

Circuit Court for Montgomery County  
Case No. 411282-V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2919

September Term, 2018

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ROBERT J. MULLEN, JR.

v.

GARY W. DAVIS

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Meredith,  
Berger,  
Nazarian,

JJ.

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Opinion by Berger, J.

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Filed: July 1, 2020

\*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.

This appeal arises out of a contract dispute between Robert J. Mullen, Jr. (“Mullen”), appellant, and Gary W. Davis (“Davis”), appellee. On November 3, 2015, Mullen filed a complaint against Davis in the Circuit Court for Montgomery County alleging breach of contract, conversion, fraud, and intentional misrepresentation, and requesting an accounting. Davis moved to dismiss the counts for conversion, fraud, and intentional misrepresentation. He also filed a counterclaim alleging fraud in the inducement, breach of contract, breach of express warranty, and constructive fraud. Davis’s motion to dismiss the claims of conversion, fraud, and intentional misrepresentation was granted by consent on July 11, 2017.

A bench trial was held on June 7, 2018. At the close of the plaintiff’s case, Davis requested judgment be entered in his favor. After the motion for judgment was denied, Mullen sought to reopen his case, and the court granted his request. Mullen called Davis as a witness. After Mullen rested, Davis again requested that judgment be entered in his favor and the court again denied his request. The court entered an interim order directing Davis to provide an accounting, took the breach of contract claim under advisement, and continued the trial to August 17, 2018.

On August 17, 2018, the court vacated the order requiring Davis to provide an accounting and entered judgment in favor of Davis on all counts of the complaint. As to the counter-claim, the court found that the evidence was insufficient to establish the claims of fraud, breach of contract, breach of express warranty, and constructive fraud, and entered judgment in favor of Mullen on all counts. Mullen filed a motion to alter or amend the judgment, which was denied. This timely appeal followed.

## **QUESTIONS PRESENTED**

Appellant presents two questions for our consideration, which we have rephrased as follows:

- I. Did the circuit court err in reversing its decision to order an accounting?
- II. Did the circuit court err in allowing appellees to make an oral motion to dismiss?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

## **FACTUAL AND PROCEDURAL BACKGROUND**

At some point in time, the dates of which were not disclosed at trial, Mullen, a certified public accountant, was the “owner” and a managing member of RJM Group, LLC (“RJM Group”). On December 17, 2013, he and Davis entered into an “Agreement to Buy and Sell” (“the Agreement”), the purpose of which was to sell to Davis a list of RJM Group’s accounting and tax clients. The specific clients were identified in Exhibit A to the Agreement. Davis agreed to pay Mullen as follows:

Thirty five thousand dollars (\$35,000.00) payable by check at closing and a dollar sum equal to forty percent (40%) of the gross fees billed and ultimately collected by Gary W. Davis, CPA during the calendar year 2014 from all accounting and tax clients of RJM Group, LLC enumerated in Exhibit A attached hereto and incorporated by reference herein for all purposes, payable June 30, 2014 for payments received to date, and on December 31, 2014 for payments received to date; and twenty five percent (25%) of the gross fees billed and ultimately collected by Gary W. Davis, CPA during the calendar year 2015 payable June 30, 2015 for payments received to date, and December 31, 2015 for payments received to date. Any other payments received in after that date that were billed during 2014 or 2015 will be paid the applicable percentage to RJ Mullen within 30 days of receipt of such payments.

There is no dispute that Davis paid the initial payment of \$35,000, that he made some additional payments in 2014, and that he ceased making payments at the end of July 2014. Mullen asserted, based upon information and belief, that Davis received payments from RJM Group clients during 2014 and 2015, but refused to make payments as required under the Agreement. Mullen also asserted that despite reasonable notice “of his intention to inspect records,” Davis failed to make ledgers, billing, and receipt records available to him pursuant to the Agreement.

In his counterclaim, Davis asserted that Mullen made several representations regarding the client list including the amount billed to those clients as of November 2013, the anticipated billings for those clients in 2014, the amount of add-on services anticipated for those clients in 2014, and an amount identified as “Total Probable 2014” billings for those clients. According to Davis, Mullen represented that the basic billings for 2014 were \$106,450, and that there was “another \$105,750 in probable add-on billing[s].” Those representations were critical to Davis’s agreement to purchase the client list. Davis also claimed that Mullen “materially misrepresented the amounts” he would be able to bill the clients on the list, failed to introduce him to some clients, and failed to utilize his best efforts to transition the clients.

The case proceeded to trial without either party engaging in any formal discovery. At trial, Mullen testified that he assisted Davis in taking over the assigned accounts during 2014 by setting up lunches and making introductions. According to Mullen, of the forty-one clients listed on Exhibit A to the Agreement, only 4 did not transfer over to Davis.

Mullen acknowledged that he had represented to Davis that he could earn \$30,000 from work for one particular client, Mr. Walde,<sup>1</sup> based on billings of \$25,000 the year before. Mullen asserted that he could not dispute Davis's assertion that he earned significantly less than \$30,000 because Davis never provided an accounting as required by the Agreement.

On July 2, 2014, Mullen and Davis attended a meeting at Mr. Walde's office during which Mr. Walde gave Mullen a "group of checks." After the meeting, Mullen pointed out that Davis had not provided the accounting that was due on June 30, 2014, and had not made the payment due under the Agreement. The men agreed that Mullen would keep four of the checks which totaled \$4,555.50. The checks had been made payable to the RJM Group. Mullen credited the amount he received to the amount Davis owed him. Thereafter, Davis still did not provide an accounting, so Mullen stopped assisting him with matters pertaining to the clients that were the subject of the Agreement.

At the conclusion of Mullen's testimony at trial, he rested. Davis moved for judgment in his favor. Davis argued that Mullen was not the real party in interest because the Agreement had been entered into by the RJM Group and not Mullen individually. Davis pointed out that Mullen signed the Agreement "RJ Mullen, managing member." Davis also argued that he was entitled to judgment in his favor because Mullen failed to produce any evidence of damages.

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<sup>1</sup> The record contains various spellings for Mr. Walde's name, but for consistency, we shall use this spelling throughout.

Mullen countered that the first paragraph of the Agreement identified the parties as Davis and Mullen, individually and in his capacity as the owner of the RJM Group. The first paragraph of the Agreement provided, in relevant part:

This agreement is made in Bethesda, Maryland as of December 17, 2013 by and between RJ Mullen, individually in his capacity as owner of RJM Group, LLC hereinafter referred to as *Seller*, and Gary W. Davis, and [sic] individual hereinafter referred to as *Buyer*.

Mullen further argued that he signed the Agreement as “RJ Mullen, managing member,” but did not indicate the name of an entity. According to Mullen, without the name of an entity, Mullen’s addition of the words “managing member” had “no meaning.”

When questioned by the trial judge about the lack of evidence of damages, counsel for Mullen responded, “[w]ell, that’s why we’ve asked for the accounting.” Counsel argued that Mullen could not establish damages without an accounting. At that point, counsel asked the court to allow him to reopen the case for the purpose of calling Davis “as on cross.” Over objection, the court permitted him to do so.

Davis testified that his gross revenues for 2014 were “roughly \$50,000,” and that for 2015 they were “[r]oughly \$60,000.” Davis acknowledged that the terms of the Agreement required him to pay Mullen forty percent of the \$50,000 in 2014, and twenty-five percent of the \$60,000 in 2015, but he did not because he “felt there was [sic] misrepresentations of what was received and what was sold.” Davis claimed he received fifty percent less than what Mullen represented he would deliver and that his projections were inaccurate. Davis advised Mullen that he was earning less than anticipated and informed him in “various emails” what he had billed and received. Davis agreed with

Mullen that there were four individual clients who did not transfer over to him, but claimed that, in addition, ten out of thirty-five entities, did not transfer to him. Davis claimed he attended every lunch meeting that he was invited to and that he was unaware of any service a client requested that he did not provide. He had access to electronic copies of certain documents, but he did not have access to Mullen's electronic record-keeping system.

At the conclusion of Davis's testimony, Mullen rested. Davis again sought judgment in his favor on the grounds that Mullen was not the real party in interest and that Mullen failed to produce evidence of damages. Davis also argued that an accounting was not a proper remedy because Mullen could have obtained the documents and information necessary to establish damages through the discovery process, but failed to do so. The court denied Davis's motion for judgment.

Davis then testified on his own behalf. In entering the Agreement, he relied on Mullen's representations regarding the value of the practice and the anticipated billings. He identified several clients that Mullen did not introduce to him and from whom he did not get any work. He claimed that Mullen failed to attend a meeting with Mr. Walde and asserted that the ten entities he never met with constituted about twenty-five percent of the anticipated billings. He also identified one of Mr. Walde's companies that was sold prior to the time he purchased the client list from Mullen. According to Davis, he was unable to reach out to the clients listed on Exhibit A to the Agreement because Mullen had provided only the clients' prior tax returns, not the clients' contact information, and he had to go through Mullen to reach the clients. As for clients that he had access to, Davis testified that he retained all of them. Davis was aware that his actual billings might not match what

was anticipated, but he had anticipated only “minor changes[.]” Davis claimed that overall, he earned about fifty percent of what he had anticipated.

At the close of the evidence, the trial court granted Mullen’s request for an accounting of work performed in 2014 and 2015. The court took under advisement the breach of contract claim and continued the trial to August 17, 2018. Thereafter, Davis provided an accounting.

When the trial resumed on August 17, Mullen testified in support of his claim for breach of contract. According to Mullen, under the terms of the Agreement, Davis owed him a total of \$39,755 for work billed in 2014 and 2015. He calculated that figure using the amount Davis billed to Mullen’s former clients. Mullen claimed that in 2014, Davis billed clients \$57,825, and he calculated that forty percent of that amount was \$23,130. In 2015, Davis billed \$66,500, and twenty-five percent of that amount was \$16,625. In addition, Mullen claimed that Davis collected from Mr. Walde 3 checks totaling \$2,200, all of which should have been paid to him.

Davis moved for judgment in his favor on the breach of contract claim. He again argued that Mullen was not the real party in interest. He maintained that under Md. Rule 2-201<sup>2</sup>, the action should have been prosecuted in the name of the real party in interest, which was the RJM Group, because the Agreement was signed by Mullen in his capacity

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<sup>2</sup> Maryland Rule 2-201 provides that, with some limited exceptions, “[e]very action shall be prosecuted in the name of the real party in interest[.]” It further provides that “[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. The joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”



as a managing member of the LLC, the assets that were purchased belonged to the LLC, and there was no evidence to justify Mullen bringing the case in his individual capacity. Davis asked the court to reconsider its prior decision to permit Mullen to reopen his case for the purpose of questioning Davis and presenting evidence of damages. The trial court denied the request to reconsider its prior order stating that it had the discretion to permit Mullen to reopen his case and did so.

Davis also asked the court to vacate its order granting Mullen’s request for an accounting. Davis asserted that the court showed partiality in favor of Mullen, and against him, when it allowed Mullen to reopen his case for the purpose of establishing damages. Davis pointed out that he was present in the courtroom during the trial and that Mullen should have called him as a witness in his case-in-chief. Davis argued that Mullen bore the burden of showing the necessity of an accounting, which is an equitable remedy, when an adequate legal remedy was available. Specifically, Davis argued that because Mullen failed to propound any discovery requests or take any depositions in the instant case, he was not entitled to pursue the equitable remedy of accounting.

Mullen countered that the Agreement was ambiguous. He noted that initially it referenced Mullen individually and in his capacity as a manager of RJM Group, but later referenced Mullen individually and referred to him as “R.J. Mullen, CPA.” Mullen claimed that his signature “as managing member” was “simply incorrect,” and that “there’s enough reference here to Mr. Mullen as an individual to make it clear that Mr. Mullen was the litigant, not the LLC.”

The trial court vacated its prior order granting Mullen’s request for an accounting. The court determined that, in light of its decision, it did not have the ability to consider any of the testimony offered on the second day of trial that was the result of information obtained from the accounting provided by Davis. The court concluded that Mullen failed to establish damages. The court entered judgment in favor of Davis on Mullen’s complaint. As to the counter-claim, the court found that the evidence was insufficient to establish the claims for fraud, breach of contract, breach of express warranty, and constructive fraud, and entered judgment in favor of Mullen on all counts.

### **STANDARD OF REVIEW**

As this case was tried without a jury, we “will review the case on both the law and the evidence.” Md. Rule 8-131(c). We “will not set aside the judgment of the trial court on the evidence unless clearly erroneous and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” *Id.* We must consider evidence that is produced at the trial ““in a light most favorable to the prevailing party[.]”” *Estate of Zimmerman v. Blatter*, 458 Md. 698, 717-18 (2018) (quoting *Bottini v. Dep’t of Fin.*, 450 Md. 177, 187 (2016)). “The clearly erroneous standard does not apply to the circuit court’s legal conclusions, however, to which we accord no deference and which we review to determine whether they are legally correct.” *Turner v. Bouchard*, 202 Md. App. 428, 442 (2011) (quoting *Cattail Assocs. v. Sass*, 170 Md. App. 474, 486 (2006) (quotations omitted)). *Accord Kunda v. Morse*, 229 Md. App. 295, 303 (2016) (we review the trial court’s application of the law to the facts under a *de novo* standard of review).

## DISCUSSION

### I.

Mullen contends that, in the interest of “fairness and justice,” we should “reconsider” the trial court’s decision to vacate its order granting an accounting. He asserts that the Agreement required an annual accounting and that he relied on the trial court’s original ruling “to obtain the long-awaited accounting, which . . . provided the documentary evidence for his claim.” He also asserts that the trial court “did not offer [him] any opportunity to provide additional evidence in support of his claim or the opportunity to provide legal authority in support of his position.” Notwithstanding the trial court’s decision, Mullen maintains that he provided proof of damages because Davis testified about the amounts he earned in 2014 and 2015. Mullen asserts that he “was prepared to move into evidence the result of the accounting, made by [Davis], which showed the evidence of the damages to which [he] was entitled, until the [trial court] vacated its order and declined to admit the result of the accounting into evidence.” We are not persuaded.

We have long acknowledged that a circuit court judge “‘is free at any time during the trial to reconsider any prior ruling in the case, whether made by him [or her] or by another judge.’” *See Placido v. Citizens Bank & Trust Co. of Maryland*, 38 Md. App. 33, 45 (1977) (quoting *Driver v. Parke-Davis Co.*, 29 Md. App. 354, 362 (1975)). We review a trial court’s ruling on a motion for reconsideration under the highly deferential abuse of discretion standard. *Wilson-X v. Dep’t of Human Res.*, 403 Md. 667, 674-75 (2008). An abuse of discretion occurs when “no reasonable person would take the view adopted by the court, ‘or when the court acts without reference to any guiding rules or principles.’” *Sydnor*

*v. Hathaway*, 228 Md. App. 691, 708 (2016) (quoting *Kona Props., LLC v. W.D.B. Corp.*, 224 Md. App. 517, 547 (2015)). “Thus, an abuse of discretion should only be found in the extraordinary, exceptional, or most egregious case.” *Wilson v. John Crane, Inc.*, 385 Md. 185, 199 (2005).

On the second day of trial, the court considered Davis’s renewed argument against the grant of an accounting. Davis argued that Maryland law did not permit use of an equitable remedy, such as an accounting, when an adequate remedy at law was available, specifically, in the instant case, through use of the discovery process. In reaching her decision, the trial judge specifically considered *P.V. Properties, Inc. v. Rock Creek Village Associates Ltd.*, 77 Md. App. 77 (1988), in which we recognized that “[t]he general rule is that a suit in equity for an accounting may be maintained when the remedies at law are inadequate.” *Id.* at 89 (citing *Nagel v. Todd*, 185 Md. 512 (1946)). We have recognized that although an equitable claim for an accounting “once served a necessary discovery function, that function has been superseded by modern rules of discovery.” *Alternatives Unlimited, Inc. v. New Baltimore City Bd. of School Com’rs*, 155 Md. App. 415, 510 (2004). Certainly, Mullen was free to use the discovery process to obtain information pertaining to Davis’s revenues from the subject clients to establish the damages he allegedly suffered as a result of Davis’s failure to pay him in accordance with the terms of the Agreement. This he failed to do. The trial judge was free to consider Davis’s argument and the case law he referenced and vacate her prior interim order granting the accounting. We find no abuse of discretion in the trial court’s decision.

Nor do we find any merit in Mullen’s argument that he was denied an opportunity to provide additional evidence or legal authority in support of his position. At the time the trial judge heard argument on Davis’s request to vacate the court’s order granting an accounting, both parties had rested and the evidence was closed. After counsel for Davis made his argument in support of vacating the order granting the accounting, the trial judge gave counsel for Mullen an opportunity to address the court. At no time did Mullen provide any argument or case law in support of the proposition that the court could grant equitable relief when an adequate remedy at law was available, nor did he request additional time to do so. For these reasons, we shall affirm the trial court’s decision to vacate its interim order and deny Mullen’s request for an accounting.

## II.

Mullen contends that the trial court erred in allowing Davis to make an oral motion to dismiss based on (1) the alleged failure of Mullen to sue in the name of the correct party and (2) the court’s decision to grant Mullen’s request for an accounting. Mullen argues that he had no opportunity to “respond in point to contrary case law[,]” and that the motion to dismiss should have been brought earlier in the case so that he “could have cited case [sic] that had been definitely resolved by the Court of Appeal [sic] or the Court of Special Appeals.” This contention is without merit.

Preliminarily, we note that Davis did not make an oral motion to dismiss. Rather, at the close of Mullen’s case, and at the close of the evidence, he requested judgment in his favor pursuant to Maryland Rule 2-519, which provides, in relevant part:

(a) **Generally.** A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

(b) **Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

At the August 17, 2018 hearing, after Mullen testified on the issue of damages, he rested. At that point, Davis renewed his motion for judgment on all counts, and the trial court granted judgment in favor of Davis on all counts pursuant to Md. Rule 2-519. As we have already noted, we review the trial court's decision to grant judgment in Davis's favor in accordance with Maryland Rule 8-131(c). We "will review the case on both the law and the evidence." Md. Rule 8-131(c). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* The trial court's application of the law to the facts, however, we review *de novo*. *Kunda v. Morse*, 229 Md. App. 295, 303 (2016).

Mullen argues that he was entitled to an accounting because Davis was under an obligation to pay money to him based upon facts and records known and kept exclusively

by Davis and because there was a confidential or fiduciary relationship between him and Davis. Mullen further asserts that even if we affirm the circuit court’s decision to vacate the order requiring an accounting, “the financial information contained in the accounting still remains good evidence.” Mullen argues that the accounting received from Davis constituted a statement of a party opponent and was, therefore, admissible under Md. Rule 5-803(a)(1)<sup>3</sup>. He also asserts that “there is simply no reason to ignore the evidence once Davis finally produced it. According to Mullen, if the trial court had indicated prior to the “close of trial” that it might not accept the accounting, he “might have had avenues to produce alternative evidence” such as calling his former clients. Finally, Mullen argues that Davis’s testimony about his earnings was sufficient to establish damages. We are not persuaded.

On the first day of trial, Davis testified that his gross revenues for 2014 were “roughly \$50,000,” and that his gross revenues for 2015 were “[r]oughly \$60,000.” There was no evidence of the amount Davis was able to bill and collect from former clients of the RJM Group in any year. Significantly, there was no specific evidence of gross revenues for 2014 or 2015 except for the rough estimates, and there was no evidence that the rough

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<sup>3</sup> Maryland Rule 5-803(a)(1) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) Statement by party-opponent. A Statement that is offered against a party and is:

(1) The party’s own statement, in either an individual or representative capacity[.]

estimates represented income derived solely from former clients of the RJM Group. For these reasons, the trial court did not err in granting judgment in favor of Davis on the ground that Mullen failed to produce evidence of damages.

Mullen’s contention that he was entitled to an accounting under the Agreement, does not address the issue of the equitable remedy of accounting and the well established law we have already mentioned, that, in general, a suit in equity for an accounting may not be maintained when there is an adequate remedy at law. *See P.V. Properties*, 77 Md. App. at 89. Mullen made the choice not to avail himself of the discovery process to obtain the documentation he needed to establish damages in his breach of contract action. We also reject Mullen’s argument that the financial information obtained through the accounting provided by Davis pursuant to the trial court’s interim order was “still good evidence” and that it was admissible as the statement of a party opponent. Mullen never sought to admit the evidence under that exception to the rule against hearsay, so he cannot be heard to complain about that issue here. Md. Rule 8-131(a) (ordinarily, we will not decide any “issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]”). As to Mullen’s assertion that the trial judge should have given him some indication that she might not accept the accounting provided by Davis, we simply note that Mullen chose not to avail himself of the discovery process. He had an opportunity to present his case. It was his choice to rely solely on Davis’s testimony to establish damages for the alleged breach of contract. As we have already noted, there was no specific evidence of gross revenues for 2014 or 2015, except for the rough estimates, and there was no evidence that the rough estimates represented income derived solely from former clients



of the RJM Group. For all these reasons, we shall affirm the trial court's decision to grant judgment in favor of Davis.<sup>4</sup>

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

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<sup>4</sup>Davis offers an alternative basis for affirming the trial court's judgment. He argues that he was entitled to judgment in his favor on all counts because Mullen failed to sue in the name of RJM Group, the real party in interest. Although the trial court did not make a specific finding that Mullen, individually, was a party to the Agreement, it clearly rejected Davis's argument. In light of our decision to affirm the judgments of the circuit court on the grounds discussed *supra*, we need not address this issue as an alternative basis for affirming the trial court's judgments.