

CITATION: Zanardo v. Di Battista, 2021 ONSC 7835
COURT FILE NO.: CV-17-11812-00CL
DATE: 20211130

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

BETWEEN: ANTHONY ZANARDO in his capacity as the Estate Trustee
for the ESTATE OF LUIGI GAMBIN, Applicant

AND:

Di BATTISTA GAMBIN DEVELOPMENTS LIMITED, RAY
Di BATTISTA, ANTHONY Di BATTISTA, JULIA
BABENSKY, WHITWOOD DEVELOPMENTS LTD. and
GREYSTAR DEVELOPMENTS INC., Respondents

BEFORE: L. A. Pattillo J.

COUNSEL: *Robert D. Malen* for the Moving Party/Respondent, Julia
Babensky

Edmond F. B. Lamek for the Court-Appointed Liquidator

Matthew P. Sammon, for the Applicant

HEARD by Videoconference: November 1, 2021

ENDORSEMENT

Introduction

[1] The respondent, Julia Babensky (“Babensky”), brings this motion for the following relief:

1. An order removing Zeifman Partners Inc. (“Zeifman’s”) as Liquidator of the respondent Di Battista Gambin Developments Limited (“DBG”) and appointing the firm of Albert Gelman Inc. (“Gelman”) as Monitor

to oversee the day-to-day management of DBG by the respondent Ray Di Battista (“Di Battista”);

2. In the alternative, an order appointing Gelman as the liquidator to replace Zeifman; and
3. An order that the fees and disbursements of Zeifman’s and its legal counsel as detailed in the fee affidavits attached to the Sixth Report of the Liquidator be reduced in such amount as the court deems reasonable and appropriate.

[2] For its part, the Liquidator seeks an order approving its activities and fees and the fees of its legal counsel as set out in its Sixth Report dated June 28, 2021, and the further extension of the listing agreement with Colliers Macaulay Nichols Inc. (“Colliers”), both of which items were adjourned to the return of this motion by Koehnen J. on July 27, 2021.

[3] For the reasons that follow, I dismiss Babensky’s motion. In my view, Babensky has failed to meet the heavy onus required to remove a liquidator. Further, given the background of this matter and the work done by the Liquidator and its counsel, I am satisfied their fees as detailed in the fee affidavits attached as appendices to the Liquidator’s Sixth Report are fair and reasonable and should be approved and the listing agreement with Colliers should be extended as requested.

Background

[4] DBG is a real-estate company founded in the mid-1980’s by the late Luigi Gambin (who died in 2010) and the respondent Ray Di Battista (“Di Battista”). It is owned 50% by Luigi’s Estate, of which the applicant, Anthony Zanardo (“Zanardo”) is the Estate Trustee and 50% by Babensky, Di Battista’s wife.

[5] Pursuant to the Judgment dated August 16, 2018, Dunphy J. ordered, among other things, that DBG and the respondent Whitwood Developments Ltd. (“Whitwood”) be wound-up and that Zeifman be appointed as Liquidator over the assets and undertaking of DBG and Whitwood. Zeifman’s appointment was part of the relief granted by Dunphy J. in an oppression application commenced by the Estate against the respondents in September 2017. It took effect following the dismissal of the respondents’ appeal from the Dunphy Judgment by the Divisional Court on February 27, 2019.

[6] In exercising his discretion to appoint a liquidator, Dunphy J. stated at par. 4 of his reasons (2018 ONSC 4905):

While it is clear that the breach of fiduciary duty and self-dealing evidenced by the Greystar transaction must be accounted for in full, that remedy alone would be insufficient. The deceased chose to place a great deal of trust in his business partner, Ray Di Battista to protect the interests of his estate within their joint enterprise. Time has shown that trust to have been misplaced. Ray has demonstrated resentment and hostility towards the 50% shareholder of a corporation he is charged as a fiduciary with managing. He has blatantly preferred his family's interests to those of the corporation as a whole. The other individual respondents have utterly failed to act independently of Ray and cannot be relied upon as guarantors of the due and fair administration of this corporation in the future. A separation of interests is the only fair and reasonable course of action at this point.

[7] The Dunphy Judgment empowers the Liquidator to, among other things, market any and all of the property belonging to DBG and Whitwood and to negotiate such terms and conditions of sale as the Liquidator in its discretion deems appropriate.

[8] At the time its appointment took effect, DBG's commercial holdings consisted of several residual pieces of land and five commercial rental properties consisting of two office buildings and three commercial plazas (the "Properties"). In addition, the respondent Greystar Developments Inc. ("Greystar") owned a property in Markham. On December 11, 2019, the court issued an order approving a sales process for the Properties which included the appointment of Colliers as the listing agent to market the Properties. Notwithstanding that the sales process commenced on the eve of the outbreak of COVID, to date, four of the five commercial properties have been sold by the Liquidator and the court has approved each of those sales.

[9] Following its appointment, the Liquidator determined to continue the employment of Di Battista as the property manager for the Properties notwithstanding the reservations expressed by Zanardo, the Estate trustee, on behalf of the Estate, about leaving Di Battista in charge of the day-to-day management of the Properties, given Dunphy J.'s findings.

[10] Issues have arisen between the Liquidator and Di Battista concerning the sale of the Properties. While Di Battista submits that the sales of all but one of the Properties to date have resulted from his efforts in obtaining offers in excess of those obtained by Colliers, the Estate and the Liquidator submit that he has acted contrary to the terms of the appointment order by engaging in a parallel marketing process,

without involving Colliers, contrary to the Liquidator's direction. Further, he has refused to provide information to the Liquidator with respect to his dealings with prospective tenants and purchasers.

The Law

[11] The role of a liquidator in a winding-up is to arrange for the closing down of the company's business in an orderly and expeditious manner while minimizing, as far as possible, the losses and harm suffered by both the creditors and other interested parties and then distributing the assets: *Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc.*, [1996] 1 S.C.R. 900 (S.C.C.) at para. 37.

[12] A liquidator, similar to a receiver, is a fiduciary as to all interests of concerned parties and as such it must act in good faith, with candor, disclosing all relevant material facts affecting the parties and avoiding any real or objectively perceived conflicts. It has a general duty to exercise its obligations with prudence, diligence, due care, and skill: *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.*, 1992 CarswellOnt 168 (Ont. Gen Div); (1992), 12 C.B.R. (3d) 220.

[13] Section 211 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B. 16 ("OBCA"), provides that the court may by order remove for cause a liquidator appointed by it, and in such case shall appoint a replacement.

[14] The case law establishes there is a heavy onus on the party seeking to remove a court appointed officer such as a receiver or liquidator. In normal circumstances, a court appointed officer will not be removed unless he, she or it has engaged in "blatant intentional action contrary to the interest of one or more parties": *Kraner v. Kraner*, 2012 CarswellOnt 10876 at paras. 10 – 11; *Canada Trustco* at para. 5.

[15] As Farley J. points out in *Canada Trustco* at para. 5: "The receiver owes a duty to exercise its responsibilities in a careful manner considering the circumstances. However the measuring of the action of the receiver is one that must take place as of the events as they unfold – not with the benefit of the ever-perfect hindsight."

Analysis

[16] At the outset, I consider that Babensky's motion is restricted to the issue of whether the Liquidator should be removed and replaced by another liquidator. Apart from the requirements of s. 211 of the OBCA, I consider Babensky's request for the

appointment of a monitor in the Liquidator's place to be a collateral attack on the Dunphy Judgment and not appropriate. Dunphy J. appointed the Liquidator to wind-up DBG, and Whitwood based on cogent evidence before him. That finding was upheld on appeal.

[17] In support of her motion, Babensky has filed the affidavit of Di Battista which sets out his assessment of his management of DBG in the 10-plus years following Luigi's death and his perspective of his dealings with the Liquidator. While DBG has fared well, it does not excuse the oppressive conduct found by Dunphy J. It is clear from Di Battista's cross-examination, however, that he does not accept Dunphy J.'s findings and feels that he is in the best position to run DBG as opposed to the Liquidator.

