STATE OF MICHIGAN

COURT OF APPEALS

BP1, LLC,

Plaintiff-Appellant,

v

COVENTRY REAL ESTATE FUND II, LLC, DDR CORPORATION, a/k/a DEVELOPERS DIVERSIFIED REALTY CORPORATION, COVENTRY II DDR BLOOMFIELD, LLC, and COVENTRY II DDR HARBOR BLOOMFIELD PHASE 1, LLC,

Defendants-Appellees.

UNPUBLISHED
September 23, 2014

No. 312579
Oakland Circuit Court
LC No. 2009-099741-CZ

BP1, LLC,

Plaintiff-Appellee,

v

COVENTRY REAL ESTATE FUND II, LLC, DDR CORPORATION, a/k/a DEVELOPERS DIVERSIFIED REALTY CORPORATION, COVENTRY II DDR BLOOMFIELD, LLC, and COVENTRY II DDR HARBOR BLOOMFIELD PHASE 1, LLC,

Defendants,

and

MV BLOOMFIELD, LLC,

Appellant.

No. 314876
Oakland Circuit Court
LC No. 2009-099741-CZ

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

In **Docket No. 312579**, plaintiff, BP1, LLC ("BP1"), appeals as of right from a judgment of no cause of action in this breach of contract case. Specifically, BP1 contests the trial court's rulings: (a) granting partial summary disposition in favor of defendant, DDR Corporation, also known as Developers Diversified Realty Corporation (DDR), regarding BP1's claims of breach of the Project Development Agreement (PDA) that arose before February 29, 2008, based on the First Amendment to the Owner LLC Operating Agreement (Amended OA), (b) determining that BP1 could only pursue claims for breach of the Operating Agreement (OA) on a derivative basis, and (c) that BP1's principal, Craig Schubiner, was not qualified to testify regarding lost profits or reliance damages. In **Docket No. 314876**, non-party, MV Bloomfield, LLC ("MVB"), appeals by delayed leave granted the order denying MVB's motion for substitution of parties. *BP1, LLC v Coventry Real Estate Fund II, LLC*, unpublished order of the Court of Appeals, entered March 26, 2013 (Docket No. 314876). We affirm.

BP1first challenges the trial court's grant of partial summary disposition in favor of DDR precluding any claims of breach of the PDA by BP1 against DDR and other defendants occurring before March 1, 2008, based on the language of the amended OA. Specifically, BP1 takes issue with the trial court's application of the amended OA default provision to DDR, which was not a party or signatory to the referenced amendment or to the OA, and finding that the OA incorporated the PDA. Significantly, the parties do not dispute that Delaware law is applicable to the OA and amended OA. The PDA and its amendment are, however, to be construed in accordance with Michigan law.

Because the OA is to be interpreted in accordance with Delaware law, the following is provided as the applicable legal standard in that jurisdiction. Summary judgment is granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Chancery Court Rule 56(c). When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party. *Judah v Del Trust Co*, 378 A2d 624, 632 (Del, 1977). Summary judgment is denied when the legal question at issue requires assessment in the "more highly textured factual setting of a trial." *Schick Inc v Amalgamated Clothing & Textile Workers Union*, 533 A2d 1235, 1239 n 3 (Del Ch, 1987) (citation omitted). Summary judgment also will not be granted when the proffered evidence provides "a reasonable indication that a material fact is in dispute." *Ebersole v Lowengrub*, 180 A2d 467, 470 (Del, 1962), mod 208 A2d 495 (Del, 1965). The burden is on the moving party to show the absence of any genuine issue of material fact. Chancery Court Rule 56(c). "When the moving party shows that no genuine issue of material fact exists, the burden shifts to the nonmoving party to substantiate its adverse claim by showing that there are material issues of fact in dispute." *Conway v Astoria Fin Corp*, 837 A2d 30, 36 (Del Ch, 2003). Finally, if "a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way . . . summary judgment is inappropriate." *Cerberus Int'l, Ltd v Apollo Mgmt, LP*, 794 A2d 1141, 1150 (Del, 2002).

In granting partial summary disposition in favor of DDR, the trial court determined that BP1's claims originating before February 29, 2008, the date of the amended OA, were "expressly released." The trial court made this determination premised on its finding that "The first Amendment to the Owner LLC [Agreement] applies to the PDA through the same

mechanism that the parties contractually intended – as an integral part of the Owner LLC Agreement." BP1 contends this ruling is erroneous because: (a) the OA and PDA comprise separate and distinct agreements, (b) DDR was not a signatory to the OA or amended OA and the consequent absence of any right to benefit from those agreements, (c) the distinction between incorporation and merger of documents, (d) the lack of mutuality and consideration, (e) the intent of the parties to limit the scope of the OA and amended OA, and, (f) various manipulations and nuances to these arguments. We surmise, however, that the issue presented is straight-forward and less complicated than is argued by BP1, and can be resolved by the language of the documents.

In accordance with Delaware law:

> [T]he threshold inquiry when presented with a contract dispute on a motion for summary judgment is whether the contract is ambiguous. Ambiguity does not exist simply because the parties disagree about what the contract means. Moreover, extrinsic, parol evidence cannot be used to manufacture an ambiguity in a contract that facially has only one reasonable meaning. Rather, contracts are ambiguous when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. [*United Rentals, Inc v RAM Holdings, Inc*, 937 A2d 810, 830 (Del Ch, 2007) (citations and quotation marks omitted).]

In addition, "A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole." *Council of Dorset Condo Apartments v Gordon*, 801 A2d 1, 7 (Del, 2002). "[A] court's interpretation of a[] . . . contract must rely on a reading of all of the pertinent provisions . . . as a whole, and not on any single passage in isolation." *O'Brien v Progressive Northern Ins Co*, 785 A2d 281, 287 (Del Supr Ct, 2001). Further:

> The presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations. Only where contract language is ambiguous will a court consider extrinsic evidence in interpreting an agreement, and a court will not disturb a bargain because, in retrospect, it appears to have been a poor one. [*West Willow-Bay Court, LLC v Robino-Bay Court Plaza, LLC*, 2007 WL 3317551 (Del Ch, 2007), p 9 (citations omitted).]

As an overriding principle, the Delaware courts recognize and emphasize "a strong American tradition of freedom to contract, and that tradition is especially strong in our State [Delaware], which prides itself on having commercial laws that are efficient." *Abry Partners V, LP v F & W Acquisition LLC*, 891 A2d 1032, 1059-60 (Del Ch, 2006) (footnotes omitted). Where individuals or entities have negotiated and voluntarily defined their relationships through a binding contract, "Delaware law is strongly inclined to respect their agreement . . . ." *Libeua v Fox*, 880 A2d 1049, 1056 (Del Ch, 2005), aff'd in pertinent part 892 A2d 1068 (Del, 2006); accord *Benihana of Tokyo, Inc v Benihana, Inc*, 891 A2d 150, 172 (Del Ch, 2005), aff'd 906 A2d 114 (Del, 2006) (recognizing the "fundamental principle that parties should have the freedom to contract and that their contracts should not easily be invalidated").

The OA specifically references the existence of the PDA and identifies it in § 1.56. The PDA is attached as an exhibit to the OA. Of particular significance is the inclusion of the PDA within the OA's incorporation clause, § 9.8, indicating that the PDA and other future agreements "contemplated thereby" and "contain the entire agreement by and among the parties . . . and any prior understandings and agreements among them respecting the subject hereof shall be binding upon the parties hereto, their successors, permitted assigns, legal representatives and administrators . . . ." The inclusion and incorporation of the PDA in the OA is specifically addressed in § 9.10 of the OA, which provides that "each exhibit . . . attached to this Agreement are an integral part of this Agreement and are incorporated into and made a part of this Agreement for all purposes." Given this unambiguous language, there can be no genuine dispute or argument that the PDA is, as discerned by the trial court, part and parcel of the OA.

Even if the language contained in the OA were somehow to be construed as not dispositive of this issue, the amended OA puts to rest any contention by BP1. The default provision (¶ 3) of the amended OA names DDR and other entities, not signatories to the OA, and clearly indicates these entities are not "in default under the LLC Agreement [OA] and no conditions exists that . . . would constitute a default . . . ." It would be nonsensical to include in a document or contract a definitive statement regarding the absence of a default of a party or entity unless that party or entity were construed and understood to be covered by the referenced agreement or contract they were acknowledged not to be in default as "[c]ontracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless.' " *O'Brien*, 785 A2d at 287.

BP1 suggests that the modification provision of the amended OA, ¶ 4, is contrary to the trial court's ruling on this issue and reflects the intention of the parties to limit the scope of the release within the amended OA. The amended OA's modification provision states:

> Modifications. Except as modified hereby, the LLC Agreement remains in full force and effect. This First Amendment shall not be deemed to be a consent to or waiver of any other term or condition of the LLC Agreement or prejudice any right or rights which any party may now or in the future have under or in connection with the LLC Agreement.

Again, the language is clear and unambiguous and the trial court's ruling comports with the wording of the provision. The trial court only limited claims to those occurring before the effectuation of the amended OA and did not apply the release or waiver provision to any other claims which existed or arose following effectuation of the amended OA. The fact that the paragraph refers to the "LLC Agreement," or OA, given the determination that the PDA was "an integral" part of the OA, does not render the trial court's ruling applying the waiver to the PDA incorrect, particularly given the specific delineation of parties such as DDR in the amended OA's release language. The state of Delaware follows the " 'objective' theory of contracts, i.e. contract construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel Osborn v Kemp*, 991 A2d 1153, 1159 (Del, 2010). In interpreting a contract, "[c]lear and unambiguous language . . . should be given its ordinary and usual meaning." *Rhone–Poulenc Basic Chems Co v American Motorists Ins Co*, 616 A2d 1192, 1195 (Del, 1992) (internal citation omitted). A court is required to "read a contract as a whole and . . . give each provision and term effect, so as not to render any part of the contract mere surplusage."

Kuhn Constr, Inc v Diamond State Port Corp, 990 A2d 393, 396-397 (Del, 2010). BP1 asserts that the intent of the parties in defining the parameters or scope of the release comprised a question of fact, precluding summary disposition. However, where, as here, a party seeks to impart meaning to a contractual provision different from its plain meaning, the Court looks to "not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Rhone-Poulenc*, 616 A2d at 1196.

Additionally, BP1 contends that the trial court erred under Michigan law, which governs the PDA, in conveying third-party beneficiary rights to DDR. Specifically, BP1 asserts that MCL 600.1405(1) requires the demonstration of express contract language showing that a promisor intended to undertake the obligation or promise for the benefit of that third party. Contrary to BP1's argument, ¶ 3 of the amended OA clearly designates DDR, and other business entities, as the intended recipients and participants in the release. This argument conflates the issue as the focus is on the language of the OA and amended OA, and not the PDA. As such, reference to Michigan statutory and case law is unavailing and inconsequential. This argument is subsumed, to a degree, in BP1's contention that DDR did not qualify as a third-party beneficiary and was merely an incidental beneficiary without standing in regard to the OA and amended OA. Once again, this is contradicted by Delaware law and the language of the relevant documents. In Delaware, "a stranger to a contract acquires no rights thereunder unless it is the intention of the parties to confer a benefit upon such a third-party." *Guardian Constr Co v Tetra Tech Richardson, Inc*, 583 A2d 1378, 1386 (Del Super Ct, 1990). "In order for third-party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon a third person that was intended, but the conferring of the beneficial effect on such third-party, whether it be creditor or donee, should be a material part of the contract's purpose." *Id.* In this instance, the amended OA is quite clear that DDR is an intended beneficiary of the release as it is specifically named within the provision and that the waiver constitutes a significant and material portion of the amended OA. As such, the standing of DDR and the intent of Coventry/DDR (Coventry II DDR Bloomfield, LLC) and BP1 having executed these contracts to convey a benefit to DDR cannot legitimately be disputed.

BP1 seeks to obfuscate the issue by alternatively suggesting that the absence of a specific reference to the PDA in ¶ 3 of the amended OA verifies that the OA and PDA are separate documents and, therefore the default provision of the amended OA is not applicable to the PDA. This contention is without merit, unnecessarily convoluted, and irrelevant based on the amended OA altering the OA, which specifically incorporates the PDA. BP1's logic or absence thereof, suggests reversal of the proper order of the documents for review by trying to elevate the amended OA to a more prominent status than the OA, and comprises the legal equivalent of having "the tail wagging the dog." *Americas Mining Corp v Theriault*, 51 A3d 1213, 1238 (Del Super Ct, 2012).

In a similar vein, BP1 contends that the reference to the PDA as "that" agreement in § 1.56 of the OA signifies that it is a separate document and not part of the OA, arguing that if the PDA were in fact a part of the OA it would be referred to as "this" agreement. This comprises semantic nonsense, particularly when placed in context with the clear and unambiguous wording of the OA and amended OA. Further, the wording cited by BP1 is within the definitional provisions of the OA and is reflective of an attempt to delineate and identify various agreements and documents referenced within the OA and subject to its implementation,

including, but not necessarily limited to § 1.25 (Dodge Purchase Agreement), § 1.35 (Initial Leasing Agreements), and § 1.58 (Property Management Agreement), in which the word "that" is used to refer to each agreement.

In a related argument, BP1 contends that the separate amendment provision of the PDA, § 7.9[1], required a specific writing to modify or amend the PDA and that the subsequent indication that the amendment to the PDA is a "first amendment" signifies that the OA and PDA should be treated as separate and distinct documents and that the amended OA did not serve to modify the PDA. Once again, BP1 seeks to conflate the issue, which is the scope of the OA. In addition, the amendment to the OA is neither inconsistent nor violative of § 7.9 of the PDA, which only requires modification of the agreement to be in writing and to be "signed by the party against whom enforcement of the change, waiver, discharge or termination is sought." The amended OA, as with all of these documents, was signed by Coventry/DDR and BP1 and did not change the obligations of any party or entity, but rather acknowledged that the parties were current and had met their designated responsibilities.

In support of its contention on appeal, BP1 also cites to Michigan family law, *Foreman v Foreman*, 266 Mich App 132, 136-137; 701 NW2d 167 (2005), to suggest a distinction between incorporation of a document such as the PDA, and actual merger of such a document, rendering the contracts or documents distinguishable and separately enforceable. This argument is without merit for two reasons.[2] First, the OA is indisputably to be governed by Delaware law, not Michigan law. Second, Delaware law is contrary to this position. *Rockwell v Rockwell*, 681 A2d 1017, 1021 (Del Super Ct, 1996) states with regard to agreements made in the context of family law:

> This Court has concluded that there is no substantive difference between an . . . agreement which becomes a . . . [c]ourt order by means of stipulation, incorporation, or merger. Consequently, with regard to alimony awards, the stipulation, merger, or incorporation of the parties' voluntary agreement into a court order does not divest that agreement of its contractual nature. [Citations omitted.]

BP1's contention that the absence of DDR as a signatory to the OA or amended OA is of significance is disingenuous and also without merit. The OA specifically contemplates the approvals, and consequently, the signatures required to amend that contract. Section 9.9 of the OA specifically states: "This Agreement may be amended by the Managing Member [defined as Coventry/DDR in § 1.39 of the OA] (with the consent of Harbor [identified in the preliminary

[1] PDA § 7.9 states: "Amendment. Neither this Agreement nor any provisions hereof may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge or termination is sought."

[2] Arguably, a third reason may exist to reject BP1's argument on this premise given the inherent differences and case law applicable to contract issues and family law issues.

paragraph of the OA as BP1], if such consent is required under Section 5.4 hereof)." In turn, Section 5.4 of the OA specifies:

> Notwithstanding any provision of this Agreement to the contrary, the approval of Harbor [BP1] (as long as Harbor is a Member), which approval shall not be unreasonably withheld or delayed, shall be required with respect to (a) amending, modifying or terminating this Agreement; provided, however, that the approval of Harbor shall not be required in connection with any amendments or modifications by the Managing Member [Coventry/DDR] of this Agreement which (i) are not material, (ii) do not adversely affect any non-consenting Member of (iii) are to Exhibit A hereto pursuant to Section 3.1(a) hereof . . . ."

Based on the execution of the OA and amended OA by both Coventry/DDR and BP1, there is no basis to suggest that the absence of a signature from a representative of DDR was necessary or served to invalidate the agreement.

BP1's argument suggesting a lack of mutuality or consideration for the waiver is similarly disingenuous given the clear and unequivocal language of the amended OA indicating that the amendment is executed "in consideration of the agreements hereafter set forth." The existence of "undertakings on the part of each party . . . in their totality [can] constitute[] the consideration for the contract." *G R Sponaugle & Sons, Inc v McKnight Constr Co*, 304 A2d 339, 344 (Del Super Ct, 1973). Similarly, when the consideration contemplated and agreed upon for the effectuation of a release comprises something of value, courts are generally reluctant to avoid the release on the ground of the inadequacy of the consideration. 76 CJS Releases § 19. See *Brown v Nationwide Mut Ins Co*, 574 A2d 841, 842 (Del, 1990), defining "consideration" to encompass the relinquishment of a right or some other "form of a tangible detriment incurred."

Finally, with regard to this issue, we note that BP1 challenges the standing of Coventry/DDR to address this issue in a footnote within its reply brief to the appellee brief of Coventry/DDR. BP1 asserts that Coventry/DDR lacks "legal or equitable right, title or interest in claims against DDR." We find this suggestion disingenuous as the issue pertains to the validity of the trial court's determination that the PDA is a part of the OA and Coventry/DDR is a signatory and party to both documents. As such, the outcome of the litigation does encompass the legal interests of Coventry/DDR. In addition, Coventry/DDR is the managing member of Owner LLC (Coventry II DDR Harbor Bloomfield Phase I, LLC), from which BP1 derivatively raises its claims. As such, there is no legitimate challenge to Coventry/DDR's standing or participation in this appeal and the issues identified. A party to a contract has standing to seek relief based upon that contract. See *Clark v Dalman*, 379 Mich 251, 260; 150 NW2d 755 (1967).

Next, while acknowledging the correct identification of Delaware law by the trial court, BP1 challenges the trial court's application of the law in its August 24, 2009 ruling finding that BP1 was restricted to a derivative claim of breach of the OA against Coventry/DDR. Coventry/DDR responds that BP1 mistakenly fails to recognize that any duties owed were to Owner LLC and that any damage claim that arises from the alleged breach of the duties owed to Owner LLC must, therefore, be derivative. Coventry/DDR further asserts that BP1 mischaracterizes the nature of the claims alleged.

Under Delaware law, in motions to dismiss, courts are required to accept all well-pleaded allegations as being true. *Spence v Funk*, 396 A2d 967, 968 (Del Super Ct, 1978). A broad sufficiency test is then applied to determine whether a plaintiff is entitled to recover under any "reasonably conceivable set of circumstances susceptible of proof under the complaint." *Id.* (citation omitted). If the complaint "gives general notice as to the nature of the claim asserted against the defendant," Delaware law disallows dismissal. *Diamond State Tel Co v Univ of Delaware*, 269 A2d 52, 58 (Del Super Ct, 1970). A complaint will not be dismissed "unless it is clearly without merit, which may be either a matter of law or fact." *Id.* If there is a basis upon which the plaintiff may recover, the motion for dismissal must be denied. *Spence*, 396 A2d at 968.

The language of the OA must be provided to assist in the analysis of this issue regarding the "put option," which is the focus of the dispute. Section 6.6, identifying and defining the "Put Option," provides in relevant part:

> (a) Subject to the terms and conditions hereof, the Company [Owner LLC] hereby grants to Harbor [BP1] a right and option (a "Put Option"), exercisable at any time after Substantial Completion, to require the Company [Owner LLC] to purchase, and the Company [Owner LLC] hereby agrees to purchase, all of Harbor's [BP1's] Membership Interests.
>
> (b) The Put Option may be exercised by Harbor [BP1] at any time after the Stabilization Date upon sixty (60) days advance written notice to the Company [Owner LLC] (a "Put Option Exercise Notice") so long as at the time of delivery of the Put Option Exercise Notice (i) Harbor [BP1] is not a breaching Member, (ii) a Sale Option Notice has not been delivered under Section 6.3 hereof, and (iii) the provisions of Section 6.4 hereof have not been invoked.
>
> (c) The purchase price of the Membership Interest of Harbor [BP1] shall be the Fair Value Membership Interest based on the Appraisal Price as of the date of delivery of the Put Option Exercise Notice (the "Put Option Exercise Price").

The OA defines the term "substantial completion" in § 1.82 to "mean[] that temporary certificates of occupancy have been issued by the applicable governmental authority with respect to the shell and core of all buildings included within the Project." The term "stabilization date" is defined in § 1.81 to "mean[], with respect to the Project, the date on which at least ninety percent (90%) of all leasable space of the Project has been leased and all such tenants or occupants are open for business and paying rents."

On August 24, 2009, the trial court issued an opinion and order following the submission of a joint motion for summary disposition and to strike portions of BP1's complaint brought by Owner LLC, Coventry/DDR and DDR. In dismissing Count I of BP1's complaint regarding an alleged breach of the OA by Coventry/DDR the trial court explained, "the injury alleged in Count I ['Breach of the Owner LLC Operating Agreement – (Defendant Coventry/DDR)'] is derivative, not direct, in nature and, therefore, the Plaintiff lacks individual standing to bring the

claim as a direct action[.]" In summarizing its reasons for the dismissal of this count, the trial court stated:

> [T]he Plaintiff's arguments are insufficient to preclude application of the derivative action analysis. . . . Further, because the breaches and injury(ies) alleged in Count I are derivative in nature (i.e., the Plaintiff cannot prevail on its claim without showing an injury to Owner LLC), the Plaintiff lacks individual standing to pursue it. However, if the Plaintiff desires to pursue a derivative action in connection with the Owner LLC Agreement, then pursuant to MCR 2.116(I)(5), the Plaintiff shall have the opportunity to amend in accordance with MCR 2.118 . . . .

BP1 was subsequently permitted to file an amended complaint, indicating this count as derivative. Notably, BP1 does not contest the use or the validity of Delaware case law cited by the trial court, but does challenge the trial court's application of that law to the facts of this case.

> Under Delaware law:
>
> > The test for distinguishing between direct and derivative claims. . . . turns on the following two questions: "(1) who suffered the alleged harm (the [partnership] or the suing [unitholders], individually); and (2) who would receive the benefit of any recovery or other remedy (the [partnership] or the [unitholders], individually)."
> >
> > The plaintiff's description of [the count] as direct is not dispositive. The court must "independently examine the nature of the wrong alleged and any potential relief to make its own determination" about the nature of the claims. The plaintiff's decision to frame similar theories as derivative claims is not dispositive either. Some theories can be asserted either as direct or derivative claims, in which case "[b]oth types of claims may be litigated." [*Allen v El Paso Pipeline GP Co, LLC*, 90 A3d 1097, 1104-1105 (Del Ch, 2014), quoting *Tooley v Donaldson, Lufkin & Jenrette, Inc*, 845 A2d 1031, 1033 (Del, 2004) (other citations omitted).]

If the corporation, rather than the individual stockholder, suffered the alleged harm, the corporation alone is entitled to recover, and the claim in question is derivative. *Tooley*, 845 A2d at 1036 (citation omitted). If stockholders suffered harm independent of an injury to the corporation that would entitle them to individualized recovery, the cause of action is direct. *Id*. at 1039 ("The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."). In addition, "Although each question is framed in terms of exclusive alternatives (either the corporation or the stockholders), some injuries affect both the corporation and the stockholders. If this dual aspect is present, a plaintiff can choose to sue individually." *Carsanaro v Bloodhound Tech, Inc*, 65 A3d 618, 655 (Del Ch, 2013), citing *Loral Space & Communications, Inc v Highland Crusader Offshore Partners, LP*, 977 A2d 867, 868 (Del, 2009) (holding that

where facts give rise to both derivative and direct claims, "[b]oth types of claims may be litigated").

The trial court correctly determined that BP1's cause of action was derivative and not direct. In this instance, although BP1 has an inchoate right regarding the "put option," that right could not materialize or become available absent the harm alleged to Owner LLC through the asserted breaches of contract. Specifically, BP1's alleged wrong does not exist "independently of any right of the corporation." *Moran*, 490 A2d at 1070. As discussed in *Feldman v Cutaia*, 956 A2d 644, 659-660 (Del Ch, 2007):

> This type of factual scenario—a plaintiff creatively attempting to recast a derivative claim by alleging the same fundamental harm in a slightly different way-is disfavored by Delaware courts. Affirming this court's decision, the Delaware Supreme Court in *In re JP Morgan Chase & Co Shareholder Litigation*[, 906 A2d 766, 771-774 (Del, 2006)] rejected a plaintiff's effort to bootstrap the harm and damages causatively linked to a derivative claim onto what, according to that plaintiff, was an independently arising direct cause of action. Justice Jacobs stated that dismissal is appropriate in such a case "because 'the damages allegedly flowing from the [purportedly direct claim] are exactly the same as those suffered [by the corporation] in the underlying [derivative] claim, [and thus] the injury alleged in the complaint is properly regarded as injury to the corporation and not to the class.' "

The harm alleged by BP1 was primarily to Owner LLC. Because the damages to be incurred by BP1 premised on the inability to exercise the "put option" are the indirect result of an injury to Owner LLC, BP1 is precluded from suing directly or as an individual on that claim.

For its third issue on appeal, BP1 sets forth a two-fold argument. First, BP1 challenges the trial court's determination regarding the necessity of presenting expert testimony on the subject of lost profits or reliance damages. Second, BP1 contests the trial court's determination that Schubiner was not qualified to testify on the issue of lost profits and reliance damages despite his position with BP1, and his overall history, experience, familiarity and involvement in this project.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). Summary disposition is appropriate under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Bonner v City of Brighton*, 495 Mich 209, 220; 848 NW2d 380 (2014) (citations omitted). This Court reviews de novo whether a trial court properly determined damages. *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242; 828 NW2d 660 (2013).

In addition, "[t]his Court reviews for an abuse of discretion the qualification of a witness as an expert and the admissibility of the testimony of the witness. . . . An abuse of discretion occurs when a circuit court chooses a result that falls outside the range of reasonable and principled outcomes." *Lenawee Co v Wagley*, 301 Mich App 134, 161-162; 836 NW2d 193

(2013) (citations and quotation marks omitted). The application of MRE 702 is reviewed for an abuse of discretion. *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part, lv den in part 477 Mich 1067 (2007).

The trial court determined the necessity of expert testimony on the issue of damages, particularly in the determination of lost profits as claimed by BP1. Specifically, the trial court found that the complexity of the issue of lost profits, in the factual circumstances of this case, "exceeds the common knowledge and experience of an ordinary layman," and thus necessitated the provision of expert testimony. As noted by the trial court:

> The alleged lost profits in this case involve an unprecedented, unique, huge, multi-million dollar project, which was intended to include mixed office and retail buildings. The project never had a single day of operations; never generated any income whatsoever; and was halted in mid-construction. . . . The Plaintiff contends that the lost profits damages here will involve highly technical information and calculations addressing such economic concepts as the "capitalization of income approach;" "projected annual revenue;" " 'would have been' " value;" "anticipated expenses;" "anticipated revenues;" "anticipated rents in the context of actual market conditions;" "net operating income;" "capitalization rate," and market reports and studies on retail leasing, office leasing and residential sales.

As recognized by the trial court, this Court has previously discussed the necessity of expert testimony in similar circumstances. In *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196-197; 555 NW2d 733 (1996), this Court opined:

> In Michigan, MRE 702 instructs the court to analyze whether an expert's testimony will help the factfinder make the ultimate decision in a case. A trial court should use its common sense to decide whether an untrained person would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from experts. [Citations omitted.]

This case involved an exceptionally large and complex development project that encompassed different types of construction on a scale that all parties acknowledged to be unprecedented in the area. Schubiner concurred that a commensurate project of this size and scope did not exist in southeastern Michigan. As the project never realized full fruition, there was no past history to guide a determination of damages for purposes of comparison or extrapolation. This must be considered with the recognized need for greater specificity in proving damages when dealing with lost profits. "In order to recover prospective profits, a plaintiff must establish proof of lost profits with a reasonable degree of certainty." *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). Lost profits can be recovered when proved, but "[t]he jury should not be permitted to speculate or guess [with regard to] the amount of lost profits." *Id*. at 175-176 (internal citations and quotation marks omitted).

An abuse of discretion standard is high and is found to occur only "when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). BP1's tacit acknowledgment of the necessity for expert

input can be construed from its original intent to present the testimony of David Burgoyne on this very issue. Given the complexity of the subject matter, it was not an abuse of discretion for the trial court to deem it necessary to present expert testimony to facilitate and explain to the jury the multitude of documents and economic issues that would be presented, particularly given the absence of any history of income or functioning associated with this project due to its lack of completion.

BP1 also contests the trial court's determination that Schubiner could not testify on the issue of lost profits or reliance damages. The trial court opined:

> "[T]he project does not fit within the circumstances where a business owner's lay opinion testimony is competent to establish lost profits. . . . Put simply, . . . Mr. Schubiner has no personal knowledge concerning how lost profits could be calculated because he never developed a Project of this magnitude and the Project was never in business – i.e., because the Project has no operating history and is self-described by BP1 as 'one-of-a-kind,' there is no custom, no comparable market, and no other fact which Mr. Schubiner could rationally perceive and rely upon for his opinion."

Based, in part, on Schubiner's acknowledgement that "he has no personal, particularized experience in operating a development anywhere near the size, scope, scale, or complexity of this Project," the trial court found that Schubiner's testimony as a lay witness "falls outside the parameters of MRE 701."

The concept of lost profits and the general requirements of proof are discussed in *Amway Global v Woodward*, 744 F Supp 2d 657, 677-678 (ED Mich, 2010) (citations omitted):

> Under Michigan law, "[i]t is clear that loss of future profits is permitted as an element of damages in breach of contract actions when they can be established with reasonable certainty." In mandating such a showing, "[t]he law does not require impossibilities; and cannot therefore require a higher degree of certainty than the nature of the case admits." Moreover, lost profits need not be "determined to a mathematical certainty," and even when they are "difficult to calculate, and are speculative to some degree, they are still allowed as a loss item." The requisite proof may be supplied in the form of reasonable projections or statistical analyses.

In establishing lost profits, the "[o]pinion testimony of the owner of a business and other persons familiar with his operation as to the amount of damages he suffered by way of lost profits has been held admissible by this Court." *Uganski v Little Giant Crane & Shovel, Inc*, 35 Mich App 88, 111; 192 NW2d 580 (1971).

The Michigan Rules of Evidence address the admissibility of lay witness and opinion testimony. MRE 602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the

> witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. [Footnote added.]

In addition, MRE 701 addresses the subject of opinion testimony by lay witnesses as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In *Joerger*, 224 Mich App at 176 (citations omitted), this Court recognized the difficulty inherent in proving lost profits and the distinction between businesses with a history supporting a claim to such damages and those lacking an established track record:

> In examining a new business versus an interrupted business, the Supreme Court has indicated that " '[i]f the business . . . has not had such a history as to make it possible to prove with reasonable accuracy what its profits have been in fact, the profits prevented are often but not necessarily too uncertain for recovery.' " Several cases have allowed a party to prove loss of future profits by pointing to profits made in previous months or years.

The overriding concern is the necessity of "establish[ing] proof of lost profits with a reasonable degree of certainty," *id.* at 175, albeit not mathematical precision, *Fera v Village Plaza, Inc*, 396 Mich 639, 644; 242 NW2d 372 (1976).

The instant case is easily distinguishable from those situations that permit lay witness testimony to establish lost profits that involve a standard business with either some history of operation to extrapolate profitability or of sufficient similarity to the subject business to permit reasonable comparison and predictability. The circumstances of this case, the breadth and complexity of the proposed development, renders it highly improbable that lost profits could be determined without resorting to rank speculation, which is impermissible. *Joerger*, 224 Mich App at 175-176. Because the project was never completed, there is no history of operation to use to determine or approximate its profitability or possible occupancy rates with any reasonable degree of accuracy. "To sustain his burden of proof, the plaintiff must establish with reasonable certainty, injury, a causal connection between the conduct complained of and the injury, and the appropriate compensation." *Sullivan Indus, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 350; 480 NW2d 623 (1991) (citations omitted).

BP1 also premises its contention that it is entitled to lost profits on to the breach of the other contractual parties involved in the project. However, the alleged breaches must be placed in context and considered in light of the economic recession that occurred during the construction and development phase of this project, making the difficulty of discerning lost profits due to breach from those merely reflective of the constrained economic reality additionally difficult and speculative, particularly without the input of an expert. "[A]n owner may not base his or her claim for . . . compensation on uncertain and speculative expected profits," as this may merely be a reflection of the owner's "high personal expectations" and fail to sufficiently account for the numerous vagaries that may occur impacting the completion of the

project and its successful operation. *Dorman v Clinton Twp*, 269 Mich App 638, 648; 714 NW2d 350 (2006).

BP1 further asserts error in the trial court's preclusion of its pursuit of reliance damages. BP1 appears to confuse the damages typically associated with a breach of contract with reasonable reliance damages that arise through the pleading of promissory estoppel as BP1's amended complaint only asserted breach of the various contract provisions and not an action based on promissory estoppel. In some respects, this argument appears to be a backdoor approach to obtain damages that could not be pursued based on the absence of expert testimony.

"The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided." *Joerger*, 224 Mich App at 173. "The guiding principle in determining an appropriate measure of damages is to ensure that the promisee is compensated for the loss suffered to the extent of the promisee's reliance. Damages awarded in promissory estoppel actions may include an award of lost profits, and out-of-pocket expenses incurred in preparation for performance or in the performing of the work that was induced by the promisor." *Id.* at 173-174 (citations omitted). In contrast, "[T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in contemplation of the parties at the time the contract was made. Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 6; 516 NW2d 43 (1994) (citations omitted).

In order to recover damages under a theory of promissory estoppel, a party is required to demonstrate that their reliance on the alleged promise was reasonable, *State Bank of Standish v Curry*, 442 Mich 76, 84; 500 NW2d 104 (1993), combined with a commensurate use of caution in the application of the doctrine of promissory estoppel. *Id*. at 83. Although lost profits are available in a proper case premised on promissory estoppel, the rule remains that lost profits cannot be premised on speculation or conjecture. *The Vogue v Shopping Centers, Inc (After Remand)*, 402 Mich 546, 551; 266 NW2d 148 (1978).

There is, to some degree, a misrepresentation of the record, albeit intentional or unintentional, with regard to the trial court's preclusion of BP1's presentation of Schubiner's testimony on the issue of reliance damages. During trial, Schubiner was queried by BP1's counsel: "Mr. Schubiner, have you determined the amount of money or financial obligations incurred, the amount of money spent or financial obligations incurred by the Bloomfield Park owner [Owner LLC] in reliance on the promises made by DDR." Opposing counsel objected, on the basis of MRE 602 and MRE 701, asserting the query was inappropriate for a lay witness and the lack of a proper foundation. BP1's counsel responded:

> I mean this seems to me to be the clearest example of a circumstance in which an individual can testify regarding his knowledge of what his – what goes on with his business. We're not talking about lost profits, we're talking about an objective question about how must [sic] was spent, and he's doing it based upon documents that are obviously reliable, they were prepared by DDR and provided to him in

> order for him to review them in the context of his investment in the project and his continued involvement, to some extent, in the management of the project or at least in advising on the management of the project.

BP1's counsel specifically acknowledged, "we are certainly not trying to qualify [Schubiner] as an expert" but asserted Schubiner was "imminently [sic] qualified to provide that lay opinion." In its March 14, 2012 opinion and order the trial court concurred with BP1 that "there *is* admissible evidence regarding reliance damages. Without limiting BP1's Response, reliance damages can be presented in summary form, either through the Defendants' business records which summarized them, or in a compilation pursuant to MRE 1006. BP1 has identified the previously disclosed documents upon which it intends to rely." The trial court found certain documents and business records admissible for this purpose, in accordance with MRE 801(d) and MCR 803(23) "due to their indicia of trustworthiness." It further acknowledged that employees of Coventry/DDR and DDR "have personal knowledge as they processed the payments and created and maintained the records and, therefore, can lay the foundation for the documents, even if Craig Schubiner cannot. Whether Craig Schubiner is also competent to testify is not the dispositive issue, and the Court will preserve that issue for another day."

At trial, counsel for DDR and Coventry/DDR objected to Schubiner, as a lay witness, testifying regarding documents that he had not prepared and, therefore, lacked personal knowledge of, other than viewing or reading. When asked whether BP1 was seeking the testimony from Schubiner as the opinion of a lay witness, BP1's counsel opined "it can be offered as an opinion . . . but, in fact, he's testifying to objective facts from documents that were not obtained from a party opponent but actually were obtained from . . . a business partner that he was working with." The trial court then expressed confusion regarding the intent of BP1's counsel given the admission of the documents. BP1's counsel indicated Schubiner would be testifying, as a lay witness, to his perceptions and inferences based on certain documents, and concurred with the trial court's understanding that the intent was to have Schubiner "opine that based on those documents that reliance damages are now some other number, that he's filling in the calculation of reliance damages." BP1 specifically disavowed Schubiner serving as an expert witness.

Opposing counsel continued to object to the propriety of Schubiner offering a lay opinion premised on documents that he did not prepare because it comprised testimony that was not based on personal knowledge as required by MRE 701. Relevance was also challenged given Schubiner's status as an investor in the project and not a manager involved in the generation and actual use of the figures being presented. Ultimately, the trial court sustained the majority of the objections of opposing counsel regarding this testimony. Despite a series of objections to the questions being posed to Schubiner, the witness was able to testify regarding various figures within documents admitted into evidence. This testimony, coupled with the admission of relevant documents demonstrating amounts expended on the project comported with the trial court's original acknowledgement that reliance damages would be admissible, but through documentation and witnesses who prepared that documentation and not Schubiner.

In addition, on appeal, BP1 now contends that Schubiner was qualified to testify as an expert, despite its repeated assertions in the trial court that it did not seek to have this witness qualified as an expert. "A party may not take a position in the trial court and subsequently seek

redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008). In addition, BP1 never sought to qualify Schubiner, pursuant to MRE 702, as an expert witness. *Grow v W A Thomas Co*, 236 Mich App 696, 713; 601 NW2d 426 (1999).

A trial court may allow a person to proffer testimony at trial as an "expert by knowledge, skill, experience, training, or education" when the "court determines that scientific, technical, or other specialized knowledge will assist the trier or fact to understand the evidence or to determine a fact in issue." MRE 702. "The admission of expert testimony requires that (1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man." *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). It is within the discretion of the trial court to recognize the qualifications of a witness as an expert and also to admit proposed expert testimony. *Id.* at 304-305. It is questionable that Schubiner would have survived the scrutiny required to qualify as an expert, which was premised solely on his purported experience as a developer.

"MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). "MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)." *Edry v Adelman*, 486 Mich 634, 639-640; 786 NW2d 567 (2010). "Under *Daubert*, 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.' " *Id.* at 640, quoting *Daubert*, 509 US at 589. Hence, "the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Gilbert*, 470 Mich at 782. An expert's "singular reliance on his own hypothetical depiction of an event may [be] too speculative, and, therefore, inadmissible under MRE 702." *Edry*, 486 Mich at 640. "Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable, and therefore, admissible." *Id.* at 642.

Finally, BP1 challenges DDR's proffered alternative bases for affirmance: (a) the failure of BP1 to submit sufficient proofs of damages incurred in reliance on DDR's performance under the PDA and (b) the impossibility of demonstrating for an award of reliance damages that the alleged non-defaulting party, Owner LLC, had no knowledge of the breach as Coventry/DDR's knowledge is attributable to Owner LLC as an owner and managing member of that corporate entity. Based on our findings, it is not necessary to consider alternative bases for affirmance. See *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011). We do note, however, contrary to BP1's position that DDR's alternative bases for affirmance on appeal constitute improper cross-appeals, that a party is not required to file a cross-appeal to argue alternative bases to affirm. See *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999).

Finally, in Docket No. 314876, MVB contests the trial court's decision to deny its motion for substitution. This Court reviews a trial court's decision on a motion to intervene or for substitution of a party for an abuse of discretion. *Mather Investors, LLC v Larson*, 271 Mich

App 254, 260; 720 NW2d 575 (2006); *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001).

"The proper interpretation and application of a court rule is a question of law, which [the appellate court] reviews de novo." *Haliw v City of Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). The interpretation and application of a court rule is governed by the principles of statutory construction, beginning with the examination of the plain language of the court rule. *Id*. at 704-705. "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Id*. at 706.

Before addressing the substantive arguments within this issue, we note that BP1 challenges this Court's jurisdiction, asserting the claim was untimely under MCR 7.205(G)(3). Specifically, BP1 contends that the application for leave to appeal is untimely based on the trial court's June 26, 2012 opinion and order denying a request by MVB to intervene. The same argument was raised by BP1 in its response to MVB's delayed application for leave to appeal and rejected by this Court, which granted MVB's delayed application, *BP1, LLC v Coventry Road Real Estate Fund II, LLC*, unpublished order of the Court of Appeals, entered March 26, 2013 (Docket No. 314876). BP1 again challenges jurisdiction in its appellee brief on the basis of timeliness.

It would appear that BP1 misrepresents actions taken in the lower court in its jurisdictional challenge on appeal. BP1 asserts that the trial court's June 26, 2012 order denied MVB's "motion to intervene or substitute." However, the June 26, 2012 order addressed MVB's motion to intervene in accordance with MC 2.201(A) and (C) and was not designated a motion for substitution. On August 3, 2012, MVB filed a separate motion seeking permission to substitute "as the party plaintiff" in accordance with MCR 2.202(B) and (D). The trial court denied this motion on August 21, 2012. This factual and procedural history is recounted here to confirm our finding that this Court does have jurisdiction of the issue presented.

"An action must be prosecuted in the name of the real party in interest[.]" MCR 2.201(B). As previously discussed by this Court:

> A real party in interest is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. This standing doctrine recognizes that litigation should be *begun* only by a party having an interest that will assure sincere and vigorous advocacy. [*Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) (quotation marks and citation omitted; emphasis added).]

In turn, the substitution of parties is governed by MCR 2.202(B) when there is a transfer or change of interest and provides: "If there is a change or transfer of interest, the action may be continued by or against the original party in his or her original capacity, unless the court, on motion supported by affidavit, directs that the person to whom the interest is transferred be substituted for or joined with the original party, or directs that the original party be made a party in another capacity." In discussing this court rule, this Court has stated that "the use of the term 'may' instead of 'shall'. . . indicates discretionary rather than mandatory action." *Church &*

Church Inc v A-1 Carpentry, 281 Mich App 330, 339; 766 NW2d 30 (2008), aff'd in part, vacated in part and aff'd on other grounds 483 Mich 885 (2009).

The lawsuit that is the subject of this appeal was initiated in April 2009. MVB was aware of Owner LLC's default under its loan agreement in March 2009, before this lawsuit was initiated. MVB did not seek to intervene until June 2012 and did not pursue foreclosure of its secured interest until late July or early August 2012. Trial in this matter initiated on July 16, 2012, and MVB did not seek substitution until August 3, 2012, after 11 days of trial had concluded. In denying MVB's motion for substitution, the trial court explained:

> (1) the Plaintiff has more than adequately represented the interests of the proposed substituted party,
>
> (2) the Motion was made near the tail end of a nearly five week jury trial and the substitution then (or even post-judgment) does nothing but interfere with the efficient administration of justice, and
>
> (3) even if the moving party has the ability to secure its indebtedness through the foreclosure proceeding and the purported security interest in the agreement at issue, the Plaintiff's action sought damages that exceed the amount recoverable by any secured creditors and therefore the Plaintiff remains a real party at interest.

Addressing the trial court's implication regarding the timeliness of the motion for substitution, MVB emphasizes that MCR 2.202(D) permits substitution at any stage of the proceedings, stating:

> Substitution of parties under this rule *may* be ordered by the court either before or after judgment or by the Court of Appeals or Supreme Court pending appeal. If substitution is ordered, the court may require additional security to be given. [Emphasis added.]

The term "may" is defined by *Black's Law Dictionary* (9th ed) as: "1. To be permitted to . . . . 2. To be a possibility," denoting its discretionary or permissive nature. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry*, 486 Mich at 639. Based on the delays in MVB's efforts to insert itself into the proceedings and the progression of the litigation at the time of MVB's seeking substitution (or even intervention), it was not an abuse of the trial court's discretion to deem it an "interfere[nce] with the efficient administration of justice."

The trial court's denial of MVB's request premised on its determination that BP1 had adequately represented MVB's interests throughout the litigation and that even if MVB were able to secure its interests through foreclosure, BP1's pursuit of damages exceeding the amount that could be recovered by secured creditors maintained BP1's status as a real party at interest are interrelated. First, MVB suggests that it is the real party in interest because BP1's claim was derivative of Owner LLC and that MVB's foreclosure of Owner LLC eliminated the interests of BP1 and Owner LLC, making MVB the real party in interest. This does not, however, serve to negate that BP1 and MVB have a commensurate interest in the proceeding as both are seeking to obtain damages premised on injuries to Owner LLC, whether it be derivative or having

subsequently assumed Owner LLC's rights and interest. In other words, the goals of BP1 and MVB are the same as both are attempting to recoup losses suffered by Owner LLC, rendering the interest of BP1 and MVB interchangeable and aligned. In addition, the damages claimed by BP1, derivatively through Owner LLC, were of a sufficient amount to encompass MVB's interests.

What is confusing, and seemingly contradictory, regarding MVB's arguments is its contention on the one hand that BP1 could not adequately represent MVB's interests while simultaneously asserting that the jury correctly determined that Owner LLC's rights under the PDA, as pursued derivatively by BP1, were correctly determined to be "zero." This incongruent position effectively appears to have MVB advocating form over substance, or procedure over outcome, in pursuit of this appeal. What does lend meaning or at least some comprehensible basis to the position of MVB is its acknowledgement that it is "an affiliate of defendant DDR." As such, its interest in the rights of Owner LLC to pursue claims of breach against DDR under the PDA is actually aligned with DDR and not Owner LLC. The interest in substitution appears to be a ploy to put a halt to any possible recovery and to assure that any potential damages obtained are paid to itself rather than to recoup an alleged loss. Hence, the motion to substitute and this appeal appear to derive from the Marie Antoinette theory of trying to "have your cake and eat it too."

Once again, in a footnote, MVB contends that because BP1 is not a real party in interest it lacks standing to pursue its appeal in the consolidated case in Docket No. 312579. Contrary to MVB's assertion, BP1's standing to appeal in Docket No. 312579 is consistent with its qualification as "an aggrieved party" having been subject to a no cause of action jury verdict. MCR 7.203(A)(1). As discussed in *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008), the "aggrieved party"

> requirement stems from the fact that this Court's judicial power, established by Const 1963, art 6, § 1, extends only to a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, and one in which the plaintiff has suffered a particularized or personal injury. [Citations and quotation marks omitted.]

Specifically:

> To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency. . . . An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Id.* at 643-644, quoting *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006) (additional citations omitted).]

In this instance, BP1 has the status of an aggrieved party because it could benefit "from a change in the judgment" had recovery been deemed appropriate. *Manuel*, 481 Mich at 644, quoting *Federated Ins Co*, 475 Mich at 291 n 2 ("A party who could not benefit from a change in the judgment has no appealable interest.").

Affirmed.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot