

Court File Number: CV-20-00647644-00CL

**Superior Court of Justice**  
Commercial List

**FILE/DIRECTION/ORDER**

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**FIRST SOURCE FINANCIAL MANAGEMENT INC.**

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Applicants

AND

**UNIONVILLE RE-DEV CORPORATION, UNIONVILLE RE-DEV PHASE 2  
CORPORATION and BLACKSMITH PARTNERS INC.**

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Respondent

Case Management  Yes  No by Judge: \_\_\_\_\_

Counsel	Telephone No:	Email/Facsimile No:
Stewart Thom for Receiver Jeff Larry for First Source Jordan Potasky for second mortgagees		
Reginald McLean for 2692006 Mark Russell for respondents		

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: \_\_\_\_\_  
 Timetable approved (as follows): \_\_\_\_\_

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**Date Heard: February 8, 2021**

- [1] RSM Canada Limited, the Court appointed receiver of certain properties (the “Receiver”) brings this motion for an order terminating a lease (the “Lease”) for certain property municipally known as 160 Main Street and 162/166 Main Street, Unionville, Ontario (the “Leased Property”) between the tenant, 2692006 Ontario Inc. (“269”), and the respondent property owner Blacksmith Partners Inc. (the “Owner”) and authorizing the Receiver to market and sell the Leased Property free and clear of the Lease.
- [2] The receiver’s motion is supported by the first mortgagee, First Source Management Inc. (“First Source”), and by the second mortgagees.
- [3] 269, supported by the Owner, opposes the relief sought.

### **Factual Background**

- [4] On the application of First Source, by an order dated October 16, 2020 with effect from October 27, 2020 (the “Appointment Order”), the Receiver was appointed as receiver of properties municipally known as 160, 162, 166, 170, 174-178, and 186 Main Street, Unionville, Ontario owned by the respondents (the “Properties”).
- [5] The Appointment Order authorizes the Receiver to, among other things, (i) exercise control over the Properties and any and all proceeds, receipts and disbursements arising out of or from the Properties, (ii) market the Properties, and (iii) sell, convey, transfer, lease or assign the Properties with the approval of the court, and (iv) apply for any vesting order or other orders necessary to convey the Properties or any part or parts thereof to a purchaser or purchasers, free and clear of any liens or encumbrances affecting the Properties.
- [6] Through its discussions with neighbouring tenants, the Receiver had been advised that on or around March 1, 2020, the former tenant of 162/166 Main Street, operating as the Blacksmith Bistro, ceased operations and vacated the property. The Receiver was advised that this property had remained vacant since that time. As of the date of the appointment of the Receiver, the two separate units on this property, a street facing restaurant, and an adjacent alley-facing house, were vacant. The Receiver was unaware of any prior lease in respect of this property.
- [7] On November 25, 2020, the Receiver was contacted by a representative of 269 who advised the Receiver that 269 was the tenant of the 160 Main Street and 162/166 Main Street properties (which are, together, the Leased Property). The representative of 269 advised that she had been travelling outside of the country and had only become aware of the receivership, and that immediate access to the Lease Property was required for the purposes of performing renovation work in relation to it.
- [8] On November 26, 2020, a copy of the Lease was provided to the Receiver.
- [9] The Receiver has engaged Colliers Macauley Nicholls Inc. (“Colliers”) for the purpose of marketing the Properties for sale. The Receiver sought advice from its legal counsel and consulted with Colliers in connection with its evaluation of the Lease and its terms. In the First Report of the Receiver, the Receiver reports its view that the Lease terms are not commercially reasonable and do not reflect market terms for the properties in question. In its report, the Receiver identifies the following specific concerns:

- a. The Lease provides for an initial seven-month rent free period, from October 1, 2020 to April 30, 2021.
- b. No provision is made for deposit of first or last month's rent and the security deposit required is \$1,000, only.
- c. After the initial rent-free period, gross rent payable under the Lease is equal to \$3,333.33 per month, plus HST, for the first and second year of the lease term, \$3,666.66 per month, plus HST, for the third and fourth year and \$3,750 per month, plus HST, for the fifth year. On the basis of rent rolls obtained by the receiver, the former tenant of 162/166 Main Street property, by comparison, paid base rent of \$114,000 annually, plus additional recoveries of approximately \$74,000, which is approximately five times higher than the rents provided for by the Lease. Further, such rates were paid by the former tenant in connection with the 162/166 Main Street property only, whereas the Lease expands the total leased property to include the adjacent property located at 160 Main Street.
- d. The Lease is for an initial 5-year term but can be extended at the tenant's option for a further 5-year term.
- e. The Lease confers upon the tenant a right of first refusal to purchase the 160 Main St. and 162/166 Main Street properties in the event of any sale.

[10] The Receiver has consulted with Colliers as to the potential impact of the Lease on the Receiver's ability to market those properties for sale and obtain fair market value. Colliers has advised that it is of the view that the terms of the Lease are likely to have a significant adverse impact on the Receiver's ability to market and sell the 160 Main Street and 162/166 Main Street properties. Colliers further confirmed to the Receiver that the terms of the Lease are not, in its view, reflective of market rates for the subject properties.

[11] On behalf of 269, affidavit evidence has been filed by its principal, Ms. Tamara Mizrachi, and by Mr. Harshal Dave, the principal of the Owner.

[12] Ms. Mizrachi provided evidence that:

- a. She is 42 and has been employed in the hospitality industry for over 15 years. Her brother approached her in May 2020 with a potential opportunity for her to operate her own business. Her brother had been working as a property manager for Watford Development Inc., a company related to the Owner. She was advised that the previous operator of the restaurant at 160-166 Main Street had abandoned the premises and left all of its equipment, chattels, fixtures and other leasehold improvements on the premises and that the premises were available for rent.
- b. It was made clear to Ms. Mizrachi by Mr. Dave that she would likely be able to operate the restaurant only for some 2 to 3 years without any issues and that eventually the Watford Group would begin construction on the surrounding properties. She understood that the proposed rent was lower than might be expected because of all the restrictions and conditions on the new property, and in particular, the restaurant itself may have to be demolished and possibly moved for construction within a reasonably short period of time. It was also a benefit to her that she was getting all the equipment and chattels for free.

- c. The Lease was signed effective the 1st day of June 2020. The plan at that time was that, as a result of the COVID-19 crisis, work would not start on preparing the restaurant for operation until October. Over the summer, 269 engaged designers and signed a contract with one to assist 269 to plan the look and feel of the new restaurant. 269 provided a deposit in the amount of \$5,000 for this work.
  - d. When she went to see the Property in October with a view to commencing construction, Ms. Mizrachi learned that the landlord had gone into receivership and she needed to contact the Receiver about the Lease.
- [13] Mr. Dave provided evidence that the Blacksmith Bistro closed around April 2020 in the face of COVID-19 shutdowns and restrictions and, prior to that, the tenant had been suffering from health issues and was behind in rent. He states in his affidavit that tenants for the premises are hard to find because any new tenancy needs to be subject to Watford's development plans and the development schedule and acknowledge that the tenant's business can be impacted by the development. He states that the terms of the Lease include 269's acknowledgement of the future development plans and agreement to hold the landlord harmless for any loss of revenue or viability of operations arising from the development. Mr. Dave states that 269 received a tenant's inducement equal to seven months rent-free from October 1, 2020 and reduced rent provided for in the Lease in consideration of its acknowledgement regarding Watford's development plans, the impacts of COVID-19, and 269's capital improvements to be undertaken.
- [14] At the time the Lease was signed, the First Source Mortgage was in default. The maturity date for the First Source mortgage was June 2, 2020, the day after the Lease was signed. On May 25, 2020, counsel for First Source wrote to counsel for the respondents and confirmed that the mortgage loan would fall due on June 2, 2020, there was no agreement to extend the loan, and the intention of First Source is to proceed with enforcement immediately should the mortgage debt not be repaid in full at maturity. The Owner pointed to evidence that there were negotiations concerning the terms of a forbearance agreement which took place after the mortgage loan had fallen due. During these negotiations, First Source was not advised of the Lease.
- [15] The Owner made an agreement dated May 2, 2019 with First Source in which, among other things, the Owner covenanted and agreed with First Source (i) that all offers to lease and leases shall be bona fide, and (ii) the terms of which are to be approved by First Source prior to execution and shall be at rental rates and terms consistent with comparable space in the area of the applicable lands and premises. The Owner did not seek the approval of First Source to the terms of the Lease.
- [16] Colliers has advised the Receiver that obtaining certainty on the Lease termination issue is of critical importance for the remainder of the sale process and that to complete the final phase of the sale process as described in the First Report of the Receiver without such certainty could have a detrimental effect on the marketing efforts and impair the Receiver's ability to maximize value.

## Analysis

- [17] In *Third Eye Capital Corp. v. Dianor Resources Inc.*, 2019 ONCA 508, the Court of Appeal for Ontario noted, at para. 73, that the purpose of a receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of creditors and that such

purpose is generally achieved through a liquidation of the debtor's assets. The essence of a receiver's powers is to liquidate the assets under receivership and the receiver's primary task is to ensure that the highest value is received for the assets so as to maximize the return to creditors.

- [18] In *Third Eye*, the Court of Appeal, at paras. 40-41, accepted that s. 100 of the *Courts of Justice Act* provides a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with principles of equity.
- [19] In *Third Eye*, the Court of Appeal, at para. 110, set out the framework for a court to follow in determining whether to order the extinguishment of an interest in land. A court should consider (1) the nature and strength of the interest in land that is proposed to be extinguished, and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in the agreements reached prior to the insolvency. If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; whether the parties are acting in good faith; and any other factors as may be relevant to the analysis.
- [20] When I consider the nature and strength of the interest created by the Lease, I note that the First Source first mortgage and the second mortgage in favour of Paul Vasilovsky and Thomas Vasilovsky were registered on title prior to the Lease being signed and, as such, these mortgages have priority over the Lease. Had First Source proceeded to enforce its mortgage by power of sale, the Leased Property could have been sold free and clear of the 269 Lease. First Source did not do so and sought the appointment of a receiver. However, the second mortgagees did not seek the appointment of a receiver, although their right to enforce their mortgage by way of power of sale is stayed by the appointment order.
- [21] This factor is not determinative because the sale is not being conducted by power of sale, but through a court-appointed receiver.
- [22] The Lease does not contain a subordination provision and 269 has not agreed to the extinguishment of its rights under the Lease.
- [23] In this case, in order to determine whether to issue an order terminating the interest of a party in land, I must consider the equitable positions of the parties. See *Meridien Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169, at paras. 18-19.
- [24] I first note that the indebtedness secured by the first and second mortgages on the Leased Property far exceeds the value of the Leased Property. At the time the Lease was signed, the first source Mortgage had been in default for some time and the Owner had been advised that the mortgage would not be extended. This information supports the interest of the Receiver in maximizing return from liquidation of the property to creditors.
- [25] I accept the Receiver's submission that the rents payable under the Lease are less than what would be payable in the marketplace. The Receiver's report to the court supports this conclusion. The fact that the rents to be paid under the Lease are many times lower

than rents paid by a former tenant also supports this conclusion. Although the business of a restaurant would presently be affected by the COVID-19 pandemic, the term of the Lease is for a period far longer than the time that the pandemic is reasonably expected to adversely affect restaurant operations. I accept that the terms of the Lease are likely to have a significant adverse impact on the Receiver's ability to market and sell the Leased property.

- [26] Ms. Mizrachi accepts that the rent is "lower than expected" and she explains this by reference to "all of the restrictions and conditions on the new property", and, in particular, that the restaurant itself may have to be demolished and possibly moved within a reasonably short period of time. Ms. Mizrachi states in her affidavit that it was made clear to her by Mr. Dave that she would likely be able to operate the restaurant for only two to three years without any issues in that eventually the Watford Group would begin construction on the surrounding premises.
- [27] The Lease itself does not provide that 269 is required to surrender its rights under the Lease if the Owner wishes to develop the Leased Property. The Lease does, however, provide that 269 has the right to assign the Lease without the prior written consent of the Landlord and that 269 has the right to sublet the Lease without the prior written consent of the Landlord. The terms of the Lease, if it is not extinguished, would be binding on the Receiver and a purchaser, and include 269's right to assign the Lease or sublet the Leased Property without the landlord's consent. The rents payable under the Lease, which are below market rentals, would apply to and be binding on a purchaser, who would not have a right to terminate the Lease if it wished to develop the Leased Property. The rents payable would remain below market value for the term of the Lease, and any renewal.
- [28] 269 has not occupied or carried on business from the Leased Property. 269 has not paid rent under the Lease. Any amounts paid in connection with the Leased Property are, on the evidence before me, very modest. I accept that the Lease was a very favourable one for 269 and this factors into my considerations of the equities. However, 269 has not invested significant amounts into its proposed restaurant business, and it is able to look for another suitable location for its business.
- [29] Finally, as part of my consideration of the equities, I return to the fact that the First Source mortgage and the second mortgage have priority over the Lease and, had First Source proceeded by way of power of sale, the Leased Property could have been sold free and clear of the Lease. This is a factor which favours the interest of the Receiver in selling the Leased Property free of the Lease.
- [30] When I consider the equities between the Receiver and 269, I am satisfied that they favour an order extinguishing the interest of 269 under the Lease and that such an order is appropriate.

**Disposition**

[31] For these reasons, I order that the Lease is terminated. The Receiver does not seek costs.

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Cavanagh J.

February 9, 2021