

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.) Thursday, THE 16th
)
JUSTICE DUNPHY) DAY OF August, 2018

BETWEEN:

(Court Seal)



ANTHONY ZANARDO IN HIS CAPACITY AS THE
ESTATE TRUSTEE FOR THE ESTATE OF LUIGI GAMBIN

Applicant

and

DI BATTISTA GAMBIN DEVELOPMENTS LIMITED,
RAY DIBATTISTA, ANTHONY DIBATTISTA, JULIA BABENSKY,
WHITWOOD DEVELOPMENTS LTD. and
GREYSTAR DEVELOPMENTS INC.

Respondents

APPLICATION UNDER sections 207 and 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16

JUDGMENT

THIS APPLICATION was heard on June 28, 2018 at the court house, 330 University Avenue, Toronto, Ontario, M5G 1R7, and judgment having been reserved to this day.

ON READING the notice of application, the application record, the responding record, the supplementary records, the joint-compendium, the parties' factums, and on hearing the submissions of the lawyer(s) for the parties,

CONSTRUCTIVE TRUST

1. THIS COURT DECLARES THAT each of the Respondents (other than Di Battista Gambin Developments Limited (“DBG”)) holds as constructive trustee for the benefit of DBG any benefit of any kind derived directly or indirectly from Greystar Developments Inc. (“Greystar”), the loan from DBG to Greystar, or the investment by Greystar in the property located at 46 Main Street North, Markham, Ontario (the “Benefits”).

2. THIS COURT ORDERS THAT each of the Respondents shall make a full accounting to DBG of all such Benefits forthwith.

3. THIS COURT ORDERS THAT:

(a) the mortgage loan to Greystar by DBG shall be set aside and repaid in full by Greystar, providing that the setting aside of the mortgage transaction shall not adversely affect the security held by DBG until such payment in full is received; and

(b) the constructive trust described in paragraph 1 of this judgment applies to all of the shares of Greystar held by any of the Respondents.

WIND-UP

4. THIS COURT ORDERS that DBG and Whitwood Developments Ltd. (“Whitwood”) shall be wound up pursuant to Sections 207 and 248(3)(l) of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 (“OBCA”).

5. THIS COURT ORDERS that, pursuant to sections 207 and 248 of the OBCA, Zeifman Partners Inc. is hereby appointed liquidator (in such capacities, the “**Liquidator**”), of the effects and estate of DBG and Whitwood (the “**Companies**”) with the powers and obligations set forth in Part XVI of the OBCA and the Judgment. Where there is an inconsistency between the powers provided to the Liquidator under the OBCA and this Judgment, the terms of this Judgment shall govern to the extent that they restrict or limit the powers of the Liquidator.

6. THIS COURT ORDERS that the fees of the Liquidator and any person engaged by the Liquidator to aid in the performance of its powers and duties under this Judgment shall be paid by DBG.

7. THIS COURT ORDERS that the Liquidator or any party may apply to the court for directions regarding the means of carrying out the wind-up of DBG and Whitwood.

THE ELECTION

8. THIS COURT ORDERS THAT the order in paragraphs 1 to 7 and 13 to 24 of the Judgment shall be effective immediately, however the Liquidator shall confine its activities to preparatory steps only for a period of two weeks and the relief ordered in these paragraphs shall be stayed until further order if Ray Di Battista, Anthony Di Battista and Julia Babensky (“Di Battista Respondents”) irrevocably elect to purchase the interests of the Estate of Luigi Gambin (the “Estate”) in accordance with the paragraph next following.

9. THIS COURT ORDERS that the DiBattista Respondents shall have a period of two weeks from August 16, 2018 to elect to purchase all of the interests of the Estate of Luigi Gambin (“The

Estate”), including shares and shareholder loans, in DBG and Whitwood (the “Election”) on the following terms:

- (a) A qualified valuator (the “Valuator”) shall be appointed by the Court to value the shares and loans of the Estate as follows:
 - (i) If the parties do not agree on the name of the Valuator, each shall nominate one qualified valuator who shall have certified his or her ability to act impartially and independently of the parties, such nomination to be made within two weeks of the date of the Election by the DiBattista Respondents;
 - (ii) The parties shall forward to the attention of The Honourable Mr. Justice Dunphy (“Dunphy J.”) within three business days of the end of such two week period the names of the two valutors so nominated along with a copy of the certification of independence and a brief summary of qualifications (CV or similar) to the court jointly and presented in such a fashion as not to reveal which valuator was nominated by which party;
 - (iii) Dunphy J. shall advise the parties of his selection as soon as practicable in writing and without reasons;
- (b) The Valuator named shall determine the fair market value of the shares and shareholder loans owned by the Estate and such determination shall be final;
- (c) Fair market value of the Estate's shares shall be determined without minority discount as being 50% of the value of all equity subject to the following adjustments:

