Circuit Court for Montgomery County
Case No. 429795V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 813

September Term, 2018

DEMOCRACY CAPITAL CORPORATION

v.

MARYLAND FINANCIAL BANK, ET AL.

Arthur,
Shaw Geter,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: February 3, 2020

This case arises from a dispute between companies owning various interests in a defaulted loan that is secured by real property. When it made the loan, the original lender sold a 50% participation interest in the loan to another lender. Several years later, the original lender purported to assign the loan to its subsidiary.

In a declaratory judgment action, the Circuit Court for Montgomery County determined that certain provisions of the assignment agreement were unenforceable because those provisions contravened restrictions from the participation agreement. Seeing no reversible error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Participants in the Sojourner-Douglass College Loan

On September 20, 2007, American Bank extended a loan in the amount of $8.4 million to SDC Equities, LLC. The loan was guaranteed by Sojourner-Douglass College, Inc., which at that time operated a private college in Baltimore City. In the event of a default, the loan documents authorized American Bank, or its successors and assigns, to pursue a foreclosure on two properties: the College's main academic building at 200 North Central Avenue and its administrative office building at 500 North Caroline Street.

On the same day that it issued the loan, American Bank entered into the "Participation Agreement"[1] with Maryland Financial Bank. For $4.2 million, Maryland

[1] Generally, a loan participation is a contractual arrangement in which a participating lender "provides funds" to a lead lender, and the lead lender "in turn uses the funds from the participant to make loans to the borrower." *In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 736 (6th Cir. 2001) (citations and quotation marks omitted). "In a typical loan participation among banks . . . , the lead bank will appear as the only party on the note and mortgage." *McVay v. Western Plains Serv. Corp.*, 823 F.2d 1395, 1398

Financial Bank purchased "an undivided 50% interest in the Loan and the Loan Documents" and the rights and obligations thereunder. American Bank retained a 50% interest and agreed to administer and service the loan for the mutual benefit of both parties. The Participation Agreement included provisions restricting the conditions under which either party might transfer their respective interests to third parties.

On the same day that it entered into the Participation Agreement, Maryland Financial Bank also entered into the "Sub-Participation Agreement," through which it sold 82.14% of its interest, for $3.45 million, to the entity now known as 1880 Bank.[2] Maryland Financial Bank represented that it had full authority to sell the sub-participation interest, even though it did not obtain prior approval from American Bank.

When the loan balance became due, neither the borrower nor the guarantor made full repayment. American Bank twice agreed to extend the maturity date. During 2015, however, American Bank declared the loan to be in default after the College lost its accreditation and ceased operations. Thereafter, the two properties were left vacant.

B. The Assignment Agreement with Democracy Capital Corporation

The original lender, American Bank, planned to merge into Congressional Bank effective January 1, 2016. As a condition for the merger, Congressional Bank required that American Bank assign certain assets to a subsidiary corporation and then divest its

(10th Cir. 1987). The lead bank usually "services the loan," and in that role has the right and duty "to make decisions concerning acceleration, foreclosure, redemption and deficiencies." *Id.*

[2] At the time, 1880 Bank was known as the National Bank of Cambridge.

ownership of that corporation by distributing all of the capital stock in the subsidiary to the shareholders of American Bank. Through this process, Congressional Bank would avoid acquiring non-performing loans that might impair its overall lending capacity. Among other assets, Congressional Bank required American Bank to assign the Sojourner-Douglass College loan to the new corporation.[3]

Democracy Capital Corporation was incorporated as a subsidiary of American Bank on December 31, 2015. Three minutes before midnight on that date, Democracy Capital and American Bank entered into the "Assignment and Servicing Agreement." American Bank agreed to transfer "all of [its] right, title and interest" in the loan and loan documents to Democracy Capital. American Bank (soon to merge into Congressional Bank) agreed that it would continue servicing the loan, subject to provisions granting Democracy Capital extensive rights to control loan servicing decisions. Congressional Bank was not a signatory to the Assignment Agreement, but it participated in the negotiations to ensure that the terms would be acceptable to it as the successor to American Bank.

The Assignment Agreement included expressions of the parties' intent to honor the rights of Maryland Financial Bank under the Participation Agreement. Nevertheless, the parties did not seek or obtain prior written consent from Maryland Financial Bank.

[3] Documents associated with the merger described this transaction as a "Spinoff" and used the name "Spinco" as a placeholder for the name of the new entity that would be created to receive assets from American Bank.

C. The Initial Claims and Settlement Agreement

Several months after the loan had been declared in default, Maryland Financial Bank requested that Congressional Bank, as the successor loan servicer, institute proceedings to foreclose on the vacant properties. Congressional Bank declined to do so. Maryland Financial Bank believed that Democracy Capital influenced Congressional Bank's decision not to proceed with a foreclosure at that time.

On January 30, 2017, Maryland Financial Bank filed suit in the Circuit Court for Montgomery County, alleging that Congressional Bank breached the Participation Agreement by entering into the Assignment Agreement without the consent of Maryland Financial Bank. Congressional Bank counterclaimed, alleging that Maryland Financial Bank had breached the Participation Agreement, many years earlier, when it sold sub-participation rights to the predecessor of 1880 Bank. Congressional Bank joined 1880 Bank, the sub-participant, as a party to that counterclaim. For its part, 1880 Bank conditionally claimed that Maryland Financial Bank would be in breach of an express warranty if, in fact, it lacked authority to sell sub-participation rights.

Those three parties (Maryland Financial Bank, Congressional Bank, and 1880 Bank) soon agreed to settle their respective claims against each other. With the express consent of Maryland Financial Bank, Congressional Bank agreed to assign the loan, the loan documents, the Participation Agreement, and the Assignment Agreement to 1880 Bank. The settlement agreement contemplated that Congressional Bank would deliver the original loan documents to 1880 Bank, so that 1880 Bank could take over as the loan servicer and pursue a foreclosure without delay.

Democracy Capital, however, objected to Congressional Bank's proposed assignment to 1880 Bank. Democracy Capital invoked terms of the Assignment Agreement in which the lender had promised that it would not assign the loan and would not resign or withdraw as loan servicer without Democracy Capital's consent. Democracy Capital informed Congressional Bank that it had possession of the original loan documents and that it intended to retain possession of those documents to prevent the proposed assignment.

Despite that objection, Congressional Bank executed an agreement to assign the loan and loan documents to 1880 Bank. The three settling parties filed a joint stipulation dismissing with prejudice their respective claims against each other.

D. The Remaining Claims Involving Democracy Capital

In the same action, Congressional Bank had also raised a claim against Democracy Capital, seeking a declaratory judgment that any terms of the Assignment Agreement contrary to the terms of the Participation Agreement were unenforceable. Separately, Maryland Financial Bank had raised claims for damages against Democracy Capital, alleging that Democracy Capital intentionally deprived Maryland Financial Bank of its rights under the Participation Agreement. Although Democracy Capital was a defendant to these claims, it did not agree to the settlement reached by the other parties.

1880 Bank filed a notice of substitution, seeking to replace Congressional Bank, by virtue of the assignment, as the plaintiff in the declaratory judgment claim against Democracy Capital. Maryland Financial Bank moved to dismiss its own claims for damages against Democracy Capital, without prejudice. The circuit court overruled

Democracy Capital's objections to the substitution and to the dismissal without prejudice.

In the wake of the settlement, Democracy Capital brought claims against the settling parties. Democracy Capital sought a declaratory judgment invalidating Congressional Bank's assignment to 1880 Bank, as well as an injunction prohibiting 1880 Bank from taking any action as the loan servicer. Democracy Capital also raised claims for damages against the other three parties. Democracy Capital later moved for a voluntary dismissal, without prejudice, of all of its claims. The court permitted Democracy Capital to dismiss its counts seeking damages, but not the count in which it sought declaratory and injunctive relief. The court directed that Democracy Capital's remaining claim would proceed against Maryland Financial Bank and 1880 Bank, but not Congressional Bank.[4]

In addition, 1880 Bank raised its own claims for declaratory relief against Democracy Capital. 1880 Bank asked the court to declare that the assignment that it received in the settlement with Congressional Bank was valid and enforceable; that, by virtue of that assignment, 1880 Bank now possessed exclusive authority to service the loan; and that the terms of the Participation Agreement superseded and nullified any contrary terms from the Assignment Agreement.

Collectively, three counts remained after the various dismissals: 1880 Bank's claim for declaratory relief, through its substitution for Congressional Bank; Democracy Capital's claims for declaratory relief and ancillary injunctive relief; and 1880 Bank's

[4] Democracy Capital had named Congressional Bank as a defendant, but Democracy Capital never served Congressional Bank with that pleading.

independent claim for declaratory relief. Maryland Financial Bank remained a defendant to the opposing claims for a declaratory judgment.[5]

E. Cross-Motions for Summary Judgment

On March 28, 2018, Democracy Capital and 1880 Bank filed cross-motions for summary judgment as to the remaining claims. Democracy Capital contended that the assignment from Congressional Bank to 1880 Bank as part of the settlement was invalid, and thus that 1880 Bank had no right to act as the loan servicer. 1880 Bank contended that its assignment from Congressional Bank was valid and that, as a result, 1880 Bank now had "unilateral" authority to service the loan. 1880 Bank also argued that the provisions in the Assignment Agreement purporting to grant Democracy Capital the right to control loan servicing decisions were unenforceable. Maryland Financial Bank submitted a consolidated memorandum in opposition to Democracy Capital's motion and in support of 1880 Bank's motion.

The arguments largely focused on the language of two agreements. 1880 Bank and Maryland Financial Bank contended that the Assignment Agreement violated the Participation Agreement, while Democracy Capital denied any conflict between those two agreements.

[5] In its pleadings, 1880 Bank explained that it had included Maryland Financial Bank as a "nominal" defendant "only because it is a necessary party" for declaratory relief. *See generally* Md. Code (1974, 2013 Repl. Vol.), § 3-405(a)(1) of the Courts and Judicial Proceedings Article (stating that "[i]f declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, shall be made a party").

Pertinent Terms of the Participation Agreement

The Participation Agreement defined American Bank as the "Lender" and Maryland Financial Bank as the "Participant." The Participant received "an undivided 50% interest in the Loan and in the Loan Documents and in all rights, benefits, obligations, payments, fees, proceeds (including insurance proceeds), awards, expenses and costs arising from or out of the Loan and Loan Documents." Their respective interests would be "ratably concurrent" and "none of the interests in the Loan and the Loan Documents [would] have priority over the other interests."

As defined by the Participation Agreement, the "Loan Documents" included a deed of trust note, a guaranty agreement, and an indemnity deed of trust and security agreement associated with the Sojourner-Douglass College loan. The Lender promised that it would possess those documents "free and clear of all liens and encumbrances" and hold the "Loan Documents and all rights with respect to the Loan and any collateral securing the Loan . . . in its own name for the benefit of the Lender and the Participant[.]"

Under the Participation Agreement, the Lender had the responsibility to make all decisions regarding the day-to-day administration of the loan, but the Lender could not make certain "Material Changes" without the Participant's consent. Among other things, the Lender generally could not "make or consent to any sale, pledge, assignment, release, substitution or exchange of any of the Loan Documents, or any collateral or security held for the Loan" without prior written consent from the Participant. The Lender was empowered to take one of those actions without consent only if the Lender determined in good faith that the action was necessary to protect the interests of both parties.

The Participation Agreement stated that the Lender had "the exclusive right to service the Loan[.]" To that end, the Lender was required to collect loan payments and any other sums received in connection with the loan and to promptly disburse an equal share to the Participant. The Lender promised to "service the Loan in accordance with acceptable mortgage practices of, and ordinary care exercised by, prudent lending institutions."

In the event of a default on the loan, the Lender was obligated to "consult with Participant . . . and make a good faith effort to mutually agree upon a course of action" before exercising any of the remedies for a default as set forth in the loan documents. If they could not mutually agree, then the Lender's chosen action would be binding, as long as the choice was made in good faith. In the event of a default on the loan and "acquisition of title by purchase at foreclosure or deed in lieu of foreclosure," the Lender would "hold title to the Property on behalf of Participant" and would "have the exclusive right" to sell the property and disburse the proceeds. During a period of title acquisition, the Lender would be required to consult with the Participant and to make good faith efforts to agree upon the appropriate action, but the Lender otherwise would be free to take actions it deemed to be in the best interests of itself and its Participant. These title acquisition activities were specifically "included within the word 'servicing'" as defined in the Participation Agreement.

