UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2242

September Term, 2015

MONUMENT BANK

v.

AMERICAN BANK, FSB

Nazarian,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 21, 2017

This case involves a well- and fully documented commercial loan transaction that, like many loans of its vintage, wasn't repaid as planned; this is the last of three lawsuits it has begotten. In the second case, the Circuit Court for Montgomery County ruled that Monument Bank ("Monument"), the original lender, breached certain obligations it owed to American Bank, FSB ("American") in servicing the loan, and that American was entitled, as a result, to take over servicing the loan as of the date of the breach. Nevertheless, Monument continued to service the loan while that case was pending, and it now seeks in this case to recover expenses it incurred in doing so. After a three-day bench trial, the circuit court found in favor of American. Monument appeals and American cross-appeals. We affirm the rulings at issue in Monument's appeal, and remand for entry of a declaratory judgment relating to American's cross-appeal.

I. BACKGROUND

Monument made two loans to Fairweather Investments, Inc. (the "Borrower"): one in 2006 for $1.1 million (the "2006 Loan"), and a second in 2007 for $1.8 million (the "2007 Loan"). David and Jane Fairweather were the guarantors for both loans. Both of these loans had "participants": EagleBank participated in the 2006 Loan and American participated in the 2007 Loan. The dispute in this case focuses on servicing expenses incurred in connection with the 2007 Loan.

On June 29, 2007, Monument and American entered into a Participation Agreement under which, among other things, Monument sold its entire interest in the 2007 Loan to American. Under the Participation Agreement, Monument agreed to administer and

service the 2007 Loan, which included collecting all payments due from the Borrower. Meanwhile, American agreed to "be responsible for the payment of its proportionate share of any [not ordinary, day-to-day] expenses . . . in connection with the servicing, administration, or enforcement of the [2007] Loan" and to reimburse the expenses "incurred or made by [Monument] in connection with the [2007] Loan for which [Monument wa]s not reimbursed by or on behalf of the Borrower." American also agreed to pay Monument's expenses in connection with collecting and enforcing the 2007 Loan, including appraisal and legal fees. The Participation Agreement specified that in the event of a material breach, American would automatically take control of servicing the 2007 Loan:

> In the event of . . . a material breach by [Monument] of any covenant or agreement herein or in the Participation Certificate . . . it is agreed that [American] 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 [Monument], and have the option to designate itself or any person or firm on its discretion to exercise such powers in a manner consistent with the respective participation interested of [Monument]. In such event, all records thereof shall be delivered to [American] or its designee, as the case may be, together with necessary or proper assignment, transfers and documents of authority, and reasonable compensation shall be paid to the person or firm exercising such powers.

The 2007 Loan matured in June 2010 and the Borrower fell behind on its payments. American informed Monument that it did not want to renew or extend the 2007 Loan. Monument did not, however, exercise any of its rights on default, and instead tried to work with the Borrower and guarantors to devise a plan to pay off the loan. In July 2010,

American first asked Monument to transfer servicing to it. On September 27, 2010, American again expressed displeasure with Monument's servicing and requested that Monument "exercise all remedies, including foreclosure," against the Borrower for default.

During the summer of 2011, the Borrower sought to extend the 2006 and 2007 Loans. American "adamantly rejected an extension" because "it appeared that there was going to be an inherent conflict in the fact that since [one of the guarantors] was on the board and an integral board member of Monument, [American] just felt that there was going to be an inherent conflict upon -- about Monument being able to enforce [the 2007 Loan]," and it disagreed with the manner in which Monument was (not) collecting the 2007 Loan. American again asked Monument to transfer servicing of the 2007 Loan to American.

In October 2011, Monument agreed to transfer the servicing of the 2007 Loan provided that American execute a Transfer and Release Agreement. American refused, contending that the agreement would prohibit American from holding Monument responsible for actions it had taken while it had serviced the 2007 Loan, and it declined to execute "any agreement other than a servicing transfer agreement." On October 21, 2011, American sent a letter to Monument stating that Monument had materially breached the Participation Agreement and demanding that Monument transfer servicing duties to American by October 28, 2011. Monument continued to service the Loan itself.

Monument declared the Borrower in default in November 2011 and, in January 2012, filed suit against the Borrower and the individual guarantors of the 2006 and 2007

Loans. The circuit court issued confessed judgments against the Borrower and the guarantors on January 30, 2012. Despite having confessed judgments in hand, though, Monument elected to defer collection efforts to continue working with the guarantors on an alternative plan.