Removal of the Liquidator

[18] Babensky's submission that the Liquidator should be removed is primarily based on the allegation it collaborated with the Estate in opposing her motion for an order to repay her shareholder's loan advanced by her to Greystar. Babensky submits that the Liquidator's actions were "blatant and intentional" and amounted to an impermissible conflict of interest. She further submits there is no prejudice in replacing the Liquidator at this stage of the winding-up as there is only one property left to be sold and Di Battista can continue to manage the affairs of GBD as he has done for years.

[19] In addition, in his affidavit, Di Battista further alleges that "[for] some time I have suspected the Estate and the Liquidator had close ties and worked together to benefit the Estate." Di Battista goes on to set out three examples: a February 2021 information request by the Liquidator for information relating to a company called Cold Creek Developments Inc. ("Cold Creek"); an attempt by the Liquidator in the spring of 2019 to persuade him to provide certain information about DBG's assets to enable a third party evaluation of the Properties; and an allegation the Liquidator "inserted himself unnecessarily" into tax restructuring discussions between himself and the Estate.

[20] The allegation of collaboration between the Liquidator and the Estate in respect of Babensky's motion for payment of her shareholder's loan requires some background.

[21] Babensky, together with Di Battista, formed Greystar in 2016 to purchase the Markham property in order to develop a condominium. Babensky and Di Battista

proceeded without the involvement of the Estate. Greystar purchased the property with a \$3-million mortgage from DBG and a shareholder's loan from Babensky. Dunphy J. found the Greystar transaction to be a breach of fiduciary duty and self-dealing by Di Battista and Babensky and as part of the relief established a constructive trust whereby the respondents (excluding DBG) hold any benefits of any kind derived directly or indirectly from Greystar for the benefit of DBG which extended to and included all the shares of Greystar. When the Markham property was about to be sold, it was clear that the sale proceeds would be insufficient to repay Babensky's shareholder loan which had grown to \$2,704,990. As a result, Babensky brought a motion for an order requiring DBG to repay the loan (the "Motion").

[22] The Motion was heard by Gilmore J. on March 15, 2021. The Motion was opposed by the Estate on the basis that DBG should not be required to repay the loan as any shortfall arising from the sale of the Markham property resulted from the consequences of the oppressive conduct. In the alternative, repayment of the loan should not happen until the Liquidator had properly assessed and determined the amount owing. The Liquidator took the position that it was premature to make any order and the best course of action was to sell the Markham property and determine Babensky's claims by way of a distribution motion in the winding-up.

[23] On March 23, 2021, Her Honour released reasons allowing the Motion and ordering that Babensky's shareholder loan be repaid upon the sale of the Markham property with any shortfall after payment of the DBG mortgage to be paid by DBG and after a full accounting by her and validation by the Liquidator of the amount owing.

[24] In addressing the Liquidator's submissions, Her Honour stated at para. 38 of her endorsement:

38. Finally, I do not agree with the Liquidator's position that an Order at this stage is premature for two reasons. First, the Liquidator is intended to be a neutral party in this matter but is clearly aligned with the Estate. Second, DBG has significant cash and sale proceeds available. There is no need to incur more expense by requiring a distribution motion.

[25] Apart from setting out the positions of the parties, there is nothing in Gilmore J.'s reasons to support her finding that the Liquidator is "clearly aligned with the Estate". In his affidavit, Di Battista states that finding arose from evidence before the court in the Liquidator's account that counsel for the Liquidator had shared a draft of its Fourth Report (filed by the Liquidator on the Motion) with counsel for

the Estate and there had been communications between them which did not include counsel for the respondents.

[26] In addition, Di Battista states that following the release of Gilmore J.'s reasons, he reviewed the Liquidator's counsel's fee invoice dated February 25, 2021, which indicated "multiple" occasions in January 2021 of "collaboration" between the lawyers for the Liquidator and the lawyers for the Estate concerning the Babensky motion.

[27] The fact that a court officer takes a position against one of the parties does not mean that he or she is in a position of conflict or not acting in good faith. As noted by Farley J., it must be considered based on the circumstances. In this case, Babensky was bringing a motion, not in her capacity as a shareholder of DBG but as a shareholder of Greystar. Further, while both the Estate and the Liquidator opposed the Motion, they did so for very different reasons. The Estate's position was that Babensky should be paid solely from the proceeds of the sale of the Greystar property, which would have resulted in a shortfall. The Liquidator's position was that the order was premature and should await the sale of the Markham property and final distribution.

[28] The Liquidator submits that it took a position that, in its view, protected the interests of DBG and its stakeholders by deferring the issue until all the relevant facts would be known to all parties. I accept the Liquidator's submission.

[29] The evidence of the alleged "collaboration" indicates there were brief telephone calls between counsel for the Estate and the Liquidator concerning the motion. Further, on January 18, 2021, counsel for the Liquidator sent the final draft of the Liquidator's report it intended to file on the motion. The next day, counsel for the Estate replied asking if the Liquidator had taken steps to confirm the amount of the loan given Di Battista's evidence that there was no dispute of the amount. That question was a reasonable one for the Estate to ask as a 50% shareholder. I also do not consider counsel's insertion of that point in the report was improper given the position it was taking on the motion. Later that same day, after making some other changes independent of any comment from the Estate, the Liquidator's counsel sent the report to counsel for the Estate and advised it would be served the next day.

[30] Given that Babensky was bringing a motion for an order against DBG which impacted the liquidation, I do not consider the discussions between counsel for the Liquidator and the Estate to be indicative of bad faith. Nor do I consider sending

counsel a copy of the draft final report the Liquidator proposed to file on the Motion to be inappropriate, in the circumstances.

[31] Based on the above, I am satisfied that the Liquidator's counsel's actions in communicating with counsel for the Estate in respect of the Motion did not come close to the type of conduct required for removal. It clearly did not amount to a conflict of interest. In my view, in the circumstances, the Liquidator's actions were in keeping with its duties as the Liquidator of the respondent companies.

[32] Nor do I accept that Di Battista's three examples of the Liquidator alleged favouring of the Estate over Babensky establish such conduct. As a result of Di Battista's hostile actions towards Zanardo and the Estate and the subsequent litigation, the direct lines of communication between Di Battista and Zanardo were non-existent resulting in the Liquidator having to act as a conduit from time to time between Zanardo and Di Battista as DBG property manager when information about the assets and operations of DBG was requested by the Estate and not otherwise in possession of the Liquidator. The "examples" all relate to such circumstances.

[33] I also reject Babensky's submission that there is no prejudice in removing Zeifman at this stage as the hourly rates charged by Gelman are less than Zeifman and Di Battista can deal with the day-to-day operation of DBG. Only one Property remains to be sold to complete the liquidation. Babensky has provided no estimate of costs for her proposed liquidator, but in my view, the costs incurred in bringing it up to speed at this stage, even at reduced rates, will likely be more than retaining Zeifman. I am also of the view, given the evidence of Di Battista's actions in deliberately disobeying the Liquidator contrary to the provisions of the appointment Order, it is important that Zeifman remain as Liquidator to oversee Di Battista's actions in the interests of all stakeholders.

Approval of the Liquidator and its Counsel's fees and Extension of Colliers' Listing Agreement

[34] As noted at the outset, the Liquidator seeks approval of its activities as set out in its Sixth Report together with approval of its fees and disbursements for the period November 1, 2020 to May 31, 2021 as well as the fees and disbursements of its counsel, DLA Piper (Canada) LLP, for the same period, and the further extension of the Colliers' Listing Agreement which matters were adjourned by Koehnen J. on July 27, 2021 to be heard in conjunction with this motion.

[35] The Liquidator's fees and disbursements for the period November 1, 2020 to May 31, 2021, including HST total \$131,762.16, split between DBG (\$105,245.37) and Greystar (\$25,516.83). They are supported by the fee affidavit of Alan Rutman, the President of Zeifman, sworn June 24, 2021 which contains Zeifman's monthly accounts for the period.

[36] DLA Piper's fees for the same period, including HST, total \$55,127.25 and are supported by the affidavit of Edward Lameck, the partner in charge of the file, sworn June 25, 2021.

[37] Babensky submits that the fees of both the Liquidator and DLA Piper should be reduced by a third, to bring the hourly rate in line with the fees charged by her proposed replacement liquidator, or alternatively, the accounts be assessed. In making that submission, Babensky does not point to any specific concern with the work detailed in the accounts in issue. Rather, she submits that the overall fees to date totaling \$1 million lack proportionality and reasonableness given the liquidation was "modest", the day-to-day management of the business was handled by Di Battista and he was able to attract offers for three of the Properties.

[38] The problem with Babensky's submission is that it ignores the court's prior approvals of the fees and disbursements of the Liquidator and its counsel on four separate occasions, covering the period from August 18, 2018 to October 31, 2020, coupled with the fact that Babensky (and the Estate) did not raise any issue concerning the fees at any of the approval motions. If there was an issue with the work done or the hourly rates charged, it should have been raised at the prior approval motions and not at this stage. I also do not agree with Babensky's portrayal of the liquidation as being "modest" or that her husband's involvement somehow reduces the Liquidator's role or responsibilities. In fact, I am satisfied from the evidence that Di Battista's actions have increased them.

[39] The accounts in issue set out the time spent by the partners and staff working on the file and deal primarily with services in connection with the marketing and sale of the Properties as well as various tasks in relation to the administration of the winding-up, including court appearances. In my view, there is nothing unusual concerning the services performed, the time spent, or the rates charged. There is no need to direct an assessment. I am satisfied the Liquidator and its counsel's accounts for the period November 1, 2020 to May 31, 2021 are fair and reasonable and should be approved.

[40] The Liquidator also requests authorization to further renew the Listing Agreement with Colliers for an additional six-month period, on the same terms and conditions as the current Listing Agreement previously approved and extended by court Orders dated December 11, 2019 and November 13, 2020.

[41] The Listing Agreement renewal term expired on May 31, 2021, and the Liquidator is recommending it be renewed for a further six months. In my view, notwithstanding Di Battista's criticism of Colliers' efforts, the evidence supports that it has conducted a thorough marketing campaign despite the pandemic and has dealt with the Liquidator and prospective purchasers in a professional and effective manner throughout. Accordingly, I am satisfied on the evidence that the Listing Agreement should be renewed on the basis requested.

Conclusion

[42] For the above reasons, Babensky's motion is dismissed in its entirety.

[43] In addition, the activities in the Sixth Report as well as the Liquidator and its counsel's fees for the period November 1, 2020 to May 31, 2021 are approved and the Liquidator is authorized to renew Colliers' Listing Agreement on the terms proposed.

[44] The Estate and the Liquidator are entitled to their costs of the motion, payable by Babensky.

[45] The Estate is entitled to its costs on a partial indemnity basis which I fix at \$20,000 in total. While the Estate claims partial indemnity costs of \$39,463.67 in its Costs Outline, in my view, given the issues and the fact that it was effectively supporting the Liquidator, I consider \$20,000 to be fair and reasonable. I also consider it to be an amount within Babensky's reasonable contemplation given her Costs Outline. Payable forthwith.

[46] The Liquidator filed no Costs Outline which is not surprising given its counsel's costs are part of the liquidation and ultimately payable on a full indemnity basis if approved by the court. In the circumstances of this motion, which I consider to have been without merit, such a result would be unfair in my view, as those costs would ultimately be borne 50% by the Estate. In order to avoid that result, in my view, Babensky should pay the Liquidator its full indemnity costs incurred in responding to her motion.

[47] Accordingly, I direct that the Liquidator submit a Costs Outline detailing its full indemnity costs for the motion within ten days of release of these reasons. Babensky shall have a further seven days from receipt of the Liquidator's Costs Outline to file a brief response, if required (no more than three pages) and the Liquidator a further five days to briefly reply, if necessary (same page length).



L.A. Pattillo J.

Released: November 30, 2021