STATE OF MICHIGAN

COURT OF APPEALS

TGINN JETS, L.L.C., RODNEY M. LOCKWOOD, JR., LOCKWOOD FAMILY INVESTMENTS LIMITED PARTNERSHIP, J. RONALD SLAVIK, J. R. SLAVIK & ASSOCIATES, and J. R. SLAVIK & ASSOCIATES II,

Plaintiffs-Appellees/Cross-Appellants,

v

HAMPTON RIDGE PROPERTIES, L.L.C., and CULLAN MEATHE,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
August 29, 2013

No. 294622
Oakland Circuit Court
LC No. 2007-082312-CK

TGINN JETS, L.L.C., RODNEY M. LOCKWOOD, JR., LOCKWOOD FAMILY INVESTMENTS LIMITED PARTNERSHIP, J. RONALD SLAVIK, J. R. SLAVIK & ASSOCIATES, and J. R. SLAVIK & ASSOCIATES II,

Plaintiffs-Appellants,

v

HAMPTON RIDGE PROPERTIES, L.L.C., and CULLAN MEATHE,

Defendants-Appellees,

and

FLAGSTAR BANK, F.S.B.,

Intervenor-Appellee.

No. 297844
Oakland Circuit Court
LC No. 2007-082312-CK

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

In this contract action, defendants appeal as of right and plaintiffs cross-appeal in Docket No. 294622 from a September 29, 2009, amended judgment, entered after a bench trial, awarding $452,311 to plaintiff TGINN Jets, L.L.C. (TGINN), $439,262 to plaintiffs J. R. Slavik & Associates II (Slavik Associates II) and Lockwood Family Investments Limited Partnership (Lockwood LP), $247,692.75 to plaintiffs Rodney M. Lockwood, Jr. (Lockwood), J. Ronald Slavik (Slavik), J. R. Slavik & Associates (Slavik Associates), and Slavik Associates II, and awarding contractual attorney fees to plaintiffs, to be set forth in a supplemental judgment. In a separate judgment dated September 29, 2009, the trial court awarded contractual attorney fees. In Docket No. 297844, plaintiffs appeal as of right from the trial court's order, in a contested garnishment proceeding, declaring that intervenor Flagstar Bank, FSB (Flagstar), as a secured creditor, has a claim superior to plaintiffs over rents owed by the city of Detroit to defendant Hampton Ridge Properties, L.L.C. (Hampton Ridge). We affirm in part, reverse in part, and remand for further proceedings in Docket No. 294622, and we affirm the trial court's postjudgment order in Docket No. 297844.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case involves a limited liability corporation, TGINN, which was formed in 1999 to purchase a jet aircraft to be used by its members. Plaintiffs Lockwood and Slavik, as managers of TGINN, acquired the initial membership unit in TGINN through a purchase by two entities, Lockwood LP and Slavik Associates II. These entities also agreed to advance capital contributions to TGINN for amounts due TGINN for unsold membership units. TGINN purchased the jet aircraft before selling the additional membership units. The purchase was financed with a bank loan guaranteed by Slavik Associates II, along with Lockwood, Slavik, and Slavik Associates. Although it was contemplated that TGINN would have eight members, only six membership units were sold. Defendant Cullen Meathe signed subscription, restated operating, aircraft lease, and reimbursement agreements for one membership unit in January 2000, which obligated Meathe, his solely owed entity Hampton Ridge, or both of them to make certain payments to TGINN and reimburse the guarantors of the bank loan. In August 2006, the jet aircraft was sold for an amount less than the outstanding bank loan.

In April 2007, plaintiffs brought this action against defendants Meathe and Hampton Ridge for breach of contract. TGINN alleged that defendants were liable for breach of the restated operating agreement by failing to make capital contributions to enable it to pay its obligations. Lockwood LP and Slavik Associates II alleged that defendants were liable to them for loans or credit that they provided for the capital contributions. Lockwood, Slavik, Slavik Associates, and Slavik Associates II alleged that defendants breached the reimbursement agreement by not indemnifying them for their share of losses associated with their guaranty of the bank loan to TGINN.

The parties' dispute principally focused on whether the membership unit that created financial obligations for defendants was still in effect when the jet aircraft was sold in August

2006, or whether the terms of a "put option" in the restated operating agreement, which permitted a member to withdraw from TGINN, was successfully exercised in August 2003. The trial court determined in a pretrial summary disposition ruling that the contracting parties intended that a member was required to make a payment to TGINN to exercise the "put option" when TGINN had a negative net worth. The trial court also determined, when denying plaintiffs' renewed motion for partial summary disposition regarding whether the option was effectively exercised, that an exiting member's obligation to make a payment must be implied into the restated operating agreement, but that there were issues of fact concerning the timeframe for the payment and when the payment obligation becomes final, which precluded summary disposition.

Following a bench trial, the trial court found that the parties' agreement required a member to actually satisfy the payment obligation in order to exercise the "put option" and, accordingly, that the membership unit, which had created financial obligations for defendants, was still in effect when the jet aircraft was sold in August 2006. The court entered a judgment on March 25, 2009, awarding plaintiffs damages against both defendants in the amounts requested in plaintiffs' "damage summary" exhibit introduced at trial. The trial court also determined that plaintiffs were entitled to contractual attorney fees, in an amount to be determined in future proceedings. On September 29, 2009, the trial court issued an amended judgment reducing the damages awarded to plaintiffs Lockwood, Slavik, Slavik Associates, and Slavik Associates II, as guarantors of the bank loan, from $990,771 to $245,692.75, but denying additional relief sought by defendants in their motion for a new trial. The trial court also entered a separate opinion and order on September 29, 2009, that, as corrected on October 15, 2009, awarded plaintiffs attorney fees as contractual damages in the amount of $102,874.09.

Plaintiffs thereafter filed numerous requests for writs of garnishment in an effort to collect the amounts owed by defendants under the amended judgment. In January 2010, plaintiffs moved to compel one garnishee defendant, the city of Detroit, to pay it in excess of $325,000 for rental payments it owed to defendant Hampton Ridge for certain property. Flagstar intervened in the garnishment proceeding, seeking a determination that it had a superior right to the rents, as a secured creditor of Hampton Ridge. Following a hearing, the trial court determined that Flagstar had a superior right to the rental payments.