American filed suit against Monument for the first time in connection with the servicing of the 2007 Loan on December 9, 2011. For a time, starting in or around November 2011, it appeared that one of the guarantors would receive money by way of a tax credit plan that would allow payments by the end of 2012. Because it appeared that this plan would succeed, Monument and American entered into a tolling agreement in September 2012 and, in October 2012, dismissed the 2011 lawsuit without prejudice. This plan, however, never came to fruition, so American re-filed its case against Monument (the second lawsuit) in May 2013. In the 2013 lawsuit, the circuit court "found that Monument had breached the '07 agreement [by failing to disclose false and misleading financial information by the Borrower]. And American was entitled to immediately succeed to Monument's rights to service the loan" as of October 6, 2011, "but shall not be entitled to money damages for any claimed loss." We affirmed. *Democracy Capital Corp. v. Monument Bank*, No. 908, Sept. Term 2015 (Md. App. Sept. 15, 2016), slip op. at 7–8.

In or around January 2014, Monument hired counsel to initiate collection proceedings on the confessed judgments for the 2006 and 2007 Loans. Monument's counsel, however, only pursued one of the loans—the 2006 Loan—to avoid duplication from pursuing two collections against "one pot of money." Monument submitted

statements of its costs associated with the collection proceeding to American in June 2014 and made several other requests for reimbursement through February 2015. American did not reimburse these costs.

Sometime early in 2014, Monument's counsel discovered that Monument held an interest reserve account with $173,000 that had been pledged by the Borrower as collateral to secure the 2007 Loan. American was not informed of this account, which could have been applied to the interest due on the 2007 Loan, until December 10, 2014.

On October 3, 2014, Monument filed the complaint that gives rise to this case, the third one arising from these loans, alleging breach of contract (Count I). After American answered, Monument filed a First Amended Complaint, adding counts of unjust enrichment (Count II) and declaratory judgment (Count III). American moved to strike Counts II and III on June 4, 2015; on June 22, 2015, Monument filed an opposition and requested a hearing. Monument and American each filed a motion for summary judgment and an opposition to the other party's motion.

After a hearing on July 21, 2015, the court ruled on American's Motion to Strike and each party's Motion for Summary Judgment (among others). American withdrew its motion to strike Count III, and the court granted the motion as to Count II because it determined that Monument's claims were grounded in the Participation Agreement. As a result of these findings, the court deemed American's Motion for Summary Judgment moot. The court also noted that the parties "agreed that any fees incurred prior to October

6, American would be obliged to pay," and denied Monument's Motion for Summary Judgment. American filed an answer to the amended complaint on July 31, 2015.

The case then went to trial on Count I on August 24, 2015. At the close of Monument's case, American moved for judgment, arguing that the Participation Agreement was a contract that precluded an equitable remedy and called for an automatic transfer of servicing upon a material breach, "mean[ing that] Monument at that moment in time no longer ha[d] the right to servicing." The court granted the motion in part, "find[ing] that there is no requirement of a judicial determination that a breach has occurred before the obligation [to turn over the servicing of the 2007 Loan] arises," and denied it in all other respects. At the conclusion of the trial, American again moved for judgment and the court deferred ruling.

The court issued its opinion in open court on October 14, 2015. It found in favor of American on its breach of contract claim and ordered that "the money in the interest loan account be turned over to American less any costs of collection or other servicing costs incurred by Monument relating to the '07 note that were incurred prior to November of 2011." Additionally, the court found that "there was no meeting of the minds between American, Monument and Eagle[Bank] on American sharing the costs of these [2006 Loan collection] efforts or the proceeds on a pro rata basis," and failed to find any "evidence that American impliedly consented or acquiesced in Monument's continued servicing of the loan following its October of 2011 breach of the agreement." The court noted that "American repeatedly and consistently insisted that Monument was required to surrender

the servicing rights to American forthwith" and, "only because Monument refused to honor American's rightful demand, American instructed Monument to exercise their powers to protect American's rights to the fullest possible extent." The court found that "Monument unreasonably withheld its approval. Had Monument approved the transfer, American would have been made whole without incurring any of the costs." The court determined that "American [wa]s entitled to a claim of th[e] tax [credit] proceeds if in fact they are realized," but "can make no claim to the proceeds from the garnishments since [American] disavow[s] any agreement to share in those proceeds or share in the costs." And with regard to Monument's election of remedies argument, the court found "no significant inconsistency between the claims asserted by American in" each iteration of its complaint.

