

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MARYLAND FINANCIAL BANK,

*

Case No. 429795V

Plaintiff,

*

vs.

*

CONGRESSIONAL BANK, et. al.,

*

Defendants.

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MEMORANDUM OPINION AND ORDER

This matter was before the Court on April 25, 2018 for hearing on Defendant Democracy Capital Corporation’s Motion For Summary Judgment On Count 1 Of Its Counterclaims And Cross-Claim, And On 1880 Banks’s Claims (Docket Entry No. 139 and Docket Entry No. 142)¹, and Defendant 1880 Bank’s Motion For Summary Judgment Declaring 1880 Bank To Possess Unilateral Lender Servicing Authority To Foreclosure On The Mortgage Property (Docket Entry No. 140). Democracy Capital Corporation (“Democracy”), 1880 Bank (“1880”), and Maryland Financial Bank (“MFB”) appeared through counsel. Congressional Bank (“Congressional”), one of the original defendants, did not appear.

For the reasons stated below, the Court **GRANTS** 1880 Bank’s Motion For Summary Judgment Declaring 1880 Bank To Possess Unilateral Lender Servicing Authority To Foreclosure On The Mortgage Property (Docket Entry No. 140); and **DENIES** Defendant Democracy Capital Corporation’s Motion For Summary Judgment On Count 1 Of Its

¹ Democracy’s Motion for Summary Judgment was docketed twice, once at Docket Entry No. 139 and again at Docket Entry No. 142.

Counterclaims And Cross-Claim, And On 1880 Banks's Claims (Docket Entry No. 139 and Docket Entry No. 142). The two-day bench trial set for May 21, 2018 will be cancelled.

UNDISPUTED MATERIAL FACTS

Maryland Financial Bank, Congressional Bank, and 1880 are Maryland chartered commercial banks whose principal offices (respectively) are in the Maryland counties of Baltimore County, Montgomery, and Dorchester. Democracy Capital Corporation is a Delaware corporation with principal offices in Montgomery County. When the events precipitating this dispute started, Congressional and 1880 each had a predecessor in interest. Congressional's predecessor was American Bank; 1880's was the National Bank of Cambridge.

On September 20, 2007, American Bank ("American") originated a loan of \$8,400,000.00 to SDC Equities, LLC ("SDC Equities" or "Borrower"), with a maturity date of September 20, 2013. The loan was guaranteed by Sojourner-Douglass College, Inc. ("SDC" or "Guarantor"), a not-for-profit college operating in Maryland. The loan was to refinance SDC's existing debt and was secured by a first lien against two of its buildings (collectively, "the property"). That same day, in a Participation Agreement, American sold MFB a participation interest in the Loan, entitling MFB an "undivided 50% interest in... all rights, benefits... payments... fees, proceeds (including insurance proceeds), awards, expenses and costs arising from or out of the Loan and Loan Documents." Again that day, in a Sub-Participation Agreement, MFB sold 82.14% of its participation interest to National Bank of Cambridge.

Over the coming years, the Borrower's and the Guarantor's financial condition deteriorated. September 20, 2013 came and went without full payment and American took no action to collect, instead extending the maturity date to January 20, 2014. On January 14, 2014, the IRS recorded tax liens against the property. On January 20, 2014, the loan matured under the

modified terms but American again took no action to collect. On August 28, 2014, American again modified the loan, extending the maturity date to September 1, 2016.

On September 2, 2014, American entered into an Agreement and Plan of Merger with Congressional, and announced the intended merger on September 3, 2014. The merger required American to spin-off the SDC loan such that Congressional could acquire American without it.

By June 23, 2015, SDC lost its accreditation and ceased operations. Thereafter, American declared the loan in default and demanded payment.

On December 31, 2015, the day before American's merger with Congressional, in an Assignment and Servicing Agreement that Congressional assisted in negotiating, American purported to transfer all of its "right, title, and interest" in the SDC loan (still unpaid) to Democracy with the intent that American (about to become Congressional) would continue to service the loan. The Assignment and Servicing Agreement was made without MFB's consent. Thereafter, the property remained vacant, was taken over by squatters, and suffered significant fire damage.

