Court File No. CV-23-00701672-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

- and –

CONACHER KINGSTON HOLDINGS INC. and **5004591 ONTARIO INC.**

Respondents

RESPONDING FACTUM OF THE RECEIVER

(Motion by 2478659 Ontario Ltd for Declaratory and Related Relief)

October 8, 2024

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TO: SERVICE LIST

A. Background

1. Parties and the Properties

1. On December 6, 2023, TDB Restructuring Ltd. (the "Receiver") was appointed receiver and manager over certain property owned by Conacher Kingston Holdings Inc. ("Conacher Kingston") and 5004591 Ontario Inc. ("500", together the "Debtors"):

(a) 311 Conacher Driver, Kingston, Ontario (the "Kingston Property"), owned by Conacher Kingston; and,

(b) 2849, 2851, 2853, 2855, and 2857 Islington Avenue, Toronto, Ontario (the "Toronto Property"), owned by 500.[1]

2. Cameron Stephens Mortgage Capital Ltd. ("Cameron Stephens") extended a credit facility to Conacher Kingston, which was secured by a first mortgage on the Kingston Property. 500 guaranteed the credit facility, which also provided Cameron Stephens with a collateral charge against the Toronto Property. The Debtors are indebted to Cameron Stephens for over $13 million.[2]

3. There are no other secured creditors on the Toronto Property.

4. There are two secured creditors on the Kingston Property:

[1] Appointment Order, Appendix A to the First Report of the Receiver, dated July 16, 2024 ("First Report"), Motion Record of the Receiver, Tab 6A, pp. 256-257.

[2] First Report, Motion Record of the Receiver, Tab 6, p. 244, paras. 11-12.

(a) 2462686 Ontario Inc. ("246") holds a second mortgage that has been registered in the amount of $5,000,000.

(b) 2478659 Ontario Ltd. ("247") holds a third mortgage that has been registered in the amount of $8,500,000.[3]

5. Neither 246 nor 247 has provided the Receiver with supporting documentation to support the validity, enforceability and priority of their respective charges.[4] Accordingly, the Receiver is not intending to make any distribution to 246 or 247 at this time.

6. A number of equityholders and other unsecured creditors have also asserted claims against both the Kingston Property and the Toronto Property.

2. Receiver's Approval Motions and 247's Motion

7. The Receiver brought a motion to approve the sale of the Toronto Property in July, 2024.[5] The Receiver's motion was granted, but the purchaser failed to close. The Toronto Property was subsequently re-listed.[6]

8. The Receiver has now brought a motion to approve the sale of the Kingston Property (the "Transaction") returnable October 9, 2024. As part of its motion, the Receiver is seeking an order that Cameron Stephens' indebtedness be paid out from the proceeds of the sale of the Kingston Property.[7] The Receiver expects that Cameron

[3] Second Report of the Receiver, dated September 26, 2024 ("Second Report"), Motion Record of the Receiver, Tab 2, p. 37, para. 56.
[4] Second Report, Motion Record of the Receiver, Tab 2, p. 37, para. 57.
[5] See First Report, Motion Record of the Receiver, Tab 6.
[6] Second Report, Motion Record of the Receiver, Tab 2, p. 27, paras. 13-15.
[7] Second Report, Motion Record of the Receive, Tab 2, p. 38, para. 58(f).

Stephens' indebtedness will be fully repaid if the Court approves the Transaction and the Transaction closes.

9. The order sought by the Receiver contemplates the postponement of any further distributions to any creditors pending the sale of the Toronto Property. In other words, the excess proceeds from the sale of the Kingston Property (the "Surplus Funds") will be held in trust by the Receiver until such time as the Toronto Property is sold and stakeholders have an opportunity to make submissions about the appropriate distribution of both the Surplus Funds and the net proceeds of sale from the Toronto Property.[8]

10. 247 has now brought a motion for a declaration that the "doctrine of marshalling be applied to require Cameron Stephens to first realize on its security against the Toronto Properties". 247 also seeks an order requiring the Receiver to maintain the sale proceeds from the Kingston and Toronto Properties in separate accounts, and that Cameron Stephens' mortgage on the Toronto Property not be discharged.[9]

B. The Declaratory Relief Should Not be Granted

11. The Receiver opposes the declaratory relief set out 247's motion. Both Conacher Kingston and 500 have covenanted to Cameron Stephens to repay the full amount of the debt, as secured by first mortgages on the Properties. There is no inequity in compelling one of the debtors to pay the full amount owed at this time nor will any stakeholder be prejudiced if Cameron Stephens is paid out in full at this time.

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[8] A substantially similar process was followed in analogous circumstances in *Gerrow v Dorais*, 2010 ABQB 560.

[9] Factum of 2478659 Ontario Ltd., para. 19. 247 has not served the Receiver with a Notice of Motion although has styled itself as a "moving party".

12. There are at least four reasons why the proceeds of sale from the Kingston Property should not be held back.

13. First, there is no dispute regarding the validity of Cameron Stephens' charges over both the Kingston Property and the Toronto Property, or the fact that Cameron Stephens is the first mortgagee. Even if the doctrine of marshalling is applicable, a fundamental principle of the doctrine is that "nothing will be done to interfere with the paramount right of the first mortgagee to pursue his remedy against either of the two estates".[10] The same is true for the Receiver seeking to sell multiple properties.

14. In other words, the right of a junior creditor to invoke the doctrine is subject to the important qualification that nothing will be done to interfere with the ability of the first mortgagee to pursue their remedy against either of the two estates. The first mortgagee is not a trustee for the junior mortgagees.[11] While there may be narrow circumstances where the interests of the first mortgagee could be interfered with, the Court cannot do so without substantially delaying or inconveniencing such mortgagee, or rendering its proceedings more onerous.[12]

15. In this case, requiring Cameron Stephens to postpone realization on its security would prejudice its "paramount" right to pursue its remedy against either of the two estates.

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[10] *807933 Ontario Inc. v. Allison (Trustee of)* (1995), 22 O.R. (3d) 102 (Gen. Div.), appeal dismissed (1998), 38 O.R. (3d) 337 (C.A.), citing *Williamson v. Loonstra* (1973), 1973 CanLII 1186 (BC SC), 34 D.L.R. (3d) 275 (B.C.S.C.).

[11] See, e.g., *First Investors Corp. v Veeradon Developments Ltd.* (1988), 1988 ABCA 38 (CanLII), 47 DLR (4th) 446 at 451 and 452 (Alta CA), citing *Snell's Principles of Equity,* 28th Edition, p. 416.

[12] Walter Traub, *Falconbridge on Mortgages, 5th Edition*, (Toronto: Thomson Reuters Canada, 2020), at §14:8 (WestLaw).

16. Second, 247's reliance on *Re Allison* is misplaced. Contrary to 247's factum,[13] the motions judge in that case concluded that "the applicants are not entitled to invoke the doctrine of marshalling" on the basis that the applicant was not a secured creditor.[14] The Court of Appeal dismissed the appeal, but determined that the doctrine of marshalling did not apply for another reason: the applicant was a secured creditor of only one of the debtors, and not the other.[15]

17. In any event, even if the doctrine of marshalling applies (and the Receiver does not take any position at this time about the application of the doctrine), the result would still be to pay down Cameron Stephens' debt, in full, from the Kingston Property and subsequently allow 246 and/or 247 to argue that they have the right to marshall into the Toronto Property. 246 and 247 will not be prejudiced, in any way, with the distribution to Cameron Stephens on this basis.

18. Third, Cameron Stephens is the largest creditor of the Debtors, and the indebtedness continues to grow as a result of the accrual of interest. The sooner that Cameron Stephens' indebtedness is satisfied, the more money will be available for the satisfaction of other debts. Reducing the total amount of proceeds available to satisfy the claims of multiple parties is in none of the stakeholders' best interests.

19. Fourth, third party creditors who assert claims, albeit unsecured, against proceeds from the Toronto Property may similarly argue that Cameron Stephens' indebtedness ought to be repaid out of the Kingston Property first. In fact, those same arguments were

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[13] Factum of 2478659 Ontario Ltd, at para. 13.
[14] *807933 Ontario Inc. v. Allison (Trustee of)* (1995), 22 O.R. (3d) 102 (Gen. Div.).
[15] *807933 Ontario Inc. v. Allison (Trustee of)* (1998), 38 O.R. (3d) 337 (C.A.).

raised in July, 2024 when the Receiver sought approval of the sale of the Toronto Property. At that time, the Approval and Vesting Order with respect to the Toronto Property specifically contemplated that the approval of the Transaction was "without prejudice to any arguments, positions, claims, rights or entitlements that any person may now have, or could have or has made to date or may hereafter decide to make in relation to either Property, and…does not prejudice any claims or rights that any person has or may have…(iv) to assert any marshalling arguments".[16]

20. The same result ought to apply here. The debt owing to Cameron Stephens should be repaid from the first available funds (which will be Kingston Property assuming the transaction closes), and then the Surplus Funds and the proceeds from the sale of the Toronto Property should be held in separate trust accounts so that all parties may tender evidence and argument with respect to the appropriate distribution of all of those funds.

21. In this way, the funds derived from the sales will be under control of the court and all stakeholders will preserve their rights to make any marshalling or other arguments about the proper apportionment of the funds at a later date. This approach is particularly warranted in this case because 246 and 247, as second and third mortgagees on the Kingston Property, have not yet provided any security documentation to the Receiver to even establish the validity and enforceability of their charges.

[16] Vesting Order dated July 24, 2024, para. 6.

22. With respect to the remaining relief sought by 247, the Receiver has already agreed to keep the respective proceeds from the sale of the Properties in separate accounts.

ALL OF WHICH is respectfully submitted this 8th day of October, 2024.

Jeff Larry / Ryan Shah

SCHEDULE "A" – AUTHORITIES CITED

1. *Gerrow v Dorais*, 2010 ABQB 560.
2. *807933 Ontario Inc. v. Allison (Trustee of)* (1995), 22 O.R. (3d) 102 (Gen. Div.), appeal dismissed (1998), 38 O.R. (3d) 337 (C.A.), citing *Williamson v. Loonstra* (1973), 1973 CanLII 1186 (BC SC), 34 D.L.R. (3d) 275 (B.C.S.C.).
3. *First Investors Corp. v Veeradon Developments Ltd.* (1988), 1988 ABCA 38 (CanLII), 47 DLR (4th) 446 (Alta CA).
4. Walter Traub, *Falconbridge on Mortgages, 5th Edition*, (Toronto: Thomson Reuters Canada, 2020) (WestLaw).

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RESPONDING FACTUM OF THE RECEIVER (MOTION BY 2478659 ONTARIO LTD FOR DECLARATORY AND RELATED RELIEF)

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