

COURT OF APPEAL FOR ONTARIO

LASKIN, MACPHERSON
AND LANG J.J.A.

FRIDAY, THE 5TH
)
) DAY OF MAY, 2006
)

B E T W E E N:

GALANDA PROPERTIES INC. and
BLACKRIDGE PROPERTIES INC.

Appellants

- and -

ZEIFMAN PARTNERS INC., IN ITS CAPACITY AS THE COURT APPOINTED
RECEIVER AND MANAGER OF ALL OF THE PROPERTY AND ASSETS AND
UNDERTAKING OF TIERCON INDUSTRIES INC., GENERAL MOTORS
CORPORATION and ROYAL BANK OF CANADA (AS AGENT FOR ROYAL BANK
OF CANADA, THE BANK OF NOVA SCOTIA AND COMERICA BANK)

Respondents

O R D E R

THIS APPEAL, by the appellant Galanda Properties Inc. ("Galanda") for and Blackridge Properties Inc. ("Blackridge"):

- a) an Order reversing the Order of Madam Justice Hoy, dated September 7, 2005;
- b) an Order setting aside the April 15, 2005 Order of Madam Justice Greer;
- c) an Order requiring Zeifman Partners Inc., in its capacity as the Court appointed receiver and manager of all of the property and assets and undertaking of Tiercon Industries Inc. (the "Receiver"), to deliver vacant possession of the Galanda lands and premises;

- d) an Order declaring termination of the leases granted to Tiercon Industries Inc. by Galanda and Blackridge:
- e) an Order or direction that the Receiver pay occupation rent in respect of the Blackridge lands and premises until it yields vacant possession of all the lands and premises of Galanda and Blackridge:
- f) an Order or direction to the Receiver that the Receiver was bound, in any event, until it yielded vacant possession, by virtue of an order or otherwise, to honour all of the obligations of Tiercon Industries Inc. under the leases including repair obligations and Additional Rent obligations (mostly Realty Taxes) owed by the Tenant Tiercon;
- g) an Order dismissing the motion of Royal Bank of Canada (as agent for Royal Bank of Canada, the Bank of Nova Scotia and Comerica Bank) (the "Senior Lenders") heard August 17, 2005: and
- h) an Order that costs of this appeal be paid by the Receiver and Royal Bank of Canada.

was heard this day, at Toronto, Ontario.

ON READING the Affidavit of John Bambery sworn April 15, 2005, the Affidavit of Galliano Tiberini sworn June 6, 2005, the Affidavit of John Bambery sworn June 21, 2005, the Affidavit of Tony Zaspalis sworn June 22, 2005, the Second Report of the Receiver, dated June 22, 2005, the Affidavit of Galliano Tiberini sworn June 27, 2005 and the transcripts of the cross-examinations on July 21, 2005 of Galliano Tiberini, Tony Zaspalis and John Bambery, and on hearing the submissions of counsel for Galanda and Blackridge and for the respondent Receiver, the respondent General Motors Corporation and the respondent the Royal Bank of Canada, as agent for the Senior Lenders.

1. THIS COURT ORDERS that the appeal is dismissed.
2. THIS COURT ORDERS that Galanda and Blackridge, jointly and severally, shall pay the Receiver costs fixed in the amount of \$10,000.

3. THIS COURT ORDERS that Galanda and Blackridge, jointly and severally, shall pay General Motors Corporation's costs fixed in the amount of \$3,000.

4. THIS COURT ORDERS that Galanda and Blackridge, jointly and severally, shall pay the Royal Bank of Canada costs fixed in the amount of \$2,000.

GENERAL MOTORS CORPORATION

and

TIERCON INDUSTRIES INC.

Court File No: C44141

Appellant

Respondent

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

ORDER

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Solicitors for the Receiver,
Zeifman Partners Inc. in its capacity as the Court
appointed receiver and manager of all of the
property and assets and undertaking of Tiercon
Industries Inc.

COURT OF APPEAL FOR ONTARIO

RE: GENERAL MOTORS CORPORATION (Applicant) -and-
TIERCON INDUSTRIES INC. (Respondent)

BEFORE: LASKIN, MACPHERSON AND LANG J.J.A.

COUNSEL: Ronald B. Moldaver, Q.C.
for the appellant Galanda Properties Inc.

Paul G. MacDonald
for the respondent Royal Bank of Canada

Jeffrey C. Carhart and
Margaret R. Sims
for the respondent Zeifman Partners Inc.

D.J. Miller and
Deborah Palter
for the respondent General Motors Corporation

**HEARD &
ENDORSED:** May 5, 2006

On appeal from the judgment of Justice Alexandra Hoy of the Superior Court of Justice, dated September 7, 2005 made at Toronto, Ontario.

APPEAL BOOK ENDORSEMENT

[1] In our view, this appeal is not moot.

[2] The appellant landlord challenges the order of Hoy J., and in effect, the order of Greer J., on two grounds:

- (1) In permitting the receiver to take over the tenant's position under the lease, the motion judges exercised their discretion in an unprincipled way; and

(2) There was material non-disclosure on the without notice motion before Greer J.

[3] We do not accept either argument. Instead, we agree entirely with the reasons of Hoy J.

[4] In respect of the first ground, on the appointment of a receiver the court was entitled to impose “just” terms. As paragraph 20 of Hoy J.’s reasons demonstrate, the receivership order justly balanced the interests of the employees and the interests of the landlord.

[5] As she found, the landlord was receiving rent in accordance with the lease, could look forward to vacant possession within nine months and had not shown that it was prejudiced by the delay in obtaining possession. We see no error in these findings.

[6] Although the landlord’s affidavit evidence claimed prejudice, in the light of the lack of detail in this evidence, the motion judge, in our view, was entitled to make the finding that she did.

[7] In respect of the second ground, Hoy J. found that there was no material non-disclosure. The appellant has not persuaded us that this finding is tainted by any palpable and overriding error.

[8] The appellant also challenges Hoy J.’s costs order. We cannot say that the motion judge exercised her discretion on costs unreasonably.

[9] The appeal is therefore dismissed. We order the costs of the appeal as follows:

For the receiver: \$10,000.00

For GM: \$3,000.00

For the Royal Bank: \$2,000.00

All these awards are inclusive of disbursements and G.S.T.