On November 16, 2015, the court entered judgment in favor of American on Count I, and as to Count III, ordered that Monument "has the right to withdraw from the CD [interest reserve] Account . . . $2,900.00[], such amount comprising costs of collection and/or servicing that Monument Bank incurred prior to October 6, 2011, and to apply such funds to its costs of collection and/or servicing that it incurred prior to October 6, 2011," and that Monument "shall turn over all remaining funds in the CD [interest reserve] Account . . . to American Bank, FSB within ten (10) days of the date of entry of final judgment." Monument filed a timely appeal and American filed a timely cross-appeal. We will discuss additional facts below as necessary.

II. DISCUSSION

Monument raises two issues:[1] *first*, whether the circuit court's finding of material breach by Monument excused American's performance under the Participation Agreement, and *second*, whether the circuit court erred by striking Monument's alternative claim for unjust enrichment. American cross-appeals, raising the additional issue of whether the circuit court rendered an impermissible advisory opinion regarding American's entitlement to the collected garnishment funds.[2]

A. The Circuit Court Correctly Found That Monument Was Not Entitled To Servicing Expenses Incurred After Breaching.

We start from the premise, grounded in our holding in the second case, *Democracy Capital Corp. v. Monument Bank*, No. 908, Sept. Term 2015 (Md. App. Sept. 15, 2016), that Monument materially breached the Participation Agreement. The dispute now is whether American was obliged to reimburse Monument for the expenses it incurred while it continued to service the 2007 Loan in the time after the breach, while the second lawsuit was pending and after Monument declined to relinquish servicing obligations to American.

[1] In its brief, Monument phrased its Questions Presented as follows:

> 1. Did the Circuit Court err by determining that a finding of material breach by Monument excused American Bank's performance under the Participation Agreement?
>
> 2. Did the Circuit Court err by striking Monument's alternative claim for unjust enrichment?

[2] American phrased its Question Presented as follows: "Did the trial court impermissibly and improperly render an advisory opinion that American is not entitled to its share of any monies collected through the garnishment proceedings against the guarantors?"

The circuit court in this case found that American's prior breach forfeited its right under the Participation Agreement to service the loan as of the date of the breach and to recover its costs. Monument asserts that its breach did not excuse American from reimbursing the costs Monument incurred in servicing the 2007 Loan after October 2011, including the cost of initiating foreclosure proceedings. Its argument is essentially an equitable one: although American pled and proved that Monument had breached the Participation Agreement, American never sought an injunction to *force* Monument to relinquish the servicing obligations immediately or to terminate the Participation Agreement, and its election not to do so obliges American to pay the costs of Monument's servicing services during the contested time period. Citing treatises, Monument argues that "the [c]ircuit [c]ourt legally erred by misapplying the doctrine of election of remedies" because American's effort to enforce the Participation Agreement now is "the exact opposite of the position that [it] took before the [c]ircuit [c]ourt, and advances in its Brief, namely that the Participation Agreement should have terminated on some date certain in October of 2011." In Monument's words, the circuit court erred by "chang[ing] American Bank's request for 'prospective relief' and its companion claim for money damages into a claim for *nunc pro tunc* termination of the Participation Agreement that never was pled, nor could it properly have been" and "ignoring the legal effect of American Bank's acceptance of the benefits of Monument's servicing under the Participation Agreement." American replies that the election of remedies doctrine does not apply in this case because "Monument is improperly trying to use the doctrine as a sword, to prevent American from

asserting a defense to Monument's breach of contract claim" and that American's defense in this case is consistent with the remedies it sought in its initial case against Monument—"to have Monument declared in breach of the Participation Agreement *and* to force Monument to turn over the servicing." (Emphasis in original.)

We agree with American. "The doctrine of election of remedies applies when a claimant has coexistent and inconsistent remedies, pursues one of them to final judgment, and then pursues the other remedy." *Walter v. Atl. Builders Grp., Inc.*, 180 Md. App. 347, 364 (2008) (citing *Surratts Assocs. v. Prince George's Cty., Md.*, 286 Md. 555, 568 (1979); *Haynie v. Nat'l Gypsum Corp.*, 62 Md. App. 528, 533 (1985)); *see also Herring v. Citizens Bank & Tr. Co.*, 21 Md. App. 517, 541 (1974) ("[T]he doctrine of election of remedies applies only when two positions taken by the same litigant are necessarily inconsistent."). "Among its necessary elements are the following: (1) two or more coexisting remedies between which there is a right of election; (2) inconsistency as to such available remedies; and (3) the actual bringing of an action and pursuing it to a final judgment." *Preissman v. Mayor of Balt.*, 64 Md. App. 552, 562 (1985) (quoting *Surratts Assocs.*, 286 Md. at 568). *Williston on Contracts* describes the doctrine essentially as the choice between having one's proverbial cake and eating it too:

