STATE OF MICHIGAN

COURT OF APPEALS

JODE INVESTMENTS LLC, CLUB GOLF PROPERTIES LLC, and CLUB GOLF INVESTORS, LLC,

Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,

v

BURNING TREE PROPERTIES, LLC, BURNING TREE INVESTORS, LLC, SIMONE MAURO, and SALVATORE DIMERCURIO,

Defendants/Third-Party-Plaintiffs-Counter-Plaintiffs-Appellants/Cross-Appellees,

and

SERGIO GESUALE,

Defendant-Appellant/Cross-Appellee,

and

ANTHONY MARROCCO and ANTHONY FANELLI,

Third-Party-Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
April 17, 2014

No. 310957
Macomb Circuit Court
LC No. 2011-000291-CZ

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

In this dispute arising from the failure of Burning Tree Golf and Country Club beginning in January 2009 and its eventual acquisition by Club Golf Properties, LLC (Club Properties) and Club Golf, Inc. (Club Golf) (collectively the Club entities),[1] defendants Burning Tree Properties, LLC, Burning Tree Investors, LLC, Simone Mauro, and Salvatore DiMercurio appeal by right the trial court's orders granting summary disposition in favor of plaintiffs Jode Investments, LLC, the Club entities, and third-party defendants Anthony Marrocco and Anthony Fanelli. Jode Investments, LLC, the Club entities, and third-party defendants Marrocco and Fanelli cross-appeal by right the trial court's decision not to sanction the Burning Tree entities, Mauro and DiMercurio. On appeal, we agree that the trial court erred in several respects. However, under the facts peculiar to this case—including the bankruptcy of several parties—we decline to grant the relief requested by the parties. Instead, for the reasons more fully explained below, we affirm in part, reverse in part, vacate in part, and remand for further proceedings.

I. BASIC FACTS

In September 2004, Marrocco, Fanelli, Mauro, DiMercurio, Sergio Gesuale, and Ralph Patti formed two limited liability companies: Burning Tree Properties, LLC and Burning Tree Investors, LLC (collectively the Burning Tree entities). Marrocco and Fanelli did not participate in the formation of the Burning Tree entities in their individual capacities; instead, they caused their own limited liability company—Jode Investments—to form the new entities along with the other members. Eventually Jode Investments, Mauro, DiMercurio, and Gesuale each owned 25% of the Burning Tree entities. The members formed the Burning Tree entities to purchase and operate the Burning Tree Golf and Country Club; specifically, they organized Burning Tree Properties to purchase the golf course's real property and organized Burning Tree Investors to operate the golf course and country club.

The Burning Tree entities financed the purchase of the golf course with a $3,360,000 loan from Fifth Third Bank. To secure the loan, Burning Tree Properties granted Fifth Third a mortgage on its real property and Burning Tree Investors guaranteed the loan and provided Fifth Third with a security agreement covering all of its personal property, including its liquor license. Marrocco, Fanelli and the individual members of the Burning Tree entities also each personally guaranteed the loan. The note obligated the Burning Tree entities to make a balloon payment in January 2009, which they did not make.

Fifth Third foreclosed against Burning Tree's real property by advertisement and purchased the property at a foreclosure sale held in October 2009. Fifth Third bid $1,500,000 for the property and recorded its deed in November of that same year. The remaining debt after the foreclosure was approximately $2 million.

[1] We note that the caption refers to Club Golf Investors, LLC, which the parties seemed to use interchangeably with Club Golf, Inc., in many of the lower court filings. However, Club Golf Investors, LLC does not appear in a search of registered entities, but Club Golf does. The filings also show that Club Golf is in the business of managing a golf course and does business under the name Burning Tree Club. Therefore, we shall use Club Golf to refer to the successor entity that manages the golf course, but does not own the underlying real property.

In November 2009, Fifth Third sued the Burning Tree entities, DiMercurio, Fanelli, Gesuale, Marrocco, Mauro, and Patti. Fifth Third alleged that the Burning Tree Investors, DiMercurio, Fanelli, Gesuale, Marrocco, Mauro, and Patti breached their guaranties. It also alleged the right to take possession of Burning Tree Investors' personal property in partial satisfaction of the remaining debt. Fifth Third asked the circuit court to appoint a receiver to preserve the personal property and any profits from the operation of the golf course.

In April 2010, Marrocco and Fanelli entered into a settlement agreement with Fifth Third. Marrocco and Fanelli agreed to pay Fifth Third $2.1 million and to release all claims against Fifth Third. In exchange, Fifth Third agreed to dismiss its civil claims against Marrocco and Fanelli "with prejudice" and without impairing Fifth Third's right to proceed against the other guarantors. Fifth Third also agreed to quit claim its interest in "the Burning Tree Property" or issue a certificate of redemption to an entity to be named by Marrocco and Fanelli. Finally, Fifth Third agreed to terminate its financing statements under the Uniform Commercial Code (UCC) against Burning Tree Investors' personal property and discharge any interest in Burning Tree Investors' liquor license. Marrocco and Fanelli also represented that they intended to create an entity to acquire Burning Tree Investors' remaining assets.

