

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

PEAKHILL CAPITAL INC.

Applicant

and

1000093910 ONTARIO INC.

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**

**FACTUM OF 2557904 ONTARIO INC.
(returnable June 12, 2024 at 9:30 a.m.)**

June 11, 2024

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TO: **SERVICE LIST**

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FACTUM OF 2557904 ONTARIO INC.

PART I - OVERVIEW

1. This factum, filed on an urgent basis behalf of 2557904 Ontario Inc. ("**255**"), is in response to the last minute, unscheduled cross-motion filed by 1000093910 Ontario Inc. (the "**Debtor**"), Ravi Aurora, Akash Aurora, and Nick Aurora (collectively, the "**Guarantors**") and Countertop Solutions Inc. and GrafcO International Laminating Inc. (collectively, the "**Tenants**") (collectively, the "**Moving Parties**") for, amongst other things, an interim order staying the Sale Process Order until June 30, 2024, an order terminating the Stalking Horse APS (as defined below) and a declaration that no Break Fee or amount under the Reimbursement Clause is payable.

2. It would be entirely improper for the Court to address the Moving Parties' cross-motion at the hearing tomorrow. This motion is nothing more than a desperate, last-minute attempt by the Debtor to frustrate the Sale Process and to cause as much chaos at the hearing as possible. Despite having months to move if it intended to do so, it is only in the late afternoon on June 10, 2024 that the Moving Parties served their cross-motion in a brazen attempt to piggy-

back on the Receiver's scheduled motion, with the Moving Parties seeking orders that would effectively stall the orderly completion of the Sale Process. During this time, there will be little, if any time, for the Receiver, the Applicant or any other interested party to file responding material or submissions, or to cross-examine on the Moving Parties on their affidavit filed in support of the cross-motion. This is critical given that the Moving Parties refuse to disclose the confirmation letter that they say will allow them to redeem the mortgages. Importantly, the Moving Parties have also offered no explanation for why it served its motion at the very last minute.

3. Should the hearing be adjourned, or should the Sale Process be delayed for any reason, 255 will suffer considerable prejudice as a result. 255 is ready to close the transaction. It intends to move into the Property as soon as reasonably practicable, and, the longer this process drags out, the greater financial pressure will be placed on 255.

4. It is also clear that the Moving Parties are not coming to the Court with clean hands. It transpires that one of the Moving Parties, Countertop Solutions Inc. has not been paying its rent to the Debtor for some months. 255 estimates that the rent due and owing is somewhere in the region of \$1,000,000.00.

5. In these circumstances, where none of the parties had been given any opportunity to cross-examine or respond, and where the party seeking extraordinary relief does not come to the Court with clean hands, 255 submits that the Moving Parties cross-motion ought to be dismissed.

PART II - SUMMARY OF FACTS

A. THE ORIGINAL APS

6. On September 7, 2023, 255 made an unconditional offer to the Debtor to purchase the property municipally known as 20 Regina Road, Vaughan, Ontario (the "**Property**") for \$28,000,000.00. 255's original offer was not accepted and the parties negotiated the price that

255 would be willing to pay, with several counter-offers being signed back to each respective party. Eventually, on September 9, 2023, 255 made a final counter-offer to purchase the Property for \$31,000,000.00 and to pay a deposit of \$1,000,000.00 to Ren/Tex as part of that agreement.¹

7. 255's offer was eventually accepted and the Original APS was signed by the Debtor on September 15, 2023, with a completion date set for December 21, 2023. At that time, 255 believed that the Debtor was fully authorized to enter into the Original APS and that it was able to freely deal with the Property as it saw fit.²

B. THE RECEIVERSHIP ORDER

8. It transpires that the Debtor was not, in fact, fully authorized to deal with the Property as it saw fit when it executed the Original APS. When the Debtor executed the Original APS, the Debtor had already consented to the appointment of a receiver to take possession and exercise control over all of its assets, including the Property. In fact, the Receivership Order was issued by Justice Lavine of the Superior Court of Justice on September 13, 2023 and was ordered to come into effect on October 2, 2023 (the "**Receivership Order**").³ The Receivership Order was not brought to 255's attention until October 3, 2023.⁴

9. As a result of the Receivership Order, certain representations made by the Debtor in the Original APS were false. For instance, Schedule 'A', s. 4(e) of the Original APS provides that the Vendor was "*duly authorized to enter Into the Agreement with power and capacity to complete the transaction provided herein in accordance with the terms, thereof*". As of September 15, 2023, the Debtor was fully aware that the Receiver would take possession and control of the

¹ Affidavit of Anthony Marcucci sworn March 14, 2024 (the "**Marcucci Affidavit**"), at para. 5.

² Marcucci Affidavit, at para. 8.

³ Receiver's Motion Record dated May 31, 2024, at Appendix "A" to Tab 2 – The Receivership Order of Justice Lavine.

⁴ Marcucci Affidavit, at paras. 6 and para. 12.

Property and that the Debtor lacked the capacity to either enter or close the sale of the Property if the conditions were not satisfied in the consent to receivership.⁵

10. The Debtor's financial difficulties, and the possibility that the Receiver was appointed and may take over, was never disclosed to 255 at any point by the Debtor during the course of the negotiations. Given the existence of the lease back provision in the Original APS, 255 would not have purchased the Property had it known of the Debtor's financial difficulties, that the mortgage registered against the Property was substantially in default, and a receivership motion had already been served.⁶

C. THE RECEIVER PROPOSES THE "AMENDING AGREEMENT"

11. To 255's surprise, on October 3, 2023, 255 was approached by the Receiver and its counsel regarding the Original APS. The Receiver informed 255's counsel that the Receiver needed comfort that 255 had the means to close the transaction and asked for a number of financial documents evidencing 255's ability to do so.⁷ These discussions took place throughout October 2023, with 255 providing the Receiver with considerable amounts of financial information over that period.⁸

12. On October 23, 2023, the Receiver wrote to counsel for 255 and provided 255 with a draft "amending agreement" (the "**Amending Agreement**"). According to the Receiver, it could not proceed with the Original APS in its current form. The Amending Agreement was necessary in order to, amongst other things, reflect the fact that the Original APS needed to be completed by the Receiver, rather than the Debtor.⁹ The Receiver told 255 that, in the event that 255 was

⁵ Marcucci Affidavit, at para. 7.

⁶ Marcucci Affidavit, at para. 10.

⁷ Marcucci Affidavit, at para. 12.

⁸ Marcucci Affidavit, at para. 12.

⁹ Marcucci Affidavit, at para. 13.

not prepared to agree to the Amending Agreement, the Receiver would “go back to the market” for the sale of the Property.¹⁰

13. The Amending Agreement was more than just a procedural document. The Amending Agreement contained materially different terms than those agreed in the Original APS, and therefore was not acceptable to 255.¹¹ The Amending Agreement, for instance, removed the lease back provision from the Original APS.¹²

14. 255 was also concerned that the Amending Agreement required the assignment of the Original APS to the Receiver, as vendor, as well as the proposed Vesting Order that the Receiver was requiring to be issued by the Court as part of the sale closing.¹³ The proposed assignment and Vesting Order in the Amending Agreement could potentially relinquish certain rights and remedies that would have otherwise been available to 255 in the event that the Receiver, as vendor, breached certain warranties and representations under the Original APS and potential statutory remedies post-closing.

15. It was for these reasons that 255 confirmed, both on a Microsoft Teams call with the Receiver and its counsel and in writing, that it would not be executing the Amending Agreement on October 31, 2023 and that, as far as 255 was concerned, the Original APS was null and void.¹⁴ The Receiver also treated the Original APS as terminated. 255 did not pay any further deposit as required by the Original APS and neither the Receiver nor 255 did any work as if the Original APS remained operative and of course did not tender on the date scheduled for closing.

¹⁰ Marcucci Affidavit, at para. 14.

¹¹ Marcucci Affidavit, at para. 15.

¹² Marcucci Affidavit, at para. 15.

¹³ Marcucci Affidavit, at para. 16.

¹⁴ Marcucci Affidavit, at para. 17.

D. THE STALKING HORSE APS

16. Notwithstanding that 255 advised the Receiver that the Original APS was now null and void, 255 was still potentially interested in purchasing the Property. Following the termination of the Original APS, 255 advised the Receiver that it was prepared to purchase the Property at a reduced purchased price.

17. 255 and the Receiver engaged in further discussions to see if a new agreement could be reached with respect to the purchase of the Property. These discussions were concluded on November 13, 2023 when the stalking horse agreement was signed by the parties (the **"Stalking Horse APS"**).¹⁵

18. The Stalking Horse APS contains the following key terms:

- a. the purchased assets include all of the Debtor's title and interest in and to, among other things, the Property;
- b. the purchase price for the Property is \$24,255,000.00, subject to adjustments on closing for property taxes and other adjustments standard for a real estate transaction;
- c. 255 will acquire the Property on an 'as is, where is' basis, with limited representations and warranties;
- d. closing of the transaction contemplated under the Stalking Horse APS is conditional upon, among other things, receipt of Court approval;

¹⁵ Marcucci Affidavit, at para. 18.

