

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

B E T W E E N:

MARSHALLZEHR GROUP INC.

Applicant

- and -

AREACOR 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**

RESPONDING APPLICATION RECORD

Date: January 12, 2022

RAR LITIGATION LAWYERS

Professional Corporation
1 West Pearce Street, Suite 505
Richmond Hill, Ontario
L4B 3K3

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LSO No.: 67864K

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sara@rarlitigation.com

Lawyers for the Respondent,
Areacor Inc.

SERVICE LIST

<p>CHAITONS LLP 5000 Yonge Street, 10th Floor Toronto, Ontario M2N 7E9</p> <p>Harvey Chaiton LSO No.: 21592F Tel: (416) 218-1129 harvey@chaitons.com</p> <p>Sam Rappos LSO No.: 51399S Tel: (416) 218-1137 samr@chaitons.com</p> <p>Lawyers for MarshallZehr Group Inc.</p>	<p>RSM CANADA LIMITED 11 King Street West, Suite 700, Box 27 Toronto, Ontario M5H 4C7</p> <p>Bryan Tannenbaum Tel: (416) 238-5055 bryan.tannenbaum@rsmcanada.com</p> <p>Proposed Receiver</p>
<p>CITY OF HAMILTON 71 Main Street West, City Hall, 1st Floor Hamilton, Ontario L8P 4Y5</p>	<p>ROSENSTEIN LAW Professional Corporation 5255 Yonge St., Ste. 1300 Toronto, Ontario M2N 6P4</p> <p>Jonathan Rosenstein LSO No.: 44914G Tel: (416) 639-2123 jrosenstein@rosensteinlaw.ca</p> <p>Lawyer for Aviva Insurance Company of Canada</p>
<p>FORD CREDIT CANADA LEASING, DIVISION OF CANADIAN ROAD LEASING COMPANY PO Box 2400 Edmonton, Alberta T5J 5C7</p>	<p>HARRIS, SHEAFFER LLP Yonge Corporate Centre 4100 Yonge Street, Suite 610 Toronto, Ontario M2P 2B5</p> <p>Gary Harris LSO No.: 16834F Tel: (416) 250-2860 gharris@harris-sheaffer.com</p>
<p>TARION WARRANTY CORPORATION 5160 Yonge Street, 12th Floor Toronto, Ontario M2N 6L9</p>	<p>GLAHOLT BOWLES LLP 800-141 Adelaide Street West Toronto, Ontario M5H 3L5</p>

<p>Tim Schumacher, Vice President & General Counsel LSO No.: 25113S Tim.Schumacher@Tarion.com</p> <p>Danielle Peck, Senior Legal Counsel LSO No.: 457680 Danielle.Peck@Tarion.com</p>	<p>Brendan Bowles LSO No.: 42802I Tel: (416) 368-8280 brendanbowles@glaholt.com</p> <p>Lawyers for Fusioncorp Developments Inc.</p>
<p>DEPARTMENT OF JUSTICE Ontario Regional Office 120 Adelaide Street West, Suite 400 Toronto, Ontario M5H 1T1</p> <p>Diane Winters LSO No.: 20824V Tel: (416) 952-8563 Diane.Winters@justice.gc.ca</p> <p>Lawyers for Canada Revenue Agency</p>	<p>HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE Insolvency Unit 33 King Street West, 6th floor Oshawa, Ontario L1H 8H5</p> <p>Leslie Crawford Tel: (905) 433-5657 leslie.crawford@ontario.ca insolvency.unit@ontario.ca</p>

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Tab	Description
1	Affidavit of Roni Gilyana, sworn January 12, 2022
A.	Email correspondence dated June 8, 2021
B.	Email correspondence between June 8, 2021 – June 9, 2021
C.	Letter dated July 13, 2021

TAB 1

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**AFFIDAVIT OF RONI GILYANA
SWORN JANUARY 12, 2022**

I, RONI GILYANA, of the City of Toronto, in the Province of Ontario, **MAKE OATH
AND SAY:**

1. I am the sole officer and director of the Respondent, Areacor Inc. (“Areacor”) and, as such, have knowledge of the matters contained in this affidavit. Where I have been advised by others, I state the source of such information and that I do verily believe it to be true.
2. I make this affidavit, on behalf of Areacor, in response to the Notice of Application dated January 6, 2022 (the “Notice”) and the Affidavit of Murray Snedden sworn January 6, 2022 (the “Snedden Affidavit”).
3. Areacor does not oppose the appointment of a receiver as requested by MarshallZehr Group Inc., (“MarshallZehr”) at paragraph 1(b) of the Notice. However, there are material

inaccuracies included in the Notice and in the Snedden Affidavit which Areacor seeks to address and correct.

