

From: Conway, Madam Justice Barbara (SCJ)

Sent: Thursday, May 13, 2021 10:34 AM

To: Elizabeth Rathbone

Cc: Jeff Larry; Sam P. Rappos; Harvey G. Chaiton; Judy Hamilton; Paul Daffern; Andrew Wood; Michael McCluskey; Adam Slavens; JUS-G-MAG-CSD-Toronto-SCJ Commercial List

Subject: RE: Court File No. CV-20-00635523-00CL - MarshallZehr Group Inc. v. Fernwood Developments (Ontario) Corporation

Importance: High

The Receiver's motion proceeded before me on May 10, 2021 by Zoom. The participant slip is attached.

Approval of the Sale

The Receiver seeks an order authorizing and directing the Receiver to enter into an asset purchase agreement with 2815864 Ontario Inc. (the "Purchaser") and granting an approval and vesting order ("AVO") with respect to that transaction. The Receiver further seeks approval of its Third Report.

The approval of the asset purchase agreement and other relief is unopposed.

I am satisfied with the sales process conducted by the Receiver and that the *Soundair* test has been met, such that the asset purchase agreement is to be approved and the AVO granted.

I am also granting a sealing order with respect to Confidential Appendix "1" to the Receiver's Third Report pending the closing of the sale of the properties or further order of this Court. I am satisfied that the *Sierra Club* test has been met. **On the resumption of regular court operations, it will be the responsibility of counsel for the Receiver to ensure that the subject materials are properly identified and protected under seal in the court file.**

There is a related action pending, *MarshallZehr Group Inc. v. Jordan Rudiger Zukowski and Rudi Heinz Edwin Zukowski*, Court File No. CV-20-00001106-0000 (the "Guarantee Action"). The parties to the Guarantee Action agree that any determination of the indebtedness of MarshallZehr Group Inc. ("MarshallZehr") in the receivership proceeding (CV-20-00635523-00CL), including the relief granted by the AVO, shall be without prejudice to any position that any of the parties to the Guarantee Action may wish to take in the Guarantee Action.

The Construction Lien Matters

There are six construction liens registered against title to the unfinished condominium units. The Receiver has not yet determined the validity, enforceability, quantum or priority of any of the construction liens. Rather, the Receiver has only attempted to determine the maximum amount of each lien claimant's potential priority claim over MarshallZehr's charge on the unfinished condominium units, which the Receiver calculated as 10% of value of services provided by the applicable lien claimant, based on the total contract value.

The Purchaser has agreed to pay the amounts that could have priority over MarshallZehr's charge to the Receiver, to be held in trust, pending a determination of the validity, enforceability, quantum and/or priority of any of the construction liens. Four of the lien claimants have agreed with the Receiver's calculation of the amount to be held in trust for their respective lien.

Counsel for two of the lien claimants, Duncan Drywall and Jeff McKeever Plumbing ("JMP"), brought a cross-motion seeking, among other things, (i) a holdback for the entire amount of their lien claims plus HST; (ii) that the potential priority holdback be paid into Court, instead of to the Receiver, in trust; (iii) that there be a holdback for their legal fees in an amount equal to 25% of the value of the lien; and, (iv) that the receivership stay be lifted to allow them to pursue their actions in Barrie.

At the hearing, counsel for MarshallZehr confirmed that MarshallZehr was willing to pay the full amount of both Duncan Drywall and JMP's claims, inclusive of HST, to the Receiver, to be held in trust pending a determination of the validity, enforceability, quantum and/or priority of any of the construction liens. This is reflected in the AVO.

The Receiver is a Court officer, and it is most efficient for these potential priority claims to be held in trust by the Receiver, as opposed to paid into Court. The order will reflect that the funds are to be held by the Receiver, in trust, earning interest at the current prevailing bank rate.

There is no basis for an additional 25% holdback for Duncan Drywall and JMP's potential legal fees. This relief is not granted.

A process may have to be established for determining the validity, enforceability, quantum and/or priority of any of the construction liens. However, at this point in time, there are too many moving parts to establish that process. I direct that counsel for MarshallZehr and the lien claimants confer with one another on how to move these lien claims forward, and in what forum. After counsel has discussed these issues, they may return before me for another half-hour attendance if necessary.

I understand that JMP may bring a motion to lift the stay in order to amend its claim. If this motion is on consent, it can be sent to me in writing for my signature.

The AVO is granted and signed by me and attached to this email. The AVO is effective from the date thereof and is enforceable without the need for entry and filing.

A handwritten signature in blue ink, appearing to read "Conway J.", is written over a light blue horizontal line.

Superior Court of Justice (Toronto)