Court File No. CV-20-640633-00CL

Superior Court of Justice

Commercial List

FILE/DIRECTION/ORDER

HILLMOUNT CAPITAL INC.

Applicant

and

CELINE BRITTANY PIZALE and RICHARD STANLEY PIZALE

Respondents

APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Counsel	Telephone No:	Email/Facsimile No:
As per attached counsel slip below		

Heard: December 17, 2020, January 5 and 8, 2021

Released: January 11, 2021

Conway J. - Endorsement

1. Zeifman Partners Inc. (the "**Receiver**") is the court-appointed receiver of a partially renovated residential property at 83 Lyndhurst Avenue, Toronto (the "**Property**"). The Receiver seeks an approval and vesting order ("**AVO**") for an agreement of purchase and sale with Patricia Armstrong and David Armstrong (the "**Purchasers**") for the Property dated September 21, 2020 and amended on November 16, 2020 (the "**Sale Agreement**").

2. The Respondents oppose the sale, as do the four mortgagees. They ask the court to dismiss the motion for an AVO. They have not brought a motion for discharge of the Receiver nor do they propose an alternative transaction. They wish to have the renovation of the Property completed and then relist the Property in a fully renovated state at some later time.

3. At the conclusion of oral argument, I granted the AVO and the Receiver's administration order, for reasons to follow. These are those reasons.

Facts

4. On June 19, 2020, Justice Koehnen granted an order appointing the Receiver over the Property, with the power to list, market and sell the Property. The Respondents had been in default under the first mortgage to Hillmount (the applicant for the receivership order) for approximately 19 months at the time.

5. There are four mortgages registered against the Property with the principal amounts as follows: (i) first mortgage to Hillmount (later assigned to Elle as set out below) for $3.35 million; (ii) second mortgage to 1713691 Ontario Inc. and Boris Nodel for $800,000; (iii) third mortgage to Harold Wine, Gad Caro and Marshall Morris for $569,359; and (iv) fourth mortgage to Weihao Zhang for $325,000.

6. On taking possession of the Property, and as outlined in its Second Report dated December 4, 2020, the Receiver took various conservatory and protective measures, met with City of Toronto building inspectors, requested documents on the renovation work from Mr. Pizale (who was principally responsible for the renovation), obtained a report from a renovation company on the cost to complete the work, obtained two appraisal reports, and entered into a listing agreement with the Sutton Group agency.

7. The Respondents brought a motion on August 20, 2020 to challenge the Receiver's authority to enter into the listing agreement without leave. On August 25, Justice Dietrich dismissed the Respondents' motion.

8. The Receiver proceeded to list the Property, based on advice from Sutton, for $4.8 million, which was higher than the appraisals. By September 17th, there had been 23 showings and no offers, although prospective purchasers provided substantive feedback on the Property to Sutton. Based on advice from Sutton and that feedback (which was summarized in the Receiver's confidential compendium), the Receiver reduced the listing price to $4.15 million on September 14, 2020.

9. The Receiver received and negotiated a number of offers to purchase the Property. On November 9, 2020, the Purchasers submitted an offer, which the Receiver accepted. The agreement was amended on November 16th. The purchase price in the Purchase Agreement is higher than the two appraisals and any other offers received.

10. The Receiver's counsel wrote to counsel for the Respondents and the second mortgagee to advise that it had entered into the Sale Agreement. The Respondents advised that they intended to oppose the sale.

11. The Respondents had been trying to get new financing for the Property for some time. On November 10, 2020, after the Receiver learned of a possible transfer of the first mortgage from Hillmount to Elle Mortgage Corporation ("**Elle**"), the Receiver's counsel wrote to Elle to advise that it had entered into the Sale Agreement with the Purchasers and would be seeking court approval even if the first mortgage was assigned to Elle. On December 1, 2020, Elle took an assignment of the first mortgage and signed an acknowledgement that the receivership remained in effect and that Elle was aware that the Sale Agreement was final and binding and unconditional except for court approval.

