

CITATION: Home Trust Company v. 2122775 Ontario Inc., 2014 ONSC 1039
COURT FILE NO.: CV-13-10313-00CL
DATE: 20140218

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Home Trust Company, Applicant

AND:

2122775 Ontario Inc., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Corne, for the Receiver, Collins Barrow Toronto Limited

C. Ho, for the applicant, Home Trust Company

B. Jenkins, for the Defendant, 2122775 Ontario Inc.

S. Crocco, for the proposed purchaser, Urbancorp (Downtown) Developments Inc.

L. Finegold, for the subsequent mortgagees, US Capital Corp. and Ali Visram

HEARD: February 14, 2014

REASONS FOR DECISION

I. Receiver's sale approval motion and debtor's effort to stay the motion

[1] Collins Barrow Toronto Limited, the receiver of 2122775 Ontario Inc. (the "Debtor") pursuant to the November 15, 2013 appointment order of Thorburn J., moved for the approval of an agreement of purchase and sale between it and Urbancorp (Downtown) Developments Inc. ("Urbancorp") of certain assets of the Debtor. The Debtor moved for a temporary stay of the receivership and its sale process for 30 days in order to enable it to complete a re-financing. At the hearing I dismissed the Debtor's motion and granted the approval and vesting order sought by the Receiver. These are my reasons for so doing.

[2] The Debtor owned property on the east side of Bayview Avenue, north of Post Road (the "Property"). The Debtor was undertaking to develop a townhouse complex on the Property. Following its appointment the Receiver moved for an order approving a sales and marketing process for the Property. I granted that order on December 11, 2013.

[3] The Receiver then conducted a standard marketing process, including the distribution of a marketing flyer, placing advertisements in local papers, distributing a confidential information

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memorandum to 111 parties who signed a confidentiality agreement, making an electronic data room available to such parties and conducting 28 site tours. The Receiver set a bid deadline of January 23, 2014.

[4] Ten offers were made to the Receiver, and the Receiver contacted the top four offerors to clarify their bids. The Receiver then set a revised deadline of January 30 for the top four offerors to improve their bids. Following a call from one of the other offerors, the Receiver contacted the remaining six bidders and afforded them the opportunity to submit improved bids. By the time of the revised deadline, 11 offers had been sent to the Receiver. After discussing the offers with Home Trust, the Receiver accepted the offer from Urbancorp, subject to Court approval.

[5] The Receiver filed, on a confidential basis, a summary of all offers received at the initial and revised deadlines. The Urbancorp offer was superior in regards to price, as well as its unconditional nature.

[6] Shortly before the return date of the Receiver's approval motion, the Debtor advised that it had negotiated term sheets with two lenders – Toronto Capital Inc. and USHJO Enterprises Inc. – which, if completed, would take out the first mortgage of Home Trust and allow the development of the project so that on completion the Debtor could pay the amounts due to the second, third and fourth mortgagees. The Debtor advised the Receiver that it would apply to the Court to request the redemption of the Home Trust mortgage and to stay the sale process. The subsequent mortgagees supported the Debtor's motion to stay the sale approval process to permit the negotiation of the refinancing.

[7] In its Second Supplemental Report the Receiver observed that neither term sheet was "firm" and the combined amounts in the term sheets would be insufficient to pay out the Home Trust mortgage and the Receiver's actual and accrued receivership costs. At the hearing counsel for the Debtor advised that his client was working on obtaining revised term sheets which would eliminate any such deficiency.

[8] Urbancorp filed an affidavit from its Chief Financial Officer, Susanna Han, which stated that it had spent time and money participating in the Receiver's bidding process and it had participated in good faith believing that the superior offer would be approved by the Court. Urbancorp also stated that a delay in the closing of the purchase could push back the start of resuming the development of the townhouses, thereby increasing costs and delaying the timing of the development. Han deposed: "[I]t would be manifestly unfair and prejudicial to Urbancorp if the approval of the sale is not granted in these circumstances".

[9] Although the Debtor portrayed its request as one seeking a stay of the sale in order to enable it to redeem the first mortgage, in essence the Debtor sought an extension of the bid deadline in order to make a late bid. If granted, the stay requested by the Debtor would seriously impugn the integrity of the court-sanctioned sales and marketing process. The bid process employed by the Receiver was done pursuant to the Sales and Marketing Order and was transparent. It was open to the Debtor to participate in the bid process. While the Debtor did not do so until well after the bid deadline had passed, 11 other bidders complied with the rules of the sales process set by the Receiver, and Urbancorp submitted the superior bid. To permit the Debtor to stay the sales process in such circumstances would risk seriously eroding the


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confidence of the market in the integrity of receivership sales processes sanctioned by the Ontario Superior Court of Justice.

[10] Moreover, this is not a case where the Debtor had presented a vastly superior offer to that accepted by the Receiver. On the contrary, the Debtor's proposal was inferior in all respects: it was not firm and the consideration would be inadequate to pay the first mortgage and the Receiver's charge.

[11] I concluded that the sales process conducted by the Receiver and the agreement it submitted for court approval satisfied the principles set out in *Royal Bank of Canada v. Soundair*¹ – the Receiver sought prior court approval for a sales and marketing process; it followed that process; it used a transparent sales process; it afforded all offerors an opportunity to submit improved bids; and, the Receiver accepted the superior bid.

[12] For those reasons, I dismissed the Debtor's motion to stay the sale process, and I granted the approval and vesting order sought by the Receiver. Given the commercially sensitive information contained in the Receiver's Supplemental Report dated February 5, 2014, I order that it be sealed until the closing of the Urbancorp agreement of purchase and sale or the further order of this Court.



D. M. Brown J.

Date: February 18, 2014

¹ (1991), 4 O.R. (3d) 1 (C.A.)