



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-17-00011812-00CL

DATE: 24 May 2024

NO. ON LIST: 2

TITLE OF PROCEEDING: ANTHONY ZANARDO IN HIS CAPACITY AS THE ESTATE TRUSTEE FOR LUIGI GAMBIN v. DI BATTISTA GAMBIN INVESTMENTS LIMITED et al

BEFORE: JUSTICE PENNY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Robert Malen	Counsel for the Moving Party/Respondent	malen@gsnh.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Matthew Sammon Nikolas De Stefano	Counsel for the Responding Party/Applicant	msammon@litigate.com ndestefano@litigate.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Edmond Lamek	Counsel for the Court-Appointed Liquidators – Zeifman Partners	Edmond.lamek@dlapiper.com

ENDORSEMENT OF JUSTICE PENNY:

[1] South Liberty Investment Ltd. brings this motion for an order: that it be added as a respondent; and that, upon an offer being made by South Liberty to the Liquidator to purchase the vendor take back mortgage on the Weston Road Property at a discount rate of 10%, the Applicant Estate of Luigi Gambin be given a right of first

refusal, to be open for acceptance for a period of 5 business days, to trigger the right of first refusal, failing which the Liquidator must accept the offer from South Liberty.

[2] For reasons which I will explain below, the motion is dismissed.

[3] The respondent DiBattista Gambin Developments Limited (“DBG”) was ordered to be liquidated and wound-up by order of Justice Dunphy dated August 16, 2018. The respondent Julia DiBattista was a 50% owner in DBG. Her interest was subsequently acquired by South Liberty. Julia is the sole shareholder of South Liberty. Her husband, Ray DiBattista, is the President of South Liberty, and was formerly the President of DBG. I will refer to these respondents as DiBattista. The remaining 50% of DBG was owned by the Estate.

[4] The liquidation order arose out of an oppression application against DiBattista commenced by the Estate. The oppression application was granted by Dunphy J. Justice Dunphy found that Mr. Di Battista had engaged in “grave” breaches of his fiduciary obligations and that he had abused his power by, among other things, misappropriating a corporate opportunity referred to as the “Greystar Transaction.” Justice Dunphy made findings of misconduct and bad faith against Mr. Di Battista. He found that Mr. Di Battista had demonstrated resentment and hostility towards the Estate and that he blatantly preferred his family’s interests to those of DBG as a whole. Having found that there was no possibility of reconciliation, Justice Dunphy ordered the wind up of DBG under the supervision of a court-appointed liquidator. He granted Di Battista a right to purchase DBG at fair market value within two weeks. Di Battista did not exercise that right to purchase the Estate’s half of DBG. The Liquidator has been managing DBG’s assets since then. Mr. Di Battista’s appeal of Justice Dunphy’s order was dismissed.

[5] The Liquidation Order grants the Liquidator broad discretion to dispose of DBG’s assets as it sees fit. The Liquidation Order specifies 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” of DBG. In 2021, Di Battista sought an order to remove the Liquidator. That motion was dismissed by Pattillo J.

[6] In 2023, the Liquidator entered into an agreement with a third party purchaser for the sale of the Weston Road Property. The purchase price was \$19,000,000 with \$7,450,000 paid in cash and the balance accounted for in the form of a vendor take back mortgage in favour of the Liquidator. The terms of this sale were presented to Mr. Di Battista and the Estate. Both Mr. Di Battista and the Estate agreed to the \$12,350,000 VTB mortgage, with a three-year term and a 6% interest rate. The mortgage contains no express right of assignment. The sale was approved by order of this court on May 9, 2023. The deal closed on June 14, 2023.

[7] Di Battista first asked the Liquidator to sell the VTB mortgage in November 2023. The Liquidator made enquiries. One firm was prepared to offer \$9 million in cash (a discount of about 23%). Those terms were not acceptable. Then Di Battista proposed that Di Battista purchase the VTB for the equivalent of \$11,213,800. Under this proposal, Di Battista would obtain the VTB in return for a cash payment to the Estate of \$5,606,900. This represents an overall discount rate on the VTB mortgage of 10%. The Liquidator has calculated that this proposal would result in the Estate receiving \$623,453 less than if the VTB were carried to maturity. Di Battista would be entitled to continue earning revenues from the VTB mortgage at 6% and would benefit from the discounted purchase price; Di Battista would make \$493,660 more than if the status quo were maintained.

[8] Following receipt of this information, Di Battista amended its proposal to include a right of first refusal to the Estate on the same terms. The Estate has said it has insufficient liquidity to exercise the right of first refusal and in any event does not wish to do so.

[9] The essence of the Di Battista proposal is that, in exchange for a payment of \$5,606,900 to the Estate, it would acquire the \$12.3 million VTB mortgage and enjoy the 6% return, plus reap the benefit of the discount, producing the equivalent of an additional 4% over the term.

[10] There are essentially two reasons advanced by Di Battista in support of its request that the Liquidator be ordered to sell the VTB as proposed. First, Di Battista is not content with the 6% return and the evidence supports the proposition that there is a better rate available in the market now. Second, Di Battista says it will speed up the liquidation and realization on the capital value of DGB's assets. Both reasons are captured in this passage of Mr. Di Battista's supplementary affidavit:

The basic fact is that the Estate is content with a 6% return, and I am not. As I explained in my First Affidavit, there are opportunities to earn a return of 9%, and I have provided examples. It is open to the Estate and its beneficiaries to take advantage of the same type of investments. I am not content to wait for two more years - the Liquidator's court-ordered mandate is to liquidate, not hold onto an investment simply because one party is content with the rate of return.

[11] Neither of these arguments is sufficient to warrant the order Di Battista seeks.

[12] I accept the Liquidator's submission that the Weston Road Property was a challenging re-development property. It took considerable time and effort for the Liquidator to obtain the City of Toronto's position on future density. This was done so the Liquidator would be in a position to negotiate a sale transaction reflecting the potential future developed value of the Weston Road Property that did not contain a contingent element based on future final density approvals by the City of Toronto. The decision to accept the VTB mortgage as part of the Weston Road sale transaction was made by the Liquidator in its business judgment, in consultation with Di Battista and the Estate, both of which concurred with that decision. The closest all cash (non-contingent) purchase price offered for the Weston Road Property was in a letter of intent at a price of \$17,500,000. That offeror decided to not proceed with the negotiation of an agreement of purchase and sale. The Di Battista proposal would essential eviscerate the benefit of the higher purchase price negotiated in exchange for providing the VTB mortgage.

[13] Di Battista says it was always his understanding that the VTB would be sold. I give no credence to his subjective understandings. Prior discussions involving the potential for VTB assignments involved a different context and different financial terms. The 3 year VTB at 6% was the deal approved by the court. Di Battista made no objection to it at the time.

[14] There is also a potential problem arising from the fact that the VTB mortgage does not contain an assignment clause. Views differed, between the parties, as to whether an assignment of the VTB mortgage may require consent of the mortgagor. That issue will not be resolved on this motion, but it is an additional question mark around the Di Battista proposal.

[15] The Liquidator also points out that, as Liquidator of DGB, it is liable for certain obligations, such as capital gains tax on the sale of the Weston Road Property. The Di Battista proposal does not involve a payment to the Liquidator but a payment to the Estate, so would require the Liquidator to transfer the benefit of the VTB mortgage without getting anything in return. The Di Battista proposal makes no provision for the satisfaction of capital gains tax on the sale of the Weston Road Property. The Liquidator will not sell the VTB mortgage to one of shareholders without adequate provision for the payment of capital gains tax. The Liquidator will also require a clearance certificate from CRA. It will take time for that certificate to be obtained.

[16] This brings me to the other reason advanced for the order sought by Di Battista: to expedite the completion of the Liquidation. However, Di Battista now acknowledges, contrary to its position when the motion was brought, that there are at least two other DGB assets which the Liquidator must be concerned with, both of which could easily take an additional two years to realize upon. Thus, selling the VTB mortgage at a discount is not doing to result in a quicker completion of the liquidation.

[17] In conclusion, there is no reason to sell the VTB mortgage now, other than Di Battista's self-interested desire to obtain a better return and an advantage over the Estate. Di Battista has now been forced to acknowledge that the time frame for administration of the DBG liquidation is not going to be abbreviated by a sale of the VTB mortgage. It is the Liquidator's business judgment the liquidation and its 50/50 shareholder stakeholders are, as a whole, better off having the Liquidator collecting the prescribed interest on the VTB until the end of the remaining term and collecting the VTB mortgage principal at that time. That is also the business judgment of the Estate.

[18] I am not prepared to interfere with the business judgment of the Liquidator or that of the Estate. The transaction approved by the court contemplated a three year mortgage at 6%. The Di Battista proposal results in a different transaction and different financial equation. It has not justified a departure from the court approved transaction. The fact that Di Battista now wishes there was no VTB mortgage, or that it bore a better return, is no reason to interfere with the court-approved sale or its terms in these circumstances.

[19] For these reasons, the motion is dismissed.

[20] Mr. Sammon asked that substantial indemnity costs be awarded to the Estate, citing knowing misleading statements made by Mr. Di Battista and the lack of any legal or factual basis for the motion. I cannot accept that submission. While Mr. Di Battista's affidavit was full of argument, which I have entirely ignored, it did not contain material misstatements of fact sufficient to warrant an elevated cost award. While I have dismissed Di Battista's motion, that does not mean that it was improper or unlawful to have brought it. The respondents shall pay to the Estate all-inclusive partial indemnity costs of \$32,000 forthwith.

[21] The Liquidator, as court-appointed liquidator acting on behalf of DGB, however, is entitled to full indemnity costs of the motion, which I fix at \$30,000, all inclusive, also payable by the respondents forthwith.

A handwritten signature in blue ink, appearing to read "Penny J.", with a stylized flourish at the end.

Penny J.