

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

MARSHALLZEHR GROUP INC., AS ADMINISTRATOR

Applicant

and

12252856 CANADA INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43, AS AMENDED

**FACTUM OF THE RESPONDENT,
12252856 CANADA INC.
(Hearing Returnable January 5, 2024)**

December 22, 2023

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PART I – OVERVIEW

1. The Respondent, 12252856 Canada Inc. (“**122**”) opposes the approval of the sale of the assets of 122 to MarshallZehr Capital partners Inc. (**MZ Capital**) pursuant to the MZ APS, as defined in the Receiver’s motion record, dated November 21, 2023.
2. The Applicant seeks to sell the subject property, to a related entity, at a liquidation price. The Receiver seeks to approve the MZ APS; however, there is a better offer.

3. 12279266 Canada Inc. ("**1227**") has submitted an offer to buy the subject property with a purchase price value of \$41,500,000, well in excess of that offered by MZ Capital.
4. The Respondent submits that the Court should order that the Receiver accept 1227's offer, or, in the alternative, reopen the sales process to allow for a reasonable marketing of the Property based on its development potential.

PART II – FACTS

Background

5. 122 is the registered owner of the properties that are the subject of the Applicant's mortgage security.¹
6. 122 had made payments towards the Loan as described in the Receiver's motion record up until in or around September 2022 when the Loan matured. Following maturity of the Loan, 122 offered partial payments to the Applicant, but the Applicant refused to accept these partial payments.²
7. The subject property consists of residential development land located at 201, 227, and 235 King Road, in the City of Richmond Hill (collectively, the "**Property**"). 122 purchased the Property in 2020. The Property is being redeveloped into a 178-unit stacked townhome development (the "**Project**").³

¹ Affidavit of Mir Ali, sworn December 22, 2023 ("**Ali Affidavit**"), para 3.

² Affidavit of Mir Ali, sworn December 11, 2023 at para 19.

³ Ali Affidavit, paras 5 and 6.

8. The planning and approval stage for the Project is virtually completed. Evans Planning has confirmed there is only one last series of plan revisions required, mainly consisting of final clearances and requests to modify plans to clarify details. There are not any City or Region of York comments which require the alteration to the design, shape or number of dwelling units proposed. The comments from the City and Region are minor and technical in nature.⁴

9. However, 122 was unable to take further action to complete the final planning items once the Receiver was appointed on February 28, 2023.⁵

10. As at February 14, 2022, the Property's "as is" current market value was appraised at \$34,710,000.00.⁶

11. As at October 31, 2023, the Property's "as is" current market value was appraised at \$35,300,000.⁷

12. The Property's "as complete" current market value is \$182,000,000.⁸

13. The Receiver proposes to approve a non-arm's length bid to purchase the lands for the value of the Receiver's charges, legal fees incurred by the Receiver and the Lender, and the Loan Amount, all of which is significantly less than the "as is" appraised

⁴ Ali Affidavit at para 11 and Exhibit A.

⁵ Ali Affidavit at para 12.

⁶ Ali Affidavit at para 27 and Exhibit C.

⁷ Ali Affidavit at para 29 and Exhibit D.

⁸ Ali Affidavit at para 38 and Exhibit F.

values. The Receiver has not capitalized whatsoever on the development status and development work completed to date, including as set out in the Evans Planning report.

14. The “as is” current market value appraisal was more than sufficient to pay out the Applicant and all other creditors, in full.⁹

15. The Receiver has not disclosed material details of the MZ APS it seeks to have approved, including the purchase price.

16. Furthermore, the Respondent had no window into the sales process, but from the information provided to date, it appears that the sales process of the Receiver has been flawed.

17. According to the Receiver’s Third Report, the Receiver’s agent marketed the Property “as is” as a liquidation property in considering the Property as “undeveloped” and with no improvement having been made since the Property was purchased in 2020.¹⁰

18. In contrast, the Property was on the cusp of completing its planning and approvals for the 178 unit development.¹¹

19. No appraisal seems to have been obtained by the Receiver.

⁹ Affidavit of Mir Ali, sworn December 11, 2023 at para. 25.

¹⁰ Ali Affidavit at para 24 and Third Report of the Receiver dated November 20, 2023 at paras 12 and 14.

¹¹ Ali Affidavit at para 10 and 12 and Exhibit B

20. The Receiver has not provided the Court with particulars or information regarding the sales process, including regarding the offers received from third parties or any evidence of the marketing efforts.

21. The Respondent has requested particulars from the Receiver as to the conduct of the sales process.¹²

22. The real estate brokerage does not appear to have made any concerted effort to attract buyers based on the development stage of the Project.

23. The manner in which the sales process has been conducted has resulted in a recommendation for the Court to approve an offer that has no benefit to any party other than the Receiver and the Applicant.

24. However, the 1227 offer would benefit all of the stakeholders.

PART III – ISSUES, LAW, AND ARGUMENT

25. The Respondents submits the issues to be decided are:

- a. Based on the *Soundair* principles, can the Receiver demonstrate that the proposed sale to MZ Capital is in the best interests of all of the stakeholders?
- b. If not, should the Court direct the Receiver to accept the higher offer of 1227?

¹² Ali Affidavit at para 35 and Exhibit E.

- c. In the alternative, should the Receiver engage in a further sales process designed to sell the Property at the development as is value rather than a liquidated value?

PART IV – LAW

26. The purpose of the sale process in a receivership is to obtain the highest and best price for a property for the benefit of all creditors and other stakeholders.¹³

27. The reasonableness and adequacy of any sales process proposed by a receiver must be assessed in light of the factors which a court will take into consideration when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.* as:

- a. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- b. the efficacy and integrity of the process by which offers are obtained;
- c. whether there has been unfairness in the working out of the process;
and
- d. the interests of all parties.¹⁴

¹³ *American Iron v 1340923 Ontario*, 2018 ONSC 2810 at para 44.

¹⁴ *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 6 citing *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (ONCA) [*CCM Master Qualified Fund*].

28. While deference is owed to a receiver's judgment, in *Bank of Montreal v. Renuka Properties Inc.*, Blok J. cautioned against placing excessive weight and too high a premium on the deference factor, as the interest of creditors is still the primary factor.¹⁵

29. This should be especially important where the Lender/Applicant and the Receiver's interests are so aligned they may be represented by common counsel. Extra scrutiny must be applied to a non-arm's length sale to the Lender's associated corporation in order to protect the interests of all the parties, especially in circumstances where the appraised value of the Property is much higher than the proposed purchase price of the related purchaser and the dearth of substantive evidence tendered by the Receiver to permit scrutiny of the conduct of the sales process that resulted in no competitive bids from third parties.

30. Given the lack of disclosure by the Receiver regarding the sales process, the lack of analysis of the Receiver as to the actual purchase price of the MZ APS, and the fact that the only parties benefiting from the proffered agreement is the Lender and the Receiver, a serious consideration of both the sale process and the purchase price of the APS is required, as is consideration of permitting 1227 to close on its fresh offer to purchase the Property for \$41,500,000.

31. A property's development potential should be taken into account when evaluating a sales plan and marking a property for its Highest and Best Use, in particular where the

¹⁵ *Bank of Montreal v Renuka Properties Inc.*, 2015 BCSC 2058 at para 42.

zoning approval and planning approvals at a mature stage, such as with the subject Property.¹⁶

32. The Court should favour the offer made by 127Co as it truly reflects the value of the Property as development lands, and not as a liquidation value, and would see the Applicant repaid while allow the subsequent secured creditors to preserve their security.

33. Further, when monetizing the debtor's assets, the receiver has a duty to guarantors that they are made liable for as little as possible as well as to subsequent encumbrancers to obtain as much recovery as possible. The Receiver has a fiduciary duty to act honestly and in the best interests of all parties, including the debtor and any guarantors.¹⁷

34. If the Property is sold to 1227, the sale transaction would be reflective of market fair in accordance with the appraised values determined by Colliers and Cushman & Wakefield. Further, the proceeds generated would likely be more than sufficient to repay the subject loan in full, without resort to any alleged personal guarantees.¹⁸

35. It is in the interest of all parties that the 1227 Offer be permitted to move ahead to closing.

¹⁶ Yarmouth (Town) v Gateway Importers and Exporters Ltd, 2011 NSCA 17 at para 10; Young Estate v 503708 Ontario Ltd, 1988 CanLII 4607 at 12 (ONSC).

¹⁷ Business Development Bank of Canada v Aventura II Properties Inc, 2016 ONCA 300 at para. 25.

¹⁸ CCM Master Qualified Fund, *supra* note 14 at para 6.

PART IV – ORDERS REQUESTED

36. The Respondent requests that the 1227 Offer be accepted by the Receiver.

All of which is respectfully submitted this 22nd day of December, 2023.



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SCHEDULE A
AUTHORITIES

No.	Authority
1.	<u>American Iron v 1340923 Ontario, 2018 ONSC 2810</u>
2.	<u>CCM Master Qualified Fund v blutip Power Technologies, 2012 ONSC 1750</u>
3.	<u>Royal Bank of Canada v. Soundair Corp, 1991 CanLII 2727 (ONCA)</u>
4.	<u>Bank of Montreal v Renuka Properties Inc, 2015 BCSC 2058</u>
5.	<u>Yarmouth (Town) v Gateway Importers and Exporters Ltd, 2011 NSCA 17</u>
6.	<u>Young Estate v 503708 Ontario Ltd, 1988 CanLII 4607 (ONSC)</u>
7.	<u>Business Development Bank of Canada v Aventura II Properties Inc, 2016 ONCA 300</u>

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