On January 30, 2017, MFB filed a four-count complaint in this Court against Congressional and Democracy, alleging, in essence, that by entering into Assignment and Servicing Agreement, Democracy and Congressional (as American's successor in interest) violated the Participation Agreement. In addition to money damages, MFB asked that Congressional be ordered to commence foreclosure proceedings on the loan. Counterclaims and cross claims followed and 1880 was joined as a necessary party.

On or about July 13, 2017, the Mayor and City Council of Baltimore began a receivership action in the District Court of Maryland for Baltimore City to take control of the property. In

that suit, the City represented that the property “. . . is partially boarded, fire-damaged, vacant, unfit for human habitation, and has not been razed or rehabilitated.”

At some point, Democracy learned that Congressional intended to transfer its servicing obligations to 1880. Thereafter, on August 21, 2017, and again on September 11, 2017, Democracy sent two letters to MFB, Congressional, and 1880 objecting to any such transfer. On September 17, 2017, notwithstanding Democracy’s objection, MFB, Congressional, and 1880, entered into Settlement and Assignment Agreement. With it, among other things, MFB, 1880, and Congressional dismissed their claims against each other. In addition, Congressional transferred all of its “right, title, and interest” in the SDC loan, the 2007 Participation Agreement, and the 2015 Assignment and Servicing Agreement, as well as its “rights and obligations” under the latter two agreements, to 1880.

On October 17, 2017, 1880 commenced foreclosure proceedings against the property in the Circuit Court for Baltimore City. As of March 28, 2018, the total amount due on the SDC loan is \$12,281,908. MFB, and now Democracy, agree that foreclosure should proceed. Nonetheless, and with the claims that remain, MFB, Democracy and 1880 now seek declaratory judgment as to 1880’s and Democracy’s rights against and obligations to each other under the above agreements. The remaining claims are:

(1) **Docket Entry No. 29:** Count I of 1880’s Amended Cross-Claim For Declaratory Relief Against Democracy Capital Corporation, Amended Counter-Claim Against Maryland Financial Bank For Breach of Contract and Joinder of 1880 Bank As A Necessary Party (which 1880 inherited from Congressional);

(2) **Docket Entry No. 80:** Count I of Democracy’s Counterclaim Against Congressional Bank, Counterclaim Against Maryland Financial Bank, Cross-Claim Against 1880 Bank; and

(3) **Docket Entry No. 131:** 1880's Counterclaim Against Maryland Financial Bank And Cross-Claim Against Democracy Capital Corporation For Declaratory Judgment.

LEGAL STANDARDS

I. Declaratory Judgment

The Court's authority to grant a declaratory judgment is derived from Section 3-409(a) of the Courts and Judicial Proceedings Article, which says:

(a) Except as provided in subsection (d) of this section, a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:

- (1) An actual controversy exists between contending parties;
- (2) Antagonistic 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.

Md. Code Ann., Cts. & Jud. Proc. § 3-409(a). In regard to the parties necessary to a declaratory relief action, Section 3-405 of the Courts and Judicial Proceedings Article says 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.” Md. Code Ann., Cts. & Jud. Proc. § 3-405.

II. Summary Judgment

Under Maryland Rule 2-501(a), any party may “. . . make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.” The Court must review the record in a light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the evidence against the moving party. *Tyler v. City of College Park*, 415 Md. 475, 498-99 (2010). Disputed facts are “material” only if they “. . . somehow affect the outcome of the case.” *King v. Bankerd*, 303 Md. 98, 111 (1985). Thus,

“[f]acts that do not pertain to the core questions involved are not ‘material’ and, consequently, are insufficient to avert a proper motion for summary judgment.” *Warner v. German*, 100 Md. App. 512, 517 (1994). Summary judgment can properly be granted in cases involving the interpretation of a contract, as the court can interpret contracts as a matter of law where appropriate. *Nicholson Air Services, Inc. v. Board of County Commissioners of Allegany County*, 120 Md. App. 47 (1998).