The Lender "reserve[d] the right to sell additional participations in the Loan and Loan Documents in such amounts and to such parties as it determine[d] in its sole discretion." If the "Lender elect[ed] to sell additional participations in the Loan," the

Lender could "do so by a separate agreement on terms other than those contained" in the Participation Agreement, "provided that involvement of other participants w[ould] not adversely affect the rights or obligations of Participant" under the Participation Agreement.

If the Lender assigned "all or part of its Percentage Interest in the Loan or Property," then its assignee would "become another participant with respect to the Percentage Interest or portion thereof in the Loan or Property thus assigned[.]" In that event, the Lender would remain obligated to "continue to service the Loan or property and exercise all the powers" set forth in the Participation Agreement with regard to loan servicing.

Except in certain circumstances in which the Lender was no longer able to continue meeting its contractual obligations, the Lender could not "assign or otherwise relinquish Lender's obligations and duties as servicer of the Loan or Property without the prior written consent of Participant."

To recapitulate, the Participation Agreement prohibited the Lender from making or consenting to an assignment of the loan documents without prior written consent from the Participant and prohibited the Lender from assigning or otherwise relinquishing its servicing obligations and duties without prior written consent from the Participant. The Participation Agreement permitted the Lender to sell additional participations in the loan, provided that the involvement of other participants would not adversely affect the rights or obligations of the Participant. In that context, the Lender proceeded to enter into the Assignment and Servicing Agreement without prior written consent from the Participant.

Pertinent Terms of the Assignment and Servicing Agreement

The Assignment and Servicing Agreement designated American Bank (soon to merge into Congressional Bank) as the "Assignor" and Democracy Capital as the "Assignee." The Assignor agreed to transfer "all of Assignor's right, title and interest in the Loan, the Loan Documents, all existing property and interests in collateral securing the Loan, and all existing and future claims against Borrower or any other persons liable for repayment of the Loan or the performance of Borrower's obligations under the Loan Documents" to the Assignee.

The parties recited their "express intention" that the Assignment Agreement would "comply in all respects with all of the terms and conditions" of the Participation Agreement, in which Maryland Financial Bank had purchased a 50% participation interest. The Assignor represented that the Assignment Agreement "complie[d] with" the Participation Agreement and agreed "to remain bound by all of the terms and provisions" of the Participation Agreement.

The Assignment Agreement provided: "Until notified by Assignee to the contrary, during the term of this Agreement, the Assignor shall administer and service the Loan . . . in accordance with the usual and customary practices employed by other commercial banks servicing loans of similar size and type to the Loan and otherwise consistent with regulatory guidelines and requirements." The Assignee "designate[d] and appoint[ed] Assignor to act as the 'agent' of the Assignee" in accordance with their agreement.

"However, and notwithstanding" that grant of authority, the Assignor was not permitted to take certain actions without consent from the Assignee. Among other

things, the Assignor could not "[a]ct with respect to any Loan default without the written consent of the Assignee[.]" Nor could the Assignor "[s]ell, transfer, or assign the Loan, excepting any sale, transfer or assignment in full repayment of the Loan" without the Assignee's consent. On the other hand, if the Assignee requested that the Assignor take one of those actions, the Assignor would be required to do so "promptly upon receipt of such request, so long as such request [was] not in contravention of the prevailing Loan Documents or [the Participation Agreement]."

The Assignment Agreement specified: "In the event of default by the Borrower or any obligor, Assignee, in its sole discretion, shall have the right to take any and all steps deemed reasonable in the handling of said default from the inception thereof until said default is cured or the security is foreclosed." It was "understood that the Assignee shall determine, in its discretion, whether foreclosure shall be under a power of sale through court action and as to whether or not a deficiency judgment shall be obtained." The Assignee also had "the power to accept a voluntary conveyance in lieu of foreclosure."

The Assignor was not permitted to "resign or withdraw as servicer of the Loan" "[w]ithout the prior written consent of Assignee" and "except as may be expressly permitted by [the Participation Agreement] and approved in writing by [Maryland Financial Bank]." Nevertheless, the Assignee, "in its sole discretion, for any reason or for no reason at all," had "the right at any time . . . to terminate the Assignor as servicer of the Loan[.]"

Upon such a termination, the Assignee could then "demand and receive payment directly" for any "sums due under the Loan Documents[.]" In those circumstances, "at

the option and immediately upon demand of the Assignee," the Assignor would be required to "assign and deliver to the Assignee . . . all original Loan Documents held by the Assignor," subject to the participation rights of Maryland Financial Bank. "[I]n such event and immediately upon demand of the Assignee," the Assignor would be required to "deliver to Assignee the Note, duly indorsed to the order of Assignee, a general assignment of the Loan Documents . . . , and any other documents reasonably necessary to evidence the transfer ownership [sic] of the Loan and the Loan Documents to Assignee[.]"

F. Judgment of the Circuit Court

The circuit court took the motions under advisement after a hearing. On May 18, 2018, the court issued a memorandum opinion explaining its decision to grant summary judgment against Democracy Capital and in favor of 1880 Bank. Overall, the court concluded that the Assignment Agreement clashed with the Participation Agreement.

The court applied the principle that "an assignment in violation of an anti-assignment clause is invalid and unenforceable." *Della Ratta v. Larkin*, 382 Md. 553, 570 (2004) (citing *Public Serv. Comm'n v. Panda-Brandywine, L.P.*, 375 Md. 185, 203 (2003)). The court explained that, under the Participation Agreement, the lender could not "assign away its obligations as servicer" or "assign the loan documents to another" without prior consent from the Participant, Maryland Financial Bank. The court reasoned that, by entering into the Assignment Agreement, the lender "attempted to assign" to Democracy Capital "several of the key obligations" that it had undertaken in the Participation Agreement. The court said that the Assignment Agreement "touched [the

lender's] very ability to service the loan and protect its and [Maryland Financial Bank's] interests in it." The Court explained: "Because these assignments violated explicit anti-assignment clauses in the Participation Agreement, the attempted assignments are themselves invalid and unenforceable."

The court rejected Democracy Capital's argument that these transfers could be "saved" from invalidation because some language in the Assignment Agreement acknowledged the continuing force of the Participation Agreement. The court wrote: "Merely saying that this assignment 'complied' with the Participation Agreement does not make it so[.]" Similarly, the court stated that an "empty . . . promise to 'remain bound' by the Participation Agreement" would not "undo the fact that [the lender] assigned its interests in the loan documents without [the Participant's] consent."

The court rejected the notion that these transfers were permissible under the clause stating that the lender could "sell additional participations in the Loan . . . by a separate participation agreement on terms other than those contained herein, provided that involvement of other participants w[ould] not adversely affect the rights and obligations of Participant hereunder." The court reasoned that the Participation Agreement gave the Participant "the right to deal with a lender that simultaneously held the loan documents, serviced the loan, [and] pursued its remedies in the event of default, and the right not to be undermined by other participants." The court said that the Assignment Agreement operated to "'fractionalize' or disperse the obligations of one lender into the hands of two entities[.]" In the court's view, it was "obvious" that the Maryland Financial Bank's "rights were 'adversely affected' by the dispersal of [the lender's] obligations between

itself and Democracy." Most notably, because of the involvement of Democracy Capital, Maryland Financial Bank was no longer dealing with a lender "empowered" to pursue a foreclosure or other remedies for the default on the loan.

The court concluded that the provisions of the Assignment Agreement purporting to authorize Democracy Capital to forbid Congressional Bank from assigning the loan or resigning as servicer "are themselves invalid." "Thus," the court said, "although Democracy objected to the assignment to 1880, Democracy had no right to do so, and its objection is no barrier." On that basis, the court rejected Democracy Capital's request to invalidate the assignment that 1880 Bank received from Congressional Bank as part of the settlement.

In a declaratory judgment accompanying the opinion, the court declared that the Assignment and Servicing Agreement is "unenforceable" to the extent that it: "purportedly permits Democracy to terminate the servicer" of the loan; "purportedly affords Democracy the right to withhold consent to the Lender's assignment of its servicing obligations" of the loan; and "purportedly permits Democracy to possess and hold" the original loan documents. The court further declared that 1880 Bank "is the lawful Lender under the Participation Agreement, with full authority to act as loan servicer pursuant to the Lender's rights and obligations as set forth in the Participation Agreement, including the right to exercise any and all Lender remedies available in the event of a loan default under the loan documents and applicable law[.]"

Democracy Capital made a timely motion to alter or amend the judgment and noted a timely appeal. After a hearing, the court granted the motion in limited part, by

revising one sentence of its opinion.[6] The court denied the motion in all other respects. Democracy Capital then filed an amended notice of appeal.

Despite the court's decisions, Democracy Capital refused demands to relinquish possession of the original loan documents. 1880 Bank and Maryland Financial Bank jointly petitioned for an injunction requiring Democracy Capital to deliver the original loan documents to 1880 Bank. Democracy Capital opposed the petition, arguing that the declaratory judgment did not require it to turn over those documents. The court disagreed and, after another hearing, ordered Democracy Capital to deliver the original loan documents to 1880 Bank. Democracy Capital then filed a second amended notice of appeal.

QUESTIONS PRESENTED

In this appeal, Democracy Capital asks this Court to reverse the judgment and to direct the circuit court to grant Democracy Capital's opposing claim for a declaratory judgment. Maryland Financial Bank asks that the judgment be affirmed in its entirety. 1880 Bank has "adopt[ed] the contents" of Maryland Financial Bank's brief and made additional arguments in its own brief. Congressional Bank, "to the extent that is considered a party to this appeal[,]" has joined 1880 Bank's brief.

In its brief, Democracy Capital presents the following four questions:

> 1. Did the circuit court commit reversible error when it failed to find that Democracy's veto right under the Assignment Agreement was valid and

[6] In its original opinion, the court had written that American Bank "took no action to collect" when the borrower and guarantor failed to make full payment on the original maturity date of the loan. The court struck that sentence from the opinion, because the parties agreed that this factual allegation was neither undisputed nor material.

enforceable, given that Democracy's veto right was the functional equivalent of Maryland Financial Bank's veto right under the Participation Agreement and did not adversely affect Maryland Financial Bank's rights under the Participation Agreement?

2. Did the circuit court commit reversible error when it found that Democracy's rights under the Assignment Agreement violated Maryland Financial Bank's rights under the Participation Agreement based on its erroneous finding that Democracy had been assigned servicing obligation under the Assignment Agreement, its failure to consider provisions in the Assignment Agreement, and its creation of hypothetical conflicts?

3. Did the circuit court commit reversible error when it failed to grant summary judgment in Democracy's favor and failed to find that the assignment to 1880 was invalid, void, and unenforceable?

4. Did the circuit court commit reversible error when it found that 1880 had standing to challenge the validity of parts of the Assignment Agreement even though it was neither a party nor third party beneficiary of it?

Upon consideration of these issues, we conclude that Democracy Capital has failed to demonstrate any basis for reversal. The judgment will be affirmed.

DISCUSSION

After the dismissal of all claims for damages, the parties ultimately presented competing claims for relief under the Declaratory Judgments Act. The Act authorizes the court "to construe a written contract and declare the rights of the parties under it." *Secure Fin. Serv., Inc. v. Popular Leasing USA, Inc.*, 391 Md. 274, 280 (2006) (citing *Northern Assur. Co. v. EDP Floors*, 311 Md. 217, 223 (1987)). The Act states that a party interested under a written contract "may have determined any question of construction or validity" arising under the contract and "obtain a declaration of rights, status, or other legal relations under it." Md. Code (1974, 2013 Repl. Vol., 2018 Supp.), § 3-406 of the

Courts and Judicial Proceedings Article ("CJP").

