CITATION: Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONSC 4000
NEWMARKET FILE NO.: CV-23-4031-00
DATE: 20240715

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Peakhill Capital Inc. Applicant	)	Dominique Michaud and Joey Jamil, for the Applicant
– and –	)	
1000093910 Ontario Inc. Respondent	)	Derek Ketelaars and Gary Caplan 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 2, 2024 - Virtually**

DECISION ON MOTIONS

SUTHERLAND J.:

Introduction

[1] The receiver, KSV Restructuring Inc. ("KSV") brings a motion for approval and vesting order for the sale assets including 20 Regina Road, Vaughan, Ontario (the "Property") owned by the respondent per the Second Sale Agreement dated November 13, 2023 (the "Stalking Horse Agreement") and Second Report dated May 31, 2024. The respondent brings a motion to permit it to redeem the mortgage held by the applicant, the first mortgagee.

[2] On September 13, 2023, the Court granted an order (the "Receivership Order") pursuant to section 243(1) of the *Bankruptcy and Insolvency Act,*[1] (the "*BIA*") and section 101 of the *Courts of Justice Act,*[2] (the "*CJA*"), appointing KSV as receiver over the respondent, without security, and the Property, including the Real Property. The Receivership Order and the receiver's appointment became effective on October 2, 2023.

[3] The respondent is the owner and commercial landlord of the Property, and the industrial property is occupied by non arms length tenant, Countertop Solutions Inc. ("Countertop") pursuant to a lease that expires on April 30, 2032.

[4] On December 20, 2023, Justice Vallee issued an order (the "Sale Process Approval Order") which, among other things: (a) approved a sale process for the Real Property (the "Sale Process"); (b) approved the retention of Jones Lang LaSalle Real Estate Service Inc. ("JLL") as the listing agent to sell the Real Property in the Sale Process; and (c) approved the Stalking Horse Agreement, which acted as the "stalking horse bid" in the Sale Process.

[5] JLL carried out the Sale Process in accordance with the Sale Process Approval Order. Ultimately, despite the solicitation of over 5,000 potential purchasers and 37 parties executing NDAs, no Qualified Bids were received.

[6] As a result, 2557904 Ontario Inc. ("255") was determined to be the Successful Bidder in the Sale Process. The Stalking Horse Agreement contemplates vacant possession and the only material condition to close is this Court's issuance of the approval and vesting order.

[7] KSV has indicated that for the respondent to redeem, the amount of $23,450,000 is required. The respondent indicates that it has as of June 28, 2024, a cheque in the amount $23,321,000 and today received a further $130,000 to have a cheque to redeem the amounts

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[1] R.S.C., 1985, c. B-3.
[2] R.S.O. 1990, c. C.4.

required by receiver to pay the applicant, the receiver's fees and expenses, the Break Fee and legal costs and disbursements as set out in the Stalking Horse Agreement.

[8] After hearing submissions, I advised the parties and all counsel present that I would make a dispositive Order with reasons to follow.

[9] On July 4, 2024, I released my dispositive Order that permitted the respondent to redeem. Below are my reasons.

History

[10] On September 7, 2023, the respondent entered into an unconditional agreement to sell to 255 for the Property for $31,000,000 ("the First APS"). Shortly thereafter, on motion by the first mortgagee, the applicant, and on the consent of the respondent and KSV was appointed Receiver over the Property, assets and undertaking of the respondent.

[11] KSV entered into negotiations with 255 and entered into the Second Agreement, the Stalking Horse Agreement. KSV brought a motion on December 20, 2023, before Justice Vallee, seeking to terminate the First APS and approve an auction process and Stalking Horse Agreement a base price of $24,255,000. The Receiver's First Report, dated December 13, 2023, was included in the Motion Record before Justice Vallee.

[12] The Sale Process Approval Order was granted.

[13] The respondent appealed the Sale Process Approval Order.

[14] On April 9, 2024, the Court of Appeal dismissed the respondent's appeal and stated:

> [11] In the circumstances, we do not find that the motion judge made any error in principle. We assume that the motion judge was aware of the law and the evidence, even if she did not refer to them in her endorsement. We see no reason why we should not defer to her decision: Canrock Ventures LLC v. Ambercore Software Inc., 2011 ONCA 414, 78 C.B.R. (5th) 97, at para. 4

[15] KSV's motion for an approval and vesting order and the respondent's unconfirmed cross motion was brought first returnable on June 12, 2024, before Justice Lavine.

[16] Due to lack of time, the motion was adjourned to be heard by me on June 14, 2024.

[17] On June 14, 2024, I adjourned both motions to be heard on June 28, 2024, and provided my reasons for the adjournment on June 20, 2024.

[18] On June 28, 2024, the motions were adjourned for argument on July 2, 2024, and any reply materials to be served and filed by 5:00 pm that day.

[19] On July 2, 2024, argument was heard, and decision was reserved. The Court indicated that a dispositive endorsement would be given as soon as possible with reasons to follow.

[20] On July 4, 2024, the dispositive endorsement was released.

Applicable Legal Principles

[21] The caselaw appears to describe that in considering whether a debtor should be able to exercise its right to redeem, a balancing analysis is required. The Court needs to balance the guiding principles of the sanctity of the receivership sales process with that of the right of the debtor to redeem.

[22] The lateness of the debtor's request to redeem may be fatal in the balancing analysis. Lateness on its own is not fatal in the balancing analysis but is a significant factor to be taken into consideration. As Justice Pepall (as she then was) conveyed in *B&M Handelman Investments Limited v. Mass Properties Inc.,*[3] at para. 9:

> In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A Receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[23] In *BCIMC*, Justice Koehnen considered a similar situation as with this case with the Clover property. Clover property was two towers: one 44 story and the other 18 story development containing 522 residential units. BCIMC was the was both the first and third mortgagee. There was a stacking horse bid from the bidding process. There was a breaking fee included of 1%. The receiver's proposal was supported by BCIMC, counsel for the unit holders and counsel for the one potential bidder apart from the stalking horse bidder. The receiver's proposal was opposed by a secured creditor, the land developer and one unsecured creditor. The debtor had money to pay off the creditors, the receiver's costs and the Break Fee in full.

[24] Justice Koehnen considered the debtors right to redeem, which he stated, "remains the core principle of the real estate law.[4] Justice Koehnen reviewed the history of the proceedings,

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[3] 2009 CanLII 37930. This quote has adopted by the Ontario Court of Appeal in *Rose-Isli Corp v. Smith* 2023 ONCA 548 (*Rose-Isli*). Also see *BCIMC Construction Fund Corporation et al v. The Clover Yonge Inc.* 2020 ONSC 3659 (*BCIMC*).

[4] *BCIMC*, note 3, at para. 40.

the prejudice to different stakeholders and the lack of clean hands on the part of the debtor and concluded:

> In the circumstances of this case, those factors do not outweigh the debtor's equity of redemption. In addition to paying out the original BCIMC debt, the debtor has offered to pay out the entire receivership debt, interest on the receivership debt, the costs of the receivership and the costs of BCIMC. This includes reasonable costs that BCIMC has incurred to prepare the stalking horse bid. I have made myself available for a speedy determination of what those costs should be in the event the parties disagree.
>
> …
>
> The concern that Concord receive no privileges over other bidders misconceives Concord's role. As noted earlier, Concord is not a bidder, it is the debtor's source of financing and is now the debtor's sole shareholder. While I can understand a potential bidder's frustration at being deprived of the opportunity to bid on a project, that is not enough to quash a debtor's right to redeem. There is no evidence before me that it would be prejudicial to receivership processes at large to allow the Clover debtor to redeem. I appreciate that the possibility of a pay out arose at the last moment but no one sought an adjournment to file evidence to respond to the proposed redemption.[5]

[25] *Rose-Isli* is an appeal from the approval and vesting order that authorized the receiver to proceed with a sale of the property in receivership. The appeal is by the second mortgagee on the basis that the second mortgagee has an "absolute right to redeem the first mortgage at any time, even where a court-approved sales process had been undertaken and the receiver was seeking court approval of a bid."[6]

[26] The Court of Appeal disagreed with that contention and indicated, at para. 8:

> The motions judge recognized that the issue for determination was not whether 273 Ontario had a right to redeem but the more pragmatic issue of whether it should be permitted to exercise that right once the court-approved sales process had run its course and the Receiver had entered into an agreement with the successful bidder: Reasons, at paras. 73-74. This properly framed the issue: the appellants had sought the appointment of the Receiver; the Receiver had undertaken the sales process approved by the court; and the Receiver had not been discharged. Accordingly, the ability of 273 Ontario to exercise a right of redemption had to take into account the reality that the property remained

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[5] Ibid, at paras. 52 and 54.
[6] *Rose-Isli*, note 2, at para. 5.

subject to an active receivership, which engaged interests beyond those of the second mortgagee.

[27] The Court of Appeal further set out principles to guide consideration of whether in specific circumstances one should be granted leave to redeem:

- In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;

- Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and

- In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process. (emphasis added)

[28] I will now turn to my analysis.

Analysis

[29] KSV takes no position on the motion by the respondent to redeem. KSV confirms that as of the date of the hearing, the respondent had the funds required to satisfy the first mortgagee, KSV as to their fees and expenses and the Break Fee with legals costs and disbursement per the Stalking Horse Agreement.

[30] It is not disputed that 255 entered into the Frist Agreement for 31 million dollars and was the only bidder in the bidding process with a bid for 24.225 million dollars.

[31] Further, that there was the Sale Process Approval Order given for the sale and that Order was upheld at the Court of Appeal and the *Soundair* principles were followed.

[32] After the decision as released from the Court of Appeal, it seems to have become apparent to the respondent that if it wished to keep the Property and redeem the first mortgage it would have to get financing in place and satisfy the interest of all creditors.

[33] The respondent did get that financing in place to satisfy all creditors. 255 did not agree. But it should be noted that 255 is not a creditor but a prospective purchaser flowing from

the bidding process. Moreover, the Stalking Horse Agreement, at Article 14, contemplated a situation if the bid is not approved by the court, and the requirements as outlined by the said Article are met, 255 would receive $200,000 for costs incurred and time spent along with $50,000 in legals.

[34] At the motion for an approval and vesting order of the Stalking Horse Agreement, the respondent moved for the Court to grant it leave to redeem. That request was supported by all the creditors and the guarantors and the tenants. It was not contested that with the redemption: the first mortgagee would be paid in full; the receiver would receive full compensation for their fees and disbursements, the second mortgagee would not experience a short fall,[7] the guarantors would not be subject to paying a short fall perhaps to the applicant and for certain to the second mortgagee. Lastly, the tenant would remain in the premisses.

[35] Taking all this into consideration and the factors outlined by the Court of Appeal in *Rose-Isli,* the Court concludes:

a) Allowing the respondent in these circumstances would not have a significant impact on the integrity of the system. There was only one bidder whose bid was significantly less than the First Agreement. All creditors are being paid in full. KSV is being paid in full. The Break Fee and legals costs are being paid into Court for security for 255. The purpose of the receivership is being fulfilled.

b) All affected interests have been taken into consideration and all but one, 255, agree with the granting the respondent the right to redeem. Though usually the Court approved system that is in compliance should not be disturbed, the factual situation falls, in my view, to outside what is usual. In that vein, I agree with the respondent, the applicant, KSV, the second mortgagee, the guarantors and the tenants that this circumstances here are unusual and exceptional.

c) Balancing all the interests, it appears to this Court that the factors favour the granting of the respondent's right to redeem.

[36] The Court does acknowledge that 255 is a party that followed the process, put forth a bid, incurred costs and resources to do so and is not receiving the property as agreed, subject to approval. However, with any bidding process, there is a risk that the agreement will not be accepted by the Court, and it is for that reason, it appears, why a Break Fee and reimbursement for costs and legals are an included term in the Stalking Horse Agreement.

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[7] Though the evidence on the amount of any shortfall was sparse, there was no dispute that there would be a shortfall given the price for the Property, the amount of the first mortgage and the costs of the receiver.

[37] The Court will also acknowledge that there is an action that has been commenced by the real estate firm/broker on the First APS for payment of commission and that there is a million-dollar deposit pursuant to that agreement. However, it is my view that the First Agreement is not connected to the Stalking Horse Agreement and is not part of the terms of that agreement. In addition, there is no certainty that the plaintiffs in that action will be successful and against whom. The Court has received no evidence to consider otherwise. Accordingly, in performing the balancing analysis, the Court gives little weight to the fact of the proceedings for commission on the First APS.

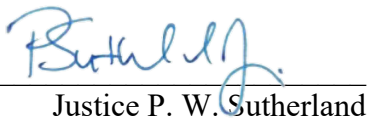
[38] But what will be certain if the Court does not grant leave for the response to redeem is that the second mortgage will have a deficiency. There may be a deficiency on the first mortgage subject to the accumulation of interest and costs up to the closing. The guarantors will be subject to payment of the deficiency with the second mortgage and perhaps, with the first mortgage. The Tenants will not have to relocate.

[39] Again, balancing the interests of all interested parties to that of 255, the balancing, in my view, favours the respondent and all the parties that support the respondent's request for leave to redeem.

[40] Thus, as written in the Endorsement dated July 4, 2024, the respondent is granted leave to redeem the mortgage.

Costs

[41] If the parties cannot agree on costs of these two motions and the settle order motion, the successful parties who are seeking costs to serve and file their submissions for costs within thirty days from the date of this Decision, and the unsuccessful party (255) will have thirty days thereafter to serve and file its submissions. The submission to be no more than three pages, double spaced, exclusive of any cost outline and offers to settle. Any case law to be hyperlinked in the submissions. There is no right to reply. Submissions are to be filed with the court. If no submissions are received within the time set out herein, an order will be made that there will be no costs.



Justice P. W. Sutherland

Released: July 15, 2024.

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SUPERIOR COURT OF JUSTICE

BETWEEN:

Peakhill Capital Inc.

Applicant

– and –

1000093910 Ontario Inc.

Respondent

DECISION ON MOTIONS

Justice P.W. Sutherland

Released: July 15, 2024