



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: **CV-22-00691528-00CL** HEARING
DATE: **June 15, 2023**

NO. ON LIST: **3**

TITLE OF PROCEEDING: **MARSHALLZEHR GROUP INC., AS ADMINISTRATOR v.
12252856 CANADA INC.**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Harvey Chaiton	MarshallZehr Group Inc., As Administrator	Harvey@chaitons.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Nicolas Canizares	12252856 Canada Inc.	equinoxgroup@bellnet.ca
Irving Fox	BridlePath	irving@ontlaw.com
Nicholas Patterson	Prime Design Corporation	npatterson@cambridgellp.com
Evan Moore	Top Producer Team Realty	emoore@moorelawyers.ca

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Messers Berger and Tanenbaum	The Receiver,RSM	Jeff.berger@rsmcanada.com
Rajiv Joshi	Various other of creditors	rjoshi@srtslegal.com

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ENDORSEMENT OF JUSTICE KIMMEL:

1. RSM Canada Limited was appointed receiver (the "Receiver") of the assets, undertakings and property of 12252856 Canada Inc. (the "Debtor"), including the premises municipally known as 201, 227, 235 King Road, Richmond Hill, Ontario (the "Property"), by an order dated February 28, 2023 (the "Appointment Order").
2. The Receiver brings this motion for, inter alia:
 - a. The approval of its first report dated May 30, 2023 (the "First Report") and its conduct and activities described therein;
 - b. The approval of the Sale Process described in the First Report and authorizing the Receiver to take all steps necessary to conduct the Sale Process, including entering into the Listing Agreement;
 - c. directing Mr. Prem Kumar G. Yachamanani, the sole director of the Debtor, to comply with the Receiver's request for information, and cause the Debtor to provide all of the requested books and records of the Debtor in his possession or control; and
 - d. sealing Confidential Appendices "1" and "2" to the First Report.
3. The Debtor seeks an adjournment, or the dismissal, of this motion on the grounds that:
 - a. There was a pre-existing agreement of purchase and sale dated February 1, 2023 (the "APS") entered into by the Debtor in respect of the Property, in respect of which conditions were waived on February 28, 2023 and the purchaser was not formally served with this motion; and
 - b. The applicant improperly included "wrap up interest" in its discharge statement dated December 14, 2022 and improperly included "deferred lender fee forbearance" on later discharge statements issued, such that it is not clear what the per diem interest rate is or is required to determine what the applicant is entitled to upon any sale of the Property and or in the event of a refinancing of the Property.
4. No other party on the service list opposes the Receiver's motion.

Approved Endorsement and Order

5. This endorsement language was approved by counsel for MarshallZehr Group Inc., also acting for the Receiver on this motion, and the Debtor, and has been incorporated herein on that basis.
6. RSM, in its capacity as court-appointed receiver of 12252856 Canada Inc (the "Debtor") seeks an order approving the sale process described in the First Report of the Receiver dated May 30, 2023 (the "Sale Process"), and other relief. In response, the Debtor (i) filed the affidavit of Hardie Ballantyne which attaches a copy of an Agreement of Purchase and Sale for the subject property dated February 1, 2023 (the "APS"), and (ii) sought an adjournment of the motion on the basis that the purchaser opposed the approval of the sale process and counsel for the purchaser was unavailable to attend the motion today, although the reason for non-attendance was unclear.
7. The APS, the validity of which is challenged by the Receiver on various grounds, contemplates a closing date of July 31, 2023. In the circumstances, I am approving the Sale Process and, in case it is necessary, scheduling a 1 hour hearing on July 27, 2023 to determine whether the APS creates an interest in the property in favour of the purchaser that is binding on the Receiver. The hearing will be peremptory on the purchaser and the Debtor. If the purchaser's lawyer, Mr. Hutt, is not available to attend the hearing at noon on July 27, 2023, he or the purchaser will have to arrange for another lawyer to argue the motion on that day. In connection with the motion, the purchaser shall file further affidavit evidence in support of its claim which shall include, among other things, (i) any relationship the purchaser may have to the Debtor or its principal; (ii) who prepared the APS; (iii) when the APS was signed by the purchaser; (iv)

- when the purchaser first became aware of the receivership of the Debtor; (v) whether the deposits contemplated by the APS were paid, and if paid, provide clear proof of payment. The purchaser will have until June 30, 2023 to file the affidavit and any other evidence. The Receiver shall have until July 7, 2023 to reply. Examinations shall take place on July 11, 2023 and facts exchanged by July 21, 2023.
8. In the event the sale transaction is not completed by July 26, 2023 and the APS is determined not to be valid and enforceable against the Receiver, in addition to the costs of the motion, I will entertain submissions with respect to who should be liable for the Receiver's costs and expenses and loan interest accrued by reason of the Debtor and the purchaser bringing the existence of the APS to the Court's attention at this time rather than at the hearing of the receivership application.
 9. The Debtor shall not further amend the APS without the consent of the Receiver or further order of the court.
 10. The balance of the relief sought by the Receiver is approved. For clarity, the Receiver is hereby authorized to enter into the Listing Agreement, as defined in its First Report, subject to an amendment stating that the "break fee" in the event that the sale transaction pursuant to the APS is completed on or before July 31, 2023 be \$25,000 plus HST. Counsel shall prepare a revised form of order in accordance with this endorsement for approval.
 11. The remainder of this endorsement briefly elaborates upon the reasons for the relief granted.

Adjournment Request

12. Counsel for the Debtor advised that counsel for the purchaser under the APS also wanted the matter to be adjourned. No explanation was offered as to why that counsel did not appear today to request the adjournment himself (the record discloses that even if the purchaser was not formally served with this motion, its counsel was clearly aware of it).
13. After hearing extensive submissions, that extended well beyond the time that had been reserved for this motion, I declined to grant the adjournment of the Receiver's motion. There is a history that is detailed in the endorsement of Osborne J. dated March 1, 2023.
14. Although I did not grant the adjournment request, I did schedule the motion. However, I have scheduled a motion regarding the purchaser's interest in the Property (described above), for one hour on July 27, 2023 at 12:00 noon.
15. The Sale Process that the Receiver will be undertaken in the meantime, pursuant to the court's order on this motion, will not be so far advanced as to render it impossible for the APS to close if it is determined to be valid and enforceable. The only external cost of this will be that the Listing Broker's break fee, to be payable now not only in the event of the Debtor's exercise of its right of redemption under the mortgage, but also to a completed sale transaction under the APS (as described above). The break fee is modest, at \$25,000 and is reasonable in these circumstances.
16. The Listing Broker will be doing most of the work under the Sale Process as it progresses in the short term. While the Receiver may do some extra work, I am not prepared to delay the Sale Process for a late-produced APS that the Debtor purported to agree to extend after the Receiver was appointed. In striking the appropriate balance, the issues regarding the APS can be adjudicated (as provided for in the terms of the consent endorsement) on a parallel track and will not be permitted to interfere with the orderly administration of the receivership.
17. The dispute between the applicant and respondent about the amount the discharge statement can be addressed at a later date. It does not need to be resolved now, it will just need to eventually be reconciled at the time of any future sale or refinancing of the Property in connection with any proposed distributions.

The Sale Process Approval

18. The Receiver has received and reviewed listing proposals submitted by the three realtors. Following its review of the proposals submitted, the Receiver, with the concurrence of the applicant, has selected the

listing proposal from Avison Young and recommends that this court authorize the Receiver to enter into a proposed listing agreement with Avison Young to market the Property for sale.

19. The court has jurisdiction to approve the Sale Process pursuant to section 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C ., 1985, c. B-3 (“BIA”).
20. The factors a court considers in its determination whether to approve a particular form of sale process are the same factors a court will use when considering the approval of a proposed sale transaction, set out in *Royal Bank v. Soundair*, : (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. See *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para 6; *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (ONCA).
21. The proposed Sale Process has three phases: pre-marketing, marketing, offer review and negotiations. The Property will be marketed on an "as is, where is" basis, the Receiver will have the right to reject any and all offers, including the highest offer; and the transaction will be subject to court approval.
22. The Receiver is recommending the Sale Process and has taken into consideration in so doing:
 - a. the fairness, transparency and integrity of the proposed process;
 - b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
 - c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
23. The Receiver considers that the Sale Process including the retention of a recognized commercial real estate brokerage firm is commercially reasonable and will optimize the chance of securing the best possible price for the Property.
24. The Receiver’s reasons for recommending the Sale Process address these factors. I am satisfied, having considered the factors to be assessed at the Sale Process approval stage, in light of the *Soundair* factors, that the Sale Process should be approved.
25. The Sale Process does not foreclose the possibility of completing the transaction under the APS if it is determined to be valid and enforceable and if it is determined to be appropriate in the circumstances. The Receiver retains broad discretion and intends to seek court approval of any transaction.

The Sealing Order

26. The Receiver requests an order sealing Confidential Appendix "1" and Confidential Appendix "2", which contain a summary of the listing proposals submitted to the Receiver and the proposed listing agreement executed by Avison Young. The information that the Receiver seeks to seal is commercially sensitive. The Receiver is of the view that, if disclosed, it would negatively impact the Receiver's efforts to maximize the sale price for the Property.
27. The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the Property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Sale Process and any sale transaction arising therefrom.
28. The commercial interest in maintaining the integrity of the Sale Process and maximizing the value of the Property and net recovery to creditors in this proceeding is an important public interest that would be jeopardized if the Confidential Appendices are not sealed. There is no reasonably alternative means to prevent that jeopardy.
29. These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings.
30. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the

reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Granting this order is consistent with the court's practice of granting limited partial sealing orders in these types of circumstances in insolvency proceedings.

31. The requested partial sealing order is limited in its scope (only to the identified Confidential Appendices). The order has been amended to make the sealing order time-limited to the earlier of the closing of a sale transaction.
32. The Receiver is directed to ensure that the sealed Confidential Appendices are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that they can be physically sealed and shall apply at the earliest opportunity for an order "unsealing" the Confidential Appendices once the Sale Process has finally concluded and there is no risk of the Receiver having to re-market the Property.

The Receiver's First Report

33. It is customary for the Receiver to seek approval of its reports and activities regularly during the receivership process, rather than at the end. This ensures transparency and accountability and provides an opportunity for concerns to be addressed and rectified as they arise. See *Re Hanfeng Evergreen Inc.*, 2017 ONSC 7161, at paras. 15-17 citing *Target Canada Co. (Re)*, 2015 ONSC 7574, at paras. 20-24, and *Laurentian University of Sudbury*, 2022 ONSC 5850, at para. 17.
34. The actions, conduct and activities of the Receiver described in its First Report are consistent with its duties and powers under the Appointment Order and in furtherance of its mandate. They are approved, subject to the usual stipulation (provided for in the proposed draft order) that this approval may only be relied upon by the Receiver in its personal capacity and only with respect to its own personal liability.

Order to Comply with Obligation to Produce Books and Records

35. Pursuant to paragraph 5 of the Appointment Order, all persons shall (i) advise the Receiver of any books and records and information of any kind related to the business or affairs of the Debtor; and (ii) provide to the Receiver or permit the Receiver to take, make copies of and grant unfettered access to any books and records of any kind related to the affairs of the Debtor or its business.
36. Mr. Prem Kumar G. Yachamanani is obligated to provide books and records, upon request and has not thus far produced the books and records related to the Debtor.

Order

37. Order to go in the revised form dated June 15, 2023 and signed by me today, with immediate effect and without the necessity of formal issuance and entry.



KIMMEL J.

June 16, 2023