

STATE OF MICHIGAN
COURT OF APPEALS

CAN IV PACKARD SQUARE, LLC,

Plaintiff/Counterdefendant-Appellee,

v

CRAIG SCHUBINER,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED

April 29, 2021

Nos. 352510; 354185; 354821

Oakland Circuit Court

LC No. 2018-167408-CB

CAN IV PACKARD SQUARE, LLC,

Plaintiff/Counterdefendant-Appellee,

v

CRAIG SCHUBINER,

Defendant/Counterplaintiff,

and

BCL PROPERTIES LIMITED PARTNERSHIP and
305 ASSOCIATES, LLC,

Appellants.

No. 354186

Oakland Circuit Court

LC No. 2018-167408-CB

Before: O’BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 352510, defendant appeals as of right a December 17, 2019 judgment in favor of plaintiff in this action for breach of a guaranty contract. In Docket No. 354185, defendant appeals as of right a June 23, 2020 order denying a motion of defendant and proposed intervenors, BCL Properties Limited Partnership (“BCL”) and 305 Associates, LLC (“305”), to quash

subpoenas and granting plaintiff's motion for proceedings supplementary to judgment. In Docket No. 354186, proposed intervenors appeal as of right the same June 23, 2020 order.¹ In Docket No. 354821, defendant appeals by leave granted² an August 31, 2020 order granting plaintiff's motion to compel postjudgment discovery. The four appeals were consolidated. *Can IV Packard Square, LLC v Schubiner*, unpublished order of the Court of Appeals, entered October 16, 2020 (Docket No. 354821). In Docket Nos. 352510 and 354821, we affirm the trial court's December 17, 2019 judgment and August 31, 2020 order, respectively, and in Docket Nos. 354185 and 354186, we vacate the trial court's June 23, 2020 order and remand for further proceedings.

I. BACKGROUND

This case arises out of a nearly \$54 million loan that plaintiff made to defendant's company, Packard Square, LLC ("Packard Square"), in October 2014 to finance the construction of a luxury retail and residential development project in Ann Arbor, Michigan. As Packard Square's principal, defendant signed a guaranty contract as security for the construction loan. After multiple construction delays, plaintiff sued Packard Square in Washtenaw Circuit Court in October 2016 ("the Washtenaw action" or "the Washtenaw case"); plaintiff requested the appointment of a receiver to manage the construction project and sought foreclosure on the mortgage that Packard Square had granted to plaintiff to secure the loan. See *Can IV Packard Square, LLC v Packard Square, LLC*, unpublished per curiam opinion of the Court of Appeals, issued January 23, 2018 (Docket No. 335512), pp 1-4 (summarizing the procedural history of the Washtenaw action).

At the outset of the Washtenaw action, the trial court granted plaintiff's request for the appointment of a receiver, and this Court affirmed the appointment of the receiver. *Id.* at 4, 11. Following the issuance of this Court's opinion affirming the Washtenaw Circuit Court's order appointing the receiver, Packard Square applied for leave to appeal in our Supreme Court, which denied the application for leave to appeal. *Can IV Packard Square, LLC v Packard Square, LLC*, 503 Mich 860 (2018).

Meanwhile, during its appeal of the receivership order, Packard Square filed for bankruptcy. The bankruptcy court dismissed the bankruptcy case and noted that "[a] dismissal will avoid any needless confusion or doubt about the ability of the Receiver and the state court in the receivership case to carry on, as if no bankruptcy had been filed." *In re Packard Square, LLC*, 575 BR 768, 783 (Bankr ED Mich, 2017). In affirming the bankruptcy court's dismissal of the bankruptcy petition, the United States District Court for the Eastern District of Michigan stated that "the [Washtenaw Circuit Court] found, and the Michigan Court of Appeals affirmed those findings, that [Packard Square] had mismanaged the Project in several different ways, leading to delays and missed milestones." *In re Packard Square, LLC*, 586 BR 853, 867 (ED Mich, 2018).

¹ Although the claim of appeal in Docket No. 354186 was filed by both proposed intervenors, the appellant's brief in that appeal was filed on behalf of 305 only.

² See *Can IV Packard Square, LLC v Schubiner*, unpublished order of the Court of Appeals, entered October 16, 2020 (Docket No. 354821).

After the appointment of the receiver, the Washtenaw case proceeded with discovery. Plaintiff eventually moved for summary disposition on its foreclosure claim, seeking foreclosure both on Packard Square's mortgage and on a higher priority mortgage securing an additional loan that plaintiff had made to the receiver to complete construction. See *Can IV Packard Square, LLC v Packard Square, LLC*, 328 Mich App 656, 658; 939 NW2d 454 (2019). In September 2018, the trial court granted summary disposition to plaintiff on its foreclosure claim and "entered a judgment of foreclosure authorizing the sale of the property at a sheriff's sale." *Id.* at 658. The property was sold to plaintiff for a \$75 million credit bid at the November 15, 2018 foreclosure sale, and Packard Square filed an appeal from the judgment of foreclosure. See *id.* at 658-660. This Court dismissed Packard Square's appeal as moot after Packard Square failed to redeem the property within the redemption period as provided in MCL 600.3140. *Can IV*, 328 Mich App at 658, 666. Following the issuance of this Court's opinion dismissing the appeal, Packard Square applied for leave to appeal in our Supreme Court, which denied the application for leave to appeal. *Can IV Packard Square, LLC v Packard Square, LLC*, 505 Mich 1001 (2020).

On February 15, 2019, the Washtenaw Circuit Court entered an order granting summary disposition to plaintiff regarding counterclaims that Packard Square had asserted against plaintiff in the Washtenaw case. Packard Square filed an appeal as of right from that order in Docket No. 348857. On July 11, 2019, the Washtenaw Circuit Court entered an order approving the receiver's final report, discharging the receiver's bond, and discharging the receiver, and Packard Square filed an appeal as of right from that order in Docket No. 350519. Those two appeals were consolidated, *Can IV Packard Square, LLC v Packard Square, LLC*, unpublished order of the Court of Appeals, entered December 10, 2019 (Docket No. 348857); *Can IV Packard Square, LLC v Packard Square, LLC*, unpublished order of the Court of Appeals, entered December 10, 2019 (Docket No. 350519), and were submitted to a case call panel of this Court on January 6, 2021.³

On July 30, 2018, plaintiff filed the present action against defendant for breach of the guaranty contract. Plaintiff alleged that, under the terms of the guaranty contract, defendant had agreed to be liable for the full amount of plaintiff's loan to Packard Square upon the occurrence of certain recourse triggers. Among those recourse triggers were the filing by Packard Square or defendant of a voluntary bankruptcy proceeding and opposition by Packard Square or defendant to a motion of plaintiff for relief from the automatic bankruptcy stay. Plaintiff asserted that, through bankruptcy filings made by defendant on behalf of Packard Square, defendant breached the guaranty contract and triggered the recourse provisions of the guaranty contract. Those actions made defendant liable to plaintiff for the full amount of the loan, including all principal, interest, advances, fees, and charges.