II. DOCKET NO. 294622

A. JURISDICTION

Initially, plaintiffs challenge this Court's jurisdiction to consider any issues other than those relating to the award of attorney fees. Although jurisdictional issues are always within the scope of this Court's review, *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009), this Court previously rejected plaintiffs' challenge when it denied plaintiffs' motion for partial dismissal. *TGINN Jets, LLC v Hampton Ridge Props, LLC*, unpublished order of the Court of Appeals, entered December 14, 2009 (Docket No. 294622). Plaintiffs' challenge is based on their erroneous contention that the March 25, 2009, judgment qualifies as the "final order" for purposes of MCR 7.202(6)(a)(i). It was not. That judgment did not resolve the issue of contractual attorney fees, which was a distinct claim in plaintiffs' complaint. "Attorney fees awarded under contractual provisions are considered damages, not costs." *Central Transp, Inc v*

Fruehauf Corp, 139 Mich App 536, 548; 362 NW2d 823 (1984). Plaintiffs' claim for contractual attorney fees was not resolved until the trial court issued its September 29, 2009, order establishing the amount of contractual attorney fees, making that order "the first judgment or order that dispose[d] of all the claims" alleged in plaintiffs' complaint. MCR 7.202(6)(a)(i). Defendants timely filed their claim of appeal from that order. MCR 7.204(A)(1)(a). Thus, there is no merit to plaintiffs' jurisdictional challenge.

B. STANDARD OF REVIEW

This Court reviews a trial court's decision concerning a motion for summary disposition de novo. *Ward v Titan Ins Co*, 287 Mich App 552, 554; 791 NW2d 488 (2010), overruled on other grounds by *Admire v Auto-Owners Ins Co*, 494 Mich 10; 831 NW2d 849 (2013). Issues of contract interpretation, including whether a contract is ambiguous, are also reviewed de novo. *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011); *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007). Issues of statutory construction, a trial court's award of interest on a money judgment under MCL 600.6013, and the proper interpretation of a court rule are also reviewed de novo as questions of law. *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005); *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 623-624; 550 NW2d 580 (1996).

"This Court reviews a trial court's findings of fact following a bench trial for clear error and reviews de novo the trial court's conclusions of law." *Trader*, 293 Mich App at 215. A trial court's determination of damages is also reviewed for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 251; 792 NW2d 781 (2010). We give deference to a trial court's special opportunity to assess the credibility of witnesses who appear before it. MCR 2.613(C).

The clearly erroneous standard is also applicable to our review of the trial court's amended or new findings when deciding a motion under MCR 2.611. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652 n 14; 662 NW2d 424 (2003). We reject plaintiffs' argument on cross-appeal that the trial court's authority to make new findings regarding damages should be qualified by the standards applicable to a motion for remittitur of a jury award, as set forth in *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008). Further, plaintiffs' reliance on MCR 2.611(A)(1)(d) is misplaced because defendants did not move for a new trial on that ground and the trial court did not grant a new trial, but rather made additional findings and entered an amended judgment. Not all standards applicable to review of a jury trial apply to a judge's findings as a trier of fact. See *Ambs*, 255 Mich App at 652 n 14. MCR 2.611(A)(2)(c) and (d) unambiguously permit a trial court to issue amended or new findings of fact and conclusions of law. An unambiguous court rule is applied as written. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). Therefore, plaintiffs have not established that the trial court erred by rendering new findings. We review the parties' challenges to the trial court's factual findings for clear error.

C. DEFENDANTS' APPEAL

1. PUT OPTION

Defendants raise several issues concerning the trial court's determination that the "put option" in the restated operating agreement was not exercised.

We first consider defendants' challenge to the trial court's determination that a member's exercise of the "put option" triggered a monetary obligation to TGINN when TGINN had a negative worth. Review of this issue is appropriate under MCR 2.116(C)(10) because the trial court considered evidence outside the pleadings in deciding that "it is beyond factual dispute that the parties intended that a put option would require payment if exercised when TGINN had a negative net worth," but that "there are questions of fact regarding when or if Defendants exercised the option, and the amount due thereunder." A motion under MCR 2.116(C)(10) tests the factual support for a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). The motion should be granted only if the submitted evidence, viewed in the light most favorable to the nonmoving party, fails to establish a genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008).

A contract option is an enforceable promise not to revoke an offer. *In re Egbert R Smith Trust*, 480 Mich 19, 25-26; 745 NW2d 754 (2008). The acceptance of an option must be in strict compliance with its terms or the optionee's right will be lost. *Le Baron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 315-316; 29 NW2d 704 (1947). The "put option" in article V, ¶ 5.5(b), of the restated operating agreement provides:

> Each Member shall have the option to Compel the Company[1] to purchase and redeem all, and not less than all, Unit(s) owned by such Member in cash at the computed fair market value of such Unit(s) less the following discount: (i) from December 1, 1999 through 31, 2000, 12%; (ii) from January 1, 2001, through December 31, 2001, 10%; and (iii) from and after January 1, 2002, 7%.

Although the phrase "purchase and redeem" is not defined in the restated operating agreement, reference to dictionary definitions is appropriate to determine the ordinary or commonly used meaning of undefined terms in a contract. *Pugh v Zefi*, 294 Mich App 393, 396; 812 NW2d 789 (2011). The term "purchase" is defined, in part, as "'to acquire by the payment of money or its equivalent; buy.'" *Coates*, 276 Mich App at 504, quoting *Random House Webster's College Dictionary* (1997). The term "redeem" is defined, in part, as "to buy back." *Random House Webster's College Dictionary* (1997). The conjunctive word "and" generally denotes a joinder or union of terms. *Mayer v Credit Life Ins Co*, 42 Mich App 648, 651; 202 NW2d 521 (1972).

[1] "Company" is defined in the restated operating agreement as TGINN.

On its face, the "put option" therefore appears to contemplate TGINN buying back a membership unit for "cash." It expressly gives a member the right to compel the redemption using the computed fair market value. It suggests that the member can only compel TGINN to "purchase and redeem" when the member offers something of value for it to do so. Contract language must be read as whole and construed to give effect to every word, clause, and phrase. *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). Article V, ¶ 5.5(e), of the restated operating agreement provides that the "[m]anagers may prescribe such fair and reasonable procedures relative to the exercise and consummation of the foregoing provisions as they deem advisable." Paragraph ¶ 5.5(a) provides:

> For purposes of this Section 5.5, the computed fair market value shall be set by agreement between the Company and the involved Member. If they do not agree within 10 days after starting the discussion process, computed fair market value shall be determined by the Company's regular accountants based on the appraised fair market value of the Aircraft and other assets of the Company, reduced by all liabilities of the Company (excerpt for obligations for goods or services not yet delivered or rendered to the Company).

