UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0908

September Term, 2015

DEMOCRACY CAPITAL CORPORATION

v.

MONUMENT BANK

Meredith,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: September 15, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Monument Bank loaned the chairman of its board of directors, David Fairweather, $1.8 million dollars. Monument then sold the loan to American Bank but, pursuant to a Participation Agreement, Monument remained the servicer of the loan. When the loan went south, American demanded that Monument act aggressively to try to obtain repayment from Fairweather. Monument took a more conciliatory approach. Eventually, however, Monument declared a default and Fairweather sought the protection of the bankruptcy court.[1]

American filed suit against Monument in the Circuit Court for Montgomery County alleging a breach of the Participation Agreement. After a five-day bench trial, the trial court found: (1) that Monument had not breached the Participation Agreement in most of the respects American claimed; (2) that Monument had breached its obligation to provide certain financial statements; (3) that the breach was material; (4) that monetary damages were not appropriate; but (5) that, as a remedy, the servicing responsibilities be turned over to American. Neither side is happy with this result: American appealed and Monument cross-appealed.

---

[1] As often happens, there is a lot more complexity to this story, but none of that complexity is particularly relevant to the resolution of the case before us. For example, the borrower in the loan transaction wasn't David Fairweather himself, but an entity that he controls, Fairweather Investments, LLC. Fairweather and his wife, Jane Fairweather, issued personal guarantees of the loan. Moreover, although American Bank was the purchaser of the loan and took all of the actions described herein, it has subsequently merged with and been succeeded by the named appellant in this case, Democracy Capital Corporation. For convenience, we will refer to the borrower simply as Fairweather and Democracy Capital as American.

FACTS

At its heart, this is a breach of contract lawsuit. As such, the most important facts are the terms of the Participation Agreement. The Participation Agreement is, apparently, Monument's standard participation contract. The parties are Monument—the seller of the loan—and American—the buyer of 100% of the loan. Monument's obligations as the servicer of the loan, which is the primary issue here, are set forth in Section 4. We have set out Section 4 (nearly) in full:

> **4. Administration and Servicing of Loan.**
>
> (a) The duties of Seller shall be administrative in nature. Seller shall not have by reason of this Agreement or otherwise a fiduciary relationship in respect of Buyer, and nothing in this Agreement, expressed or implied, is intended to or shall be soon construed as to impose upon Seller any obligations in respect of this Agreement except as set forth herein.
>
> …
>
> (c) Seller shall administer and service the Loan in accordance with the usual practices employed by Seller in servicing commercial loans in connection with which Seller is the sole or lead lender and shall administer the Loan in all respects consistent with law and regulations, Seller shall have the authority to make decisions under the Loan Documents in connection with the day-to-day administration and servicing of the Loan and other matters of a routine nature involved in the administration and servicing of the Loan, and Buyer shall be bound thereby. … Seller makes no express or implied representations or warranties concerning, and shall have no responsibility to Buyer with respect to: (i) the collect[a]bility of the Loan, (ii) the accuracy, adequacy or completeness of any information heretofore or hereafter furnished to Buyer by Borrower or by any of its representatives or agents, (iii) the execution, validity, legal effect, enforceability or adequacy of

any of the Loan Documents, or (iv) the financial condition of Borrower, it being agreed and understood that Buyer has investigated and reviewed and will continue to investigate and review such matters itself and hereby assumes all risk of loss in connection with the Loan to the same extent as if it were the sole lender to Borrower to the extent of its participation interest in the Loan.

(d) Seller shall collect all payments due from Borrower….

(e) Buyer's share in the loan origination fee heretofore collected by Seller shall be $9,000.00 (provided that this Agreement is executed on or before June 29, 2007). Seller shall deduct a servicing fee (the "Servicing Fee") from Buyer's proportionate share of the loan interest paid to Buyer equal to One Quarter of a percent (.25%) from the Borrower's stated rate. …

(f) Buyer will, upon demand by Seller, reimburse Seller to the extent of Buyer's participation interest, any and all costs, expenses and disbursements (including attorney's fees) which hereafter may be incurred or made by Seller in connection with the Loan for which Seller is not reimbursed by or on behalf of the Borrower.

(g) Seller shall maintain such books and records relating to the Loan as it would were the Loan made solely by Seller, including but not limited to a record of each receipt and each disbursement, which books and records shall be presumed to be correct, absent manifest error, and shall be made available to Buyer at the offices of Seller at all reasonable times for the purpose of inspection, examination, and audit thereof by Buyer at Buyer's sole expense. …

(h) Seller shall provide Buyer with copies of all financial statements submitted by Borrower and any Loan guarantors in connection with the Loan, within thirty (30) days following receipt thereof. Seller shall from time to time, when requested by Buyer, render advice, to its knowledge, as to the status of any matter relating to the Loan and shall, regardless of whether it is requested to do so, advise, Buyer as to the existence and nature of any fact coming to Seller's attention which constitutes a material Event of Default under any of the Loan Documents.

(i) Seller may, in its sole discretion and without notice to Buyer, modify any of the terms of the Loan Documents, and may waive any of such terms or give or withhold consents or approvals to any action or failure to act by Borrower thereunder, or exercise or refrain from exercising any rights, powers or remedies it may have, or permit substitutions or withdrawals of any of the collateral which may then be held by Seller as security for the Loan. Notwithstanding the administrative authority delegated to Seller by Buyer, and without limiting such administrative authority, Seller shall not, without the prior consent of the Buyer, cause or permit any of the following actions ("Extraordinary Actions"):

(1) Decrease the interest rate of the Loan;

(2) Increase the maximum authorized principal amount of the Loan;

(3) Extend the final maturity of the Loan (excluding the granting of extensions incorporated into the Note);

(4) Release the Borrower or any guarantor of the Loan from liability; or

(5) Release any of the real estate securing the Loan.

(j) Buyer agrees to abide by and cooperate in implementing such decisions as may from time to time be made by Seller; provided such decisions shall not breach any of the provisions of Subsection (i) of this Section. …

…

> (l) Buyer shall not without the prior written consent of the Seller, contact the Borrower, or the Grantors with respect to any matters relating to the Loan.

ANALYSIS

I. No "Extraordinary Actions"

American's first constellation of challenges are resolved by reference to the standard of review. That is, although American struggles mightily to characterize these as legal challenges, we are constrained to hold that they are, in fact, factual challenges. Because the trial court's factual determinations were not clearly erroneous, we affirm. *See B & P Enterprises v. Overland Equip. Co.*, 133 Md. App. 583, 601, 758 A.2d 1026, 1035 (2000) (An appellate court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous.").

First, American argues that Monument was required to declare a default and, as a consequence, increase the rate of interest to the default rate. Because Monument declined to do so, American argues, the net effect was a "[d]ecrease [in] the interest rate of the Loan," which was an "Extraordinary Action" that Monument could not take without American's prior consent pursuant to Section 4(i)(1) of the Participation Agreement. As a result, American concludes, Monument breached the contract. Instead, the trial court found that Monument did not (and was not required to) declare a default, did not (and was not required to) increase the rate of interest to the default rate, and therefore, did not "[d]ecrease the interest rate of the Loan." That was a factual determination, well supported in the record, and we will not disturb it.

Second, American argues that the trial court erred in finding that Monument didn't grant Fairweather an "[e]xten[sion of] the final maturity of the Loan" without American's prior consent and thus Monument breached the Participation Agreement. The trial court heard evidence that supported a distinction between a formal extension (which would qualify as an "Extraordinary Action") and a *de facto* extension (which would be an ordinary action—to "waive any … terms or give or withhold consents or approvals to any action or failure to act by Borrower"—within the exclusive power of Monument as seller). *See* § 4(i) of the Participation Agreement. Again, this was a factual determination, well-supported in the record, which we will not alter.

Third, American argues that Monument breached the Participation Agreement by releasing a second priority judgment lien against a parcel of land owned by Fairweather. Specifically, American claims Monument "[r]eleased] … real estate securing the Loan"[2] without American's prior consent, which was an "Extraordinary Action." The trial court, however, found that, although Monument did release that lien, the lien was against a parcel that was not collateral securing the loan. There is significant evidence to support the trial court's finding, and American conceded as much at trial American's attempts to circumvent the trial court's finding by reference to Virginia law are unavailing as the Participation Agreement specifically selects Maryland's as the governing law.[3] Thus, we

[2] *See* § 4(i)(5) of the Participation Agreement.

[3] American also thinks that the trial court erred in giving too much credence to Monument's fears that, if it took aggressive action in loan collection, Fairweather would seek bankruptcy protection. It is not clear to us precisely how this fits in with (continued…)

find that the trial court did not err in its factual determination that no "Extraordinary Actions" were taken without American's consent.

II. Monument's Breach

The trial court found that Monument breached its duty to disclose Fairweather's financial statements to American. The trial court, however, found this breach to be negligent, not intentional, and declined to award monetary damages, but instead ordered that Monument turn over the servicing of the loan to American. Neither side is happy with this ruling. American disputes both: (1) the determination that the breach was negligent not intentional; and (2) that monetary damages are not available. Monument contests the trial court's finding that the breach was material and, therefore, argues that it should remain the loan's servicer.

Whether the breach was negligent or intentional matters because, in § 5 of the Participation Agreement, American promised to indemnify Monument for all claims

---

American's overall analysis. These bankruptcy fears (as American puts it) were just one of the factors that the trial court discussed in reaching its conclusions. Moreover, there are several problems with American's theory. *First*, there was evidence in the record, to which the court was entitled to give credence, that bankruptcy "would be no good for anyone." *Second*, the fact that Fairweather did seek bankruptcy protection makes Monument's fear that he would seem particularly well-founded. Most importantly to us, however, § 4(c) of the Participation Agreement specifically required Monument to service this loan in a manner consistent with the "usual practices employed by [Monument] in servicing commercial loans," and there was testimony that Monument's "general philosophy [is] to remedy deterioration in credit through mutual cooperation and negotiation, rather than an adversarial approach." The trial court made specific findings that Monument serviced the loan in a manner consistent with its standard practice, which included avoidance of bankruptcy. With such a record, we conclude that the trial court's finding was not clearly erroneous.

against it "except to the extent [such claims] result from gross negligence, bad faith[,] or willful misconduct by [Monument]." American's brief includes a list of events, which if credited, might support a finding that Monument's conduct was intentional. The problem for American, however, is that there was also evidence to support a finding that the breach was negligent. Specifically, there was evidence of a near-constant flow of financial information from Monument to American with the sole exception of the 2011 financial statement. Moreover, Monument's CEO, H.L. Ward, testified that he thought the 2011 financial statement had been sent, said that there was no reason it wouldn't have been sent, and that if it wasn't sent, it was a "lapse." The trial court reviewed the evidence and found that it supported a finding of negligent, not intentional conduct. We will not interfere with that judgment.

In refusing to award monetary damages for Monument's breach of the Participation Agreement, the trial court found that "any loss American may have suffered is too speculative and uncertain to be recoverable." American disagrees and contends the court erred in two respects. American begins with a three-step, "Rube Goldberg"-style theory: *First*, Monument breached the Participation Agreement by failing to disclose Fairweather's financial statements to American; *second*, pursuant to Section 21 of the Participation Agreement, a material breach allows American to "automatically succeed" to the servicing rights;[4] and, *third*, by failing to automatically turn over the servicing rights, Monument

---

[4] Section 21 provides:

(continued…)

committed a second breach. We see at least three problems with this theory. *First*, it doesn't appear that American presented this argument to the trial court (which might explain why it was "overlooked"). *Second*, as this was an alternative basis for the trial court's decision, if we agreed and adopted American's theory, we are unsure what effect it would have on the result. But most importantly, *third*, American's argument doesn't make the damages any less speculative.

American also points to Monument's appraisal of Fairweather's accessible net worth as sufficient evidence of damage certainty. This is a non-sequitur. "The amount of damages recoverable for breach of contract is that which will place the injured party in the monetary position he would have occupied if the contract had been properly performed." *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1, 12 (1998). As noted by the trial court, it is not clear how American would have proceeded if servicing rights were turned over to it earlier or how another lien against Fairweather would have benefited

> In the event of ... a material breach of any covenant or agreement herein or in the Participation Certificate, ... the Buyer shall automatically succeed to all rights, titles, status and responsibilities which Seller may have regarding the holding and servicing of the Loan, and have an option to exercise all of the powers herein above granted to Seller, and have the option to designate itself or any person or firm in its discretion to exercise such powers in a manner consistent with the respective participation interest of Seller.

American. Therefore, an appraisal of Fairweather's net worth doesn't make damages any less speculative or uncertain,[5] and this argument cannot prevail.

Finally, Monument argues that although the trial court found that Monument breached the Participation Agreement (and Monument does not challenge that finding), the breach could not have been "material" as a matter of law and, therefore, that the trial court erred in ordering a remedy (transfer of servicing) on the basis of that breach. We think that the question of how significant the breach was, at least in these circumstances, a question of fact. As such we defer to the trial court's finding that Monument's breach was material.

III. Attorney's Fees

Maryland follows the traditional "American rule" regarding attorney's fees, which states that a party generally may not recover attorney's fees "unless (1) the parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against malicious prosecution." *Thomas v. Gladstone*, 386 Md. 693, 699 (2005). Monument asserts that the trial court erred because Monument views the "Limitation of Liability" clause (the "indemnification clause") of the Participation Agreement as a contractual obligation to pay attorney's fees.

[5] American argues that Monument, "as the wrongdoer, is not entitled to benefit from the speculative nature of damages." Although damages need not be mathematically precise, and an award may consider the fault of the breaching party, this does not relieve a party of its obligation to prove damages with "sufficient reasonable certainty." *See David Sloane, Inc. v. Stanley G. House & Associates Inc.*, 311 Md. 36, 40-41 (1987).

In *Nova Research, Inc. v. Penske Truck Leasing Co.*, the Court of Appeals explained that, although Maryland courts do not "strictly require the phrase 'attorney's fees' in a contract to override the American rule …, a contract provision must call for fee recovery expressly … to overcome the application of the American rule." 405 Md. 435, 452-53 (2008). Here, the Participation Agreement's indemnification clause states that American will indemnify Monument of "all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses, and/or disbursements" incurred. The trial court noted that this indemnification clause does not explicitly mention attorney's fees, and found that the clause's indemnification was insufficient to overcome the presumption in favor of the American rule. We agree.

In sum, we have reviewed the work of the trial court in this case. Its oral opinion demonstrated a thoroughgoing mastery of the complicated facts presented and we affirm in all respects.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID 3/5 BY APPELLANT, 2/5 BY APPELLEE/CROSS-APPELLANT.