The circuit court issued its declaratory judgment when it ruled on cross-motions for summary judgment. When deciding cross-motions for summary judgment, "the court must assess each motion on its merits." *Payne v. Erie Ins. Exch.*, 442 Md. 384, 391 (2015). The court must "consider the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party." *Id.* The court may grant summary judgment if a "motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f).

On appellate review of a "declaratory judgment entered in tandem with summary judgment, we consider 'whether that declaration was correct as a matter of law.'" *Springer v. Erie Ins. Exch.*, 439 Md. 142, 155-56 (2014) (quoting *Catalyst Health Solutions, Inc. v. Magill*, 414 Md. 457, 471 (2010)) (further quotation marks omitted). The appellate court considers any questions of law without deference to the conclusions of the circuit court. *See, e.g., Payne v. Erie Ins. Exch.*, 442 Md. at 391. The proper interpretation of a written contract is usually a question of law. *See, e.g., Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. Ltd. P'ship, LLLP*, 454 Md. 475, 485 (2017).

A. Existence of a Genuine Dispute of Material Fact

Ordinarily, "[b]efore considering the questions of law, we must 'make the threshold determination as to whether a genuine dispute of material fact exists, and only

where such a dispute is absent will we proceed to review determinations of law.'" *120 West Fayette Street, LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 328-29 (2010) (quoting *O'Connor v. Baltimore County*, 382 Md. 102, 110 (2004)). Democracy Capital takes issue with the circuit court's assessment of the undisputed facts. Democracy Capital argues that the court erred by treating it as an undisputed fact that American Bank entered into the Assignment Agreement without the consent of Maryland Financial Bank.

When 1880 Bank initially moved for summary judgment, it contended that the Assignment Agreement was invalid to the extent that it purported to give Democracy Capital control over the lender's loan servicing rights and obligations. In describing the "Material Terms" of the Participation Agreement, 1880 Bank noted: "perhaps most importantly, the Participation Agreement permits the Lender to assign its Lender duties and rights; however, to do so it must obtain '… the prior written consent of Participant.'" 1880 Bank's primary argument was that the Assignment Agreement "adversely affected" the rights of Maryland Financial Bank, in violation of section 13(a) of the Participation Agreement. That provision stated that the lender reserved the right to sell additional participation interests in the loan and loan documents, "provided that the involvement of other participants will not adversely affect the rights or obligations of Participant" under the Participation Agreement.[7]

[7] 1880 Bank's argument that the Assignment Agreement adversely affected Maryland Financial Bank's rights under the Participation Agreement emphasized that Democracy Capital, unlike the other parties, is not subject to banking regulations. In a summary judgment affidavit, one of 1880 Bank's executives explained that a non-

Maryland Financial Bank, in its summary judgment memorandum, "posit[ed] a slightly different legal justification" for the "same result" sought by 1880 Bank. Maryland Financial Bank invoked section 13(b) of the Participation Agreement, which states: "Lender may not assign or otherwise relinquish Lender's obligations and duties as servicer of the Loan or Property without the prior written consent of Participant." Maryland Financial Bank argued that the Assignment Agreement purported to give Democracy Capital the right to control all aspects of loan servicing. Maryland Financial Bank asserted that it "did not consent to an assignment . . . of any administration or servicing rights with respect to the Loan[.]" (Emphasis in original.)

In support of that assertion, Maryland Financial Bank submitted an affidavit from its president, who stated: "American did not seek or obtain MFB's consent to the DCC Assignment, or to the assignment of any of the servicing rights and obligations to DCC."[8]

1880 Bank echoed these statements from Maryland Financial Bank when it filed its response in opposition to Democracy Capital's summary judgment motion. 1880

performing loan can impair a bank's lending capacity until the bank removes the non-performing loan from its balance sheet. According to 1880 Bank, a regulated bank has a strong incentive to complete a foreclosure sale without delay, so that it can restore its capacity to make new loans; Democracy Capital, an ordinary corporation not subject to banking regulations, has no similar incentive. According to 1880 Bank, because of these different "economic interests," Democracy Capital "may frequently disagree" with a regulated bank regarding their preferred approaches for handling a non-performing loan. In response to these assertions, Democracy Capital stated that its "sole motivation" is to "maximize the recovery" on the loan.

[8] Maryland Financial Bank later said that the "primary reason" for submitting the affidavit "was to make sure that this important fact was included in the summary judgment record."

Bank argued that the lender had purported "to assign and relinquish all of the Lender's authority to service the loan" when it entered into the Assignment Agreement. 1880 Bank asserted that it was "undisputed that the Participant did not consent" to those provisions.[9]

During the summary judgment hearing, Maryland Financial Bank suggested yet another, alternative theory. Maryland Financial Bank pointed to section 6(b) of the Participation Agreement, which states: "Lender shall not, without the prior written consent of Participant . . . make or consent to any sale, pledge, assignment, release, substitution or exchange of any of the Loan Documents, or any collateral or security held for the Loan[.]" Maryland Financial Bank argued that the Assignment Agreement purported to assign to Democracy Capital the entire loan, the loan documents, and the property securing the loan. Relying on the affidavit, Maryland Financial Bank reiterated that it was "undisputed" that Maryland Financial Bank never consented to any assignment to Democracy Capital.[10]

The opinion accompanying the circuit court's declaratory judgment included a

[9] Democracy Capital subsequently filed its response in opposition to 1880 Bank's motion. Democracy Capital argued: "contrary to 1880's assertions, the Assignment Agreement does not vest the servicing rights and duties with DCC."

[10] Democracy Capital tells us that, before the court ruled on the motions, no party had ever contended that Democracy Capital received an assignment of the loan documents. In fact, Maryland Financial Bank advanced that contention during the summary judgment hearing. Democracy Capital responded by addressing that argument on the merits. Democracy Capital asserted that Maryland Financial Bank had "mischaracterized" the Assignment Agreement when Maryland Financial Bank had "argued that the entire loan was assigned."

summary of the "Undisputed Material Facts." The court wrote: "The Assignment and Servicing Agreement was made without MFB's consent." The court went on to explain that, under the Participation Agreement, Maryland Financial Bank's consent was needed "before [the lender] could assign away its obligations as servicer" and "before [the lender] could assign the loan documents to another[.]" The court concluded that the Assignment Agreement, made without the consent required by sections 6(b) and 13(b) of the Participation Agreement, violated these "explicit anti-assignment clauses[.]"

On appeal, Democracy Capital contends that the circuit court should not have treated the assertion from Maryland Financial Bank's affidavit as an undisputed fact. Democracy Capital points out that a party moving for summary judgment "must set forth sufficient grounds for summary judgment" and support the party's contentions "by placing before the court facts that would be admissible in evidence[.]" *Bond v. NIBCO, Inc.*, 96 Md. App. 127, 134 (1993). "Only if a movant meets the initial burden does the burden shift to the party opposing summary judgment to show with some precision that there is a genuine dispute as to a material fact." *Id.* at 141 (citation and quotation marks omitted). The "non-moving party is not required to identify the material facts in dispute unless the moving party includes in its motion the facts that are necessary to obtain judgment and shows that there is no dispute as to those facts." *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 262 (1996), *aff'd*, 346 Md. 122 (1997).

Democracy Capital observes that, when 1880 Bank initially moved for summary judgment, 1880 Bank made no factual assertion about Maryland Financial Bank's lack of

consent to the Assignment Agreement. Maryland Financial Bank did not submit its own motion for summary judgment, but merely submitted a memorandum and affidavit in support of one motion and in opposition to another. Democracy Capital argues that Rule 2-501 does not permit "a non-movant party to enlarge the universe of undisputed facts supporting another party's summary judgment motion[.]" In Democracy Capital's view, it had no obligation to discuss Maryland Financial Bank's lack of consent, because 1880 Bank "was not basing its summary judgment motion on that fact."

Assuming without deciding that this argument reflects a correct interpretation of each party's burden under Rule 2-501, we still see no basis for reversal.

Except for certain jurisdictional issues, this Court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). The purposes of this Rule are "to require counsel to bring the position of their client to the attention of the [trial court] . . . so that the trial court can pass upon, and possibly correct any errors in the proceedings" and "to prevent the trial of cases in a piecemeal fashion[.]" *Maryland State Bd. of Elections v. Libertarian Party of Maryland*, 426 Md. 488, 517 (2012) (citation and quotation marks omitted). Maryland Rule 2-517(c) specifies that, "[f]or purposes of review by the trial court or on appeal of any . . . ruling or order" other than one on the admission of evidence, "it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." But "[i]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection." *Id.*

Summary judgment procedures are not exempt from the prevailing principles of issue preservation. *See Informed Physician Servs., Inc. v. Blue Cross & Blue Shield of Maryland, Inc.*, 350 Md. 308, 338 (1998) (holding that party "clearly waived its right to complain" on appeal "that the judgments exceeded the scope of the motion" for summary judgment through the party's "decision to raise no objection to that approach"). If a party has the opportunity to object to an adversary's request that the court consider information that the court should not properly consider, the party ordinarily must make the objection known before the court makes its ruling. *See Faith v. Keefer*, 127 Md. App. 706, 736-37 (1999) (holding that party failed to preserve contention that the circuit court improperly relied on interrogatory answers with defective form of oath where the party "had ample opportunity to complain" but failed to raise the issue in a subsequent written response or during the hearing on summary judgment motion).

Maryland Financial Bank filed its memorandum and affidavit on April 13, 2018. From that date forward, Democracy Capital had notice that Maryland Financial Bank was asking the court to consider as "undisputed" a fact that had not been mentioned in the original motion. Three days later, 1880 Bank filed its response in opposition to Democracy Capital's motion. From that date forward, Democracy Capital had notice that 1880 Bank was also asking the court to consider the additional "undisputed" fact. Another two days later, Democracy Capital filed a response in opposition to 1880 Bank's motion.

At the hearing on April 25, 2018, Democracy Capital did not object to the court's consideration of the fact asserted in the affidavit. Democracy Capital disputed the merits

of its adversaries' arguments and did not assert that the court should not consider those arguments. Thereafter, Democracy Capital did not ask the court to strike the affidavit or for leave to show a dispute as to any fact asserted in the affidavit.

Consequently, the court made its ruling under the impression that Democracy Capital had no objection to the court considering the fact stated in the affidavit to be undisputed. Under these circumstances, an objection to the court considering that fact as part of its summary judgment analysis is not adequately preserved.

When it moved to alter or amend the judgment, Democracy Capital for the first time argued that it was improper for the court to treat Maryland Financial Bank's lack of consent to the Assignment Agreement as an undisputed fact. When the court denied that aspect of the motion, the court observed that Democracy Capital "did not ask to strike or urge the court not to consider the [Maryland Financial Bank] affidavit" despite its opportunities to do so.

An appellate court will not disturb the denial of a motion to alter or amend a judgment absent an abuse of discretion by the trial court. *See, e.g.*, *Miller v. Mathias*, 428 Md. 419, 438 (2012). A motion to alter or amend under Rule 2-534 is not an occasion for a party to make arguments that it did not make initially. *See Morton v. Schlotzhauer*, 449 Md. 217, 232 n.10 (2016). A circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have been made earlier, and consequently was waived. *See id.* The circuit court, therefore, did not abuse its discretion when it declined to revise the judgment.

Moreover, as Maryland Financial Bank aptly notes, Democracy Capital "cannot point to any evidence in the record contradicting" the fact stated in the affidavit and does "not even argue in its [b]rief that such evidence exists." During the reconsideration hearing, the court directly asked counsel for Democracy Capital: "do you seriously contend that MFB consented to the 2015 agreement between American and Democracy?" Counsel conceded that Maryland Financial Bank never actually "signed a document consenting to that assignment agreement," but he asserted that Maryland Financial Bank had "acquiesced" in that assignment after the fact.

On appeal, Democracy Capital again relies on this "acquiescence" theory as a possible basis for rebutting the fact asserted in the affidavit. This theory lacks any factual support in the record, let alone the precise and detailed facts needed to prevent the grant of summary judgment. *See, e.g.*, *Educational Testing Serv. v. Hildebrant*, 399 Md. 128, 145 (2007) (citing Md. Rule 2-501(b)).

The Participation Agreement specified that none of its provisions could be waived "except by an instrument in writing . . . by the party waiving its rights" under that agreement. The record does not disclose exactly when Maryland Financial Bank first learned that American Bank made an assignment without prior written consent in the final minutes of 2015. The record does include a letter dated August 15, 2016, in which Maryland Financial Bank accused Congressional Bank of breaching the Participation Agreement by entering into the Assignment Agreement without the requisite consent. Maryland Financial Bank formalized those allegations in the complaint filed on January 30, 2017. Maryland Financial Bank later withdrew that claim without prejudice, but it

continued to assert, in its answer to Democracy Capital's claim for a declaratory judgment, that all or part of the Assignment Agreement was invalid and unenforceable. At the time of the summary judgment ruling, Maryland Financial Bank reiterated that it "d[id] not at present consent" to the Assignment Agreement or to Democracy Capital "participating in or performing any of the servicing obligations with respect to the Loan." A bare characterization of this behavior as "acquiescence" does not create any genuine dispute of material fact.

Under these circumstances, we see no reversible error in the decision to treat it as undisputed, for summary judgment purposes, that American Bank and Democracy Capital made the Assignment Agreement without the consent of Maryland Financial Bank.

B. Violation of the Anti-Assignment Clauses

In its opinion, the circuit court applied two provisions in the Participation Agreement that barred certain assignments by the lender. Section 6(b) stated that the lender could not "make or consent to any . . . assignment . . . of any of the Loan Documents, or any collateral or security held for the Loan" without prior written consent from Maryland Financial Bank. Section 13(b) stated that the lender could not "assign or otherwise relinquish [its] obligations and duties and servicer of the Loan or Property" without prior written consent from Maryland Financial Bank. All parties agree that the Assignment Agreement included an assignment of some sort, but they disagree over what exactly the lender purported to assign to Democracy Capital.

Democracy Capital challenges the court's conclusion that the Assignment

Agreement included any transfer of the loan documents, in violation of section 6(b), and of the lender's servicing obligations, in violation of section 13(b). Democracy Capital argues that the court "misunderstood" the nature of the interest transferred. According to Democracy Capital, the Assignment Agreement merely conveyed a participation interest in the loan and the loan documents, and the lender did not need consent from Maryland Financial Bank before selling an additional participation interest.

Maryland Financial Bank contends that the intent and effect of the Assignment Agreement was to convey much more than loan participation rights. Maryland Financial Bank points out that the Assignment Agreement used "all-encompassing language" expressing an intention to assign the loan, the loan documents, the properties securing the loan, and causes of action against the borrower. According to Maryland Financial Bank, the "obvious purpose" of the transaction was to ensure that Democracy Capital would control servicing decisions after American Bank merged into Congressional Bank. Even though the court invalidated only parts of the Assignment Agreement, Maryland Financial Bank contends that the "entire" Assignment Agreement "is invalid and unenforceable" because it contravenes the anti-assignment clauses from the Participation Agreement.[11]

[11] It is not clear whether the other appellees, 1880 Bank and Congressional Bank, agree with the breadth of that argument. Even as they "adopt[ed] the contents" of Maryland Financial Bank's brief, they also stated that it was their "position" that the Assignment Agreement "effectively conveyed an economic interest" to Democracy Capital "as well as those rights that were not invalidated" by the court. In any event, all appellees seek only to uphold the court's judgment, which did not invalidate the entire Assignment Agreement.

"In general," the Court of Appeals has "adopted the rule that an assignment in violation of an anti-assignment clause is invalid and unenforceable." *Della Ratta v. Larkin*, 382 Md. 553, 570 (2004). The leading case on this subject is *Public Service Commission v. Panda-Brandywine, L.P.*, 375 Md. 185 (2003), in which the Court determined that certain contractual provisions were unenforceable because those provisions contravened the anti-assignment clause from an earlier agreement. *Id.* at 203.

In that case, an electric utility company had entered into an agreement to purchase energy from a power seller. *Public Serv. Comm'n v. Panda-Brandywine, L.P.*, 375 Md. at 189-90. The power purchase agreement stated "that '[n]either this Agreement, nor any of the rights or obligations hereunder, may be assigned, transferred, or delegated by either Party, without the express prior written consent of the other Party[.]'" *Id.* at 191. Several years later, the utility tried to divest itself of power purchase agreements. *Id.* at 191-92. "Recognizing that some of the contracts intended to be assigned . . . may contain anti-assignment clauses, requiring the consent" of a power seller, the utility attempted to accomplish the sales even if the power seller withheld consent. *Id.* at 192. The sale agreements stated that, if a power seller declined to consent to an assignment, the utility would agree to re-sell to the buyer all power that it purchased from the power seller. *Id.* The utility would then appoint the buyer to be its exclusive agent and authorize the buyer to take the actions that the utility could take under the power purchase agreement without further approval from the utility. *Id.* at 192-93.

In its analysis of the transaction, the Court of Appeals differentiated between "the term 'assignment,'" meaning "the transfer of contractual rights[,]" and "the term

'delegation[,]'" meaning "the transfer of contractual duties." *Public Serv. Comm'n v. Panda-Brandywine, L.P.*, 375 Md. at 197. The Court explained that a contractual right may not be assigned if the assignment is validly precluded by contract, and that a contractual duty may not be delegated if the delegation is contrary to the terms of the obligor's promise. *Id.* at 198. Put differently, a "valid contractual provision prohibiting assignment or delegation" may limit "the extent to which rights may be assigned and duties of performance may be delegated[.]" *Id.* at 198-99.

It was undisputed that the power seller never consented to the sale in question and that the power purchase agreement prohibited both "non-consensual assignment and delegation[.]" *Public Serv. Comm'n v. Panda-Brandywine, L.P.*, 375 Md. at 197. "The issue, then," was not whether the utility could "make such an assignment or delegation but only whether it ha[d], in fact, done so." *Id.* at 199.

The Court reasoned that, although the sale agreement may not have transferred all of the utility's rights under the power purchase agreement, the sale agreement "certainly ha[d] the effect of transferring" rights of considerable consequence to the power seller. *Public Serv. Comm'n v. Panda-Brandywine, L.P.*, 375 Md. at 199. "Unquestionably, the overall effect" of the transaction was "far more than just a 'back to back' resell agreement[,]" because it gave the buyer "a substantial measure of control over [the power seller's] operations." *Id.* at 200. It was "impermissible" for the utility to transfer those rights and obligations "in contravention of an anti-assignment provision, by a transaction clothed as something else." *Id.* at 202. The Court held that the challenged provisions of the sale agreement "constitute[d] an assignment of rights and obligations under the

[power purchase agreement] in contravention of [the anti-assignment clause] of that agreement" and those provisions were "therefore invalid and unenforceable." *Id.* at 203.

Much like the assignment invalidated in the *Panda-Brandywine* case, the Assignment Agreement here appears to have been designed to accomplish something that the parties could not do directly without the consent of a third party. The acknowledged purpose of the transaction was to allow American Bank to merge into Congressional Bank, without Congressional Bank ever acquiring the non-performing loan. For that reason, Congressional Bank directed American Bank to assign the loan to Democracy Capital, so that Democracy Capital would assume the liabilities associated with the loan. Yet in the Participation Agreement, American Bank had undertaken to hold the "Loan Documents and all rights with respect to the Loan and any collateral securing the Loan . . . in its own name for the benefit of" itself and Maryland Financial Bank. American Bank had expressly promised that it would not "make or consent to any sale, pledge, assignment, release, substitution or exchange of any of the Loan Documents, or any collateral or security held for the Loan" without the prior written consent of Maryland Financial Bank.

Despite those obligations, the lender did not seek or obtain consent from Maryland Financial Bank when it made the "Assignment and Servicing Agreement" with Democracy Capital. A recital in that document explains: "The Assignor has agreed to transfer to Assignee, and the Assignee has agreed to accept from Assignor all right, title and interest of the Assignor in and to the Loan, except that Assignor shall be obligated to continue servicing the Loan in accordance with this Agreement." An attached certificate

"evidencing the Assignee's interest in the Loan" states that Democracy Capital received "all right, title and interest in and to the Loan[.]"

Section 2 sets forth the "Agreement" between American Bank and Democracy Capital. It provides:

> Agreement. Subject to the provisions of this Agreement, Assignor agrees to transfer, and Assignee agrees to accept, on the date hereof, all of Assignor's right, title and interest in the Loan, the Loan Documents, all existing property and interests in collateral securing the Loan, and all existing and future claims against Borrower or any other persons liable for the repayment of the Loan or the performance of Borrower's obligations under the Loan Documents (collectively, "Interest"). Except with respect to a breach of this Agreement, the transfer of the Loan and the Loan Documents to Assignee is made as is and with all faults, and without recourse, representation of warranty to Assignor.

Under the natural reading of the above language, American Bank made a transfer of the loan documents, through which Democracy Capital accepted all of American Bank's right in the loan documents, as well in the property held as security for the loan. This transfer expressly included American Bank's rights in all claims for performance of the borrower's obligations under the loan documents. Any fair reading of this language satisfies the definition of an assignment of a contractual right: "'a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.'" *Public Serv. Comm'n v. Panda-Brandywine, L.P.*, 375 Md. at 197 (quoting Restatement (Second) of Contracts § 317 (1981)). A drafter attempting to transfer the loan documents could scarcely find language more suitable than the language used here. *See* Restatement (Second) of Contracts § 328 (1981) (stating that "[u]nless the

language or the circumstances indicate the contrary, . . . an assignment of 'the contract' or of 'all my rights under the contract' or an assignment in similar general terms is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract").[12]

Democracy Capital nonetheless argues that the Assignment Agreement transferred nothing more than a participation interest. Democracy Capital asserts that the language used in section 2 of the Assignment Agreement is "strikingly similar" to language used to define Maryland Financial Bank's participation interest. Democracy Capital cites one of the opening paragraphs of the Participation Agreement, which states that "Lender grants to Participant and Participant accepts" a "Percentage Interest," defined as "an undivided 50% interest in the Loan and in the Loan Documents and in all rights, benefits, obligations, payments, proceeds (including insurance proceeds), awards, expenses and costs arising out of the Loan and Loan Documents[.]" In the cited language, however, the introductory phrase ("an undivided 50% interest in . . .") limits the reach of all of the language that follows it. The Assignment Agreement, by contrast, uses a phrase ("all of Assignor's right, title and interest in . . .") that serves only to expand the reach of all items that follow it. In short, the Participation Agreement uses the language one would use to sell a participation interest, while the Assignment Agreement uses the language

[12] When Congressional Bank entered into the settlement, Congressional Bank promised to "assign and transfer to 1880 [Bank] all of Congressional Bank's right, title and interest" in the loan and loan documents. In that context, everyone appeared to understand that a transfer of "all right, title and interest" in the contract was an assignment of contractual rights.

one would use to accomplish an assignment of the loan documents.[13] Their substance matches their respective labels.

Democracy Capital alludes to, but fails to explain, some distinction between a transfer of the loan documents and a transfer of "all right, title and interest in . . . the Loan Documents[.]" Even if such a distinction might exist for some purposes, to rely on such a distinction as the basis for upholding this transaction would unreasonably dilute the anti-assignment clause. When Maryland Financial Bank received the lender's promise that it would not make or consent to any assignment of the loan documents without consent, Maryland Financial Bank acquired an objectively reasonable expectation that the lender would not transfer "all . . . right, title and interest" in the loan documents, as well as in "all existing and future claims" under the loan documents, without consent.

Democracy Capital insists that the Assignment Agreement, despite its use of expansive language, "cannot reasonably be interpreted as conveying the Loan Documents." Democracy Capital argues that the Assignment Agreement should be construed not to transfer the loan documents because the Assignor still "retained" a few obligations with respect to the loan documents. Democracy Capital cites section 5.1.5,

[13] "A participation agreement usually specifies that the participant is purchasing an 'undivided interest,' a 'participating interest,' a 'fractional interest' or some similar interest in the loan." Jeffrey D. Hutchins, *What Exactly Is a Loan Participation*, 9 RUTGERS-CAM. L.J. 447, 450 (1978). The use of this "fractional interest language" expresses "an intention that the participant receive a partial assignment of the [lead institution]'s interest in the underlying loan." W.H. Knight, Jr., *Loan Participation Agreements: Catching Up with Contract Law*, 1987 COLUM. BUS. L. REV. 587, 613 (1987).

which states: "the Assignor shall not, without prior written consent of the Assignee . . . [s]ell, transfer, or assign the Loan, excepting any sale, transfer or assignment in full repayment of the Loan." Democracy Capital asserts that this provision would be "meaningless" if the Assignor had already assigned the loan documents to Democracy Capital.

The meaning of that provision, however, is apparent from the context in which it appears. The introductory language of section 5.1 states: "During the term of this Agreement, Assignee hereby designates and appoints Assignor to act as the 'agent' of the Assignee to act as specified herein and in the Loan Documents, and Assignee hereby irrevocably authorizes Assignor, in its capacity as agent, to take such actions, exercise such powers and perform such duties as are expressly delegated to or conferred upon the Assignor by the terms of this Agreement and the Loan Documents, together with such other powers as are reasonably incidental thereto." Section 5.1.5 is one item in a list of limits on the Assignor's authority to act as Democracy Capital's agent, "notwithstanding" the general authorization to exercise powers granted under the loan documents. Provisions stating that Democracy Capital was authorizing its agent to possess the loan documents and to exercise some powers under the loan documents, while specifying that its agent lacked the authority to assign the loan documents to another party, are fully consistent with the circuit court's conclusion that Democracy Capital had become the holder of the loan documents.

Democracy Capital also looks to section 11 as an indication that the Assignment Agreement made no assignment of the loan documents. That section purported to allow

Democracy Capital, "in its sole discretion, for any reason or for no reason at all . . . at any time . . . to terminate the Assignor as servicer of the Loan[.]" In that event, and "immediately upon demand" of Democracy Capital, the Assignor would be required to "deliver to Assignee . . . a general assignment of the Loan Documents in a form reasonably acceptable to Assignee, and any other documents reasonably necessary to evidence the transfer ownership of the Loan and the Loan Documents to Assignee . . . , together with the originals of the Loan Documents in the Assignor's possession[.]" Democracy Capital argues that this provision would be "meaningless" if the Assignor had already assigned the loan documents to Democracy Capital.

Again, however, the meaning is apparent from the context. The Assignment and Servicing Agreement included not only an assignment but also a servicing contract, which would create an ongoing relationship between Democracy Capital and the lender. The purpose of requiring the lender to execute and deliver a "general assignment" instrument upon the termination of that relationship would be to replace their prior agreement with one that set forth the assignment only. Far from meaningless, this step would finalize Democracy Capital's unilateral termination of the lender's role as the agent of Democracy Capital.

Moreover, even under Democracy Capital's reading, section 11 still expresses the lender's unequivocal consent to a complete transfer of the loan documents at any time upon demand from a third party. When Maryland Financial Bank received a promise that the lender would not "make or consent" to "any sale, pledge, assignment, release, substitution or exchange" of the loan documents, Maryland Financial Bank could

justifiably expect that the lender would not make an arguably incomplete assignment of the loan documents, while simultaneously binding itself to complete that transfer whenever its assignee might demand the loan documents in the future.

Overall, we agree with the circuit court's assessment that the Assignment Agreement purported to transform Democracy Capital into the "new holder" of the loan documents and to reduce the lender into a "mere possessor" of those documents for Democracy Capital's benefit.[14]

Democracy Capital also disputes the court's conclusion that the Assignment Agreement included any assignment of the servicing rights and obligations that the lender had undertaken in the Participation Agreement. Democracy Capital observes that under the Assignment Agreement the Assignor would be "obligated to continue servicing the Loan in accordance with this Agreement." It also provided: "Until notified by Assignee to the contrary, during the term of this Agreement, the Assignor shall administer and service the Loan[.]" Democracy Capital argues that, because the Assignment Agreement continued to designate the lender as the servicer of the loan, it must not have transferred any of the servicing rights or obligations.

[14] An exception in the Participation Agreement allowed the lender to override an objection to an assignment of the loan documents under narrow conditions. It stated: "Notwithstanding the foregoing, in the event Lender, in its sole discretion, deems immediate action . . . necessary to protect its and Participant's interest in the Loan, and Lender and Participant cannot agree within five (5) business days, or such shorter period as deemed by Lender to be required under the circumstances, Lender's chosen course of action, if made in good faith, shall be binding on Participant." Democracy Capital does not contend that American Bank entered into the Assignment Agreement under this exception.

To determine whether this transaction complied with the anti-assignment clause, however, one must examine not only how the transaction is "clothed" (*Public Serv. Comm'n v. Panda-Brandywine, L.P.*, 375 Md. at 202), but also the transaction's "overall effect" (*id.* at 200) on the parties' rights and obligations. Notwithstanding the designation of the Assignor as a servicer, the Assignment Agreement purported to grant Democracy Capital rights to control nearly all decisions regarding the servicing of the defaulted loan.

The Participation Agreement had given the lender "the exclusive right to service the Loan[.]" The lender was obligated to consult in good faith with Maryland Financial Bank about the appropriate response to a loan default. Unless they reached a mutual agreement, the lender had the ultimate responsibility to decide whether to pursue the remedies available under the loan documents, including an acquisition of title by purchase at a foreclosure sale or by deed in lieu of foreclosure. The Participation Agreement expressly included these title acquisition activities within the definition of "servicing" the loan. Thus, the lender's rights and obligations as servicer of the loan or property included the right and obligation to decide the appropriate remedy for a loan default.

The Assignment Agreement upended this servicing dynamic. "[N]otwithstanding" the lender's promise to continue "to service the Loan," the lender could not "[a]ct with respect to any Loan default without the written consent" of Democracy Capital. And "notwithstanding" the promise "to service the Loan," the lender had the obligation to take an action with respect to a loan default, if "requested" to do so by Democracy Capital,

"promptly upon receipt" of the request. Furthermore, Democracy Capital "in its sole discretion" had the "right to take any and all steps deemed reasonable in the handling of [the] default from inception thereof until [the] default is cured or the security is foreclosed." Democracy Capital even had "the right to accept a voluntary conveyance in lieu of foreclosure" and to "determine, in its discretion, whether foreclosure shall be under a power of sale through court action and as to whether or not a deficiency judgment shall be obtained."

By the time of execution of the Assignment Agreement, the loan was already in default with little to no hope of repayment.[15] Servicing no longer involved the collection and disbursement of payments due under the note. The servicer's remaining obligations were to decide whether and how to pursue a foreclosure or an alternative to foreclosure. Through the Participation Agreement, Maryland Financial Bank had entrusted those decisions to the judgment of the lender; through the Assignment Agreement, the lender purported to subject those same decisions to the control of Democracy Capital. In this way, the Assignment Agreement contravened the lender's promise that it would not "assign or otherwise relinquish" its rights and obligations as servicer of the loan or property without prior written consent from Maryland Financial Bank.

Democracy Capital also suggests that the Assignment Agreement should not be construed as a prohibited assignment because it included language expressing the

[15] The Assignment Agreement explicitly stated that the lender had "declared the Loan in default" six months earlier. This declaration of default came after the lender had granted two previous extensions of the maturity date.

lender's intent to comply with and to remain bound by the Participation Agreement. On this point, we agree with the circuit court: "Merely saying that this assignment 'complied' with the Participation Agreement does not make it so[.]" The court's reasoning parallels the reasoning of the Court of Appeals in *Public Service Commission v. Panda-Brandywine, L.P.*, 375 Md. at 203. There, the assignor argued that a transfer was permissible because the assignor had purported to make the transfer "only 'to the fullest extent permitted'" by the agreement that included the anti-assignment clause. *Id.* Yet because "[v]irtually none of the rights and responsibilities transferred" were permissible under the prior agreement, the Court concluded that "[t]he 'fullest extent permitted' language . . . ha[d] no real meaning." *Id.*

The circuit court did not err in concluding that the Assignment Agreement purported to make the types of transfers that the Participation Agreement prohibited. The Assignment Agreement contravened the provisions stating that, unless Maryland Financial Bank gave prior written consent, the lender could not "make or consent to any . . . assignment . . . of any of the Loan Documents," and the lender could not "assign or otherwise relinquish [its] obligations and duties as servicer of the Loan[.]"

C. The Lender's Right to Sell Additional Participation Interests

Although the Participation Agreement prohibited the lender from making certain assignments without Maryland Financial Bank's consent, it also permitted the lender to sell additional participation interests to other participants under certain circumstances. Democracy Capital contends that the Assignment Agreement was permissible under this qualified "right to sell additional participations in the Loan."

Section 13 of the Participation Agreement concerns the "Assignment of Interests" by the Lender or Participant. After omitting all sentences that relate solely to an assignment by the Participant, Maryland Financial Bank, section 13 provides:

> (a) . . . Lender reserves the right to sell additional participations in the Loan and Loan Documents in such amounts and to such parties as it determines in its sole discretion. In the event that Lender elects to sell additional participations in the Loan, it may do so by a separate participation agreement on terms other than those contained herein, provided that involvement of other participants will not adversely affect the rights or obligations of Participant hereunder.
>
> (b) . . . In the event of the assignment by Lender of all or part of its Percentage Interest in the Loan or Property, its assignee shall become another participant with respect to the Percentage Interest or portion thereof in the Loan or Property thus assigned, and Lender shall continue to service the Loan or property and exercise all the powers, subject to the duties and conditions herein set forth with regard to such servicing. . . . Upon the making of an assignment, the assignee shall have all the rights, and be subject to all obligations of the Participant under this Agreement to the extent of its interest in the Loan and Property. . . . Subject to paragraph 15 below,[16] Lender may not assign or otherwise relinquish Lender's obligations and duties as servicer of the Loan or Property without the prior written consent of Participant.

Democracy Capital asserts that section 13(a) ensures the lender "the unfettered right to sell additional participation interests at its sole and exclusive discretion." Democracy Capital attempts to characterize the Assignment Agreement as the sale of an additional participation interest in the loan, and thus as a transaction that the lender could

[16] Paragraph 15 of the Participation Agreement addresses the contingency of the "Lender's Default." It envisioned that, in situations in which the lender was unable to continue meeting its obligations, the lender would assign the loan to Maryland Financial Bank or its designee, and the parties would exchange their respective roles of "Lender" and "Participant." Democracy Capital does not contend that American Bank made the Assignment Agreement under this exception.

undertake without consent from Maryland Financial Bank.

In response, Maryland Financial Bank contends that the Assignment Agreement cannot reasonably be treated as the sale of an additional participation interest in the loan. Maryland Financial Bank notes that the Assignment Agreement "does not purport to be a 'participation agreement'" and "does not state anywhere in the body of the agreement" that Democracy Capital was acquiring a participation interest. Moreover, the "circumstances" surrounding the transaction were not typical of a sale: American Bank was divesting itself of the loan by giving the loan to a wholly-owned subsidiary, without any payment in return.[17]

The circuit court reasoned that, to the extent that the Assignment Agreement might be regarded as the sale of a participation interest, the transaction would fail to satisfy the final condition of section 13(a): the requirement that the "involvement of other participants w[ould] not adversely affect the rights or obligations of Participant hereunder." The court reasoned that the Participation Agreement gave Maryland Financial Bank "the right to deal with a lender that simultaneously held the loan documents, serviced the loan, [and] pursued its remedies in the event of a default[.]" The

[17] Participation agreements are "arms-length contracts between relatively sophisticated financial institutions[.]" *First Bank of Wakeeney v. Peoples State Bank*, 758 P.2d 236, 240 (Kan. Ct. App. 1988) (citations and quotation marks omitted). One defining feature of "a 'true' participation agreement" is that "money is advanced by a participant to a lead lender" in exchange for its interest in the loan. *In re AutoStyle Plastics*, 269 F.3d 726, 736-37 (6th Cir. 2001). Participation agreements usually state that the purchasing bank either will pay or has already paid the selling bank for a percentage of the loan. Patrick J. Ledwidge, *Loan Participations Among Commercial Banks*, 51 TENN. L. REV. 519, 520-21 (1984).

court concluded that the Assignment Agreement served to "'fractionalize' or disperse the obligations of one lender into the hands of two entities," and that this "dispersal of [the lender's] obligations between itself and Democracy" adversely affected the rights and obligations of Maryland Financial Bank.

Democracy Capital argues that the court misread section 13(a). Democracy Capital argues that the language permitting the sale of a participation interest "by a separate participation agreement on terms other than those contained herein, provided that involvement of other participants will not adversely affect the rights or obligations of Participant hereunder" necessarily implies that the lender had the right to sell participation interests on terms identical to those from the Participation Agreement. According to Democracy Capital, "the 'adversely affect' clause . . . applied only to a Lender's sale of a participation interest under *different* terms than those granted to the Participant." (Emphasis in original.) Democracy Capital proposes that any right granted to it under the Assignment Agreement should survive, as long as the right is "not substantively different" from a corresponding right of Maryland Financial Bank under the Participation Agreement.

In response, Maryland Financial Bank argues that this "proposed construction of Section 13(a) ignores the phrase 'involvement of other participants.'" Maryland Financial Bank notes that "[i]t is the 'involvement' of another participant, not simply the exercise by another participant of a differing right, that cannot 'adversely affect' MFB's rights."

In our assessment, it is difficult to imagine how the construction favored by

Democracy Capital could salvage the transaction. The terms of the Assignment Agreement, particularly with respect to handling the existing loan default, were entirely different from the terms of the Participation Agreement. The Assignment Agreement purported to empower Democracy Capital to override any of the lender's decisions with respect to the remedy for the loan default. The Assignment Agreement even stated that Democracy Capital, unilaterally and at any time, could sever the lender's connection with the loan and compel the lender to surrender all original loan documents. Without question, the Assignment Agreement purported to grant Democracy Capital rights far exceeding those of Maryland Financial Bank.

Democracy Capital nevertheless proposes this construction in an effort to rescue one particular provision, which it calls its "veto right over a change in servicer." A sentence in section 11 of the Assignment Agreement states: "Without the prior written consent of Assignee and except as may be expressly permitted by the MFB Participation and approved in writing by MFB, Assignor shall not resign or withdraw as servicer of the Loan." Democracy Capital argues that this contractual right is "functionally identical" to a right possessed by Maryland Financial Bank. Section 13(b) of the Participation Agreement states: "Lender may not assign or otherwise relinquish Lender's obligations and duties as servicer of the Loan or Property without the prior written consent of Participant."

Even if we were to adopt Democracy Capital's proposed construction, we would disagree with the premise that these two "veto" provisions are equivalent. Like any contractual terms, these provisions must be understood in the context in which they

appear. *See, e.g.*, *Phoenix Servs. Ltd. P'ship v. Johns Hopkins Hosp.*, 167 Md. App. 327, 392-93 (2006). The parties to the Participation Agreement expressly used the term "servicing" in a special sense, to include a foreclosure and other title acquisition activities in the event of a loan default. The "obligations and duties as servicer of the Loan or Property," which the lender could not "assign or otherwise relinquish" without Maryland Financial Bank's consent, included the lender's responsibility to take appropriate action in the event of a default, after consulting in good faith with Maryland Financial Bank to try to reach a mutual agreement.

The Assignment Agreement states the lender was "obligated to continue servicing the Loan in accordance with this Agreement." "Until notified by Assignee to the contrary, during the term of this Agreement," the lender was obligated to "service the Loan and the interest of [Democracy Capital] therein[.]" "[N]otwithstanding" the promise to continue servicing the loan, the lender could not "[a]ct with respect to any Loan default without the written consent of the Assignee." Decisions of how to handle a default, including decisions about a foreclosure, were left in the "sole discretion" of Democracy Capital. Democracy Capital's purported right to prevent the lender from "resign[ing] or otherwise withdraw[ing] as servicer of the Loan" must be understood in this context.

Section 11 of the Assignment Agreement does not preserve the lender in the "servicing" role that the lender had assumed in the Participation Agreement. The function of Democracy Capital's veto provision is to lock the lender into the role of "servicer" as set forth in that agreement. This role of "servicer" to Democracy Capital is

not only different from, but irreconcilable with, the lender's preexisting obligations to Maryland Financial Bank. In this way, the Assignment Agreement was doubly offensive to Maryland Financial Bank's rights. It not only purported to abdicate servicing responsibilities that the lender had undertaken in the Participation Agreement, but it also purported to prohibit the lender from withdrawing from that prohibited arrangement.

Democracy Capital goes on to argue that, "even if the entire Assignment Agreement had been invalidated," Democracy Capital should still be entitled to exercise "the exact same rights" that Maryland Financial Bank received under the Participation Agreement. Democracy Capital seeks to rely on a sentence of the Participation Agreement which states: "Upon the making of an assignment, the assignee shall have all the rights, and be subject to all obligations of the Participant under this Agreement to the extent of its interest in the Loan and Property." According to Democracy Capital, this sentence reveals an understanding between the participant and lender that, upon any assignment, by either the participant or the lender, the assignee would acquire "all the rights of, and be[come] subject to all obligations of the Participant[.]"[18]

Of course, it would be unreasonable to read the introductory phrase "[u]pon making of an assignment" to include an assignment that the Participation Agreement otherwise prohibits. The preceding sentence presupposes that an assignment by the lender must be one that does not impair the lender's servicing obligations to Maryland

[18] 1880 Bank contends that the most reasonable interpretation of this sentence is that an assignee of the Participant (not an assignee of the Lender) can obtain the rights and obligations of the Participant. This discussion will assume, without deciding, that this sentence might govern an assignment by the Lender.

Financial Bank. It states: "In the event of the assignment by Lender of all or part of its Percentage Interest in the Loan or Property, its assignee shall become another participant with respect to the Percentage Interest or portion thereof in the Loan or Property thus assigned, and Lender shall continue to service the Loan or property and exercise all the powers, subject to the duties and conditions herein set forth with regard to such servicing." The Assignment Agreement, if enforceable, would make it impossible for the lender to continue servicing the loan or property in accordance with the Participation Agreement, because it purported to shift the lender's decision making power to Democracy Capital.

Democracy Capital nonetheless theorizes that section 13(b) of the Participation Agreement should operate so that any purported assignee of the lender is "automatically deemed a participant, with the same rights and obligations" as those of Maryland Financial Bank under the Participation Agreement. Under this theory, when an attempted assignment is ineffective, the rights and obligations of the assignee by "default[]" become "those of a Participant in the Participation Agreement." This theory would seem to require a reader to ignore the entire text of the Assignment Agreement and to proceed on a fiction that the lender and Democracy Capital had instead executed a document with terms identical to the Participation Agreement. Democracy Capital cites no authority for this unusual remedy.

Democracy Capital cannot exercise rights supposedly created by the Participation Agreement, made between American Bank and Maryland Financial Bank, simply because Democracy Capital entered into a contract that mentions the Participation

Agreement. *See Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 292 (1996), *aff'd*, 346 Md. 122 (1997). The Assignment Agreement does not state that American Bank and Democracy Capital ever agreed that, if their purported assignment turned out to be invalid, they would mutually bind themselves to a different set of terms identical to those stated in the Participation Agreement. To the contrary, they stated: "This Agreement, executed by the Assignor and the Assignee, and the Loan Documents contain the final and entire agreement and understanding of the parties, and any terms and conditions not set forth in this Agreement or the Loan Documents are not part of this Agreement and the understanding of the parties hereof." Democracy Capital has consistently maintained that it "would not have entered into the Assignment Agreement without the protections and rights granted to it thereunder."

Quite simply, even if Maryland Financial Bank understood that the lender could bring in new participants under a document substantially identical to the Participation Agreement, the lender and Democracy Capital never executed such a document. Permitting the involvement of Democracy Capital under the terms actually set forth in the Assignment Agreement would adversely affect the rights of Maryland Financial Bank under the Participation Agreement. The involvement of an unaccountable third party with full control of servicing decisions, with the power to forbid the lender from resigning from its role as Democracy Capital's loan servicing agent, and with unrestricted ability to terminate the lender's relationship with the loan and loan documents at any time manifestly impairs Maryland Financial Bank's basic "right to expect performance from the other party to the contract[.]" *Public Serv. Comm'n of Maryland v. Panda-*

Brandywine, L.P., 375 Md. 185, 197 (2003). Maryland Financial Bank had a "substantial interest in having [the lender] perform or control the acts promised" in the Participation Agreement (*id.*), but under the Assignment Agreement, "that control ha[d] been delegated" to Democracy Capital, a "stranger" to Maryland Financial Bank. *Id.* at 202-03 (citation and quotation marks omitted).[19]

In sum, Democracy Capital has not shown any error in the circuit court's conclusion that the Assignment Agreement is unenforceable to the extent that it purports to grant dominion over the loan documents and loan servicing decisions to Democracy Capital. The lender's qualified right to sell participation interests, provided that the involvement of additional participants would not adversely affect the rights or obligations of Maryland Financial Bank, is no basis for saving the provisions that the court invalidated.

D. Scope of the Controversy Between the Parties

Separately, Democracy Capital argues that that court "went beyond its authority to decide actual controversies" when it concluded that involvement of Democracy Capital under the terms of the Assignment Agreement would impair the contractual rights of

[19] As Maryland Financial Bank explained in its summary judgment memorandum: "Perhaps the most critical of the rights MFB possesses under the Participation Agreement is the right to have the 'Lender' service the Loan[.]" Democracy Capital itself has acknowledged that the identity of the entity making loan servicing decisions is often a material ingredient of a bargain. Democracy Capital explains: "The servicing of a loan requires skill and judgment, which varies from person to person and from corporation to corporation[,] . . . particularly . . . where . . . the collateral securing a loan is to be foreclosed upon." In those instances, a servicer may need to exercise skill and judgment in "decid[ing] on a bidding strategy," in the "management of the property until it is sold," and in "marketing and selling the property."

Maryland Financial Bank. Democracy Capital seeks to rely on the principle that declaratory relief generally is unavailable where a party "requests adjudication based on facts that have yet to occur or develop[.]" *120 West Fayette Street, LLLP v. Mayor & City Council of Baltimore*, 413 Md. 309, 356 (2010) (citing *Hickory Point P'ship v. Anne Arundel County*, 316 Md. 118, 130 (1989)).

The stated purpose of the Declaratory Judgments Act "is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." CJP § 3-402. The Act is "remedial" and should be "liberally construed and administered." *Id.* The Act authorizes the court to grant a declaratory judgment "if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if: (1) [a]n actual controversy exists between contending parties; (2) [a]ntagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or (3) [a] party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it." CJP § 3-409(a).

The Court of Appeals has maintained that "a justiciable controversy is a prerequisite to the maintenance of a declaratory judgment action." *Secure Fin. Serv., Inc. v. Popular Leasing USA, Inc.*, 391 Md. 274, 280-81 (2006). A justiciable controversy exists "'when there are interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought or demanded.'" *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. at 356 (quoting *Reyes v. Prince George's County*, 281 Md. 279, 288 (1977)). Generally, the court should

"not decide future rights in anticipation of an event which may never happen," but the court should "wait until the event actually takes place, unless special circumstances appear which warrant an immediate decision." *Boyds Civic Ass'n v. Montgomery Cty. Council*, 309 Md. 683, 690 (1987) (citation and quotation marks omitted). This "ripeness" requirement serves to "ensure that adjudication will dispose of an actual controversy in a conclusive and binding manner." *Id.* at 691.

Democracy Capital recognizes that a justiciable controversy existed here. Indeed, Democracy Capital itself asked the court to issue a declaratory judgment to resolve the controversy between the parties. In its pleadings, Democracy Capital recounted the following undisputed facts: in 2007, American Bank extended a loan secured by certain real property and also sold a 50% participation interest to Maryland Financial Bank; in 2015, American Bank declared the loan to be in default; just before merging into Congressional Bank in 2016, American Bank made an assignment to Democracy Capital and then divested its ownership of Democracy Capital; and in 2017, Congressional Bank (with approval from Maryland Financial Bank) made an assignment to 1880 Bank, knowing that 1880 Bank intended to initiate foreclose proceedings.

In a letter dated September 11, 2017, Democracy Capital formally objected to the proposed assignment from Congressional Bank to 1880 Bank. Democracy Capital "confirm[ed] that it d[id], in fact, have possession of the original Loan documents." Democracy Capital acknowledged that "the avowed and incontrovertible purpose of the contemplated assignment to 1880 is for 1880 to proceed with a foreclosure against the real property securing the Loan." Democracy Capital asserted that, "[f]or 1880 to

proceed with a foreclosure, it w[ould] have to represent that it has standing to foreclose," which, according to Democracy Capital, "would be a fraud on the court because the assignment to 1880 would be invalid." Democracy Capital stated that it planned to "hold" the original loan documents "in trust" in order to "prevent" the actions contemplated by Congressional Bank and 1880 Bank.

In its pleadings, Democracy Capital explained that, while it "believed" that Congressional Bank "should have foreclosed" on the properties, "it has never believed that 1880 has the requisite knowledge and experience to service the Loan, including making the strategic decisions necessary to maximize recovery on the Loan in the event of a foreclosure, and hence" Democracy Capital "withheld its consent to the transfer" to 1880 Bank.

In the count for a declaratory judgment, Democracy Capital stated that "there exists an actual controversy of a practicable issue . . . involving the rights and liabilities of the parties[.]" Specifically, Democracy Capital stated that it denied the validity of Congressional Bank's assignment to 1880 Bank, while its adversaries contended that their assignment was valid. Democracy Capital alleged that it would "suffer immediate, substantial, and irreparable harm" unless the court restrained 1880 Bank from acting as loan servicer. Democracy Capital sought a declaration stating that the purported assignment to 1880 Bank was unenforceable, as well as an injunction restraining 1880 Bank from "acting as servicer of the Loan[.]"

1880 Bank then proceeded to act as the loan servicer, by exercising the powers set forth in the loan documents to remedy the default. Acting through a substitute trustee,

1880 Bank instituted proceedings to foreclose on the properties. In that action, 1880 Bank relied on its "assignment of [a]n indemnity trust and security agreement . . . from Congressional Bank, as successor-by-merger to American Bank[.]" The indemnity deed of trust and security agreement provides that, in the event of a default, "the Trustee or the Beneficiary may, at the option of the Beneficiary, exercise" certain remedies, including foreclosure. That document defines the "Beneficiary" to include the "successors and assigns" of American Bank.[20]

In their answers to Democracy Capital's claim, both Maryland Financial Bank and 1880 Bank claimed that Democracy Capital was not entitled to the declaration it sought because all or part of the Assignment Agreement was unenforceable.

Democracy Capital later attempted to withdraw its own claim for a declaratory judgment without prejudice to its ability to reassert the claim in the future. While Democracy Capital "maintain[ed] its position" that the assignment to 1880 Bank was invalid, Democracy Capital said that, rather than endure "the expense of litigating its claims," it was "willing to take a wait-and-see approach to the foreclosure process as the foreclosure process unfolds[.]" Democracy Capital added that, to the extent that 1880 Bank was "concerned about its ability to convey clear title at some point after the foreclosures," 1880 Bank was "free to seek whatever relief it deems appropriate through the declaratory judgment claim[.]"

[20] 1880 Bank exercised another of the remedies for a default when it filed a separate petition to appoint a receiver for the properties. In that action, 1880 Bank also relied on its status as the assignee of Congressional Bank, the successor to American Bank.

Shortly thereafter, 1880 Bank raised its own claim for declaratory judgment. 1880 Bank asserted that Democracy Capital's denial of 1880 Bank's claimed rights had created a "cloud" over the foreclosure proceedings, which would "negatively affect" the price that a purchaser would pay for the properties. 1880 Bank asserted that the provisions of the Assignment Agreement purporting to allow Democracy Capital to control servicing decisions "if enforceable, would provide [Democracy Capital] with a second ground" for attacking 1880 Bank's right to foreclose, which would "similarly create[] a cloud on title to the Property" and thus limit the recovery from any sale. 1880 Bank asserted that the "[a]ntagonistic claims and positions" of the parties indicated that "imminent and inevitable litigation" would occur until the court settled the dispute in a binding declaration.

The court declined to permit Democracy Capital to dismiss without prejudice its claim for a declaratory judgment. The court credited 1880 Bank's assertions that Democracy Capital had created "a cloud on the title, which would make it difficult to reasonably conclude a foreclosure sale." For that reason, the court was "not persuaded that a wait and see approach might be appropriate[.]"

Against the background of those accrued facts, the court decided the cross-motions for summary judgment. The court rejected the notion that the controversy between the parties was somehow restricted to the question of whether Democracy Capital could use its Assignment Agreement to block Congressional Bank's assignment to 1880 Bank. The court perceived the controversy to include whether Democracy Capital could use its Assignment Agreement to restrain 1880 Bank from acting as the loan servicer, by

proceeding with the foreclosure under the loan documents. That court reasoned that, through the Participation Agreement, Maryland Financial Bank had received promises "that the lender's course of action would prevail" in the event of a default. The court concluded: "Here, as long as Democracy can stop the foreclosure that 1880 opted for, MFB's right to know that 1880's decision will prevail is adversely affected."

Accordingly, the court's ruling concerned not only the enforceability of the "veto" clauses that Democracy Capital had expressly invoked in its attempt to block the assignment of the loan and servicing rights to 1880 Bank. Maryland Financial Bank and 1880 Bank had also asked the court to invalidate other "extraordinary rights" purportedly granted to Democracy Capital in the Assignment Agreement. In its opinion, the court concluded that the provisions purporting to transfer control over the handling of loan defaults to Democracy Capital would impair Maryland Financial Bank's contractual right to have the loan serviced exclusively by the lender. The court went on to declare that the Assignment Agreement was unenforceable to the extent that it purportedly permitted Democracy Capital to terminate the lender as the loan servicer and to possess and hold the original loan documents.

On appeal, Democracy Capital argues that the circuit court "impermissibly invented" a series of "hypothetical conflicts" between the Assignment Agreement and the Participation Agreement. Democracy Capital suggests that the declaration should not have involved any of its contractual rights other than the so-called veto rights on which it expressly relied in its attempt to restrain 1880 Bank from acting as the loan servicer. Democracy Capital posits that it is "not difficult" to imagine circumstances in which the

exercise of the control rights purportedly granted to it "could substantially benefit" Maryland Financial Bank. Under this view, any determination that Democracy Capital's involvement would adversely affect the rights of Maryland Financial Bank "would have depended entirely on if, when, and under what circumstances" Democracy Capital exercised its rights.

To a large extent, this argument appears to conflate the "rights" of Maryland Financial Bank with the interests of Maryland Financial Bank. The language of section 13(a) of the Participation Agreement imposes the requirement "that involvement of other participants will not adversely affect the rights or obligations of Participant hereunder." As Democracy Capital aptly observed in opposition to 1880 Bank's summary judgment motion, this language protects Maryland Financial Bank "against a diminishment of its legal rights, not against an action that it subjectively believes is adverse to its interests."

Maryland Financial Bank suggests that a determination that a transaction impairs the rights of Maryland Financial Bank can be made as soon as the lender executes an agreement setting forth the terms of the involvement of the additional party. Maryland Financial Bank argues that the court "necessarily had to engage in an analysis of the conflicts" between the Participation Agreement and the Assignment Agreement, and all conflicts that the court identified are "apparent on the face of the two documents." In this view, the analysis of the adverse effect of the Assignment Agreement on Maryland Financial Bank's rights does not depend on any "future hypothetical conflict."[21]

[21] 1880 Bank analogizes these circumstances to those of *Layman v. Layman*, 282 Md. 92 (1978). Before their divorce, two spouses entered into a separation agreement in

It is unnecessary for this Court to decide whether it would have been appropriate for the court to issue its declaration immediately after the Assignment Agreement first took effect at the end of the 2015 calendar year. The additional facts that had accrued by the time the court issued its declaratory judgment gave the controversy a more definitive shape. As recounted above: Congressional Bank agreed with 1880 Bank and Maryland Financial Bank that 1880 Bank should initiate a foreclosure; Democracy Capital forcefully objected, in the belief that 1880 Bank would be unable to maximize the recovery, and refused to relinquish possession of the original loan documents; Congressional Bank made an agreement to assign the loan documents to 1880 Bank, over that objection; Democracy Capital sued to enjoin 1880 Bank from acting as loan servicer; and 1880 Bank initiated foreclosure proceedings that Democracy Capital claimed to be fraudulent.

On this record, it would be unreasonable to conclude that the controversy was no larger than the immediate issue of whether Congressional Bank could assign its servicing rights to 1880 Bank. The controversy necessarily included the practical question of

which they promised to devise real property to their children. *Id.* at 93. The former husband then published a will that included a gift to his children of a sum that he claimed was be equal to the value of his equity interest in the real property. *Id.* at 94. The former wife obtained a declaratory judgment that the will was contrary to the separation agreement. *Id.* at 94-95. The Court of Appeals saw no merit in the former husband's contention that the trial court lacked power to grant that relief. *Id.* at 95. The Court said that there was "no question" that the requirement of a justiciable controversy had been satisfied, where "a legal decision [was] sought as to the construction of a provision of a contract already executed, the obligations of which one party has purported to fulfill in a manner alleged by the other to be contrary to the agreement." *Id.* The Court added: "A clearer example of interested parties, adverse claims, and accrued facts would be difficult to come by." *Id.*

whether 1880 Bank, under that assignment, could effectively exercise powers under the loan documents and incident to the role of servicer. Democracy Capital repeatedly made it known that disagreed with the decision that 1880 Bank should conduct the foreclosure and that it did not recognize 1880 Bank's claimed right to foreclose. As Democracy Capital later explained in its motion for reconsideration, there was no longer any disagreement over whether "a foreclosure was the right course of action," and the remaining "dispute at that time was *who* would pursue the foreclosure."

We agree with Maryland Financial Bank's observation that, under these facts, continued conflict over 1880 Bank's exercise of servicing rights was "imminent and inevitable." Under the circumstances, the circuit court was not required to confine either its reasoning or its declaration to the specific "veto" provisions that Democracy Capital had already invoked in its attempt to prevent 1880 Bank from becoming the new loan servicer. The court acted properly in evaluating the validity of the other provisions through which Democracy Capital might achieve its announced goal of restraining 1880 Bank from acting as the loan servicer: the purported rights to control the loan servicer's handling of the default, to terminate the loan servicer, and to compel the loan servicer to deliver the loan documents. The court did not need to hold back on a decision protecting the rights and interests of the other parties, thereby permitting Democracy Capital to invoke one clause after another until its rights were adjudicated in a series of separate declaratory judgments.

A primary objective of the Declaratory Judgments Act is to "relieve litigants of the rule of the common law that no declaration of rights may be judicially adjudged unless a

right has been violated[.]" *Boyd Civics Ass'n v. Montgomery Cty. Council*, 309 Md. 683, 691 (1987). With respect to contractual rights, the Act specifies that a "contract may be construed before or after a breach of the contract." CJP § 3-407. The Court of Appeals has endorsed the view that a state of facts is "not too contingent or speculative for declaratory relief" where the court is satisfied those facts indicate that litigation will ensue unless the matter is "settled and stabilized by a tranquilizing declaration." *Boyd Civics Ass'n v. Montgomery Cty. Council*, 309 Md. at 691 (quoting Edwin Borchard, *Declaratory Judgments* 57 (2d ed. 1941)). "'The imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform, create justiciability as clearly as the completed act or event[.]'" *Boyd Civics Ass'n v. Montgomery Cty. Council*, 309 Md. at 692 (quoting E. Borchard, *Declaratory Judgments* 60 (2d ed. 1941)).

In our assessment, all matters addressed in the court's declaration were practical rather than theoretical. Even if Democracy Capital had yet to exercise each of its contractual powers, those powers were claimed to exist "and in the light of the past history we think it is a fair assumption that th[ese] power[s] would be exercised, if found to exist." *Liss v. Goodman*, 224 Md. 173, 177 (1960). Indeed, "[i]n light of the certain continuation of the dispute," it might have "been irresponsible for the court not to exercise its authority" (*Huggins v. Huggins & Harrison, Inc.*, 220 Md. App. 405, 425 (2014)) to relieve the parties of the uncertainty created by Democracy Capital's denials of 1880 Bank's right to foreclose.