Because liabilities are considered as part of the procedure for determining the fair market value of TGINN, it is apparent that the parties contemplated that the "computed fair market value" could result in TGINN having a negative net worth where liabilities exceed the appraised value of the jet aircraft and other assets. In this circumstance, the "purchase and redeem" provision could not be literally applied because there would be nothing for TGINN to purchase.

We disagree with defendants' argument that the "put option" should nonetheless be construed as unambiguously entitling a member to compel TGINN to take back the membership unit without any monetary obligation. The restated operating agreement, as a whole, clearly contemplates that members share in TGINN's obligations based on their membership interests. Members are required under article III (capital contributions), ¶ 3.4(a), to enter into a "sharing and reimbursement agreement so that each member will be responsible for his/her/its pro rata share of any obligations incurred under the bank guaranty" for the loan that was used to fund the acquisition of the aircraft. Each member is required under ¶ 3.1 to make an initial capital contribution to TGINN of $85,000 and other amounts to be established from time to time, and ¶ 3.2 provides for monthly capital contributions to be "equal to his/her/its Sharing Ratio of the Company's recurring obligations." Allowing a member to exercise the "put option" without a monetary obligation where TGINN has a negative net worth would be contrary to the parties' plain intention to share obligations.

We also reject defendants' argument that evidence extrinsic to the contract and, in particular, evidence that TGINN's managers attempted to amend the "put option" in 2003, demonstrates that members were not required to make any payment to exercise the "put option" when TGINN has a negative net worth. When a contract is ambiguous, courts may use extrinsic evidence to determine the parties' intent. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). Extrinsic evidence may also be used to show a latent ambiguity—that is, contractual language that appears to suggest a single meaning, but requires interpretation because other facts create a choice among two or more possible meanings. *Id*. at 667-668. Summary disposition is not appropriate if contract language is ambiguous, because its meaning becomes a question of

fact. *Coates*, 276 Mich App at 503-504; *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 363; 480 NW2d 275 (1991). Defendants have not argued, let alone shown, that the proposed amendment creates an ambiguity. Contrary to defendants' argument on appeal, the fact that an amendment was proposed does not show that TGINN "knew" that the existing agreement did not require payment.

While the trial court gave some consideration to evidence regarding TGINN's course of dealings with its members, extrinsic evidence, as noted, is an appropriate consideration in determining whether there is a latent ambiguity that precludes summary disposition. *Shay*, 487 Mich at 667-668; *Coates*, 276 Mich App at 503-504. The evidence regarding the course of dealings between members and TGINN's managers did not demonstrate an ambiguity. Because we find no evidence of a latent or patent ambiguity in the restated operating agreement concerning whether a monetary obligation accompanies the "put option" when TGINN has a negative net worth, we affirm the trial court's summary-disposition ruling on this issue.

Defendants also argue that they were entitled to a ruling that the membership unit underlying their financial obligations ended on August 31, 2003, when notice was provided to TGINN regarding an intention to exercise the "put option." We disagree. When a party moves for summary disposition, the trial court may render judgment in favor of the opposing party if it appears that the opposing party is entitled to judgment. MCR 2.116(I)(2). In this case, defendants' own responses to plaintiffs' initial and renewed motions for partial summary disposition indicated that the trial court could find a genuine issue of material fact with respect to the termination date of a membership unit under the "put option," regardless of whether it was accompanied by a monetary obligation. The trial court essentially agreed with defendants' argument in finding that a genuine issue of material fact existed regarding when monetary obligations under the "put option" become final and operative by the parties. As the trial court indicated in its decision denying plaintiffs' renewed motion for partial summary disposition, it was unable to "rule out a finding that Defendants successfully exited the corporation in 2003." Considering that the restated operating agreement does not expressly contain provisions for exercising the "put option," but rather provides for the managers to prescribe the procedures and requires an agreement or calculation with respect to TGINN's fair market value, we find no error in the trial court's determination that a genuine issue of fact existed that precluded summary disposition.

Defendants also argue that the trial court erred in finding after the bench trial that Hampton Ridge withdrew the exercise of the "put option" and decided to remain a member of TGINN until the jet aircraft was sold in 2006. However, a review of the record fails to disclose that the trial court actually found that Hampton Ridge withdrew an exercise of the "put option." Rather, in its initial March 10, 2009, opinion, the trial court found that the parties' agreement required "[d]efendants to actually satisfy their obligations before membership could effectively be withdrawn." The trial court further found in its August 4, 2009, decision amending the March 25, 2009, judgment that "[t]he trial in this matter focused largely on whether Defendants had, in fact, exercised their option to exit [TGINN], thereby limiting their obligations. The Court found that they had not[.]" Because defendants have not shown that the trial court made the specific finding that their claim was erroneous, their request for relief on this ground cannot succeed. See *Roberts & Son Contracting Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (an appellant's failure to recognize the full basis of the trial court's decision and to

address an issue that necessarily must be reached precludes appellate relief). While this Court is empowered to consider any issue that, in this Court's opinion, justice warrants be considered and resolved, *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004), we find no basis for disturbing the trial court's finding that actual payment, and not merely notice of a member's intentions, was required for a member to exercise the "put option."

To the extent that defendants suggest that the trial court should have found that an enforceable modification of the restated operating agreement occurred in 2004—a modification that would allow the use of the jet aircraft's actual sales price in 2006 to determine the "put option" payment and treat a member as having no liability for any further capital contributions to TGINN while the sale was pending—we find no basis for relief from the amended judgment. A provision in article XII, ¶ 12.6, of the restated operating agreement provides that it "may be amended or revoked at any time only by a written agreement executed by the Managers and the holders of a majority of the Units." While a written modification clause is itself subject to modification or wavier, "where there is no mutual agreement to enter into a new contract modifying a previous contract, there is no new contract and, thus, no modification." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003).

Lockwood's testimony regarding his conversation with Meathe in 2004 does not indicate an intention in any capacity to enter into an agreement with Meathe that would be binding on TGINN, but only to confirm Meathe's intentions. In addition, it is clear from the trial court's initial March 10, 2009, findings after the bench trial that it found Lockwood to be a credible witness, particularly with respect to Meathe's intention to remain a member of TGINN until the jet aircraft was sold. The jet aircraft was not sold until more than two years later, in August 2006. There was evidence that TGINN sent tax information to Hampton Ridge for the period between 2004 and 2006 that reflected losses and that was used by its owner, Meathe, in the preparation of tax returns. Giving appropriate deference to the trial court's determination that Lockwood's testimony was credible, the court did not clearly err in assessing Meathe's intentions.[2] The court's finding is dispositive of any claim by defendants that the membership obligations under the restated operating agreement ended before the sale of the jet aircraft.

