CITATION: *2607087 Ontario Limited v. 2654993 Ontario Ltd. et al.*, 2024 ONSC 4595
COURT FILE NO.: CV-24-00721511-00CL
DATE: 20240716

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: *2607087 Ontario Limited*, Applicant

AND:

2654993 Ontario Ltd. et al., Respondents

BEFORE: Peter J. Osborne J.

COUNSEL: *Richard MacGregor and Gina Rhodes*, for the Applicant

Sara J. Erskine, for the Respondents

Eric Golden, for Romspen Investment Corporation and Horseshoe Valley Developments (2018) Inc.

Brahm Rosen, Court Appointed Receiver

HEARD: July 16, 2024

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ENDORSEMENT

1. 2607087 Ontario Limited (the "Applicant" or the "Mortgagee") seeks an order appointing Rosen Goldberg Inc. as Receiver of the real property of the Respondents (the "Debtors") known as 1101 Horseshoe Valley Rd. W., Oro-Medonte, Ontario (the "Property"), and granting corresponding Charges over the Property in favour of the proposed Receiver and its counsel.

2. The Respondents oppose the appointment of a Receiver, and submit that even if this Court determined that the appointment of a Receiver were appropriate, the proposed Receiver is in a position of conflict and a different firm should fulfil that role.

3. The Applicant relies upon the Affidavit of Carlos Lopez sworn June 4, 2024 and the Reply Affidavit of Lopez sworn June 25, 2024, each together with Exhibits thereto, and the cross-examination of the Respondents' Affiant, Zhiyuan (Charles) Xiao ("Xiao").

4. The Respondents rely on the Affidavit of Xiao affirmed June 21, 2024, together with Exhibits thereto, and the cross-examination of Lopez.

5. There is no pre-filing report of the proposed Receiver.

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

7. The Property formerly operated as a golf course. The Debtors proposed to redevelop the lands.

8. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 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 ("*Freure Village*").

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. 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;

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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.

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12. 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).

13. 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. See also *Freure Village* at para. 10.

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

15. In my view, it is not.

16. Given the history of this matter, however, it is important to set out in detail the relevant chronology and positions of the parties.

17. The Debtors are on title to the Property. Xiao is the principal and directing mind of the Debtors. The Property is in fact comprised of two adjacent parcels that together form a contiguous piece of land. The Debtors are single-purpose real estate holding companies with no other assets.

18. The Mortgagee is the prior owner and sole secured creditor of the Property through vendor takeback mortgages registered on title to the Property. The Mortgagee and Xiao entered into an agreement of purchase and sale for the Property, and Xiao incorporated the Debtors for the purpose of holding title to the lands that together comprise the Property. That APS included the granting of VTB mortgages. The Purchase price was $11 million, satisfied in part by cash paid on closing, and in part by the obligations under the VTB mortgages which represented 50% of the purchase price.

19. In connection with the sale, four such VTB mortgages were registered on title to the parcels comprising the Property:

a. Mortgage 1 for $2,106,689;

b. Mortgage 2 for $1,243,460;

c. Mortgage 3 for $880,356; and

d. Mortgage 4 for $1,269,495.

20. Each of the four mortgages bears interest at 4.25% per annum, calculated semi-annually, not in advance. Payments were required every month from December 7, 2018 to and including November 7, 2022. The mortgages include acceleration clauses providing that upon default of any payment obligation when due, the principal, interest and all other monies payable are due and payable in full, and the Mortgagee is entitled to possession and sale of the Property.

21. Pursuant to an (unregistered) mortgage amending agreement among the Mortgagee and the Debtors, the First Payment Date for each of the mortgages was amended to January 21, 2019 and the Balance Due Date for each of the mortgages was amended to December 21, 2022.

22. The Debtors have defaulted on the mortgages, which default first occurred on December 21, 2022. Notice of the defaults was given, but the defaults continue and as of the date of the hearing of this Application, the Debtors have failed to pay principal and interest since December, 21, 2022, or at all.

23. As of May 9, 2024, the total indebtedness owing to the Mortgagee by the Debtors was $6,630,200.52, which amount continues to accrue interest and fees.

24. Regrettably, the purchase and sale transaction and the mortgages between and among these parties has spawned much litigation.

25. On July 6, 2020, Xiao and the Purchaser Companies commenced a claim in this Court against the Mortgagee, and others, particularly including their own counsel who acted for them on the transaction, alleging negligence, negligent misrepresentation and breach of contract. The Defendants delivered Statements of Defence and Cross-claims. Discoveries were conducted in November, 2022 but the action has not progressed since then.

26. A second action was commenced on March 1, 2023 by the Mortgagee against the Debtors for enforcement of the mortgages. The Debtors delivered Statements of Defence and Cross-claims, but as with the first action described above, no further steps have been taken. On March 6, 2023, the Mortgagee issued a Notice of Sale Under Mortgage and Notice of Intention to Enforce Security.

27. In the main, Xiao and the Debtors assert their causes of action against their own counsel who acted for them on the transactions, but also against the Applicants in their counter-claim asserted in the mortgage enforcement action. They take the position that they are now prevented from developing the Property as they intended to do as a result of easements and restrictive covenants on title to the Property.

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28. The Mortgagee now brings this action on the basis that the Debtors are insolvent and unable to fulfil their obligations under the mortgages and it is reasonable for the Mortgagee to enforce its security in an effort to recover the outstanding indebtedness since it has no visibility into the Property or the management thereof, and submits that it does not know if adequate or any insurance coverage is in place, and nor does it have visibility into the status of any unpaid taxes, rates, levies, charges or assessments. Finally, it submits that such a course of action is permitted by the terms of the mortgages.

29. The proposed Receiver, Rosen Goldberg Inc., is a licensed Trustee in Bankruptcy, has consented to act as Receiver, if appointed, and, the Mortgagee submits, is familiar with the circumstances of the Debtors and the Property.

30. The Mortgagee submits that the issues raised by the Debtors (discussed below) are "irrelevant and without merit" and represent "transparently a meritless attempt to thwart the proceedings, so the Debtors can remain owners of the Property without paying the amounts owed under the Mortgages". The Mortgagee submits that at their highest, the claims of misrepresentation against the Applicants are at best contingent, unsecured and unliquidated damages claims that the Debtors are free to assert in their counterclaim in the ordinary course, but that those claims ought not to operate so as to defeat this Application for the appointment of a receiver, to which the Mortgagee has a contractual right as a secured creditor. It observes that in his claims, Xiao does not seek any injunctive relief related to possession of the Property.

31. The Mortgagee further submits that this Court should strike the Affidavit of Xiao or alternatively accord it no weight since it constitutes evidence that was not properly interpreted, contrary to the requirements of Rule 4.06(8). They submit that the Affidavit appears to have been prepared by counsel and Xiao's "assistant" and as such does not represent his own testimony. The jurat does not include a certification that the affidavit was interpreted prior to swearing, and the Applicant submits this is because it was not translated by a certified interpreter, although such was required since Xiao does not speak, write or read English. He admitted during his cross-examination that he was not able to read the entire affidavit before it was sworn, did not have a sworn interpreter interpret the draft affidavit for him, and further that the affidavit was prepared by counsel, and that his "assistant" reviewed it and made edits together with counsel.

32. Finally, the Mortgagee submits that Xiao admitted in cross-examination that he did not know who prepared the promotional materials to which he refers in his affidavit and his pleadings and yet swears that they were prepared by the Applicant and which form the basis of the misrepresentations on which he bases his claims.

33. This is particularly relevant, the Mortgagee submits, since Xiao never met the principal of the Applicant, had no direct communications with the Applicant, does not speak English and therefore his misrepresentation claims will likely fail. They emphasize that Xiao agreed to the mortgages and moreover made some interest payments even after the first action referred to above was commenced, and only ceased making payments when the principal became due, further demonstrating the lack of *bona fides* in the misrepresentation claims. It is therefore just and convenient, and fair in equity, that the Receiver be appointed.

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34. The proposed Receiver has also been appointed as receiver over the real property adjacent to the Property that is the subject of this Application. It is for this reason that the Applicant here submits that the proposed Receiver has experience with and knowledge of the Property, the parties and the easements and restrictive covenant described below. That receivership proceeding is also ongoing on the Commercial List.

