CITATION: RBC v. 2531961 Ontario Inc. et al., 2024 ONSC 1272
COURT FILE NO.: CV-23-00704556-00CL
DATE: 20240229

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: Royal Bank of Canada, Applicant

AND:

2531961 Ontario Inc., TNT International Leasing Inc., 24HR. Kitchens Inc., and Melania Augustin, Respondents

BEFORE: Peter J. Osborne J.

COUNSEL: *Sanjeev Mitra and Samantha Hans,* for the Applicant

Howard Manis, for the Respondents

George Benchetrit, for the Receiver, Fuller Landau Group Inc.

HEARD: February 29, 2024

ENDORSEMENT

1. The Applicant, the Royal Bank of Canada, (the "Applicant" or "RBC") seeks the appointment of a Receiver pursuant to s. 243 of the *Bankruptcy and Insolvency Act* and s. 101 of the *Courts of Justice Act,* of the assets, undertakings and properties of the Respondents TNT International Leasing Inc. ("TNT"), 24Hr. Kitchens Inc. ("Kitchens") and 2531961 Ontario Inc. ("253") including the real property located at 2135 Lawrence Ave. E., Scarborough, ON and the real property registered on title to Melania Agustin at 2139 Lawrence Ave. E., Scarborough, ON.

2. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

3. RBC relies upon the Affidavit of Tro Derbedrossian sworn August 23, 2023 together with exhibits thereto and his Supplementary Affidavit sworn September 22, 2023, together with exhibits thereto, the consent of The Fuller Landau Group Inc. to act as Receiver, and the Report of the Monitor dated February 22, 2024.

4. The Respondents rely upon the affidavit of Mr. Stephen Smith affirmed September 14, 2023 together with exhibits thereto and his supplementary affidavit affirmed September 29, 2023, along with a letter from a law firm uploaded to CaseLines yesterday although not as part of any sworn or affirmed affidavit or motion record. Mr. Smith is the General Manager of all of the respondent corporations.

5. Almost all of the relevant facts are not in dispute and are not contested. Indeed, the position of the Debtor is that it does not contest the contractual right of the Applicant to appoint a receiver in the event of default under the security documents, and that an event of default has occurred.

6. The Respondents submit, however, that they should be given one more additional extension and a brief period of time until April 1, 2024, since there is a financing transaction at hand that is expected to close on March 29, 2024 and which, it is submitted, would yield sufficient funds to pay out RBC. They make this submission notwithstanding the failure to file any evidence to that effect.

7. RBC seeks the appointment of a Receiver today notwithstanding the possibility of a new transaction, given the chronology of this matter and particularly the repeated indulgences and forbearances granted to the Respondents that have not resulted in any transaction.

8. The test for the appointment of a receiver pursuant to s. 243 of the *BIA* or s. 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

9. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

10. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

11. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 43-44.

12. As observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999) listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25):

a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

c. the nature of the property;

d. the apprehended or actual waste of the debtor's assets;

e. the preservation and protection of the property pending judicial resolution;

f. the balance of convenience to the parties;

g. the fact that the creditor has a right to appointment under the loan documentation;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

13. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).

14. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007 at paras. 24, 28-29.

15. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

16. In my view, it is, for the following reasons.

17. RBC commenced this Application for the appointment of a receiver almost a year ago on August 24, 2023. It first came before me on November 2, 2023 for a case conference at which time the Respondents sought an adjournment of the Application which was then scheduled to be heard on the merits on November 20, 2023. No responding materials had been filed by the Respondents. The Applicant was prepared to agree to an adjournment given that counsel were getting up to speed, but requested as a term thereof that arrears of the payments that had not been made since August be paid in the approximate amount of $300,000. The Respondents submitted that they lacked the funds to do that. I adjourned the matter for a week until November 10, 2023 without the requirement or term of repayment in the interim.

18. The case conference continued before me on November 10, 2023 as scheduled and new counsel for the Respondents (who is counsel today) appeared and requested an adjournment to get up to speed and file materials. I adjourned the matter to yet a further case conference on November 17, 2023 and vacated the hearing of the receivership Application itself that had been previously scheduled for November 20, 2023.

19. When the matter came before me the third time on November 17, 2023, the Respondents sought yet a further adjournment that the Respondents expected to have a replacement financing commitment in place imminently which would pay out RBC.

20. RBC consented again to an adjournment but on terms that a monitor be put in place in the interim period to provide for some visibility and transparency into the business of the debtors in order that RBC could determine whether there was any further erosion to its security. I appointed the Monitor, observing in my endorsement of that date that no payments to RBC had been made since August, none were offered even then, and the carrying costs were over $70,000 per month. The Respondents submitted that they were very concerned about the Monitor contacting potential external lenders or investors and I was clear that the Monitor would not do so.

21. The receivership Application was adjourned to today's date, specifically selected and agreed to by the parties because the proposed financing was expected to close before then, as advised by the Respondents. However, the financing did not materialize.

22. Accordingly, RBC seeks the appointment of the Receiver today, having lost all confidence in the Respondents.

23. In the Monitor's Report dated February 22, 2024, the Monitor sets out, among other things, its repeated requests for information and documents from the Respondents together with updates on their refinancing efforts that were made in December 2023 and January 2024. The Respondents have not been cooperative, forthcoming or transparent. Most of the requests of the Monitor, which

are appended to the report and were reasonable and consistent with the execution of its mandate, were not provided. The Respondents have simply failed to respond in any meaningful way.

24. Yesterday, the Respondents uploaded to CaseLines a letter from a real estate solicitor for the Respondents addressed to counsel for the Respondents in this matter, purporting to confirm that counsel writing the letter had received confirmation from yet another law firm, Denton's Canada, that he (the real estate solicitor) would be in funds sufficient to pay out the Bank on or before March 29, 2024.

25. Even if the letter were considered to be proper evidence, no particulars whatsoever were provided as to this financing, such as to allow any consideration by either the Monitor or the Applicant as to the likelihood that the transaction would close, or even what the transaction was (including the identity of a lender) or any relevant conditionality. I pause to observe that the letter did not contain any express commitment to in fact repay RBC on or before that date.

26. Based on this, however, counsel for the Respondent urged the court to either dismiss the Application or in the alternative, make an order appointing the Receiver but suspending its effect until April 1, 2024.

27. Mr. Smith was present in court today and requested the opportunity to speak following on the submissions of counsel for the Respondents and I permitted him to do so. He advised the court that the financing commitment was unconditional and irrevocable, that the Respondents had already paid $500,000 in commitment fees (the source for which was unclear, the Respondents having advised the court in November 2023 they were unable to pay even $300,000 in arrears to the bank), but that the transaction could not close until March 29, 2024 because the lenders were located in Germany and one of the principals who was currently travelling in the United States wished to come to Canada for the closing of the financing transaction. This would take approximately one week and he was not available until mid-March 2024. The commitment letter or loan documentation had not been provided to either the Monitor or to RBC.

28. I invited the Respondents, through counsel, to consider whether some greater transparency might assist and I stood down the matter for one hour to allow them the opportunity to consider whether they would provide the documents to the Monitor and RBC and to allow all of the parties to have a discussion outside court.

29. Upon resuming one hour later, a commitment letter had been provided to counsel to the Monitor, but not to RBC or its counsel. The Respondents refused to provide the commitment letter to RBC, submitting that such would interfere with their relationship with the Lenders. The document was provided to counsel for the Monitor with specific instructions that it was not to be shared with RBC.

30. Counsel for the Monitor advised that, having had only a very brief opportunity to review the commitment letter, it appeared to be subject to a number of material conditions and that there was no evidence of an irrevocable commitment to fund on March 29, 2024 or at all. Again, that

commitment letter is not in the record and the Respondents declined to file it or provide it to the Applicant even today. Counsel for the Monitor observe that the commitment letter was dated January 4, 2024 so is apparently already almost two months old, although the existence of the letter was disclosed only yesterday.

31. It is also not clear to me why the transaction requires the personal attendance of the principal of the lender in Toronto for a week, particularly if the funds are already in the trust account of counsel (and there is no evidence of that either).

32. The Respondents submitted that if the Receiver were appointed today, there was a risk that the lenders might be nervous and back away from the transaction. Again, there is no evidence in the record to this effect and on its face, such would be incongruent with an irrevocable commitment to fund as there is said to be, in any event. In response to my inquiry, counsel for the Respondents confirmed that the lenders were aware that there was a court appearance today.

33. I am satisfied that it is not only just or convenient, but in fact just *and* convenient to appoint a Receiver today. The Respondents do not contest the indebted which exceeds $12 million, the fact that there is an outstanding garnishment notice issued by the Canada Revenue Agency, the demands or delivery of the section 244 *BIA* notices.

34. RBC has not acted rashly or insisted upon the appointment of a Receiver on a rushed basis. It commenced this Application last August 2023. There have still been no repayments whatsoever since then. RBC consented to three adjournments, the last one on condition that the Monitor be appointed. The Respondents have not cooperated with the Monitor in terms of providing information and documents. As stated above, they still will not provide what is said to be this new commitment letter to RBC, and disclosed it to the Monitor, without any supporting or backup documentation, only today, notwithstanding that it is approximately two months old. Simply put, the Respondents are not making any efforts to assist the court officer or, frankly, help themselves. One would have expected that if the financing were irrevocable and real, the Respondents would be motivated in their own self-interest to disclose it promptly to the Applicant and the court officer.

35. For all of these reasons, Fuller Landau is appointed Receiver on the terms of the order I have signed today. The order is consistent with the Model Order of the Commercial List, and counsel for the Respondents confirmed that there were no issues with respect to the terms of the order.

36. As I advised the Respondents at the hearing today, the Receiver can, of course, consider the potential financing apparently available within one month, as it sees fit. Realistically, the property (the main asset of the Respondents) will not be sold within the next month in any event. If the proposed financing transaction is real and materializes such that it would pay out all indebtedness of the Respondents in full together with costs and interest, it may be that the receivership can be limited in scope of activities and short in duration. Simply put, RBC would, I expect, be pleased to consent to the discharge of the Receiver upon being paid out in full.

37. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Osborne J.