Defendants also argue that TGINN had no right to rescind the "put option" agreement reached in 2004. Where a contract exists, rescission is an equitable remedy that will only be granted in the sound discretion of the trial court. *Shell Oil Co v Estate of Kert*, 161 Mich App 409, 421; 411 NW2d 770 (1987). To rescind a contract is to undo it from the beginning and to restore the parties to the relative positions they would have had if no contract was ever made. *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938). Because the trial court did not find the existence of an alternative "put option" agreement, let alone consider a remedy of rescission, we find no basis for relief from the amended judgment based on rescission principles.

[2] Because the trial court's findings were not based on estoppel principles, we decline to consider plaintiffs' argument that defendants should be estopped from asserting a position that differs from information on a federal income tax return. Consideration of this proposed estoppel theory is not necessary to a proper resolution of this appeal.

In sum, while there was evidence that Meathe gave notice of an intention to exercise the "put option" in the restated operating agreement, the trial court reasonably found from the evidence that Meathe never followed through with this intention. Because the trial court did not clearly err in determining that payment was required to exercise the "put option," and that mere notice of a member's intention was not sufficient, we affirm the trial court's determination that the membership unit at issue in this case was still in effect when the jet aircraft was sold in August 2006.

2. MEATHE'S LIABILITY

Next, we consider defendants' challenge to the trial court's decision that Meathe was personally liable for the damages awarded to TGINN and to Lockwood LP and Slavik Associates II under the restated operating agreement. We agree with defendants that only Hampton Ridge is liable for the damages.

Based on the factual stipulation in the parties' joint final pretrial statement, it was undisputed that Hampton Ridge is a Michigan limited liability corporation, solely owned by Meathe. As with other corporations, a limited liability corporation is considered a separate and distinct entity from its owner. *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 20-21; 812 NW2d 793 (2011). However, a piercing of the corporate veil can apply to a limited liability corporation. *Florence Cement Co v Vittraino*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011).

It was undisputed that Meathe executed various agreements, including the subscription agreement and the restated operating statement, for TGINN. At the same time, the parties stipulated that Hampton Ridge "has not paid any amount of money to TGINN Jets, L.L.C. to terminate its membership interest in TGINN Jets, L.L.C." Consistent with the parties' factual stipulation regarding Hampton Ridge's membership, the trial court found that Hampton Ridge purchased one of TGINN's eight membership units for $85,000. However, the court also referred to *both* defendants having a membership interest. Given the undisputed fact that Hampton Ridge was a member of TGINN, and the evidence that Meathe signed the subscription agreement and the restated operating agreement without indicating his capacity in doing so, we must determine whether the evidence permitted a factual finding that Meathe was signing these documents as both an agent for Hampton Ridge and in an individual capacity. The capacity in which an individual signs a contract can present a factual issue for trial. See, generally, *Moscone v Mitoff*, 33 Mich App 259, 260-261; 189 NW2d 763 (1971).

While the subscription agreement signed by Meathe required that the signor certify that he was an accredited investor, it also provided for a tender of $85,000 to become a member, and the trial court specifically found that Hampton Ridge was the purchaser. In addition, where TGINN sought to have the owner of a corporation held personally liable for an obligation, the agreement was written to address that liability. This is apparent from the reimbursement agreement, which identifies the "indemnitor" as either a TGINN member or an individual who is member of a limited liability company that is a member of TGINN, and contains two signatures of Meathe, one in an individual capacity and the other as the member/manager of Hampton Ridge. The evidence regarding the tax treatment of the membership and the schedule accompanying a December 5, 2006, letter from TGINN's counsel to demand various payments

following the sale of the jet aircraft also indicates that TGINN treated Hampton Ridge as the TGINN member. Lockwood's testimony also indicated that Meathe had been permitted to function through a "shell entity."

It is also true, as plaintiffs argue on appeal, that defendants' trial counsel referred to Meathe as a member of TGINN in his opening statement at trial. Indeed, the record indicates that Meathe was repeatedly referred to interchangeably with his wholly owned entity, Hampton Ridge. However, considering that a limited liability corporation functions as a separate and distinct entity from its owner and considering the evidence that Hampton Ridge was the TGINN member, we conclude that the trial court clearly erred in finding Meathe personally liable for the monetary obligations accompanying Hampton Ridge's membership interest. Therefore, we reverse the amended final judgment to the extent that it imposes personal liability on Meathe for the damages awarded to TGINN and to Lockwood and Slavik Associates II.

3. CONDITIONS PRECEDENT

Defendants also argue that there could be no liability under the restated operating agreement for not paying monthly capital contributions to TGINN, with the exception of a $550 charge for the cost of an aircraft appraisal, because default notification procedures were not followed. While we find merit to defendants' argument that default notification procedures were not followed, we conclude that it is not necessary to disturb the trial court's award of damages to TGINN for the unpaid monthly capital contributions based on this omission.

A "condition precedent" is a fact or event that parties to a contract intend must take place before there is a right to performance. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007). It is distinct from a promise because it does not create a right or duty in and of itself, but rather functions as a limiting or modifying factor. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999).

As defendants argue on appeal, notice or demand is a prerequisite to performance if required by the terms of a contract. *Cole v Findley Tool & Die Co*, 290 Mich 199, 204; 287 NW2d 433 (1939). The restated operating agreement does not specify that an invoice or other formal writing is a condition precedent to a member's obligation to make monthly capital contributions for TGINN's fixed costs. To the contrary, article III (capital contributions), ¶ 3.2, provides that "[e]ach Member shall be responsible for a monthly capital contribution."

In addition, notice or demand is unnecessary if a contracting party owing a debt has the means of knowing when it becomes due. *Cole*, 290 Mich at 204. While there was evidence that the monthly amount due from members was subject to change, it cannot reasonably be argued that defendants lacked the means to determine the monthly amount or when it was due during the relevant period. Nonetheless, the restated operating agreement imposes conditions on TGINN's right to take enforcement action against a member. Article III, ¶ 3.5, provides:

> If a Member fails to make a capital contribution payment within thirty (30) days after the due date of the written notice of such capital contributions, then the Company shall send the non-paying Member a notice of nonpayment, copied to all Members. If the non-paying Member does not cure the nonpayment within

> thirty (30) days after the date of the notice of non-payment, the Member shall be in default and the Company may, in addition to the other rights and remedies the Company has under the Act or applicable law, take such enforceable action (including the commencement and prosecution of court proceedings) against such Member as the Members consider appropriate. Moreover, the remaining Members must contribute the amount of such required capital contribution themselves according to their respective Sharing Ratio calculated against the total Sharing Ratios of all Members excluding the defaulting Member. In such an event, the remaining Members who contribute ("the Contributing Members") shall be entitled to treat such amounts as an extension of credit to such defaulting Member, payable upon demand . . . . Anything to the contrary contained herein notwithstanding, if a Member is sent a notice of nonpayment three (3) times in any thirty-six (36) month period, such defaulting Member shall not be entitled to the benefit of the thirty (30) day cure period upon a fourth notice of nonpayment within said thirty-six (36) month period, but shall be immediately in default as of the date of the notice of nonpayment.

It is clear from the evidence that TGINN failed to comply with the strict terms for a default established by ¶ 3.5 to trigger enforcement action. There was no evidence that TGINN sent notices of nonpayment, with copies to all members. In addition, Lockwood testified that TGINN stopped providing written notice in the form of invoices for monthly capital contributions after March 2004. Lockwood testified that monthly billings stopped because Meathe was not making payments, it was decided that Meathe would not pay, and TGINN wanted to avoid having the monthly billings reflected as income in its financial records. Lockwood also testified regarding Meathe's stated intention to "let it ride" until the jet aircraft was sold and, as indicated previously, the trial court found Lockwood's testimony to be credible.

The trial court erred to the extent that it failed to recognize that ¶ 3.5 established a condition precedent to TGINN's enforcement action. An unambiguous contract must be applied as written. *Coates*, 276 Mich App at 503 n 1. However, this Court "will affirm the trial court when it reaches the right result even if it does so for the wrong reason." *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 74; 817 NW2d 609 (2012).

We disagree with plaintiffs' argument that this issue should be deemed waived because it was not pleaded as an affirmative defense to the breach-of-contract claim pursuant to MCR 2.111(F)(3). In Michigan, unless a party asserts a defense in a motion under MCR 2.116 before filing a responsive pleading, an affirmative defense must be stated in the party's responsive pleading as originally filed or as amended under MCR 2.118. See MCR 2.111(F)(2)(a); MCR 2.111(F)(3). "An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993); see also MCR 2.111(F)(3)(b). A ground of defense that would take the adverse party by surprise is also an affirmative defense. MCR 2.111(F)(3)(c).

In order to establish a prima facie case of breach of contract, "[a] party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract

suffered damages as a result of the breach." *Miller-Davis Co*, 296 Mich App at 71. The burden of establishing the performance or occurrence of a condition precedent rests with the party claiming a breach of contract. *Valley Nat'l Bank of Arizona v Kline*, 108 Mich App 133, 137-138; 310 NW2d 301 (1981). Under MCR 2.112(C), if the plaintiff alleges generally in a complaint that all conditions precedent were performed or occurred, the defendant must plead a denial of performance with particularity. If the issue has been properly pleaded in the complaint, and the defendant fails to make the specific denial, the plaintiff is not required to offer specific proofs to establish the performance or occurrence of a condition precedent. *Valley Nat'l Bank*, 108 Mich App at 137-140.

Because the complaint in this case does not contain a general allegation that all conditions precedent were performed, plaintiffs, and more specifically TGINN, was not relieved, by virtue of defendants' omission, of its burden of establishing satisfaction of conditions precedent to its enforcement of Hampton Ridge's obligation, as a member of TGINN, to pay for recurring obligations by monthly capital contributions. In addition, considering that TGINN failed to plead that all conditions precedent were satisfied, TGINN cannot complain that it was taken by surprise, within the meaning of MCR 2.111(F)(3), by virtue of defendants' actions. Accordingly, we reject plaintiffs' claim of waiver.

Nonetheless, we find merit to plaintiffs' argument that TGINN's failure to provide the written notices required to trigger enforcement action may be excused based on futility. In general, the law does not require a useless formality or idle ceremony. See *Ranck v Springer*, 333 Mich 671, 674; 53 NW2d 678 (1952) (failure to tender payment was no defense to claim for specific performance of a contract where payment would have been refused); *Lansing Sch Dist v Fidelity & Cas Co of New York*, 266 Mich 189, 191-192; 253 NW 263 (1934) (failure to make demand on bank, which had closed, was not a condition precedent to enforcement of bond); see also *Weinburgh v Saier*, 303 Mich 640, 645; 6 NW2d 921 (1942).

Although the trial court did not specifically rule on the claim of futility raised by plaintiffs' counsel at the hearing on defendants' motion for a new trial or an amended judgment, the trial court did find in its original March 10, 2009, decision that Meathe could not have *reasonably* assumed that liabilities would be limited to those applicable in August 2003, and we find no support for defendants' argument that the absence of monthly invoices affected Meathe's decisions regarding payments. Giving deference to the trial court's finding that Lockwood gave credible testimony regarding Meathe's intentions, and the evidence that no payment was forthcoming, even after a demand for payment was made following the sale of the jet aircraft, it follows that a strict application of the notice provisions in article III, ¶ 3.5, of the restated operating agreement would have been a useless formality. Accordingly, the trial court reached the right result in allowing TGINN to take enforcement action.

Defendants also challenge the damages awarded to Lockwood LP and Slavik Associates to reimburse them for capital contributions paid to TGINN on the ground that the default notification procedures were not followed. It is clear from article III, ¶ 3.5, of the restated operating agreement that the default of a TGINN member is a condition precedent to a nondefaulting member's obligation to contribute capital to TGINN toward the amount of the defaulted liability. While we find merit to defendants' argument that the evidence established that TGINN failed to strictly comply with the default notice procedures in ¶ 3.5 with respect to

any monthly or additional contributions owed by Hampton Ridge, as with the TGINN's claim for monthly capital contributions, we similarly conclude that the trial court reached the right result in allowing Lockwood LP and Slavik Associates II to recover damages triggered by a default because the evidence established that strict notice with the default notification procedures would have been a useless formality.

Lastly, defendants argue that plaintiffs did not have a viable cause of action for attorney fees under article III, ¶ 3.7, of the restated operating agreement because TGINN failed to follow the default notification procedures in ¶ 3.5. We disagree. Article III, ¶ 3.7, provides:

> A Member shall be liable to the Company for all costs incurred by the Company arising from such Member's default, including costs of collection, reasonable attorney fees and court costs, all of which shall be secured by such defaulting Member's interest in the Company.

Although the word "default" is not defined in the restated operating agreement, contract language is read as a whole to determine the parties' intent. *McGrath*, 290 Mich App at 439. As indicated previously, ¶ 3.5 establishes the conditions precedent for determining whether a member is in default. As noted, the trial court erred to the extent that it found that TGINN could declare a member to be in default without following ¶ 3.5. However, giving effect to the principle that the law does not require a useless formality, defendants have not established any basis for disturbing the result reached by the trial court in finding a default sufficient to trigger liability for attorney fees under ¶ 3.7.

4. PRETRIAL STATEMENT

Defendants argue that the damages awarded to TGINN for monthly capital contributions and to Lockwood LP and Slavik Associates II under the terms of the restated operating agreement should be limited to amounts claimed in the parties' joint final pretrial statement. They assert that the damages summarized in plaintiffs' exhibit 167 at trial inexplicably reflected higher damage amounts. Because defendants stipulated to the admissibility of plaintiffs' damages summary at trial, and failed to object to Lockwood's testimony regarding that summary, this issue is unpreserved. MRE 103(a)(1). Therefore, to obtain relief, defendants must show a plain error affecting their substantial rights. MRE 103(d); *Hilgendorf v Saint John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Considering the evidence that defendants stipulated to the admissibility of the damages summary, and defendants' failure to cite any authority to support their claim that a plaintiff is bound by alleged damages recited in a joint final pretrial statement, we conclude that defendants have not demonstrated a plain error affecting their substantial rights. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or *negligence*." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997) (emphasis added).

5. SHARING RATIO FOR CAPITAL CONTRIBUTIONS

Defendants challenge the damages awarded to TGINN and to Lockwood LP and Slavik Associates II on the ground that the trial court used the wrong sharing ratio to determine

damages. Having considered defendants' arguments, we conclude that it is necessary to remand this case for further proceedings with respect to damages.

With respect to the damages of $331,576 awarded to TGINN for monthly contributions, plaintiffs had the burden of proof. *Miller-Davis Co*, 296 Mich App at 71. The trial court initially adopted plaintiffs' proposed damages as accurate based on its belief that they were largely undisputed. In addressing defendants' challenge to the damages in defendants' motion for a new trial or an amended judgment, the trial court found no basis for disturbing that finding on the ground that the award was based on the sharing ratio and supported by the evidence.

In considering defendants' challenge to the trial court's findings regarding TGINN's damages, we note preliminarily that our decision to uphold the admission of plaintiffs' damages summary is not dispositive of whether the trial court clearly erred in determining the amount of damages. Defendants' stipulation to admit the damages summary did not address the purpose of the evidence. As the proponents of the evidence, plaintiffs still had the burden of establishing a relevant purpose of the evidence. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). Although a judge sitting as a finder of fact is "presumed to possess an understanding of the law that allows him to understand the difference between admissible and inadmissible evidence or statements of counsel," *In re Forfeiture of $19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1995), plaintiffs failed to establish that the damages summary itself, as a mere summary of claimed damages, was substantively admissible to establish the truth of the matter asserted. From the face of the exhibit, it does not even satisfy the requirements for summary evidence under MRE 1006[3] because it does not purport to summarize voluminous writings. See *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99-100; 535 NW2d 529 (1996). Accordingly, our determination of whether the trial court erred in adopting plaintiffs' claimed damages depends on other substantive evidence introduced by plaintiffs to explain the claimed damages.

Examined in this context, we reject defendants' argument that the sharing ratio applied by the trial court to determine TGINN's damages resulted in a calculation of 100 hundred percent of the monthly capital contributions, which should be allocated between members to cover recurring obligations or fixed costs. According to Lockwood's testimony, a sharing ratio of 20 percent was being used by TGINN, based on an amendment of the restated operating agreement. Lockwood also testified that the damages of $331,576 sought by TGINN represented the amount that he and Slavik were paying on a monthly basis for their own membership interests in TGINN, based on the budgeted amounts and "regular invoices" sent by the bookkeeper. The

[3] MRE 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

monthly amounts of $9,566 and $9,166 claimed by Lockwood were also reflected in invoices prepared for Hampton Ridge's membership interest before April 2004.

Because there was evidence that the claimed damages for TGINN represented the amount for monthly capital contributions associated with a single membership unit and it could be inferred from Lockwood's testimony that TGINN used a sharing ratio of 20 percent to determine the monthly amount, the trial court did not clearly err in failing to treat the damages sought by TGINN as 100 hundred percent of the monthly capital contributions that were to be paid by members for recurring obligations or fixed costs. Nonetheless, the trial court's findings also indicated that the sharing ratio for a membership interest should be the original ratio of 12-1/2 percent contained in the restated operating agreement, and not the sharing ratio of 20 percent claimed by plaintiffs. As discussed in part II(D) of this opinion, *infra*, the trial court used a sharing ratio of 12-1/2 percent to determine defendants' liability under the reimbursement agreement. It failed to render any findings regarding whether the parties had the requisite mutual assent to amend the restated operating agreement to provide for a 20 percent sharing ratio during the period underlying TGINN's damages claim. *Quality Prod & Concepts Co*, 469 Mich at 372.

A judge sitting as a trier of fact is required to render a logical decision. *People v Hutchinson*, 224 Mich App 603, 605; 569 NW2d 858 (1997). Because the trial court made inconsistent findings with respect to damages, we remand this case to the trial court for further proceedings regarding whether the membership interest contained in the restated operating agreement was amended and, if necessary, a redetermination of the appropriate damages to TGINN consistent with MCR 2.611(A)(2).

Defendants also challenge the trial court's award to Lockwood LP and Slavik Associates II of 50 percent of the total amount of capital contributions that, based on Lockwood's testimony, Lockwood LP and Slavik Associates II paid to TGINN for amounts above the "budgeted" monthly capital contributions used to determine TGINN's damages.[4] Defendants argue that the trial court incorrectly applied the default provision in article III, ¶ 3.5, in determining that the 50 percent sharing ratio was proper. We agree.

Paragraph 3.1 unambiguously establishes that a membership interest of 12-1/2 percent is to be used as the sharing ratio for capital contributions. Absent a determination that the restated operating agreement was amended to 20 percent, the original sharing ratio of 12-1/2 percent must be applied as written in determining a member's liability. *Coates*, 276 Mich App at 503 n 1. The provision in ¶ 3.5 for determining how much a non-defaulting member must contribute to TGINN to cover a defaulting member's unpaid capital contributions does not affect the

[4] According to Lockwood's testimony, the requested damages of $322,402, or 50 percent of $644,804, represented "capital calls and contributed capital for costs that we were incurring, fixed costs that we were incurring over and above the budgeted ones from the previous page. So Mr. Slavik and I would write checks as needed to make the bank payments, or the hangar insurance, the fixed costs over and above that which was budgeted." Lockwood testified that the amounts paid were actually double that reflected in the damage summary because "we had to pay Mr. Meathe's share also."

defaulting member's liability. Therefore, the trial court erred in using ¶ 3.5 to determine the damages to be awarded to Lockwood LP and Slavik Associates II for contributions that they made to TGINN, as creditors of Hampton Ridge, to cover Hampton Ridge's unpaid capital contributions. Accordingly, on remand, the trial court shall redetermine damages in accordance with Hampton Ridge's sharing ratio for capital contributions.

6. INTEREST

Defendants also challenge the trial court's decision to apply an annual contractual interest rate of 18 percent to all three damage awards, commencing December 5, 2006, the date TGINN's counsel demanded payment to TGINN for various obligations under the restated operating agreement, which had been covered by "LFILP and Slavik," and for the indemnification obligation in the reimbursement agreement..

With respect to the damages awarded to TGINN for monthly capital contributions, defendants argue that the use of the 18 percent interest rate should be vacated in its entirety because the December 5, 2006, demand letter did not constitute an invoice sufficient to trigger interest under the agreement reached by members to allow such interest. While we do not fully agree with defendants' argument, we agree that modification of the interest award is warranted.

The commonly used meaning of the word "invoice" is "an itemized bill for goods sold or services provided, containing prices, the total charge, and the terms." *Random House Webster's College Dictionary* (1997). Further, "there is no broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions." *Skotak v Vic Tanny Int'l*, 203 Mich App 616, 619; 513 NW2d 428 (1994). The December 5, 2006, demand letter on which plaintiffs relied to trigger TGINN's entitlement to interest contains the prices, charges, and terms sufficient to satisfy the "all invoices" provision of the parties' oral agreement, as set forth in the factual stipulation contained in the parties' joint final pretrial statement and memorialized by Lockwood in a memorandum in January 2003. Therefore, we find no error in the trial court's use of the December 5, 2006, letter to award interest to TGINN.

While we have concluded that TGINN's failure to comply with the default notification procedures did not preclude its enforcement action, that holding does not apply to TGINN's claim for contractual interest. The agreement reached by TGINN members regarding interest cannot reasonably be construed as allowing TGINN to collect interest on amounts that it claimed were owed, but, through some error or neglect, failed to include in the invoice.

As indicated previously, it is necessary to remand this case for further proceedings regarding the amount of damages to be awarded to TGINN for the monthly contributions that were not paid by Hampton Ridge. To the extent that the trial court determines on remand that the amount due TGINN for monthly capital contributions exceeds the invoiced amount, the agreed-upon interest rate of 18 percent should not be automatically allowed. In any event, for the period commencing April 16, 2007, when the complaint was filed, the trial court shall determine interest under MCL 600.6013(8). Because the oral agreement in this case does not constitute "a written instrument evidencing indebtedness with a specific rate," we agree with defendants' argument that MCL 600.6013(7) does not apply. See *Yaldo v North Pointe Ins Co*,

457 Mich 341, 346; 578 NW2d 274 (1998) (the term "written instrument" is generally considered interchangeable with the term "written contract").

With respect to the damages awarded to Lockwood LP and Slavik Associates II for their contributions to TGINN to cover Hampton Ridge's liability, we agree with defendants that there was no contractual basis for applying the contractual rate of 18 percent to damages. Article III, ¶ 3.5, contains its own interest rate for members making contributions to TGINN to cover a defaulting member's liability. It provides that the contributing member shall be entitled to treat the contributions "as an extension of credit to such defaulting Member, payable upon demand, with interest accruing thereon at the rate of fifteen percent (15 percent) per annum until paid." Because the oral agreement reached by TGINN members to allow an interest rate of 18 percent only applies to TGINN's invoices, the trial court clearly erred in applying it to the claims made by Lockwood LP and Slavik Associates II. Accordingly, we vacate the trial court's award of contractual interest to them. We express no opinion regarding Lockwood LP and Slavik Associates II's entitlement to contractual interest under article III, ¶ 3.5, of the restated operating agreement. However, for the period commencing April 16, 2007, when the complaint was filed, the trial court shall determine interest under MCL 600.6013(8), inasmuch as the claims of Lockwood LP and Slavik Associates II do not involve a judgment on a written instrument evidencing indebtedness under MCL 600.6013(7).

Lastly, considering that the reimbursement agreement does not contain an interest provision, we vacate the trial court's award of interest to Lockwood, Slavik, Slavik Associates, and Slavik Associates II commencing December 5, 2006, at an annual interest rate of 18 percent. On remand, the trial court shall determine the allowable interest pursuant to MCL 600.6013(8).

D. PLAINTIFFS' CROSS-APPEAL

Plaintiffs challenge the trial court's use of a membership interest of 12-1/2 percent to determine defendants' liability to Lockwood, Slavik, Slavik Associates, and Slavik Associates II for the indemnity obligation established by the reimbursement agreement. Plaintiffs argue that the trial court misconstrued the reimbursement agreement in reaching this determination.

"When there are several agreements related to the same subject matter the intention of the parties must be gleaned from all the agreements." *Omnicom of Mich v Giannetti Investment Co*, 221 Mich App 341, 346; 561 NW2d 138 (1997). Further, where one writing refers to another writing, the two writings are construed together. *Culver v Castro*, 126 Mich App 824, 826; 338 NW2d 232 (1983).

> [C]onstruing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things. [*Northwestern Fin Co v Crouch*, 258 Mich 411, 414; 242 NW 771 (1932), quoting 3 R.C.L., p 870.]

Because the reimbursement agreement was required by and executed contemporaneously with the restated operating agreement, the trial court properly construed the two documents together to determine the percentage interest in TGINN that governs the indemnity obligation in the reimbursement agreement. To the extent that plaintiffs argue that the reimbursement agreement should have been construed separately from the restated operating agreement because it involves different parties, we disagree. Indeed, the four plaintiffs named as guarantors of the bank loan in the reimbursement agreement are mere third-party beneficiaries of the requirement in the restated operating agreement that a member execute the reimbursement agreement.[5]

Construing the reimbursement agreement and restated operating agreement together, the trial court did not err in finding no ambiguity, or in determining that the membership interest contained in the restated operating agreement established the "percentage interest" to be applied to the reimbursement agreement. However, because the reimbursement agreement requires that the percentage interest in TGINN be determined at the time the indemnity obligation arises, a necessary issue is whether the membership interest was amended after the execution of the restated operating agreement. As indicated in part II(C)(5) of this opinion, the trial court made inconsistent findings regarding whether the original membership interest of 12-1/2 percent was still in effect, or whether an amended membership interest of 20 percent should be applied in determining damages in this case. Therefore, we remand to the trial court for further proceedings regarding this issue and, if necessary, an appropriate redetermination of the damages awarded to Lockwood, Slavik, Slavik Associates, and Slavik Associates II for defendants' breach of the reimbursement agreement.