12. The Receiver also learned from the second mortgagees that they had reached an agreement with the Respondents whereby their second mortgage would be redeemed but that the second mortgagees would nonetheless oppose the sale of the Property.

13. The Receiver brought its motion, supported by the Second Report. In that report, the Receiver recommended the Sale Agreement and the AVO notwithstanding the comments of the Respondents and the second mortgagee in light of, among other things, its mandate under the appointment order,[1] the public and commercially recognized process it had run, and the arm's length Sale Agreement it had entered into. It stated that if the Sale Agreement was not approved, it did not believe it would be able to sell the Property for an equal or higher price. In one of the confidential appendices, the Receiver listed eight grounds for recommending that the Sale Agreement be approved.

14. The motion was adjourned on December 17 for the Receiver to provide a copy of the confidential compendium to interested parties. The Receiver filed a First Supplement to its Second Report dated December 29, 2020. It described the following.

    a. On December 8, Elle's counsel told the Receiver that of the $3,673,679 advanced to take an assignment of the first mortgage, Elle had only advanced $3.4 million, the rest had been advanced by a subsequent mortgagee, and Elle was indifferent as to whether the Property was sold under the Sale Agreement.

    b. On December 14, the second mortgagees told the Receiver that they had reached an agreement with the Respondents to redeem the second mortgage but that they would still be opposing the sale of the property. The Receiver asked for a copy of the agreement between the second mortgagees and the Respondents. The Respondents objected to producing it to the Receiver and the second mortgagees would not produce it without the Respondents' consent.

    c. On December 15, counsel for Elle provided the Receiver's counsel with a "Declaration and Acknowledgment" stating that Elle opposed any sale of the

[1] The Respondents submit that the Receiver's mandate was not to sell the Property. However, the sale of the Property was clearly reflected in the terms of the appointment order. Further Justice Koehnen specifically contemplated a sales in his endorsement: "Appointment of a receiver does not preclude the respondents from pay out their debt and resuming control of the property provided they can do so before the sales process begins in any meaningful way. Even after the sales process begins, they have the ability to take control of the property by participating in the sales process." [my emphasis added]

Property but supported a discharge of the Receiver.[2] The third and fourth mortgagees signed the same form of document.

d. Elle did not provide the Receiver with any additional information or explanation as to why its position had changed since December 8 (when it indicated it was indifferent to the sale). The Receiver states that it does not have any additional information that would allow it to assess the positions or interests of the mortgagees.

e. The Receiver considered the mortgagees' stated opposition to the transaction but continued to recommend the sale to the Purchasers, for the reasons set out in its Second Report.

15. The Purchasers continue to be committed to completing the sale transaction that they entered into with the Receiver. Their counsel filed a factum on this motion and made submissions as to the interests and position of his clients.

Law and Analysis

16. The court, in determining whether or not to grant the AVO, is required to apply the principles set out in *Royal Bank v. Soundair* [1991] O.J. No. 1137 (C.A.). I am satisfied that the four principles of the *Soundair* test have been met in this case.

17. With respect to the first principle, whether the Receiver made sufficient effort to get the best price and did not act improvidently, the record clearly establishes that the Receiver meets this criterion. On its appointment, it took the appropriate steps to consider the state of the Property, evaluate the cost to complete the renovations, obtain appraisals, engage a listing agent, take the advice of that agent, consider the specific feedback from prospective purchasers and reflect that in the reduced listing price. The Receiver received and negotiated numerous offers and accepted the highest one. There is no basis to interfere with the Receiver's decision to accept the Sale Agreement based on the information it had at the time and the sales process it had run. Indeed, there is no basis to conclude that the Receiver's sales process was flawed or that this was not the highest price available to it.[3]

18. With respect to the second part of the *Soundair* test, the Receiver is to consider the interests of all parties.[4] While the primary interest is that of the creditors, other persons' interests require consideration and may include those of a purchaser who had negotiated an agreement with a court appointed receiver: *Soundair*, at para 39-40, *Ron Handelman Investments Ltd. v. Mass Properties Inc.*, 179 ACWS (3d) 114, at para. 27; *Business*

[2] However, neither the mortgagees nor the Respondents took steps to seek a court-ordered discharge of the Receiver.
[3] The Respondents tendered two appraisals for the Property. Both considered the value of the Property in a completely renovated state. In my view, that is inconsistent with the sales process approved by the court for a sale of the Property in its current, unrenovated state. Further, those appraisals were obtained and tendered by the Respondents well after the sales process had run and the Sale Agreement signed with the Purchasers.
[4] The Respondents' counsel argued that this court should not be granting the AVO solely on the basis of the Receiver's properly conducted process. I agree. *Soundair* provides that all four principles are to be taken into account.

Development Bank of Canada v. Marlwood Golf & Country Club Inc., 2015 ONSC 3909, at para. 26. I am satisfied that the Receiver did so in this case.

19. I observe that both the first and second mortgagees supported the receivership order, which contemplated and empowered the Receiver, among other things, to list and sell the Property in its partially renovated state. In obtaining the receivership order, those mortgagees knew that they were invoking this court's process, that they were losing the ability to control the sales process and that it would thereafter be conducted by the Receiver under the supervision of this court: see *Soundair*, at para. 62. Further, they did not seek to engage in the sales process or take action with respect to the Property at any time prior to the Receiver entering into the Sale Agreement.

20. In the case of Elle, it took an assignment of the first mortgage after the Receiver made it aware of the Sale Agreement and its intention to seek the AVO. Elle initially told the Receiver that it was indifferent to the Sale Agreement (as it appears that its mortgage would be covered by the sales price). A week later,[5] it reversed course and opposed it, without providing any explanation to the Receiver for its change of position. It only provided a blanket statement of opposition to the sale. Under the circumstances, I place no weight on Elle's opposition.

21. In the case of the second mortgagees, they originally supported the receivership order and did not oppose the listing agreement or take part in the sales process. After the Receiver entered into the Sale Agreement, the second mortgagees advised that they were completing a transaction with the Respondents and would be opposing the AVO. They completed the transaction on December 14, well after the Sale Agreement was signed. The circumstances of the second mortgagees' continued opposition were unclear to the Receiver (and to this court). The second mortgagees advised the Receiver that they had completed a transaction with the Respondents to redeem the second mortgage yet it was the second mortgagees that continued to oppose the Sale Agreement, not the Respondents.[6] They provided no evidence or explanation for their stated opposition. They did not provide the Receiver with a copy of the agreement they made with the Respondents. While I recognize that the second mortgagees had no obligation to do so, the Receiver was left in the position of having no information to assess the position or interest of the second mortgagees beyond their mere stated opposition to the AVO. Under the circumstances, I cannot say that the Receiver failed to consider the interest of the second mortgagees.[7] I place minimal weight on their opposition.

22. In the case of the third and fourth mortgagees, they did not oppose the receivership order. It appears from the Receiver's appraisals that their interests on the sale of the partially

[5] This reversal by Elle came at the same time that the second mortgagees did their deal with the Respondents and told the Receiver that they were opposing the Sale Agreement.

[6] I note that although the various mortgagees had counsel at the hearing, they did not submit any *facta* or materials on the motion. All of the submissions on their behalf were made by counsel for the Respondents.

[7] Also, see *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581, at paras. 37-39 in which the court observed that the Receiver's obligation is to seek the highest and best price reasonably available in considering the shared interest of all of the parties. The court squarely rejected the notion that the fulcrum creditor has unique interests to be considered by the Receiver. It noted that there was no authority for the proposition that the Receiver has a positive obligation to consult with subsequent mortgagees about a particular sales process or listing price.

renovated Property were "under water" from the beginning. Their interests have not changed. I place no weight on their opposition.

23. With respect to the Purchasers' interests, there is no evidence from them on this motion. However, it is clear from the record that they entered into the Sale Agreement after the Property had been listed for several months, that they negotiated the deal with the Receiver and that they entered into the Sale Agreement to acquire the Property in its partially renovated state. There is no suggestion that the Purchasers did not act in good faith at all times.

24. In *Soundair*, the court rejected the attempt of two secured creditors to require the receiver to accept the bid of the purchaser they supported instead of the one the receiver had accepted. The court stated at para. 63:

> There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

25. The court further analyzed the reasons the secured creditors supported their preferred purchaser over the accepted one and gave no weight to those reasons in the circumstances of that case.

26. In that regard, the case at bar is analogous to that in *Soundair*. The mortgagees, together with the Respondents, are making a concerted effort to have this court dismiss the AVO motion and block the sale of the Property. However, a consideration of their interests and the manner in which this situation unfolded leads me to reject their position. It was only after the Sale Agreement was entered into that the mortgagees (after making certain arrangements with the Respondents) joined forces to mount a coordinated opposition to the AVO. Their reasons for doing so are not apparent on the face of the record and consist only of a stated opposition. The mortgagees and Respondents failed to engage in the court-authorized receivership and sales process at any time prior to the signing of the Sale Agreement. The Receiver, after conducting a legitimate and proper sales process, entered into an agreement with the Purchasers, which the mortgagees and Respondents are now seeking to have this court reject. They are seeking to prevent the sale altogether. I have considered and weighed the interests of all parties and find that there is no basis for this court to allow the objections of the mortgagees and Respondents to prevent the Receiver from concluding its agreement with the Purchasers.

27. The third and fourth parts of the *Soundair* test are easily satisfied. With respect to the efficacy and integrity of the process by which offers were obtained by the Receiver, the sales process run by the Receiver with the assistance of Sutton, as described above, was efficient and had integrity. Indeed, the efforts of the objecting mortgagees and Respondents

would undermine the integrity of the process.[8] With respect to the fourth factor, whether there was any unfairness in the working out of the process, there is nothing to suggest that any prospective purchaser had an unfair advantage over any other purchaser in bidding for the Property.

Decision and Orders

28. In summary, in determining whether or not the AVO should be granted, I have considered all four principles of *Soundair* and have concluded that the Receiver's sale of the Property to the Purchasers pursuant to the Sale Agreement should be approved. I therefore granted the AVO.

29. The administration order was unopposed, except for fees and disbursements, which the Receiver will bring to the court for approval at a later date. I amended the draft order to remove the fees and disbursements paragraph and signed the amended administration order.

30. I signed and sent the two orders to counsel on January 8, 2021. The orders were effective on that date and are enforceable without the need for entry and filing.

31. The Receiver and the Purchasers do not seek costs from any opposing party on this motion. This shall not affect the Receiver's ability to seek approval of those costs as part of its fees and disbursements in the receivership.

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Conway J.

Justice Conway

Released: January 11, 2021

[8] See *Business Development Bank of Canada v. Marlwood Gold & Country Club Inc.*, 2015 ONSC 3909, at para. 26 in which the court observed the need to maintain the integrity of the process.

COUNSEL SLIP

FOGLER, RUBINOFF LLP, for the Receiver, Zeifman Partners Inc.

Robert Macdonald Email: rmacdonald@foglers.com

ROSENSTEIN LAW PROFESSIONAL CORPORATION, for the Respondents

Jonathan Rosenstein Email: jrosenstein@rosensteinlaw.ca

MAND RAI LLP, for the Third Mortgagees, Harold Wine, Gad Caro and Marshall Morris

Paul Mand Email: pmand@mandlaw.com

TWL LAW PROFESSIONAL CORPORATION, for the Second Mortgagees 1713691 Ontario Inc. and Boris Nodel

Shana Nodel Email: shana.nodel@twllaw.ca

TERRY M. WALMAN, BARRISTER AND SOLICITOR, for the First Mortgagee, Elle Mortgage Corporation
Terry M. Walman Email: terry@terrywalman.com

CONROY SHIFMAN PROFESSIONAL CORPORATION, for the Purchasers, David Armstrong and Patricia Armstrong

Behn Conroy Email: behn@conroylaw.ca