- e. the Stalking Horse APS contemplates a break fee of \$200,000.00 (inclusive of HST) if 255 is not the successful bidder in the sale process; and
- f. the Stalking Horse APS also contemplates an expense reimbursement of up to \$50,000.00 (inclusive of HST) in respect of legal, diligence and other costs incurred by 255 Ontario in respect of the sale process.

E. THE RECEIVER'S MOTION AND THE DEBTOR'S LATE BREAKING CROSS-MOTION

19. On December 13, 2023, the Receiver served a motion record for a motion hearing that was to take place on December 20, 2023.¹⁶ In its notice of motion, the Receiver sought various forms of relief to approve the sale process, the bidding procedure, Stalking Horse APS, and the entering into a new listing agreement with a realtor and formally terminating the Original APS. According to the Receiver, the order terminating the Original APS was necessary because the real estate agents, Ren/Tex, expressed concerns that they could not release 255's original deposit given the possibility of a breach of trust claim as a result of the Confirmation of Co-operation and Representation Agreement that was executed with 255's brokerage as part of the Original APS.¹⁷ Given that the Original APS had already been terminated and the Stalking Horse APS had been executed, 255 did not take a position at that hearing.¹⁸

20. On December 19, 2023, **less than 24 hours before the motion hearing**, the Debtor served a cross-motion on the Receiver and the Service List in the receivership proceedings. Given the extremely short notice, 255 did not have an opportunity to retain a commercial litigator to appear at the hearing, did not have an opportunity to place an affidavit

¹⁶ Marcucci Affidavit, at para. 20.

¹⁷ Receiver's Motion Record dated May 31, 2024, Tab 2, Appendix "H" – Receiver's First Report dated December 13, 2023.

¹⁸ Marcucci Affidavit, at para. 20.

before the court in respect of either of those motions, nor did 255 have the opportunity to cross-examine the Debtor on the content of the Debtor's affidavit filed in support of its motion.

F. THE DECEMBER 20, 2023 ORDER AND ENDORSEMENT

21. On December 20, 2023, the Motion Judge, The Honourable Justice Vallee, granted the Order and refused to consider the Vendor's Cross-Motion for the following reasons:

"The receiver brings a motion for various relief relating to an agreement of purchase and sale dated November 13, 2023. As of late yesterday, the motion was unopposed. At 3:56 p.m. the respondent served a cross-motion. For several reasons, I will not consider the cross-motion.

Motions require 7 days' notice to give other parties an opportunity to respond and to give the court an opportunity to read the materials. The cross motion was served at 3:56 p.m. yesterday, which is essentially no notice.

A cross motion cannot be piggybacked on to a motions list. It has the effect of adding a motion to what might be an already full list.

The facts on which the cross-motion is based have been known for some time. A motion could have been brought earlier.

The cross-motion has little chance of success. It concerns a different real estate transaction entered into six days before the receivership order. The closing date is tomorrow. The receiver states that it could not close this transaction because of certain terms that it contains. Another agreement of purchase and sale entered into by the receiver and 2557004 Ontario Inc. dated November 13, 2023, referred to as the stalking horse agreement is now in play. The receiver's motion concerns this transaction. The purchaser states that it would refuse to close the earlier transaction, which it considers to be null and void.

The relief sought by the receiver is granted."¹⁹

22. On December 29, 2023, the Debtor served and filed a notice of appeal from the reasons and requests that the Order be set aside and in its place an order be made allowing the Debtor or the Receiver to enforce the terms of the Original APS, including the right to specific performance. The Appeal was dismissed by the Court of Appeal on April 2, 2024 and the Receiver

¹⁹ Order of the Honourable Justice Vallee dated December 20, 2023, Receiver's Motion Record dated May 31, 2024, Tab 2, Appendix "B"

sought a hearing to have the Sale Process approved. This hearing has been listed for June 12, 2024 at 10:00 am.

PART III - QUESTION IN ISSUE

23. The questions before this Honourable Court are:

- a. whether or not the Court should consider the last-minute motion served by the Moving Parties; and
- b. if so, will the Moving Parties' cross-motion be successful on its merits?