Also in April 2010, members holding a 70% interest in Burning Tree Properties (Marrocco, on behalf of Jode Investments, Mauro, and DiMercurio) caused Burning Tree Properties to assign all of its "right, title, and interest" in the real property, including its redemption rights, to Club Properties.[2] Under the terms of the agreement, the manager of Burning Tree Properties had to execute a quit claim deed to Club Properties.

Club Properties paid $2,100,000 to Fifth Third as part of the settlement between Fifth Third, Fanelli, and Marrocco in May 2010. Fifth Third executed a 'redemption certificate' acknowledging that Club Properties had redeemed the real property in that same month. The redemption was not recorded until February 2011. Fifth Third also stipulated to the dismissal of its claims against the Burning Tree entities, Marrocco, Fanelli, and Patti.

In July 2010, Fifth Third settled with Mauro and DiMercurio. Under the settlement agreement, Mauro and DiMercurio agreed to each execute a deficiency note for $70,000 to cover their personal guaranties. In exchange, Fifth Third agreed that the settlement would resolve its claims against Mauro and DiMercurio. The circuit court dismissed Fifth Third's claims against Mauro and DiMercurio later that same month.

In January 2011, Jode Investments, Club Properties, and Club Golf Investors sued the Burning Tree entities, Mauro, DiMercurio, and Gesuale. Jode Investments and the Club entities alleged that a dispute had arisen between the members of the Burning Tree entities concerning the dissolution of those entities and the personal property owned by Burning Tree Investors. Jode Investments and the Club entities asked the trial court to order the dissolution of the two Burning Tree entities on the grounds that both entities were no longer able to carry on business and their members were deadlocked over whether to dissolve the entities' existence. They

[2] Club Golf and Club Properties were formed in April 2010.

alleged that Burning Tree Properties could not carry on its business because its only asset—the golf course—was now owned by Club Properties. They also alleged that Burning Tree Investors could no longer operate its business because Club Golf had taken over operation of the golf course.

Jode Investments and the Club entities also asked the trial court to declare that Club Properties owns the real property formerly owned by Burning Tree Properties and to declare that Club Golf owns the personal property formerly owned by Burning Tree Investors, including its liquor license. They alleged too that Mauro, DiMercurio, and Gesuale were unjustly enriched. Specifically, they alleged that the individual defendants directly benefited from Club Properties' settlement with Fifth Third and that it would be inequitable to permit them to retain the benefit from that settlement without compensating Club Properties. For that reason, they asked the trial court to order the other members of the Burning Tree entities to reimburse Jode Investments for the payments that it made to Fifth Third through Club Properties in settlement of the Burning Tree entities' debts. Finally, the Club entities alleged that Mauro, DiMercurio, and Gesuale each interfered with their business expectations by refusing to release Burning Tree Investors' personal property to Club Investors and by restricting the Club entities' ability to operate the golf course.

In February 2011, Jode Investments and the Club entities filed a motion asking the trial court to issue an order to maintain the status quo. They alleged that, as of May 2010, Club Properties owned the golf course's real property and Burning Tree Investors had ceased operating the golf course. The Club entities, they further alleged, were operating the golf course. For these reasons, they asked the trial court to order Burning Tree Investors to transfer all of its personal property, including its liquor license, to Club Golf so that the Club entities could properly run the business pending resolution of the claims.

The Burning Tree entities and individual defendants opposed the motion. They argued that Jode Investments and the Club entities were in effect asking the court to grant them the relief requested in their complaint, which would amount to an improper prejudgment attachment.

In March 2011, the trial court issued an order providing that Jode Investments shall "continue to operate the golf course" until further order of the court. It otherwise denied all other relief requested in the motion.

In April 2011, the Burning Tree entities, Mauro, DiMercurio, and Gesuale, countersued Jode Investments and the Club entities and sued Marrocco and Fanelli in their individual capacities. For their first claim, they alleged that Jode Investments, the Club entities, and Marrocco and Fanelli seized control of the day-to-day operation of the golf course and, therefore, had an obligation to provide the accounting. The Burning Tree entities, Mauro, and DiMercurio also alleged that Jode Investments, the Club entities, and Marrocco and Fanelli wrongfully exercised dominion over Burning Tree Investors' personal property; accordingly, they asked for damages for the conversion and the return of the property. Finally, they alleged that Jode Investments breached the Burning Tree Investors' operating agreement and breached its fiduciary duties to the members of Burning Tree Investors, in relevant part, by operating the golf course and settling with Fifth Third without obtaining permission from a majority of Burning Tree Investors' members.

