UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1463

September Term, 2013

TOWER OAKS BOULEVARD, LLC

v.

VIRGINIA COMMERCE BANK, ET AL.

Eyler, Deborah S.,
Hotten,
Friedman,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: May 1, 2015

Tower Oaks Boulevard, LLC ("Tower Oaks"), the appellant, appeals from a judgment by the Circuit Court for Montgomery County dismissing with prejudice its first amended complaint. The appellees are Virginia Commerce Bank ("the Bank") and Joseph P. Corish, an attorney who represented the Bank with respect to certain matters.

Tower Oaks presents one question for review, which we have rephrased slightly:

> Did the circuit court err by dismissing the amended complaint for failure to state a claim for which relief can be granted?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Tower Oaks is a Virginia limited liability company that at the relevant times owned commercial real estate at 2701 Tower Oaks Boulevard, in Rockville ("the Tower Oaks Property"). In 2001, John Buckingham, Sr. ("John"), now deceased, was involved in the development of the Tower Oaks Property. Tower Oaks was formed to own and operate the Tower Oaks Property. Oak Plaza, LLC ("Oak Plaza") was the sole member of Tower Oaks. John's five children – Daniel, David, Thomas, Richard, and Susan – were the members of Oak Plaza. John had no membership interest in Oak Plaza until 2007, when he acquired a 1% membership interest. John was manager of Oak Plaza and Tower Oaks.

Tower Oaks's Operating Agreement vested its manager (John) with "full, exclusive and complete discretion, power, and authority to manage, control, administer, and operate Tower Oaks's business and affairs," except with regard to "major decisions." They only

could be made "by written instrument of members representing a majority of membership interests." A decision to "finance, refinance, sell, convey, assign, lease, exchange, or otherwise dispose of or encumber any [Tower Oaks] property" was a "major decision."

Since 1979, John had owned and operated another business, Sun Control Systems, Inc. ("Sun Control"), a Maryland corporation. Sun Control was a commercial subcontracting firm that "arranged for the fabrication and installation of window coverings." The Bank (and its predecessors in interest) extended loans and lines of credits to Sun Control throughout its operation. The Bank's chief lending officer was Richard Anderson, Jr. He and John were personal friends.

By 2001, Sun Control was owned by John (85%) and Thomas (15%). John was its president, Daniel was its vice president, and Thomas was its vice president of sales. Also in 2001, Tower Oaks began leasing office space to Sun Control ("the Lease").

On July 20, 2006, John, as manager of Tower Oaks, executed a Deed of Trust in favor of the Bank in the amount of $1 million ("the DOT"), secured by the Tower Oaks Property. Apparently, the DOT was to secure certain of Sun Control's loan obligations to the Bank. Granting the DOT was a major decision under the Tower Oaks Operating Agreement. John did not obtain majority membership interest consent before granting the DOT. Tower Oaks alleges "[u]pon information and belief" that the Bank had a copy of the Tower Oaks's Operating Agreement and knew that John was not authorized to grant the Bank the DOT.

The DOT was not recorded in the land records. David, Susan, and Richard first learned of its existence in 2011.

In 2007, Tower Oaks, with the consent of the majority members of Oak Plaza, took out a $9.1 million refinance loan from CWCapital LLC ("CW"), secured by the Tower Oaks Property ("the CW Loan"). The terms of the CW Loan prohibited Tower Oaks from further encumbering the Tower Oaks Property.

By late 2007, John was displaying symptoms of dementia. In January 2008, a neurologist at the Mayo Clinic diagnosed him with early on-set dementia. In April 2009, a neurologist at The Johns Hopkins Hospital evaluated John and found him to be "incompetent" as a result of dementia. By then, John's "dementia had progressed to the point that the dementia was plainly apparent to anyone who interacted with [him.]" In the summer of 2009, John was diagnosed with "frontotemporal dementia," a terminal illness.

Also around this time, Sun Control defaulted on its loan obligations to the Bank. In February 2009, the Bank retained Bean, Kinney & Korman, P.C., to represent it in matters related to Sun Control's loans and other loans to John. Corish was the Bean Kinney & Korman attorney assigned to represent the Bank in the Sun Control matter.

On March 3, 2009 and May 11, 2009, Corish met with John to discuss matters relating to Sun Control.

Also in May 2009, Sun Control entered into a Forbearance Agreement with the Bank to restructure its loans and lines of credit. Tower Oaks was one of the parties to the Forbearance Agreement. John executed the Forebearance Agreement on Tower Oaks's behalf. The Forbearance Agreement included provisions granting the Bank an interest in the proceeds from any sale of the Tower Oaks Property and granting the Bank a first priority security interest in and lien on 49% of Oak Plaza's membership interest in Tower Oaks. The Forbearance Agreement was drafted by Corish.

In a November 24, 2009 telephone conference call, David told Corish and Anderson that John was suffering from dementia.

In March 2010, the Bank engaged an outside consulting firm specializing in "work-out and turnaround management" to assist in the Sun Control matter. Stephen Wexler was the individual charged with the Sun Control work-out. Thomas "notified and regularly updated Wexler . . . regarding [John]'s physical and mental deterioration." In an April 29, 2010 "Special Asset Action Plan Report" Wexler prepared for the Bank regarding Sun Control, he stated that John's "currently diagnosed illnesses [would] result in [his] death over the next 6 months."

By May 27, 2010, Corish "knew that, at a minium, significant questions existed regarding [John]'s capacity to execute documents" and, as a result of this knowledge, advised the Bank that it might want to consider having John evaluated by a physician before entering

into any future agreements with him or the business entities he managed. The Bank did not follow this legal advice.

In June 2010, Sun Control and the Bank entered into a Second Amendment to the Forbearance Agreement ("the Second Amendment"). Tower Oaks also was a party to the Second Amendment, and John executed it on Tower Oaks's behalf. In the Second Amendment, Tower Oaks agreed to forgive more than $3 million in unpaid rent owed under the Lease, and to forgive future rent Sun Control would owe. Tower Oaks also agreed to increase its indebtedness under the DOT held by the Bank.

On December 3, 2012, in the Circuit Court for Montgomery County, Tower Oaks filed suit against the Bank and Corish. It alleged that they tortiously interfered with the contractual relations between Tower Oaks and Sun Control, and with the contractual relations between Tower Oaks and another business; converted Tower Oaks's funds and property; conspired to convert Tower Oaks's property; aided and abetted Sun Control to misappropriate Tower Oaks's property; and unjustly enriched themselves at Tower Oaks's expense.

The Bank moved to dismiss for failure to state a claim for which relief can be granted. Corish moved to dismiss or, in the alternative, for summary judgment. The court held a hearing. By agreement, Corish's motion was converted into a motion to dismiss. The court

granted the motions to dismiss with leave to amend. It gave Tower Oaks the right to conduct some limited discovery prior to filing its amended complaint.

On July 8, 2013, Tower Oaks filed its first amended complaint, setting forth additional formal allegations and adding a claim for a violation of the Virginia business conspiracy statute. We shall discuss the individual counts, *infra*.

The Bank again moved to dismiss and Corish again moved to dismiss or, in the alternative, for summary judgment. On August 30, 2013, the court held a hearing. After hearing argument, the court treated both motions as motions to dismiss and dismissed the first amended complaint with prejudice "for the reasons [the Bank and Corish] set forth in their papers with the exception [of Corish's argument that Tower Oaks was equitably estopped from bringing its action]" and "for the additional reason" that Tower Oaks had failed to show that the Bank and/or Corish owed it a legal duty.

On September 10, 2013, the court entered two orders granting the Bank's and Corish's motions to dismiss and entering judgment in favor of the Bank and Corish. This timely appeal followed.

DISCUSSION

We review *de novo* the circuit court's decision to grant a motion to dismiss for failure to state a claim for which relief can be granted. *Gasper v. Ruffin Hotel Corp. of Md., Inc.*, 183 Md. App. 211, 226 (2008). In so doing, we "assume the truth of all relevant and material

facts that are well pleaded and of all inferences which can be reasonably drawn therefrom." *Tri-County Unlimited, Inc. v. Kids First Swim School, Inc.*, 191 Md. App. 613, 619 (2010). "Dismissal is proper only when the alleged facts and permissible inferences, even if later proven to be true, would fail to afford relief to the plaintiff." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995).

- A -

Claims Against Corish
(Counts I, II, III, IV, VI, & VII)

Before the circuit court, Corish's primary argument was that the claims against him all were subject to dismissal because he was protected from liability by the "qualified privilege doctrine." That doctrine provides that, while an attorney may be liable to his or her client for the giving of negligent advice or other negligent acts or omissions, "[a]ttorneys have a qualified privilege that protects them from potential civil liability to their clients' litigation adversaries [or third parties], except where the attorneys act with actual malice, bad intent, or for the attorneys' personal benefit." *Havilah Real Prop. Servs., LLC v. Early*, 216 Md. App. 613, 633 (2014); *see also Fraidin v. Weitzman*, 93 Md. App. 168, 236 (1992)) (opining that "to impose liability on an attorney for giving advice regarding a matter of no personal interest to him or her would be a fundamentally erratical change in the law which would radically change the nature of attorney-client relationships") (quotation marks and

citation omitted). The privilege is qualified because it is defeasible by malice. *See Fraidin*, 93 Md. App. at 236 ("while an attorney is acting within the scope of his employment, he may not commit fraud or collusion, or a malicious or tortious act, even if doing so is for the benefit of the client"). An allegation that "the attorney . . . possess[ed] a desire to harm which [was] independent of the desire to protect his client" is sufficient to show the existence of actual malice. *Id*.

Tower Oaks asserts that, to the extent the court dismissed its claims against Corish on this basis,[1] the court erred, because Corish's "collusive conduct is beyond the qualified privilege." Specifically, it points to its allegations that Corish "met with [John] and had an opportunity to observe him and his appearance and demeanor"; that Corish did not communicate with Tower Oaks's legal counsel (David), but rather "communicated directly with [John]," whom "he believed to be Tower Oaks [sic] managing agent"; and that despite having knowledge that "significant questions existed regarding [John's] capacity to execute

[1]Tower Oaks did not address the issue of qualified privilege in its opening brief in this Court, purportedly because it was under the impression that the circuit court dismissed the first amended complaint based only on its ruling that Tower Oaks had failed to show the existence of a legal duty. The court's oral remarks and its orders do not so limit its ruling, however. In his brief, Corish argues that Tower Oaks has waived this argument and that we should affirm the dismissal of the first amended complaint against him on this basis. While Corish is correct that an appellate court "generally will not address an argument that an appellant raises for the first time in a reply brief," *State v. Jones*, 138 Md. App. 178, 230 (2001), we shall exercise our discretion to do so here because Corish fully briefed the issue and, accordingly, will not be prejudiced.

documents for Tower Oaks, Oak Plaza, or himself," and having advised the Bank as much, drafted the Forbearance Agreement for him to execute and "did not witness" his execution of those documents.

None of these allegations rise to the level of malice.[2] Tower Oaks alleged that, at all relevant times, Corish was representing the Bank with regard to its loan agreements with Sun Control and John. It does not allege that Corish had any personal motivation to harm Tower Oaks or to benefit Sun Control outside of his motivation to advocate zealously on behalf of his client. Having failed to allege any facts sufficient to defeat the privilege, we shall affirm the dismissal of the first amended complaint against Corish.

- B -

Tortious Interference with Contractual Relations
(Counts I and VI)

Tower Oaks alleged in the first amended complaint that the Bank (and Corish) tortiously interfered with two contracts between it and third parties: the Lease (Count I) and the CW Loan (Count VI). To state a claim for tortious interference with an existing contract, a plaintiff must plead facts sufficient to show five elements: "(1) existence of a contract

[2]Tower Oaks also alleges, in a conclusory fashion, that at all times, Corish and the Bank were acting with malice. It is well settled that an allegation of malicious conduct must be supported with facts tending to show malicious intent. *See, e.g., Elliott v. Kupferman*, 58 Md. App. 510, 528 (1984) ("Merely asserting that an act was done maliciously, or without just cause, or illegally, or with wanton disregard, or recklessly, or for improper motive does not suffice."). No such facts were alleged by Tower Oaks with respect to Corish.

between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional interference with that contract; (4) breach of that contract by the third party; and (5) resulting damages to the plaintiff." *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 466 (1991).

With respect to the Lease, Tower Oaks alleged that Sun Control was obligated to pay rent to it; that the Bank knew of the existence of the Lease; and that the Bank "purposely and maliciously interfered with the Lease and induced Sun Control to breach the Lease through intentional and improper acts." Specifically, the Bank"encourag[ed] Sun Control to not pay rent due to Tower Oaks" and "encourag[ed] [John], acting as Tower Oaks's agent, to forgive approximately $3 Million of rent owed by Sun Control to Tower Oaks" by entering into the Second Amendment. Moreover, it did so at a time when it knew or should have known that John was incompetent. As a result of these allegedly tortious acts, Sun Control "continuously breached the Lease by, *inter alia*, failing to pay rent due under the Lease." Tower Oaks sought judgment against the Bank for more than $75,000, punitive damages of $10 million, pre-judgment interest, post-judgment interest, attorneys' fees, and costs.

As it did below, the Bank argues that Count I is deficient for several reasons. First, in the Second Amendment, John, acting on behalf of Tower Oaks, agreed to forgive approximately $3 million in rent then owing from Sun Control to Tower Oaks under the Lease. The Bank asserts that this was a modification to the Lease, not a breach of the Lease,

and so Tower Oaks has failed to show that the Bank caused a breach of the Lease. Second, it asserts that Tower Oaks's allegation that Sun Control owed $3 million in unpaid rent to Tower Oaks *at the time it entered into* the Second Amendment shows that there had been a "serious, material, prohibitive" breach of the Lease prior to any of the allegedly tortious conduct by the Bank.

Tower Oaks responds that it alleged that the Forbearance Agreement and the Second Amendment thereto both are void and without legal effect due to John's incapacity. It follows that any purported modification of the Lease contained in those agreements also was without legal effect and cannot serve to defeat its claim for tortious interference against the Bank. Second, while it acknowledges that Sun Control was in breach of the Lease prior to the execution of the Second Amendment, it argues that "[e]ach successive monthly failure to pay rent was a separate and repetitive breach of the Lease."

We agree with the Bank that Tower Oaks failed to state a claim for tortious interference with the Lease. As Tower Oaks alleges, Sun Control had not paid any rent for many months and was $3,000,000 in arrears at the time that the Bank was alleged to have "encourag[ed]" it to breach the Lease. Sun Control was insolvent at that time, was being forced to pay Wexler's salary as he tried to make it solvent again, and had already entered into one Forbearance Agreement with the Bank in an attempt to restructure its loans. It defies logic to suggest that the Bank's conduct in "encouraging" John to enter into the

Second Amendment that included a clause purporting to forgive Sun Control's obligation to pay past-due rent *and* to forgive future rent to Tower Oaks was the proximate cause of Sun Control's breaching its continuing obligation to pay rent to Tower Oaks. *See Lyon v. Campbell*, 120 Md. App. 412, 431 (1998) ("To establish causation in a tortious interference action, the plaintiff must prove that the defendant's wrongful or unlawful conduct proximately caused the injury alleged."). The circuit court did not err in dismissing Count I of the first amended complaint.

With respect to the CW Loan, Tower Oaks alleged that the terms of the loan agreement precluded it from encumbering the Tower Oaks Property, modifying its lease agreements, or waiving or forgiving rents due under leases and that those acts all would be "events of default" under the CW Loan. It further alleged that when John executed the Second Amendment, the Bank knew or should have known that he was incompetent and knew or should have known of the existence of the CW Loan and its terms. Tower Oaks alleged that, despite this knowledge, the Bank exerted "undue influence" on John and "took advantage of his incompetence" to cause him to execute the Second Amendment, "thereby creating an event of default on the [CW] Loan." And it alleged that the Bank "knew that Tower Oaks was obligated to make payments to CW[] on the [CW] Loan and that Tower Oaks needed the Sun Control rent payments in order to make [those loan payments]." Tower Oaks asserted that, as a result of these allegedly tortious acts, it was unable to make payments

under the CW Loan and was "forced to file for bankruptcy protection." Tower Oaks sought the same damages and other relief under this count as under the other count for tortious interference.

The Bank responds, and we agree, that Tower Oaks failed to state a claim for tortious interference with the CW Loan because the alleged damages flowing from the Bank's tortious conduct – Tower Oaks's inability to make payments due on its loan – were incidental to and not proximately caused by the alleged tortious interference. While Tower Oaks alleges that numerous clauses in the Second Amendment amounted to "events of default" under the CW Loan, it does not allege that CW took any action as a result of these breaches. Rather, the only injury it alleges flows from the fact that Tower Oaks did not have the funds to make its loan payments to CW because Sun Control was not making its rent payments to Tower Oaks. Thus, for the same reasons discussed with regard to the Lease, Tower Oaks failed to adequately plead causation with respect to tortious interference with the CW Loan.

- C -

Conversion
(Count II)

"'A "conversion" is any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his right or inconsistent with it.'"*Allied Investment Corp. v. Jasen*, 354 Md. 547, 560 (1999) (quoting *Interstate Ins. Co. v. Logan*,

205 Md. 583, 588-89(1954)). At common law, there was no cause of action for conversion of intangible property. *Id*. Maryland now recognizes a claim for conversion of intangible property under the very limited circumstance where the intangible property interest is merged or incorporated in a document *and* that document has been converted. *Id*. at 562; *see also Brass Metal Prods., Inc. v. E-J Enters., Inc.*, 189 Md. App. 310, 340 (2009).

In the first amended complaint, Tower Oaks alleged that the Bank (and Corish) converted its property by "unlawfully and improperly accept[ing] payments from Sun Control, with knowledge that the source of funds from which the payments were being made was the funds that Sun Control had misappropriated from Tower Oaks" and by

> obtaining (1) an assignment of a percentage of the proceeds of a sale of the Tower Oaks Property, (2) a first priority security interest in and lien against 49% of the membership interest in Tower Oaks, (3) an extension of the [DOT] . . ., and (4) the forgiveness of past and future rent Sun Control owed to Tower Oaks.

The allegation that the Bank converted Tower Oaks's funds by accepting payment from Sun Control with knowledge that Sun Control had "misappropriated" those funds from Tower Oaks does not state a claim for conversion. The "funds" allegedly converted were, at that time, Sun Control's property. Sun Control voluntarily paid those funds to the Bank. The Bank's acceptance of payment from Sun Control on debt owed to it was not an unlawful exercise of dominion or control. Moreover, the "funds" in question were money, which is intangible, and it is well-established that a claim for conversion of money does not exist

unless the plaintiff alleges that the defendant "converted specific segregated or identifiable funds." *Jasen*, 354 Md. at 564. The first amended complaint makes no such allegation.

With respect to the latter four allegations, all of the property interests are intangible: an assignment of a percentage of proceeds, a security interest and a lien, an extension of the DOT, and a forgiveness of past and future rent. *See Neuman v. Travelers Indem. Co.*, 271 Md. 636, 643 (1974) (tangible property is property that has "physical substance" and all other property is intangible) (citation omitted). Tower Oaks has not alleged that the Bank unlawfully exercised dominion or control over a document in which any of these interests were merged and, as a result, has not stated a claim for conversion of an intangible property interest.

- D -

Civil Conspiracy & Aiding and Abetting
(Counts III & IV)

Tower Oaks's claims for civil conspiracy and aiding and abetting fail because both require the existence of a viable claim for some underlying tortious conduct. *See Lloyd v. General Motors Corp.*, 397 Md. 108, 154 (2007) (discussing liability for civil conspiracy); *Alleco, Inc. v. Harry & Jeannette Weinberg Foundation, Inc.*, 340 Md. 176, 201 (1995) (discussing civil aider and abettor liability). For the reasons we have already explained, Tower Oaks has failed to state a claim for any such conduct.

- E -

Unjust Enrichment
(Count V)

A claim for unjust enrichment requires a showing that the plaintiff conferred a benefit upon the defendant; that the defendant had knowledge of the benefit; and that the defendant retained the benefit under circumstances evidencing an inequity. *Dolan v. McQuaide*, 215 Md. App. 24, 36 (2013), *cert. denied*, 439 Md. 331 (2014). Tower Oaks alleged in the first amended complaint that the Bank accepted from Sun Control funds that Sun Control had "misappropriated" from Tower Oaks, *i.e.*, the unpaid rent, and that the Bank retained those funds with knowledge that the funds rightfully belonged to Tower Oaks. Plainly, these allegations do not state a claim for unjust enrichment because the benefit conferred on the defendant (the Bank) was not conferred by the plaintiff (Tower Oaks), but by a third party (Sun Control).

- F -

Violation of Virginia Business Conspiracy Statute
(Count V)

The final count of the first amended complaint alleged that the Bank (and Corish) violated the Virginia business conspiracy statute, codified at Va. Ann. Code, section 18.2-499 *et seq.* As relevant here, that statute prohibits two or more persons from conspiring to "willfully and maliciously" "injur[e] another in his . . . trade, business, or profession" or

"compel[] another to do or perform any act against his will, or prevent[] or hinder[] another from doing or performing any lawful act." Va. Ann. Code § 18.2-499A. Tower Oaks alleges that the Bank (and Corish) conspired with Sun Control to misappropriate Tower Oaks's "funds" by accepting payment of funds it knew to rightfully belong to Tower Oaks and by accepting interests in Tower Oaks's property. For the same reasons already discussed, the conduct alleged was neither tortious nor unlawful and therefore Tower Oaks failed to state a claim.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.