

Court File Number: CV-18-00604717-00CL
CV-18-00604725-00CL
Cv-18-00604721-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

MERCHANT REALTY PARTNERS INC., as agent

Applicant and Moving Party

AND

**2407553 ONTARIO INC., 2384648 ONTARIO INC., 2384646 ONTARIO INC.,
24000196 ONTARIO INC. AND 2396139 ONTARIO INC.**

Respondents and Responding Parties

MERCHANT REALTY PARTNERS INC., as agent

Applicant and Moving Party

AND

4267 RIVER ROAD LP and 4267 RIVER ROAD GP INC.

Respondents and Responding Parties

MERCHANT REALTY PARTNERS INC., as agent

Applicant and Moving Party

AND

4544 ZIMMERMAN AVENUE LP and 4544 ZIMMERMAN AVENUE GP INC.

Respondents and Responding Parties

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Email/Facsimile No:
Kenneth Kraft and Sara-Ann Wilson for Zeifman Partners Inc. as Receiver		
W. Friedman and Steven Nadler for Respondents and Andrzej Kepinski		
Steven Graff and Damian Lu for Respondents and Charles Hunter Milborne		

Order Direction for Registrar **(No formal order need be taken out)**
 Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

Adjourned to: _____

Time Table approved (as follows): _____

IN WRITING

ENDORSEMENT

[1] Zeifman Partners Inc., in its capacity as the Court-appointed receiver (the "Receiver") brought motions in three applications for approval of a sales process in respect of real properties that are the subject of these proceedings, and related relief.

[2] The motions were opposed by the Respondents and by Charles Hunter Milborne and Andrzej Kepinski.

[3] At the first return date of these motions on December 18, 2020, an adjournment was granted at the request of the Respondents and Mr. Milborne and Mr. Kepinski. The individuals advised, through their counsel, that they have given personal guarantees and, if the guarantees are enforceable, the motions are critical for them. The requested adjournment was granted.

[4] The Receiver was successful on the motions. A motion for leave to appeal was dismissed.

[5] The Receiver seeks costs of the motions from the Respondents and from Mr. Milborne and Mr. Kepinski, jointly and severally. The Receiver submits that the Respondents are insolvent and incapable of paying any costs award.

[6] The real issue in respect of costs is whether Mr. Milborne and Mr. Kepinski, who opposed the Receiver's motions, should be held liable for costs of the motions and, if so, on what scale and in what amount.

[7] The Receiver provided a Cost Outline showing a claim for costs on a substantial indemnity scale in the amount of \$23,037.57 or, alternatively, on a partial indemnity scale in the amount of \$15,358.40.

[8] The Respondents submit that the Receiver ought to have its costs paid out of the receivership estate. Alternatively, the Respondents submit that costs should be limited to partial indemnity costs associated with specific actions it took in responding to the Respondents' opposition to the motion.

[9] The Respondents submit that Mr. Milborne and Mr. Kepinski are non-parties and should not be held personally liable for the Receiver's costs.

[10] Mr. Milborne and Mr. Kepinski were represented on the motions by separate counsel who also acted as co-counsel for the Respondents. Mr. Milborne and Mr. Kepinski are the majority equity holders of the Respondents and principals of the Respondents. As I have noted, they have also given guarantees of the indebtedness of the Respondents to the Applicant and, in this capacity, have potential liability to the Applicant if the guarantees are enforceable.

[11] Mr. Milborne and Mr. Kempinski submit that Mr. Milborne swore two affidavits in opposition to the Receiver's motion in his capacity as the major equity holder in each of the named Respondents in these three proceedings. They submit that his actions in doing so did not make him, or Mr. Kepinski, parties to the proceedings such that they may be held liable for costs.

[12] Mr. Milborne and Mr. Kepinski submit that costs may be ordered against a non-party principal of a corporation only where there is proof of fraud or abuse of the Court's process or the bankruptcy process for a wrongful collateral purpose. They submit that this principle applies even if the litigant against whom costs may be awarded cannot pay the costs award and if the principal stands to personally benefit from the outcome of the position taken in the litigation.

[13] In support of this submission, the guarantors rely upon *1730960 Ontario Ltd., Re*, 2009 ONCA 720. In that case, the moving party moved to stay an order approving the sale of certain properties and was unsuccessful. The successful responding parties sought an order that the shareholder of the moving party be held liable for the costs ordered against the moving party on the ground that the shareholder was the real moving party and had the largest economic stake in the outcome. Juriansz J.A. did not accept this submission:

The case before me is quite different. Accepting that 220 was incorporated for the specific purpose of purchasing the property of the bankrupt, its bringing of the motion is consistent with attempting to achieve its corporate purpose. The contention the 220 was acting as a nominee or surrogate of sole shareholder, Romspen, is simply an attempt to lift the corporate veil. Cost awards against non-parties always involve the exceptional exercise of judicial discretion. Absent fraud, abuse of the court's process in general and the bankruptcy process in particular to serve a collateral purpose or similar wrongdoing, there is no basis

for looking behind the moving party's corporate legal personality to award costs against its parent.

[14] I agree that neither Mr. Milborne nor Mr. Kepinski should be held liable for costs simply because Mr. Milborne swore two affidavits upon which the Respondents relied in opposition to the Receiver's motions. That is not the basis upon which the Receiver seeks costs against them.

[15] The Receiver does not seek costs against Mr. Milborne and Mr. Kepinski on the basis that, as principals and shareholders of the Respondents, they are the real litigants, and that I should exercise my discretion to look behind the Respondents' corporate legal personalities and award costs against their shareholders. The Receiver seeks costs against Mr. Milborne and Mr. Kepinski because they appeared as interested persons in response to the Receiver's motion, represented by counsel, and opposed the Receiver's motion because of their potential exposure to liability as guarantors. The principle in *1730960* does not apply to this case.

[16] Under s. 131 of the *Courts of Justice Act*, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court. On these motions, Mr. Milborne and Mr. Kepinski appeared as interested persons because of their potential liability as guarantors, and, represented by separate counsel, they opposed the Receiver's motion. They were unsuccessful in opposing the Receiver's motion and should be liable for costs.

[17] There is not a proper basis to award costs on a substantial indemnity scale. Costs should be awarded on a partial indemnity scale.

[18] The Respondents and Mr. Milborne and Mr. Kepinski submit that the Receiver has made a claim for costs for activities which would have been necessary even without opposition, including preparation of a factum, and attendance at the hearing. They also submit that the Receiver took steps that prolonged and increased the costs of the motions by failing to disclose the appraisals and listing proposals until ordered to do so by the court. They submit that the partial indemnity costs should be reduced to an amount that does not exceed \$7,500 all-inclusive.

[19] I have reviewed the Receiver's Cost Outline. These motions were originally returnable on December 18, 2020 and they were adjourned on that day at the request of the Respondents and Mr. Milborne and Mr. Kepinski. The Receiver does not claim costs for preparation of the motion materials for the December 18, 2020 hearing or for attendance at that hearing. The activities for which a claim for costs is made are those which were necessary because of the opposition to the Receiver's motions. The amount of time claimed for these activities is reasonable and the partial indemnity hourly rates claimed are based on 60% of counsel's actual rates. These rates are reasonable. I do not accept that the Receiver took actions that increased the costs of the motions.

[20] I fix costs of the Receiver's motions on a partial indemnity scale in the amount of \$13,591.50 for fees and \$1,766.90 for HST, a total of \$15,358.40. These costs are to be paid by the Respondents and by Mr. Milborne and Mr. Kepinski, jointly and severally, within 30 days.



Digitally signed by
Mr. Justice Cavanagh

Cavanagh J.

July 6, 2021