

CITATION: Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONSC 3887
NEWMARKET FILE NO.: CV-23-4031-00
DATE: 20240709

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Peakhill Capital Inc.

Applicant

– and –

1000093910 Ontario Inc.

Respondent

)
)
) Dominique Michaud, Joey Jamil and Philip
) Holdsworth, for the Applicant

)
)
) Gary Caplan, Derek Ketelaars and Aram
) Simovonian for the Respondent/Debtor

)
) Richard Swan and Aiden Nelms for the
) receiver, KSV Restructuring Inc.

)
) Kevin Sherkin and Mitchell Lightowler for the
) purchaser, 2557904 Ontario Inc. (“255”)

)
) Domenico Magisano for Ren/Tex Realty Inc.
) and ReMax Premier Inc.

)
) Laura Cullerton for the second mortgagee,
) Zaherali Visram

)
) D.J. Miller for Firm Capital Corporation (third
) party lender for the respondent)

)
) Ran He for 20 Regina JV Ltd (joint owner of
) the respondent)

)
) **Heard: July 5 and 8, 2024 - Virtually**

DECISION: SETTLE THE ORDER

SUTHERLAND J.:

- [1] The respondent has brought an urgent motion for me to sign a draft order that has been approved as to form and content by the receiver, KSV Restructuring Inc., the applicant/first mortgagee and the financial lender, Firm Capital. The prospective purchaser, 2557904 Ontario Inc. ("255") does not agree with the Order, or my dispositive Endorsement dated July 4, 2024. In the draft order is a provisional execution that 255 objects.
- [2] I am advised that 255 has brought an urgent motion to the Court of Appeal seeking a stay and has filed an appeal concerning my dispositive Endorsement of July 4, 2024.
- [3] As indicated in the material filed and my Endorsement of July 4, 2024, the reason for the urgency is that costs were being incurred with every day of delay which includes interest in the first mortgage with the applicant and the new financial lender, Firm Capital in the amount of approximately \$17,000 per day along with the applicant not being paid on its mortgage and the Receiver and applicant incurring further costs.
- [4] Further, the financing with Firm Capital has to be completed by July 12, 2024, or the financing offer expires.

The Law

- [5] The pertinent sections of the *Bankruptcy & Insolvency Act* ("BIA") (RSC 1985 c. B-3) are 193 and 195. These sections read as follows:

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

195 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.

[6] Counsel have provided the Court with the following decisions:

a. *Century Services Inc. v. Brooklin Concrete Products Inc.* [2005] O.J. No. 124, 10 C.B.R. (5th) 169. (“*Century*”).

b. *Computershare Trust Company of Canada v. Beachfront Developments Inc and Beachfront Realty Inc.* 2010 ONSC 4833 (“*Computershare*”).

c. *YG Limited Partnership and YSL Residences RE*, 2021 ONSC 5206 (“*YG*”).

d. *Kingsett Mortgage Corp v. 30 Roe Investment* CV-22-674810-OOCL dated February 16, 2023 (“*Kingsett*”).

[7] From the cases provided, I conclude the following:

a) In determining whether to exercise the jurisdiction, the Court should consider “whether there is a serious issue to be appealed,¹ whether the moving party would suffer irreparable harm if the stay were not lifted and whether the moving party would suffer greater harm than the responding party if the stay were not lifted.” Or as stated by the Alberta Court of Appeal, “generally in application under section 195 focused on the relative prejudice to the parties and the interest of justice generally.” (*Computershare* at para. 9).

b) The factual matrix of each case is determinative on whether the Court should or should not exercise its jurisdiction under section 195.

[8] In *YG*, the Court exercised its jurisdiction due to the delay in the proceeding and the further delay that would occur by simply filing of a notice of appeal. In addition, the Court concluded that section 195 brought uniformity between the *BIA* and the *Companies Creditors Arrangements Act* proceedings.

[9] In *Computershare*, the Court granted the order subject to provisional execution due to the substantial risk the receiver feared, that the tenant Canada Post will not renew and would move elsewhere. Justice Newbould determined that the fear of the receiver was well “grounded” and “that the value of the under receivership would likely deteriorate substantially without Canada Post being a tenant.” (para. 13).