E. CONCLUSION IN DOCKET NO. 294622

In sum, we affirm the trial court's finding that the "put option" in the restated operating agreement was not exercised, but reverse the trial court's determination that Meathe was personally liable for obligations under that agreement to make capital contributions. We remand to the trial court for further proceedings regarding the damages to be awarded to TGINN for Hampton Ridge's breach of its obligation to provide capital contributions to TGINN under the restated operating agreement, the damages to be awarded to Lockwood LP and Slavik Associates II for their extension of credit to Hampton Ridge to cover its unpaid capital contributions, and the damages to be awarded to Lockwood, Slavik, Slavik Associates, and Slavik Associates II for defendants' breach of the indemnification obligation under the reimbursement agreement. On remand, the trial court shall also redetermine the amount of interest for each award, consistent with this opinion.

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[5] We note that, under MCL 600.1405, where a party to a contract promises to undertake an obligation directly for the benefit of another person, the person is a third-party beneficiary and has a right to enforce the promise. *Shay*, 487 Mich at 662-666.

III. DOCKET NO. 297844

Plaintiffs argue that the trial court erred in determining that Flagstar had a superior right to certain periodic rents owed by the city of Detroit to Hampton Ridge because Flagstar failed to present proof that Hampton Ridge was in default of the terms and conditions of its mortgage. Plaintiffs assert that the trial court made a factual assumption that there was a default and that, based on Flagstar's lack of proof, they have superior rights to the past due rents owed by the city of Detroit to Hampton Ridge. We disagree.

At most, the trial court's decision indicates that it failed to recognize that plaintiffs were disputing Flagstar's claim that a default had occurred. However, a party should not be punished for a trial court's failure to rule on an issue that has been properly raised. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Although the trial court did not address this issue, this Court may consider an issue that is necessary to a proper determination of the case, or an issue of law that has been presented for which the facts necessary for its resolution have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

In a garnishment proceeding, "[i]f there is a dispute regarding the garnishee's liability or another person claims an interest in the garnishee's property or obligation, the issue shall be tried in the same manner as other civil actions." MCR 3.101(M)(1). Although the trial court did not conduct a trial in this case, summary disposition is permitted in a garnishment proceeding when there is no factual dispute and the issue depends on the interpretation of a contract. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 310; 486 NW2d 351 (1992). A motion under MCR 2.116(C)(10) is an appropriate means to determine if there is factual support for a claim in a garnishment proceeding. *Waati & Sons Electric Co v Dehko*, 230 Mich App 582, 585-589; 584 NW2d 372 (1998).

While Flagstar did not frame its motion to establish priority as a motion for summary disposition, a court is not bound by a party's choice of labels for a matter because this would place form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Because plaintiffs had an opportunity to respond to the motion, we shall consider whether plaintiffs substantiated their position that they were entitled to judgment as a matter of law or, alternatively, whether a genuine issue of material fact precluded a decision in favor of Flagstar. See, generally, *Al-Maliki v LaGrant*, 286 Mich App 483, 485-486; 781 NW2d 853 (2009).

A judgment creditor stands in no better position than the principal defendant with respect to an obligation owed by a third-party to the principal defendant. *Kidd v Minnesota Atlantic Transit Co*, 261 Mich 31, 34; 245 NW 561 (1932); *Smit v State Farm Mut Auto Ins Co*, 207 Mich App 674, 683; 525 NW2d 528 (1994). At the time of the garnishment proceeding in this case, plaintiffs sought rents owed by the city of Detroit to Hampton Ridge commencing with the rental month of November 2009. Flagstar's documentary proofs established that it had a right, under a mortgage loan agreement and an additional business loan agreement, which were cross-collateralized and cross-defaulted, to an assignment of the rental payments as security for the loan. Pursuant to MCL 554.231, such an assignment becomes binding only in the event of a

default. *Otis Elevator Co v Mid-America Realty Investors*, 206 Mich App 710, 713-714; 522 NW2d 732 (1994).

We need only consider the default events in the additional business loan agreement to conclude that plaintiffs have not established any factual dispute that would preclude a grant of summary disposition in favor of Flagstar with respect to whether a default event occurred. Contrary to plaintiffs' argument on appeal, the "right to cure" provision in the additional business loan agreement does not require that Flagstar give Hampton Ridge notice of and an opportunity to cure any purported default. It expressly provides that "if any default, other than a default on indebtedness, is curable and if Borrower or Grantor, as the case may be, has not been given a notice of a similar default within the preceding twelve (12) months, it may be cured if Borrower or Grantor, as the case may be, after receiving written notice . . . [cures the default]."

Also, while Flagstar did not support its motion with evidence of Hampton Ridge's nonpayment of the loan, the amended judgment and garnishment proceedings in this case supported Flagstar's claim that other default events, including a default on another agreement, creditor proceedings, and circumstances where "[a] material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the Loan is impaired," had occurred. Based on plaintiffs' failure to establish any factual dispute regarding the occurrence of these defaults or whether they were curable, we find no basis for disturbing the trial court's decision. No genuine issue of material fact existed that precluded the trial court from determining that Flagstar had a superior right to the rents.

Plaintiffs argue that, even if a default event occurred, Flagstar did not have a superior right to the rents because it failed to record notice of the default with the register of deeds and serve such notice on the city of Detroit. We disagree. MCL 554.231 provides that an assignment of rent "shall operate against and be binding upon the occupiers of the premises from the date of filing by the mortgagee in the office of the register of deeds . . . of a notice of default . . . and service of a copy of such notice upon the occupiers of the mortgaged premises." This provision is concerned with the operation of the assignment against the tenant, not the assignor of the rents. *Otis Elevator Co*, 206 Mich App at 714. Therefore, the trial court correctly determined that plaintiffs could not establish priority to the rents based on this portion of MCL 554.213.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion in Docket No. 295622. We affirm in Docket No. 297844. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher