

CITATION: First Source Financial Management v. Chacon Strawberry Fields Inc., 2024
ONSC 7229

COURT FILE NO.: CV-24-00717742-00CL

DATE: 20241223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

AND:

CHACON STRAWBERYY FIELDS INC. and SURINDER KAUR CHAHAL

Respondents

BEFORE: Justice Jana Steele

COUNSEL: *Steven L. Graff and Adrienne Ho*, for the Receiver, The Fuller Landau Group Inc.

Wolfgang Kaufmann and Tajinder Kaur Sivia, for the Respondents

Ryan Shah, for the Applicant, First Source Financial Management Inc.

Jitseh Bhalla, for the Second Lender, 1794523 Ontario Inc.

Arnab Bose, for the third-party, Ramesh Ahluwalia

HEARD: December 20, 2024

ENDORSEMENT

Overview

[1] This is a motion brought by The Fuller Landau Group Inc., the Receiver, for the approval of a sale process and transaction, an approval and vesting order, and an ancillary order approving the Receiver's report, fees and disbursements, and a distribution to the first secured lender, among other things.

[2] The contentious issues before the court relate to whether last ditch attempts to alter the sale process by an unsuccessful bidder, Ramesh Ahluwalia, and by the respondents should be permitted.

[3] The respondents seek access to certain sealed confidential documents and an adjournment of three weeks. The respondents say they want the time to secure financing.

[4] Mr. Ahluwalia asks that his late offer be considered when the court determines whether to approve the agreement of purchase and sale with the Purchaser.

[5] For the reasons set out below the Receiver's motion is granted.

Background

[6] The application to appoint the Receiver was filed by First Source Financial Management Inc. ("First Source") on or about April 3, 2024. However, due to a forbearance agreement that was reached, the Receiver was not appointed until on or about July 19, 2024. At that time, the Receiver was appointed as receiver and manager of the lands and premises municipally known as 12550, 12560 and 12570 Kennedy Road, Caledon Ontario, (the "Real Property") owned by Chacon Strawberry Fields Inc. (the "Debtor").

[7] The Debtor is a company incorporated pursuant to the laws of Ontario.

[8] The Debtor owns and operates a mixed-use retail plaza called "Strawberry Fields Plaza," which is situated on the Real Property, a 2.32-acre piece of land. The plaza is fully leased to 15 tenants.

[9] Upon being appointed and determining the nature of the property and other preliminary steps, the Receiver undertook a process to engage a real estate broker to market and sell the Real Property. The Receiver met with five real estate brokerages, each of which were asked to provide a marketing proposal for the Real Property. All five brokerages submitted marketing proposals. The Receiver selected Lennard Commercial Realty, Brokerage ("Lennard") based on its specific expertise with properties similar to the Real Property and prior successful experience with sales in receiverships.

[10] The Receiver entered into the listing agreement with Lennard on or about September 17, 2024.

[11] Lennard listed the property on September 23, 2024. Lennard took numerous other marketing steps, resulting in 127 parties executing non-disclosure agreements to access the data room.

[12] The initial bid deadline was set at November 6, 2024, at 3 p.m. Eleven offers were submitted by the deadline and three other offers were submitted after the deadline, including Mr. Ahluwalia's bid. The top six bidders (all of which had submitted their bids by the deadline) were invited to submit another bid – Mr. Ahluwalia was not asked to re-submit because he was not among the top six bidders.

[13] The successful bidder (the "Purchaser") submitted its bid by the initial bid deadline and was among the top six asked to re-submit a bid.

[14] The second bid deadline was set at November 12, 2024, at 3 pm. Five of the six bidders who were invited to re-submit, including the Purchaser, did so in accordance with the deadline. Two other bidders who were not invited to re-submit, including Mr. Ahluwalia, made another bid.

[15] The Purchaser's bid was accepted by the Receiver on November 13, 2024. The Purchaser's bid was the highest bid delivered by the second bid deadline. The Purchaser paid the required deposit to the Receiver.

[16] On November 14, 2024, two days after the second bid deadline, and after the Receiver had accepted the Purchaser's bid, Mr. Ahluwalia made another bid.

[17] Among other things, the Receiver is asking the court to approve the transaction with the Purchaser (the "Sale Transaction"). The Sale Transaction is targeted to close on January 13, 2025.

[18] The applicant, First Source, is the first ranking secured creditor on the Real Property.

Analysis

Should the Court adjourn the proceedings to January 9, 2025, as requested by the respondents?

[19] The respondents ask the court to adjourn the Receiver's motion to January 9, 2025 to give the respondents the opportunity to redeem. Tied in with this request, is the respondents' request that the Receiver be required to provide the respondents with access to certain sealed documents, including the sale price the Purchaser is paying pursuant to the Sale Transaction, the adjustments to the sale price, and a draft payout statement to show what each creditor is expected to receive (the "Transaction Information").

[20] The Court of Appeal in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, at para. 9, affirmed that the motions judge had not erred in applying the following principles to guide her consideration of whether the debtor should be granted leave to redeem:

- a. In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
- b. Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and
- c. In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.

[21] Unlike *Rose-Isli*, in the instant case the sales process was not pre-approved by the court. The Receiver asks the court on this motion to approve the sales process that it undertook. As set out below, I am satisfied that the *Soundair* principles have been satisfied and the sales process should be approved.

[22] The respondents' evidence is that they have obtained a financing offer from Gurpreet Kainth of K.P. Financial Group for \$23.5 million (the "Financing Offer"). Further, the respondents state that their redemption plan, assuming the financing is approved, is to pay the following:

- a. First Source will be paid in full,
- b. The second mortgagee will receive 90% of the amount owing,
- c. All HST, realty taxes, Receiver's costs and real estate break fees will be satisfied, and
- d. Subsequent mortgagees will be compensated, with specific amounts allocated to obtain necessary postponements.

[23] Essentially the respondents are asking the court for more time to put together a proposal that they say will be better than the Sale Transaction. The respondents are not saying that they have "cash in hand" and can redeem the outstanding mortgages on the property. The respondents seek the confidential Transaction Information so they can ensure that their proposal is better than the deal reached pursuant to the Sale Transaction.

[24] The Receiver objects to any adjournment. As the Receiver points out an adjournment will result in a delay and will not change the outcome. Setting aside whether the Financing Offer may come to fruition, the proposed \$23.5 million in financing is not enough for the Debtor to redeem the outstanding mortgages on the property. The Receiver states that the Debtor would need more than \$32.8 million in financing to pay out the mortgagees in full.

[25] The jurisprudence provides for a balancing act that the court must engage in when faced with a debtor who wants to redeem. After a receiver has gone through an exhaustive bidding process, including the costs associated therewith, to find a purchaser, the court may still permit a last-minute redemption where the debtor comes with a cheque in hand: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 4000 at para. 7-9. Further, in the exceptional circumstances where the court may permit a last-minute redemption, the cheque in hand must be sufficient to cover all the outstanding obligations: *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635, at para. 97.

[26] There is no cheque in hand in the instant case.

[27] Further, a short adjournment would not alter the situation such that the debtors would have sufficient funds to redeem the mortgages. As noted above, the Financing Offer, even if it comes to fruition, would not provide sufficient funds for the debtor to redeem all the outstanding mortgages on the Real Property. Instead, the debtors want to obtain information and financing so that they can make an offer above the sale price in the Sale Transaction. As noted by the Receiver, this is one of the reasons the purchase price is kept confidential in a situation like this until the transaction closes. Otherwise, the debtor may use the information to try to obtain financing just to beat the purchase price and attempt to negotiate with subsequent mortgagees. This would thwart the entire process.

[28] As noted by the court in *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930, 55 C.B.R. (5th) 271, at para. 22:

[...] Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[29] The request for an adjournment is denied.

Should the Court approve the Sale Agreement and the Sale Transaction with the Purchaser?

[30] The Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727, 4 O.R. (3d) 1 set out the factors for the court to consider when determining whether a proposed sale should be approved:

- a. Whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
- b. The efficacy and integrity of the process by which offers were obtained;
- c. Whether there has been unfairness in the working out of the process; and,
- d. The interest of all parties.

[31] I am satisfied that the *Soundair* factors have been met.

[32] The Receiver first sought proposals for the brokerage firm to market the property. After receiving and considering five marketing proposals, the Receiver selected Lennard, based on its expertise and experience. The activities taken to market the Real Property included listing the property on MLS, sending weekly eblasts with relevant details to prospective purchasers and agents, featuring the Real Property on the Lennard Commercial website and LinkedIn, and advertising the Real Property on three occasions in the *Globe & Mail's* Report on Business section. As evidenced by the fact that 127 parties executed NDAs and were granted access to the data room, the Real Property received wide market exposure. As noted above, 14 bidders submitted offers on the first round and seven bidders submitted offers on the second round. The Purchaser's offer was the highest and best offer received in the bidding process and the agreement of purchase and sale does not contain any material conditions. The Real Property is being bought by the Purchaser on an "as is where is" basis. I further note that the Sale Transaction has the support of the Debtor's first ranking secured creditor.

[33] Mr. Ahluwalia asks the court to consider his November 14, 2024 offer when determining whether to approve the sale process and the proposed Sale Transaction. As noted above, Mr. Ahluwalia missed the first bid deadline and submitted a bid significantly below the top six bidders who were asked to re-submit. Mr. Ahluwalia submitted a bid in the second round of bidding in any event, which the Receiver did consider. However, there were at least three parties who had higher bids than Mr. Ahluwalia in the second round. Accordingly, the Receiver accepted the

Purchaser's offer. Mr. Ahluwalia submitted his November 14, 2024 offer after the Receiver had accepted the Purchaser's offer.

[34] A disappointed bidder does not generally have standing to challenge a motion to approve a sale to another bidder: *Re Consumer Packaging Inc.*, 2001 CanLII 6708, at para. 7.

[35] In any event, considering Mr. Ahluwalia's bid after the bid deadline passed and the Purchaser's offer was accepted would thwart the integrity of the sales process. If a party could swoop in at the last minute and submit a bully bid, after a fair and thorough sales process has been run and the highest and best offer accepted, complete uncertainty would be created.

[36] As noted by the Receiver, courts will generally defer to a court-appointed receiver's expertise in reviewing a sale and will not second-guess their recommendation absent exceptional circumstances: *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 15.

[37] I am satisfied that the sale agreement and Sale Transaction with the Purchaser should be approved.

Should the Approval and Vesting Order be granted?

[38] The Receiver seeks an approval and vesting order in respect of the Real Property sale to the Purchaser.

[39] Under section 100 of the *Courts of Justice Act* the court has the power to grant approval and vesting orders:

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[40] The proposed vesting order will extinguish the registered charges on the Real Property listed out in paragraphs 30 and 31 of the Receiver's factum.

[41] Vesting orders are routinely granted by this court: *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para. 106.

[42] I agree with the Receiver's submission that it is appropriate for the court to grant the requested AVO, granting the Real Property to the Purchaser free and clear of the claims and encumbrances set out at paras. 30 and 31 of the Receiver's factum (other than Permitted Encumbrances). The applicant, First Source, is supportive of the transaction being put forward. Further, as set out above, the sale was conducted in a manner that meets the *Soundair* principles.

Should the Interim Distribution be approved?

[43] The Receiver seeks court approval to distribute \$16 million to First Source following the completion of the Transaction. The Receiver seeks authorization to make further payments to First Source from available funds up to the amount of First Source's debt, once the Receiver has determined the amounts due in respect of certain priority claims.

[44] The court routinely grants orders authorizing interim distributions in insolvency proceedings: *e.g.*, *Ontario Securities Commission v. Bridging Income Fund L.P.*, 2022 ONSC 4472, at paras. 8 and 12.

[45] In determining whether it is appropriate to authorize an interim distribution the court may consider: (a) whether the proposed recipient's security is valid and enforceable; (b) whether the amounts that are owed to the proposed recipient exceed the proposed interim distribution amount; and (c) whether the proposed interim distribution would result in interest savings: *Re Abitibiwater Inc.*, 2009 QCCS 6461 at para. 75.

[46] In the instant case, First Source has a valid and enforceable security interest in respect of the collateral covered by its security. Counsel to the Receiver provided the Receiver with a security opinion, subject to the usual qualifications, assumptions and disclaimers, which opinion confirms the validity of the charge granted in favour of First Source on the Real Property. The amount of First Source's indebtedness as at October 1, 2024 was \$17,752,258.56. The proposed distribution of \$16 million is less than the amount outstanding on the loan. By repaying a portion of the loan, there will be interest savings.

[47] I am satisfied that the proposed interim distribution should be approved.

Should the Court grant the Sealing Order?

[48] The Receiver seeks a sealing order with respect to the Confidential Appendices of the Third Report. The Confidential Appendices contain information regarding the purchase price for the transaction and information regarding the sales process, including other offers submitted.

[49] Subsection 137(2) of the *Courts of Justice Act* provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.

[50] For the court to grant a sealing order, the party requesting the order must establish that:

- a. Court openness poses a serious risk to an important public interest;
- b. The order sought is necessary to prevent this serious risk to the interest because reasonably alternative measures will not prevent this risk; and
- c. As a matter of proportionality, the benefits of the sealing order outweigh its negative effects:

Sherman Estate v. Donovan, 2021 SCC 25, at para. 38.

[51] The requested sealing order is limited in scope. The proposed sealing order balances the open court principle and legitimate commercial requirements for confidentiality in the circumstances. In my view, the benefits of the requested sealing order outweigh the negative impact on the "open court" principle. The Confidential Appendices contain commercially sensitive information that could have a detrimental impact on a future sales process, should one be required if the transaction does not close. No stakeholder will be materially prejudiced by the

sealing order, which applies to only a limited amount of information. As noted by the Receiver, there is not a reasonable alternative to a sealing order.

[52] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 53, requirements, as modified in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38.

[53] I am satisfied that the Confidential Appendices should be sealed pending further order of this court.

Should the Court grant the other relief sought by the Receiver?

[54] There was no opposition to the other relief sought by the Receiver, specifically, the approval of the Second Report, Third Report, and Supplemental Third Report, and the approval of the fees and disbursements of the Receiver and its counsel.

[55] As noted in *Re Target Canada Co.*, 2015 ONSC 7574, at para. 2, court appointed officers routinely seek court approval of their reports and activities, which relief is routinely granted where there is no opposition. The court in *Target* also recognized, at para. 22, that there are “good policy and practical reasons” for the court to provide such approval. While *Target* was a case involving court approval of Monitor’s reports and activities under a *Companies’ Creditors Arrangement Act* proceeding, subsequent cases have confirmed that the considerations apply equally to the reports and activities of a receiver: *Re Hangfeng Evergreen Inc.*, 2017 ONSC 7161 at para. 15.

[56] I am satisfied that the activities of the Receiver set out in the Second Report, Third Report, and Supplemental Third Report were necessary and undertaken in good faith in accordance with the order appointing the Receiver and should be approved.

[57] Having reviewed the fee affidavits and considered the non-exhaustive factors in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para. 33, I am satisfied that the fees and disbursements of the Receiver and its counsel for the applicable billing period are fair and reasonable and should be approved.

[58] Orders attached.

J. Steele J.

Released: December 23, 2024