

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

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

Plaintiffs/Counter-Defendants,

vs.

Case No. 2011-000291-CZ

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

Defendants/Counter-Plaintiffs/
Third-Party Plaintiffs,

vs.

ANTHONY MARROCCO and
ANTHONY FANELLI,

Third-Party Defendants.

OPINION AND ORDER

Plaintiffs/Counter-Defendants (“Plaintiffs”) have filed a motion for summary disposition pursuant to MCR 2.116(C)(5). Defendants/Counter-Plaintiffs (“Defendants”) have filed a response and request that the motion be denied. Plaintiffs have also filed a reply in support of their position. In addition, Defendants have filed a supplemental brief in support of their position.

Factual and Procedural History

On April 17, 2014, the Michigan Court of Appeals entered its opinion in connection with the parties’ appeals in this matter. See *Jode Investments, LLC v Burning Tree Properties, LLC*,

unpublished per curium opinion of the Court of Appeals, decided April 17, 2014, (Docket No. 310957). In its opinion, the Court of Appeals remanded this matter and ordered this Court to conduct a hearing to determine the value of certain personal property, and an earlier tax refund, and ultimately order Plaintiffs to pay the value of the items to Burning Tree Investors, LLC's ("BTI") members in proportion with their shares under the membership agreement. *Id.* at 14.

On July 25, 2014, Plaintiffs filed their motion for summary disposition. One ground Plaintiffs raised as a potential basis for summary disposition is that Simone Mauro and Salvatore Dimercurio lack standing to pursue BTI's claims. Defendants have since filed a response and request that the motion be denied. On September 22, 2014, the Court held a hearing in connection with motion and took the portion of the motion related to standing under advisement and permitted Defendants to file a supplemental brief in connection with the issue. Defendants have since filed a supplemental brief as invited by the Court.

Standards of Review

MCR 2.116(C)(5) provides that summary disposition is appropriate if the party asserting the claim lacks the legal capacity to sue. In reviewing such a motion, a court must consider the affidavits, together with the pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5); *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409, 413; 478 NW2d 693 (1991).

Arguments and Analysis

In support of its motion, Plaintiffs cite to a portion of the Court of Appeals' decision in which it noted that "it is unclear whether Mauro or Dimercurio have the authority to act on the Burning Tree entities behalf or to cause those entities to continue prosecuting their claims should we reinstate the entities claims." *See* April 17, 2014 Opinion, at 14. However, despite the

potential question regarding standing, the Court of Appeals declined to address the issue and instead elected to order this Court to hold a hearing regarding the value of certain personal property and a tax return and to order Plaintiffs to remit the value of those assets to BTI's members.

In their instant motion, Plaintiffs request that this Court grant them summary disposition rather than follow the procedure set forth by the Court of Appeals. However, “[a] lower court may not take action on remand that is inconsistent with the judgment of the appellate court.” *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). In this matter, the Court is bound to follow the mandate of the Court of Appeals notwithstanding the fact that a question of standing exists. If this Court were to address the merits of Plaintiffs’ argument and ultimately grant them summary disposition it would have an effect which is inconsistent with the Court of Appeals’ mandate in this case. Consequently, the Court is convinced that Plaintiffs’ motion for summary disposition on the basis of standing must be denied.

Conclusion

For the reasons set forth above, the portion of Plaintiff’s motion for summary disposition based on standing pursuant to MCR 2.116(C)(5) is DENIED. Pursuant to MCR 2.602(A)(3), this matter remains OPEN.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: October 9, 2014

JCF/sr

Cc: Robert W. Kirk, Attorney at Law
Cindy Rhodes Victor, Attorney at Law