PART IV - ARGUMENT

(i) The Court should refuse to hear the Moving Parties Motion

24. It is respectfully submitted that the Court should not hear the Moving Parties' late served motion at the hearing. The moving parties have not scheduled the motion nor have any of the steps normally associated with a motion been complied with. The Moving Parties have included affidavit evidence which has omitted a key piece of evidence, the commitment letter, on the basis that it is "confidential". The responding parties have had little, if any time, to put together a thorough response to the motion. In the words of Justice Penny in [*Tridelta Investment Counsel Inc. v. GTA Mixed-Use Developments GP Inc.*](#),

The motion to intervene was simply a devise, an ill-advised device I might add, to get around the fact that 320 Bronte's motion was not properly booked through the Commercial List office. The practice of "piling on" unscheduled matters with those properly scheduled is one to be denounced in the strongest possible terms.²⁰

²⁰ [*Tridelta Investment Counsel Inc. v. GTA Mixed-Use Developments GP Inc.*, 2022 ONSC 2121 \(CanLII\), at para. 27.](#)

25. It is submitted that the Moving Parties should not be rewarded for their continued disregard for the *Rules of Civil Procedure*. Their behaviour should be denounced in the strongest possible terms and their cross-motion ought to be dismissed for that reason alone.

(ii) *Even if the Court is Prepared to Hear the Motion, the Cross-Motion will not Succeed*

26. Even if the Court is minded to hear the Moving Parties' late breaking cross-motion, it is submitted that the motion is, at its heart, without a legal basis that will allow it to succeed as there is no automatic right to redeem in receiverships.

27. The Receiver was appointed pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended on September 13, 2023 by the Order of Justice Lavine (the "**Order**"). Paragraph 3(l) order empowered the Receiver to market the Property and to sell it out of the ordinary course of business without the approval of the Court if the purchase price exceeded \$50,000.00 and with approval of the Court if the value exceeded \$50,000.00.

28. In each case where the Receiver took such steps, it is submitted that it was exclusively authorized and empowered to do so, to the exclusion of all other persons including the debtors and without interference from any other person. It is submitted that, in the face of such a provision, and when a sale process has been fairly run (as, it is submitted, is the case here),²¹ the Debtor has no automatic right to redeem. According to Justice Pepall in [*B&M Handelman Investments Limited v. Mass Properties Inc.*](#), "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

²¹ [*Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.*, 2015 ONSC 3909 \(CanLII\)](#), at paras. 26 – 27.

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.²² This is exactly what the Moving Parties are trying to attempt with their late breaking cross-motion.

29. The Court have also confirmed that, while the primary concern of a receiver is protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected.²³ In addition, the interests of a purchaser in a property run sales process by a receiver are to be considered.²⁴

30. In this case, the Moving Parties are asking the Court to ignore 255 and its negotiations with the Receiver with respect to the Stalking Horse APS. It is respectfully submitted that this is an important consideration and one which mitigates against an order in favour of the Moving Parties.

31. It is respectfully submitted that there is no automatic right to redeem in a receivership. In fact, in circumstances such as these, this late in the process, the Appellate courts made it almost impossible to upend the process as has been established by the case law. To do so would create uncertainty in receivership process, be detrimental to stakeholders and make receivership process uncertain having a negative affect on same. On this basis, 255 submits that the cross-motion is without merit and ought to be dismissed.

²² See [B&M Handelman Investments Limited v. Mass Properties Inc.](#), 2009 CanLII 37930 (ON SC); See also [Home Trust Co. v. 2122775 Ontario Inc.](#), 2014 ONSC 1039 (CanLII), at paras. 11 - 12;

²³ [Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.](#), 2015 ONSC 3909 (CanLII), at para. 26.

²⁴ [Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.](#), 2015 ONSC 3909 (CanLII), at para. 26.

PART V - ORDER REQUESTED

32. An Order that the Moving Parties Motion is dismissed, with costs payable to 255 on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of June, 2024

A handwritten signature in blue ink, appearing to read 'Kevin Sherkin', is positioned above a horizontal line.

Kevin Sherkin
MILLER THOMSON LLP

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Tridelta Investment Counsel Inc. v. GTA Mixed-Use Developments GP Inc.*, 2022 ONSC 2121](#)
2. [*Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.*, 2015 ONSC 3909 \(CanLII\)](#)
3. [*B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930 \(ON SC\)](#)
4. [*Home Trust Co. v. 2122775 Ontario Inc.*, 2014 ONSC 1039 \(CanLII\)](#)

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Court File No. CV-23-00004031-0000

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	<p>FACTUM OF 2557904 ONTARIO INC. (returnable June 12, 2024 at 9:30 a.m.)</p>
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