

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

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Court File No.: CV-18-00604717-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

MERCHANT REALTY PARTNERS INC., as agent

Applicant

- and -

2407553 ONTARIO INC., 2384648 ONTARIO INC., 2384646 ONTARIO INC., 24000196 ONTARIO INC.
and 2396139 ONTARIO INC.

Respondents

Court File No. CV-18-00604725-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

MERCHANT REALTY PARTNERS INC., as agent

Applicant

- and -

4267 RIVER ROAD LP and 4267 RIVER ROAD GP INC.

Respondents

Court File No.: CV-18-00604721-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

MARCHANT REALTY PARTNERS INC., as agent

BETWEEN:

Applicant

- and -

4544 ZIMMERMAN AVENUE LP and 4544 ZIMMERMAN AVENUE GP INC.

Respondents

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Email/Facsimile No:
Kenneth Kraft and Sara-Ann Van Allen for Receiver		
Steven Graff for respondents and Charles Hunter Milborne W. Friedman and Steven Nadler for respondents and Andrzej Kepinski		

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): _____

Date Heard: March 24, 2021

- [1] Zeifman Partners Inc. in its capacity as receiver and manager ("Receiver") of the assets, undertakings and real properties of the respondents moves for, among other things, an order approving a sale process in respect of five real properties located in downtown Niagara Falls, Ontario ("Real Properties") including the proposed list prices for the Real Properties.
- [2] The respondents oppose the Receiver's motion and, in particular, they oppose the proposed list prices for the Real Properties. The respondents contend that the Receiver intends to sell the Real

Properties without regard to their development potential or other attractive features. The respondents contend that for the Receiver to sell the Real Properties without taking into account the development potential for the Real Properties makes no practical sense.

- [3] Pursuant to receivership orders dated August 6, 2020 and entered on October 14, 2020, the Receiver is authorized to market the Real Properties, including advertising and soliciting offers in respect of the Real Properties, and negotiating such terms and conditions of sale as the Receiver may deem appropriate.
- [4] In order to determine the appropriate list prices for each of the Real Properties, the Receiver (a) obtained independent appraisals from two local appraisers: Humphreys Appraisal Services Inc. and Jacob Ellens & Associates Inc.; and (b) obtained list prices for each of the Real Properties from three real estate brokerages.
- [5] The final proposed list prices were arrived at based on the Receiver's review of the appraisals and the realtor valuations, and discussions with the proposed listing brokerage with expertise in selling real property in the Niagara Falls area. The two appraisers arrived at their appraised values independently and the values are similar. The values are supported by the opinions of the opinions of relators who were consulted.
- [6] The respondents rely upon appraisals issued by Colliers dated January 10, 2020 and two updated appraisals issued by Colliers dated March 4, 2021. Colliers opinion is that the values of the Real Properties (except one) are, based on the development potential for the Real Properties and a valuation methodology which Colliers used to take the development potential into account, substantially higher than the Humphreys and Ellens appraisals and the three realtor valuations and the proposed listing prices.
- [7] The respondents ask that I direct that the Receiver list the Real Properties at the appraisal values determined by Colliers and that the properties be promoted at those values for a period of at least sixty days to assess what the market will bear.

Analysis

- [8] Pursuant to section 247 of the *Bankruptcy and Insolvency Act*, the Receiver is required to act honestly and in good faith and to deal with the Real Properties in a commercially reasonable manner. The Receiver is an officer of the court and owes fiduciary duties to all creditors. The Receiver does not have a financial stake in the outcome of receivership proceedings and is not an advocate of any affected party. As a court officer and appointee, the Receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. See *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para. 31.
- [9] In *Regal Constellation Hotel Ltd. (Re)*, [2004] O.J. No. 2744 (C.A.), the Court of Appeal heard a motion to quash an appeal from decisions approving the conduct of a receiver in relation to the sale of a hotel and a vesting order. The Court of Appeal also heard an appeal of those orders. In his reasons for the Court, Blair J.A. wrote:

Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances -

particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

- [10] In *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 MBCA 46, the Manitoba Court of Appeal, at para. 11, addressed the proper role of the court in reviewing the sale process in receiverships:

The motion judge owed the decision of the Receiver significant deference. While it is the duty of the court to ensure the integrity of the process, it is not appropriate for the court to go into the minutia of that process. The court's role in reviewing the sale process in receiverships is not to second-guess the receiver's business decisions, but to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. The court should not intervene in the decision of the receiver except in an exceptional case.

- [11] The respondents contend that the Receiver, acting in reliance on two appraisers, the broker valuations, and its own judgment, has failed to take into consideration the development potential of the Real Properties, as Colliers did, and, as a result, the proposed listing prices are far lower than they should be, such that the Receiver will be unable to maximize realization on a sale of the Real Properties.
- [12] The respondents point to various factors taken into account by Colliers including sale prices for comparable Real Properties with development potential, the location of the Real Properties in proximity to a GO Transit Station, the location of the Real Properties in the Downtown Niagara Falls Community Improvement Plan, and pre-approvals of three Real Properties for 20 storey buildings and one for an 8-storey building. The respondents also rely on a report dated March 23, 2021 from the Planning, Building & Development department of the City of Niagara Falls to the Mayor and Municipal Council recommending approval of amendments to the zoning by-law to accommodate the long term development of the downtown area which concludes that the zoning amendments, which were approved, would implement the Official Plan Amendment 125 "which provided the vision and policy framework that over time, will result in substantial investment and redevelopment of the Downtown Area".
- [13] The Receiver was provided with the Colliers appraisal, including Colliers' updated appraisals. The Receiver obtained input from the same two appraisers it had consulted with respect to the appropriateness of the comparable sales and their relevance to the Real Properties. The appraisers consulted by the Receiver expressed their views that the comparable sales upon which Colliers relied would not be appropriate for the valuation of the Real Properties for reasons given in their reports. One appraiser considered that the comparable Real Properties upon which Colliers relied "were all located within superior areas that would command a premium relative to

that of the subject property and considered inappropriate for the subject Real Properties' valuations". The other appraiser considered it to be unreasonable to compare "high density" sites with development timing more imminent than that of the Real Properties, and considered that there are sufficient sales located within the Real Properties' market area. The Receiver considered the effect of the by-law amendments, in consultation with the realtor proposed to be used, and this information did not change its recommendation concerning the sale process.

- [14] The respondents also rely on the fact that that the investors in Marchant, the applicant in these proceedings, invested based on acquisition prices that were based on the development potential of the Real Properties. The Receiver points out that the respondents have been given significant time to refinance the Real Properties and, if the Colliers' values were realistic, refinancing of the Real Properties could have been achieved.
- [15] The Receiver is concerned that if the list prices are inflated and far exceed the sale prices of similar properties in downtown Niagara Falls, there may be limited interest in the sale process. The Receiver reports that in its experience, listing properties for prices far in excess of what the market will bear can result in little to no interest in the sale process, with the result that properties languish on the market and ultimately require drastic price reductions to generate interest. In the Receiver's experience, this can lead to lower recoveries than what would have been possible had the property has been listed for sale at an appropriate price at the outset.
- [16] After reviewing the updated Colliers appraisals, the Receiver concluded that the Humphreys and Ellens appraisals provide far more realistic values than the updated Colliers appraisals. The Receiver recommends that the Court approve the sale process and the proposed listing prices for the Real Properties as set out in its first report.
- [17] The Receiver is an officer of the court with duties to all stakeholders. In my view, the Receiver has shown that it is acting in good faith and diligently to discharge its duty to deal with the Real Properties in a commercially reasonable manner. The Receiver has reviewed the Colliers appraisals and the information upon which Colliers relies for its appraisals of the Real Properties. The Receiver has explained why it does not agree with the Colliers appraisals, and why it has recommended that the sale process be approved. I have considered the process which the Receiver has followed and the information upon which it relies to support its recommendations. The respondents have not shown that the Receiver followed a flawed procedure. I am not satisfied that this is an exceptional case where it is proper for me to reject the business judgment made by the Receiver.
- [18] I accept the recommendation made by the Receiver and approve the sale process.
- [19] I am also satisfied that the other relief requested by the Receiver in its Notice of Motion should be granted. The fees and disbursements of the Receiver and its counsel are reasonable and were incurred for services that were properly performed in the interests of the estate and its stakeholders. I am also satisfied that the Second Supplemental Report of the Receiver contains confidential information and that it is proper that an order be made sealing this report from the public record until completion of the sale transactions in respect of the Real Properties or further Order of this Court.
- [20] Orders to issue in forms of orders attached to this endorsement and signed by me.

[21] If the parties are unable to agree on costs, written submissions may be made.

Cavanagh J.

March 25, 2021