CITATION: 2615333 Ontario Inc. v. Central Park Ajax Developments Phase 1 Inc. et al, 2024 ONSC 1484
COURT FILE NO.: CV-20-00651299-00CL
DATE: 20240311

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2615333 ONTARIO INC., Applicant

AND:

CENTRAL PARK AJAX DEVELOPMENTS PHASE 1 INC., 9654488 CANADA INC., 9654461 CANADA INC., 9654372 CANADA INC., 9617680 CANADA INC. and 9654445 CANADA INC., Respondents

BEFORE: Cavanagh J.

COUNSEL: *Wendy Greenspoon-Soer*, for the Applicants

John R. Hart for The Corporation of the Town of Ajax

Rebecca L. Kennedy and Alexander Soutter for RSM Canada Limited in its capacity as Court-appointed Receiver

HEARD: March 4, 2024

ENDORSEMENT

Introduction

[1] The Applicant, 2615333 Ontario Inc., holds mortgages against three properties in the Town of Ajax that, together, are referred to as the "Harwood Properties" and are more particularly described below. The mortgages fell into default.

[2] The Applicant commenced this application for the appointment of a receiver. The Applicant's application was opposed by the Respondents and another mortgagee.

[3] When the Applicant's application was commenced, the Applicant was in litigation with the Town of Ajax (the "Town"). The Town had commenced an action to determine the purchase price to be paid on the repurchase of two of the Harwood Properties pursuant to a contractual right of re-purchase in favour of the Town that was a term of the development agreement with the purchaser. The Applicant was a defendant in the Town's action and defended the Town's claim on the basis that the proposed price was too low and that the Town's right of re-purchase does not have priority over the Applicant's mortgage.

[4] After the Applicant's application was commenced, the Town commenced its own application for the appointment of a receiver.

[5] Before the Applicant's application for the appointment of a receiver was heard, the Town agreed to withdraw its application and to consent to the Applicant's application, provided that the receivership order requested by the Applicant include provisions that provided for a right for the Town to be consulted on any sale transaction and required a purchaser to enter into a development agreement with the Town which includes a right of re-purchase substantively similar to the Town's right in its development agreement with the owner.

[6] The Applicant's application for the appointment of a receiver on the terms of its requested order was granted. An order was made on April 21, 2021, on consent of the Town, appointing RSM Canada Limited as receiver of the Harwood Properties. Upon issuance of the Appointment Order, the Town's action against the Applicant (and other defendants) was stayed. The Respondents appealed the Appointment Order and later discontinued their appeal.

[7] The Receiver negotiated a form of development agreement that the Town would accept and sought and obtained a Sale Procedure Order. After the sale procedure was implemented, it did not produce a bid that was acceptable to the Applicant or the Receiver. The Receiver obtained market feedback and reports that the proposed development agreement was seen as extremely onerous and that overall market interest in the Harwood Properties, and potentially their overall value, would be significantly stronger if there was no development agreement required.

[8] The Applicant moves under the comeback clause in the Appointment Order and s. 187(5) of the *Bankruptcy and Insolvency Act* ("*BIA*") for (i) an order that the Town's contractual right of re-purchase is subordinate to the Applicant's mortgage (against one of the Harwood Properties); (ii) a declaration that the Town does not have a right of re-purchase with respect to another of the three Harwood Properties; and (iii) an order varying the Appointment Order to delete provisions included at the request of the Town in exchange for its consent to the Appointment Order.

[9] For the following reasons, the Applicant's motion is dismissed.

Background Facts

[10] I set out the background facts below.

Applicant's mortgages

[11] The Applicant holds mortgages registered against title to certain real property in Ajax referred to herein as the Phase 1A Lands, the Utility Lands or the Phase 1B Lands (collectively, the "Harwood Properties"). The mortgages have been in default for several years.

[12] The Respondents were incorporated for a planned residential real estate development. The Respondents acquired title to the lands described as the Phase 1A Lands by purchasing these lands from the Town pursuant to a Development and Purchase Agreement (the "DPA").