In May 2011, Jode Investments and the Club entities, along with Marrocco and Fanelli, filed an amended complaint. Jode Investments, the Club entities, and Fanelli and Marrocco alleged that Mauro was the managing member of the Burning Tree entities and that he took no actions to save the golf course from foreclosure. They further claimed that, after Fifth Third sued them in circuit court, Mauro abandoned his obligation to manage the golf course for the Burning Tree entities. They similarly alleged that DiMercurio and Gesuale abandoned any involvement with the Burning Tree entities. They asked the trial court to dissolve the Burning Tree entities and declare that the Club entities own all the real and personal property formerly owned by the Burning Tree entities. They also restated claims for unjust enrichment, breach of the Burning Tree entities' operating agreements, and tortious interference. In a new claim, they alleged that Mauro and DiMercurio breached their fiduciary duties by abandoning their obligation to continue operations and by engaging in self-dealing. They also alleged claims of conversion and interference with the Club entities' operation of the golf course.

In July 2011, the trial court ordered the escrow of a tax refund obtained on behalf of Burning Tree Properties and provided that it could not be distributed except on stipulation of the parties or order of the court.

In September 2011, Jode Investments, the Club entities, Marrocco, Fanelli moved for partial summary disposition of the claims against them under MCR 2.116(C)(7), (C)(8), and (C)(10). They argued that the claims against them for conversion, claim and delivery, and breach of fiduciary duty were untenable because the undisputed facts showed that Club Golf lawfully acquired Burning Tree Investors' personal property. Specifically, they alleged that the Burning Tree entities and Mauro and DiMercurio were aware that Marrocco and Fanelli settled with Fifth Third and redeemed the Burning Tree entities' property and waived any objection to the settlement. They also argued that their redemption amounted to a disposition after default under the UCC, which transferred Burning Tree Investors' personal property to Club Golf.

In response, the Burning Tree entities and Mauro[3] argued that Fifth Third never exercised its right to take possession of Burning Tree Investors' personal property; indeed, they contended that Fifth Third disavowed having made a disposition of the collateral after the Burning Tree entities' default.

The trial court issued its opinion and order granting the motion for partial summary disposition in November 2011. The trial court noted that Fifth Third had the right to seize Burning Tree Investors' personal property after the default. The trial court then examined the settlement between Fifth Third, Marrocco, and Fanelli and determined that Fifth Third agreed to transfer its rights in Burning Tree Investors' property to an entity to be named by Marrocco and Fanelli in that agreement. The trial court stated that Mauro and the other non-moving parties had acknowledged in their own settlements with Fifth Third that Marrocco and Fanelli had "redeemed the mortgage, obtained terminations of the UCC financing statements, and were released." It concluded that the undisputed evidence showed that Marrocco and Fanelli lawfully

[3] DiMercurio did not join the response because the trial court closed the case as to him after he filed for bankruptcy.

obtained Burning Tree Investors' personal property and did so in good faith. Because the transfer of the personal property was proper, it agreed that the claims for conversion, claim and delivery, breach of fiduciary duty, and breach of contract must be dismissed.

In December 2011, Jode Investments, the Club entities, Marrocco, and Fanelli filed two motions. In their first motion they asked the trial court to order the escrowed tax refund to be disbursed to them and asked for an order compelling Burning Tree Investors to assign its liquor license. They argued that the tax refund and liquor license were personal property, which belonged to them—as the trial court already determined—after the settlement with Fifth Third. In a separate motion, they asked the trial court to order Mauro to execute a quit claim deed transferring Burning Tree Properties' real estate, as contemplated under the April 2010 assignment of the right of redemption.

In response, Mauro and the Burning Tree entities argued that the trial court should deny the motions as premature. They argued that the trial court's order granting summary disposition did not address the ownership of the tax refund and, before distributing any assets, the trial court should calculate the value of the personal property to determine whether the members were entitled to any surplus.

The trial court granted the motion for specific performance in January 2012. Accordingly, the trial court ordered Mauro to execute the quitclaim deed transferring the golf course's real property to Club Properties. However, in an opinion and order entered in February 2012, the trial court denied the request to disburse the escrowed tax refund without prejudice, but ordered the assignment of Burning Tree Investors' liquor license.

In March 2012, Jode Investments, the Club entities, Marrocco and Fanelli moved to show cause why Mauro should not be held in contempt for failing to comply with the trial court's orders by formally transferring Burning Tree Investors' personal property, including the liquor license. After a hearing, the trial court held Mauro in contempt; it ordered Mauro remanded to the county jail until he executed the assignment and ordered him to pay more than $2,000 in costs. After Mauro executed the assignment, the trial court ordered his release.

The trial court also ordered the disbursement of the escrowed tax refund to Jode Investments, the Club entities, Marrocco, and Fanelli on reconsideration in that same month. The trial court determined that they were entitled to the refund because Burning Tree Properties assigned its right and title to the real property to Club Properties.

In April 2012, Jode Investments, the Club entities, Marrocco, and Fanelli moved for an order dissolving the Burning Tree entities. They noted that the Burning Tree entities' were no longer represented and no longer had any assets and could not conduct business. For those reasons, they asked the court to enter an order dissolving both entities and asked the trial court to dismiss their own claims without prejudice.

