COURT OF APPEAL FOR ONTARIO

CITATION: Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 584
DATE: 20240722
DOCKET: COA-24-CV-0671

Brown, Harvison Young and Gomery JJ.A.

BETWEEN

Peakhill Capital Inc.

Applicant (Respondent)

and

1000093910 Ontario Inc.

Respondent (Respondent)

IN THE MATTER OF AN 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

Kevin D. Sherkin and Mitchell Lightowler, for the appellant, 2557904 Ontario Inc.

Gary M. Caplan and Aram Simovonian, for the respondent, 1000093910 Ontario Inc.

Dominique Michaud and Joseph Jamil, for the respondent, Peakhill Capital Inc.

Richard B. Swan and Aiden Nelms, for the Receiver, KSV Restructuring Inc.

D.J. Miller, for Firm Capital Corporation

George Benchetrit and Laura Culleton, for the second mortgagee, Zaherali Visram

Jason Squire, for Ren/Tex Realty Inc. and ReMax Premier Inc.

Ran He, for 20 Regina JV Ltd.

Heard: July 19, 2024

On appeal from the order of Justice Phillip Sutherland of the Superior Court of Justice dated July 9, 2024, with reasons at 2024 ONSC 3887.

REASONS FOR DECISION

OVERVIEW

[1] 2557904 Ontario Inc. (“255”), the stalking horse bidder in the court-approved sale process in the receivership of 1000093910 Ontario Inc. (the “Debtor”), appeals the July 9 order (the “Order”) of the motion judge that: (i) dismissed the motion of the court-appointed receiver, KSV Restructuring Inc. (the “Receiver”), for an approval and vesting order (“AVO”) to transfer the purchased assets of the Debtor to 255, the successful bidder in the sales process; and, (ii) instead, approved the Debtor’s motion seeking approval to redeem the first mortgage held by Peakhill Capital Inc. on the Debtor’s Vaughan industrial property (the “Refinancing Transaction”), which had formed the subject matter of a cross-motion by the Debtor in response to the Receiver’s AVO motion. The Debtor plans to effect the redemption through a combination of funding obtained from Firm Capital Corporation, pursuant to a Letter of Commitment dated June 13, 2024 and amended on July 12, 2024, together with other sources, including the existing second mortgagee.

[2] The history of this receivership and the motions that led to this appeal are set out in prior reasons of this court and need not be repeated: 2024 ONCA 59; 2024 ONCA 261; and 2024 ONCA 558.

[3] The appeal was heard on an expedited basis pursuant to the July 11, 2024 directions of this court: 2024 ONCA 558.

[4] 255 raises two main grounds of appeal: (i) the motion judge committed reversible error by dismissing the Receiver's motion for an AVO and, instead, granting the Debtor the opportunity to redeem the first mortgage; and (ii) the motion judge erred by varying his July 4 redemption approval to provide for provisional execution of the order under s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), notwithstanding that 255 had already filed a notice of appeal with this court.

[5] As a preliminary matter, the Debtor submits that this court should not hear the appeal filed by 255 because (i) 255 lacks standing to bring an appeal and (ii) if 255 does have standing, it requires leave to appeal pursuant to *BIA* s. 193(e), which should be refused.

STANDING OF 255

[6] We disagree that 255 lacks the standing to appeal the Order. 255 provided the stalking horse bid for the court-approved sale process pursuant to an agreement it entered into with the Receiver (the "Stalking Horse Agreement"). At the completion of the sale process, the Receiver selected 255 as the successful bidder. The Receiver then moved for an AVO to complete the Stalking Horse Agreement transaction.

[7] The motion judge's Order, which dismissed the Receiver's motion and terminated the Stalking Horse Agreement, adversely affected 255 as the successful bidder in a court-approved sale process. 255 thereby has an interest in the subject matter of the proceeding that entitles it to seek appellate review of the Order: *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), 1991 CarswellOnt 205, at paras. 39-40; *Winick v. 1305067 Ontario Limited* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), at paras. 3 and 4.[1]

APPLICABLE AVENUE OF APPEAL

[8] The Debtor submits 255 does not have an automatic right to appeal the Order under *BIA* s. 193 but requires leave to appeal, which should be refused. Again, we disagree. According to the table set out in section 3.0 of the Supplement to the Receiver's Second Report, the Order approved a Refinancing Transaction that would result in proceeds of approximately $23.788 million, while dismissing the Receiver's AVO motion which, had it been approved, would have resulted in proceeds of $24.255 million. Accordingly, the Order brings into play a difference in the realized value of the Debtor's property in excess of $10,000 that would entitle 255 to appeal as of right: *BIA* s. 193(c); *Cardillo v. Medcap Real Estate Holdings*