35. The Debtors do not dispute the fact that they have not paid interest or principal on the mortgages or that the mortgages on their face, are in default. They do submit, however, that the appointment of a receiver is an extraordinary remedy, and that such an extraordinary remedy is not just or convenient here.

36. The Debtors submit that there is no evidence that the value of the asset is depreciated or is being wasted, and the conduct of the Applicant in making the alleged misrepresentations to induce Xiao to buy the Property in the first place, are relevant to the analysis of what is just or convenient, and that the appointment of a receiver will not maximize value for the parties, and instead will achieve the opposite effect.

37. It is important in this case that the property over which the receivership is sought is restricted to Real Property. There is no ongoing business, there are no employees, and there are no other relevant assets to be monetized, such as receivables or inventory, for example. The Real Property is therefore centrally relevant to the analysis.

38. The adjacent lands that are also subject to ongoing receivership proceedings are also relevant. Those lands (the "Adjacent Lands"), surrounded by the Real Property that is the subject of this Application, are now owned by Horseshoe Valley Developments 2018 Inc. ("HVD"). They were previously owned by Horseshoe Valley Lands Ltd. ("HVL").

39. In 2001, the Real Property was owned by Horseshoe Valley Resort Ltd. ("HVR"). It operated a four season resort and two golf courses (including one on the Real Property) under the name "Horseshoe Valley".

40. HVL and HVR are affiliated corporations. HVR built and operated the resort and golf courses. HVL was established to develop and build residential homes in five proposed phases. In 2001, HVR (the then owner of the Real Property) granted to HVL (the then owner of the Adjacent Lands proposed for development) an easement (the "2001 Easement").

41. The 2001 Easement permits, in relevant part, the owner of the Adjacent Lands to construct and maintain storm sewer and stormwater management facilities as required by municipal authorities and enter upon the Real Property with workers, material and equipment to do just that.

42. In 2010, Romspen Investment Corporation entered into a loan agreement with HVL to finance construction of the five phase development of residential homes. When that financing facility went into default in July, 2016 because HVL was indebted to Romspen for over $20 million, Romspen applied for the appointment of a receiver over HVL. A receivership order was granted on November 29, 2016 over the Adjacent Lands. Rosen Goldberg was appointed the receiver. That receivership proceeding is the ongoing receivership proceeding in respect of the Adjacent Lands referred to above.

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43. Romspen subsequently entered into an asset purchase agreement with Rosen Goldberg in its capacity as receiver of the Adjacent Lands, which agreement was approved by the Court and a vesting order was granted in February, 2018. That vesting order specifically provided that the 2001 Easement shall remain an encumbrance registered on title. Title was taken in the name of HVD which is continuing the development, funded by Romspen.

44. The Real Property that is the subject of this Application was sold by HVR to Skyline Horseshoe Valley Inc. in 2008 in trust for the company to be incorporated. That agreement of purchase and sale contemplated a "Good Neighbour Agreement" with HVL which was then entered into in July, 2008 between Skyline and HVL. It addresses numerous issues, including easements and rights of way to permit further development.

45. Skyline then operated the golf course on the Real Property from 2008 until it was closed following the 2016 golf season. Since that time, the Real Property has been left to naturalize.

46. On November 24, 2017, the Real Property was sold to the Applicant for $6.25 million.

47. As stated above, approximately six months later on May 16, 2018, the Applicant and Xiao entered into an agreement of purchase and sale pursuant to which Xiao agreed to purchase the Real Property for $11 million of which 50% was satisfied by the VTB mortgages.

48. Xiao's misrepresentation claims relate in large part to the 2001 Easement which, he submits, prevent redevelopment of the Real Property as he had intended. He alleges that the Applicant represented to him that the Real Property could be redeveloped for residential purposes and that these representations were conveyed in part in the marketing materials referred to above.

49. There is much material in the record on this Application about the 2001 Easement, the knowledge of all of the parties with respect thereto, and correspondence between and among the parties and their respective solicitors leading up to the closing date of the purchase and sale transaction. The Debtors allege that the Applicant wrote to Romspen as owner of the Adjacent Lands requesting that the 2001 Easement be removed from title, and Romspen declined, saying that the 2001 Easement was critical to the development of the Adjacent Lands, but that the Applicant never disclosed this to the Debtors. All of that is the subject of claims yet to be determined.

50. The Applicant and the Debtors then entered into a Post-Closing Agreement on November 6, 2018, pursuant to which the Applicant agreed to use best efforts to address outstanding title issues, and if it was unable to resolve them, the Debtors had the right to take steps to rectify those, and set off the expense of doing so as against the principal owing under the VTB Mortgages.

51. For these reasons, the Respondents submit that there is a real and as yet undetermined issue about the amounts owing under the VTB mortgages that are the basis for the proposed receivership, all as is the subject of the claims made in the first action and the counterclaim advanced in the second action (the mortgage proceeding commenced by the Applicant in this proceeding).

52. On August 5, 2021, Romspen and the new owner of the Adjacent Lands, HVD, brought a motion in that receivership proceeding seeking a declaration that the 2001 Easement operated as a prohibition to residential development on the Real Property. Penny, J. of this Court determined

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that motion and declared in relevant part that the restrictive covenant in the 2001 Easement prohibits residential development on the Real Property until November 15, 2041.

53. The form of order arising out of that decision was the subject of disagreement between the parties, however, largely as a result of a dispute about the validity and effect of the 2001 Easement beyond November 15, 2041. I am advised that the form of order has not yet been settled.

54. All of this is relevant to the within Application, in the submission of the Debtors, due to the fact that the receiver over the Adjacent Property is the same firm as the proposed Receiver here. The Debtors submit that even if this Court were persuaded that the appointment of a receiver here were appropriate, it cannot and should not be the same firm, since the 2001 Easement that is central to the allegations underlying the ongoing litigation, and which is or may be the subject of negotiations and discussions between the respective owners of the Adjacent Lands (as dominant tenement) and the Real Property (as subservient tenement), would then be controlled by the same firm acting in dual capacities as receiver of both parcels of land. That receiver would in effect be negotiating and/or dealing with itself, as representing both sides of discussions and any transaction and/or litigation.

55. I have considered all of the evidence and the submissions of the parties. I have done so as against the factors relevant to a determination of whether it is just or convenient to appoint a receiver at this time. As set out above, those factors should be considered holistically rather than in isolation, and a determination as to whether a receiver should be appointed is inherently very fact-specific and generally confined to the specific case, and the status of matters as of the date the determination is being made.

56. Having considered all of the above evidence and the positions of the parties, I conclude that it is not just or convenient to appoint a receiver at this time. The security of the Applicant continues to be fully protected by the mortgages registered against title to the Real Property. There is no evidence upon which I can conclude today that the value of the Real Property that is the subject of the proposed receivership is depreciating.

57. It is vacant land, previously used as a golf course and land that has been “left to naturalize” since the conclusion of the 2016 golf season. There is no ongoing business over which receivership powers are sought, no employees, no bank accounts, accounts receivable or inventory. The proposed receivership property is simply vacant land, already subject to first priority mortgages in favour of the Applicant.

58. Moreover, there is no evidence as to why the Applicant has not advanced the mortgage enforcement proceeding that it has already commenced, and in which, if successful, the Applicant would presumably be entitled to force a sale of the Real Property and seek to be paid out on its mortgages.

59. I do not need to determine the validity of the respective claims and defences regarding the 2001 Easement and the representations or lack thereof alleged to have been made by the Applicant to the Respondents with respect to the 2001 Easement and its impact on the development potential of the Real Property, and to be clear, I do not do so.

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60. Finally, even if I were of the view that the appointment of a receiver were just or convenient, I accept the position of the Respondents on this Application that so long as the receivership proceeding in respect of the Adjacent Property is ongoing and issues remain as between the two properties and their respective owners with respect to the 2001 Easement, it is not appropriate that the same firm act as receiver over both properties. There is no issue whatsoever about the qualifications and experience of Rosen Goldberg, and the ability of that firm and its principals to carry out the duties of a Court-appointed receiver. In these particular circumstances, however, the same firm (whoever it is) should not act in the capacity as receiver of both properties.

61. For all of these reasons, the Application is dismissed.

Osborne J.

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