

Circuit Court for Montgomery County
Case No. 422745V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0816

September Term, 2018

MARY MODDERMAN

v.

PAG ANNAPOLIS JL1, LLC., ET AL.

Arthur,
Friedman,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: September 27, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A minor member of an illegal conspiracy sued her alleged co-conspirators because one of the conspirators breached a side-agreement with her. The Circuit Court for Montgomery County dismissed her federal RICO claim and her common-law claims for conspiracy and aiding and abetting. She appealed. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Because this case comes to us on a motion to dismiss for a failure to state a claim upon which relief can be granted, we assume the truth of all well-pleaded facts and the inferences reasonably drawn therefrom. *See, e.g., Parks v. Alpharma, Inc.*, 421 Md. 59, 72 (2011).

Appellant Mary Joan Modderman alleged that Kerem Celem was the mastermind behind a scheme to purchase luxury automobiles in the United States and to export them illegally to China and Russia, where they could be sold for up to four times the retail price here. Celem operated a used car dealership in Virginia, known as KC Auto.

According to Modderman, Celem and his alleged co-conspirators recruited persons with good credit to serve as “purchasing agents” (or, more accurately, straw purchasers) of luxury automobiles. In exchange for a small fee paid by Celem or his companies, the “purchasing agent” would take out a loan to finance the purchase of a luxury automobile. After purchasing the automobile, the “purchasing agent” would immediately deliver it to Celem, with the understanding that Celem or his companies would pay off the loan. Celem would export the automobile to China or Russia, without a title and without the lender’s permission.

On October 24, 2013, Modderman entered into a “Non-Exclusive Purchasing Agent Agreement” with Celem and KC Auto. Shortly thereafter, Modderman purchased a 2014 Land Rover from a local dealership, PAG Annapolis JL1, LLC. Modderman borrowed over \$84,000.00 from SunTrust Bank to finance the purchase of the automobile.

Modderman alleges that Celem and one of his employees, Michael Stoll, arranged all aspects of the purchase. She claims that Stoll told her the precise date and time at which to go to a specific dealership (PAG Annapolis) and that he instructed her to meet with specific representatives to retrieve a specific car that had already been pre-selected by Celem at a pre-determined price.

Modderman specifically alleges that on November 7, 2013, Stoll advised her that the sale of the Land Rover had been “lined up” with Carnell Pinkston, a salesman at PAG Annapolis, and third-party defendant Larry Cash, the dealership’s finance manager. Modderman alleges that she did not look at the car that she was going to purchase, that she did not walk through the showroom or the dealer’s lot to pick out a car, and that she did not negotiate the purchase price or the down payment.

According to Modderman, the dealership’s employees were in on the scam. She alleged that by 2013 manufacturers had become wary of dealerships making sales to wholesalers like Celem. Consequently, Celem allegedly bribed the dealership’s employees to facilitate sales to straw purchasers like Modderman. In exchange, the dealership’s employees allegedly participated in the conspiracy by picking the car to be purchased and preparing the paperwork, including the documents for the SunTrust loan.

Modderman alleged that, within minutes of leaving the dealership, she met two unnamed agents of Celem’s company in a nearby parking lot. They drove back to the dealership, where the agents took possession of the Land Rover. According to Modderman, Celem “illegally shipped” the car “to China (or some other foreign destination).”

Under her “purchasing agreement” with Celem and KC Auto, Modderman never intended to pay off the loan to SunTrust with her own personal funds. Instead, she expected Celem and KC Auto to pay off the loan once she turned the car over to him. In breach of the purchasing agreement, however, Celem and KC Auto failed to pay off the loan from SunTrust. As a result, in November 2015, SunTrust sued Modderman for breach of contract, demanding \$84,453.95, plus costs, attorney’s fees, and interest.¹

On November 11, 2016, Modderman filed a third-party complaint against 14 third-party defendants, including PAG Annapolis and Carnell Pinkston. She sought damages in the exact amount that she owed to SunTrust.

At a hearing on June 6, 2017, the Circuit Court for Montgomery County dismissed Modderman’s claims against all but one of the third-party defendants, but granted Modderman leave to amend.

