

IN THE MATTER OF THE CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30, AS AMENDED
AND IN THE MATTER OF AN APPLICATION MADE BY JADE-KENNEDY DEVELOPMENT CORPORATION
FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE
CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30, AS AMENDED

Court File No. CV15-10882-00CL
June 4-15

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

MOTION RECORD
OF THE TRUSTEE
(returnable June 4, 2015)

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Lawyers for the Trustee

HS

June 4, 2015

*As per endorsement on yellow sheets (5),
Order to give authorizing the Trustee to forward
two residential agreements of purchase and
note date Feb 9, 2015. No costs.*

Dr. Roberto T.

Court File Number: CU-15-10882-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Re: dade-kennedy Development Corporation
Plaintiff(s)

AND

Defendant(s)

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Facsimile No:
Harvey Chaiton Sam Rappos for Trustee		
David Shiller - for purchasers		

- Order Direction for Registrar (No formal order need be taken out)
- Above action transferred to the Commercial List at Toronto (No formal order need be taken out)
- Adjourned to: _____
- Time Table approved (as follows):

This is a motion by Gallus Barrow Toronto Limited in its capacity as court appointed Construction Lien Act ("CLA") Trustee (the "Trustee") for an order authorizing it to terminate or disclaim two residential agreements of purchase and sale ^(the "Agreements") each dated Feb 9, 2015 between dade-kennedy Residential Corporation as vendor and Roger James Dol on the one hand and Anna Gayle Andrew on the other ^(the "Purchasers"); on each case the Agreements related to the purchase of a residential condominium unit in Phase II of a development by

June 4, 2015
Date

[Signature]
Judge's Signature

Additional Pages 4

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Wade Kennedy Development Corporation known as South Unionville Square for a purchase price for each unit of \$200,000 and a deposit of \$5,000.

The Purchasers submit that the court should order the Trustee to complete the Agreements. They submit the court has no basis for determining if the sale of the units was improvident because the Trustee has not provided any evidence of the true market value of the units. They further submit the Trustee has provided no evidence of bad faith or improper conduct on the part of the Purchasers.

The Trustee does not rely on the fact that sales of the units ~~are~~ improvident or that there was bad faith or improper conduct on the part of the Purchasers. Rather, it relies on the principal that a court appointed Receiver is not bound by existing contracts made by the debtor: *Bank of Montreal v. Scaffold Connection Corp.*, [2002] A.T. No. 959, 36 C.B.R. (4th) 13 (Alberta C.A.); *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, [2005] B.C.T. No. 546, 9 C.B.R. (5th) 267 (B.C.C.A.)

In this case, the Trustee was appointed pursuant

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to s. 68 of the CFA which provides in subparagraph (2) that "Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may, (a) act as receiver and manager..." Further, paragraph 3 of the Trustee's appointment order dated February 11, 2015 authorizes and empowers the Trustee to act as receiver and manager of the property and take any steps reasonably incidental to the exercise of the powers. Based on the above, therefore, I am satisfied that the Trustee is not bound by the Agreements entered into prior to its appointment. That, however, does not end the matter.

Although the Trustee is not bound by prior agreements, it is clear that it cannot arbitrarily terminate them: see *Bennett on Receiverships*, 2nd ed. Carswell, p. 341. Any decision to terminate must be done in a fair and proper manner.

In *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J.), Morawetz J. (as he then was) dealt with the issue of a receiver terminating certain purchase agreements for units in an unregistered condominium in connection with the approval of a proposed marketing

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and sales proceeds of the respondent's commercial property. In considering the Receiver's right to terminate the purchase agreements, Marawaty J. held it was necessary for the Receiver to take into account the equitable considerations of all stakeholders. In my view, the Trustee's decision to terminate the Agreements is appropriate having regard to the interests of all stakeholders. In that regard, the Trustee has presented evidence in the form of a recent listing for sale of a similar unit; previous sales in 2014 (2) and 2013 (1) of similar size units; and an offer in March 2015 for Unit 117, one of the two units in dispute. That evidence is sufficient, in my view to establish that the purchase price in cash of the Agreements is materially below fair market value for the unit. Accordingly, to permit the Agreements to close would be prejudicial to the mortgagees, their claimants and other creditors of Dade-Kennedy.

The Agreements (which are, except for the purchase and unit number, ~~and~~ identical) contain clauses subordinating the Purchasers' rights to any mortgages (para. 15) and

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acknowledging that the Purchasers, by executing the Agreement, has not acquired any equitable or legal interest in the unit or property (para 16).

The Purchasers each paid a deposit of \$5,000 at the time the Agreements were executed but the Trustee has agreed to return the deposit.

In my view, when the equitable considerations of all the stakeholders, including the Purchasers, are taken into consideration, termination of the Agreements is appropriate. Given the evidence, I am of the view that the Trustee has a reasonable basis for terminating the Agreements. Order authorizing same, as requested, to issue.

The Confidential Supplement to the Third Report of the Trustee contains confidential information as to the net sale price the agent indicated it could sell unit 117 for. In the circumstances and at the request of the Trustee that Supplemental Report shall be sealed until further order of the court.

As the Trustee does not request costs, No order as to costs.