



**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-22-00691528-00CL

DATE: 1 March 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: **MARSHALLZEHR GROUP INC V 12252856 CANADA INC**

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Counsel for Applicant George Benchetrit	MARSHALLZEHR GROUP INC., AS ADMINISTRATOR/ Mir Ali	george@chaitons.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Counsel for Respondent Nicolas Canizares	12252856 CANADA INC.	equinoxgroup@bellnet.ca
Counsel for Lien Claimant Elham Beygi	Prime Design Build Corporation	ebeygi@cambridgellp.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Proposed Receiver	RSM Canada	Bryan.tannenbaum@rsmcanada.com

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Applicant, MarshallZehr Group Inc., as Administrator, seeks the appointment of a receiver over the assets and undertaking of the Company, 12252856 Canada Inc.
2. The company seeks an adjournment of that request, initially for 60 days or, as advised by counsel during submissions, for a minimum of 45 days, to allow it to attempt to secure financing to pay out the Applicant.
3. The Application was commenced on December 9, 2002 and originally returnable on that date. It is not in dispute that the Applicant loaned to the Respondent the principal sum of \$18 million, and took as security a first registered charge/mortgage over the Company's real property. There is no operating business. The Company essentially owns a condominium project.
4. The loan matured on September 1, 2022. No payment was made. It is also not in dispute that the security documents entitle the Applicant to the appointment of a receiver. The Applicant delivered the section 244 BIA notice and demanded payment on September 9, 2022.
5. The parties entered into a settlement agreement dated December 20, 2022, pursuant to which the receivership application was to be adjourned to January 31, 2023. The Company consented to a receivership order being issued on that date in the event that it had not repaid the Applicant the sums owing by January 30, subject to the resolution of two issues concerning the calculation of the exact quantum of the amount owed.
6. On December 21, 2022, the parties appeared before me and advised the Court of the settlement agreement referred to above. I scheduled a hearing of the two issues than in dispute for January 24, 2023, in order that they could be resolved or determined well in advance of the payment deadline and rescheduled hearing date for the receivership Application on January 31.
7. On January 27, 2023, the parties entered into a second settlement agreement (the "Second Settlement") pursuant to which the two issues in dispute were resolved, and the parties agreed that the Company would be given a further extension until 3 PM on February 24, 2023 to pay a settlement amount to the Applicant.
8. Importantly, and pursuant to the Second Settlement, in the event that the settlement amount was not repaid by the revised date of February 24, the Company consented to the appointment of a receiver, agreed not to contest the receivership application on any basis, and undertook to take no step or action that could in any way delay or interfere with the appointment of a receiver in the event of a nonpayment.
9. The settlement amount was not paid. Accordingly, the Applicant seeks the appointment of RSM Canada Limited as Receiver pursuant to section 101 of the CJA and section 243 of the BIA.
10. Today, Mr. Canizares for the Company seeks an adjournment of the motion, as noted above. Counsel concedes, both in argument and in his aide memoire, that the Second Settlement was entered into, includes the relevant terms summarized above, and further that the settlement amount was not paid.
11. Since, however, the essential purpose of appointing a Receiver would be to sell the property, the Company seeks what is effectively a further extension of two months to allow it to obtain alternate financing. The company submits in its aide memoire filed for today that: "the Respondents have now obtained two

mortgage commitments which; if allowed to close, will yield net advances of funds in excess of the amounts set out in the [2nd Settlement].

12. Redacted versions of the two mortgage commitments are appended to the aide memoire. I pause to observe that the Respondents have not filed any sworn affidavit evidence from either the Respondents or the proposed new mortgage lenders. The Company submits that the aggregate of the amounts proposed to be advanced under the new financing facilities, a new first mortgage and a new second mortgage, would together be sufficient to pay out the Applicant.
13. However, and as strongly submitted by the Applicant, a review of even the redacted versions of these two mortgage commitments appended to the aide memoire of the Company are very clear that neither of the two new financing commitments is unconditional or irrevocable. On the contrary, each is subject to a number of material conditions, all of which must be satisfied or waived in order for those commitments to be binding upon the new lenders such that funding is irrevocable.
14. Today, I asked counsel for the Company whether, notwithstanding the lacunae in the Record, he could confirm that all conditions had been waived are satisfied. In candour and fairness, he was unable to do so. I asked him whether, if I were inclined to adjourn the matter for a brief period (such as 24 hours) he would be in a position to put in sworn affidavit evidence to the effect that both proposed new financing commitments were unconditional and irrevocable, and could be funded immediately. Again, and again with all candour, he was unable to do so.
15. I also observe that the mortgage commitments are dated in October, 2022. This is relevant for a few reasons. First, there is no evidence before me today of any due diligence having been done in the four-month period since they were issued. Counsel for the Company, who is new to this matter, was unable to assist. Second, those commitments predated the first settlement agreement as well as the Second Settlement, and indeed were the very reason why those settlements were entered into. Yet, still, there is no evidence before me as to why those commitments were not consummated (i.e., why the conditions precedent to funding were not waived or satisfied before either or both of the first settlement agreement and the Second Settlement), or what if anything has transpired since.
16. In the circumstances, I accept the submission of the Applicant that there is no basis upon which to have any reasonable belief that the funding will close if yet another adjournment is granted, and the Second Settlement was intended (and agreed) to be itself a further opportunity and extension in favour of the Company to secure necessary financing, failing which there would be no dispute about the appointment of a Receiver.
17. In the circumstances, I am satisfied that it is just and convenient to appoint a Receiver. The terms of the proposed receivership are consistent with the Model Order of this Commercial List and are appropriate in the particular circumstances of this case. Counsel have discussed the terms and are agreed as to the form and content of the order (this was part of the Second Settlement).
18. Counsel for the Company asked whether the Court would entertain a motion to vary the terms of the receivership or discharge the Receiver in the event that financing was secured and the Applicant could be paid out in full. The draft order provides for the usual comeback clause on seven days' notice and I advised counsel that I would hear them on short notice, if required, to deal with issues that may arise. Both the Applicants and the proposed Receiver confirms that they would continue to cooperate with the Company and would have good faith discussions with the Company if indeed financing were obtained. I would expect that the Applicant would be well pleased to be paid out in full as soon as possible.
19. However, in the interim, I am satisfied that the Applicant (which was entitled to the appointment of a receiver upon default pursuant to the original loan agreements even before the first settlement and the

Second Settlement) has afforded the Company multiple opportunities to obtain financing. I am concerned as noted above, given two formal settlements and funding commitments that are now four months old, when today I am faced with no sworn evidence from the Company whatsoever and therefore no ability to conclude that it would be just and convenient to adjourn this matter yet again.

20. Order to go in the form signed by me which is effective immediately and without the necessity of issuing and entering.

Ozawa, J.