The trial court granted the motion to dissolve Burning Tree Properties in April 2012 and granted the motion as to Burning Tree Investors in June 2012. In the latter order, the trial court also dismissed Jode Investments, the Club entities and Marrocco and Fanelli's remaining claims without prejudice. The trial court indicated that this was the final order and closed the case.

The Burning Tree entities moved for reconsideration in June 2012, but the trial court struck the motion as untimely in July 2012.

The parties now appeal to this Court.

II. THE BURNING TREE ENTITIES' ASSETS AND DISSOLUTION

A. STANDARDS OF REVIEW

On appeal, the Burning Tree entities, Mauro and DiMercurio raise several claims of error. They argue that the trial court erred when it determined that the undisputed evidence showed that Fifth Third transferred all of the Burning Tree entities' property—real and personal—to Marrocco and Fanelli in the settlement agreement and related documents. They contend that the evidence showed that Fifth Third only had a security interest in Burning Tree Investors' personal property and that Fifth Third did not seize the personal property. They also argue that, after Marrocco and Fanelli paid the redemption price for Burning Tree Properties' real property, Fifth Third's sheriff's deed became void and title to the real property reverted back to Burning Tree Properties. They further maintain that the trial court improperly ordered the dissolution of the Burning Tree entities. On the basis of these errors, they ask this Court to reverse the trial court's erroneous opinions and orders and further order the real and personal property—including the liquor license—returned to the Burning Tree entities.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of contractual agreements. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Likewise, this Court reviews de novo whether the trial court properly selected, interpreted, and applied the law. *Gay v Select Specialty Hosp*, 295 Mich App 284, 291; 813 NW2d 354 (2012). To the extent that the claims of error involve the trial court's discretionary decisions, this Court reviews the exercise of discretion for abuse. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. BURNING TREE INVESTORS' PERSONAL PROPERTY

We shall first address the Burning Tree entities' argument that the trial court erred when it determined that the undisputed evidence showed that Fifth Third transferred all of Burning Tree Investors' personal property, including the liquor license, to Marrocco and Fanelli.

It is undisputed that Burning Tree Investors pledged all its personal property, including its liquor license, as security for repayment of the funds borrowed from Fifth Third to finance the purchase of the golf course. It is also undisputed that Burning Tree Investors defaulted on the terms of the note in January 2009. After Burning Tree investors defaulted, Fifth Third had the right to take possession of Burning Tree Investors' personal property. MCL 440.9609(1). It had the right to take possession through judicial process or without judicial process as long as it proceeded without breaching the peace. MCL 440.9609(2). Fifth Third also had the right to "sell, lease, license, or otherwise dispose of any or all of the collateral . . . ." MCL 440.9610(1); see also *Fodale v Waste Mgt of Mich, Inc*, 271 Mich App 11, 23; 718 NW2d 827 (2006). If, however, Fifth Third elected to take some affirmative act to exercise its right to dispose of

Burning Tree Investors' personal property, it would have had to comply with the protections afforded to debtors under the UCC. See, e.g., MCL 440.9610(2) (stating that every "aspect of the disposition" must be commercially reasonable); MCL 440.9610(3) (limiting the secured party's ability to purchase the collateral); MCL 440.9611 (stating the notice requirements that the secured party must meet before disposing of collateral); MCL 440.9615 (providing for the distribution of the proceeds from a secured party's disposition of collateral); MCL 440.9620 (stating the conditions under which a secured party may accept collateral in full or partial satisfaction of the obligation); see also *Fodale*, 271 Mich App at 24-33 (discussing the debtor's rights under the UCC). And it could be liable to Burning Tree Investors for any harm caused by its failure to comply with these statutory provisions. See MCL 440.9625. Reading these statutory provisions together, it is evident that Fifth Third had to take some affirmative step to assert its rights—that is, the UCC does not provide for an automatic transfer of collateral on a debtor's default and Fifth Third had no obligation to seize the collateral or take any particular action to dispose of Burning Tree Investors' personal property.

In their motion for summary disposition, Jode Investments, the Club entities, Marrocco, and Fanelli argued—and the trial court agreed—that the undisputed evidence showed that Fifth Third exercised its right to dispose of Burning Tree Investors' personal property. Specifically, they relied on the fact that Fifth Third had the right to dispose of the collateral at issue, sued Burning Tree Investors, and then entered into a settlement agreement in which it transferred the collateral for consideration to Marrocco and Fanelli. As already explained, having the right to dispose of collateral is not the same as acting on the right. Moreover, although Fifth Third elected to exercise its right to seek possession through judicial process by suing Burning Tree Investors, see MCL 440.9609(2), it did not complete that process; instead, it stipulated to the dismissal of its claims against Burning Tree Investors. Therefore, the propriety of the trial court's decision on the motion for summary disposition depends solely on whether Fifth Third took some act to dispose of Burning Tree Investors' personal property within the settlement agreement that it made with Marrocco and Fanelli.

Fifth Third entered into a settlement agreement with Marrocco, Fanelli, and Patti—in their individual capacities and as the trustees of their various trusts—after the Burning Tree entities' default. Notably, the settlement agreement did not include Jode Investments or the Burning Tree entities as parties. Instead, it related solely to Marrocco and Fanelli's personal guaranties.

In the background section, the parties to the settlement agreement referred to Marrocco and Fanelli's personal guaranties for the financing of the purchase of the "Burning Tree Property." Although the parties did not define the "Burning Tree Property", the parties recited that the financing was secured by a "mortgage" on the "Burning Tree Property together with various security agreements." The parties also stated that Fifth Third successfully bid for the "Burning Tree Property" at a foreclosure sale. Finally, the parties recited that it was their intent that Fifth Third would quitclaim its interest in the "Burning Tree Property" to an entity to be named by Marrocco and Fanelli, or would "issue a certificate of redemption" for that property. From these recitations, it is evident that the parties used "Burning Tree Property" to refer to the real property on which Fifth Third held a mortgage and which Fifth Third purchased at the foreclosure sale. The parties also plainly distinguished this property from the other collateral covered by the "various security agreements."

After making these background recitations, the parties stated the terms of the settlement. Marrocco and Fanelli (and Patti) agreed to pay $2.1 million to Fifth Third. In exchange, Fifth Third agreed to dismiss its claims against them in circuit court and to release them from their personal guaranties. As for the collateral, Fifth Third agreed to quitclaim its interest in the "Burning Tree Property" to a limited liability company to be named by Marrocco and Fanelli or, at their option, to issue a redemption certificate to the new entity. Fifth Third also agreed to file "termination statements" for its financing statements covering Burning Tree Investors' personal property and to discharge "any interest" that it might have in its liquor license.

These contractual provisions are not ambiguous and plainly do not provide any basis for concluding that Fifth Third took an affirmative step to "sell, lease, license, or otherwise dispose" of Burning Tree Investors' personal property—let alone transfer that property to Marrocco or Fanelli or the entity of their choice. MCL 440.9610(1). Fifth Third did not recite or warrant that it had taken possession or title to Burning Tree Investors' personal property or liquor license. In contrast, Marrocco and Fanelli warranted that they would be forming an entity to "take title to the Burning Tree Property and further to acquire any and all remaining assets" from Burning Tree Investors. By warranting that they *intended* to acquire Burning Tree Investors' assets, they acknowledged that Burning Tree Investors still held title to the personal property. In addition, at no point in the settlement agreement did Fifth Third promise to transfer, either by quitclaim or otherwise, any of its rights to Burning Tree Investors' personal property—whatever those rights might have been. The only thing that it agreed to do with regard to Burning Tree Investors' personal property was file a termination statement for its UCC financing statements. A termination statement renders the financing statement ineffective. MCL 440.9513(4). Stated another way, the filing of a termination statement constitutes a release of the lien against the debtor's property covered by the financing statement—it does not cause a transfer of any interest in the property. See *Crestar Bank v Neal*, 960 F2d 1242, 1245 (CA 4, 1992). As such, the only thing that Fifth Third promised with regard to the personal property at issue was to release its lien against the personal property, which it did; it did not promise to transfer or actually transfer any interest that it might have held or could have asserted with regard to the personal property.

On appeal, Jode Investments, the Club entities, Marrocco, and Fanelli argue that the trial court did not err when it interpreted this settlement agreement. They contend that the evidence showed that the separate settlements between Fifth Third, Mauro, and DiMercurio were conditioned on a successful settlement between Fifth Third, Marrocco, and Fanelli. This, they maintain, is evidence that Mauro and DiMercurio benefited from Marrocco and Fanelli's settlement with Fifth Third. They also noted in their motion for partial summary disposition that the payment that they made in settlement to Fifth Third exceeded the redemption price of the real estate; presumably because this showed that they intended to purchase more than just the real property with the settlement. However, courts must apply unambiguous contracts as written—they may not look beyond the intent actually expressed in the agreement. *Rory*, 473 Mich at 468-470, 469 n 21. And at no point in the settlement agreement at issue did Fifth Third assert that it had taken possession or title to Burning Tree Investors' personal property and at no point did it promise to take an affirmative step to transfer Burning Tree Investors' personal property to Marrocco or Fanelli or an entity of their choice. As such, this settlement agreement was not evidence that Jode Investments, the Club entities, Marrocco, Fanelli—or anyone else for that matter—had taken lawful title to Burning Tree Investors' personal property or liquor license.

Jode Investments, the Club entities, Marrocco, and Fanelli had the initial burden to demonstrate that they were entitled to summary disposition of the claims by the Burning Tree entities, Mauro, DiMercurio, and Gesuale; they had to meet this burden by both identifying the issues as to which they believed there was no question of fact and by presenting evidence that, if left unrebutted, would demonstrate that they were entitled to judgment as a matter of law. See *Barnard Mfg*, 285 Mich App at 369-370. In their motion, Jode Investments, the Club entities, Marrocco, and Fanelli relied exclusively on Marrocco and Fanelli's settlement agreement with Fifth Third as evidence that Fifth Third transferred Burning Tree Investors' property to them. Because that agreement did not purport to transfer Burning Tree Investors' property, they failed to demonstrate that they were entitled to summary disposition. Accordingly, the trial court should have denied their motion. *Id.* at 370. For the same reason, the trial court erred when it ordered Burning Tree Investors' to formalize the transfer of its assets to Club Golf under the mistaken belief that Club Golf had lawfully obtained title to the property through the settlement agreement with Fifth Third. There simply was no record evidence that Fifth Third took any steps to dispose of Burning Tree Investors' personal property.

On appeal, Jode Investments, the Club entities, Marrocco, and Fanelli in passing contend that the Club entities had lawful title to Burning Tree Investors' personal property because Mauro and DiMercurio caused the Burning Tree entities to assign their rights to "all" their assets to Marrocco and Fanelli. They did not, however, make this argument to the trial court in their motion for partial summary disposition. Indeed, in their motion, they noted the assignment, but acknowledged that it applied only to Burning Tree Properties—not Burning Tree Investors—and concerned only Burning Tree Properties' real property. Because they did not argue that this assignment gave them lawful title to Burning Tree Investors' personal property or liquor license before the trial court, to the extent that they now raise this as an alternate basis for relief, it is not properly before this Court. *Id.* at 380-381 (stating that this Court's review of a trial court's decision on a motion for summary disposition is limited to the arguments and evidence actually presented to the trial court).

On appeal, Jode Investments, the Club entities, Marrocco, and Fanelli make much of the fact that Fifth Third *could have* taken some action to dispose of Burning Tree Investors' personal property. They also argue that any failure on the part of Fifth Third to comply with the UCC provisions governing such a disposition would not invalidate the transfer. But these claims beg the question: what evidence is there that Fifth Third actually took some action to transfer Burning Tree Investors' personal property and liquor license? Jode Investments, the Club entities, Marrocco and Fanelli relied exclusively on their settlement with Fifth Third, but that settlement at no point purports to make such a transfer. Because there was no evidence that Fifth Third actually disposed of Burning Tree Investors' personal property, the trial court erred when it concluded otherwise. The undisputed evidence showed that Fifth Third agreed to take steps to formalize the transfer of only one asset in this settlement: Burning Tree Properties' real property. Each of its remaining promises involved relinquishing its liens against the personal property and liquor license.

The trial court erred when it dismissed the claims by the Burning Tree entities, Mauro, and DiMercurio on the grounds that Fifth Third transferred Burning Tree Investors' personal property and liquor license to Marrocco, Fanelli, or Club Golf. Given the unambiguous and undisputed evidence, those assets remained Burning Tree Investors' property. The trial court also erred when it order Burning Tree Investors to transfer those assets to a third party without compensation.

C. BURNING TREE PROPERTIES' REAL PROPERTY

We shall next address the argument by the Burning Tree entities and Mauro that, after Marrocco and Fanelli paid the redemption price for Burning Tree Properties' real property, Fifth Third's sheriff's deed became void and title to the real property reverted back to Burning Tree Properties. By timely paying the required amount to redeem a property after a foreclosure sale, the redeeming party voids the deed obtained by the purchaser at a foreclosure sale. MCL 600.3240(1). After a foreclosure sale, equitable title to the property vests in the purchaser, but the mortgagor retains legal title until the expiration of the redemption period. *Ruby & Assoc, PC v Shore Financial Services*, 276 Mich App 110, 118; 741 NW2d 72 (2007), vacated not in relevant part 480 Mich 1107 (2008). The mortgagor's right to redeem is a property interest that may be conveyed to third parties. *Id.* And, if a party other than the mortgagor redeems the property, the redeeming party becomes subrogated to the "lien, priority, and remedies of the creditor whose claim" the redeeming party paid. *Lieblien v Hansen*, 178 Mich 11, 15; 144 NW 496 (1913). Thus, it stands to reason that a person who purchases a mortgagor's right to redeem purchases a contingent interest in the mortgagor's legal title, which vests when he or she makes the payment required to redeem the property. In any event, under the facts involved here, Club Properties plainly obtained full title to the real property at issue.

It is undisputed that Burning Tree Properties executed an assignment of its right to redeem the real property. Under the terms of the assignment, Burning Tree Properties conveyed to Club Properties all of its "right, title, and interest in and to any and all" of its "Redemption Rights" to the real property that Fifth Third purchased at foreclosure sale in October 2009. Burning Tree Properties also agreed that its manager had the authority "and shall execute" a quitclaim deed conveying the interest to the property to Club Properties. This assignment is unambiguous and clearly transferred Burning Tree Properties right to redeem the real estate at issue to Club Properties. In addition, when read as a whole, it is evident that Burning Tree Properties agreed to quitclaim title to Club Properties along with its right to redeem. Therefore, the trial court did not err when it ordered Burning Tree Properties to meet its obligations under the assignment and quitclaim its title to the real property to Club Properties.

D. BURNING TREE PROPERTIES' TAX REFUND

The Burning Tree entities and Mauro also argue that the trial court erred when it determined that Burning Tree Properties' assignment of its right to redeem to Club Properties also transferred Burning Tree Properties' right to its tax refund. Jode Investments, the Club entities, Marrocco, and Fanelli contend that this Court should decline to address this claim of error because the Burning Tree entities and Mauro did not claim that the assignment of redemption was invalid before the trial court. The Burning Tree entities and Mauro state their belief on appeal that the assignment of redemption was of "questionable origin" and conclude

that the trial court should not have relied on it, but their real argument is that the trial court erred when it determined that the assignment of the right to redeem included an assignment of Burning Tree Properties' right to its tax refund. Although the argument was not fleshed out, the Burning Tree entities and Mauro did argue in their brief in opposition to the motion to disburse the tax refund that there was no evidence that Burning Tree Properties transferred its right to the tax refund. And, in its opinion and order on reconsideration, the trial court addressed this issue and concluded that Burning Tree Properties' assignment of its redemption rights included an assignment of the right to the tax refund. This was sufficient to preserve this issue for appeal.

As described above, Burning Tree Properties transferred to Club Properties all of its "right, title, and interest in and to any and all of [its] Redemption Rights to which [it] is now or may hereinafter become entitled" to the golf course, which "Fifth Third Bank purchased" at a foreclosure sale. Although this provision refers to rights "hereinafter" acquired, it also plainly limits the transfer to those rights—including the later acquired rights—involving the redemption of the real property. Burning Tree Properties also provided that its manager "shall execute" a quitclaim deed conveying its interest in the real property to Club Properties. Examining the language actually used in the assignment, there is no indication that Burning Tree Properties agreed to transfer anything other than the specified rights to the real property, whether then existing or later acquired. Accordingly, the trial court erred to the extent that it failed to enforce this assignment as written and instead expanded it to include interests other than those identified in the assignment. *Rory*, 473 Mich at 468-470.

E. BREACH OF FIDUCIARY DUTY

The Burning Tree entities and Mauro also argue that the trial court erred when it dismissed their claims for breach of fiduciary duties. Specifically, they argue that the undisputed evidence showed that Marrocco and Fanelli were not authorized to settle with Fifth Third on behalf of the Burning Tree entities; consequently, they maintain, the settlement constituted a breach of their fiduciary duties. Marrocco and Fanelli settled with Fifth Third in their individual capacities and as the trustees of their own trusts—they did not purport to act on the Burning Tree entities' behalf. In addition, because the settlement agreement did not impair any asset or right held by either Burning Tree entity, the decision to settle with Fifth Third cannot serve as a basis for a claim that they breached their duties to the Burning Tree entities. Therefore, the trial court did not err when it dismissed the claims premised on Marrocco and Fanelli's decision to settle with Fifth Third, even if it did so for a different reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

F. DISSOLUTION

The Burning Tree entities and Mauro next argue that the trial court erred when it ordered the dissolution of the Burning Tree entities. Specifically, they argue that there was no evidence to establish any of the grounds permitting a trial court to dissolve a corporation under MCL 450.1823. Although the Burning Tree entities and Mauro cite the provisions governing the dissolution of corporations rather than limited liability companies, we agree that the trial court erred when it prematurely ordered the dissolution of the Burning Tree entities, in part, under a mistaken understanding of the facts.

A trial court has the discretion to dissolve a limited liability company upon the application of a member if the "company is unable to carry on its business in conformity with the articles of organization or operating agreements." MCL 450.4802. A trial court may be justified in ordering the dissolution of a limited liability company under this statute where there is evidence that the members are so deadlocked that the company is unable to carry on its business. Here the record plainly supports such a finding. However, the trial court's decision to order the dissolution of the Burning Tree entities was, at least in part, premised on its erroneous conclusion that the Burning Tree entities no longer had any assets after Fifth Third transferred Burning Tree Investors' property to Marrocco and Fanelli and Burning Tree Properties' transferred all of its property to Club Properties. Because its exercise of discretion was premised on this error, we agree that it abused its discretion. *Gay*, 295 Mich App at 291.

III. CONTEMPT

The Burning Tree entities and Mauro finally argue that the trial court abused its discretion when it ordered him incarcerated for contempt of court for refusing to assign Burning Tree Investors' property to Club Golf. Specifically, they contend that the trial court abused its discretion by finding Mauro in contempt without affording him due process and while there was a motion for reconsideration of the order underlying the purported contempt. The Burning Tree entities and Mauro ask this court to "reverse" the trial court's order that Mauro be incarcerated for contempt. However, it is clear that Mauro is no longer incarcerated. Therefore, this claim of error is moot, see *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998), and we decline to address it.

IV. SANCTIONS

Jode Investments, the Club entities, Marrocco, and Fanelli cross-appeal the trial court's decision to deny their requests for costs and sanctions against the Burning Tree entities and Mauro. Specifically, they contend that the Burning Tree entities and Mauro's defense was frivolous under MCL 600.2591 because they did not have a reasonable basis to believe that the Burning Tree entities still owned the property at issue or had valid claims. Consequently, they maintain, the trial court abused its discretion by failing to order them to pay costs, attorney fees, and sanctions to Jode Investments, the Club entities, Marrocco, and Fanelli.

Given our resolution of the issues on appeal, we cannot agree that the Burning Tree entities or Mauro raised or alleged frivolous claims or defenses. Accordingly, the trial court did not abuse its discretion when it declined to order sanctions beyond those that it actually ordered.

V. CONCLUSION AND RELIEF

As we have already stated, the trial court erred in several respects: it erred when it dismissed the claims by the Burning Tree entities, Mauro, and DiMercurio on the grounds that Fifth Third transferred Burning Tree Investors' personal property and liquor license to Marrocco, Fanelli, or Club Golf; it erred when it determined that Burning Tree Properties' assigned its right to its property tax refund; it erred when it ordered Burning Tree Investors to transfer its personal property without compensation; and it erred when it ordered the dissolution of the Burning Tree entities on the grounds that those entities were no longer capable of conducting business because

they did not own any property. On the basis of these errors, the Burning Tree entities, Mauro, and DiMercurio ask this Court to reverse the trial court's decisions, restore the entities, and order the return of "all personal property, including the liquor license" and the "tax refund." However, given the unique facts and procedural history of this case, we do not agree that this relief is appropriate.

Here, the record shows that Mauro and DiMercurio filed for bankruptcy protection while this case was pending. As such, it is unclear whether and to what extent Mauro and DiMercurio's individual claims might still be actionable even if we were to reverse the trial court's decision to dismiss those claims. See generally *Spohn v Van Dyke Public Schools*, 296 Mich App 470; 822 NW2d 239 (2012). Similarly, it is also unclear on this record that Mauro or DiMercurio have the authority to act on the Burning Tree entities' behalf or to cause those entities to continue prosecuting their claims should we reinstate the entities' claims. In addition, and notwithstanding that the trial court erred when it ordered the dissolution of the Burning Tree entities under a mistaken conclusion of law, it is clear from the record that the Burning Tree entities will be unable to conduct the business that they were originally formed to conduct and it is equally clear that their members are unable or unwilling to work together to wind up these entities' affairs. For these reasons, the trial court likely came to the correct result when it ordered the dissolution of these entities, even if it did so prematurely. *Taylor*, 241 Mich App at 458.

Additionally, at a very early point in this dispute, the trial court gave Jode Investments permission to manage the golf course using the personal property and accounts that belonged to Burning Tree Investors. The trial court later ordered the personal property transferred to Club Golf and it has since owned and used the property to operate the golf course. During this time, the personal property likely suffered from wear and tear and had to be maintained or replaced. Other property may have been added to the inventory and mingled in such a way that it would be impractical to now segregate the property. As such, we cannot agree that it would be appropriate to order Club Golf to return the property that the trial court erroneously ordered Burning Tree Investors' to transfer to Club Golf.

Under these circumstances, we elect to exercise our discretion "to grant further or different relief as the case may require." MCR 7.216(A)(7). We reverse the trial court's order compelling Burning Tree Investors to transfer its personal property, including its liquor license, to Club Golf, but only to the extent that the court ordered the transfer without compensation. We further remand this case to the trial court to conduct a hearing to determine the value of those assets. After determining the value, the trial court shall amend its order to provide that Club Golf must pay that amount to Burning Tree Investors' members; the order shall provide that each member is entitled to that proportion of the payment that the member would have been entitled to under the membership agreement as of the date of the original order compelling the transfer.

We also reverse and vacate the trial court's order distributing the Burning Tree Property's tax refund to Jode Investments, the Club entities, Marrocco, and Fanelli. On remand, the trial court shall enter an order compelling Jode Investments, the Club entities, Marrocco, and Fanelli to pay the members of Burning Tree Property for the erroneously disbursed tax refund; the order shall provide that each member is entitled to that proportion of the payment that the member

would have been entitled to under the membership agreement as of the date of the original order disbursing the tax refund.

Finally, we remand this matter to the trial court to amend its orders dismissing the parties' various claims. With the exception of those claims that we have resolved in this appeal, the trial court shall amend the orders to provide that those claims have been dismissed without prejudice. In all other respects, we affirm.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We further order that none of the parties may tax their costs on appeal. MCR 7.219(A).

/s/ Peter D. O'Connell
/s/ Michael J. Kelly