

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14460
Non-Argument Calendar

D.C. Docket No. 9:19-cv-80291-DMM

ROBIN GUSTIN,
CAPITAL SECURITY SYSTEMS INC.,

Plaintiffs-Appellants,

versus

BRUCE NICOLL,
NCR Corporation Solutions Architect, et al.,

Defendants,

NCR CORPORATION,
PARASCRIPPT LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(August 26, 2020)

Before WILLIAM PRYOR, Chief Judge, WILSON and BRANCH, Circuit Judges.

PER CURIAM:

Robin Gustin and her company, Capital Security Systems Incorporated, appeal the dismissal of their fifth amended complaint against NCR Corporation and Parascript LLC. Gustin complained that NCR and Parascript violated her federal right to a trial by jury under the Seventh Amendment during a previous lawsuit. *See* 42 U.S.C. § 1983. Gustin also complained that NCR and Parascript committed fraud under Florida law. NCR and Parascript moved to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The district court dismissed Gustin's fifth amended complaint with prejudice on the ground that further amendment would be futile. We affirm.

Gustin retained counsel to file her fifth amended complaint after NCR and Parascript moved to dismiss her *pro se* fourth amended complaint. *See id.* NCR and Parascript argued that Gustin failed to allege how they conspired to violate her federal right to trial by jury and that the claim failed as a matter of law because NCR is a private entity. NCR also argued that Gustin failed to plausibly allege a claim of common-law fraud.

To determine whether Gustin's fifth amended complaint states a claim, we accept its allegations and the contents of its attachments as true and view them in the light most favorable to her. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 351

(1993); *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019). Gustin alleges that, in 2014, Capital Security sued NCR for patent infringement, and NCR counterclaimed, as the inventor, to invalidate the patents. During discovery, NCR filed some records that it marked “Highly Confidential” and “For Attorney’s Eyes Only,” and the senior vice president for Parascript submitted a declaration that authenticated some of the records. Gustin’s “attorney was privy to the ‘Highly Confidential’ documents,” but Gustin, who is “‘thoroughly knowledgeable’ about the technical aspects of the patent, was not able to study the[] documents and determine their effect on her case.” After five years of litigation, the district court invalidated Gustin’s patents. Later, Gustin inspected the records submitted by NCR and determined that they were publicly accessible.

Gustin complained that NCR and Parascript “depriv[ed] [her] of her right to a trial as stated in Amendment 7 of the United States Constitution,” *see* 42 U.S.C. § 1983, and that they committed “common law fraud” in violation of Florida law. She alleged that the companies “prevented her from pursuing her lawsuit with full knowledge of all the evidence at her disposal” by “concealing evidence critical to her case” against NCR through “deceptively label[ing]” records as “Highly Confidential.” She also alleged that she was unaware that NCR and Parascript had falsely labeled as confidential “evidence necessary to litigate her case with a

reasonable probability of success” and that the fraud divested her of patents that constituted “all of the assets of her company.”

The district court dismissed Gustin’s complaint. It ruled that Gustin did “not allege . . . that NCR performs any public function or is closely intertwined in the with the state in any regard” as required “to support a finding that either NCR or Parascript are capable of violating [her] constitutional rights.” *See* 42 U.S.C. § 1983. The district court also ruled that Gustin failed to plead, as required to state a state-law claim for fraud, that she was damaged or “deprived of any information” because she alleged that “her lawyer saw the documents, which under the principles of agency law, amounts to [her] seeing the documents.”

The district court did not err by dismissing Gustin’s fifth amended complaint. The fifth amended complaint lacks “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Gustin does not dispute that she failed to allege facts from which the district court could plausibly infer that NCR and Parascript acted “under of color of state law” to deprive her of a right guaranteed under the Constitution. *See Arrington v. Cobb Cnty.*, 139 F.3d 865, 872 (11th Cir. 1998). Gustin does not even mention, much less discuss the merits of, her federal claim in her brief. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). Gustin’s complaint fails to allege that she was damaged

due to lack of access to the records that NCR marked as “confidential.” In Florida, “lawyers . . . are always agents of their clients,” *Brooks Tropicals, Inc. v. Acosta*, 959 So. 2d 288, 295 (Fla. Dist. Ct. App. 2007) (quoting *Lipsig v. Ramlawi*, 760 So. 2d 170, 186 (Fla. Dist. Ct. App. 2000)), and “knowledge of the agent constitutes knowledge of the principal as long as the agent received such knowledge while acting within the scope of his authority,” *id.* (quoting *Ruotal Corp., N.W., Inc. v. Ottati*, 391 So. 2d 308, 309 (Fla. Dist. Ct. App. 1980)). Because Gustin’s attorney was “privy” to the marked records, knowledge of their contents was imputed to Gustin. That Gustin “did not know of the [contents of the records] . . . is immaterial” because the fault, if any, lies with her attorney for “fail[ing] to act for her” *See id.* (quoting *Griffith v. Investment Co.*, 110 So. 271, 271–72 (Fla. 1926)).

Gustin argues that the district court should have given her another opportunity to amend her complaint, but the district court was not required *sua sponte* to allow Gustin to file a sixth amended complaint when she was represented by counsel who never requested leave to amend nor moved to amend the fifth amended complaint. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002). And the district court was not required to give Gustin an opportunity to amend when amendment would have been futile. *See Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007).

We **AFFIRM** the dismissal of Gustin's fifth amended complaint.