> When one party commits a material breach of contract, the other party has a choice between two inconsistent rights—it can either elect to allege a total breach, terminate the contract and bring an action or, instead, elect to keep the contract in force, declare the default only a partial breach, and recover those damages caused by that partial breach—but the nonbreaching party, by electing to continue receiving benefits

> under the agreement, cannot then refuse to perform its part of the bargain.

13 Williston on Contracts § 39:32 (4th ed.). Although parties may claim alternative relief in the same suit, "they finally must elect which alternative they would use and accept, and [] a judgment reflecting that election [] bar[s] recovery under the other theory." *City of Balt. v. Landay*, 258 Md. 568, 580 (1970).

Monument points us to *7-Eleven, Inc. v. McEvoy*, a case in which 7-Eleven terminated one franchise owner but continued to treat the ex-franchisee as a franchisee after his termination. 300 F. Supp. 2d 352, 355 (D. Md. 2004). After a period of time in which the ex-franchisee received no salary, 7-Eleven filed for injunctive relief to eject him from its store and alleged, among other things, breach of contract for alleged failure by the ex-franchisee to adhere to the parties' Franchise Agreement. *Id.* The ex-franchisee counterclaimed, alleging breach of contract, wrongful termination, negligence, and fraud, and argued that 7-Eleven's breaches of the Franchise Agreement excused his own breaches. *Id.* at 355, 358. The court ruled that "[h]ad 7-Eleven breached the agreement before [the ex-franchisee] breached, he could have: 1) treated 7-Eleven's breach, if material, as a repudiation of the agreement and discontinued his performance and acceptance of benefits under the agreement; or 2) treated the breach as a partial breach and sued for damages." *Id.* at 358 (citing *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 376 (3d Cir. 1992)). The ex-franchisee could not, however, do both, *i.e.*, continue reaping the benefits of the Franchise Agreement while discontinuing his performance under the agreement. *Id.* (citing *S & R Corp.*, 968 F.2d at 376).

Unlike in *7-Eleven*, though, this Participation Agreement stated that a material breach by Monument would result in an *automatic* transfer of servicing responsibilities to American. The Participation Agreement itself contemplated that upon a breach of the Participation Agreement, Monument would relinquish its servicing duties and American would take them over immediately. As American puts it, the circuit court found that "American did not ***choose*** for Monument to continue servicing the [2007 L]oan, but rather that American 'repeatedly and consistently' insisted that Monument surrender the servicing" (emphasis in original) and requested that Monument transfer the servicing to it, but Monument refused.

Nor did American's decision not to seek a preliminary injunction serve as acquiescence to Monument continuing to service the loan. Injunctions requesting a change to the status quo require a higher standard of proof than a victory on the merits. *See Md. Tr. Co. v. Tulip Realty Co. of Md.*, 220 Md. 399, 412–13 (1959) ("[A] mandatory or affirmative injunction should be issued with caution, and is ordinarily restricted to cases where adequate redress at law is not afforded, or where the injury is not compensable in damages, and in weighing the propriety of issuing it, a court should consider the relative convenience and inconvenience which will result to the parties from granting or refusing this form of injunctive relief." (citation omitted)). At the same time, American's allegations put Monument on notice of American's position that Monument's breach entitled it to an automatic transfer of servicing the 2007 Loan. And if Monument had turned over servicing when American first requested it do so in 2010 or when Monument

discovered that it had materially breached the Participation Agreement in 2011, it wouldn't have incurred any servicing expenses and this dispute would have been avoided. Indeed, rather than relinquishing servicing, Monument attempted to condition the transfer on a release not contemplated by the Participation Agreement, disregarding language in the Participation Agreement providing that upon an automatic transfer, all records will be delivered to American along with "necessary or proper assignment, transfers and documents of authority." Reimbursing Monument for servicing expenses under these circumstances would render American's contractual remedy—taking over the servicing of the 2007 Loan—illusory and reward Monument for refusing to relinquish servicing in the wake of the breach. We recognize that Monument disagreed that it ever breached the Participation Agreement. But when Monument decided to refuse American's request to take over servicing, it assumed the risk that if it lost the second suit, then it wouldn't be able to recover its servicing costs. We agree with the circuit court's rejection of the election of remedies doctrine here.