- (i) Other than the loan due to Whitwood by DBG, shareholder loans due to any respondents shall only be considered in the valuation to the extent symmetrical to shareholder loans due to the Applicant – all other shareholder loans (if any) shall be disregarded for valuation purposes;
 - (ii) Greystar shall be separately valued, but the \$3 million mortgage receivable shall be valued at par for the purposes of the valuation of DBG; and
 - (iii) Any payments made by or charged to DBG in respect of this litigation shall be reversed for the purposes of the valuation;
- (d) The DiBattista respondents and Greystar shall fully account for any and all Benefits, and any value so determined shall be attributed to DBG for purposes of the valuation of the Applicant's equity interest;
- (e) The fair market value of the Applicant's shareholder loans shall be the par value of such loans without discount or adjustment on account of term or interest rate;
- (f) The Valuator shall deliver his or her opinion of fair market value within forty-five days of being nominated and for that purpose will be given full access to the books and records of DBG, Whitwood, and Greystar and the full cooperation of the parties as same may be reasonably required;
- (g) The costs of the valuator shall be borne equally by vendor and purchaser and be paid by the purchaser no later than the time of closing (the vendor's portion to be credited against the purchase price otherwise payable);

- (h) Closing shall occur within thirty days of such opinion being delivered and payment for the shares and loans shall be made by certified cheque;
- (i) On closing, the Estate shall assign to the purchaser all of its shares and its interest in all of the shareholder loans; and
- (j) On closing, the Applicant and the Respondents shall exchange mutual releases of all claims arising out of or related to matters raised in this application.

COSTS

10. THIS COURT ORDERS that the Applicant is entitled to its costs which costs shall not be considered in the valuation of DBG or Whitwood. While the Respondents will be jointly liable for the costs of the Applicant, as between the DiBattista Respondents and the corporate Respondents, the liability shall be that of the Di Battista Respondents.

11. THIS COURT ORDERS that if the parties are unable to agree on the amount of costs, Dunphy J. shall receive written submissions of the parties as to amount and scale on the following timetable:

- (a) Applicant-written submissions, outline of costs by September 14, 2018;
- (b) Respondents - written submission, outline of costs if any by October 5, 2018.

12. THIS COURT ORDERS that all such costs submissions shall adhere to the following guidelines:

- (a) Five pages exclusive of attachments (ie. Offers, outlines of costs);

- (b) No need to expand upon first principles;
- (c) Cases should not be attached unless not available electronically;
- (d) Delivered in electronic format - the last to deliver (in this case, the respondents) to assemble submissions of both parties and deliver them to the court together via email thumb drive via my assistant (daisy.ng@ontario.ca) or to judge's administration Rm 107, 361 University Avenue (disk or thumb drive); and
- (e) Reply only with leave and leave to be granted rarely.

LIQUIDATOR'S POWERS

13. THIS COURT ORDERS that the Liquidator is hereby empowered and authorized, but not obligated, to act at once in respect of all of the assets, undertakings and property real and personal of the Companies, of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (collectively, the "Property"). and, without in any way limiting the generality of the foregoing, the Liquidator is hereby expressly empowered and authorized to do any of the following where the Liquidator considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to manage, operate, and carry on the business of the Companies, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Companies;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Liquidator's powers and duties, including without limitation those conferred by this Judgment;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Companies or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Companies and to exercise all remedies of the Companies in collecting such monies, including, without limitation, to enforce any security held by the Companies;
- (g) to settle, extend or compromise any indebtedness owing to the Companies;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Liquidator's name or in the name and on behalf of the Companies, for any purpose pursuant to this Judgment;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Companies, the Property or the Liquidator, and to settle or compromise any such

proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Liquidator in its discretion may deem appropriate, including the listing of the Property with a broker or listing agent as the Liquidator may deem appropriate and at such listing price as may be recommended by such broker or listing agent and approved or agreed to by the Liquidator as appropriate in the circumstances;
- (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply;
- (l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Liquidator deems appropriate on all matters relating to the Property and the Liquidation, and to share information, subject to such terms as to confidentiality as the Liquidator deems advisable;

- (n) to register a copy of this Judgment and any other Orders in respect of the Property against title to any of the Property;
- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Liquidator, in the name of the Companies;
- (p) to exercise any shareholder, partnership, joint venture or other rights which the Companies may have; and
- (q) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Liquidator takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Companies, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE LIQUIDATOR

14. THIS COURT ORDERS that (i) the Companies, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, (iii) the DiBattista Respondents, (iv) Greystar, and (v) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Judgment (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Liquidator of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Liquidator, and shall deliver all such Property to the Liquidator upon the Liquidator's request.

15. THIS COURT ORDERS that all Persons shall forthwith advise the Liquidator of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Companies, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Liquidator or permit the Liquidator to make, retain and take away copies thereof and grant to the Liquidator unfettered access to and use of accounting, computer, software and physical facilities relating thereto.

16. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Liquidator for the purpose of allowing the Liquidator to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Liquidator in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Liquidator. Further, for the purposes of this paragraph, all Persons shall provide the Liquidator with all such assistance in gaining immediate access to the information in the Records as the Liquidator may in its discretion require including providing the Liquidator with instructions on the use of any computer or other system and providing the Liquidator with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE LIQUIDATOR

17. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Liquidator except with the written consent of the Liquidator or with leave of this Court.

NO PROCEEDINGS AGAINST THE COMPANIES OR THE PROPERTY

18. THIS COURT ORDERS that no Proceeding against or in respect of the Companies or the Property shall be commenced or continued except with the written consent of the Liquidator or with leave of this Court and any and all Proceedings, other than any Appeal of this Judgment, currently under way against or in respect of the Companies or the Property are hereby stayed and suspended pending further Order of this Court.

NO INTERFERENCE WITH THE LIQUIDATOR

19. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Companies, without written consent of the Liquidator or leave of this Court.

LIQUIDATOR TO HOLD FUNDS

20. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Liquidator from and after the making of this Judgment from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Judgment or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Liquidator (the "**Post Liquidation Accounts**") and the monies standing to the

credit of such Post Liquidation Accounts from time to time, net of any disbursements provided for herein, shall be held by the Liquidator to be paid in accordance with the terms of this Judgment or any further Order of this Court.

LIMITATION ON THE LIQUIDATOR'S LIABILITY

21. THIS COURT ORDERS that the Liquidator shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Judgment, save and except for any gross negligence or wilful misconduct on its part.

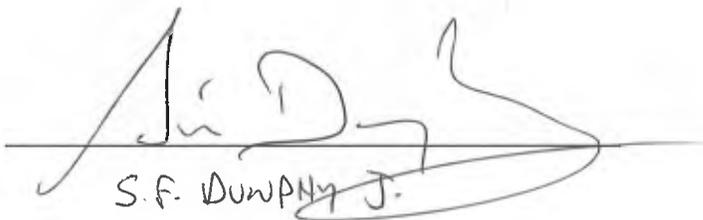
LIQUIDATOR'S ACCOUNTS

22. THIS COURT ORDERS that the Liquidator and counsel to the Liquidator shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Liquidator and counsel to the Liquidator shall be entitled to and are hereby granted a charge (the "Liquidator's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Judgment in respect of these proceedings, and that the Liquidator's Charge shall form a first charge on the Property in priority to all security interests registered against the Property in favour of Persons not related to, or not dealing at arm's length with the Companies as of the date of this Judgment.

23. THIS COURT ORDERS that the Liquidator and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Liquidator and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

24. THIS COURT ORDERS that prior to the passing of its accounts, the Liquidator shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its

fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Liquidator or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.



S.F. DUNPHY J.

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OCT 23 2018

PER / PAR: 

ANTHONY ZANARDO IN HIS CAPACITY AS THE ESTATE
TRUSTEE FOR THE ESTATE OF LUIGI GAMBIN
Applicant

-and- DI BATTISTA GAMBIN DEVELOPMENTS LIMITED et al.
Respondents

Court File No. CV-17-11812-00CL

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COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

JUDGMENT

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