On December 17, 2018, defendant filed an answer denying liability and asserted affirmative defenses and counterclaims. Among his affirmative defenses, defendant asserted that plaintiff had breached the loan agreement with Packard Square first, making it impossible for Packard Square and defendant to perform their contractual obligations. Defendant further asserted

³ In addition to the appeals in the Washtenaw case that have already been discussed, there have been many other appeals by Packard Square in the Washtenaw case, none of which are pertinent to the instant appeals and none of which were successful.

that plaintiff had altered the loan agreement and impaired collateral. In his counterclaims, defendant alleged that, when the loan agreement was made in October 2014, he deposited \$1 million into a City National Bank account in which plaintiff held a security interest in accordance with ancillary agreements known as a deposit accounts control agreement (“DACA”) and a pledge agreement. Defendant also asserted that plaintiff’s refusal to pay certain subcontractors in August 2016 led to the filing of liens by those subcontractors. Plaintiff’s refusal to pay construction costs in the summer of 2016 made it impossible for Packard Square to continue construction. On February 21, 2017, months after the receiver had been appointed in the Washtenaw action, plaintiff sent a letter to defendant asserting that defendant was responsible for paying or removing liens on the construction project. On February 24, 2017, plaintiff instructed City National Bank to wire the funds in the DACA account to plaintiff, and City National Bank wired those funds, which amounted to \$1,000,885.33, to plaintiff on the same date. Defendant asserted a breach of contract counterclaim, alleging that plaintiff improperly declared defaults by Packard Square when there were no defaults, that defendant had no obligation to pay off the liens, that plaintiff had caused the liens by failing to fund the construction, and that plaintiff had no right to instruct City National Bank to transfer the funds from the DACA account to plaintiff.⁴

The parties filed competing motions for summary disposition pursuant to MCR 2.116(C)(10) regarding both plaintiff’s breach of contract claim and defendant’s counterclaims. On December 11, 2019, the trial court issued an opinion and order granting summary disposition to plaintiff on both its breach of contract claim and defendant’s counterclaims. On December 17, 2019, the trial court entered a judgment for plaintiff and against defendant in the amount of \$13,992,936.05, along with attorney fees, consultant fees, continuing interest, and costs.

Extensive postjudgment litigation ensued regarding plaintiff’s collection efforts against defendant and entities associated with defendant. On January 16, 2020, the trial court entered an order enjoining defendant from transferring assets outside of the normal course of business pending the satisfaction of the judgment.

On March 6, 2020, proposed intervenors, BCL and 305, filed trial court motions to intervene, quash garnishments, set aside judgment liens, and vacate orders to seize property. According to proposed intervenors, plaintiff had improperly attempted to execute the December 17, 2019 judgment in this case against multiple properties that are each owned by either BCL or 305 which are located in Birmingham, Michigan, or Ann Arbor, Michigan. 305 was owned by a number of trusts of which defendant and members of his family were beneficiaries. BCL was owned by defendant as a general partner and a limited partner named Richard Rogel. Proposed intervenors sought to intervene in order to protect their ownership interests in the properties and to prevent plaintiff from undertaking collection efforts against the properties owned by proposed intervenors. Defendant filed a concurrence in proposed intervenors’ motion.

On March 13, 2020, plaintiff filed a response opposing the motions. Plaintiff argued that defendant was attempting to obstruct lawful collection efforts. With respect to each of the properties at issue, defendant had historically transferred the property in and out of his name. By

⁴ In addition to his breach of contract counterclaim, defendant also alleged other counterclaims, which are not discussed here because defendant raises no issue on appeal about them.

way of example, defendant held the two properties located in Birmingham, 201 Linden and 200 Aspen, in his name up until January 20, 2020, but transferred them to 305, of which defendant was a member, the resident agent, and manager, for the consideration of \$1. As of the date of the trial court denial of the motion to quash, the Ann Arbor property, 702 Tappen, was titled in the defendant's name.

The trial court determined that the resolution of the question of who was the rightful owner of the subject properties required an evidentiary hearing and, due to the Covid-19 pandemic, scheduled an evidentiary hearing for May 14, 2020. That date was later adjourned to June 25, 2020. All collection efforts regarding the properties at issue were stayed pending the evidentiary hearing.

In its collection efforts, plaintiff had issued subpoenas to four of 305's past and current lenders, seeking financial information about proposed intervenors and related entities not involved in this case. On June 9, 2020, defendant and proposed intervenors filed a joint motion to quash subpoenas and for a protective order. They asked that all collection efforts aimed at the subject properties cease because plaintiff knew that defendant did not individually own the Aspen, Linden, and Tappen properties. Defendant and proposed intervenors asked the trial court to quash the subpoenas and to enter a protective order to protect the confidential and proprietary financial information of proposed intervenors and their related entities and to prevent plaintiff from obtaining discovery from the third-party lenders.

On June 15, 2020, plaintiff filed a motion for proceedings supplementary to judgment. Plaintiff argued that defendant's transfer of the Aspen property to 305 on January 20, 2020, was fraudulent, a violation of the January 16, 2020 order enjoining the transfer of defendant's assets, and a voidable transaction under the Uniform Voidable Transactions Act (UVTA), MCL 566.31 *et seq.* As a consequence, plaintiff asked that the trial court enter an order to void the fraudulent transfer. Specifically, plaintiff asked the court to do the following:

- (1) Set aside the January 20, 2020 transfer of the Aspen and Linden properties to 305 or order 305 to show cause why the conveyance should not be set aside;
- (2) Quiet title to the Aspen and Linden properties in plaintiff's name;
- (3) Order defendant to provide an accounting of all proceeds of a mortgage that defendant took on the Aspen property in January 2020 and turn the proceeds over to plaintiff to the extent necessary to satisfy the judgment; and
- (4) Enjoin defendant and 305 from transferring or disposing of assets pending satisfaction of the judgment.

On June 19, 2020, defendant and 305 filed a joint response to plaintiff's motion for proceedings supplementary to judgment. They argued that plaintiff's motion was an attempt to circumvent the stay on collection proceedings that was in effect pending the evidentiary hearing ordered by the trial court. Defendant argued he did not violate the order enjoining transfers because the property that was refinanced was owned by 305 and the transactions were part of the ordinary course of refinancing the property. He asserted that the Aspen property was nominally

put in his name for only one business day in January 2020 in order to effectuate the routine refinancing.

On June 23, 2020, the trial court entered an order denying the motion to quash subpoenas, finding that they were another attempt by defendant to delay proceedings and avoid his obligations under the judgment. The court further found that the motion was made “without basis in law or fact” and sanctioned both defendant and his attorney in the amount of \$1,000. The motion to allow proceedings supplemental to judgment was granted.

On August 24, 2020, plaintiff filed in the trial court a motion to compel discovery from defendant and for sanctions against defendant and his counsel. The motion stated that, on July 10, 2020, plaintiff served on defendant a request for production of documents. On August 7, 2020, defendant filed his response to the discovery request, which consisted entirely of objections, and defendant did not produce a single document. As relevant to these appeals, one of defendant’s objections was that plaintiff did not ask the trial court for leave to engage in discovery. Plaintiff argued that, as a judgment creditor, it was not required to seek leave to engage in discovery. Plaintiff asked for an order compelling discovery as well as sanctions against defendant and his counsel. Defendant argued sanctions against him and his counsel would be improper because defendant’s objection to the discovery request was justified. On August 31, 2020, the trial court issued an order granting the motion, ordering defendant to comply with discovery requests, and sanctioning defendant by requiring him to pay plaintiff’s attorney fees of \$2500 in bringing the motion.

These consolidated appeals ensued from the respective judgment and orders as set forth in the opening paragraph of this opinion.

II. DOCKET NO. 352510

A. SUMMARY DISPOSITION

1. STANDARD OF REVIEW

This Court reviews de novo a trial court’s decision regarding a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). When considering a motion under MCR 2.116(C)(10),

a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*El-Khalil*, 504 Mich at 160 (quotation marks and citations omitted).]

This Court also reviews de novo the proper interpretation or application of a contract. *Yoches v Dearborn*, 320 Mich App 461, 479; 904 NW2d 887 (2017). Unambiguous contractual language is applied as written. *Chestonia Twp v Star Twp*, 266 Mich App 423, 432; 702 NW2d 631 (2005). See also *Comerica Bank v Cohen*, 291 Mich App 40, 54-55; 805 NW2d 544 (2010) (noting that guaranty contracts “are to be construed like other contracts” and that, “under ordinary

contract principles, if contractual language is clear, construction of the contract is a question of law for the court[.]” (quotation marks, brackets, and citations omitted).

The proper interpretation and application of a statute are likewise reviewed de novo. *Wood v Detroit*, 323 Mich App 416, 419; 917 NW2d 709 (2018). Unambiguous statutory language is applied as written. *Mich Ass’n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019).

2. PLAINTIFF’S BREACH OF CONTRACT CLAIM

Defendant argues that the trial court erred in granting summary disposition to plaintiff on its claim that defendant breached his guaranty contract. Defendant asserts that plaintiff lacked authority to make the receiver loan secured by the receiver mortgage. According to defendant, the receiver loan and mortgage constituted material alterations of Packard Square’s original debt, thereby relieving defendant of his obligation as a guarantor of the original debt. Defendant’s argument is unavailing.

A material alteration of an underlying loan agreement releases a guarantor from his or her obligation. See *Texaco, Inc v Clifton*, 87 Mich App 546, 551-553; 274 NW2d 486 (1978). But no material alteration of the underlying loan agreement occurred here. The appointment of a receiver and the advancement of funds to the receiver to complete construction were anticipated as part of the original loan agreement. Under § 9.3 of the original mortgage, Packard Square agreed that, “upon the occurrence of an Event of Default[,]” plaintiff “shall, as a matter of right, be entitled to the appointment of a receiver for all or any part of the Property[.]” And § 9.3 of the original mortgage expressly noted the possibility that plaintiff would advance funds to the receiver; that section referred to “[a]ny money advanced by [plaintiff] in connection with a receivership” Defendant argues that § 9.3 did not authorize a separate receiver mortgage, instead making any funds advanced to the receiver part of the original indebtedness, but § 9.3 contains no language precluding plaintiff from exercising its rights under Michigan law, which, as explained later, included the issuance of the receiver mortgage.

“It is a well-established rule that a variation of the principal’s contract which under the terms of the original agreement should have been anticipated as a possibility will not discharge the surety.” *Matter of Bluestone’s Estate*, 121 Mich App 659, 667; 329 NW2d 446 (1982) (quotation marks, brackets, and citation omitted). In § 6(h) of the guaranty contract, defendant acknowledged that he had received and approved the underlying loan documents. In § 6(b) of the guaranty contract, defendant acknowledged that “[t]he Loan Documents, and all dealings between Borrower or Guarantor and Lender, and any of them, shall conclusively be deemed and presumed to have been created, contracted, incurred, and consummated in reliance upon this Guaranty.” It is beyond dispute that the appointment of a receiver and the advancement of funds to the receiver by plaintiff were anticipated as a possibility under the terms of the original loan documents and that these events thus did not discharge defendant’s obligations as a guarantor.

Further, the receiver mortgage was authorized by Michigan law. MCL 570.1123(1), a provision of the Construction Lien Act (CLA), MCL 570.1101 *et seq.*, provides, in relevant part:

The receiver may petition the court for authority to complete construction of improvements to the real property in full or in part, to borrow money to complete the construction, and to grant security, by way of mortgage or otherwise, for the borrowings. The priority of the security shall be determined by the court.

In its order appointing the receiver, the Washtenaw Circuit Court authorized the receiver to

present to the Court for approval a loan agreement, note, mortgage and other security agreements securing the Receiver loan, which loan, secured by a senior, first-priority mortgage on the Receivership Property, and all disbursements and advancements under the loan shall be senior to all other liens and have a super priority lien position on the Receivership Property

Also, MCL 570.1124(1) provides, in relevant part, that “[r]epayment of funds borrowed by the receiver, under court authority, for the completion of improvements, or for any other purpose shall have priority in the distribution, unless a different priority has been ordered by the court.”⁵ The Washtenaw Circuit Court did not order a different priority. Rather, the Washtenaw Circuit Court’s order appointing the receiver described the receiver mortgage as “a senior, first-priority mortgage” that had “a super priority lien position on the Receivership Property” And the Washtenaw Circuit Court’s judgment of foreclosure stated, “Under the terms of the Order Appointing Receiver, the Receiver Mortgage grants Plaintiff a super priority mortgage lien on the Property[.]”⁶

In the guaranty contract, defendant agreed that Michigan law governed the original loan documents. Contracting parties are presumed to act with knowledge of the law. *Hyatt v Grand Rapids Brewing Co*, 168 Mich 360, 363; 134 NW 22 (1912). Given the provisions of Michigan

⁵ Defendant suggests that this provision, which is part of the CLA, is inapplicable because the foreclosure sale was not initiated by the receiver. But provisions of the CLA apply when there is an action to foreclose a mortgage on real property on which an incomplete improvement exists and appointment of a receiver is sought, i.e., the precise circumstance that existed here. See MCL 570.1122(1) (“If the improvement to the real property is not completed as of the date of commencement of . . . any action to foreclose a mortgage on the real property on which the incomplete improvement exists, any lien claimant or mortgagee may petition the court for the appointment of a receiver.”). Defendant has cited no authority establishing that the priority provision of MCL 570.1124(1) is limited to receiver-initiated sales.

