



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP / ENDORSEMENT**

COURT FILE NO.: CV-22-674747-00CL DATE: October 3, 2022

NO. ON LIST: 2

TITLE OF PROCEEDING: **MARSHALLZEHR GROUP INC V AREACOK INC**

BEFORE JUSTICE: **OSBORNE**

**PARTICIPANT INFORMATION**

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## **ENDORSEMENT OF JUSTICE OSBORNE:**

1. The Court-appointed Receiver of the Debtor, Areacor Inc., moves for approval of an agreement of purchase and sale dated August 26, 2022 [the “APS”], a vesting order, related relief including termination of Existing Purchase Agreements, and approval of the First Report and Second Report of the Receiver together with the activities therein and the fees and expenses for the Receiver and its counsel, and finally, discharge of the Receiver upon completion of the remaining activities detailed in the Second Report.
2. The Receiver seeks a sealing order in respect of the confidential appendices to the Second Report relating to the sale in respect of which approval is sought.
3. All the principal parties appeared today. A few of the purchasers under residential condominium unit APS’ are also present to observe.
4. The relief sought today is unopposed by any party. Concerns initially raised by the Debtor related to the sales process described below have been resolved by the parties. So too has an issue raised by Fusioncorp. Developments Inc. relating to construction liens and security for costs. No other party has raised concerns, and indeed all affected stakeholders wish this matter to be at an end.
5. Defined terms in this Endorsement have the meanings given to them in the First and Second Reports.
6. I have reviewed both of those Reports, together with the Supplement to the Second report dated September 28, 2022 and all other motion materials filed including the affidavits and exhibits thereto.
7. The Receiver was appointed on January 13, 2022. The Debtor is an SPV that holds title to the property at 11 – 15 Cannon Street West, Hamilton Ontario [the “Property”]. The plan was to develop the Property into a six story condominium project with 40 residential units and commercial space on the ground floor.
8. Regrettably, as of the date of the appointment of the Receiver, only a five-story skeleton structure, comprised essentially of steel framing and precast concrete slabs, has been erected. There has been no construction activity since approximately June, 2021.
9. The Debtor had entered into 29 APS’ in respect of residential condominium units.
10. MarshallZehr had provided construction financing to the Debtor, secured by a first mortgage against the Property in the principal amount of \$13.5 million. Following on the Debtor’s default, the Receiver was appointed at the request of MarshallZehr without opposition.
11. Numerous safety and structural issues related to the Property were required to be, and were, addressed by the Receiver.
12. A sales process as described in the Second Report [the “Sales Process”] was undertaken by the Receiver. A process for the marketing of the assets of the Debtor, including the Property, began on April 4, 2022. The particulars and key components of the Sales Process are set out in the Second Report and I have not repeated all of them here. Suffice to say that an online data room was created, physical signage was erected, advertising of the opportunity was completed, there was a direct solicitation to an extensive list of prospective purchasers and influencers, and the bid submission deadline of May 17, 2022 was fixed.
13. 35 parties executed NDAs. Three offers were received, each of which was subject to financing and due diligence conditions. Each was for an amount significantly less than the amount owed to MarshallZehr under its first priority mortgage. As a result, it did not support a completion of the transaction contemplated by any of the three offers.
14. MarshallZehr then advised that it was in discussions with a builder interested in acquiring the Property by way of an assumption of all or part of the outstanding indebtedness. That purchaser ultimately presented to the Receiver a signed APS on August 26, 2022.
15. That APS contemplates an “as is, where is” acquisition of certain assets, specifically including the Property. The purchase price is to be satisfied by payment of Priority Payables, other components and

- the assumption of most of the indebtedness owing to the ranking secured creditor. It contemplates a short closing following Court approval, if granted. The short closing [some 11 days] is desired by the purchaser in order to allow the acquisition to be completed with sufficient time to winterize the project.
16. The APS represents the highest and best offer received, as submitted by the Receiver, and supported by MarshallZehr. I observe the submissions to the effect that the purchaser under the APS is not related in any way to MarshallZehr [or the Receiver].
  17. The APS contemplates, as noted, the payment of Priority Payables. Those include the portion of valid construction liens that may be determined by the Court to have priority over the first mortgage. The validity of those liens is disputed.
  18. The validity of the relevant liens is to be determined by this Court at a previously scheduled hearing on October 31. The registered lien claims are those of Fusioncorp., whose counsel is present in Court today, as the only direct contractor with the Debtor, and three subcontractors.
  19. Accordingly, the relief sought today contemplates a holdback of sorts in the amount of \$347,404.36 representing 10% of the costs of services supplied by Fusioncorp. and the subcontractors to the project. In other words, this quantum is, in the view of the Receiver, and confirmed by Fusioncorp., the maximum priority amount under all of the registered liens, in the aggregate, pursuant to section 78 of the *Construction Act*.
  20. Those funds held back will be maintained by the Receiver until such time as the validity of the liens has been determined and the court directs the distribution of that amount, or the parties consent to the release of the funds.
  21. The APS is conditional on Court approval as well as the termination of the existing purchase agreements for the residential condominium units. The project is nowhere near completion. It has significant outstanding issues that must be rectified for the development to proceed.
  22. No offeror in the sales process conducted by the Receiver, nor the Purchaser under the APS in respect of which approval is sought today, was prepared to assume those existing purchase agreements. The Receiver submits that the termination of those agreements is necessary to facilitate a sale of the project.
  23. In all the circumstances, and particularly given that all affected parties, including the counterparty purchasers to the residential condominium unit agreements of purchase and sale sought to be terminated, have been given notice, and none opposes today, I am satisfied that the requested relief is appropriate.
  24. I am satisfied that the Sales Process as set out in the Second Report represented a robust and vigorous attempt to sell the assets of the Debtor and maximize sales proceeds. Regrettably, it yielded only three offers, and the total value of each was materially less than the outstanding amount owed to MarshallZehr.
  25. I have reviewed the Confidential Appendices to the Second Report, consisting of an offer summary and an unredacted copy of the APS. I have considered those materials in reaching this decision together with the materials referred to above.
  26. I am satisfied that the APS represents the highest offer received for the assets, and is more favourable than are any of the three offers received as a result of the Sales Process. Notwithstanding that the purchaser under the APS was introduced by MarshallZehr, I am satisfied that there is no relationship between those two parties and this fact does not impair or affect the integrity of the process. In any event, the results speak for themselves.
  27. Accordingly, I am satisfied that the Sales Process undertaken met all of the relevant factors required and in particular, the *Soundair* principles. The sale is approved.
  28. The Receiver seeks a sealing order in respect of the Confidential Appendices limited to those materials and also limited in time until the proposed transaction in respect of which approval is sought [with a very short closing] is completed. In the circumstances, and to protect the integrity of the process and the value of the assets in the hopefully unlikely event that sale does not close and the assets are required to

be re-marketed, a sealing order on this limited basis is appropriate. I am satisfied that the requirements set out by the Supreme Court of Canada in *Sherman Estate* and *Sierra Club* have been satisfied.

29. I direct the Receiver to file with the Commercial List office a physical copy of the Confidential Appendices in a sealed envelope marked: "confidential and not to form part of the public record pending further order of this Court."].
30. I am also satisfied that the two reports of the Receiver and the activities described therein are appropriate and should be approved.
31. Finally, it is appropriate in the circumstances that the Receiver be discharged, effective upon the completion of those remaining activities as detailed in the Second Report.
32. For all of the above reasons, I have signed the two orders sought today. They are effective without the necessity of issuing and entering.

O'Shea, J.