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[1] *Skyepharma PLC v. Hyal Pharmaceutical Corporation* (2000), 47 O.R. (3d) 234 (C.A.) does not apply to the situation of a successful bidder. It considered whether an unsuccessful "bitter bidder" had the standing to appeal, concluding it did not. The court in *Skyepharma* distinguished *Soundair* on the basis that the latter decision dealt with the situation of a successful bidder: at para. 28. As well, the analysis in *Skyepharma* proceeded under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, whereas the determination of standing and appeal rights in the present case is governed by *BIA* s. 193: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, 69 C.B.R. (6th) 13.

Inc., 2023 ONCA 852, at para. 21. In any event, if 255 required leave to appeal, we would grant leave for a number of reasons: 255 raises an issue of general importance to insolvency practice, namely, the reasonableness of granting a debtor leave to redeem at the 11th hour in the face of a receiver's recommendation to proceed with a transaction resulting from a court-supervised sales process; the appeal certainly raises a serious question; and given the expedited scheduling of this appeal, the appeal would not hinder the progress of the receivership proceeding: *Cardillo*, at para. 50. 255 is entitled to seek appellate review of the Order.

FIRST GROUND OF APPEAL: PERMITTING THE DEBTOR TO REDEEM THE FIRST MORTGAGE

[9] Regarding the merits of 255's appeal, the motion judge's reasons explain why he permitted the Debtor to redeem. They disclose that he correctly identified the governing principles as those summarized by this court in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, at paras. 9 and 10. In applying those principles, the motion judge engaged in the required circumstance-specific balancing of the factors relating to a mortgagor's right to redeem with those concerning the integrity of a court-supervised receivership process. He concluded that, in the exceptional circumstances of this case, the integrity of the receivership process would not be undermined by permitting the redemption. Although other judges might have weighed the applicable factors differently and reached a different result, for the

most part, the motion judge's weighing of the factors in the circumstances of this case was not unreasonable.

[10] However, the reasoning underpinning the Order was legally deficient in one respect, which prompts us to intervene and vary it.

[11] On one reading of paras. 33 to 35 of his July 15 reasons, the motion judge suggested that permitting the Debtor to redeem would not have a significant impact on the integrity of the receivership process as the Break Fee and legal costs totalling $250,000, as contemplated by s. 14.2 of the Stalking Horse Agreement, would be paid into court as security for 255, the stalking horse bidder. However, the motion judge's reasons ultimately left 255's entitlement to the $250,000 unresolved and his Order did not deal with that issue.

[12] In our respectful view, in the circumstances of this case, where the Debtor made an 11th hour attempt to redeem the first mortgage, the motion judge erred by approving the Refinancing Transaction without ensuring that 255, as the successful stalking horse bidder recommended by the Receiver for an AVO, would receive reasonable compensation for its costs thrown away in the sale process that culminated in the July 9 Order.

[13] In our view, it was necessary for the motion judge to order payment of such compensation to 255 from the proceeds of the Refinancing Transaction in order to adequately protect the integrity of the court-supervised receivership process.

Without ordering such compensation, approval of the Debtor's 11th hour redemption request should not have been granted.

[14] The Debtor's redemption motion was made at the 11th hour. By that point in time: the Receiver had entered into the Stalking Horse Agreement with 255; the Receiver had obtained court approval of a sale process that used 255's stalking horse bid, that approval had been upheld on appeal by this court, and the process had run its course. When the sale process concluded in early May 2024, 255's stalking horse bid emerged as the successful bid, and the Receiver then filed a motion for an AVO with the court to complete the transaction with 255 as set out in the Stalking Horse Agreement. Only then did the Debtor bring its early June cross-motion for redemption, and the Debtor was only able to confirm to the court "cheque in the hand" financing in early July after it had sought, and received, several adjournments of the Receiver's motion.

[15] There is no suggestion that the sale process failed to comply with the *Soundair* principles. In our view, to permit a debtor to redeem at the 11th hour and, at the same time, to reject a receiver's AVO motion without requiring the debtor, as a condition of redemption, to compensate the successful bidder in a *Soundair*-compliant court-approved sale process for its costs thrown away in that process would amount to sanctioning an abuse of the court-supervised receivership process, thereby undermining the integrity of that process.

[16] The Debtor contends that 255 is not entitled to any compensation for its costs thrown away in the sale approval process as the Stalking Horse Agreement only entitled 255 to a Break Fee and legal costs in the event it was not the successful bidder. That is an unreasonable submission. It is true that the Stalking Horse Agreement talked in terms of compensation if 255 was not the successful bidder. However, there can be no doubt that the agreement did not deal with compensation in the event 255 was the successful bidder because, in the ordinary course, court approval of the stalking horse transaction would follow. Last-minute derailments of a court-approved sale process by a debtor's request to redeem are not common – there "may be a 1% chance", as put by the Debtor's counsel in oral submissions. However, 255's entitlement to reasonable compensation for costs thrown away in the sale process is not limited to the terms of the Stalking Horse Agreement. In the circumstances of this case, as described, protecting the integrity of the receivership sale process required the court to impose, as a condition of properly exercising its judicial discretion to grant an 11th hour redemption request, the obligation that the redeeming Debtor pay the successful bidder's reasonable costs thrown away. The motion judge erred by failing to so condition his approval of the Debtor's Refinancing Transaction.[2]

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[2] As 255 points out in its supplementary factum, the case of *BCIMC Construction Fund Corporation et al v. The Clover Yonge Inc.*, 2020 ONSC 3659, relied on by the motion judge involved quite a different circumstance than the present case. (It was not a "similar situation" as incorrectly suggested by the motion judge at para. 23 of his July 15 reasons.) As Koehnen J. noted in *BCIMC*, in that case the debtor offered to pay the costs of BCIMC, including the reasonable costs BCIMC had incurred in preparing a stalking horse bid.

[17] As to the quantum of 255's reasonable costs thrown away, we are not prepared to remit the issue of the amount of such compensation to the court below. This proceeding has consumed a disproportionate amount of court time since the Receiver filed its AVO motion, a situation caused by the Debtor's 11th hour redemption cross-motion. We shall fix the amount of the reasonable compensation to which 255 is entitled: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(a) and (c) ("*CJA*").

[18] The Stalking Horse Agreement fixed the amount of costs thrown away at $250,000 up until the end of the sale process. It is beyond question that 255 has incurred further, unforeseen, legal costs as a result of the Debtor's 11th hour redemption cross-motion and the resulting numerous attendances that followed the original June 12, 2024, return date of the Receiver's AVO motion, largely driven by the Debtor's adjournment requests in order to win time to obtain "cheque in the hand" funding. 255 is entitled to reasonable compensation for those costs thrown away. Taking this into account, the Debtor should be required to pay 255 a total of $300,000 in costs thrown away as a condition of closing the Refinancing Transaction.

[19] Although 255 submits that its compensation should take into account its exposure for the deposit currently held in escrow by Ren/Tex Realty Inc. in respect of the September 2023 Pre-Appointment Agreement of Purchase and Sale between 255 and the Debtor, we do not regard that amount as a cost thrown away

by 255 as a result of its participation in the receivership sale process as the stalking horse bidder.

[20] Consequently, we vary para. 3 of the July 9 Order approving the Refinancing Transaction to include that, as conditions of closing the Refinancing Transaction, the Debtor pay the following two amounts:

(a) to Receiver's counsel, the Receivership expenses – Professional Fees, including Additional Fee Accrual, Receivership expenses, and Broker work fee – as set out in the table in para. 1 of section s. 3.0 of the Receiver's Supplement to its Second Report; and

(b) to counsel for 255, in trust for his client, the sum of $300,000 as compensation for 255's costs thrown away in the receivership sale process.

PROVISIONAL ENFORCEMENT PROVISION IN THE ORDER

[21] The motion judge granted the Debtor's redemption motion by order made on July 4, 2024. The same day, 255 filed a notice of appeal. By his further Order dated July 9, 2024, the motion judge, at the Debtor's request, varied his July 4 order to include a term for provisional execution pursuant to *BIA* s. 195. That section provides:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being

> prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[22] Paragraph 9 of the motion judge's July 9 Order stated, in part:

> [T]he terms of this Order and the closing of the Refinance Transaction as defined herein shall be implemented forthwith notwithstanding any motion to vary, notice of appeal or notice of motion for leave to appeal that may be sought. For greater certainty, this Order is subject to provisional execution and if any of the provisions of this Order shall be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "Variation"), such Variation shall not in any way impair, limit or lessen the protections, priorities, rights and remedies of the parties providing funding in connection with the Refinance Transaction.

[23] 255 submits the motion judge erred in granting provisional enforcement of his order approving the Refinance Transaction. We agree with its submission. This was not an appropriate case for the motion judge to grant provisional enforcement of the Order. There was nothing extraordinary or exceptional about the circumstances of the case: in order to save its interest in a property, a debtor engaged in a last-minute scramble to secure financing; there had been no history of delay by the successful bidder, 255, who was eager to complete the sale process; and the only "deadline" that emerged after the Receiver filed its AVO motion was the artificial one created by the Debtor as part of its 11th hour financing scramble.[3] As well, it was not appropriate for the motion judge to grant provisional

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[3] *Kingsett Mortgage Corp. v. 30 Roe Investment* (16 February 2023), Toronto, CV-21-00674810-00CL (Ont. S.C), where Steele J. wrote at para. 15:

enforcement after 255 had filed notice of appeal from his July 4 order. In those circumstances, the motion judge should not have interfered with the ordinary-course automatic stay and lift stay provisions contained in *BIA* s. 195. Our court operates its motions list on a virtually open basis, so a party is able to obtain a quick attendance to seek a lift-stay order, if the circumstances warrant.

[24] Accordingly, we set aside para. 9 of the Order.

ADDITIONAL ISSUES

[25] The filings before us indicate that the Firm Capital Corporation commitment letter has been amended to set 5 p.m. on Monday, July 22, 2024, as the "Final Outside Date" for closing the Refinancing Transaction.

[26] Peakhill submits, in effect, that if the Refinancing Transaction does not close, then this court should exercise its powers under *CJA* s. 134 to grant the Receiver the authority to close the Stalking Horse Agreement transaction.

[27] We accept that submission. Given the ongoing accumulation of interest and other costs, finality must be brought to the treatment of the Debtor's property and undertaking. No party has suggested that the sale process run by the Receiver did not comply with the *Soundair* principles. Accordingly, in the event the Refinancing

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> 15. I agree with the Company. The sales of properties subject to approval and vesting orders are common occurrences in insolvency proceedings. The fact that there is an upcoming closing date for a sale of a property is not sufficient as to constitute the type of extraordinary circumstances necessary to alter a party's appeal rights. There is a statutory scheme regarding appeals in the BIA. Although section 195 of the BIA contemplates that an order may be subject to provisional execution, it is clear from the few cases cited that this is an extraordinary provision.

Transaction does not close by 5 p.m. on Monday, July 22, 2024, on the terms as varied by these reasons, then the July 9 Order is set aside and, in its place, we grant the AVO and Distribution and Discharge Order sought by the Receiver in its May 31, 2024 motion, varied to reflect the updated Receiver's expenses.

DISPOSITION

[28] By way of summary, we allow the appeal in part and make the following orders:

(a) Paragraph 3 of the July 9 Order is varied to include that, as conditions of closing the Refinancing Transaction, the Debtor pay the following two amounts:

(i) to Receiver's counsel, the Receivership expenses – Professional Fees, including Additional Fee Accrual, Receivership expenses, and Broker work fee – as set out in the table in para. 1 of section 3.0 of the Receiver's Supplement to its Second Report; and

(ii) to counsel for 255, in trust for his client, the sum of $300,000 as compensation for 255's costs thrown away in the receivership sale process;

(b) Paragraph 9 of the July 9 Order is set aside; and

(c) In the event the Refinancing Transaction does not close by 5 p.m. on Monday, July 22, 2024, on the terms as varied by these reasons, then the

July 9 Order is set aside and, in its place, we grant the AVO and Distribution and Discharge Order sought by the Receiver in its May 31, 2024 motion, varied to reflect the updated Receiver's expenses.

[29] Only 255 and the Debtor sought an order for the costs of the appeal: Peakhill advised it would add its costs to the mortgage debt and the Receiver advised its costs would come out of the Receivership estate. 255 sought appeal costs of $25,000; the Debtor submitted that in view of the divided success on the appeal, there should be no order as to the costs of the appeal. We accept the Debtor's submission; there shall be no order as to costs of the appeal as between 255 and the Debtor.

[30] We repeat our indebtedness to counsel for the assistance provided by their submissions, both written and oral.

J.A.

A. Harrison Young J.A.

J.A.