CITATION: *Central 1 Credit Union v. 2139770 Ontario Inc.*, 2024 ONSC 5988
COURT FILE NO.: CV-24-97134
DATE: 2024 10 29

SUPERIOR COURT OF JUSTICE

APPLICATION UNDER SECTION 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

RE: CENTRAL 1 CREDIT UNION, Applicant

AND:

2139770 ONTARIO INC., Respondent

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Heather Fisher, for the Applicant

Alexander Bissonnette, for the Respondent

Rosemary Fisher, for the proposed Receiver

DECISION AND REASONS

[1] This is an Application seeking a court appointed receiver over the property, assets and undertakings of the Respondent 2139770 Ontario Inc. ("the debtor") on behalf of Central 1 Credit Union ("the secured creditor").

[2] The Application was brought earlier this year but before it was heard, the parties entered into a Forbearance Agreement ("the Agreement") under which the secured creditor agreed not to enforce its security until June of 2025 provided the debtor complied with the terms of the Agreement.

[3] The Applicant now asserts that there has been default under the Agreement and moves for a receiving order. The Respondent agrees that it has failed to comply with what it characterizes as minor terms of the Agreement, seeks relief from forfeiture or termination and requests the Court to deny the appointment of a Receiver at this time.

[4] For the reasons that follow, I am granting a postponement of the Receivership order on strict terms but if the debtor cannot comply then the order will go as asked. Providing the debtor meets the terms, then it will be entitled to rely upon the Forbearance Agreement.

BACKGROUND

[5] The debtor is a single purpose corporation related to the Ashcroft Group of Companies controlled by David Choo.[1] It was incorporated for the purpose of developing, owning and operating a retirement home called "Ravines" and it operates under the banner of "Alavida Retirement Homes".

[6] The Applicant is the lead lender of a syndicate with which the debtor established a $43,500,000 credit facility in 2015, updated in 2019. It is the holder of security including a first charge against the subject lands and a General Security Agreement ("GSA") registered under the *PPSA.*[2] Amongst other relief available to the secured creditor, the security documents entitle the lender to appointment of a Receiver.

[7] It is undisputed that the debtor committed certain acts of default including unpaid real property taxes and income taxes and failure to provide adequate working capital to the corporation. The debtor does not dispute that the creditor was entitled to call the loan. A Demand Letter and Notice of Intention to enforce security was served on August 9, 2024 and this Application was commenced shortly thereafter.[3]

[8] The outstanding balance due under the loan not including enforcement costs and other charges is $38,281,183.64. Prior to the original hearing date for the Receivership Application, the parties entered into a Forbearance Agreement dated September 25, 2024. The Forbearance Agreement provided the debtor until June 30, 2025 (or to a terminating event) to refinance the debt

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[1] Mr. Choo is also a guarantor of the debt.
[2] *Personal Property Security Act*, RSO 1990, c. P.10
[3] In any event, the five year term under the commitment letter expires on November 15, 2024

and the Applicant agreed not to enforce the security until that time provided the terms of the agreement were met.

[9] Amongst other things, the Forbearance Agreement included the following:

a. Acknowledgement of the acts of default and the fact the loan is due.

b. Additional guarantees from two other Ashcroft companies with security to be provided over two Ashcroft projects (Envie 1 & La Promenade) as additional collateral.

c. Appointment of a Receiver if the agreement expires or terminates and the loan has not been repaid

d. Payment of a forbearance fee of $75,000 in 4 monthly installments

e. Payment of $93,327.09 for legal costs and additional legal costs as incurred

f. Payment of a monthly monitoring fee of $2,500

g. An increase in the interest rate on the underlying loan indebtedness to prime plus 3.5% or 7.25% whichever is greater

h. Payment of the "Envie1" and "La Promenade" proceeds to the lender during the forbearance period

[10] Under the heading "additional covenants" the Forbearance Agreement required the debtor to pay outstanding taxes and provide proof of same and prohibited transfers or withdrawals of cash or other assets. Amongst the requirements, the debtor and the guarantors were obligated to provide the following:

a. An updated personal worth statement of David Choo by September 30, 2024

b. By September 30, 2024, a complete copy of CMLS' underwriting, to include particulars of all debt and other obligations in respect of the "Envie1 property" in form and substance acceptable to the lender

c. By the same date, a copy of the listing agreement and an appraisal along with other documents relevant to the La Promenade property

d. The latter two documents were to provide satisfactory evidence that the Envie 1 and La Promenade proceeds would total at least $20,000,000.

[11] All the payments due under the Agreement to date have been made but the debtor was unable to deliver the underwriting documents or the appraisal by September 30. The appraisal was available and was delivered in draft but the final version was not available until October 9, 2024. The underwriting document is not yet available although a draft for comment was provided by the underwriter to the debtor on October 17 and the final underwriting report is expected shortly.

[12] Failure to provide these documents by September 30 is technically a breach of the covenants. Moreover, the lender has now been advised that although a severance which the lender believed had been granted has been approved by the City, it has not yet been registered. The lender has therefore lost confidence in the value of the additional security it has been offered and has lost confidence in management of the debtor corporation. It argues that breach of the Forbearance Agreement gives it the immediate right to a Receiver.

[13] In response to the Application, the Respondent argues that the breaches are trivial and requests relief from forfeiture or termination pursuant to s. 98 of the *Courts of Justice Act.* The Respondent also seeks to challenge the suitability of the proposed receiver because in another Ashcroft receivership (a dispute with DUCA Credit union) Ashcroft has obtained financing to pay out the loan but there is a dispute about the Receiver's fees and expenses. That Receiver is also BDO Canada Limited but a different office and licenced individual.

ANALYSIS & DECISION

[14] The Court has the authority to appoint a receiver pursuant to s. 243 (1) of the *Bankruptcy and Insolvency Act.,* or s. 101 of the *Courts of Justice Act* whenever it is "just and convenient" to do so. Various factors can be considered in assessing whether it is appropriate to grant such a discretionary remedy. It is highly relevant that the contractual documents entitle the secured creditor to seek such an order and the debtor has consented. [4] Nevertheless, the appointment is not automatic and the powers to be granted to a receiver are discretionary.[5]

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[4] *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258, 40 CBR (3d) 274 (SCO – Commercial List)

[5] See *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.,* 2023 ONSC 5911

[15] It is apparent that the debtor has not been able to comply with all of the terms of the Forbearance Agreement and I do not agree that the defaults are trivial. When parties enter into a forbearance agreement on terms, the debtor is ordinarily required to comply strictly with the terms as it is upon those terms that the creditor has agreed to hold off on enforcement of its security for a debt that is already in default.

[16] In this case the debtor has failed to deliver important information by the deadline it agreed to. It is true that this is not a wilful or intentional failure. The evidence shows that the debtor has taken steps to obtain reports and appraisals that must be completed by third parties. But the covenants to deliver this information by a deadline were not ends in themselves. The purpose of the information is to demonstrate that there is value in the Envie 1 and La Promenade projects which have been pledged as additional collateral. The Applicant is entitled to be satisfied that the Envie 1 and La Promenade proceeds will exceed $20 million.

[17] On the other hand, the appraisal for La Promenade is now available and the underwriting information in relation to Envie 1 should be available shortly. The Respondent has so far complied with its obligation to make payments and (I am advised) is paying the interest on the underlying debt. It has other deadlines and hurdles to meet in the coming months and there are other terminating events which may occur.

[18] As the court stated in *Romspen, supra,* a major consideration in appointing a receiver is to end chaos and to maximize recovery for all stakeholders. At this point there is no evidence that other creditors are becoming restless or that there is "chaos" in the operation of the retirement home. There are obvious cash flow problems.

[19] I do not consider it unreasonable to grant the debtor a brief extension of time to provide the missing information and for the secured creditor to be satisfied. I am not sure that relief from forfeiture is technically required since the imposition of a receivership is an equitable remedy which can be withheld. Relief from a forfeiture or penalty, however, may be granted where the interests of the party seeking forfeiture may be vindicated without resort to forfeiture.

[20] I am prepared to grant relief from forfeiture or alternatively to withhold the granting of a receivership order for the time being provided the Respondent meets the following terms:

a. The missing CMLS underwriting is to be provided to the Applicant by November 12, 2024.

b. Any reasonable request for further information with respect to the Choo personal worth statement is to be provided by the same date.

c. The Respondent and the guarantors are to use best efforts to register the severance and to provide proof of same to the Applicant by November 30, 2024.

d. The debtor shall fully comply with all other terms of the Forbearance Agreement as they fall due; and

e. The debtor shall pay costs of this Application in an amount to be agreed upon or fixed by the Court.

[21] In the event the Respondent fails to meet these terms or there are further breaches of the Forbearance Agreement, an order will be made for appointment of a Receiver and Manager as proposed. I agree with the Respondent that the power to assign the debtor into bankruptcy should not form part of the order. Other than that, the Respondent does not object to the form of the proposed order (largely tracking the commercial list draft order).

[22] I do not accept the Respondent's objection to appointment of BDO Canada Limited as Receiver. Court appointed receivers must always report to the Court and seek approval of their proposed fees and expenses. The fact that another Ashcroft entity does not agree with the amount which BDO proposes to charge in the DUCA matter is insufficient to create a conflict of interest or to impugn the neutrality of the proposed Receiver. The Receiver once appointed is an officer of the Court and is answerable to the Court.

[23] In summary, the current default under the Forbearance Agreement may be cured providing the Respondent complies with the terms set out above. If it is unable to do so, if there is default

under those terms or further default under the agreement then an order in the form requested by the Applicant (minus the bankruptcy provision) may issue.

Justice C. MacLeod

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DECISION AND REASONS

Justice C. MacLeod

Released: October 29, 2024