[13] The DPA included a right of re-purchase in favour of the Town in the event that the Respondents did not meet certain deadlines for commencement of construction in accordance with the approved site plan and failed to cure their default within 90 days of receipt of a re-purchase notice from the Town (the "Right of Re-purchase").

[14] The Respondents acquired title to the Phase 1B lands and the Utility Lands by purchasing them from other parties.

[15] Under the Right of Re-purchase, the Town would have the right to repurchase the Phase 1A Lands and the Utility Lands, but not the Phase 1B Lands, at a price as determined by the terms of the DPA.

[16] The Respondents obtained financing for the purchase of the lands, including from Toronto Capital Corp. and a syndicate of investors (collectively, "TCC").

[17] Pursuant to a Loan Purchase Commitment dated May 16, 2018, the Applicant purchased certain loans which had been advanced to the Respondents by TCC and received an assignment of all instruments, agreements and security related to the purchased loans.

[18] The loan secured by the Applicant's mortgages became due and payable on June 30, 2018 and the Applicant thereafter delivered Demands and Notices of Intention to Enforce Security, as well as issued Notices of Sale under the various mortgages.

Applicant's application for appointment of a receiver

[19] In November 2020, the Applicant commenced an application for the appointment of RSM Canada Limited as receiver of the Harwood Properties. In addition to the debt owing to the Applicant, there were a number of other creditors with subsequently registered encumbrances against the Harwood Properties.

The Town's Position on the Applicant's application for the appointment of a receiver

[20] On July 17, 2017, the Town delivered a re-purchase notice to the Respondents under the DPA. The Respondents failed to cure the default within the requisite time. The Town thereafter asserted a right to re-purchase the Phase 1A Lands and Utility Lands (but not the Phase 1B Lands).

[21] In March 2018, the Respondents commenced a legal proceeding against the Town alleging, among other things, that the Town had wrongfully issued its repurchase notice. In the decision on a trial of an issue within that proceeding, Mullins J. found

that the Town's exercise of its right to repurchase the Phase 1A Lands and the Utility Lands was proper and in accordance with the terms of the DPA. The Court of Appeal for Ontario upheld this decision on October 4, 2019.

[22] On February 6, 2020, the Town commenced an action against the Applicant and other registered encumbrancers seeking an Order to determine the repurchase price for the Phase 1A Lands and Utility Lands and to delete all subsequent registered encumbrances against those properties. The Town's action was defended by the Applicant and a number of the other stakeholders including on the basis that the proposed repurchase price was unconscionably low and would result in unjust enrichment to the Town, to the detriment of other stakeholders. The Applicant's defence also denied the entitlement of the Town to exercise its re-purchase right in priority to the Applicant's mortgages.

[23] In November 2020, the Town commenced its own application for the appointment of a receiver. After doing so, the Town agreed that it would support the Applicant's application, provided additional provisions were incorporated into the appointment order to give the Town the right to require a development agreement with the ultimate purchaser and to preserve a right of re-purchase therein. If these terms were agreed to, the Town agreed to forgo enforcement of its right of re-purchase.

[24] The Applicant agreed with the Town regarding the terms of the appointment order that the Applicant requested in its application. The Town withdrew its application for the appointment of a receiver. On the basis of provisions in the requested order, the Town consented to the application by the Applicant.

[25] The application by the Applicant for the appointment of a receiver in the form of the requested order was opposed by the Respondents and by Ajax Master Holding Inc. ("AMHI"), a creditor of the Respondents with mortgage security ranking in different positions against different parcels of the Harwood Properties.

[26] The decision on the Applicant's application for an order for the appointment of a receiver in the requested form was released on April 15, 2021. The Applicant's application was granted and an order issued, with the consent of the Town, in accordance with the form of order requested by the Applicant (the "Appointment Order").

[27] Upon the Appointment Order having been made, the Town's action was stayed and the issues raised therein were not adjudicated.

[28] The Appointment Order expressly states that it is made on the Court "being advised of the Consent of the Town of Ajax". The Appointment Order includes the following provisions:

> 3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the

generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

…

(i) 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 Receiver and its discretion may deem appropriate, provided, however, that such terms and conditions must be satisfactory to the Town of Ajax, unless otherwise ordered by this Court;

(j) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $100,000, provided that the aggregate consideration for all such transactions does not exceed $250,000; and

(ii) with the approval of this Court, in consultation with the Town of Ajax, in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

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

(iii) unless otherwise agreed to by the Town of Ajax and the applicable purchaser or transferee, none of the real property presently subject to the Development Agreement and Agreement of Purchase and sale between Windcorp Grand Hardwood Place Ltd. and the Town of Ajax, as amended (The "Development Agreement") shall be sold, conveyed, transferred, leased or assigned by the Receiver without the purchaser or transferee agreeing to enter into a development agreement with the Town of Ajax, on mutually agreeable terms, which include a Right of Repurchase in favour of the

Town of Ajax, substantively similar to such right provided for in the Development Agreement.

Respondents' appeal

[29] The Respondents appealed the Appointment Order. On February 24, 2022, the appeal was settled and withdrawn and the Receiver resumed its activities pursuant to the Appointment Order.

Receiver's actions under Appointment Order

[30] The Receiver made extensive efforts to negotiate a draft of a new development agreement with the Town. Through these efforts, the Receiver was attempting to balance the competing interests of the Town and those of the mortgagees.

[31] In consultation with the commercial real estate broker retained by the Receiver, the Receiver developed a sale procedure that was intended to canvass the market for the opportunity to acquire the Harwood Properties and related assets.

[32] The Receiver brought a motion for approval of its proposed sale procedure in respect of the Harwood Properties and the assets, undertakings and properties of the Respondents acquired for, or used in relation to such lands, including all proceeds thereof. The motion record of the Receiver included a form of development agreement that was acceptable to the Town. The final terms of the new development agreement would still be negotiated between the Town and a prospective purchaser. On June 1, 2023, an Order was made approving the sale procedure and the Receiver was authorized and directed to carry out the sale procedure in accordance with its terms and the Order.

[33] In response to the broker's marketing efforts, nineteen potential purchasers executed confidentiality agreements and were given access to the data room. The bid deadline was August 24, 2023. There were two bidders. One bidder was disqualified for failure to pay a deposit as required by the sale procedure. The other bidder advised that they had determined that building permit plans did not exist and approximately 6-7 months, and approximately $3 million, would be required for building permit plans to be prepared. This bidder required a $3 million abatement to the price set out in their bid.

[34] The proposed abatement was not acceptable to the Receiver or to the Applicant. The second bidder was not selected as having made a successful bid.

Receiver's report on market feedback

[35] The Receiver reports that the broker has advised it that the draft new development agreement was not well received by the market and was seen as extremely onerous and one-sided, with unrealistic timelines and severe penalties. The Receiver reports that the overall market interest in the Harwood Properties, and potentially their

overall value, would be significantly stronger if there was no draft development agreement in place.

Analysis

[36] The Appointment Order was made on the Applicant's application pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") and s. 101 of the *Courts of Justice Act*. The Appointment Order includes the usual "comeback clause" providing that any interested party may apply to this Court to vary or amend the Order on notice. Section 187(5) of the *BIA* provides that "[e]very court may review, rescind or vary any order made by it under its bankruptcy jurisdiction".

[37] The Applicants submit that this court has jurisdiction to hear and decide its motion under the comeback clause in the Appointment Order and pursuant to s. 187(5) of the *BIA*.

[38] In *Canada North Group Inc. (Companies' Creditors Arrangement Act*), 2017 ABQB 550 the motion judge addressed the use of the comeback provision in an initial order under the *CCAA* as authority for a motion to vary the terms of the order. The motion judge held that the comeback provision is available to any interested party and that an interested party that was not given notice of the motion that resulted in the order can rely on the comeback clause and, depending on the circumstances, an interested party given notice may also access the comeback clause. The motion judge held, citing jurisprudence including the decision of Blair J. (as he then was) in *Royal Oak Mines Inc., Re*, 1999 CanLII 14840, that recourse through the comeback clause is available when circumstances change and as a means of sorting out issues as they arise during the course of a restructuring. The motion judge in *Canada North* also referenced s. 187(5) of the *BIA* which she described as an "analogous form of statutory recourse".

[39] The motion judge in *Canada North* held that she had jurisdiction to hear the motion to vary the order even though the moving party had been served with the motion materials (the motion materials did not get into the right hands until after the initial order was made and the moving party failed to appear at the initial hearing). The motion judge noted that in so concluding, she was mindful that the relief sought by the party seeking to vary the initial order could well have been sought by way of appeal. The motion judge held, citing *Algoma Steel (Re)*, 2001 CanLII 5433 (ON CA), that a motion to vary the order pursuant to the comeback clause may be the preferred route (over an appeal) where a party did not have actual notice of an order made early in the proceeding.

[40] The motion judge in *Canada North*, having accepted that comeback relief may be appropriate in the circumstances, observed, at para. 68, citing the decision of Farley J. in *Muscletech Research and Development Inc., Re*, 2006 CanLII 1020, at para. 5, that while comeback relief may be appropriate, it "cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question".

The motion judge proceeded to hear and decide the motion to vary the initial order on its merits.

[41] I accept that I have jurisdiction to hear and decide the Applicant's motion under s. 187(5) of the *BIA* and pursuant to the comeback clause in the Appointment Order. The question is whether, in the circumstances, it would be proper for me to do so where, if the Applicant succeeds in obtaining the relief sought, the result would be a variation of the Appointment Order to delete provisions in the Appointment Order (negotiated for the benefit of the Town) requiring the Receiver to consult with the Town with respect to a sale of the Harwood Properties and conferring on the Town the right to require the purchaser to enter into a development agreement with the Town on mutually acceptable terms including a right of re-purchase substantively similar to such right provided for in the DPA.

[42] On this motion, the Applicant is not in a similar position to the moving party in *Canada North*. The Applicant sought the Appointment Order after agreeing with the Town to include provisions in the requested form of order for the benefit of the Town. The terms of the Appointment Order were agreed upon in circumstances where there was pending litigation between by the Applicant and the Town in which the issue of priority that the Applicant seeks to have determined on this motion was directly raised. The agreement that was reached resulted in a stay of the Town's action upon issuance of the Appointment Order, and given its terms, made determination of the priority issue unnecessary.

[43] It must not be forgotten that the Appointment Order, as between the Applicant and the Town, was made on consent. The Applicant's application was opposed by the Respondents and by AMHI, including on grounds that the provisions in the requested form of order for the benefit of the Town were not appropriate.

[44] In *Clatney v. Quinn Thiele Mineault Grodski LLP*, 2016 ONCA 377, the Court of Appeal for Ontario addressed the circumstances in which a court may set aside a consent order. Epstein J.A., writing for the Court, held, at para. 57, that "[c]ourts are, with good reason, cautious about setting aside orders, particularly those made on consent". Epstein J.A. noted that finality is important in litigation and when dealing with a consent order, the objective that the parties be held to their agreement is also an important consideration. Epstein J.A. held, at para. 60, that a court may set aside an order, including a consent order, where it is necessary in the interests of justice to do so.

[45] The Town relied upon the terms of the Applicant's requested form of receivership order when it consented to the Applicant's application that, if granted, would result in a stay of its action against the Applicant and other parties to enforce the re-purchase right in the DPA in priority to their mortgages. The Town agreed to accept this outcome, and did not pursue its own application for the appointment of a receiver, in exchange for the protections to its position provided for in the Applicant's requested form of order.

[46] The Receiver acted under the Appointment Order by negotiating a form of development agreement that was acceptable to the Town and by seeking and obtaining court approval for a Sale Procedure Order that required a qualified bidder, in order to be selected as the successful bidder, to confirm that the Town and the bidder have arrived at a form of development agreement that is acceptable to the Town.

[47] The main change in circumstances upon which the Applicant relies is that implementation by the Receiver of the approved sale procedure did not produce a bid that is acceptable to the Applicant or the Receiver.

[48] In my view, this circumstance does not make it necessary in the interests of justice for the Court to allow the Applicant to seek a determination in this proceeding of the priority issue that was first raised in the Town's now stayed action and, if the determination is made in the Applicant's favour, to seek a variation of the Appointment Order that would delete provisions consented to by the Applicant for the Town's benefit. The use of the comeback clause in the Appointment Order to seek such a variation would be prejudicial to the position of the Town which relied on the Appointment Order as issued. The comeback clause should not be used in these circumstances. See, as noted, *Muscletech*, at para. 5. For the same reasons, this circumstance does not justify an order varying the Appointment Order pursuant to s. 187(5) of the *BIA*.

[49] The Receiver, in its Fourth Report, reports that the broker has advised it that development of the Harwood Properties is effectively "shovel ready" and permits can be applied for and obtained in very short order. The Receiver reports that the Town repeatedly advised it that the development was "shovel ready" and the existing plans are at a point where a building permit can be issued. The Receiver reports that this is not the case because building plan permit plans do not exist, and that its information is that it would likely take between 6-10 months to obtain a building permit.

[50] The Applicant submits that the Town negotiated timelines with the Receiver in the draft development agreement that were unrealistic because the proposed development was not "shovel ready" because plans did not exist that were needed for a successful application for a building permit. The Applicant submits that this circumstance also justifies its right to move in this application for determination of the priority issue raised in the Town's action and, if successful, variation of the Appointment Order to delete provisions negotiated by the Town for its benefit.

[51] The Town denies that it made any representation that drawings for a building permit had been issued. The Town's position is that there are no planning hurdles in the way of any developer applying for the necessary permits to "commence construction" (as that term is defined in the proposed development agreement).

[52] The Applicant does not assert that the Town made any untrue representation to it that induced it to agree with the Town on the requested form of receivership order. There is no evidence of a misrepresentation by the Town that would vitiate the Applicant's consent to the Appointment Order. In these circumstances, the remedy for any misrepresentation by the Town after the Appointment Order was issued, if there was one, lies elsewhere. The proper remedy is not that the Appointment Order should be varied to delete provisions included for the benefit of the Town.

[53] I conclude that the Applicant is not entitled to a variation of the Appointment Order to remove provisions to which it consented and were included for the benefit of the Town.

[54] I heard submissions at the hearing of the motion on the issue of whether the Applicant's mortgage on the Phase 1A Lands has priority over the Town's Right of re-purchase. Given my conclusion that the Applicant is not entitled to a variation of the Appointment Order, it would not be appropriate for me to decide the priority issue. In addition, this issue is already the subject of the Town's stayed action and, in my view, it would not be proper for me to allow the Applicant to circumvent the stay of this action, imposed by the Appointment Order it sought and obtained, by seeking to have an issue raised therein decided in this receivership proceeding.

[55] In conclusion, I observe that the Applicant and the Town share an interest in having the Harwood Properties sold to a developer. The Town's interest is that the property be sold by the Receiver for the construction of an appropriate building that corresponds with the Town's "vision" for the proposed development. The Applicant's interest is that the Harwood Properties be sold by the Receiver expeditiously under a process that will realize fair value that is not lessened by unreasonable restrictions that the market will not accept. Although there is some tension between these interests, it seems to me that with diligent effort by the parties, it is possible to achieve a sale of the Harwood Properties by the Receiver in compliance with the Appointment Order and that satisfies the interests of the Applicant and the Town.

[56] The Receiver brought a motion that was heard with the Applicant's motion. Included in the relief sought by the Receiver is an order for advice and direction regarding a further or amended sale procedure in respect of the Harwood Properties (and related property). I adjourned this part of the Receiver's motion until after my decision on the Applicant's motion.

Disposition

[57] For these reasons, the Applicant's motion is dismissed.

[58] The Receiver's motion for advice and directions should be scheduled at a scheduling appointment before me to be arranged through the Commercial List Office.

[59] I encourage the parties to resolve costs. If they are unable to do so, they may make written submissions (not longer than 3 pages; 1 page for reply) according a timetable to be agreed upon by counsel and approved by me.

Cavanagh J.

Date: March 11, 2024