The events that immediately followed the issuance of the declaratory judgment confirmed that the court had made a realistic and accurate assessment of the scope of the

controversy. The underlying "concerns animating the parties had not dissipated." *Huggins v. Huggins & Harrison, Inc.*, 220 Md. App. at 425. The entrenched controversy quickly escalated into litigation over which party had the right to possess the original loan documents.

Promptly after the court issued its judgment, 1880 Bank requested that Democracy Capital "deliver the original Loan Documents" into the possession of 1880 Bank "as soon as possible." 1880 Bank explained: "It is essential to 1880 Bank's exercise of its default remedies as the Lender that it have immediate possession of the original Loan Documents." 1880 Bank reiterated its request for delivery of the original loan documents after the court denied Democracy Capital's motion for reconsideration.

Meanwhile, 1880 Bank engaged in negotiations to sell the loan documents to third parties. A prospective purchaser offered to purchase the loan documents on terms acceptable to both 1880 Bank and Maryland Financial Bank. After being informed of the offer, Democracy Capital was dissatisfied with the purchase price. Democracy Capital asserted that, under the Assignment Agreement, the proposed sale could not proceed without its consent.

1880 Bank and Maryland Financial Bank jointly filed an emergency petition for an injunction compelling Democracy Capital to deliver the original loan documents to 1880 Bank. In an affidavit supporting the petition, counsel for 1880 Bank explained that the third-party purchaser would not agree to purchase the loan unless it received the original loan documents, so that the purchaser then could complete the foreclosure.

Opposing the petition, Democracy Capital contended that it had no obligation to deliver the original loan documents to 1880 Bank, because, although the court's opinion had discussed the loan documents, the court's declaration did not expressly require Democracy Capital to deliver the loan documents. As a "separate justification" for opposing the petition, Democracy Capital argued that it was entitled to keep the loan documents to prevent 1880 Bank from selling the loan to a third-party purchaser. Democracy Capital cited the provisions of the Assignment Agreement stating that the Lender, without prior written consent from Democracy Capital, could not "[a]ct with respect to any Loan default" and could not "[s]ell, transfer, or assign the Loan, excepting any sale, transfer or assignment in full repayment of the Loan."

The circuit court granted the emergency petition and ordered Democracy Capital to deliver physical possession of the loan documents to 1880 Bank, under the court's authority to grant "[f]urther relief based on a declaratory judgment . . . if necessary or proper." CJP § 3-412(a).

Under the circumstances, the court's declaratory judgment did not exceed the scope of the justiciable controversy. Democracy Capital's insistence that the court should have issued a more limited declaration is not only impractical, but it depends upon an unreasonably narrow view of the court's power to grant declaratory relief and of the facts that had accrued by the time of the court's ruling.

E. Challenges to Appellees' Ability to Seek the Declaratory Judgment

Finally, Democracy Capital makes a two-tiered challenge to whether its adversaries could properly seek a declaration invalidating terms of the Assignment

Agreement.

Democracy Capital was named as a defendant in two separate counts for declaratory relief. First, Congressional Bank sought a declaration invalidating provisions of the Assignment Agreement. 1880 Bank later replaced Congressional Bank as the plaintiff on that claim, by virtue the assignment made as part of the settlement. Second, 1880 Bank sought a declaration invalidating provisions of the Assignment Agreement and establishing the validity of its assignment from Congressional Bank.

As to the first claim, Democracy Capital argues that Congressional Bank, by asking the court to invalidate provisions of the Assignment Agreement that it inherited from American Bank, was actually "seeking a reformation" of that contract. Democracy Capital asserts that Congressional Bank established no grounds to "modify" that instrument, such as "mutual mistake, fraud, duress, or other inequitable conduct." Democracy Capital argues that Congressional Bank should not be permitted to "avoid[] its contractual responsibilities simply because it regretted the deal that its predecessor-in-interest made with its knowledge and approval" during the merger. Democracy Capital further argues that 1880 Bank should "fare no better" as the putative successor to Congressional Bank's claim.

Separately, Democracy Capital contends that 1880 Bank lacks independent standing to challenge the validity of the Assignment Agreement. "In order to have 'standing' to bring a declaratory judgment action, one must have 'a legal interest' such as . . . 'one arising out of a contract.'" *Young v. Anne Arundel County*, 146 Md. App. 526, 558 (2002) (quoting *Committee for Responsible Dev. on 25th St. v. Mayor & City*

Council of Baltimore, 137 Md. App. 60, 72 (2001)). Democracy Capital observes that, "[g]enerally, only parties to a contract or third-party intended beneficiaries have standing to challenge the validity or application of a contract." *Precision Small Engines, Inc. v. City of Coll. Park*, 457 Md. 573, 587-88 (2018). Democracy Capital notes that 1880 Bank was "neither a party to the Assignment Agreement nor a third-party beneficiary" of that contract, which was made between Democracy Capital and American Bank. Democracy Capital concedes that 1880 Bank had standing to seek clarification of its own contractual rights, such as those under its assignment from Congressional Bank. Democracy Capital argues, however, that 1880 Bank "had no right to seek what amounted to a reformation of a contract to which it was not a party."

Notably absent from these two arguments is any mention of the status of the remaining party: Maryland Financial Bank. Democracy Capital also raised its own claim for declaratory relief, naming Maryland Financial Bank as a defendant alongside Congressional Bank and 1880 Bank.[22] That count began with the assertion that the "Assignment Agreement . . . is a valid and enforceable contract." Democracy Capital relied on terms of the Assignment Agreement as the basis to seek a declaration that "the purported assignment of the Loan and its servicing rights by Congressional to 1880 is void and unenforceable[.]" In its answer to that count, Maryland Financial Bank claimed that "various provisions of the Assignment Agreement are invalid and unenforceable."

Ordinarily, "when a declaratory judgment action is brought and the controversy is

[22] 1880 Bank also named Maryland Financial Bank as a defendant in its own count seeking a declaratory judgment.

appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment, defining the rights and obligations of the parties . . . even if the action is not decided in favor of the party seeking the declaratory judgment." *Lovell Land, Inc. v. State Highway Admin.*, 408 Md. 242, 256 (2009) (citations and quotation marks omitted). The court's "declaration may be [either] affirmative or negative in form and effect[.]" CJP § 3-411. Furthermore, when a party moves for summary judgment, the court may "enter judgment in favor of *or against* the moving party[.]" Md. Rule 2-501(f) (emphasis added). Democracy Capital, as the plaintiff and movant seeking a declaratory judgment, created the risk that the court would issue a declaration unfavorable to Democracy Capital on the issues it raised.

When the circuit court rejected Democracy Capital's standing arguments, the court observed that the controversy involved "no shortage of putative contractual relationships between opposing parties[.]" The court invoked not only the rights of 1880 Bank, but also the rights of Maryland Financial Bank. The court wrote: "1880 (and MFB) want to know whether certain provisions of the Assignment and Servicing Agreement violate the anti-assignment provisions of the Participation Agreement and with what remedy." The court reasoned: "Even if Congressional could be said to have 'waived' these violations by willingly insisting on American's undertaking them, Congressional cannot have waived MFB's rights under the Participation Agreement, or MFB's and 1880's ability to seek a declaration of their rights."

Democracy Capital has not contested the court's conclusion that Maryland Financial Bank had standing to seek clarification of its rights under the Participation

Agreement. This Court "ordinarily do[es] not decide issues of standing where it is undisputed that [at least] one party on each side of the litigation has standing." *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55 (2008); *see also Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 205 Md. App. 636, 652 (2012) (quoting *Board of License Comm'rs v. Haberlin*, 320 Md. 399, 404 (1990)) (stating that, "'[w]here there exists a party having standing to bring an action or take an appeal, we shall not ordinarily inquire as to whether another party on the same side also has standing'").

The position of Maryland Financial Bank, in seeking to enforce the anti-assignment clauses of the Participation Agreement, is no weaker than that of the parties that the Court of Appeals has permitted to enforce anti-assignment clauses by invalidating all or part of a subsequent contract. In *Public Service Commission of Maryland v. Panda-Brandywide, L.P.*, 375 Md. 185 (2003), a power purchase agreement prohibited a utility company from making assignments without the consent of the power seller. *Id.* at 191. The power seller successfully invoked that contractual right as the basis for invalidating provisions of the utility's subsequent sale agreement with a third-party buyer. *Id.* at 203.

A year later, the Court applied the "rule" from *Panda-Brandywine* "in the context of a limited partnership agreement[.]" *Della Ratta v. Larkin*, 382 Md. 553, 570 (2004). In that case, a general partner had purported to transfer his partnership interest to a trust, even though the partnership agreement prohibited him from assigning his share of the partnership. *Id.* at 569. Some limited partners questioned whether the general partner could properly seek a declaration challenging the validity of his own assignment. *Id.* at

570 n.10. The Court observed, however, that the general partner was "not alone in challenging his purported assignment[,]" because several other limited partners who "were not parties to the assignment" also sought "enforcement of the anti-assignment clause." *Id.* Permitting those partners to enforce the anti-assignment clause, the Court held that the purported assignment of the partnership interest was "invalid and unenforceable from its inception." *Id.* at 570.

In those cases, the parties that successfully invalidated an assignment were parties to the contract containing the anti-assignment clause, not parties to the contract purporting to make the prohibited assignment. Indeed, if they had been parties to the assignment contract, then they might have "waived" their right to enforce the anti-assignment clause or might be "estopped" from challenging the validity of an assignment to which they had assented. *See Della Ratta v. Larkin*, 382 Md. at 570 n.10. The Court said nothing suggesting that these objecting parties were third-party beneficiaries of the assignment contract. The Court did not liken this remedy to "reformation," nor did the Court suggest that the objecting parties needed to show any mutual mistake, fraud, duress, or inequitable conduct in order to invoke the remedy. Like the objecting parties in the *Panda-Brandywine* and *Della Ratta* cases, Maryland Financial Bank is the party, if any, that should be heard to enforce provisions made for its benefit by challenging an assignment made in violation of those provisions.

Moreover, the position of Maryland Financial Bank, in enforcing the anti-assignment provisions of the Participation Agreement, is no weaker than that of Democracy Capital, in attempting to enforce the anti-assignment clauses of the

Assignment Agreement. Democracy Capital is also a party to an agreement (the Assignment Agreement) that included provisions prohibiting certain assignments made without its consent. Democracy Capital invoked those provisions as the basis for seeking to invalidate an assignment (from Congressional Bank to 1880 Bank), even though Democracy Capital was neither a party to, nor a third-party beneficiary of, that assignment agreement. Democracy Capital, in seeking that remedy, did not allege any mutual mistake, fraud, duress, or other inequitable conduct. If Democracy Capital may properly bring a declaratory judgment action to invalidate an assignment made without its consent in violation of its contractual rights, then so too may Maryland Financial Bank, in defense of the action, seek to invalidate an assignment made without its consent in violation of its contractual rights.

Accordingly, even if neither Congressional Bank and 1880 Bank should be heard to challenge the Assignment Agreement, it was proper for the circuit court to issue a declaration concerning the validity of the Assignment Agreement. Maryland Financial Bank's standing, relied upon by the court and unchallenged by Democracy Capital, was sufficient. This result is consistent with the *Panda-Brandywine* and *Della Ratta* opinions, which were the basis of the relief sought by Democracy Capital and of the court's ultimate ruling.

CONCLUSION

In conclusion, we perceive no basis for reversal. By entering into the Assignment Agreement, American Bank purported to do what it had promised not to do without prior written consent from Maryland Financial Bank: make or consent to an assignment of the

loan documents; and assign or otherwise relinquish its loan servicing obligations. The involvement of the assignee, on the terms of the Assignment Agreement regarding the loan documents and loan servicing decisions, impaired the very contractual rights that Maryland Financial Bank undertook to protect through the anti-assignment provisions. The circuit court neither erred in its legal conclusions nor exceeded its authority when it granted the declaratory relief.

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