[10] In *Kingsett*, Justice Steele determined that a provisional execution was not necessary. Justice Steele determined that unlike *YG* and *Computershare* that involved “extraordinary

¹ A copy of the Notice of Appeal was not provided and as such, no determination could be made on the whether there is a serious issue to be appealed.

circumstances”, no such circumstances were present in *Kingsett* (paras. 10-12). There was no issue that the Court did not have jurisdiction to make provisional execution even though it was known that there was an intention by the debtor to file a notice of appeal and such a notice of appeal was filed shortly thereafter.

Positions Argued

- [11] The receiver took no position. The applicant supported the request and argument of the respondent and indicated that the applicant was in agreement to be paid in full sooner rather than later.
- [12] The respondent, guarantors, second mortgagee, and tenants all argued that the circumstances here were exceptional. In not one of the cases presented, did the debtor have funds and financing to satisfy all the parties: the creditor(s), and the receiver. The respondent has obtained the financing to pay into Court the sum of \$250,000 which was the amount set out in the Second Agreement that compensated 255 for the failure to close in certain circumstances, as described in the Second Agreement, as the Break fee, legal costs and disbursements. If the provisional execution is not provided, then the financing will fall and there may be further losses for the applicant, and definitely further losses for the second mortgagee, and the guarantors. The respondent would lose their property. Tenants would have to vacate. Also, it is argued that it is not certain that the appeal filed by 255 automatically stays the Order and that leave would not be required.
- [13] 255 argued that to permit the provisional execution would cause harm to 255 and would be prejudicial. 255 has a valid appeal and that appeal is automatic. To permit the provisional execution would in effect remove 255’s right to appeal. It would make the receivership process meaningless and unreliable. 255 also argued that the respondent did not request the provisional execution in their motion material and as such cannot not request that relief now. The Court cannot grant relief not requested (*Garfin v. Mirkopoulos* 2009 ONCA 421 (“*Garfin*”) at para. 9 and *Midland Resources Holding Limited v. Shtaif* 2017 ONCA 320 at paras. 109-115 (*Midland* 2017) and 2018 ONCA 743 (CanLII) (*Midland* 2018)). 255 also argues that it has a one-million-dollar deposit on the First Agreement of Purchase and Sale with the respondent that the realtor is claiming payment for its commission. Lastly, 255 argues that this Court has no jurisdiction to grant the relief requested. Section 195 mandates that such relief is to be determined by a Judge of the Court of Appeal and this Court consequently has no jurisdiction to grant such relief.

Conclusion

- [14] I will first consider 255’s argument relying on *Garfin* and *Midland*. Then I will consider the jurisdiction argument and lastly, I will consider whether the Court should grant provisional execution.

Relief not Requested

- [15] I do not give much credence to this argument.

- [16] *Garfin* involved the issue of awarding costs in matrimonial litigation where there was a purported agreement for payment of costs between the appellant and respondent. The Court determined that the evidence at trial could not support the trial judges finding of an agreement to pay the appellant's costs and further "the appellant did not plead a claim in contract" (para. 9).
- [17] *Midland* 2017 considered whether a defence could be raised at the appeal stage when no such defence was raised in the pleadings or argued at trial. The availability of the defence was known at the time of the pleading and at trial. *Midland* 2018 is a motion for reconsideration of the decision of the Court of Appeal in *Midland* 2017. In *Midland* 2018, the Court of Appeal confirmed its reasoning in *Midland* 2017.
- [18] The circumstances here are much different. Here, it was not known to the respondent or the receiver at the time of drafting the motion materials that the respondent would be successful and that 255 would appeal any decision that it did not favour. To expect such a claim of relief on the off chance that the Court's decision may not favour an interested party and that interested party may appeal, is hypothetical at best and is not supported by *Midland* 2017 and *Midland* 2018 or *Garfin*. *Midland* and *Garfin*, in my view, stands for the proposition that in a pleading the party seeking relief, or a defence must set out the specifics of that relief or defence in the pleading to be granted such relief or utilize such defence. The relief or defence was known as factually in existence at the time the pleading was drafted. That is not the circumstances here. The respondent or receiver would not have known the decision of the Court and would not have known that 255 would appeal at the time the motion material for court approval and redemption was drafted, served, and filed.
- [19] Further, 255 has not provided any cases to support its argument that on a motion like the one brought by the receiver and respondent, where there may be a possible appeal and request for provisional execution may be necessary, such relief should have been sought in notice of motion requesting court approval or redeem the mortgage. Given that there are no cases presented that supports 255's argument and in my view, the argument was not grounded in a factual known at the time of drafting, serving and filing the motion material, I give no weight to the argument.

Jurisdiction

- [20] On the suggestion that the appeal is not automatic, I make no finding. There was no substantial argument on this point and further, whether the appeal requires leave or not is not material to a determination on the issue of provisional execution.
- [21] It is not in dispute that in reviewing section 195, the Court is to use the modern approach to statutory interpretation that the words of the *Act* are to be read in their entire context in their grammatical and ordinary sense (*LaPresse Inc v. Quebec* 2023 SCC 22 at paras. 22-24).
- [22] In reviewing section 195 in its grammatical and ordinary sense, I agree with the respondent that the section reads as an exception to a stay and that this Court has the jurisdiction to make

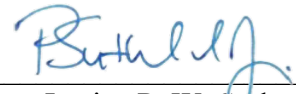
a provisional execution “notwithstanding any appeal therefrom.” Thus, this Court has the jurisdiction to make such provisional execution and that the provisional execution is not stayed. It is not as argued by 255 that this Court has no jurisdiction to make provisional execution and that jurisdiction solely lies with the Court of Appeal. The section, in my view, does not read in its grammatical ordinary sense as suggested by 255.

- [23] I agree with Steeles J. and with Newbould J. that this Court has the jurisdiction to make an order for provisional execution, but such jurisdiction should be exercised with caution “given the operation of a notice of appeal.” (*Century* at para. 5).

Provisional Execution

- [24] I agree with the respondent, the second mortgagee, the financial lender, the tenants and the guarantors, that the circumstances here are exceptional. The fact that the respondent has a cheque in hand to pay the applicant in full, the receiver in full, the amount for 255 is exceptional. No party has provided a case where the factual matrix that a cheque in hand has been provided to pay all required with a request for provisional execution.
- [25] Moreover, looking at the irreparable harm or prejudice, it is clear to me that there would be irreparable harm or prejudice to the applicant, respondent, second mortgagee, and guarantors if provisional execution is not granted. The financing would fall away. The applicant would incur further costs and interest which may or may not be paid. The applicant would have to wait longer for its money. The second mortgagee would have a loss. The respondent would lose the property. Existing tenants will have to find alternate premises. The guarantors would be liable for any deficiency with the applicant and the second mortgagee. If the respondent is permitted to redeem, as accepted by this Court and that redemption can finalize before July 12, 2024, costs and interest would be limited and would come to an end. The applicant would be paid in full. The tenants would remain in the premises. The second mortgagee would not have a deficiency and the guarantors would not be subject to any deficiency on the first mortgage and without question, the second mortgage.
- [26] In contrast, 255 would lose the purchase of the property. It would still have the Break Fee, costs and disbursements of \$250,000 which it can claim as an agreed quantification for its costs and expenses in the Second Agreement. It also still has the outstanding proceeding with the realtor on the First Agreement. But again, it is not certain that the realtor would be successful in that proceeding and if it is successful, against whom.
- [27] Having said this, I am cognizant that 255 has not delayed this proceeding. 255 is a prospective purchaser that followed the procedure of the bidding process. But it was not hidden that the closing of the purchase pursuant to the Second Agreement was always a risk that could not happen without approval of this Court. It is for this reason, I presume, why the Break Fee and amount for legal costs and disbursements was negotiated and included as a term in the Second Agreement.

- [28] Taking all these circumstances into consideration, I conclude that the irreparable harm or prejudice that would be suffered by the respondent, the guarantors, the applicant and the second mortgagee if provisional execution is not granted outweighs any harm or prejudice that may be suffered by 255.
- [29] The harm and prejudice to the parties other than 255 are real and immediate. The harm or prejudice to 255 on the realtor proceeding is not certain. The loss of the purchase of the property exists but there was no evidence before me that indicates any real costs or harm that 255 will suffer if the property is not sold to it, other than the amount agreed upon in the Second Agreement.
- [30] Accordingly, I conclude that in these circumstances the balancing favours and the general interest of justice favours the granting of provisional execution.
- [31] I therefore grant provisional execution in the draft order provided by the receiver that has been approved as to form and content by all interested parties except 255. Draft order signed by me this day.
- [32] I will accept submissions on costs on this motion at the same time I hear or receive submissions on the motion brought by the receiver for an approval and vesting order and the motion of the respondent requesting the right to redeem.
- [33] This Decision to be sent to all interested parties listed above and the Order be sent to KVS and the respondent immediately.



Justice P. W. Sutherland

Released: July 9, 2024.

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