



**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00717917-00CL

DATE: November 12, 2024

NO. ON LIST: 5

TITLE OF PROCEEDING: MARSHALLZEHR GROUP INC v. SPOTLIGHT ON COURTLAND INC.

BEFORE: JUSTICE OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant:

| Name of Person Appearing | Name of Party | Contact Info |
|---------------------------------|--------------------------|--|
| Maya Poliak Laura Culleton | Counsel for the Receiver | maya@chaitons.com laurac@chaitons.com |

For Defendant, Respondent:

| Name of Person Appearing | Name of Party | Contact Info |
|-----------------------------------|---|--|
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For Other, Self-Represented:

| Name of Person Appearing | Name of Party | Contact Info |
|---------------------------------|---|--|
| Yonatan Kramer | Counsel for 1000469509 Ontario Inc. | Yonatan.kramer@devrylaw.ca |
| Jeff Berger Brian Tannenbaum | Receiver – TDB Restructuring | jberger@tdbadvisory.ca btannenbaum@tdbadvisory.ca |
| Alexander Soutter | Counsel for the Stalking Horse Bidder, Courtland Kitchener Inc. | asoutter@tgf.ca |

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Court-appointed Receiver over the property of Spotlight on Cortland Inc. (the “Debtor”), including the Real Property at Cortland Avenue and Brockline Road in Kitchener, Ontario, seeks an order:
 - a. approving the marketing and sale process for the Real Property as described at Schedule “A” to the proposed Sale Process Approval Order;
 - b. authorizing the Receiver, *nunc pro tunc*, to enter into the listing agreement with Colliers;
 - c. authorizing and directing the Receiver, *nunc pro tunc*, to enter into the Stalking Horse APS dated October 30, 2024 with Cortland Kitchener Inc. as Purchaser solely for the purpose of acting as the stalking horse bid in the Sale Process, in the form attached as Appendix “G” to the First Report;
 - d. compelling the directors, officers and shareholders of the Debtor and other Persons as defined in the Appointment Order to comply with the information requests of the Receiver;
 - e. approving the activities of the Receiver as described in the First Report; and
 - f. sealing Confidential Appendix “1” to the First Report.
2. At the conclusion of the hearing of the motion, I granted the relief sought for reasons to follow. These are those reasons.
3. The Receiver relies on the First Report dated November 1, 2024. Defined terms in this Endorsement have the meaning given to them in the First Report, and/or the motion materials, unless otherwise stated.
4. The Service List was served with the motion materials on November 1, 2024. The relief sought is now opposed by two parties: 1000469509 Ontario Inc. (“9509”) and the Debtor. The Debtor served a responding motion record last night and uploaded it to Caselines this morning. 9509 served and uploaded a responding motion record last night.
5. The Debtor, supported by 9509, seeks an adjournment of the motion for 20 days. It essentially wants yet another indulgence to attempt to close a new financing to avoid a sale process and pay out MarshallZehr. The submission was that the Debtor has secured a commitment letter to refinance the Mortgage, as is expressly stated at paragraph 6 of the affidavit of Mr. Larjani, and that the Debtor fully expected that this new financing will have closed, and it would be in a position to pay out MarshallZehr in full within 20 days such that the sale process will be unnecessary. The commitment letter itself is attached as Exhibit “C”.
6. After hearing submissions from all of the parties, I denied the adjournment request. The chronology of this matter is fully set out in the motion materials and the First Report. The Debtor has had multiple false starts with refinancing efforts that have not come to pass. It has been given repeated indulgences and opportunities to complete a refinancing. That has not yet occurred. There is significant prejudice to MarshallZehr in this matter being adjourned further, including but not limited to the fact that interest continues to accrue at the rate of approximately \$500,000 per month.
7. Moreover, there is even today, no certainty whatsoever that the new, further, financing now proposed will close in 20 days, or at all. It is patent on a plain reading of the commitment letter at Exhibit “C” to the Larjani affidavit that the new financing is highly conditional, and that a significant number of substantive steps need to be completed before the commitment is firm. The commitment letter itself is dated October 31 (notwithstanding that it was first produced yesterday), and there is no evidence that any of the conditions precedent to the advance of funds have been met or waived since that time, and nor is there any

evidence on which I can conclude that it is certain or even likely that they will be met or waived within 20 days from today. There is simply no evidence to that effect in the Larjani affidavit or otherwise.

8. Moreover, 9509, who supports the adjournment request, submits that 20 days is entirely insufficient for due diligence to be completed in any event (a submission it also makes in support of its argument that the proposed sale process is too short). This further increases my concern about the ability of the Debtor to close the proposed new financing in the 20 days requested.
9. Finally, in my view, the Debtor can submit a bid in the proposed sale process if indeed the financing becomes firm and available. Potential prejudice to the individual guarantors (principals of the Debtor) arising from the break fee is addressed below.
10. Accordingly, I denied the adjournment request and the motion proceeded. All parties made submissions.
11. The Receiver submits that the proposed sale process is reasonable in the circumstances for all the reasons set out in the First Report.
12. The Receiver submits that the timelines are reasonable and balance the urgency of this matter (including the fact that interest is continuing to accrue) against the imperative of ensuring that the assets proposed to be sold are exposed to the market for a sufficient period of time. The Receiver submits that the property was sold last year, and that the market is generally aware of the opportunity available. Moreover, and in advance of this motion, the proposed listing agent, Colliers, has already reached out informally on a non-binding basis to potential bidders to generate interest in the opportunity.
13. The proposed sale process includes a stalking horse bid. That in turn includes a purchase price of \$22,750,000 and a break fee in the amount of \$450,000, representing approximately 2% of the purchase price. That purchase price and the stalking horse bid, supported by MarshallZehr, represents an amount that is less than that secured creditor is owed.
14. The Debtor submits that the proposed timelines in the sale process are not long enough to sufficiently expose the property to the market, and that the 30-day period until the Qualified Bid Deadline (including 20 days for an LOI Deadline) should be extended, taking the process into late January, 2025.
15. I am satisfied that the sales process with its existing timelines is appropriate in the circumstances. The prejudice to MarshallZehr and the continuing interest accrual needs to be minimized. The professional opinion of the Receiver and its proposed listing agent, Colliers, both of whom are extremely experienced in marketing and selling properties such as that at issue here, is that the proposed timelines are sufficient to expose the property to the market, taking into account the upcoming holiday season. The property is of sufficient value that potential bidders are anticipated to be highly sophisticated parties in any event.
16. There were extensive submissions made about the value of the property and the fact that the stalking horse purchase price was, in the submission of the Debtor and 9509, too low. Without question, there is a significant divergence in the indicators of value for the property. A January, 2022 appraisal estimated value at \$42 million. A recent appraisal estimated value at \$60 million, and yet the same party who obtained a recent appraisal was a party to the sale of the very property at issue in April, 2023 for approximately 28.5 million.
17. In my view, and in the circumstances of this case, the appropriate, fair and transparent manner in which to test value is to conduct the sale process and see what offers the market generates. If, as was submitted, the stalking horse bid is low, the market (again, a sophisticated one here) will presumably speak in the form of superior bids.

18. If the stalking horse bid is ultimately the successful bid, the break fee is irrelevant. If the break fee is payable, counsel for the Receiver and the stalking horse purchaser have confirmed in Court that MarshallZehr will not seek recourse against the individual guarantors if MarshallZehr ultimately suffers a shortfall in circumstances where the stalking horse bid was not the successful bid, and the break fee was paid.
19. 9509 is the former owner of the Real Property. It sold the property to the Respondent, Spotlight on April 5, 2023 for a purchase price of \$28,500,000. As a term of that sale, 9509 provided a vendor takeback loan to Spotlight in the amount of \$8,500,000, which 9509 asserts was secured in part by way of an interest in the Property.
20. In summary, the terms of the VTB Loan included the issuance by Spotlight of preferred shares to 9509. Another entity, 2412984 Ontario Inc., the principal shareholder of Spotlight, was to purchase the shares of 9509 in Spotlight for 1 dollar each on an agreed schedule and to make monthly dividend payments to 9509; and in the event of default, 241 would be required to purchase all of the shares following expiry of a cure.
21. Spotlight executed an irrevocable acknowledgement authorizing 9509 to register a mortgage in the amount of \$8,500,000 on title to the Property in the event of a default by 214 or Spotlight. The obligations of 214 and Spotlight were guaranteed by Spotlight and the principal of 241, Shahrzad Larjani.
22. The agreed timeline for payments was extended three times. The allegation of 9509 is that 214 and Spotlight have failed to make payments to 9509 and are in default of their obligations with the result that 9509 has a contractual entitlement to register the mortgage against title to the Real Property. However, it is unable to do so because the Applicant, who holds a first mortgage, has registered an application to annex restrictive covenants on title pursuant to section 118 of the *Land Titles Act*, and this prevents 9509 from registering the mortgage.
23. As a result, 9509 takes the position that it holds an equitable mortgage against the Property in second priority to the first mortgage held by the Applicant. It further takes the position that the proposed Sale Process fails to adequately consider the interests of 9509 and does not demonstrate sufficient efforts to secure the best possible price and is otherwise unfair.
24. 9509 submits that the Receiver has not considered alternatives such as a traditional auction or open market listing, which may yield a higher return, and there is no indication that the Receiver has attempted to identify other potential bidders. Finally, and among various other arguments advanced, 9509 submits that the Debtor should be given yet another opportunity to attempt to close the new financing now proposed, although 9509 acknowledges that such is unlikely to occur within the 20 days (as discussed above).
25. In argument, counsel for 9509 and the Debtor acknowledged that those parties entered into some sort of settlement agreement yesterday. That agreement is not in the record, and the Court was not advised of its terms, or scope. I noted during the hearing that I was surprised that that agreement was not adverted to in the record.
26. In all the circumstances, and based on the (incomplete) material filed (at the last minute), I am completely unable to determine whether 9509 has any rights at all, and if it does, whether those rights amount to anything beyond rights that would normally accrue to a shareholder of the Debtor.
27. As noted above, in my view the proposed sale process is appropriate and satisfies the factors set out in *Royal Bank of Canada v. Soundair Corp.* the same criteria inform the determination of whether to approve a proposed sale process by a receiver: *CCM Master Qualified Fund Ltd., v. blutip Power Technologies Ltd.*

28. Stalking horse agreements are used in insolvency proceedings to facilitate sales and establish a baseline price and transactional structure for any superior bids, all with a view to maximizing the value of an asset for the benefit of stakeholders: *Danier Leather Inc., Re*. The factors to be considered when approving a stalking horse sales process include those identified in the authorities referred to above, as well as in *Re Nortel Networks Corp., Re Brainhunter Inc. and Validus Power Corp. v. Macquarie Equipment Finance Limited*, 2023 ONSC 6367. I am satisfied that the proposed stalking horse agreement is appropriate here.
29. I am also satisfied that the break fee should be approved. Such fees represent a cost of stability in addition to disbursements and the costs of preparing a bid, and all of that may include a premium beyond out-of-pocket costs. This break fee, representing 2% of the Purchase Price, is within the range previously approved by this Court. Its effects have also been mitigated by the undertakings of counsel given at the hearing, as described above.
30. I am satisfied that the activities of the Receiver as described in the First Report were necessary, undertaken in good faith, and are consistent with the mandate of the Receiver given to it in the original Appointment Order. They are approved.
31. Finally, I am satisfied that Confidential Appendix “1” to the First Report should be sealed, pending completion of the sales processor further order of the court. The materials included, which in turn include the listing terms and other commercially sensitive information, would clearly and negatively impact the sales process for the property and should be sealed on the temporary, limited and proportionate basis proposed. I am satisfied that the test set out by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate* has been met here.
32. Sales Process and Ancillary Orders to go in the form signed by me today which are effective immediately and without issuing and entering.

Oliver, J.