitable enforcement principle, the Attorney General has broad common law authority to litigate in the public interest. *District of Columbia v. ExxonMobil Oil Corp.*, 172 A.3d 412, 430 (D.C. 2017) (noting approvingly that, under D.C. Code § 1-301.81(a), "the Attorney General . . . has the responsibility, and the authority, to uphold the public interest in D.C. by litigating on behalf of the public."). The cases cited by the NRA are inapposite, and none involve the question of the Attorney General's authority to bring an enforcement action in these circumstances.

III. The District does not have to plead that the NRA acted wrongfully to state a statutory or common law claim for a constructive trust.

Finally, the NRA argues that a constructive trust is only warranted under the NCA or the common law where the party holding the funds has acted wrongfully, and the District has not alleged that the NRA has done anything wrong. NRA Mem. at 15. This is incorrect as a matter

⁴ "The attorney general has common law authority to sue the directors of a charitable . . . corporation for allegedly misappropriating and diverting the corporation's assets." "With respect to . . . charitable corporations 'only a public officer, usually the state Attorney General, has standing to bring an action to enforce the terms of the trust.'" *Family Federation for World Peace v. Hyun Jin Moon*, 129 A.3d 234, 244 (D.C. 2015) (quoting *Hooker v. Edes Home*, 579 A.2d 608, 612 (D.C. 1990)).

of law and fact. As to the law, this Court has recognized that a plaintiff “does not need to allege a wrongful act to support a claim for a constructive trust.” *PIC Order* at 21; *see also Options PCS, Order* (Jan. 15, 2014) at 9 (“The Court finds that the District does not have to trace specific property held by any individual to a wrongful act, but only that the District needs to plead a wrongful act that occurred and allege that the holders of payments at issue unfairly hold title to such funds.”) (attached as Ex. 2); *Hertz v. Klavan*, 374 A.2d 871, 873 (D.C. 1977) (holding that at common law, a constructive trust is an appropriate equitable remedy in a wide range of circumstances which need not involve wrongful conduct).

Regardless, the Complaint clearly alleges wrongful conduct by the NRA. The District has alleged that NRA officials had direct involvement in exploiting the Foundation’s funds for the NRA’s own purposes and in encouraging and assisting the Foundation board in subordinating its public purposes to the NRA’s concerns about its lack of financial health. Compl. ¶ 63. As a result of these wrongful acts, millions of dollars of the Foundation’s funds were conveyed to the NRA.

This Court should reject the NRA’s assertion that the Court cannot impose a constructive trust over funds it received from the Foundation because the NRA is legally entitled to those funds. NRA Mem. at 16. The District plainly and sufficiently alleges that the Foundation transferred these funds to the NRA in violation of law. The mere fact that the Foundation’s board authorized the payments does not show that their decisions were lawful. The NRA cannot moot the District’s well-pled allegations with legal conclusions that its conduct was lawful or in good faith. The Superior Court has previously imposed a constructive trust over funds that a nonprofit transferred to third parties that were contrary to its nonprofit purposes. *See Options PCS, Order* (Jan. 15, 2014) at 5. This is sufficient to state a claim for a constructive trust.

CONCLUSION

For these reasons, the District requests that the Court deny the NRA’s Motion to Dismiss.

Dated: October 20, 2020

Respectfully submitted,

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Next Event: Initial Scheduling Conference

Date: November 6, 2020, at 10:00 a.m.

ORDER

Upon consideration of Defendant NRA Foundation, Inc.'s motion to dismiss the complaint, the District's opposition, any reply, and the entire record herein, it is hereby

ORDERED that Defendant NRA Foundation Inc.'s motion is **DENIED**.

SO ORDERED.

José M. López
Associate Judge

Copies to: all counsel of record via CaseFilexPress