⁶ Defendant argues that, despite the language in the order appointing the receiver and the judgment of foreclosure, the receiver loan agreement itself did not grant priority to the receiver mortgage over Packard Square’s original mortgage. But even if the receiver loan agreement itself did not grant priority to the receiver mortgage over the original mortgage, this does not lead to the conclusion that plaintiff was *required* to apply the foreclosure sale proceeds first to the original loan rather than the receiver loan or that plaintiff’s failure to do so relieved defendant of his obligation as a guarantor of the original loan. As noted later, in the guaranty contract, defendant waived any defense based on plaintiff’s election not to pursue any remedy against any collateral.

law discussed, the receiver mortgage with its priority status should have been anticipated as a possibility, and defendant's obligation as a guarantor was not extinguished.

Defendant's argument fails for additional reasons. In the guaranty contract, defendant agreed that, without affecting defendant's liability, plaintiff was authorized to "take and hold security for the performance of [Packard Square's] obligations under the Note or any of the other Loan Documents and exchange, enforce, waive and release any such security". Defendant further agreed that plaintiff was authorized to "apply such security and direct the order or manner of sale thereof as [plaintiff] in its sole discretion may determine[.]" Plaintiff, empowered to exercise its sole discretion, acted within its contractual authority when it decided to apply the proceeds of the foreclosure sale first to the receiver loan and then to the original loan. See *In re Dosker*, 284 Mich 597, 602-603; 280 NW 61 (1938) ("The law is uniform that if collateral is pledged to secure a number of different notes, one of which is also guaranteed by a surety, in the absence of an agreement to the contrary, the proceeds of the collateral may be applied to notes not so guaranteed."); *United States v Brown*, 833 F Supp 625, 631 (ED Mich, 1993) (holding that a guarantor was bound by the discretion granted to the lender with respect to determining the manner of applying the proceeds of the sale of collateral).⁷

Pursuant to the guaranty, plaintiff was not required to take collateral or to enforce its rights with respect to any collateral. The guaranty contract provided that "[i]t is not a condition to effectiveness or enforceability of this Guaranty . . . that any collateral or security interest be taken or effective or perfected in respect of the Guaranteed Obligations" Any defense premised on plaintiff's election not to pursue any remedy against any collateral was waived. The contract provided that "any defense whether otherwise available to [defendant] under any applicable Laws, based upon [plaintiff's] election to (or election not to) pursue any remedy against all or any of the Collateral." Defendant argued at the trial court and here that plaintiff should be foreclosed from recovery because it failed to pursue a remedy against the collateral. Defendant waived that defense in the guaranty contract. See *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003) ("a waiver is a voluntary and intentional abandonment of a known right[]").

Finally, defendant's reliance on equitable principles discussed in this Court's recent opinion in *Fed Home Loan Mtg Corp v Werme*, ___ Mich App ___, ___ NW2d ___ (2021) (Docket No. 350981), is misplaced. In his notice of supplemental authority to this Court, defendant notes that in *Werme*, we relieved the defendant from a potential mortgage deficiency claim by applying equitable principles against double recoveries as set forth in *Bd of Trustees of the Gen Retirement Sys of Detroit v Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich App 318; 377 NW2d 432 (1985). Defendant says that, under the equitable principles applied in *Werme* and *Ren-Cen*, plaintiff's application of its \$75 million credit bid to first pay off the receiver loan should have fully discharged Packard Square's original mortgage and relieved defendant of any liability for the loan repayment deficiency. Defendant argues that plaintiff "now owns the property and stands to recover even more money from selling the now completed development project." Defendant

⁷ Decisions of lower federal courts are not binding on this Court but may be persuasive. *Vanderpool v Pineview Estates, LC*, 289 Mich App 119, 124 n 2; 808 NW2d 227 (2010).

identifies no support for this contention beyond mere conjecture and speculation. A party may not rely on mere conjecture and speculation at the summary disposition stage. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Defendant has not established that the equitable principles barring double recovery set forth in *Ren-Cen* and *Werme* apply here. There is no record evidence that plaintiff's \$75 million credit bid constituted a depressed purchase price in relation to the value of the property at the time of purchase. The record is also devoid of evidence that plaintiff obtained a windfall in the form of a double recovery. Cf. *Werme*, ___ Mich App at ___; slip op at 10-12; *Ren-Cen*, 145 Mich App at 325-326.

3. DEFENDANT'S BREACH OF CONTRACT COUNTERCLAIM

Defendant next argues that the trial court erred in granting summary disposition to plaintiff on defendant's counterclaim for breach of contract. According to defendant, plaintiff breached the guaranty contract, the pledge agreement, and the DACA when plaintiff swept \$1 million that defendant had deposited in the DACA account as collateral. Defendant's argument is unavailing.

In the guaranty contract, defendant guaranteed Packard Square's obligations or liabilities to plaintiff "for any actual loss, damage, liability, cost or expense incurred by" plaintiff relating to the property which was a direct result of, as relevant here, "the failure to pay any . . . lienable charges" In the pledge agreement, defendant granted to plaintiff "a continuing and unconditional security interest in" the DACA account (referred to in the pledge agreement as "the Guarantor Account") "maintained with City National Bank" The pledge agreement further provided:

This Pledge Agreement and the Security Interest created hereby secures payment of all obligations of any kind owing by [defendant] to [plaintiff] in connection with [defendant's] payment and performance, as applicable, obligations under the Guarantees (collectively, the "Guarantee Obligations"). Upon an Event of Default together with [defendant's] failure to promptly satisfy, as determined by [plaintiff] **in its sole discretion**, any Guarantee Obligation, [defendant] hereby authorizes [plaintiff] to transfer and apply any and all Collateral to satisfy, in whole or in part to the extent of Collateral available, the Guarantee Obligations. [Emphasis added].

The pledge agreement also stated that, "upon an Event of Default together with [defendant's] failure to promptly satisfy, as determined by [plaintiff] in its sole discretion, any Guarantee Obligation, [plaintiff] shall have the right to" direct City National Bank "to transfer all or any of the funds in the Guarantor Account, together with any interest thereon, to" plaintiff. And in the DACA, the parties agreed that plaintiff "shall be entitled . . . at any time to give [City National Bank] instructions as to the withdrawal or disposition of funds . . . without further consent of [defendant], and [City National Bank] shall comply with such instructions without further consent of" defendant.

