COURT OF APPEAL FOR ONTARIO

CITATION: Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 261
DATE: 20240409
DOCKET: COA-23-CV-1357

Harvison Young, Coroza and Gomery JJ.A.

BETWEEN

Peakhill Capital Inc.

Applicant (Respondent)

and

1000093910 Ontario Inc.

Respondent (Appellant)

and

2257004 Ontario Inc.

Third Party (Respondent)

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, as amended, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, as amended

Gary M. Caplan and Aram Simovonian, for the appellant

Richard Swan, Sean Zweig and Aiden Nelms, for the respondent, KSV Restructuring Inc.

Kevin Sherkin and Mitchell Lightowler, for the third party/respondent, 2257004 Ontario Inc.

Heard: April 2, 2024

On appeal from the order of Justice Mary E. Vallee of the Superior Court of Justice, dated December 20, 2023.

REASONS FOR DECISION

[1] 1000093910 Ontario Inc., a company in receivership, appeals from the motion judge's decision declining to hear a cross-motion it sought to present on December 20, 2023. Through the cross-motion, the appellant sought orders to vary the receivership order and to enforce an agreement of purchase and sale (the "September APS") of its primary asset, a piece of real estate in Vaughan, Ontario, with the third party 2557004 Ontario Inc. ("255 Ontario"). The appellant further contends that the motion judge erred in granting, in the same decision, the receiver's proposal for a public auction of the property, subject to a "stalking horse" agreement with 255 Ontario whereby it agreed to pay a minimum price under a second APS.

[2] After hearing the parties' arguments, the court advised that the appeal was dismissed, with reasons to follow. These are those reasons.

[3] The motion judge's decision not to hear the cross-motion was an exercise of her discretion. It should not be overturned unless she erred in law, misapprehended the evidence in a material way, or was clearly wrong: *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 MCBA 46, at para. 12. Decisions by judges supervising insolvency and restructuring proceedings are, in particular, entitled to considerable defence: *Re Harmon International Industries Inc.*, 2020 SKCA 95, at para. 40. This court will intervene only if the motion judge committed a demonstrable error: *Marchant Realty Partners Inc. v.*

2407553 Ontario Inc., 2021 ONCA 375, at para. 18, citing *Ravelston Corporation Limited (Re)*, 2007 ONCA 135, at para. 3.

[4] The appellant has not established that the motion judge erred in refusing to hear the cross-motion. Both the receivership order and the *Rules of Civil Procedure* required the appellant to give seven days notice of its cross-motion. Prior to the hearing date, the receiver repeatedly told the appellant's lawyers that it could not consider any motion that it might bring until materials had been served. The appellant served its notice of cross-motion and supporting materials minutes before 4:00 p.m. on the eve of the hearing date set for the receiver's motion. As the motion judge observed, the receiver did not have any opportunity to respond to the cross-motion nor had the court had time to read the materials. In addition, the hearing list that day was already full.

[5] The motion judge moreover found that the cross-motion had little chance of success:

> [The cross-motion] concerns a different real estate transaction entered into six days before the receivership order. The closing date is tomorrow. The receiver states that it could not close this transaction because of certain terms that it contains. Another agreement of purchase and sale entered into by the receiver and 2557004 Ontario Inc. dated November 13, 2023, referred to as the "stalking horse agreement", is now in play. The receiver's motion concerns this transaction. The purchaser states that it would refuse to close the earlier transaction, which it considers null and void.

[6] The appellant has not identified any error in the motion judge's findings, which are amply supported on the record. Indeed, 255 Ontario sought and obtained leave to intervene in this appeal to confirm that it had refused to consent to changes to the September APS required following the receivership order and that, in its view, "the deal is dead".

[7] The appellant contends that the motion judge should have adjourned the hearing of the cross-motion to give the receiver and any other stakeholders time to respond. The appellant did not, however, initially seek an adjournment at the December 20 hearing. Its counsel instead insisted that the cross-motion had to be heard that day, as the September APS would expire the next day if the purchase did not close. The hearing, which was set for less than one hour, consumed over two and a half hours of the motion judge's time. When the motion judge verbally advised the appellant's counsel that she would not be adjudicating the cross-motion, he then asked for the first time for an adjournment, which was refused.

[8] In the circumstances, we do not accept the appellant's submission that it was unjustly deprived of a right to be heard.

[9] The appellant has likewise not shown that the motion judge erred in principle or exercised her discretion improperly in granting the receiver's motion to engage in the sales process it proposed. The appellant argues that the motion judge's

granting of the receiver's motion is inconsistent with the principles in *Royal Bank of Canada v. Soundair Corp.,* 1991 CanLII 2727 (ONCA), alleging that there are steps that the receiver could and should have taken prior to the hearing date that might have permitted enforcement of the original APS.

[10] The receiver's report proposed a sale process involving public marketing and an auction process undergirded by a stalking horse agreement. Its factum in support of its motion identified the criteria for assessing the proposed sales process, including the *Soundair* principles. The receiver directed the motion judge to evidence that the proposed process was fair and transparent; that it promoted integrity and commercial efficacy; and that it would optimize the chances of securing the best price for the assets. It pointed out that, in *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, at para. 7, a stalking horse agreement may be considered an element of a reasonable sales process.

[11] In the circumstances, we do not find that the motion judge made any error in principle. We assume that the motion judge was aware of the law and the evidence, even if she did not refer to them in her endorsement. We see no reason why we should not defer to her decision: *Canrock Ventures LLC v. Ambercore Software Inc.*, 2011 ONCA 414, 78 C.B.R. (5th) 97, at para. 4.

[12] The appeal is therefore dismissed. The appellant is ordered to pay costs to the receiver of $25,000 inclusive on the appeal and the motion for directions and stay before Simmons J., as agreed by the parties. No costs are awarded on 255 Ontario's motion to intervene.

"A. Harvison Young J.A."
"S. Coroza J.A."
"S. Gomery J.A."