UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0700

September Term, 2015

JOHN POLING

v.

CAPLEASE, INC., et al.

Meredith,
Nazarian,
Arthur,

JJ.

Opinion by Nazarian, J.

Filed: May 3, 2016

The challenge in this appeal lies more in framing the question than in reaching the answer. John Poling, a preferred stockholder of CapLease, Inc. ("CapLease" or the "Company"), sued individually and on behalf of a putative class of Series B and C preferred stockholders ("Preferred Stockholders"), alleging that the terms of the Company's 2013 merger (the "Merger") with American Realty Capital Properties, Inc. ("ARCP") breached the Preferred Stockholders' contractual rights. Mr. Poling's theory of the case begins with the Articles Supplementary as the analytical starting point, and contends that the absence of any provision specifically defining the Preferred Stockholders' rights in a transaction like this Merger precluded the Company from exchanging the preferred shares to ARCP for cash. We agree with the Circuit Court for Baltimore City, though, that Mr. Poling has the analysis inverted: the Corporations and Associations Article of the Maryland Code authorized the Company to enter and close the Merger, and nothing in the Articles otherwise limited it. We affirm the circuit court's decision to grant the Company's motion to dismiss with prejudice.

I. BACKGROUND

Before the Merger, CapLease was a Maryland corporation that owned and managed single-tenant commercial properties and operated as a real estate investment trust ("REIT") for federal income tax purposes. On April 8, 2012, CapLease filed the Series B Articles Supplementary with the Maryland State Department of Assessments and Taxation. The original Series B Articles authorized CapLease to issue 2,300,000 shares of Series B preferred stock; an amendment authorized an additional one million Series B shares. On January 18, 2013, CapLease filed the Articles Supplementary authorizing 850,000 shares

of Series C preferred stock.[1] Pursuant to Section 3 of the Articles, Series B and C holders were entitled to receive annual dividends of 8.375% and 7.25%, respectively, as approved by the board of directors and permitted by the Company. The Articles further provided that the preferred stock could not be redeemed prior to April 19, 2017 and January 25, 2018,[2] respectively, after which the Company could redeem any or all preferred stock at its option. The Articles also contained certain protections for Preferred Stockholders. Among other things, Section 7 precluded the Company (or a successor) from issuing additional shares or materially altering the Preferred Stockholders' rights, preferences, privileges or voting power without a two-thirds vote of the existing Preferred Stockholders. And Section 9 allowed Preferred Stockholders to convert their shares into cash—$25.00 per share plus accumulated and unpaid dividends—in the event of a Change of Control, a defined term that encompassed transactions in which the acquiring entity was not publicly traded.

On May 28, 2013, CapLease and ARCP, a Maryland corporation that also operated as a REIT and invested in single-tenant commercial real estate properties, announced the Merger. As part of the consideration, ARCP agreed to pay $25.00 cash per share plus any accumulated and unpaid dividends for each outstanding share of preferred stock. The Merger closed on November 5, 2013, after which CapLease and its partner companies

[1] Because the relevant portions of the Series B and C Articles Supplementary are identical, we will refer to them collectively as the "Articles."

[2] The Articles set forth exceptions to the redemption rule, but those exceptions are irrelevant because no redemption occurred.

ceased to exist and its directors resigned from their positions. Because ARCP *was and is* publicly traded, the Merger did not qualify as a Change of Control that would allow Preferred Stockholders to convert shares pursuant to Section 9 (although, as it turns out, they received the same cash consideration in the Merger as they would have in a conversion).

On October 8, 2013, four months after the Merger was announced, Mr. Poling filed a complaint[3] (the "Complaint"), on behalf of himself and a putative class including the Series B and C Preferred Stockholders, in which he alleged that the cash-out transaction violated the Preferred Stockholder's contractual rights, as defined in the Articles. Mr. Poling also alleged that CapLease breached its fiduciary duty by entering into a merger that was unfair to the Preferred Stockholders, and that ARCP aided and abetted CapLease in its breach. Mr. Poling sought a declaratory judgment memorializing these allegations.

The defendants—CapLease and its directors, ARCP, and various Merger-related subsidiaries—moved to dismiss the Complaint, and Mr. Poling opposed the motion. The circuit court held a hearing on May 15, 2015, and granted the motion to dismiss in a written Memorandum and Order it issued shortly thereafter.[4] The circuit court found that Mr. Poling's allegations were "insufficient to state a claim," and dismissed the case with

[3] Mr. Poling did not seek to enjoin the Merger. CapLease noted in its appellate brief that, as of filing, no other Preferred Stockholder had filed suit.

[4] The Memorandum and Order are hand-dated two days before the motions hearing, but appear from the docket entries to have issued three days after, and neither party disputes the chronology of events.

prejudice, declining Mr. Poling's in-hearing request for leave to amend because "the essential basis of [Mr. Poling]'s claim is the provisions of the [Articles], whose application has been resolved as a matter of law." Mr. Poling filed a timely notice of appeal.

II. DISCUSSION

Mr. Poling's five appellate questions[5] really boil down to two: did the circuit court err in granting CapLease's motion to dismiss, and in doing so with prejudice? He maintains that CapLease was not entitled to enter into a merger that cashed out the Preferred Stockholders' shares; that the terms of this Merger violated the Preferred Stockholders'

[5] Mr. Poling states the Questions Presented in his brief as follows:

> 1. Did the circuit court err by holding that the conversion provision of Section 9 of the Articles Supplementary permitted the involuntary defeasance of the Series B and C Preferred Stockholders, even when Defendants conceded that the required prerequisite for Section 9's conversion provision did not occur?
>
> 2. Did the circuit court err by dismissing Plaintiff's breach of fiduciary duty claim?
>
> 3. Did the circuit court err by dismissing Plaintiff's claim for declaratory relief when the Complaint pled facts demonstrating that this matter was subject to resolution through the declaratory judgment statute?
>
> 4. Did the circuit court err by dismissing Plaintiff's aiding and abetting claim on the basis that Plaintiff had not properly alleged an underlying breach of fiduciary duty against CapLease's directors?
>
> 5. Did the circuit court err in not allowing the Plaintiff to file an amended complaint?

rights as defined in the Articles; and that by agreeing to the terms of the Merger, CapLease violated its fiduciary duty. Mr. Poling also contends that even if the court didn't err in dismissing the case, he and the putative class should have been permitted an opportunity to amend their Complaint. CapLease responds that Maryland corporate law permitted the Company to merge with ARCP and to exchange the Preferred Stock for cash as part of the consideration for the Merger, unless the Articles provided otherwise, which, CapLease says, they didn't.

A party may move to dismiss a complaint if the complaint fails to state a claim upon which relief can be granted. Md. Rule 2-322(b)(2). On review, we "must determine whether the [c]omplaint, *on its face*, discloses a legally sufficient cause of action." *Pittway Corp. v. Collins*, 409 Md. 218, 234 (2009) (emphasis in original). We presume that all well-pleaded facts are true and construe reasonable inferences in a light most favorable to the plaintiff. *Id.* Dismissal is only appropriate when the facts as alleged and reasonable inferences, if proven, would still not afford any relief to the plaintiff. *Litz v. Md. Dep't of Env't*, 434 Md. 623, 639 (2013).

A. CapLease Had The Authority To Exchange The Preferred Shares For Cash As Consideration For The Merger.

Mr. Poling phrases the question here as "whether the *[Articles] permitted* [CapLease] to involuntarily defease the Preferred Stockholders by converting their Series B and C shares to cash to effectuate the merger." (Emphasis added.) He claims that CapLease breached the Preferred Stockholders' contract with the Company—the Articles—by exchanging the preferred stock for cash. Citing the Articles and the

Prospectus,[6] he contends that the preferred stockholders' shares cannot be defeased, as he puts it, except under the "five very limited circumstances"[7] listed in the Articles. And since none of these five circumstances occurred in connection with this Merger, he argues that the preferred stockholders' interests in the preferred stock survived the Merger, and ARCP should have "assumed" the shares (along with the obligation to continue paying dividends).

His argument, though, proceeds from the analytically backward assumption that the Articles are the starting point for understanding the Company's rights and obligations vis-à-vis the Preferred Stockholders, and thus that the Company needs authority from the Articles in order to proceed with the Merger. We disagree. CapLease was a Maryland corporation governed by the Corporations and Associations Article of the Maryland Code ("CA"). And although preferred stock may have attributes of other instruments, such as a defined stream of dividends, at its core, it's still stock. *See Leviness v. Consolidated Gas Elec. Light & Power Co.*, 114 Md. 559, 566-67 (1911) ("The preferred stockholder, though he holds a lien by way of special security, is nevertheless a member of the corporation

[6] The Series B and Series C Prospectuses (there is one for each series, but like the Articles, the relevant portions are identical) provide potential investors with details about the terms and conditions of the Preferred Stock. Their function is to disclose the contents of the operative documents, *i.e.*, the Articles, and don't embody or create any rights of the Preferred Stockholders. Mr. Poling characterizes them essentially as annotations to the Articles, particularly the disclosure that "[t]he Series [B and C] preferred stock has no maturity date and will remain outstanding indefinitely unless redeemed by us or converted in connection with a Change of Control by the holders of Series [B or C] Preferred Stock." But the Preferred Stockholders' redemption and conversion rights are defined in the Articles, and we will address them below.

[7] These are listed at p. 11, n.11, and discussed in detail at pp. 11-13.

. . . He is expressly invested with all the incidents, rights, privileges, immunities and liabilities of a stockholder." (internal quotations and citations omitted)). Corporations owning capital stock may merge with other corporations, CA § 3-102(a), and the Code allows merging corporations to exchange their stock, including preferred stock, or convert it into any consideration, including money, as part of such a transaction. CA § 3-103.

The difference between common stock and preferred stock lies in preferred stock's preferential rights, which are defined by contract (in this case the Articles) and can include a broad range of terms and conditions. *See Scott v. B&O R.R. Co.*, 93 Md. 475, 497 (1901) (preferred stock "has about it no elements or rights other than those that are conferred upon it by the statute or contract to the authority of which it owes its existence"); *see also Md. Cas. Co. v. Blackstone Int'l Ltd.*, 442 Md. 685, 695 (2015) ("[T]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract." (quoting *Long v. State*, 371 Md. 72, 84 (2002))); *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 937 (Del. 1979) ("the rights of a preferred shareholder are least affected by rules of law and most dependent on the share contract" (internal quotations and citations omitted)). "Any rights, preferences and limitations of preferred stock that distinguish that stock from common stock must be expressly and clearly stated, as provided by statute. Therefore, these rights, preferences and limitations will not be presumed or implied." *Matulich v.*

Aegis Commc'ns Grp., Inc., 942 A.2d 596, 601 (Del. 2008) (internal quotations and citations omitted).[8]

CapLease's preferred stock entitled its holders to prospects its common stockholders didn't have, most notably a specified stream of dividends and the opportunity to redeem the shares for cash. The Articles also specified the Preferred Stockholders' rights under certain circumstances, such as a corporate liquidation or a Change in Control, a term defined in the Articles to encompass mergers where the acquirer is not publicly traded. That said, the Articles state, in Section 13, that "[t]he Series B Preferred Stock shall not have any preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications or terms or conditions of redemption other than expressly set forth in the Charter and these Series B Terms." Thus, the Articles themselves recognize their limitations—they define the Preferred Stockholders' rights, but only those rights delineated in the Articles distinguish the preferred stock from the common.

In the Complaint, Mr. Poling classified the transaction as a redemption by the Company. At the motions hearing in the circuit court, he recharacterized the transaction

[8] Maryland courts "deem decisions of the Delaware Supreme Court and Court of Chancery to be highly persuasive . . . ." *Kramer v. Liberty Prop. Tr.*, 408 Md. 1, 24-25 (2009) (noting similarities in Maryland's and Delaware's business law statutes, as well as Delaware courts' reputation for their expertise in matters of corporate law).

as a conversion.[9] But as those terms are defined in the Articles, it's neither. Whatever one calls it, we agree with the circuit court that nothing in the Articles forbade a cash-out merger and that CapLease had the authority to enter into and consummate this transaction.

Mr. Poling points primarily to Section 9 of the Articles, which allows Preferred Stockholders to convert their shares into cash if a carefully defined Change in Control[10] occurs:

> 9. Conversion. The shares of Series B Preferred Stock are not *convertible* into or exchangeable for any other property or securities of the Company, except as provided in Section 9.
>
> (a) Upon the occurrence of a Change of Control, *each holder of shares of Series B Preferred Stock shall have the right* . . . to convert some or all of the shares of Series B Preferred Stock held by such holder . . . into a number of Common Stock per share of Series B Preferred Stock to be converted . . . .
>
> * * *

[9] The Articles do limit CapLease's right of redemption, but the parties now agree that the transaction was not a redemption because CapLease did not acquire the preferred stock.

[10] A Change of Control, as defined in the Articles, Section 6(a), occurs when (i) there is a merger and (ii) neither the Company (CapLease) nor the surviving entity (ARCP) have a class of common securities listed on the NYSE or NASDAQ. ARCP is a publicly traded company on the NYSE, and so the parties agree that the Merger was not a Change of Control.

Many of the provisions in the Articles are not triggered until there is a Change of Control. As CapLease explains, such provisions, including Section 9, serve to "ensur[e] that, as the result of a particular type of transaction, preferred stockholders are not left holding preferred stock in a privately held company with no opportunity either to exercise voting rights or liquidate their holdings."

> (e) *In order to exercise the Change of Control Conversion Right, a holder of shares of Series B Preferred Stock shall be required to* deliver . . . the certificates representing the shares . . . .

(Emphasis added.) According to Mr. Poling, this provision represents the *only* instance in which preferred stock can be cashed out. He argues that the conversion rights conferred in Section 9 apply to both stockholders and the Company, and so both the Preferred Stockholders and the Company have the same rights and limitations. And he insists that because both parties agree a Change of Control did not result from the Merger, neither he nor CapLease had any ability to convert the preferred shares into cash.

CapLease responds that Section 9 creates a conversion right only in the *holders* of preferred stock, and the plain language supports this reading. CapLease points as well to the definition of "convertible," which indicates "[a] security (usually a bond or preferred stock) that may be exchanged by the owner for another security." (citing BLACK'S LAW DICTIONARY 1560 (10th ed. 2014). CapLease draws support from CA § 2-105(7), which permits a corporation's charter to state whether "any specified class or series of stock is convertible into shares of stock of one or more other classes or series and the terms and conditions of conversion," and from a Delaware case interpreting the phrase "each share of Series A Preferred Stock shall thereafter be convertible," to "grant[] the Preferred Stockholders the right, but does not impose the obligation to convert their preferred shares into a new security." (quoting *Winston v. Mandor*, 710 A.2d 835, 840-41 (Del. Ch. 1997). And furthermore, the Preferred Stockholders' conversion rights under Section 9 arise only if the Company has not elected to redeem the stock. All told, Section 9 allows a Preferred

Stockholder to convert shares under certain conditions, but it in no way limits CapLease's right to "convert" the shares to cash under different circumstances. We agree with the circuit court that "[Section 9] establishes a limitation upon the right of Preferred Stockholders to convert their stock . . .," and that this right, whatever its bounds, isn't triggered by this Merger.

Mr. Poling points as well to Sections 3, 4, 5, and 6 of the Articles, each of which, he claims, defines the limited circumstances under which Preferred Stockholders can be "defeased."[11] We agree with the Company, though, that in defining the rights and obligations they define, none of these provisions limits CapLease from taking any other action authorized by Maryland corporate law. If anything, the Articles' careful delineation

[11] In his brief, Mr. Poling frames this argument as follows:

> The [Articles] specifically set forth only five instances in which Preferred Stockholders may be defeased of their contractual rights:
>
> (i) On or after the redemption dates (i.e., April 19, 2017 for Series B shares and January 25, 2018 for Series C shares) (Section 5);
>
> (ii) To maintain REIT status for federal taxation purposes (Section 3);
>
> (iii) A liquidation (Section 4);
>
> (iv) A Special Optional Redemption (Section 6);
>
> (v) A Preferred Stockholder's right to choose a conversion of preferred stock into common stock (Section 9).

of the Preferred Stockholders' rights and CapLease's obligations bolsters our view that the Articles left CapLease free to close this Merger.

Section 3 establishes a preferential right to dividends: "Holders of Series B Preferred Stock shall be entitled to receive, when and as authorized by the Board of Directors and declared by the Company . . . cumulative preferential cash dividends at the rate of . . . ." Section 4 explains the stockholders' rights in the event of the Company's liquidation, dissolution or winding up (as Section 4 defines a liquidation, this Merger is not an event that triggers liquidation rights). Section 5 states that preferred stock may not be redeemed before a specified date unless necessary for the Company to maintain REIT status, and the stock is otherwise redeemable at the Company's option after the specified dates. The clause sets the redemption price at $25 per share plus accumulated and unpaid dividends. Section 6 provides CapLease with a "Special Option Redemption," under which CapLease may redeem some or all stock at the redemption price upon a Change of Control. Section 7 clarifies that preferred stockholders do "not have any voting rights, except as set forth" in that section. Nothing in these provisions supports Mr. Poling's views of the Company's rights vis-à-vis the Preferred Stockholders; the Articles themselves, read as a whole, reinforce the circuit court's decision and our agreement with it.

We agree with the circuit court as well that *Rauch v. RCA Corp.*, 861 F.2d 29 (2d Cir. 1988), is instructive. In that case, RCA merged with General Electric Company and converted preferred stock into the right to receive cash. *Id.* at 29-30. The stockholder claimed the transaction was an illegal redemption, but the court found it to be a permissible conversion. *Id.* at 31. As we have here, *Rauch* looked first to Delaware statutory corporate

law, which authorized mergers and the conversion of shares to cash to effectuate a merger. *See id.* at 30 (noting that a conversion to cash was "legally distinct" from a redemption of shares by the corporation). The court then examined the Preferred Stockholders' contract with RCA and found nothing expressly prohibiting a cash-out merger: "Nothing in RCA's [contract] indicated that the holders of Preferred Stock could initiate a redemption, nor was there provision for any specified event, such as the [merger], to trigger a redemption." *Id.* at 31. The circuit court here conducted its inquiry in the same manner as the *Rauch* court—statute first, then contract—and achieved the same result.

Rauch relied heavily on *Rothschild Int'l Corp. v. Liggett Grp.*, in which the Supreme Court of Delaware explained that "where a merger of corporations is permitted by law, a shareholder's preferential rights are subject to defeasance. Stockholders are charged with knowledge of this possibility at the time they acquire their shares." 474 A.2d 133, 136-37 (Del. 1984) (minority shares may be eliminated by merger). Just as the circuit court did here, *Rauch* held that "because the merger [] was permitted by law, [the company] legitimately chose to structure their transaction in the most effective way to achieve the desired corporate reorganization, and were subject only to a similar duty to deal fairly." *Rauch*, 861 F.2d at 32.

When analyzed against the correct legal backdrop, Mr. Poling's breach of contract claim could not survive CapLease's motion to dismiss. "[A] complaint alleging a breach of contract 'must of necessity allege with certainty and definiteness *facts* showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by defendant.'" *RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 655 (2010) (quoting

Cont'l Masonry Co. v. Verdel Constr. Co., 279 Md. 476, 480 (1977) (emphasis in original)). As we've explained, it doesn't matter that the Merger did not fit the criteria specified in the Articles for redemption or conversion, and he's wrong that the absence of these "defeasance" conditions means the Company lacked authority to exchange the preferred stock for cash as a condition of the Merger. The authority to merge on the agreed terms, including the exchange of preferred shares for cash, flowed to the Company from the Code, and nothing in the Articles limited it.

B. Mr. Poling's Other Claims Fail For The Same Reasons.

In addition to his breach of contract claim, Mr. Poling alleged that the terms of the Merger breached CapLease's fiduciary duties to the Preferred Stockholders, that ARCP aided and abetted CapLease's breaches, and that the court should enter a declaratory judgment in his favor. On appeal, he argues that the circuit court erred in dismissing those counts along with the principal breach of contract allegation. CapLease contends that these claims were properly dismissed because their survival depended on the existence of the breach of contract claim, and we agree.

In Count II, Mr. Poling complains that CapLease "attempt[ed] to unfairly deprive [Mr. Poling] and other members of the Class of the true value of their investment in CapLease." On appeal, Mr. Poling offers this as an alternative to his breach of contract theory, that if "this Court finds that the [Articles] do not expressly cover the involuntary defeasance that occurred here, then the directors were obligated to treat the Preferred Stockholders fairly." But this claim rests on the same fundamental assumption we rejected in connection with the breach of contract claim, *i.e.*, that CapLease acted without "loyalty,

good faith, [and] candor" by "fail[ing] to disclose [to Mr. Poling] that the Merger Agreement and the [Articles] were in conflict with respect to terms regarding the Preferred Stock."

Moreover, Mr. Poling's notion of bad faith flows entirely from allegations that are too general to fulfill his pleading obligations. *See RRC*, 413 Md. at 655 (requiring "certainty and definiteness" in the complaint). He complains that on the last trading day before the Merger announcement, the Series B and C Preferred Stock were trading at $27.30 and $27.84 per share, respectively. When the Merger and the payment of $25.00 per share plus dividends were announced, the market value of the preferred stock value decreased to $25.80 and $25.45, respectively, while the value of CapLease's common stock rose by 20.4%. Mr. Poling translates this to mean that CapLease's directors violated their fiduciary duty "to treat all of their shareholders fairly," and "the market's divergent reaction demonstrated that the $25.00 offered to the Preferred Stockholders was patently unfair, given the trading price of the Preferred Stock." But that's where the Complaint started and ended: a bold allegation that the transaction was "unfair." We agree with the circuit court that Mr. Poling had a "duty to plead specific facts, and not merely conclusory allegations," and his failure to do so justified dismissal of his fiduciary duty claim.

Count III, the aiding and abetting claim fails for the same reason. Mr. Poling alleged that "[a]s a direct participant and beneficiary of the Merger, [ARCP] knew of and actively participated in the breaches of fiduciary duties and breach of contract alleged herein." But a prerequisite to aiding and abetting liability is, of course, a violation of a fiduciary duty

by a principal[12] to which the aiding and abetting claim can attach. *See Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 201 (1995) ("[T]ort liability for aiding and abetting can only exist where someone has committed [an] actual tort."); *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 91 (2015) (aiding and abetting requires the complainant to prove that the defendant knowingly participated in the breach).

And the circuit court properly dismissed the claim for declaratory relief, Count IV, as well. Mr. Poling asked the court to declare that

> (a) the terms of the Merger Agreement with respect to the Preferred Stock violate the terms of the [Articles] and are therefore unlawful unenforceable; (b) the Preferred Stock should not be redeemed pursuant to the terms of the Merger Agreement; (c) [CapLease has] committed a gross abuse of trust and ha[s] breached their fiduciary duties to [Mr. Poling] and the Class and/or have aided and abetted such breaches; (d) the Merger Agreement was entered into in breach of [CapLease]'s fiduciary duties and is therefore unlawful and unenforceable; and (e) the Merger should be enjoined.

Although dismissal of a declaratory judgment action is rarely appropriate, *120 West Fayette St., LLLP v. Mayor & City Council*, 413 Md. 309, 355 (2010), the circuit court should do so when there is no legal remedy available to the complainant, *see Howard v. Montgomery Mut. Ins. Co.*, 145 Md. App. 549, 555 (2002), or "where a declaration would not serve a useful purpose or terminate a controversy," *Hamilton v. McAuliffe*, 277 Md. 336, 340 (1976).

[12] Had we found a breach of the Articles, the aiding and abetting claim would still require further pleading because a "[m]ere failure to perform a contractual duty, without more, is not an actionable tort." *Wilmington Tr. Co. v. Clark*, 289 Md. 313, 329 (1981).

Here, the circuit court concluded, and we agree, that Mr. Poling is not entitled to declaratory relief, and CapLease never sought any:

> "[T]he applicable legal principles do not support [Mr. Poling]'s claims that the challenged transaction is invalid. That holding concludes the controversy between the parties concerning the legal effect of the transaction. Affording [Mr. Poling] an unfavorable declaration would serve no useful purpose, and [CapLease] ha[s] not requested such a declaration."

The circuit court's decision is consistent with our holding in *Polakoff v. Hampton* that a court may exercise its discretion to refuse to make a declaration if such declaration would not serve a useful purpose. 148 Md. App. 13, 27 (2002); *see also Fertitta v. Brown*, 252 Md. 594, 599 (1969) ("Once a controversy has been finally adjudicated by a court with jurisdiction of the subject matter and the parties, the controversy is no longer alive and therefore is not the proper subject for a declaratory judgment action . . . .").

C. The Circuit Court Did Not Abuse Its Discretion By Dismissing The Complaint With Prejudice.

Finally, Mr. Poling complains that he was not afforded leave to amend his complaint to cure the deficiencies that caused the dismissal. Leave to amend ordinarily is granted liberally, *RRC*, 413 Md. at 673, although "an amendment should not be allowed if it would result in prejudice to the opposing party or undue delay, such as where amendment would be futile because the claim is flawed irreparably." *Id.* at 673-74. And save for an oral request at the tail end of the motions hearing, Mr. Poling never filed a motion for leave to amend the Complaint or made any sort of proffer about what sort of allegations he might offer in order to resurrect these claims. Mr. Poling's theory of the case evolved throughout oral argument on the motion to dismiss. He conceded in mid-stream, for example, that the

Merger was not actually a redemption, and rephrased his argument to characterize it as an illegal conversion. The circuit court allowed Mr. Poling to argue a number of theories that, as counsel acknowledged, had not been pled, then took the time in the Memorandum to consider them, at least at the level of detail the hearing presentation permitted.

"A trial court has discretion to dismiss a claim with prejudice if it fails to state a claim that could afford relief." *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 727 (2007). In dismissing this case with prejudice, the circuit court explained that "because the essential basis of plaintiff's claim is the provisions of the [Articles], whose application has been resolved as a matter of law, there are no additional facts that plaintiff could allege that would rectify the deficiencies in the claims asserted," and Mr. Poling never proffered any facts that, if true, could change the outcome. The circuit court was not obliged to anticipate the possibility that Mr. Poling might have some basis on which to amend, then grant that relief without a motion seeking leave in the first place. On this record, we see no error in the circuit court's decision to dismiss with prejudice.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.