The application of collateral estoppel is reviewed de novo. *Radwan v Ameriprise Ins Co*, 327 Mich App 159, 164; 933 NW2d 385 (2018). "Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498,

529; 866 NW2d 817 (2014). “Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel.” *Id.*

“The parties to the second action need be only substantially identical to the parties in the first action, in that the rule applies to both parties and their privies.” *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003). “Regarding private parties, a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee.” *Id.* at 12-13. “A manager is an agent of the limited liability company for the purpose of its business[.]” MCL 450.4406. A shareholder of a closely held corporation is deemed in privity with that corporation. See *Wildfong v Fireman’s Fund Ins Co*, 181 Mich App 110, 115-116; 448 NW2d 722 (1989).

“Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action.” *Monat v State Farm Ins Co*, 469 Mich 679, 684; 677 NW2d 843 (2004) (quotation marks, brackets, and citation omitted). That is, “the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.” *Id.* at 684-685 (quotation marks, brackets, and citations omitted).

The first element of collateral estoppel is satisfied because Packard Square’s responsibility for two subcontractor liens was actually litigated and adjudicated in the Washtenaw action. In the Washtenaw case, plaintiff filed a complaint against Packard Square, seeking an order appointing a receiver as well as a judgment of foreclosure. Among the reasons why plaintiff sought such relief was that Packard Square had failed to resolve certain subcontractor liens filed against the property, including a lien recorded by Gaylor Electric, Inc. (“Gaylor”), on September 29, 2016, for \$916,312.91, and a lien recorded by Jermor Plumbing & Heating, Inc. (“Jermor”), on October 6, 2016, for \$330,958.06. In its answer to plaintiff’s complaint in the Washtenaw case, Packard Square asserted that the liens were solely the result of plaintiff’s refusal to fund the construction. Packard Square made the same argument in responding to plaintiff’s motion to appoint a receiver, i.e., Packard Square contended that plaintiff’s refusal to provide funding led to the recording of the Gaylor and Jermor liens.

The Washtenaw Circuit Court determined that Packard Square defaulted under the original loan documents, and it thus entered an order appointing the receiver; this was a final order on plaintiff’s claim for appointment of a receiver. Packard Square filed an appeal as of right from the order appointing the receiver. In affirming that order, this Court addressed Packard Square’s argument that plaintiff had unclean hands because it had purportedly “failed to release funds to subcontractors for work that plaintiff approved and thereby failed to honor its loan commitments.” *Can IV*, unpub op at 7. That is, Packard Square contended that “plaintiff could not hold [Packard Square] in default when plaintiff’s conduct obstructed [Packard Square’s] efforts to comply with the contract.” *Id.* This Court explained that Packard Square’s argument lacked merit and was based on a false premise:

Although plaintiff advised [Packard Square] that it approved certain subcontractor’s pay applications, plaintiff informed [Packard Square] that before it

would pay those applications, [Packard Square] had to provide plaintiff unconditional lien waivers. Under Loan Agreement § 9.2, [Packard Square] had the obligation to provide lien waivers before plaintiff's obligation to disburse funds arose. The record contains no evidence that [Packard Square] ever obtained full unconditional lien waivers from the subcontractor who recorded liens or presented them to plaintiff. Consequently, plaintiff had no obligation to make such payments merely because it approved the work. [Packard Square] had to fulfill the contractual conditions precedent to payment. [Packard Square] failed to do so. Further, [Packard Square's] commission of the other events of default as defined in Loan Agreement § 10.1 triggered operation of Loan Agreement § 9.1(e) which unequivocally provided that plaintiff had no obligation to disburse funds if any default existed. The record reflects that plaintiff complied with the terms of the Loan Agreement and simply exercised its contractual rights. Therefore, we hold that the trial court did not abuse its discretion by appointing a receiver because plaintiff did not come to the trial court with unclean hands. [*Id.*]

Following the issuance of this Court's opinion affirming the Washtenaw Circuit Court's order appointing the receiver, Packard Square applied for leave to appeal in our Supreme Court, which denied the application for leave to appeal. *Can IV*, 503 Mich at 860.

Plaintiff later sought summary disposition on its foreclosure claim in the Washtenaw case. In granting summary disposition to plaintiff on its foreclosure claim, the Washtenaw Circuit Court stated, in relevant part, that "[t]he loan documents obligated Packard Square to resolve any liens that subcontractors might place on the property. . . . Liens were filed and Packard Square did not resolve/release those claims of lien in compliance with the loan document." The Washtenaw Circuit Court therefore entered a judgment of foreclosure. Packard Square filed an appeal as of right from the judgment of foreclosure. This Court dismissed Packard Square's appeal as moot after Packard Square failed to redeem the property within the redemption period as provided in MCL 600.3140. *Can IV*, 328 Mich App at 658, 666. Following the issuance of this Court's opinion dismissing the appeal, Packard Square applied for leave to appeal in our Supreme Court, which denied the application for leave to appeal. *Can IV*, 505 Mich at 1001. Therefore, Packard Square's responsibility for subcontractor liens was actually litigated and adjudicated in the Washtenaw case.

The second element of collateral estoppel is satisfied. The same parties or their privies had a full and fair opportunity to litigate the issue of the subcontractor liens in the Washtenaw case. Although defendant was not a party in the Washtenaw case, he is in privity with Packard Square; his deposition testimony establishes that he owns and manages Packard Square and is the sole decisionmaker for it.

The third element of collateral estoppel is likewise satisfied. There is mutuality of estoppel because plaintiff and Packard Square were both parties in the Washtenaw action, and plaintiff thus would have been bound by the adjudication in the Washtenaw action if it had gone against plaintiff.

Accordingly, the trial court properly determined that defendant was collaterally estopped from relitigating the facts that Packard Square defaulted in failing to resolve subcontractor liens and that plaintiff could stop disbursing funds following Packard Square's defaults. Notably,

defendant's brief on appeal does not address the trial court's application of collateral estoppel. "When an appellant fails to address the basis of a trial court's decision, this Court need not even consider granting relief." *Seifeddine v Jaber*, 327 Mich App 514, 522; 934 NW2d 64 (2019).⁸ Packard Square's defaults triggered defendant's obligations under the guaranty contract, and it is beyond dispute that defendant never satisfied his obligations under the guaranty contract. Plaintiff was thus entitled to transfer funds from the DACA account pursuant to the earlier-quoted provisions of the pledge agreement and the DACA. In short, plaintiff acted within its contractual rights when it obtained funds from the DACA account. Defendant thus has not demonstrated a genuine issue of material fact in support of his counterclaim for breach of contract, and the trial court properly granted summary disposition to plaintiff on the breach-of-contract counterclaim.

3. DAMAGES

Defendant next makes various arguments challenging the trial court's award of damages. Defendant's arguments are unavailing.

An issue must be raised in or decided by the trial court in order to be preserved for appeal. *Glasker-Davis v Auvenshine*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 345238); slip op at 3. The issue of plaintiff's entitlement to damages at the summary disposition stage was raised and decided below and is preserved. However, defendant did not raise below his arguments that an affidavit of plaintiff's principal, Gerald Goldman, was based on hearsay or that plaintiff failed to mitigate its damages by failing to seek immediate foreclosure. Those arguments are therefore unpreserved.

For the unpreserved aspects of the issue, any review is limited to plain error affecting substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006). Defendant must show that an error occurred, that the error was clear or obvious, and that the error affected substantial rights. *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). Generally, an error affects substantial rights if it is prejudicial, i.e., it affected the outcome of the case. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

Damages may be awarded at the summary disposition stage if there is no genuine issue of material fact with respect to the amount of damages. See *Batton-Jajuga v Farm Bureau Gen Ins Co of Mich*, 322 Mich App 422, 425, 428, 438; 913 NW2d 351 (2017) (affirming an order awarding damages on summary disposition); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 363-364, 381; 775 NW2d 618 (2009) (same). When moving for summary disposition on its breach of contract claim, plaintiff presented an affidavit of its corporate representative, Goldman, setting forth detailed calculations regarding the amount owed under the loan documents. The receiver reported the same amount to the Washtenaw Circuit Court, which approved the receiver's final report over Packard Square's objections. Goldman's affidavit indicated that, in accordance with the Washtenaw Circuit Court's orders and Michigan law, plaintiff applied its \$75 million credit bid to the receiver indebtedness first, extinguishing

⁸ Defendant's reply brief seems to address the collateral estoppel issue, but "[r]eply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007).

\$37,823,096.45 of indebtedness. Plaintiff applied the remainder of the credit bid to the original loan indebtedness, leaving a balance owed by defendant of \$13,992,936.05, exclusive of collection costs, attorney fees, consulting fees, and other applicable continuing interest, costs, fees, and expenses. Plaintiff asked for a judgment in accordance with the amounts, calculations, and averments in Goldman's affidavit. Defendant provided no evidentiary basis to dispute the amounts in Goldman's affidavit. Therefore, no genuine issue of material fact existed regarding the amount of damages.

As for defendant's unpreserved contention that the Goldman affidavit contains hearsay, defendant fails to appreciate that evidence presented at the summary disposition stage need only be *substantively* admissible. See *Barnard Mfg*, 285 Mich App at 373 (although evidence presented at the summary disposition stage "must be substantively admissible, it does not have to be in admissible form[]"). The damages calculations contained in Goldman's affidavit were based on business records. The underlying business records would have been admissible under MRE 803(6) if a proper foundation was laid. A party is not required at the summary disposition stage to lay a foundation for the admission of documents as long as a plausible basis for their admission exists. *Barnard Mfg*, 285 Mich App at 373. Although the Goldman affidavit itself was prepared in anticipation of litigation and thus would not itself be admissible *in form*, there is no indication that the underlying business records were prepared in anticipation of litigation. Defendant relies on inapposite cases in which *business records themselves* were prepared in anticipation of litigation and were thus deemed inadmissible under MRE 803(6); see *Solomon v Shuell*, 435 Mich 104, 125-128; 457 NW2d 669 (1990) (opinion by ARCHER, J.); *People v Huyser*, 221 Mich App 293, 297-298; 561 NW2d 481 (1997); *Attorney General v John A Biewer Co, Inc*, 140 Mich App 1, 17-18; 363 NW2d 712 (1985). In short, defendant has identified no basis to conclude that the *substantive contents* of the Goldman affidavit were inadmissible. Defendant thus has not shown that the trial court plainly erred by considering that affidavit in awarding damages.

Next, defendant contends that Goldman's affidavit improperly calculated accrued default interest as beginning to run on September 15, 2014, contrary to the original promissory note which did not provide for interest to begin running before a payment default. However, the promissory note expressly provides, " 'Interest Commencement Date' shall mean September 15, 2014." The calculation of interest in Goldman's affidavit thus conformed with the plain language of the note.

Defendant further argues that he is entitled to offsets or credits for rent and tax increment financing ("TIF") reimbursements received by plaintiff. Defendant fails to explain why he is entitled to such offsets. Plaintiff purchased the property at the foreclosure sale. After the redemption period expired, defendant lost any right in and to the property. See *Can IV*, 328 Mich App at 666. As the owner of the property, plaintiff is entitled to collect rents, and because plaintiff pays property taxes, it is entitled to any tax reimbursements from the government. Defendant also contends that he is entitled to a credit for \$200,000 that the receiver transferred to plaintiff at the end of the receivership, but defendant fails to explain precisely why he is entitled to an offset for this amount. Defendant "cannot leave it to this Court to make his arguments for him. His failure to adequately brief the issue constitutes abandonment." *Seifeddine*, 327 Mich App at 521 (citation omitted).

Defendant makes an unpreserved argument that plaintiff failed to mitigate its damages because plaintiff sought the appointment of a receiver to complete construction rather than

immediate foreclosure. “[A] breach of contract imposes on the plaintiff a duty to mitigate damages. The defendant bears the burden of proving a failure to mitigate.” *Lorenz Supply Co v American Standard, Inc*, 100 Mich App 600, 610; 300 NW2d 335 (1980). Defendant suggests that plaintiff could have avoided its damages by seeking immediate foreclosure rather than the appointment of a receiver to complete construction. When plaintiff sought the appointment of a receiver, Packard Square admitted the project was only 60% completed. See *Can IV*, unpub op at 3. Defendant has provided no evidentiary basis to support a claim that plaintiff would have suffered less economic injury with a sale of an unfinished retail and residential development project than from a completed construction. Defendant has not shown any plain error in regard to a failure to mitigate damages.

III. DOCKET NOS. 354185 AND 354186

Defendant and 305 argue that, in its June 23, 2020 order, the trial court committed various errors regarding plaintiff’s motion for proceedings supplementary to judgment and the motion of defendant and proposed intervenors to quash subpoenas and enter a protective order. We agree with some of defendant and 305’s arguments, and we thus vacate the trial court’s June 23, 2020 order and remand for further proceedings.

A. MOTION FOR PROCEEDINGS SUPPLEMENTARY TO JUDGMENT

An issue must be raised in or decided by the trial court in order to be preserved for appeal. *Glasker-Davis*, ___ Mich App at ___; slip op at 3. The overall issue was raised and decided below. Hence, the overall issue is preserved. But defendant and 305 did not raise below their appellate contention that plaintiff’s motion for supplementary proceedings had to be verified. That aspect of the issue is therefore unpreserved.

A trial court’s legal conclusions are reviewed de novo, while any factual findings are reviewed for clear error. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). Clear error exists when a reviewing court is definitely and firmly convinced that a mistake was made. *Id.* The interpretation and application of court rules are reviewed de novo. *In re DMK*, 289 Mich App 246, 253; 796 NW2d 129 (2010).

A trial court’s decision whether to hold a hearing is reviewed for an abuse of discretion. *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999). A trial court’s discovery rulings are also reviewed for an abuse of discretion. *Truel v Dearborn*, 291 Mich App 125, 131; 804 NW2d 744 (2010). An abuse of discretion occurs when the trial court’s decision falls outside the range of principled outcomes. *Rock v Crocker*, 499 Mich 247, 255; 884 NW2d 227 (2016).

Also, for the unpreserved aspect of the issue, any review is limited to plain error affecting substantial rights. *Kloian*, 272 Mich App at 242. Defendant and 305 must show that an error occurred, that the error was clear or obvious, and that the error affected substantial rights. *In re Ferranti*, 504 Mich at 29. Generally, an error affects substantial rights if it is prejudicial, i.e., it affected the outcome of the case. *In re Utrera*, 281 Mich App at 9.

Defendant and 305 contend that there were factual questions for which the trial court failed to make fact-findings with respect to plaintiff’s request for relief under the UVTA due to defendant’s alleged transfers of properties to 305. We agree with defendant and 305 that the trial

court's June 23, 2020 order did not include any factual findings. Further, the trial court failed to explain why it reversed its earlier ruling that an evidentiary hearing was required.

Initially, it must be noted that the trial court's June 23, 2020 order failed to specify exactly what relief was granted to plaintiff. The order stated that plaintiff's motion for proceedings supplementary to judgment was granted. The order did not specify the particular nature of the relief being granted, i.e., whether each item of relief requested in the motion was granted. This omission is significant given the broad nature of the relief requested with respect to the properties at issue. The trial court's order did not specify whether it was granting all of part of the broad relief requested. This omission alone warrants a remand to the trial court for clarification. The trial court did not make the fact-findings required by MCL 566.35(1), a provision of the UVTA, provides,

A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

To set aside a transfer under MCL 566.35(1), a creditor must show that “(1) the creditor's claim arose before the transfer, (2) the debtor was insolvent or became insolvent as a result of the transfer, and (3) the debtor did not receive reasonably equivalent value in exchange for the transfer.” *Dillard v Schlusel*, 308 Mich App 429, 446; 865 NW2d 648 (2014) (quotation marks and citation omitted). The moving party has the burden of proof by a preponderance of the evidence. MCL 566.35(3).

With respect to defendant and 305's unpreserved contention that plaintiff was required to verify its motion for proceedings supplementary to judgment, it is impossible to resolve that issue on the present record. MCR 2.621(B)(1) provides that a motion for proceedings supplementary to judgment must be verified if it “seeks to reach an equitable interest of a debtor[.]” Plaintiff argues that verification was not required because plaintiff was not seeking an equitable interest of defendant but rather his legal title to the Aspen and Linden properties. Plaintiff cites caselaw referring to title by deed as legal in nature rather than equitable. See, e.g., *Graves v American Acceptance Mtg Corp*, 469 Mich 608, 614; 677 NW2d 829 (2004); *Grand Lodge IOOF v Barker*, 139 Mich 701, 705; 103 NW 193 (1905). Resolution of this question thus arguably hinges on the ownership issue, which the trial court has yet to resolve, making it premature to determine whether the verification requirement applies here.

B. MOTION TO INTERVENE

Next, 305 argues that the trial court did not formally rule on the motion to intervene. Plaintiff responds that this omission was harmless because the trial court essentially treated 305 and BCL as intervenors and considered their briefing before ruling. However, because the case is being remanded for reasons already discussed, we direct the trial court on remand to formally rule on the motion to intervene.

C. MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER

Defendant and proposed intervenors argue that the trial court failed to provide a sufficient rationale for denying defendant and proposed intervenors' motion to quash subpoenas and for a protective order. We agree.

"While Michigan is strongly committed to open and far-reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 327; 900 NW2d 680 (2017) (quotation marks and citation omitted). "Michigan's commitment to open and far-reaching discovery does not encompass fishing expeditions." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011) (quotation marks, brackets, and citation omitted). A trial court has authority to quash or modify a subpoena if it is unreasonable or oppressive. MCR 2.305(A)(4)(a). If good cause is shown, a trial court "may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" MCR 2.302(C). A protective order may direct "that the discovery not be had[.]" MCR 2.302(C)(1).

In their joint motion to quash subpoenas and for a protective order, defendant and proposed intervenors stated that plaintiff had issued subpoenas to four of 305's past and current lenders, seeking financial information about proposed intervenors and related entities not involved in this case. The third-party lenders had made loans secured by 305's properties. According to defendant and proposed intervenors, none of this information was relevant to determining the ownership of the properties at issue. Also, the trial court's March 17, 2020 order had stayed all collection efforts. Defendant and proposed intervenors asked the trial court to quash the subpoenas and to enter a protective order to protect the confidential and proprietary financial information of proposed intervenors and their related entities and to prevent plaintiff from obtaining discovery from the third-party lenders. In response, plaintiff argued that the challenged subpoenas were seeking documents that were relevant to the ownership, control, and use of assets that plaintiff believed belonged to defendant and that this was material to plaintiff's ongoing efforts to enforce the judgment.

In denying defendant and proposed intervenors' motion to quash subpoenas and for a protective order, the trial court's June 23, 2020 order stated that defendant had engaged in obfuscation and delay and that he had used real estate transactions to avoid his obligations. However, the trial court failed to address defendant and proposed intervenors' contention that the subpoenas to the four third-party lenders were overly broad in that they sought information about entities unrelated to this case and which was irrelevant to determining ownership of the properties at issue. Because the trial court failed to provide a sufficient rationale, we vacate the court's order and remand for further consideration of defendant and proposed intervenors' motion and for a fuller explanation of the trial court's ultimate ruling on this motion.

IV. DOCKET NO. 354821

A. DISCOVERY

Defendant argues that the trial court erred in granting plaintiff's motion to compel postjudgment discovery. Defendant contends that, under MCR 2.621(B)(2), plaintiff was not entitled to seek discovery as a judgment creditor without obtaining permission or leave of the court through a motion or separate action. Defendant's argument is unavailing.

A trial court's discovery rulings are reviewed for an abuse of discretion. *Truel*, 291 Mich App at 131. An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Rock*, 499 Mich at 255. The interpretation and application of court rules and statutes are reviewed de novo. *In re DMK*, 289 Mich App at 253. Unambiguous language of a court rule or statute is enforced as written. *In re Kerr*, 323 Mich App 407, 411; 917 NW2d 408 (2018).

MCR 2.621(B)(2) provides, "The judgment creditor may obtain relief under MCL 600.6110, and discovery under subchapter 2.300 of these rules." This language is unambiguous and must be enforced as written. See *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 350; 852 NW2d 22 (2014) ("When ascertaining the meaning of a court rule, the reviewing court should focus first on the plain language of the rule in question, and when the language of the rule is unambiguous, it must be enforced as written."). As a judgment creditor, plaintiff is entitled to discovery under subchapter 2.300 of the Michigan Court Rules. A judgment creditor is not required to seek leave to pursue this type of postjudgment discovery. See 3 Longhofer, Michigan Court Rules Practice, Text (7th ed), § 2621.5 ("A judgment creditor may choose to take discovery as to the debtor's assets under the informal and flexible procedures established by subchapter 2.300 of the Michigan Court Rules. In that event, the creditor need not apply to the court for supplementary proceedings, but may pursue discovery upon notice alone.") (citation omitted).⁹

Indeed, in other contexts, our Supreme Court has enacted court rule provisions explicitly requiring a party to seek leave or take some other type of affirmative action before engaging in discovery. See, e.g., MCR 2.301(A)(4) ("After a post judgment motion is filed in a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules."); MCR 2.301(A)(2) ("In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties."). Therefore, in the present context, if our Supreme Court had intended to require a judgment creditor to obtain leave of the court before engaging in discovery under subchapter 2.300 of the Michigan Court Rules, our Supreme Court could have included such language in MCR 2.621(B)(2). See *Terra Energy, Ltd v Michigan*, 241 Mich App 393, 401; 616 NW2d 691 (2000) (noting that, if our Supreme Court had wished to incorporate a certain provision into a court rule, our Supreme Court could have expressly done so).

Defendant suggests that the proper interpretation of MCR 2.621(B) requires reference to statutory provisions regarding motions for proceedings supplementary to judgment because the catch line of MCR 2.621 states, "Proceedings Supplementary to Judgment." Our Supreme Court has noted that " 'the catch lines of a rule are not part of the rule and may not be used to construe the rule more broadly or more narrowly than the text indicates.' " *Schell v Baker Furniture Co*,

⁹ Commentary on court rules is not binding but may be considered persuasive. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 585; 644 NW2d 54 (2002).

461 Mich 502, 514 n 11; 607 NW2d 358 (2000) (brackets omitted), quoting MCR 1.106. The catch line of MCR 2.621 is thus not pertinent to the interpretation of MCR 2.621(B)(2).

Next, in arguing that a judgment creditor must file a motion or separate action in order to obtain discovery under MCR 2.621(B)(2), defendant relies on *another* provision of MCR 2.621. In particular, defendant cites MCR 2.621(A), which provides, in relevant part:

When a party to a civil action obtains a money judgment, that party may, by motion in that action or by a separate civil action:

* * *

(2) obtain relief supplementary to judgment under MCL 600.6101-600.6143

MCL 600.6104 provides, in relevant part:

After judgment for money has been rendered in an action in any court of this state, the judge may, on motion in that action or in a subsequent proceeding:

(1) Compel a discovery of any property or things in action belonging to a judgment debtor, and of any property, money, or things in action due to him, or held in trust for him

Defendant's reliance on MCR 2.621(A)(2) is misplaced. MCR 2.621(B)(2) provides for discovery under subchapter 2.300 of the Michigan Court Rules and does not require seeking leave of the court in order to engage in discovery. By contrast, MCR 2.621(A)(2) allows a judgment creditor, by motion or a separate civil action, to obtain relief supplementary to judgment under statutory provisions, including MCL 600.6104(1), under which a judge may compel discovery. MCR 2.621(B)(2) and MCR 2.621(A)(2) are not in conflict; they merely provide alternative ways by which a judgment creditor may pursue discovery. Indeed, this point has been made in commentary explaining the differences between discovery under subchapter 2.300 of the Michigan Court Rules and discovery under the statutory scheme for proceedings supplementary to judgment:

Despite the broad discovery available under the discovery rules, the judgment creditor may find the specific advantages of the statutory discovery proceedings more important than the greater flexibility and informality of discovery under the rules. The court may, in the statutory order for examination, issue an ex parte restraining order forbidding transfer of property by the debtor or by a third person. The examination is had before a judge, which may inspire more cooperative testimony. The judgment debtor may be required to attend proceedings outside its county of residence, if ordered by the court. Under the discovery rules, a deponent is required to attend an examination only in the county where he or she lives, is employed or personally transacts business, although the court has power to set a convenient place that may be none of these.

Upon a verified showing that satisfies the judge that the debtor probably has some assets, the court has authority to subpoena either the debtor or a third party to appear and be examined and to bring any records designated. A judge holding the

examination may specify a particular officer of a corporation to attend. . . . [3 Longhofer, Michigan Court Rules Practice, Text (7th ed), § 2621.5 (citations omitted).]

In short, the discovery court rules and the statutory scheme for proceedings supplementary to judgment provide different ways by which a judgment creditor may pursue discovery. Defendant thus errs in saying that the requirement in MCR 2.621(A) of filing a motion or a separate action when seeking relief supplementary to judgment also applies when a judgment creditor seeks discovery under subchapter 2.300 of the Michigan Court Rules pursuant to MCR 2.621(B)(2).

Defendant further argues that, if a judgment creditor may pursue discovery under MCR 2.621(B)(2) without first seeking leave of the court, the judgment creditor could engage in discovery that is disproportionate or that seeks information that is not relevant to collection efforts. Defendant is again mistaken. Under subchapter 2.300, there are safeguards available to prevent disproportionate or irrelevant discovery. For example, a party or person from whom discovery is sought may file a motion for a protective order under MCR 2.302(C). There are also numerous court rule provisions allowing objections to discovery requests, such as MCR 2.309(B)(1), MCR 2.310(C)(2), and MCR 2.312(B)(4), and a judgment creditor could then move to compel discovery. See MCR 2.313(A)(2)(b). The court rules thus provide avenues to challenge discovery requests.

B. SANCTIONS

Defendant argues that the trial court erred in imposing sanctions against defendant for objecting to plaintiff's discovery requests. We disagree.

A trial court's decision regarding the imposition of sanctions is reviewed for clear error. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Clear error exists when the reviewing court is definitely and firmly convinced that a mistake was made. *Id.*

MCR 2.302(G)(3) provides, in relevant part:

The signature of the attorney or party constitutes a certification that he or she has read the disclosure, request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry:

* * *

(b) the discovery request, response, or objection is:

(i) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

MCR 2.302(G)(4) provides:

If a certification is made in violation of this rule, the court, on the motion of a party or on its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

As explained, defendant's objection to the discovery requests was premised on an interpretation of MCR 2.621(B)(2) that contravened the unambiguous language of the rule. We discern no clear error in the trial court's determination that defendant's objection lacked a legal basis and was intended to obstruct the process. The trial court properly awarded sanctions against defendant.

V. CONCLUSION

In Docket Nos. 352510 and 354821, we affirm the trial court's December 17, 2019 judgment and August 31, 2020 order, respectively, and in Docket Nos. 354185 and 354186, we vacate the trial court's June 23, 2020 order and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra