STATE OF MICHIGAN

COURT OF APPEALS

BSA MULL, LLC, Plaintiff-Appellant,	UNPUBLISHED September 30, 2014
v	No. 310989 Wayne Circuit Court
GARFIELD INVESTMENT COMPANY, HERITAGE PLACE CONDOMINIUMS, LLC, PAUL M. LUBIENSKI, JERRY WHITE, JOHN WHITE, and MARK WHITE, Defendants-Appellees.	LC No. 11-000720-CB
HERITAGE INVESTORS GROUP, LLC, Plaintiff-Appellee,	
v	No. 311911 Wayne Circuit Court
HERITAGE PLACE CONDOMINIUMS, LLC, Defendant-Appellant.	LC No. 11-001283-CZ
HERITAGE PLACE CONDOMINIUMS, LLC, d/b/a HERITAGE POINTE CONDOMINIUMS, and GARFIELD INVESTMENT COMPANY, Plaintiffs-Appellants,	
V	No. 315359 Wayne Circuit Court
SHIRLEY MULL, HERITAGE INVESTORS GROUP, LLC, BSA MULL, LLC, and BRIAN MULL, Defendants-Appellees.	LC No. 11-001433-CB

HERITAGE PLACE CONDOMINIUMS, LLC,
d/b/a HERITAGE POINTE CONDOMINIUMS,
AND GARFIELD INVESTMENT COMPANY,

Plaintiffs-Appellees,

v

SHIRLEY MULL, BSA MULL, LLC, and
HERITAGE INVESTORS GROUP, LLC,

Defendants-Appellants,

and

BRIAN MULL,

Defendant.

No. 315544
Wayne Circuit Court
LC No. 11-001433-CB

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

In docket no. 310989, BSA Mull, LLC appeals as of right a trial court order granting summary disposition in favor of defendants on its claims of minority member oppression, breach of statutory duty of care, breach of fiduciary duties, and civil conspiracy. We affirm.

In docket no. 311911, Heritage Place Condominiums, LLC appeals by leave granted a trial court order granting summary disposition in favor of Heritage Investor's Group, LLC on Heritage Place Condominium LLC's counter-claim which sought a declaratory judgment limiting Heritage Investor's Group LLC's recovery against it to $3.5 million. We affirm.

In docket no. 315359, Heritage Place Condominiums, LLC and Garfield Investment Company appeal as of right a trial court order denying their motion for dissolution under the applicable provisions of the Uniform Partnership Act and/or to expel BSA Mull, LLC from Heritage Place Condominiums, LLC and an order denying their motion to compel BSA Mull, LLC to consent to refinance Heritage Place Condominiums, LLC's debt at a lower interest rate. We affirm.

In docket no. 315544, Shirley Mull, BSA Mull, LLC, and Heritage Investors Group, LLC appeal as of right a trial court order granting summary disposition in favor of Heritage Place Condominiums, LLC and Garfield Investment Company with respect to their claims of usurpation of corporate opportunity and tortious interference with a business relationship or expectancy and further contest the inclusion of Garfield Investment Company on the judgment.

We affirm the trial court's summary disposition rulings, but remand for an amendment to the judgment to reflect that the judgment is in favor of Heritage Place Condominiums, LLC only.

UNDERLYING FACTS

Heritage Place Condominiums, LLC (HPC) is a limited liability company that was formed specifically to purchase the Heritage Place Apartments, an apartment complex in Dearborn Michigan. HPC is comprised of three primary members: BSA Mull, Inc. (49% interest), Garfield Investment Company (27.25% interest) and Paul M. Lubienski (5% interest). BSA Mull, Inc. (BSA), in turn is a limited liability company whose only members are Shirley Mull and her son, Brian Mull. Garfield Investment Company (Garfield) is likewise a family owned limited liability company whose members are brothers John and Mark White and their father, Jerry White. Garfield is the managing member of HPC.

HPC purchased property in 2005 via financing from Republic Bank (now Citizens Bank). The debt was secured by a future advance mortgage, a construction mortgage, and personal guarantees of Garfield and the individual White members of Garfield. The outstanding loan amounts of approximately $5.7 million were ultimately due in September 2010 and HPC was near defaulting on the loans. HPC was thus required to seek refinancing of the loans. Unbeknownst to Garfield or the other members of HPC, Shirley and Brian Mull (together with a third party) formed a new limited liability company, Heritage Investors Group, LLC, and negotiated directly with Citizens Bank to pay off the note at a discounted price of $3.5 million. Heritage Investors Group, LLC (HIG) obtained a new loan from First Michigan Bank to pay off the Citizens loan in that amount and securing the same with a new mortgage. HIG thereafter received an assignment of the mortgage on HPC's property and the notes that had secured the debt and sought repayment of the note in its full face value of $5.7 million from HPC.

a. Docket no. 310989[1]

In January 2011, BSA initiated an action against Garfield for minority shareholder oppression, breach of statutory duty of care and breach of fiduciary duties, against Lubienski for minority member oppression, and against Garfield, Lubienski, HPC and all of the Whites, individually, for an accounting and for civil conspiracy. BSA alleged that HPC failed to secure new financing for the Citizens loans and that BSA had to address the problem itself or face foreclosure. BSA further alleged that Garfield had mismanaged HPC and frozen BSA out of decisions and kept it in the dark concerning finances.

Defendants were granted summary disposition in their favor as to all of BSA's claims against them with the exception of BSA's claim for an accounting. The trial court granted summary disposition in favor of BSA on its claim for an accounting.

b. Docket No. 311911

[1] All three cases were consolidated in the lower court.

HIG filed a complaint for injunctive relief against HPC alleging that HIG held a valid mortgage given by HPC on the apartment complex in Dearborn by virtue of an assignment of the same from Citizens executed in favor of HIG on November 29, 2010, and recorded on December 23, 2010. HIG asserted that HPC was in default of the terms of the mortgage by not paying the loan obligation and underlying promissory note since October 2010 and had additionally taken actions to circumvent a validly recorded assignment of rents.

HPC filed a counter-complaint for declaratory judgment. HPC alleged that around the time the note and mortgage became due, it, too, had reached an agreement with Citizens Bank to pay off the note at a $2.2 million discount by obtaining a new loan from First Michigan Bank which would be secured with a new mortgage. According to HPC, HIG had used confidential information it obtained from HPC to negotiate the same deal for itself and ultimately paid Citizens $3.5 million for the outstanding note rather than the $5.7 million actually owed. HPC asserted that HIG could thus only seek to collect the $3.5 million amount to which Citizens had already agreed to decrease the note when HIG received the assignment of the note, despite the fact that the face value of the note reads $5.7 million.

The trial court granted summary disposition in favor of HIG with respect to HPC's counter-complaint against it and later granted summary disposition in favor of HPC with respect to HIG's complaint against it. This case was thus resolved in its entirety with no relief granted to either party.

<u>c. Docket no.'s 315359 and 315544</u>

HPC and Garfield filed a complaint against Shirley Mull, Brian Mull, BSA and HIG for breach of fiduciary duty, breach of duty of loyalty, tortious interference with contractual and business relations, usurpation of corporate opportunity, unjust enrichment/constructive trust, conspiracy, piercing the corporate veil (the Mulls), and seeking an injunction (HIG). These plaintiffs asserted that HPC had made an offer to Citizens to settle its outstanding loan for approximately $3.5 million ($2.2 less than it owed) and that in the months prior to the offer to Citizens, it kept in regular contact with the members of HPC, including the Mulls, about the refinancing. HPC alleged that it made the restructuring offer to Citizens on October 15, 2010, and Citizens verbally accepted the offer on November 1, 2010. However, hours later, Citizens advised HPC that it had accepted another offer to purchase the note. HPC learned that the purchaser was HIG. According to HPC and Garfield, HIG used confidential information obtained from HPC to purchase the note for $3.5 million and to obtain the assignment of the mortgage from Citizens.

The trial court dismissed HPC and Garfield's claims of breach of fiduciary duty, piercing the corporate veil, unjust enrichment, and any claim seeking an injunction. The trial court granted summary disposition in favor of HPC and Garfield on its claims against BSA and the Mulls for breach of duty of loyalty and usurpation of corporate opportunity and against HIG and Shirley Mull on its claim of tortious interference with contractual and business relations. To place HPC in the position it would have been in had there been no wrongdoing, the trial court entered a judgment in favor of HPC and Garfield and against HIG, BSA and Shirley Mull, jointly and severally in the amount of $2.2 million, plus costs.

APPEALS

a. Docket no. 310989

On appeal, BSA contends that the existence of questions of fact precluded summary disposition in favor of Garfield and Lubienski on BSA's claims of minority shareholder oppression against these defendants. We disagree.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 362–363.

A limited liability company, such as HPC, is defined in Michigan's Limited Liability Company Act (LLCA), MCL 450.4101 *et seq.*, as "an entity that is an unincorporated membership organization formed under this act." MCL 450.4102(2)(k). Under the LLCA, members have no interest in specific limited liability company property, MCL 450.4504(2), but limited liability companies do involve fiduciary relationships. See NTS Am Jur 2d, Limited Liability Companies, § 11, pp 13-14. And, members do have a limited statutory right to file an action in circuit court against managers and other members. MCL 450.4515 provides, in relevant part:

> (1) A member of a limited liability company may bring an action in the circuit court of the county in which the limited liability company's principal place of business or registered office is located to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member . . . .
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> (2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other member interests disproportionately as to the affected member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

The “primary goal” of statutory interpretation “is to discern the intent of the Legislature by first examining the plain language of the statute.” *Driver v Naini*, 490 Mich 239, 246–247; 802 NW2d 311 (2011). When the language is clear and unambiguous, “no further judicial construction is required or permitted, and the statute must be enforced as written.” *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (internal quotations and citation omitted). Moreover, “[w]hen a statute specifically defines a given term, that definition alone controls.” *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

The definition of “willfully unfair and oppressive conduct” as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member” in the LLCA mirrors the definition of the same phrase as set forth in the Michigan Business Corporation Act at MCL 450.1489(3) with the word “shareholder” taking the place of “member.” In *Franchino v Franchino*, 263 Mich App 172; 687 NW2d 620 (2004), the Court stated that “willfully unfair and oppressive conduct” refers to conduct that substantially interferes only with rights that automatically accrue to a shareholder by virtue of being a shareholder. By association, only conduct that substantially interferes with rights that automatically accrue to a member by virtue of being a member will be considered for purposes of determining whether such conduct was willfully unfair and oppressive. Shareholder interests typically include actions like “voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends.” *Franchino*, 263 Mich App at 184. Again, by association, these same interests could be deemed typical of a member in an LLC.

With respect to Lubienski, there were no allegations in the complaint that Lubienski was the manager of the company or that he was a member in control of the company. While BSA initially alleged in the complaint that Lubienski and Garfield, together, held 51% or a majority interest in the company, Shirley Mull testified at deposition that Lubienski actually held a 5% interest and Garfield held a 27.25% interest. There were also no allegations in the complaint that Lubienski, specifically, engaged in any articulated actions that were illegal, fraudulent, or willfully unfair and/or oppressive. In response to Garfield and Lubienski’s motion for summary disposition, BSA makes no mention of Lubienski. That being the case, summary disposition in favor of Lubienski on the claim of minority member oppression was appropriate pursuant to both MCR 2.116(C)(8) and (10).

Further, in response to the motion for summary disposition on claims of minority oppression, BSA stated generally that there was factual support for the claims and that the claims would be proven at trial. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, a motion for summary disposition is properly granted. *Quinto*, 451 Mich at 362-363. Failing to provide any true factual support for the allegations and relying on its ability to potentially provide support at trial, BSA failed to carry its burden to defeat the motion for summary disposition. For that reason alone, the trial court appropriately granted summary disposition in favor of defendants.

The few specific references BSA was able to direct the trial court to in support of its claim for willfully unfair and oppressive conduct consist generally of factual assertions without support or actions that while perhaps amounting to a breach of the operating agreement, do not indicate oppressive conduct. For example, BSA refers to a singular statement by Jerry White of Garfield that two credits of $5,000 owing to BSA were not in the records of HPC "and that's our omission in not keeping proper records." White did not dispute at deposition that the monies were owed to BSA. It is unclear how the failure to record the admittedly owed monies on the books, however, *substantially* interfered with BSA's interests in HPC. Moreover, while HPC's operating agreement required Garfield, as managing member, to keep accurate books, a breach of the operating agreement is tantamount to a breach of contract. It does not equate to minority shareholder oppression. BSA also directs us to testimony from John White of Garfield that Garfield occasionally made loans to HPC and there were no written agreements drawn up for loans. Again, the operating agreement required the consent of all members for HPC to incur debt and Garfield's breach of the operating agreement to make loans to HPC may be a breach of contract. This could arguably be considered a significant action that substantially interferes with the interests of BSA as a member of HPC. However, the unrefuted testimony of John White was that such loans kept HPC afloat and that all members, including Shirley Mull, were provided with the opportunity to loan monies to HPC and receive interest on the same when needed and that none of them took up the offer except Garfield.

BSA also provided the testimony of Shirley Mull that she believed that Garfield had mishandled HPC by signing checks for over $10,000 without two signatures as required so that BSA did not know if the checks were for legitimate expenses. Mull testified to being aware of one check for $35,000 paid to the Jaffe law firm, whom she acknowledged represented HPC, Garfield, the Whites and Lubienski in the instant lawsuit, but also testified that she was unsure what the payment of the $35,000 in fees to Jaffe represented. Mull also testified that there was a $15,000 check written to Jerry White to repay a loan that he had made to HPC, without approval, two days prior to the check being issued. When asked if she could put a dollar amount on how she felt that Garfield was spending money that it should not have spent, Mull stated that she could not answer the question because "I don't have any information to back up anything that I can say." In sum, BSA felt that it was not provided with an opportunity to give or withhold consent on certain items as provided for in the operating agreement. BSA has directed this Court to no authority suggesting that a breach of the operating agreement amounts to minority shareholder oppression. As a result, the trial court did not err in granting summary disposition in favor of defendants on BSA's claims of minority shareholder oppression.

BSA claims that because the trial court ruled that BSA was entitled to an accounting, it has been established that Lubienski and Garfield engaged in a significant action that substantially interfered with BSA's interests as a member of HPC. In ruling on the record at the March 30, 2012, summary disposition hearing, however, the trial court stated, "[w]ith respect to count [five], the accounting. Neither party address[es] this. It seems to me that BSA Mull as a member of the HPC has an inherent right to know the accounting, but that's the law." In its June 1, 2012, opinion and order, the trial court granted summary disposition in favor of BSA with respect to its claim for an accounting. At no time, then, did the trial court find that defendants engaged in any action that substantially interfered with BSA's interests as a member of HPC or otherwise engaged in willfully unfair and oppressive conduct. Rather, the trial court simply observed that BSA had a right to an accounting. Indeed, MCL 450.4503(5) provides: "A member may have a formal accounting of a limited liability company's affairs, as provided in an operating agreement or whenever circumstances render it just and reasonable." The trial court thus need not have found that Lubienski or Garfield engaged in willful and oppressive conduct in order to find an accounting appropriate.

BSA next asserts that questions of fact existed concerning its claim that Garfield breached its statutory duty of care. We disagree.

MCL 450.4404 provides, in relevant part:

> (1) A manager shall discharge the duties of manager in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the manager reasonably believes to be in the best interests of the limited liability company.
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> (4) A manager is not liable for an action taken as a manager or the failure to take an action if the manager performs the duties of the manager's office in compliance with this section.
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> (5) Except as otherwise provided in an operating agreement or by vote of the members pursuant to section 502(4) and (7), a manager shall account to the limited liability company and hold as trustee for it any profit or benefit derived by the manager from any transaction connected with the conduct or winding up of the limited liability company or from any personal use by the manager of its property.

The LLCA's requirement that a manager discharge duties "in the best interests of the limited liability company," MCL 450.4404(1), indicates that a manager's fiduciary duties are owed to the company, not the individual members. Cf. *Remora Investments, LLC v Orr*, 277 Va 316, 673 SE2d 845 (2009) (Virginia statutory law containing similar "best interests of the limited liability company" provision did not provide a basis for member to bring a claim for breach of fiduciary duty directly against another manager or member). Moreover, the above LLCA provision compares to the Business Corporation Act's recitation of a director's obligations to a corporation in a similar manner:

> (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
>
> (a) In good faith.
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.

As explained in *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 282; 649 NW2d 84 (2002), "[an] MCL 450.489 suit seeks to redress oppression that injures either the corporation or the shareholder, whereas a §541 a suit seeks to redress wrongs to the corporation." *Id.* at 282.

BSA's complaint alleged that Garfield, in its capacity as managing member of HPC, owed statutory duties to BSA, in its capacity as a member of HPC. Applying the standards applicable to corporations by analogy, BSA's allegations are legally insufficient to establish its standing to pursue an individual claim for breach of statutory duty against Garfield. Though the trial court did not grant summary disposition based upon this reasoning, we will not reverse a lower court that reaches the right result for wrong reasons. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). The trial court properly found that summary disposition was appropriate in defendants' favor on BSA's claim that Garfield breached its statutory duty of care.

We reach the same conclusion with respect to BSA's assertion that questions of fact existed concerning its claim that Garfield breached its fiduciary duties. BSA's allegations in its complaint with respect to this claim are essentially the same allegations set forth in its claim against Garfield for breach of its statutory duties. Again, the LLCA's requirement that a manager discharge duties "in the best interests of the limited liability company," MCL 450.4404(1), indicates that a manager's fiduciary duties are owed to the company, not the individual members. Cf. *Remora Investments, LLC*, 277 Va 316; see also, *Estes*, 250 Mich App at 282. Because BSA's complaint alleged that Garfield, in its capacity as managing member of HPC, owed fiduciary duties to BSA personally, in its capacity as a member of HPC, and that it breached the same, the trial court properly found that summary disposition was appropriate in defendants' favor on BSA's claim that Garfield breached its fiduciary duties (albeit for the wrong reason). *Taylor*, 241 Mich App at 458.[2]

We affirm.

<u>b. Docket no. 311911</u>

HPC alleges that because Citizens Bank wrote down HPC's loan from $5.7 million to $3.5 million prior to its assignment of the note to HIG, HPC was entitled to a declaratory judgment that HIG, as assignee of the note, received the right to enforce an obligation for only $3.5 million. According to HPC, the trial court erred in granting summary disposition in HIG's favor on HPC's counter-complaint seeking such a declaratory judgment. We disagree.

An assignment is defined as "[t]he transfer of rights or property." Black's Law Dictionary (7th ed), p. 115. Under general contract law, rights can be assigned unless the

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[2] BSA also appeals the dismissal of its civil conspiracy claim. However, for a civil conspiracy claim to succeed, it is necessary to prove a separate, actionable tort. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n,* 257 Mich App 365, 384; 670 NW2d 569 (2003). BSA's tort claims having all been dismissed and their dismissals affirmed on appeal, no separate actionable tort upon which to base BSA's civil conspiracy claim exists and, its dismissal, too, must thus be affirmed on appeal.

assignment is clearly restricted. *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). An assignee stands in the shoes of the assignor and acquires the same rights as the assignor possessed. *First of Am Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996).

A mortgage is a lien on real property intended to secure performance or payment of an obligation. *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 670; 5 NW2d 524 (1942). Although a mortgage is a contingent interest in real property, a note secured by a mortgage is itself personal property and, as such, the owner of a note secured by a mortgage may transfer the note to third parties. *Prime Fin Services LLC v Vinton*, 279 Mich App 245, 256-57; 761 NW2d 694 (2008). The transfer of the note, however, necessarily transfers the mortgage with it. *Id*. at 257.

Here, HPC executed a mortgage and note in favor of Citizens Bank with an (extended) maturity date on the note of September 15, 2010. It is undisputed that HIG received an assignment of the mortgage and note executed by HPC by virtue of an allonge[3] and an assignment of mortgage executed by Citizens Bank in favor of HIG on November 29, 2010. Notably, the allonge simply states that it is "to a Commercial Term Note dated March 24, 2008, which amended and restated a certain Commercial Term Note dated June 30, 2005, payable to the undersigned [Citizens bank] from Heritage Place Condominiums, LLC." The June 30, 2005, Commercial Term Note indicated that the amount owed was $6,902,000.00. The March 24, 2008, note indicated that the original principal sum borrowed was $5,994,500.00. The allonge mentions no reduced or discounted amount. It mentions only the original loan documents. The contract between HIG and Citizens Bank was thus for the existing note balance, regardless of what HIG actually paid Citizens for the assignment. HIG bought an outstanding loan note.

Moreover, the documentary evidence supports the trial court's decision. Both parties rely upon an internal document of Citizens Bank showing the approval of a short sale/payoff to HPC with three Citizens Bank signatures dated October 29, 2010, November 1, 2010, and November 2, 2010. While HPC contends that the document reflects that Citizens Bank had approved to settle its loan to it for $3.5 million by November 2, 2010, the document states at the bottom of page 1 under "Conditions" that "The settlement is expected to close by or before 2-28-11 as the appraisal and Phase I ESA required by the refinancing bank have not yet been ordered." The document also states that "The borrower has indicated that they have an approval to refinance the apartment complex for $3,400,000. . . . The $3,400,000 refinance loan to be provided by First [] Michigan Bank is subject to a new appraisal in the minimal amount of $4,650,000." And, "It is recommended that we accept the settlement proposal of $3,500,000 . . . . At this point the settlement may close in Q1 2011." It is clear by the language used in the document alone that it is not a final document that purports to serve as an actual write down of the loan. It contains conditions that have not been met, clearly indicates that the document is a recommendation from

[3] An "allonge" is "a slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." Black's Law Dictionary, (7th ed).

one Citizens employee to others, is not directed to HPC, and contains no signatures of any HPC member.

One of the Citizens Bank signatories, Robert Skrycki, testified at deposition that Skrycki testified that document was an internal bank document used to move forward to resolve a loan. Skrycki testified that he did recommend that the bank accept the payoff as settlement of HPC's loan and that three signatures on the bottom of the document were the only three necessary to approve the settlement document. However, he testified that the document was not sent to HPC. Jerry White also testified that he had not seen the internally prepared document of Citizens Bank until this litigation began in 2011-well after HIG had been assigned the loan. He further testified that he became aware that the note had been sold to another party on November 3, 2010.

A mere expression of intention does not make a binding contract. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). And, unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Id*., quoting *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 626–627; 692 NW2d 388 (2004).

There is no indication that Citizens undertook any unequivocal act to manifest its intent to settle HPC's loan with it for $3.5 million, given that it did not send the document to HPC. And where the offering party received no indication of an acceptance, no contract between the parties could have formed. As a result, there is no evidence that Citizens did, in fact, write down HPC's loan to $3.5 million prior to its assignment of the same to HIG in November 2010 and summary disposition was appropriate in HIG's favor on HPC's counter-complaint.

HPC next contends that HIG should be precluded from enforcing the full amount of the note in any event based upon the principle that a wrongdoer cannot profit from its wrongdoing. HPC relies upon the trial court's finding in one of the consolidated cases that HIG tortiously interfered with HPC's contractual and business relations and that HIG and Shirley Mull usurped HPC's corporate opportunity by obtaining the note from Citizens as the basis for its claim that HIG is a "wrongdoer" where the note is concerned.

The application of a preclusion doctrine represents a question of law that we review de novo. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). We also review de novo whether equitable relief is proper. *Sinicropi v Mazurek*, 279 Mich App 455, 462; 760 NW2d 520 (2008). However, when reviewing a dispositional ruling in an equitable matter, "an appellate court will set aside a trial court's factual findings only if they are clearly erroneous." Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that a mistake has been made. *Id*.

We do not see that a mistake has been made in this instance. It is significant to our resolution that all three cases in this matter were consolidated in the lower court because they all addressed essentially the same parties and germinated from the same core set of facts and events.

In a June 1, 2012, order, the trial court granted summary disposition in one of the cases in favor of plaintiffs HPC and Garfield and against HIG and Shirley Mull only with respect to their claim of tortious interference with contractual and business relations. In a later order entered in all three consolidated cases, the trial court noted that it had already ruled that Shirley Mull had tortiously interfered with HPC's business relationship. It also noted that HPC requested *either* damages in the amount of $2.2 million or equitable relief that would limit HIG to collect only $3.5 million instead of the full $5.7 million stated on the note. It opined that to provide HPC with equitable relief that would allow HIG to enforce the note as to $3.5 million would be the same as re-writing the note and that the only relief that would thus be appropriate would be to order HIG to pay HPC and Garfield $2.2 million in damages which would place them in the same position had no wrongdoing on BSA and Shirley Mulls part occurred. The trial court further declared that the note held by HIG would remain in the amount stated, clearly stating the rights and obligations of HPC and HIG with respect to the note, and thereby doing away with the need for a separate declaratory judgment setting forth the amount HIG could collect under the note.

HPC's claim that HIG should now be limited to recovery of only $3.5 million ignores that it was fully compensated for the tortious interference claim and that to limit HIG's award based upon its illegal conduct would provide for a double recovery for HPC. A judgment was rendered against HIG for its tortious interference to the tune of $2.2 million—the exact amount that HPC seeks to have taken off the note that HIG currently holds. Not only does HPC seek to keep its award of $2.2 million from HIG, it also seeks to owe only $3.5 million on the note. In fashioning a remedy in one of the cases, the trial court took into account the options of either providing HPC with an equitable remedy of enforcing the note for only $3.5 million, or rendering a judgment in HPC's favor and against HIG in the amount of the $2.2 million write off that it would have been entitled to had HIG not obtained the note, thus acknowledging the effect it's decision would have on all of the other cases. The court elected to award the $2.2 million and it did so in an order in which all three consolidated cases were listed in the caption. To allow HPC the double recovery it now seeks would be inequitable under the circumstances.

Moreover, while fraud or illegality may be a defense available to HPC had Citizens engaged in the same in inducing HPC to sign the note in the first place, there is no authority suggesting that HPC, as a party with whom HIG tortiously interfered, may assert fraud or illegality offensively in an attempt to limit the amount of the note between HIG and Citizens. HPC references MCL 440.3203(2), in support of its position which provides:

> (2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

In the comments to MCL 440.3203, comment 2. notes that "a holder in due course that transfers an instrument transfers those rights as a holder in due course to the purchaser. The policy is to assure the holder in due course a free market for the instrument. There is one exception to this rule stated in the concluding clause of subsection (b). A person who is party to fraud or illegality affecting the instrument is not permitted to wash the instrument clean by passing it into the hands of a holder in due course and then repurchasing it." Comment 4. provides:

> The operation of Section 3-203 is illustrated by the following cases. In each case Payee, by fraud, induced Maker to issue a note to Payee. The fraud is a defense to the obligation of Maker to pay the note under Section 3-305(a)(2).
>
> *Case #1*. Payee negotiated the note to X who took as a holder in due course. After the instrument became overdue X negotiated the note to Y who had notice of the fraud. Y succeeds to X's rights as a holder in due course and takes free of Maker's defense of fraud.
>
> *Case #2*. Payee negotiated the note to X who took as a holder in due course. Payee then repurchased the note from X. Payee does not succeed to X's rights as a holder in due course and is subject to Maker's defense of fraud . . . .

The examples illustrate that the UCC provision cited by HPC contemplates application to situations in which the original Payee (here Citizens) engages in fraud or illegality. Moreover, while HIG was deemed to have tortiously interfered with HPC's contractual and business relations, it could be argued that this illegality did not "affect the instrument." MCL 440.3203(2). Citizens was apparently willing to negotiate with HPC and was also willing to negotiate with HIG on the note. The note remained the same amount and was enforceable against whichever party held it.

Finally, as stated in *Orzel by Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995), "[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." (quoting 1A CJS, Actions, § 29, p. 386). Michigan courts have long recognized the existence of the above, known as "the wrongful-conduct rule." *Id*. at 559. This rule does, however, have exceptions. "The mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule. To implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Id*. at 561. Tortious interference is not prohibited under a penal or criminal statute. Thus, the principle cited by HPC for limiting HIG's recovery on its note to $3.5 million is inapplicable. The trial court did not err in dismissing HPC's counter-claim for declaratory relief.

We affirm.

<u>c. Docket no. 315359</u>

HPC and Garfield assert that the operating agreement specified that the members were to treat each other as partners and, under such treatment, HPC's motion for dissolution under the applicable provisions of the Uniform Partnership Act and/or to expel BSA from HPC should have been granted. We disagree.

Pursuant to MCL 450.4102(2)(r) of the LLCA, an "operating agreement" is a written agreement between the members of a limited liability company pertaining to the affairs of the limited liability company and the conduct of its business. As a contract between the members of a limited liability company, the operating agreement is construed according to principles of contract interpretation. "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto–Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Unambiguous contracts are not open to judicial construction and must be enforced as written*."* *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). "If the contract language is clear and unambiguous, its meaning is a question of law." *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). "Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Id*. Issues of contract interpretation are matters of law that are reviewed de novo on appeal. *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

HPC's operating agreement identifies HPC in the very first paragraph as a "Michigan Limited Liability Company" and indicates that the operating agreement is entered into between members of the company. Article I of the operating agreement at 1.1 specifies that the Company "has been organized as a Michigan Limited Liability Company under and pursuant to the Michigan Limited Liability Company Act, being Act No. 23, Public Acts of 1993, (the "Act") by the filing of Articles of Organization ("Articles") with the Department of Consumer & Industry Services of the State of Michigan as required by the Act." HPC is referred to throughout the operating agreement as the "Company" and those who formed the company as "members." There is no confusion that the company was formed, legally, as a limited liability company and under and pursuant to the LLCA.

Plaintiffs direct us to 1.6 in Article one to contend that the Partnership Act should nonetheless govern HPC. That subsection provides:

> Intention for Company. The members have formed the Company as a Limited Liability Company under and pursuant to the Act. The members specifically intend and agree that the Company be treated as a partnership. Members or Managers shall be construed to be a partner in the Company.

The singular statement in the operating agreement as to how the company is to be treated does not negate the form under which the company was organized or the statutes under which it is interpreted. Rather, it is actually consistent with how a limited liability company is handled for certain purposes. As explained in Am Jur 2d, Limited Liability Companies, § 1, a limited liability company is a form of "hybrid business entity that offers all of its members limited liability as if they were shareholders of a corporation but treats the entity and its members as a partnership for tax purposes."

MCL 450.4202(2) provides that "The existence of the limited liability company begins on the effective date of the articles of organization . . . . Filing is conclusive evidence that all conditions precedent required to be performed under this act are fulfilled and that the company is formed under this act . . . ." Plaintiffs do not dispute that the articles of organization for HPC were filed and that the company was thus formed under the LLCA. The LLCA thus governs the agreement, not the Partnership Act. That the members agreed, contractually, that the company should be *treated* as a partnership and each other as partners has no bearing on which statutory scheme governs, particularly when the purpose for which the company should be treated as a partnership was not specified.

The Partnership Act being inapplicable, plaintiffs' arguments on appeal regarding the expulsion of BSA and the dissolution of the company in reliance on said act fail. While the LLCA provides for dissolution upon the certain conditions, see MCL 450.4801 and MCL 450.4802, plaintiffs have not asserted that any of the requisite conditions occurred.

HPC and Garfield next aver that they were entitled to an order compelling BSA to consent to refinance HPC's debt at a lower interest rate. Plaintiffs contend that refinancing would be in the best interest of HPC because it would save money on interest fees, but that BSA would not consent to the refinancing because Shirley Mull, acting as HIG, held a note with a face value of $5.7 million that she hoped to collect from HPC and that the refinancing may extinguish her rights to collect upon said note if she were to succeed on appeal. Plaintiffs point out that Mull had a fiduciary duty to HPC to act in its best interests and by declining to approve of the refinancing, was not acting in HPC's best interests. Because the parties were still engaged in negotiations and most of the matters resolved by the trial court were pending on appeal, it was not unreasonable for the trial court to decline any award of equitable relief concerning a refinance of the existing loan obligation at that time.

We affirm.

<u>d. Docket no. 315544</u>

BSA, HIG and Shirley Mull ("Mull") contend that the trial court erred in granting summary disposition in favor of plaintiffs with respect to their claim of usurpation of corporate opportunity. These defendants specifically argue that the trial court erred in finding that a partnership existed between the members and in finding defendants liable based upon this relationship.

As previously indicated, HPC was undisputedly formed as a limited liability company and the trial court did not find that it was organized as a partnership. The trial court did find, however, that, "[u]nder 1.6 of the operating agreement, the Court is more than satisfied, it's clear, that the members of HPC agree to treat one another as partners. The provision is clear and unambiguous. The Court is going to construe it as written." There was no error in this finding.

A limited liability company is a legal entity that has the attributes of both a partnership and a corporation. Am Jur 2d, Limited Liability Companies, § 2. "Whether the relations among members of a limited liability company resemble a partnership more than a corporation, or vice-versa, is left largely to the discretion of the individual organizers." *Id.* And, pursuant to MCL 450.4102(2)(r), an operating agreement written and signed by the member of a limited liability company is an agreement "pertaining to the affairs of a limited liability company and the conduct of its business." It is thus a contract between the members of the LLC and it is construed according to principles of contract interpretation, which include:

> [I]f contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual

> development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. *[Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (internal citations omitted).]

The operating agreement, or contract, here specifically provided that the members agreed that HPC should be treated like a partnership and that "Members [] shall be construed to be a partner in the Company." The trial court did not err in reading the specific, unambiguous language in the operating agreement as a contractual agreement between the members of HPC that they should be construed ("interpreted," *The American Heritage Dictionary* (4th ed)) as partners. As such the members, or partners, would owe the fiduciary duties applicable to partners.

In *Band v Livonia Assoc*, 176 Mich App 95, 113–114; 439 NW2d 285 (1989) this Court stated:

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. Partners are held to a standard stricter than the morals of the marketplace and their fiduciary duties should be broadly construed, "connoting not mere honesty but the punctilio of honor most sensitive." The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. (citations omitted).

MCL 449.20 imposes a duty on partners as follows: "Partners shall render on demand true and full information of all things affecting the partnership to any partner . . . ." This Court has recognized that MCL 449.20 "has been broadly interpreted as imposing a duty to disclose all known information that is significant and material to the affairs or property of the partnership." *Band*, 176 Mich App at 95. MCL 449.21(1) also provides that every partner is accountable as a fiduciary as follows:

> Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. . . .

Thus, MCL 449.21(1) imposes a fiduciary obligation on partners to the partnership.

In *Rapistan Corp v Michaels*, 203 Mich App 301, 306-307; 511 NW2d 918 (1994), this Court explained the general principles of corporate opportunity, set forth in Delaware law and referred to as the *Guth* Rule and the *Guth* Corollary. The *Guth* Rule provides:

> [I]f there is presented to a corporate officer or a director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in

> which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. [*Id*. at 306, quoting 23 Del Ch at 272-273, 5 A2d 503.]

Rapistan explains that the *Guth* Corollary provides:

> It is true that when a business opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest in it if, of course, the officer or director has not wrongfully embarked the corporation's resources therein. [*Id*. at 306, quoting 23 Del Ch at 271, 5 A 2d 503.]

Notably, as indicated in *Rapistan*'s explanation of the *Guth* rule, the business opportunity must be one in which the corporation has an interest or a reasonable expectancy.

In the instant matter, HPC had a note with Citizens Bank with an outstanding balance of approximately $5.7 million. HPC was in danger of defaulting on the loan when it reached its maturity date and this information was known to Mull by virtue of her position as officer of BSA, one of the few members of HPC. According to Citizens Bank documentation, HPC requested a short sale of the note for $3.5 million. Internal Citizens Bank documentation showed that Citizens had approved the request with the required signatures as of November 2, 2010, although HPC had not been advised of the approval.

On November 2, 2010, Mull, as a member of HIG, submitted an offer to purchase the note from Citizens for $3.5 million. Citizens responded with a letter addressed to Mull that it was willing to sell the note at that price. HPC also provided documentation dated November 3, 2010, from Ranier offering HPC a loan of $3.5 million to refinance the Citizens loan. While not a binding commitment, it serves as further evidence that HPC had "an interest or a reasonable expectancy" that the Citizens loan would be short saled to it at $3.5 million.

While Mull testified at deposition that she has no explanation as to how the amount that she, through HIG, offered to purchase the outstanding note happened to be the exact same amount that HPC offered Citizens to settle the same loan, she also testified that she was aware, as of October 21, 2010, that First Michigan Bank had issued a letter of intent to HPC to offer it a loan with respect to the Citizens debt. An October 11, 2011, letter addressed to both Mull and Jerry White from First Michigan Bank indicates that First Michigan was interested in refinancing HPC's mortgage loan in the amount of $3.4 million with certain guarantees required. Mull also testified that she had received a copy of a letter from Citizens "asking all of the investors to contact them, and see if [they] could get financing made for the loan."[4] Mull thereafter contacted First Michigan and ultimately procured the purchase of the loan through her newly formed company.

This case bears resemblance to *Production Finishing Corp v Shields*, 158 Mich App 479, 485-486; 405 NW2d 171 (1987). That case involved a company, Production Finishing Corporation (PFC), which provided steel polishing services, to the automotive industry. Ford Motor Company performed its own steel polishing in-house and it had long been a goal of PFC to obtain Ford's business if it ever outsourced its steel polishing. Peter Shields, president of PFC and a member of its board of directors, regularly approached Ford with proposals to let PFC perform its polishing. Shields learned that Ford was considering ceasing its in-house polishing and brought the information to the attention to PFC, who requested that Shields investigate the matter. The manager of Ford was against PFC obtaining Ford's work and Shields then asked the manager if Ford would let him do the work in his individual capacity. Met with approval, Shields thereafter incorporated a business for himself for the purpose of providing polishing services for Ford and resigned from PFC. Shields did not tell PFC of any of the Ford conversations until after he resigned. PFC thereafter sued Shields for breach of fiduciary duties and diversion of corporate opportunity. In holding that PFC was entitled to a judgment in its favor as to its claims of both breach of fiduciary duty and appropriation of a corporate opportunity, this Court first noted that "it is widely recognized that the appropriation of a corporate opportunity by an officer or director will constitute an actionable breach of fiduciary duties:" *Id.* at 485.

> A corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain. The rule is that if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake which is, from its nature, in the line of the corporation's business and is of practical advantage to it, and which is one in which the corporation has an interest or a reasonable expectancy, and if, by embracing the opportunity, the self interest of the officer or director will be brought into conflict with that of this corporation, the law will not permit him to seize the opportunity for himself. If he does, the corporation may claim the benefit of the transaction." 18B Am Jur 2d, Corporations, § 1770, pp 623-624; see also 19 CJS § 785, p 161; Anno: Fairness to corporation where "corporate opportunity" is allegedly usurped by officer or director 17 ALR4th 479. [*Id.* at 485-485.]

[4] In the letter, addressed to Jerry White, the Citizens representative actually stated that he "strongly recommend that you and the investors develop a proposal for the bank regarding a possible short sale offer on the property with a deficiency note . . . . I am willing to talk with you or any of the other investors to answer questions regarding the bank's position in dealing with the matured loan."

Shields argued that because Ford refused to deal with PFC, PFC had no opportunity. However, this Court held that "a third party's purported refusal to deal with a corporation will not relieve a fiduciary from liability when he had failed to disclose the refusal to his principal" and that Shields had not disclosed Ford's refusal to PFC. *Id*. at 489-490. This holding is intertwined with the fiduciary duty to disclose relevant information to the corporation.

Similarly, in this case, Citizens had at least conditionally approved a short sale/write down of HPC's loan to $3.5 million. The opportunity was presented to HPC for a refinance through First Michigan for that amount, subject to several conditions. HPC also had the potential to refinance for that amount through Ranier. Mull had contacted First Michigan in the first place through BSA and on behalf of HPC. When she advised First Michigan that the deal for HPC was not going through because she would not pledge her personal assets for that company, Mull decided she would instead pledge her personal assets for a new company formed for the specific purpose of buying the note at the same discounted price. She did not advise HPC, however, in advance of her decision or even until days after the transaction was completed. HPC may have been financially able to undertake the opportunity to refinance the loan at a discounted rate, it would have been of practical advantage to it to do so, and HPC had an interest or a reasonable expectancy to do so. The trial court's finding regarding the usurpation of corporate/business opportunity is sound.

BSA, HIG, and Mull next argue that the trial court erred in determining that they were liable for tortious interference with a business relationship or expectancy where HPC's expectancy was nothing more than wishful thinking and where their actions were motivated by legitimate business reasons. We disagree.

The elements of tortious interference with a business relationship or expectancy are "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Cedroni Association, Inc v Tomblinson, Harburn Associates, Architects & Planners Inc*, 492 Mich 40, 45-46; 821 NW2d 1 (2012). "The expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). And, the interference must be improper, meaning that it lacked justification. *Advocacy Org for Patients & Providers*, 257 Mich App at 383. "The 'improper' interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship." *Id.* "One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another." *N Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84, 93; 268 NW2d 296, 299 (1978), quoting 45 Am Jur 2d, Interference, s 50, p. 322. "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Dalley v Dykema Gossett*, 287 Mich App 296, 324; 788 NW2d 679 (2010).

As addressed above, it cannot be denied that HPC had a valid business relationship with Citizens, and, as demonstrated by the internal Citizens approval of a setoff, Citizens was clearly willing to work with HPC to restructure or refinance the loan at a significant savings to HPC. HPC also had a valid business relationship with First Michigan, as demonstrated by the preliminary loan application dated October 21, 2010, prepared by First Michigan for HPC regarding refinancing of the Citizens loan. HPC also provided documentation showing preliminary approval of a refinancing loan through Ranier. Mull has not denied intentionally obtaining a refinancing loan through First Michigan in the discounted amount in a business formed by her, HIG, for that explicit and singular purpose. To date, Mull, through her newly formed business, HIG, holds a note that she bought at a discounted price in the full face value and for which HPC remains liable. Thus, HPC established the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of BSA through Mull, an intentional interference by BSA through Mull inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to HPC. *Cedroni Association, Inc*, 492 Mich at 45-46.

Defendants nevertheless contend that their actions were motivated by legitimate business reasons-to preserve the viability of HPC. However, defendants could arguably just as easily have preserved the viability of HPC by allowing/aiding HPC in obtaining the refinancing at the reduced rate in its own name rather than obtaining the reduced note for themselves and attempting to enforce the face value of the note against HPC. How, exactly, does Mull, through HIG, enforcing a note for $5.7 million against HPC when HPC could have renegotiated the same note for $3.5 million itself, preserve the viability of HPC? Moreover, "[a] defendant's cry that its actions were motivated by purely business interests cannot, standing alone, operate as a miracle cure making all that was wrong, right." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 96; 443 NW2d 451 (1989). "On the contrary, the defendant's motive is but one of several factors which must be weighed in assessing the propriety of the defendant's actions. Such factors include (1) the nature of the defendant's conduct, (2) the nature of the plaintiff's . . . interest, (3) the social utility of the plaintiff's and the defendant's respective interests, and (4) the proximity of the defendant's conduct to the interference." *Id.* at 96-97. Improper motives include motives that are illegal, unethical or fraudulent. *Dolenga v Aetna Cas & Sur Co*, 185 Mich App 620, 626; 463 NW2d 179 (1990).

Mull's conduct in taking a write down for herself, through a newly formed business in which she (individually or with her son) appears to hold majority interest, rather than allowing the company in which she (together with her son, through BSA) holds a 49% interest, HPC, to take the advantage of the write down for itself, was direct and appears on its face to be unethical. Had she disclosed her intent to HPC, it may appear differently, but, where Mull's only expressed interest was to "preserve" HPC, her claim of legitimacy falls flat.

Finally, BSA, HIG and Mull argue that the trial court erred in entering a judgment in favor of both HPC and Garfield where Garfield was only a member of HPC. We agree.

In its written June 1, 2012, order, the trial court granted summary disposition in favor of plaintiffs, HPC and Garfield, and against BSA and the Mulls with respect to plaintiffs' claims of breach of duty of loyalty and usurpation of corporate opportunity. It further granted summary disposition in favor of plaintiffs HPC and Garfield and against HIG and Shirley Mull with respect to their claim of tortious interference with contractual and business relations. A judgment was ultimately entered on March 14, 2013, in favor of HPC and Garfield and against

HIG, BSA and Shirley Mull, jointly and severally for $2.2 million plus costs and interests. The judgment resolved the last pending claim in all three consolidated cases.

In plaintiffs' claim for usurpation of corporate opportunity, plaintiffs alleged that defendants owed duties to HPC, breached those duties, and usurped HPC's opportunity to restructure its financial relationship with Citizens. The claim of usurpation of corporate opportunity was not alleged to include Garfield and Garfield could not be included in a judgment awarding any amount on such a claim.

Similarly, in their claim for tortious interference, plaintiffs alleged that defendants interfered with HPC's business and contractual relationship with Citizens. Garfield was not alleged to have had a valid business relationship or expectancy with Citizens and defendants were not alleged to have interfered with any relationship involving Garfield. Thus, no judgment could be entered in favor of Garfield and against defendants on a claim for tortious interference.

Plaintiffs did assert, in their claim for breach of duties of loyalty, that defendants breached duties of loyalty to HPC and other members of HPC, including Garfield. However, the allegations in this claim were that BSA had a duty of loyalty "under which it could not divert [HPC's] assets, opportunities, or information for personal gain." Plaintiffs alleged that BSA breached these duties of loyalty by "using confidential information and purchasing the Note and obtaining an assignment of the mortgage through Heritage Investors as stated above." Plaintiffs alleged that they were damaged by these breaches of loyalty "including but not limited to, the loss of the opportunity to retire the Note and mortgage at a discount, and to restructure their deal with Citizens Bank." Clearly, the allegations pertaining to the breach of duty pertain exclusively to the mortgage and note--to which HPC was the only party. Where, as here, the duty of loyalty alleged to have been breached resulted in the only articulable damage as HPC's loss of the opportunity to retire the note and mortgage at a discount, and to restructure their deal with Citizens Bank, Garfield is not entitled to be on the judgment. Garfield has not alleged or established any loss or damage separate from HPC's. The singular judgment awarded the $2.2 million discount that HPC, as the maker of the note and the party negotiating with Citizens for the reduction, would have been entitled to had BSA and Mull not engaged in tortious conduct. Garfield, as a member of HPC, was not "damaged" in any manner different from any other member and did not suffer a loss of $2.2 million as a result of BSA's and the Mulls' actions.

We affirm the trial court summary disposition rulings, but remand for an amendment to the judgment to reflect that the judgment is in favor of Heritage Place Condominiums, LLC only. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto