From: Cavanagh, Justice Peter (SCJ)
Sent: December 8, 2020 3:56 PM
To: Jeff Larry; Sam P. Rappos; Chris E. Reed
Cc: JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Subject: CV-20-635523-CL MarshallZehr Group Inc. v. Fernwood Developments (Ontario) Corporation

Counsel:

Jeffrey Larry for RSM Canada Limited, Receiver of the assets of Fernwood Developments (Ontario) Corporation

Sam Rappos for MarshallZehr Group Inc.

Christopher Reed for Simcoe Standard Condominium Corporation No. 420

Endorsement:

Introduction

This is a motion brought by RSM Canada Limited ("RSM") in its capacity as court-appointed receiver ("Receiver") of all of the assets, undertakings and properties of Fernwood Developments (Ontario) Corporation ("Fernwood") and in its capacity as Trustee in Bankruptcy of the Estate of Fernwood for an order:

a. declaring that Simcoe Standard Condominium Corporation No. 420 (the "Condo Corporation") has no right to collect any monthly rent from the tenants occupying the units owned by Fernwood from the date of the receivership forward, and

b. directing the Condo Corporation to disgorge and pay over to the Receiver all rents collected from the Fernwood tenants from November 1, 2020 forward and to provide the Receiver with an accounting of the rents collected from November 1, 2020 forward.

Background Facts

Fernwood was the developer of a 94-unit stacked townhouse condominium complex located in Barrie, Ontario (the "Development"). Fernwood sold most of the residential units in the Development, however, the 26 residential condominium units owned by Fernwood were not sold and are still owned by Fernwood. These units are rented out to tenants (the "Fernwood Tenants"). As of the end of October 2020, there were 60 tenants renting these units.

MarshallZehr Group Inc. (MZG") provided Fernwood with a loan of $19.95 million which matured on September 1, 2019. Fernwood did not repay the loan. As a result, MZG brought an application for the appointment of RSM as receiver under the *Bankruptcy and Insolvency Act* ("BIA").

On February 12, 2020, an order was made appointing RSM as receiver over all of Fernwood's assets, undertakings, and properties, including all proceeds from these assets and properties (collectively, the "Property"). The appointment order provides that "all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this court".

The Receiver subsequently sought and received court authorization to file an assignment in bankruptcy on behalf of Fernwood. Fernwood was assigned into bankruptcy on July 29, 2020. RSM was named Trustee in Bankruptcy of the Fernwood estate. Fernwood is currently subject to both the receivership and bankruptcy schemes.

The Condo Corporation was incorporated in 2016, after registration of the Development.

When the Receiver was appointed, Fernwood had not paid common expense fees to the Condo Corporation since December 2018. The Condo Corporation registered liens against the Fernwood Units for a portion of these arrears. Ultimately, the Receiver and the Condo Corporation reach a settlement pursuant to which the Receiver paid all common area fees relating to the liens, plus costs, and those arising after the date of its appointment. The Condo Corporation discharged its liens.

On October 13, 2020, counsel for the Condo Corporation directed the Fernwood Tenants to pay their rent to the Condo Corporation, as opposed to the Receiver, going forward. In the letter sent to each tenant, the Condo Corporation's counsel told the Fernwood Tenants they were required to make these payments to the Condo Corporation by law.

Analysis

The Condo Corporation maintains that it is a secured creditor under the *BIA* and is entitled to collect these rents under s. 87 of the *Condominium Act*.

Section 87(1) provides:

> If an owner who has leased a unit defaults in the obligation to contribute to the common expenses payable to the owner's unit, the corporation may, by written notice to the lessee, required the lessee to pay to the corporation the lesser of the amount of the default and the amount of the rent due under the lease.

Section 69.3(1) of the *BIA* provides that on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for recovery of a claim provable in bankruptcy. Section 69.3(1) of the BIA is subject to s. 69.3(2) which provides that the bankruptcy of a debtor does not prevent "secured creditors" from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders.

The Condo Corporation's position on this motion is that it is a "secured creditor" within the meaning of that term in the *BIA* and, therefore, it is not subject to the stay of proceedings in s. 69.3(1) of the *BIA*. The meaning of "secured creditor" for purposes of the *BIA* is

broader than in normal usage. See *Re Sara* (1985), 56 C.B.R. (N.S.) 282 (Ont. S.C.), at para. 17, quoting from *Re Commercial Textiles Ltd.* (1940), 21 C.B.R. 387 at p. 394 (Ont. S.C.).

The term "secured creditor" is defined in s. 2 of the *BIA*:

> In this Act, …
>
> **secured creditor** means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or …

The issue on this motion is whether s. 87 of the *Condominium Act* creates a charge or lien in favour of the Condo Corporation on or against the rents due and owing by the Fernwood Tenants to Fernwood such that the Condo Corporation is a secured creditor within the meaning of that term in the *BIA*.

Provincial legislation can create liens, charges, trusts and interests that are enforceable notwithstanding the *BIA*. If a creditor enjoys the benefit of a provincial lien or charge, then it is a secured creditor for the purposes of the *BIA* and is not subject to the stay of proceedings thereunder. Examples of liens and charges contained in provincial statutes that are enforceable as claims of a secured creditor in bankruptcy are construction lien rights, a credit union's lien, and a forestry worker's lien.

The Receiver and MZG contend that the Condo Corporation, through the interpretation of s. 87 of the *Condominium Act* it urges the court to accept, is impermissibly trying to revive lien rights previously lost. These parties submit that s. 87 of the *Condominium Act*, unlike s. 85, provides only for a statutory process to facilitate collection of arrears of common expenses akin to the right of an execution creditor to garnish amounts owing to an execution debtor under rule 60.08 of the *Rules of Civil Procedure*.

In order to determine whether a right over property constitutes a charge for the purposes of the definition of "secured creditor" in the *BIA*, courts have distinguished between rights against property intended to be "as valid and as binding upon the Company as if made by formal instrument" (which are secured creditor rights) and "words to facilitate process or execution" (which fall within "executions or other process against the property of a bankrupt" and are not secured claims). See *Re Little Tree Farm Ltd.*, (1997), 45 C.B.R. (3d) 149 (Ont. Bktcy.), at paras. 22-23.

The *Condominium Act*, in s. 85(1), expressly provides that a condominium corporation may have a lien against an owner's unit for unpaid common expenses:

> If an owner defaults in the obligation to contribute to the common expenses payable for the owner's unit, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid rent.

Section 85(2) of the *Condominium Act* provides that the lien created by s. 85(1) expires three months after the default that gave rise to the lien unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister. Section 85(6) provides that the lien may be enforced in the same manner as a mortgage. Section 86(1) provides that a lien mentioned in s. 85(1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose.

In support of their submissions, the Receiver and MZG rely on the decision of the Court of Appeal in *Toronto Standard Condominium Corporation No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc*., 2014 ONCA 696 (CanLII). In *Stefco*, the owner of two units was in arrears of common expenses. The condominium corporation commenced an application against the owner of the two units claiming the arrears as damages under s. 134(3) of the *Condominium Act*. Under s. 134(5) of the *Condominium Act*, such damages shall be added to the common expenses for the unit. If successful on its application, the condominium corporation could have then registered a lien for the full amount of the arrears and, under s. 86(1), this lien would stand in priority to all other encumbrances, including the mortgage registered against title to the units.

The Court of Appeal in *Stefco*, at para. 29, identified the issue before it as whether a condominium corporation's claim for common expenses can constitute a claim for damages under s. 134 of the *Condominium Act*. This issue raised the question of priority between the mortgagee's claim and the claim of the condominium corporation for common expenses: *Stefco*, at para. 1. The Court of Appeal held that the interpretation of s. 134 urged by the condominium corporation is contrary to the legislative purpose behind the enactment of the sections of the *Condominium Act*, the scheme of this Act, and is not consistent with the wording of s. 134.

In reaching this conclusion, the Court of Appeal, at paras. 39-42, first considered the legislative purpose behind the enactment of sections of the *Condominium Act* dealing with the collection of common expenses:

> Toronto Standard [the condominium corporation] describes the *Act* as being consumer protection legislation, which demonstrates a clear preference for the rights of a condominium corporation to collect common expenses over the rights of a mortgagee to enforce payment obligations under a mortgage.
>
> That statement is accurate only to a point. In recognition of the special significance of common expenses in the on-going operation of a condominium building, s. 86 grants the condominium corporation a powerful tool by creating a priority for the collection of common expenses. However, the use of that tool is conditional on the condominium corporation fulfilling its obligation to register its lien and provide notice to encumbrancers.
>
> In my view, this part of the Act is designed to safeguard the financial viability of a condominium corporation in the manner that fairly balances the rights of the various stakeholders. Lane J. was correct in *York Condominium Corp. No. 482 v. Christiansen*, (2003), 2003 CanLII 11152 (ON SC), 64 O.R. (3d) 65 (Ont. S.C.J.)

> when he observed, at para. 5: “[A] principal object of the *Act* is to achieve fairness among the parties - owners, their tenants, their mortgagees, the corporation itself - in raising the money to keep the common enterprise solvent.”
>
> In restricting the availability of the priority for common expenses to circumstances where the condominium corporation has registered its lien and provided notice to encumbrancers, the legislature has balanced the right and obligation of a condominium corporation to collect common expenses against the right of a mortgagee to have notice of a default in the payment of common expenses. This right of notice is of significant benefit to a mortgagee. It allows a mortgagee to determine if it should take steps to protect its interests under s. 88, by paying the common expenses, treating the failure to pay as a default under the mortgage, and commencing enforcement proceedings. The proposed revival strategy ignores the fair balance the legislature has struck in the rights of mortgagees and condominium corporations.

In *Stefco*, the Court of Appeal considered the position advanced by the condominium corporation to be a “revival scheme” which is inconsistent with the purpose of the *Condominium Act* and the intention of the legislature. The Court of Appeal observed, at para. 46, that if the argument of the condominium corporation were accepted, and a priority could be revived using the s. 134 procedure for an unexpired lien right, s. 85(2) would be rendered meaningless in the sense that a condominium corporation could ignore its obligation to register a lien under that subsection, safe in the knowledge that it could always assert its lien rights later and still claim priority. The Court of Appeal held that this interpretation would result in a statute that is internally inconsistent. The appeal was dismissed.

I accept the holding of the Court of Appeal in *Stefco* that a principal objective of the *Condominium Act* is to balance the rights of the various stakeholders. Section 85(1) of the *Condominium Act* expressly provides for priority to the condominium corporation (over any other registered or unregistered encumbrance which existed before the lien arose) for arrears of payment of common expenses through provision for creation of a statutory lien. In contrast, s. 87(1) does not include language which expressly provides for creation of a statutory lien. If the legislature had intended that s. 87(1) should be read as creating a lien or charge in favour of the condominium corporation which has priority over other registered or unregistered encumbrances, it could have achieved this result through the use of specific language.

In my view, the interpretation advanced by the Condo Corporation would render section 85(2) meaningless because if, as the Condo Corporation contends, s. 87(1) operates to make a condominium corporation a secured creditor for all arrears, no purpose would be served by s. 85(2) because s. 87(1) could be used to give a condominium corporation priority for all arrears, not just arrears going back three months.

I conclude that s. 87(1) provides only for a statutory process to facilitate collection of arrears of common expenses akin to the right of an execution creditor to garnish amounts owing to an execution debtor under rule 60.08 of the *Rules of Civil Procedure*. Section 87

of the *Condominium Act* does not create a charge or lien in favour of the Condo Corporation on or against the rents due and owing by the Fernwood Tenants to Fernwood such that the Condo Corporation is a secured creditor within the meaning of that term in the *BIA*.

Disposition

For these reasons, the motion by RSM is granted. I make an order:

a. declaring that the Condo Corporation has no right to collect any monthly rent from the Fernwood Tenants from the date of the receivership forward; and
b. directing the Condo Corporation to disgorge and pay over to the Receiver all rents collected from the Fernwood Tenants from November 1, 2020 forward and to provide the Receiver with an accounting of the rents collected from November 1, 2020 forward.

If there is any issue about the formal order to be issued, I may be spoken to. If the parties are unable to agree on costs, very brief written submissions may be made.

Cavanagh, J.