B. The Circuit Court Properly Struck Monument's Unjust Enrichment Count.

Our decision on Monument's first issue drives the outcome of the second. Monument argues *next* that the circuit court "prematurely str[uck] Monument's alternative claim for unjust enrichment . . . . because Monument is expressly entitled to 'state as many separate claims or defenses as the party has, regardless of consistency and whether based on legal or equitable grounds."' (quoting Md. Rule 2-303(c)). That broad proposition is true as far as it goes, but it doesn't carry the day.

"Amendments shall be freely allowed when justice so permits," Md. Rule 2-341(c), "but not 'if the amendment would result in prejudice to the opposing party or undue delay,'" *Asphalt & Concrete Services., Inc. v. Perry*, 221 Md. App. 235, 269 (2015) (citation omitted). "As long 'as the operative factual pattern remains essentially the same, and no new cause of action is stated invoking different legal principles,' amendments to pleadings are to be allowed freely and liberally." *Id.* (citation omitted). "We review for abuse of discretion a court's decision to allow or disallow amendments to pleadings." *Hendrix v. Burns*, 205 Md. App. 1, 45 (2012) (citing *Schmerling v. Injured Workers' Ins. Fund*, 368 Md. 434, 443–44 (2002)).

The decision here to strike Count II was substantive, not procedural—Monument's amendment was timely, but it sought to add a claim sounding in equity to a case that sounded entirely in contract. Unjust enrichment is "an obligation which the law creates in absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it." *Cty. Comm'rs of Caroline Cty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 94–95 (2000) (quoting *Black's Law Dictionary* 324 (6th ed. 1990)). But where the parties have an express, written contract, the plaintiff generally cannot assert a claim for unjust enrichment. *Baker v. Baker*, 221 Md. App. 399, 403 (2015); *see also Robinette v. Hunsecker*, 212 Md. App. 76, 126 (2013) ("Admittedly, a claim of unjust enrichment, a quasi-contract claim, 'may not be brought where the subject

matter of the claim is covered by the express contract between the parties.'" (quoting *J. Roland Dashiell & Sons, Inc.*, 358 Md. at 96)), *aff'd*, 439 Md. 243 (2014).

To be sure, a plaintiff may plead a claim for unjust enrichment in the alternative to breach of contract so long as the claim for unjust enrichment includes an allegation of fraud or bad faith in the formation of the contract. *J.E. Dunn Constr. Co. v. S.R.P. Dev. Ltd. P'ship*, 115 F. Supp. 3d 593, 608 (D. Md. 2015) (citations omitted). But not in a case like this where there is no dispute that the parties had an express contract—the Participation Agreement—that governed their respective rights to service the 2007 Loan. Everything at issue here, or even potentially at issue here, was covered by the Participation Agreement. To the extent American was "enriched" by the course of the parties' (non-)performance, that enrichment flowed from Monument's adjudicated breach and its decision not to relinquish the servicing obligation when American requested it. There was no gap here for equity to fill, and we see no abuse of discretion in the circuit court's decision to strike Count II.

C. The Circuit Court Did Not Render An Advisory Opinion Regarding American's Right To Money Collected From The Guarantors, But Did Not Enter A Declaratory Judgment Either.

Lastly, American contends in its cross-appeal that the circuit court rendered an impermissible advisory opinion in the course of its ruling. At trial, witnesses testified that EagleBank, Monument, and American did not have a writing specifying how the proceeds from the garnishment proceedings would be divided. But according to Monument's witnesses, the banks had a verbal understanding of how the proceeds of the 2007 Loan

garnishment collection proceeds would be distributed and the costs allocated—namely, on a *pro rata* basis according to the percentage of principal balance loaned by each bank.

As part of its oral opinion, the circuit court made findings about the parties' respective rights to garnishment and tax credit proceeds:

> Finally, and perhaps more significantly, inasmuch as American denies there was any agreement to pay the costs of recovery which Monument believed existed, American can make no legal or equitable claim to a share of any monies recovered pursuant to [Monument's collection attorneys'] garnishment efforts on the '06 agreement. The tax credit proceedings, however, if realized, result from the Nash Road agreement which in part relied on American's agreement to dismiss its lawsuit.
>
> Therefore, American is entitled to a claim of those tax shares proceeds if in fact they are ever realized. But for the reasons stated herein American can make no claim to the proceeds from the garnishments since they disavow any agreement to share in those proceeds or share in the costs.