Background

4. Areacor is the registered owner of the property municipally known as 15 Cannon Street, West, Hamilton (the "Property").
5. The Property was acquired with the intention of developing it into a condominium project consisting of 40 residential units and commercial space (the "Development").
6. Areacor obtained construction financing from MarshallZehr pursuant to the Loan Commitment dated May 15, 2018 and amended by letters dated June 27, 2018, December 3, 2018, and December 19, 2019 (collectively the "Loan Agreement"). A copy of the Loan Agreement is attached at Exhibit C of the Snedden Affidavit.
7. Areacor retained FusionCorp Developments Inc. ("FusionCorp"), as its general contractor for the Development. The parties executed a CCDC GMP (Guaranteed Maximum Price) 5B dated January 30, 2019 (the "Construction Agreement").
8. Pursuant to the Construction Agreement, Areacor was to pay FusionCorp, a guaranteed maximum price of \$8,780,142.00.
9. Pursuant to the Construction Agreement, Areacor would not be responsible for any amount above the guaranteed maximum price of \$8,780,142.00, except for any change orders requested by FusionCorp and approved by Areacor.

Draw No. 27 Request

10. MarshallZehr retained The Glynn Group Inc. and Mr. Martin Glynn ("Mr. Glynn") to act as its Quantity Surveyor to monitor the progression of the Development.
11. On June 8, 2021, I sent an email to Mr. Martin Glynn of the Glynn Group Inc. ("Mr. Glynn"). The email included all necessary information, in accordance with the Loan Agreement, for Mr. Glynn to prepare the report to MarshallZehr in respect of Draw No.

27. (the “Draw No. 27 Request”). Attached hereto and marked as **Exhibit “A”** to my Affidavit is a true copy of the Email dated June 8, 2021.
12. Following the Draw No. 27 Request, Mr. Glynn was required to prepare a Progress Draw Report in respect of the Draw No. 27 Request and deliver same to MarshallZehr such that MarshallZehr could advance funds under the Draw No. 27 Request.
13. Pursuant to the Loan Agreement, MarshallZehr is required to fund and process a draw within ten (10) business days from the date Areacor’s request.
14. Mr. Glynn did not prepare a progress draw report in respect to the Draw No. 27 Request until November 29, 2021, which will be discussed in further detail below.
15. Instead, I received an email from Mr. Joseph Varrecchia (“Mr. Varrecchia”), a manager at MarshallZehr, requesting an updated budget to reflect the accelerated project schedule.
16. Mr. Varrecchia further advised me that MarshallZehr would not provide any further advances until it received an updated schedule and related budget. I advised Mr. Varrecchia that FusionCorp was not required under the terms of its Construction Agreement with Areacor, to provide an updated schedule and related budget. Attached hereto and marked as **Exhibit “B”** to my Affidavit is a true copy of the email exchange.
17. Areacor does provide Mr. Glynn with a payment certificate with each draw request that includes FusionCorp’s budgets / schedule certified by Lintack Architects Incorporated as the payment certifier with each draw request.
18. Furthermore, the terms of the Loan Agreement do not specifically require that Areacor provide an updated schedule and budget as a condition of receiving draw advances.
19. MarshallZehr arbitrarily and in breach of the Loan Agreement, refused to advance under the Draw No. 27 Request. Ultimately MarshallZehr refused any further advances under the Loan Agreement.

Termination of the Construction Agreement

20. On or about June 15, 2021, FusionCorp suspended work as a result of MarshallZehr's refusal to advance under the Draw No. 27 Request.
21. FusionCorp and Areacor attempted to resolve their issues through mediation.
22. During the mediation process, FusionCorp requested confirmation of financing from MarshallZehr. I requested same from MarshallZehr.
23. MarshallZehr provided a letter dated July 13, 2021, confirming:
 - i. a loan was in place as between MarshallZehr and Areacor which loan matures on September 1, 2021; and
 - ii. that there was a six-month option to extend the term of the loan to March 1, 2022 that had not yet been executed by Areacor. Attached hereto and marked as **Exhibit "C"** to my Affidavit is a true copy of the Letter dated July 13, 2021.
24. MarshallZehr was aware that FusionCorp and Areacor were engaged in mediation and in fact, I provided several updates to MarshallZehr in respect of the status of the mediation.
25. Ultimately, FusionCorp and Areacor agreed to terminate the Construction Agreement.

Draft Progress Report No. 27

26. During the mediation process, FusionCorp provided certain budget information in respect of the Development at the demand of MarshallZehr. The budget information was shared with Mr. Glynn.
27. On or about November 29, 2021, Mr. Glynn prepared the draft progress report no. 27 which included an updated capital cost budget indicating a shortfall of approximately \$3.5 Million.
28. In response to paragraph 36 of the Snedden Affidavit, Areacor did not present the updated capital cost budget to MarshallZehr. As indicated above, it was prepared entirely by Mr.

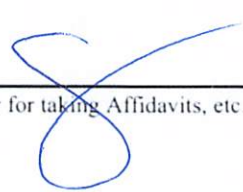
Glynn based on information obtained from FusionCorp. pursuant to MarshallZehr's demand.

29. The \$3.5 Million shortfall included a \$2.5 Million increase in hard costs which FusionCorp would have assumed under the terms of the Construction Agreement and which Areacor would not otherwise have been responsible to assume.

30. Despite the Loan maturing on September 1, 2021, MarshallZehr did not demand repayment under the Loan until its lawyers, Chaitons LLP, delivered a demand letter dated December 14, 2021, a copy of which is attached at Exhibit P of the Snedden Affidavit.

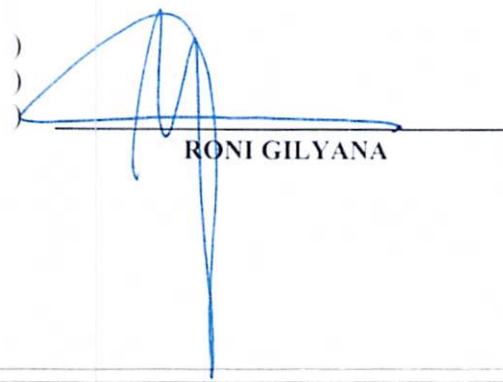
SWORN REMOTELY BY Roni Gilyana of)
the City of Toronto, in the Province of)
ONTARIO, before me in the Town of)
Richmond Hill in the Province of **ONTARIO**)
on this 12th day of January, 2022, in accordance)
with O. Reg. 431/20, Administering Oath or)
Declaration Remotely

Commissioner for taking Affidavits, etc.



)
)

RONI GILYANA



This is Exhibit "A" referred to
in the Affidavit of Roni Gilyana
sworn before me, this the 12th day of January, 2022.



A Commissioner etc.

Sara Mosadeq
LSO No.: 67864K

From: Ron Gilyana, Areacor Inc.
<roni@areacor.com>
Sent: Tuesday, June 8, 2021 3:22 PM
To: Martin Glynn <mglynn@glynngroup.ca>
Cc: Joseph Varrecchia
<jvarrecchia@marshallzehr.com>
Subject: Progress No. 27 (Jamesville)

Hi Martin,

Please find attached Progress No. 27,

1. GL for April '21 (Include both 'bill' and 'cheque expense')
2. April '21 Statement

3. Cop 29

4. Trust ledger, April '21

5. Architect review

reports https://www.dropbox.com/sh/ow2z3yaultx256w/AAC9IPLZc1F0Yfn2AsTyOOa3a/Construction%20Correspondence/General%20Review%20Reports?dl=0&subfolder_nav_tracking=1

6. Schedule (5th floor precast is complete. Contractor working on 6th floor).

7. Concrete test results

8. B19 Reporting

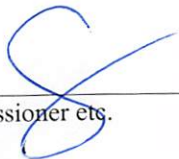
9. Advance statement for P. No # 26

- Ron

Sent from my iPhone

This email is confidential and privileged between the sender and the intended receipt. If you are not the intended receipt please delete the email and notify the sender.

This is Exhibit "B" referred to
in the Affidavit of Roni Gilyana
sworn before me, this the 12th day of January, 2022.



A Commissioner etc.

Sara Mosadeq
LSO No.: 67864K

From: Joseph Varrecchia jvarrecchia@marshallzehr.com
Subject: RE: Progress No. 27 (Jamesville)
Date: June 9, 2021 at 4:24 PM
To: Ron Gilyana, Areacor Inc. roni@areacor.com
Cc: Josh Thiessen jthiessen@marshallzehr.com, Martin Glynn mglynn@glynngroup.ca



Ron

I called you back but missed you.

We cannot move forward until we get an updated budget. In early May, the GC was working on an accelerated schedule, and we fully expected it to be available by now. We advanced the last draw on the premise that we would have an updated schedule and budget done for this Report.

When I look at the schedule contained in the cop 29, it shows that progress should be at the rooftop by now and that exterior cladding has begun. Can I report this to our Lenders? The schedule also shows occupancies beginning in July and ending in December which I don't believe is correct.

I would like to ask the Contractor directly how he intends to fulfill his contract, given that production is behind and if the contracts he has in place for drywall, windows, mechanical, and electrical are still valid and are not subject to an increase.

A meeting with all stakeholders is required.

Joe



Joseph Varrecchia

Manager - Mortgage Underwriting & Funding

T 519 342 1000 X 234

C 416 662 0568

marshallzehr.com | [email](#)

MarshallZehr Group Inc. | Mortgage Administration #11955 | Mortgage Brokerage #12453

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From: Ron Gilyana, Areacor Inc. <roni@areacor.com>
Sent: Wednesday, June 9, 2021 3:06 PM
To: Joseph Varrecchia <jvarrecchia@marshallzehr.com>
Cc: Josh Thiessen <jthiessen@marshallzehr.com>; Martin Glynn <mglynn@glynngroup.ca>
Subject: Re: Progress No. 27 (Jamesville)

Hi .Insenh

A copy of the schedule is in cop 29, the contractor updates his schedule on a monthly basis.

The contractors budget is in cop 29 reviewed and certified by the payment certifier.

The contractor is required to be paid 20 days from final submissions of the payment certificate. Otherwise the contractor may stop work until payment is received.

The contractors is not required to provide acceleration plan/ schedule. Its mutually exclusive from the progress draw. Although he is working on an accelerated plan and should be ready in 2 weeks.

The proposal is to sufficiently fund the contingency and general allowance shortfall in the current draw.

- Ron
Sent from my iPhone

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On Jun 9, 2021, at 2:46 PM, Joseph Varrecchia
<jvarrecchia@marshallzehr.com> wrote:

Hi Ron

In reviewing the documentation you sent to Martin, it appears this draw request will be in the \$100K range, and questions will arise as to the productivity on site.

We need an updated budget with realistic timelines to understand how much more time and money we need to complete the project. Furthermore, on the last draw, we identified \$125K in deferred equity that we need to deal with.

I cannot go to Lenders asking them for \$1MM for contingency as you propose and then offset it as we go forward. I don't see why we cannot get an updated schedule and budget right away.

Can you please organize a call with you, the GC, Martin , Josh and I so we can initiate a budget and schedule update, and then move forward with a draw request.

The GC has already committed to having a stakeholder meeting.

Joe



Joseph Varrecchia

Manager - Mortgage Underwriting & Funding

T 519 342 1000 X 234

C 416 662 0568

marshallzehr.com | [email](#)

MarshallZehr Group Inc. | Mortgage Administration #11955 | Mortgage Brokerage #12453

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From: Ron Gilyana, Areacor Inc. <roni@areacor.com>

Sent: Tuesday, June 8, 2021 5:01 PM

To: Joseph Varrecchia <jvarrecchia@marshallzehr.com>; Martin Glynn <mglynn@glynnngroup.ca>

Cc: Josh Thiessen <jthiessen@marshallzehr.com>

Subject: Re: Progress No. 27 (Jamesville)

Hi Joseph,

Martin still needs to complete the progress report. We have 20 days from when payment is certified to pay the contractor for work.

As discussed, we can increase the contingency, and a portion can fund the general overheads for the remaining project months while we wait for the contractors acceleration plan.

- Ron

Sent from my iPhone

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On Jun 8, 2021, at 4:09 PM, Joseph Varrecchia <jvarrecchia@marshallzehr.com> wrote:

Ron

We will not be able to go to our lenders for an advance request

we will not be able to go to our Lenders for an advance request until we get an updated schedule and related budget. This was a commitment we had made to our Lenders in order for them to agree to fund the last draw request.

Joe



Joseph Varrecchia

Manager - Mortgage Underwriting & Funding

T 519 342 1000 X 234

C 416 662 0568

marshallzehr.com | [email](mailto:jvarrecchia@marshallzehr.com)

MarshallZehr Group Inc. | Mortgage Administration #11955 | Mortgage Brokerage #12453

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From: Ron Gilyana, Areacor Inc. <roni@areacor.com>
Sent: Tuesday, June 8, 2021 4:02 PM
To: Joseph Varrecchia <jvarrecchia@marshallzehr.com>
Cc: Martin Glynn <mglynn@glynnngroup.ca>; Josh Thiessen <jthiessen@marshallzehr.com>
Subject: Re: Progress No. 27 (Jamesville)

Hi Joseph,

They are still working on it, they said it will be available in 2 weeks.

- Ron
Sent from my iPhone

This email is confidential and privileged between the sender and the intended receipt. If you are not the intended receipt please delete the email and notify the sender.

On Jun 8, 2021, at 3:45 PM, Joseph Varrecchia <jvarrecchia@marshallzehr.com> wrote:

Hi Ron

Did you meet with the contractor on Friday to discuss the acceleration plans?

As discussed last month, we will have to update the budget to reflect the accelerated plan and any related increases.

We need a plan to cover the additional costs for the General Overheads and any other increases.

Joe



Joseph Varrecchia

Manager - Mortgage Underwriting & Funding

T 519 342 1000 X 234

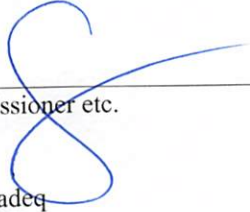
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marshallzehr.com | [email](mailto:)

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This is Exhibit "C" referred to
in the Affidavit of **Roni Gilyana**
sworn before me, this the 12th day of January, 2022.



A Commissioner etc.

Sara Mosadeq
LSO No.: 67864K



Financing Efficiency = Opportunity

MarshallZehr Group Inc.
465 Phillip Street, Suite 206
Waterloo ON N2L 6C7 Canada

7/13/2021

Areacor Inc.
3044 Bloor Street West Suite 270
Etobicoke, ON
M8X 2Y8

Attn: Roni Gilyana

RE: Jamesville Lofts, 15 Cannon Hamilton, ON

Ron

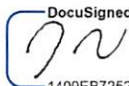
You have asked us to confirm for your purposes that MarshallZehr has a financing package in place for your Jamesville Lofts project in Hamilton.

Our financing Facility (15 Cannon MZGI 195) was issued on May 15, 2018, to Areacor Inc. as "Borrower" for the servicing and construction of the Jamesville Lofts project.

Over the course of construction, the Commitment has been amended to accommodate changes in the Sources and Uses and the current lender approved budget is \$16,555,000 and the loan matures September 1, 2021; the 6-month extension option to extend the term to March 1, 2022, has not been executed at this time by the Borrower.

Should you have any questions, please do not hesitate to contact us.

Regards,

DocuSigned by:

1409EB7252D74CF...

Josh Thiessen
Vice President – Business Development
T 519 342 1000 x 242
C 226 750 7293
jthiessen@marshallzehr.com

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rocco@rarlitigation.com

Sara Mosadeq
LSO No.: 67864K
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LSO No.: 50875I

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