THE CONTRACTS

I. The Participation Agreement

Identifying American as the “Lender” and MFB as the “Participant,” the Participation Agreement allocated the parties’ respective rights and obligations and thereby defined their contractual relationship vis-à-vis the SDC loan. With regard to the underlying loan documents, Exhibit B identified (from the underlying loan) the Deed of Trust Note, the Indemnity Deed of Trust and Security Agreement, and the Guaranty Agreement, among others, as the documents in which MFB would receive a 50% interest. As to who would actually hold and possess the loan documents, the parties agreed that American would do so, for its own benefit and that of MFB. Thus, in Section 4, the parties agreed that American would “have in its possession the [loan] documents[,]” and in Section 5, that “[t]he Loan Documents and all rights with respect to the Loan and any collateral securing the Loan shall be held by the Lender [American] in its own name for the benefit of the Lender [American] and the Participant [MFB] as their respective interests therein may be from time to time.”

With regard to the material terms of the loan, American could not alter them without MFB’s prior written consent unless such alterations were deemed immediately necessary. Thus, Section 6 stated:

6. Restrictions on Material Change. Lender [American] shall have the authority to make all decisions in connection with the day-to-day administration of the Loan, provided, however, that except in connection with actions taken pursuant to Paragraph 7, hereof, Lender [American] shall not, without the prior written consent of Participant [MFB]:

- (a) give releases or grant extensions or deferrals in the terms of any of the Loan Documents; or
- (b) 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; or
- (c) extend the maturity of the indebtedness of Borrower on the Loan, except in accordance with any extension option granted to the Borrower in the Loan Documents; or
- (d) agree to forbearance with respect to any term of the Loan; or
- (e) release or waive any claim upon Borrower or any guarantor, or other obligor, in connection with the Loan; or
- (f) extend the term or period during which Lender is committed to make advances of the Loan; or
- (h) change the interest rate.

Notwithstanding the foregoing, in the event Lender [American], in its sole discretion, deems immediate action is necessary to protect its and Participant's [MFB's] interest in the Loan, and Lender [American] and Participant [MFB] cannot agree within five (5) business days, or such shorter period as deemed by Lender [American] to be required under the circumstances, Lender's [American's] chosen course of action, if made in good faith, shall be binding on Participant [MFB].

American and MFB also specified the procedure American would follow upon the Borrower's default, making American's chosen course of action binding upon MFB, if made in good faith after consultation with MFB. Thus, Section 7 stated that in the "[e]vent of Default [by the Borrower] (as defined in the Loan Documents), Lender [American] shall consult with Participant [MFB] prior to taking such action as Lender [American] deems appropriate[.]" and that, in the event the parties could not argue after such a consultation, "Lender's [American's] chosen course of action, if made in good faith, shall be binding on Participant [MFB]."

The Participation Agreement denoted American's general duties in servicing the loan and the standard of care American was to employ in doing so. Thus, Section 8 stated that American

shall have “exclusive right to service the Loan and to collect the interest, principal and all other amounts due or collectible in connection with the Loan,” and in doing so “shall service the Loan in accordance with acceptable mortgage practices of, and ordinary care exercised by, prudent lending institutions.” Thus, as servicer, American agreed to “receive, hold and disburse... payments made by Borrower and others[;]... keep proper books of accounts and records[;]... accept repayment of the Loan... and execute any required corresponding release[;]... receive, hold and disburse[,]” insurance proceeds.

The Participation Agreement also specified the extent to which American was free to delegate its duties. Section 13 dealt with “Assignment of Interests[,]” and stated:

- (a) Participant [MFB] shall not assign any interest in the Loan or, after title is acquired, any interest in the Property without the prior written consent of the Lender [American], which consent shall not be unreasonably withheld. In addition, the Lender [American] shall have a right of first refusal, to be exercised within ten (10) business days of notice from Participant [MFB] of its proposed sale of an interest in the Loan. Lender [American] 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 [American] 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 and obligations of Participant [MFB] hereunder.
- (b) No assignment of Participant’s [MFB’s] interest in the Loan shall become effective until the assignee (to the extent of the interest assigned) assumes, in writing, all obligations of the assigning party under this Agreement and any amendments of this Agreement. In the event of the assignment by Lender [American] 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 [American] 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. No assignment by Participant [MFB] shall be effective until the required consent of Lender [American] is given in writing, which consent shall not be unreasonably withheld, together with the

written assumption by the assignee in form satisfactory to Lender [American] and Participant [MFB]. Upon the making of an assignment, the assignee shall have all the rights, and be subject to all obligations of the Participant [MFB] under this Agreement to the extent of its interest in the Loan and Property. In the event Participant [MFB] assigns all or part of its Percentage Interest in the Loan, as herein permitted, and title to the Property is acquired after default, the assignee shall hold a Percentage Interest in the Property and all rights and obligations set forth herein and by law to the same extent as the Participant [MFB] held a percentage interest in the Loan. Subject to paragraph 15 below, Lender [American] may not assign or otherwise relinquish Lender's [American's] obligations and duties as servicer of the Loan or Property without prior written consent of Participant [MFB].

Finally, the Participation Agreement provided a mechanism for MFB to assume the lender's obligations in the event American became insolvent. Specifically, Section 15 stated that, in case American was unable to fulfill its obligations because of its financial condition, it would "assign to Participant [MFB] or its designee" the loan documents and obligations thereunder.

II. The Sub-Participation Agreement

MFB, in the Sub-Participation Agreement, sold 82.14% of its interest in the loan to National Bank of Cambridge (1880's predecessor bank). Section 1 of that Agreement stated that "MFB... assigns and conveys... title to [1880] to an undivided interest and participation interest in the MFB Loan Interest[.]" Section 2 stated that "[t]his Agreement is intended, and shall be construed, to convey title to the Participation Interest to [1880]." Section 14 said that "MFB has good title and full right, power and authority to convey to [1880] the Participation Interest."

III. The Assignment and Servicing Agreement

With the December 31, 2015 Assignment and Servicing Agreement, American purported to transfer its economic interest in the SDC loan,² and the authority to make certain decisions

² To Democracy, American transferred all of its "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 the Borrower or any other persons liable for the repayment of the Loan

regarding the SDC loan, to Democracy. With regard to how the Assignment and Servicing Agreement related to the Participation Agreement, American represented to Democracy in Section 3.1.2 that “[t]his Agreement and the transaction contemplated hereby complies with the MFB Participation, and Assignor [American] agrees to remain bound by all of the terms and provisions of the MFB Participation.”

With regard to servicing the loan, and more specifically loan defaults, American no longer had the ability to bind Participants to its chosen course of action. Thus, subsection 5.1.4 prevented American from “[a]ct[ing] with respect to any Loan default without the written consent of” Democracy, and, in Section 10.1 Democracy got “the right to take any and all steps deemed reasonable in the handling of default [by the Borrower or any obligor] from the inception thereof until said default is cured or the security is foreclosed.” Moreover, Section 11 gave Democracy “the right at any time... to terminate the Assignor [American] as servicer of the Loan[.]”

As to who would possess the loan documents, American was to possess them and make them available to Democracy’s inspection, but Democracy was free to demand them at any time. Thus, Section 4 provided that American “shall keep and maintain... he original Loan Documents... [and they] shall be available for inspection by the Assignee [Democracy] or its agent at such location, at any time and from time to time upon reasonable prior notice,” Section 11 stated that “upon demand of the Assignee [Democracy], the Assignor [American] shall deliver to Assignee [Democracy]... the originals of the Loan Documents in the Assignor’s [American’s] possession[.]”

or performance of the Borrower’s obligations under the Loan Documents.” See Section 2 of the Assignment and Servicing Agreements. Whether Democracy received a “participation interest” or something else is disputed.

IV. The Settlement and Assignment Agreement

With the September 2017 Settlement and Assignment Agreement, Congressional, MFB and 1880 attempted to settle their differences. Thus, at Section 2, Congressional assigned its interest in the SDC loan to 1880: “Congressional Bank shall execute and deliver to 1880 the [loan documents]... pursuant to which Congressional shall assign and transfer to 1880 all of Congressional Bank’s right, title and interest... in the SDC Loan, the SDC Loan documents, the Participation Agreement and the Assignment and Servicing Agreement.” In that same Section, MFB agreed to the assignment. In Section 4, Congressional, MFB and 1880 agreed to release each other from any claims arising from the loan, and Section 5 specified that they would enter a stipulation of dismissal.

THE PARTIES’ CONTENTIONS AND REQUESTS

Fundamentally, 1880 and MFB stand aligned against Democracy, each side making mirror arguments about the validity (or invalidity) of key provisions of the Participation Agreement, the Assignment and Servicing Agreement, and the Settlement and Assignment Agreement. As the purported assignee of American’s (and then Congressional’s) servicing obligations under the Participation Agreement, and as a Sub-Participant, 1880 claims that certain provisions of the Assignment and Servicing Agreement are invalid. Democracy goes a step further, countering that the Assignment and Servicing Agreement is valid in its entirety and that it prevents Congressional from assigning its servicing obligations to 1880. For its part, MFB sides with 1880, adding that at most, Democracy may pursue a claim for damages against Congressional, but not a finding of invalidity.

Where the parties agree is the mechanism by which the Court can resolve this dispute. In large measure, the parties' arguments in support of summary judgment rest on interpretation of the above agreements and not on determinations of the materiality (or not) of disputed facts. All parties urge the court to interpret the above contracts, and declare their rights thereunder, as a matter of law.

1880 requests that the Court declare, among other things: (1) that the Settlement and Assignment Agreement is valid and enforceable; (2) that Congressional's assignment of the loan documents to 1880 was lawful, valid and enforceable; (3) that the Participation Agreement supersedes the Assignment and Servicing Agreement and nullifies and invalidates any right Democracy would otherwise have to interfere with administration of the loan, including foreclosure; (4) that 1880 has full authority to act as the Lender and exclusive servicer of the loan; (5) that 1880 lawfully instituted the foreclosure action pursuant to its rights as servicer; (6) and that any and all provisions in the Assignment and Servicing Agreement that conflict with 1880's rights under the Participation Agreement are void.

Democracy requests two declarations: (1) that Congressional's assignment to 1880 of the servicing rights to the loan is invalid, void and unenforceable; and (2) that 1880 is enjoined from acting as servicer of the loan.

DISCUSSION

The rules of contract interpretation are well settled. First, "[t]he cardinal rule of contract interpretation is to give effect to the parties' intentions." *Dumbarton Imp. Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 51 (2013) (quoting *Tomran, Inc. v. Passano*, 391 Md. 1, 14 (2006)). To effectuate this, Maryland adheres to the objective theory of contract interpretation, in which "[t]he written language embodying the terms of an agreement will govern the rights

and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite understanding.” *Id.* at 51 (quoting *Slice v. Carozza Properties, Inc.*, 215 Md. 357, 368 (1958)).

Regarding the ability of parties to enter into a contract, “Maryland law recognizes the freedom of parties to contract as they see fit.” *Sang Ho Na v. Gillespie*, 234 Md. App. 742, 752 (2017) (citing *Nesbit v. Gov’t Employees Ins. Co.*, 382 Md. 65, 76 (2004)). This principle has explicitly been applied to anti-assignment provisions. *Della Ratta v. Larkin*, 382 Md. 553, 570 (2004) (“In general, we have adopted the rule that an assignment in violation of an anti-assignment clause is invalid and unenforceable.”); *Pub. Serv. Comm’n Of Maryland v. Panda-Brandywine, L.P.*, 375 Md. 185, 203 (2003) (holding that “an assignment of rights and obligations... in contravention of [an anti-assignment provision]... is therefore invalid and unenforceable.”).

Here, by entering into the Assignment and Servicing Agreement, American attempted to assign to Democracy several of the key obligations American undertook in the Participation Agreement. Because these assignments violated explicit anti-assignment clauses in the Participation Agreement, the attempted assignments are themselves invalid and unenforceable. Plain reading of the relevant clauses shows why.

The key things American promised touched its very ability to service the loan and protect its and MFB’s interests in it. To start, American had the exclusive right to service the SDC loan. Thus, American promised to collect the money due under the loan, to hold and disburse it, to keep books, to receive financial statements from SDC, and to advance MFB’s portion of certain payments.³ For the loan documents, American promised to possess and hold them, and to do so

³ See Section 8 of the Participation Agreement.

free of lien or encumbrance.⁴ With regard to the terms of the loan, American promised not to agree to material changes without first consulting with MFB unless said changes were deemed immediately necessary to protect American's and MFB's interests.⁵ The same was true for remedying loan defaults. American promised not to do so without first consulting MFB and attempting to agree on a mutual course of action.⁶ For participation interests to other participants, American promised not to sell same where doing so would adversely affect MFB's rights and obligations.⁷ And if American itself defaulted, American promised that it would assign the loan documents to MFB unless another participant had so notified American first.⁸

For each of these key obligations, the breadth of American's promise about whether, and under what circumstances, American could assign the obligation was explicit and clear. Thus, MFB's prior written consent was required before American could assign away its obligations as servicer,⁹ unless the assignment was through a voluntary business combination or the result of American's default.¹⁰ MFB's prior written consent was also required before American could assign the loan documents to another, unless American deemed same was immediately necessary to protect MFB.¹¹

In defending the assignments at issue here, Democracy does not contend that MFB consented to them, or that the "exceptions" present in the above clauses apply, or that *Del Ratta's* and *Panda-Brandywine's* proscription against offending assignments is no longer the law

⁴ See Section 4 and 5 of the Participation Agreement.

⁵ See Section 6 of the Participation Agreement.

⁶ See Section 7 of the Participation Agreement.

⁷ See Section 13(a) of the Participation Agreement.

⁸ See Section 15 of the Participation Agreement.

⁹ See Section 13(b) of the Participation Agreement.

¹⁰ See Section 15 of the Participation Agreement.

¹¹ See Section 6 of the Participation Agreement.

in Maryland.¹² Instead, Democracy argues: (1) that 1880, the loan's actual servicer since October, 2017, does not have standing to seek a declaration of its rights and obligations because its predecessor, Congressional, is neither a party to, nor a third-party beneficiary of, the Assignment and Servicing Agreement; (2) that Congressional, and thereby 1880, cannot be heard to complain about perceived inconsistencies between the Participation Agreement and the Assignment and Servicing Agreement; Congressional insisted on the spin-off of the SDC loan to Democracy, as well as changes in the Assignment and Servicing Agreement, and was well aware of any inconsistencies before it merged with American; (3) the assignment is "saved" by Section 3.1.2 of the Assignment and Servicing Agreement because this provision assures 1880 and MFB that the transaction complied with the Participation Agreement and that American has agreed to remain bound it; and (4) that MFB's rights under the Participation Agreement are not adversely affected by the Assignment and Servicing Agreement. All of these arguments fail.

With regard to 1880's standing to seek declaratory relief, 1880 has standing because it is a party to the Settlement and Assignment Agreement and the Sub-Participation Agreement and its rights and obligations are the subject of this dispute. Indeed, Section 3-406 of the Courts and Judicial Proceedings Article states that "[a]ny person *interested* under a... written contract... *or whose rights, status, or other legal relations are affected by a... contract... may have determined any question of construction or validity arising under the... contract... and obtain a declaration of rights[.]*" Md. Code Ann., Cts. & Jud. Proc. § 3-406 (emphasis added).

¹² As an alternative argument, MFB presses the distinction between a contracting party's "right" to make a non-conforming assignment and its "power" to do so, and cites *Halpert v. Dental Care Alliance*, 2007 WL 1295805 (D. Md. May 1, 2007). As of 2007, as *Halpert* recognized though, it was not clear that Maryland's courts had addressed this distinction. Given the result below, this court need not do so.

Precision Small Engines, Inc. v. City of Coll. Park, 457 Md. 573 (2018), the case on which Democracy relies, does not hold otherwise. In *Precision Small Engines*, the parties were tenants and property owners seeking a declaration regarding a contract between the Prince George's County and the city of College Park. *Id.* at 576-577. The Court held that the tenants and property owners lacked standing because they were neither a party to the contract between the County and the city, nor were they the intended beneficiaries of it. *Id.* at 587-588. Here, by contrast, we have no shortage of putative contractual relationships between the opposing parties, and as a consequence, 1880 may seek clarification of its rights and obligations under those contracts.

Nor does 1880's position suffer because it is the successor to an entity (Congressional) that willingly entered into arguably inconsistent contracts. 1880's claim for declaratory relief does not hinge only on the argument that the Participation Agreement and the Assignment and Servicing Agreement are inconsistent. Instead, 1880 (and MFB) want to know whether certain provisions of the Assignment and Servicing Agreement violate the anti-assignment provisions in the Participation Agreement and with what remedy. 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.

Turning to the substance of the contracts, Democracy's reliance on Section 3.1.2 of the Assignment and Servicing Agreement to "save" the transaction does not hold up in light of the key obligations American undertook in the Participation Agreement. With regard to the loan documents, American agreed not to assign its interest in them without MFB's prior written

consent (and one other exception not applicable here),¹³ but did so anyway. Merely saying that this assignment “complied” with the Participation Agreement does not make it so, though, for as long as Democracy held American’s interest in the loan documents without MFB’s consent, the Participation Agreement was not complied with. Just as empty is American’s promise to “remain bound” by the Participation Agreement. Merely agreeing to be bound into the future does not undo the fact that American assigned its interest in the loan documents without MFB’s consent.

Beyond Section 3.1.2, Democracy says that MFB and 1880 cannot complain that Democracy got greater control than they did over who services the SDC loan and how to remedy loan defaults. Specifically, Democracy says it got a participation interest from American, and that Section 13(a) of the Participation Agreement allows American to sell participation interests on terms other than those afforded MFB. Thus, the variance between Democracy’s and MFB’s rights vis-à-vis the SDC loan is not a basis to invalidate Democracy’s rights. The difficulty with this argument lies in the last clause of the Participation Agreement’s Section 13(a), which prohibits the “involvement” of other participants that “. . . adversely affect the rights or obligations of [MFB].”

With the Participation Agreement, what MFB got was the right to deal with a lender that simultaneously held the loan documents, serviced the loan, pursued its remedies in the event of default, and the right not to be undermined by other participants. If American wanted to assign away its servicing obligations, MFB could not prevent the assignment but could control the choice of replacement by exercising its right to withhold consent. Thus, if MFB consented to American’s choice, the assignment would occur or American would opt to remain the servicer. If

¹³ See Section 6(b) of the Participation Agreement.

MFB withheld consent, American would propose another replacement or opt to remain the servicer. Either way, MFB got some control over who serviced the loan.

What the Assignment and Servicing Agreement did was “fractionalize” or disperse the obligations of one lender into the hands of two entities, one bank (American and then Congressional) and one other entity (Democracy). For example, rather than possess and hold the loan documents, American was now a mere possessor, required to make the loan documents available for inspection by Democracy, their new holder.¹⁴ With regard to remedying loan defaults, American’s hurdle was now higher. Rather than merely consulting MFB for five business days in an attempt to reach a mutual course of action, after which American could bind MFB, now American would also have to get Democracy’s written consent prior to taking action.¹⁵ With regard to servicing, American could no longer assign its obligations merely with the consent of one participant.¹⁶ Now, a second participant (Democracy) was involved, and in addition to being able to block a replacement servicer by withholding its consent, that second participant could also terminate American as servicer.¹⁷

That MFB’s rights and obligations were “adversely affected” by the dispersal of American’s obligations between itself and Democracy is obvious from this case. In September, 2017, with the Settlement and Assignment Agreement, Congressional (as American’s successor) wanted to assign its servicing obligations on the SDC loan to 1880. MFB consented. Under the Participation Agreement, these two steps would have been enough to conclude the assignment. Thus, there would be no uncertainty among 1880 (servicer), MFB (participant) and Democracy

¹⁴ See Sections 4 and 11 of the Assignment and Servicing Agreement.

¹⁵ See Sections 5.1.4 and 10.1 of the Assignment and Servicing Agreement.

¹⁶ See Sections 5.1.5 and 11 of the Assignment and Servicing Agreement.

¹⁷ See Section 11 of the Assignment and Servicing Agreement.

(participant) about who was responsible for what going forward. Had 1880 opted to foreclose, it could have done so, even in the face of MFB's or Democracy's objection, provided that it consulted with MFB and Democracy first. Instead, if Congressional had acceded to Democracy's objection and stopped the assignment to 1880, MFB and Congressional would be left in a contractual relationship that neither now wants. And rather than have a lender empowered to pursue default remedies, even to foreclose on the property in the face of MFB's or Democracy's objection, MFB has a lender that possesses, but does not hold, the loan documents and that cannot exercise default remedies unless another participant (Democracy) permits it to.

To minimize these problems, Democracy claims that MFB never had the right to compel a change of loan servicer, only to consent to a change once American wanted one. Thus, goes the argument, because MFB could not compel a change, MFB loses nothing by American's affording another participant (Democracy) the right to withhold consent to a change. Attractive as this approach may appear, it oversimplifies the rights MFB got. When the Participation Agreement was executed in 2007, MFB was the only participant, not one of several. Accordingly, as above, while it could not compel a change of servicer, it could expect to control the choice of replacement. That right evaporated when, with the Assignment and Servicing Agreement, Democracy got the apparent right not only to withhold consent to a change in, but also to terminate, the servicer.

Finally, with regard to foreclosure, Democracy contends that because it now agrees that foreclosure should proceed, MFB's rights are not adversely affected by Democracy's involvement. Again, as above, this argument diminishes MFB's contractual rights. What MFB got in the event of a loan default was the knowledge that the lender's course of action would prevail, even if MFB disagreed with it. 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.

Democracy's current stance on foreclosure is of no moment.

These conclusions doom Democracy's attempt to invalidate Congressional's assignment of its servicing obligations to 1880. Specifically, Democracy looks to Sections 5.1.5 and 11 of the Assignment and Servicing Agreement and argues that because they prevent Congressional from assigning the SDC loan or resigning as servicer without Democracy's prior written consent, consent that Democracy did not give, Congressional's assignment to 1880 is invalid. As above, though, Sections 5.1.5 and 11 are themselves invalid. Thus, although Democracy objected to the assignment to 1880, Democracy had no right to do so, and its objection is no barrier.

ORDER OF DECLARATORY JUDGMENT

For the reasons stated above, it is this 17th day of May, 2018, by the Circuit Court for Montgomery County, hereby

ORDERED, that 1880 Bank's Motion For Summary Judgment Declaring 1880 Bank To Possess Unilateral Lender Servicing Authority To Foreclosure On The Mortgage Property (Docket Entry No. 140) be and is hereby **GRANTED**; and it is further

ORDERED, ADJUDGED, and DECLARED, that to the extent that it purportedly permits Democracy to terminate the servicer of the SDC loan, the Assignment and Servicing Agreement is unenforceable; and it is further

ORDERED, ADJUDGED, and DECREED, that to the extent that it purportedly affords Democracy the right to withhold consent to the Lender's assignment of its servicing obligations of the SDC loan to another, the Assignment and Servicing Agreement is unenforceable; and it is further

ORDERED, ADJUDGED, and DECREED, that to the extent it that purportedly permits Democracy to possess and hold the original SDC loan documents, the Assignment and Servicing Agreement is unenforceable; and it is further

ORDERED, ADJUDGED, and DECREED, that 1880 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; and it is further

ORDERED, that Defendant Democracy Capital Corporation's Motion For Summary Judgment On Count 1 Of Its Counterclaims And Cross-Claim, And On 1880 Banks's Claims (Docket Entry No. 139 and Docket Entry No. 142) be and is hereby **DENIED**; and it is further

ORDERED, that the two-day bench trial scheduled for May 21, 2018 shall be removed from the court's docket.

✓ Anne K. Albright, Judge
Circuit Court for Montgomery County,
Maryland