American argues that these statements constitute an advisory opinion regarding the tax credit sale proceeds because the ruling wasn't included in the final written order and the issue was not raised in the pleadings. American also contends that it would be "patently unfair" and "improper" for the circuit court to address the parties' rights to the garnishment proceeds because there was no request for a declaratory judgment concerning the parties' respective rights, and asks that we reverse the circuit court in this regard.

Monument counters that the circuit court "did not err by rendering an oral ruling because . . . it was not required to detail its ruling in a 'final written order,'" and that even if we concluded that the circuit court should have rendered its judgment in writing, we

should remand, not reverse. Further, Monument contends that the circuit court's determination was correct that American could not retain the benefits of Monument's servicing efforts.

The Maryland Uniform Declaratory Judgments Act, Md. Code (1973, 2013 Repl. Vol., 2016 Supp.), §§ 3-401 to -415 of the Courts and Judicial Proceedings Article ("CJ"), is "remedial" and its purpose is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." CJ § 3-402. The Act further provides that:

> [e]xcept for the District Court, a court of record within its jurisdiction may declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.

CJ § 3-403(a). When it will serve to terminate the uncertainty or controversy at issue, a court may grant a declaratory judgment 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.

CJ § 3-409(a). "The declaration may be affirmative or negative in form and effect and has the force and effect of a final judgment or decree." CJ § 3-411; *see Universal Underwriters Ins. Co. v. Lowe*, 135 Md. App. 122, 130–31 n.6 (2000) ("While a declaratory decree need not be in any particular form, it must pass upon and adjudicate the issues raised in the

proceeding, to the end that the rights of the parties are clearly delineated and the controversy terminated." (quoting *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 29 (1974))). Both this Court and the Court of Appeals have held that a declaratory judgment must detail the rights and obligations of the parties and be in writing:

> [W]hen a declaratory judgment action is brought and the controversy is appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment, defining the rights and obligations of the parties or the status of the thing in controversy, and that judgment must be in writing and in a separate document. That requirement is applicable even if the action is not decided in favor of the party seeking the declaratory judgment.

Krause Marine Towing Corp. v. Ass'n of Md. Pilots, 205 Md. App. 194, 226 (2012) (quoting *DeWolfe v. Richmond*, 434 Md. 403, 433 (2012)); *see also Messing v. Bank of Am., N.A.*, 373 Md. 672, 702–03 (2003) (stating that where a party requests "declaratory judgment, the circuit court must enter a written declaration of the rights of the parties" (citation omitted)). "[T]he failure to enter a proper declaratory judgment is not a jurisdictional defect, but rather is a procedural error. In that situation, the appellate court may, in its discretion, review the merits of the controversy and remand for the entry of an appropriate declaratory judgment by the circuit court." *Rupli v. S. Mountain Heritage Soc., Inc.*, 202 Md. App. 673, 680–81 n.7 (2011) (internal citations and quotations omitted).

The issues were all fair game for decision, and adequately encompassed by Monument's requests for declaratory relief regarding the interest reserve account as well as "such other and further relief as th[e circuit c]ourt deems just and proper." During the trial, the circuit court inquired as to the parties' rights to several funds, including the interest

reserve account and the garnishment and tax credit proceeds. As part of resolving the parties' disputes, the circuit court sought to address the division of each disputed source of funds. And because it did so in the context of an actual case and controversy and after hearing conflicting evidence, its decisions do not constitute advisory opinions. *See 120 W. Fayette St., LLLP v. Mayor of Balt. City*, 413 Md. 309, 356 (2010) ("To be justiciable the issue must present more than a mere difference of opinion, and there must be more than a mere prayer for declaratory relief. Indeed, the addressing of non-justiciable issues would place courts in the position of rendering purely advisory opinions, a long forbidden practice in this State." (quoting *Hatt v. Anderson*, 297 Md. 42, 46 (1983)). But although the circuit court entered a written order defining Monument's and American's rights to the interest reserve account, the written order doesn't mention the parties' rights regarding the forthcoming garnishment and tax credit proceeds, even though they were covered by the circuit court's oral opinion. But the court decided that American is not entitled to a share of any forthcoming garnishment proceeds, and it should have embodied that decision in a separate declaratory judgment, so we remand for that limited purpose.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLANT TO PAY COSTS.