On June 20, 2017, Modderman filed an amended third-party complaint against 13 third-party defendants. The amended third-party complaint contained three counts

¹ SunTrust originally filed suit in the Circuit Court for Prince George’s County, in the erroneous belief that Modderman resided there. When SunTrust learned that Modderman lived in Montgomery County, it moved to transfer the case to the Circuit Court for Montgomery County.

against PAG Annapolis and Pinkston: (1) a claim for money damages under the Racketeer Influenced and Corrupt Organizations Act or “RICO,” 18 U.S.C. §§ 1961 to 1968, (2) a common-law claim for civil conspiracy, and (3) a common-law claim for aiding and abetting.

PAG Annapolis and Pinkston moved to dismiss the amended third-party complaint. At a hearing on September 7, 2017, the court announced that it would grant the motions. The court issued orders on September 18, 2017, dismissing the amended complaint as to Pinkston and PAG Annapolis, without prejudice. The written orders did not grant leave to amend.

Nonetheless, on October 18, 2017, Modderman filed a second amended third-party complaint, in which she restated her claims against PAG Annapolis, Pinkston, and others and added Annapolis Motorcars, LLC, as an additional third-party defendant. PAG Annapolis, Pinkston, and Annapolis Motorcars each moved to dismiss the second amended third-party complaint. Among other things, they argued that Modderman had no right to file another amended complaint, because the court had not granted her leave to amend when it dismissed her last complaint. *See* Md. Rule 2-322(c) (stating that, “[i]f the court orders dismissal, an amended complaint may be filed only if the court expressly grants leave to amend[]”).

Meanwhile, on December 4, 2017, Modderman moved to revise the order that dismissed the first amended third-party complaint without granting her leave to amend. In an order issued on February 20, 2018, the court denied Modderman’s motion to revise.

Then, in a series of orders dated March 13, 2018, the court dismissed the second amended third-party complaint as against PAG Annapolis, Pinkston, and Annapolis Motorcars.²

Once the court had disposed of the remaining claims against the remaining third-party defendants, Modderman took an appeal.

The appeal is technically defective, because the circuit court did not enter a separate document memorializing the entry of judgment. *See* Md. Rule 2-601(a)(1) (stating that “[e]ach judgment shall be set forth on a separate document”); *see also* *URS Corp. v. Ft. Myer Constr. Corp.*, 452 Md. 48, 65-66 (2017); *Hiob v. Progressive American Ins. Co.*, 440 Md. 466, 478-80 (2014). The requirement of a separate document can be waived, however, to preserve an appeal. *See, e.g.,* *URS Corp. v. Ft. Myer Constr. Corp.*, 452 Md. at 67-70. Were we to hold that the requirement was not waived, we would remand to the circuit court, which would simply file and enter the separate judgment, from which a timely appeal would then be taken. “This would be a classic example of wheels spinning for no practical purpose.” *Id.* at 70. For that reason, “[w]e hold that the separate document requirement has been waived.” *Id.*

² Before the court dismissed her second amended pleading, Modderman had moved to revise the order denying the earlier motion to revise. Although the court never expressly ruled on the second motion to revise, the court implicitly denied that motion by dismissing the second amended third-party complaint. *See Frase v. Barnhart*, 379 Md. 100, 116 (2003) (“the determination of a motion need not always be expressed but may be implied by an entry of an order inconsistent with the granting of the relief sought[]”) (quoting *Wimberly v. Clark Controller Co.*, 364 F.2d 225, 227 (6th Cir. 1966)).

QUESTIONS PRESENTED

Modderman presented two questions for our review, which we have rephrased as follows:

1. Did the trial court err in dismissing Modderman’s first amended third-party complaint for failure to state a claim?
2. Did the trial court abuse its discretion in not granting leave to amend the first amended third-party complaint and dismissing the second amended third-party complaint that Modderman filed without leave to amend?³

For the reasons stated below, we answer both questions in the negative.

Consequently, we shall affirm the judgment of the Circuit Court for Montgomery County.

DISCUSSION

I. Dismissal of Civil Conspiracy, RICO, and Aiding and Abetting Claims

The circuit court granted motions to dismiss for “failure to state a claim upon which relief can be granted.” Md. Rule 2-322(b)(2). The function of such a motion is to test the sufficiency of an opposing party’s pleadings. *See, e.g., Walton v. Network Sols.*,

³ Modderman presented the following questions in her brief:

1. Whether the trial court erred in its Orders of September 18, 2017 in dismissing the First Amended Third-Party Complaint (hereafter “ATPC”) (DE #116) as to Appellees PAG and Pinkston insofar as the First Amended Complaint state a viable cause of action for civil conspiracy; for aiding and abetting fraud; and for civil RICO violations?
2. Whether the trial court erred in its Orders of February 20, 2018 and March 13, 2018 in denying the Motion to Revise the Court’s September 18, 2017 Order (refusing to afford Modderman leave to amend the Third-Party Complaint, and dismissing the Second Amended Third-Party Complaint)?

221 Md. App. 656, 665 (2015). In ruling on the motion, the court considers the facts alleged in the complaint and any supporting exhibits incorporated into the complaint. *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643 (2010) (citing *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004)). Dismissal is proper if, even after assuming the truth of all well-pleaded factual allegations and after drawing all reasonable inferences from those allegations in favor of the pleader, the pleader would still not be entitled to relief. *See, e.g., O'Brien & Gere Eng'rs, Inc. v. City of Salisbury*, 447 Md. 394, 403-04 (2016).

On review of the grant of a motion to dismiss, the appellate court analyzes whether the trial court's ruling was legally correct, without any special deference to that court's legal conclusions. *Patton v. Wells Fargo Fin. Maryland, Inc.*, 437 Md. 83, 95 (2014). This Court may affirm the dismissal of a complaint on any ground adequately shown by the record, regardless of whether the trial court relied on that ground or whether the parties raised that ground. *Mostofi v. Midland Funding, LLC*, 223 Md. App. 687, 695-96 (2015) (citing *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009)).

As against PAG Annapolis and Pinkston, Modderman attempted to allege claims for civil conspiracy, RICO, and aiding and abetting. We consider each of those claims in turn.

Civil conspiracy is “a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or means employed must

result in damages to the plaintiff.” *Hoffman v. Stamper*, 385 Md. 1, 24 (2005) (quoting *Green v. Wash. Sub. San. Comm’n*, 259 Md. 206, 221 (1970)). The plaintiff “must also prove the commission of an overt act, in furtherance of the agreement, that caused the plaintiff to suffer actual injury.” *Id.* at 25. Modderman cannot adequately allege the element of damages resulting from the conspiracy.

According to Modderman, Celem, KC Auto, and others conspired with PAG Annapolis, Pinkston, and others to defraud banks and to evade the manufacturers’ restrictions on sales to wholesalers by orchestrating sales to straw purchasers, so that Celem and his companies could illegally export the automobiles overseas. Modderman, however, does not allege that PAG Annapolis, Pinkston, or anyone other than Celem, KC Auto, and its employees conspired to breach the “purchasing agreement” by defaulting on the obligation to pay off the debt that Modderman incurred. To the contrary, the intended victims of the alleged conspiracy were the lenders and manufacturers, not straw purchasers like Modderman. Consequently, Modderman’s damages were not a direct or proximate result of the conspiracy, as her only damages arose from Celem’s breach of the obligation to pay off the loan. *See Daugherty v. Kessler*, 264 Md. 281, 292 (1972) (explaining that in an action for civil conspiracy, the damages recoverable are those which proximately result from the wrongful conduct).

The RICO claim suffers from the same defect. Although Modderman alleges that PAG Annapolis and Pinkston participated in an elaborate conspiracy to sell luxury vehicles to straw purchasers, it does not allege that they conspired with Celem or his companies or employees to breach Celem’s alleged agreement to pay off the straw

purchasers' indebtedness. In fact, Modderman does not allege that PAG Annapolis and Pinkston had any knowledge of any such agreement. "The reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise." *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003).

Because Modderman was not a reasonably foreseeable victim of the alleged conspiracy, the court did not err in dismissing the RICO claim against PAG Annapolis and Pinkston. *See id.* (stating that "[c]entral to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were 'a substantial factor in the sequence of responsible causation,' and whose injury was 'reasonably foreseeable or anticipated as a natural consequence).

Nor did the court err in dismissing the count for "aiding and abetting." While civil conspiracy involves an agreement to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, aiding and abetting involves knowingly assisting, advising, or encouraging the direct perpetrator of a tort. *Alleco Inc. v. Harry & Jeanette Weinberg Found.*, 340 Md. 176, 199 (1995) (citing *Duke v. Feldman*, 245 Md. 454, 457 (1967)). Modderman, however, does not allege that PAG Annapolis or Pinkston assisted, advised, or encouraged Celem or KC Auto not to pay off the SunTrust loan. Thus, while PAG Annapolis and Pinkston allegedly aided and abetted other misconduct by Celem and his companies, they are not alleged to have aided and abetted the misconduct that damaged Modderman.

II. Denial of Leave to Amend and Dismissal of Second Amended Third-Party Complaint

When reviewing a trial court’s decision to deny leave to amend, an appellate court applies the deferential abuse of discretion standard. *Schmerling v. Injured Workers’ Ins. Fund*, 368 Md. 434, 443-44 (2002); accord *A.C. v. Maryland Comm’n on Civil Rights*, 232 Md. App. 558, 579 (2017); *Hendrix v. Burns*, 205 Md. App. 1, 45 (2012). In general, a trial court abuses its discretion when “no reasonable person would take the view adopted by the [trial] court,” or when the court acts “without reference to any guiding rules or principles.” *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (alteration in original) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)). Typically, for an appellate court to find an abuse of discretion, “[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Id.* at 313 (quoting *North v. North*, 102 Md. App. at 14).

Maryland Rule 2-322(c) states, in part, that “[i]f the court orders dismissal [for failure to state a claim upon which relief may be granted], an amended complaint may be filed only if the court expressly grants leave to amend.” A trial court grants leave to amend by “by adding, within the four corners of the order itself, the explicit words ‘with leave to amend.’” *Mohiuddin v. Doctors Billing & Mgmt. Sols., Inc.*, 196 Md. App. 439, 453 (2010). If an order does not grant leave to amend, the filing of an amended complaint is “a nullity, for the Rule very clearly states that an amended complaint may be

filed ‘only if the court expressly grants leave to amend.’” *Walser v. Resthaven Mem. Gardens, Inc.*, 98 Md. App. 371, 380 (1993).

At the hearing on September 7, 2017, when the circuit court announced its intention to dismiss the amended third-party complaint as against PAG Annapolis and Pinkston, it referred to the hypothetical possibility of a second amended complaint during a discussion about scheduling. When it issued its order, however, the court included no provision for leave to amend. Modderman argues that the absence of leave to amend results from a “clerical error” that the court abused its discretion in failing to correct.

We are unpersuaded. The circuit court judge is presumed to know the law (*see, e.g., Payton-Henderson v. Evans*, 180 Md. App. 267, 286 (2008)) and, thus, is presumed to know the effect of an order that dismisses a pleading, but does not expressly grant leave to amend. In these circumstances, we infer that, in drafting the order, the court made a conscious decision not to permit any further amendment. The court reaffirmed that decision when it denied Modderman’s motion to reconsider the denial of leave to amend. The court affirmed that decision again when it dismissed the second amended third-party complaint, which Modderman filed without obtaining leave to amend.

Modderman did not argue that, had she received leave to amend, she could have identified a set of previously unstated allegations that, if true, would establish that PAG Annapolis and Pinkston conspired with Celem to default on his obligation to pay off the SunTrust loan or that they assisted, advised, or encouraged him not to pay off the loan. Modderman, therefore, gave the court no reason to believe that she could allege any new facts to support her claims against PAG Annapolis and Pinkston. The court, accordingly,

did not abuse its discretion in denying her leave to amend. *See RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 674-75 (2010). It follows that the court did not abuse its discretion in dismissing the second amended third-party complaint that Modderman filed without obtaining the requisite leave to amend.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**