

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

PEAKHILL CAPITAL INC.

Applicant
(Respondent on Motion)

and

1000093910 ONTARIO INC.

Respondent
(Applicant on Motion)

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

**SECOND SUPPLEMENTARY FACTUM OF THE RESPONDENT,
GUARANTORS, AND TENANTS**
(returnable July 2, 2024)

June 28, 2024

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TO: SERVICE LIST

PART I: OVERVIEW STATEMENT

1. The issue before this Court is whether the Debtor, at the last moment, should be permitted to redeem the security and discharge this Receivership.
2. The Receiver, the initiating creditor/first Mortgagee Peakhill Capital Inc. ("**Peakhill**"), and the disappointed buyer, have combined to frustrate and undermine the Debtor's attempt to redeem.

PART II – STATEMENT OF FACT

3. On April 30, 2024, the Debtor made it known to the Receiver, Peakhill, and the Purchaser of its intention to redeem and on the same day the Debtor requested payout or discharge statements so that the Debtor could, in the compressed and limited time it had, raise the necessary funds.
4. On May 31, 2024, the Receiver's Second Report particularized the expenses and costs of the Receivership as follows:
 - a. \$92,732.30 for the Receiver's fees;
 - b. \$454,533.88 for the Receiver's counsel's fees;
 - c. **\$169,000.00, being a \$150,000.00 plus HST contingency for the Receiver's additional fees and the Receiver's Counsel's additional fees;** and
 - d. \$158,000.00, being \$140,000 plus HST for the work fee payable to the Receiver's broker JLL; and
 - e. \$250,000.00 to pay the amount of the Break Fee set out in Stalking Horse APS into court, notwithstanding the fact that the Debtor denies this amount is payable.
5. On June 7, 2024, after some negotiations Peakhill delivered a final payout statement. The statement indicated that, except for final legal fees, Peakhill was owed \$21,924,852.68. As of June 28, 2024, that amount equalled \$22,816,178.26 after adding \$202,05699.40 for twenty days of per diem interest.

6. At all times, the Receiver, Peakhill, and the Purchaser, that the Debtor would rely on the representations made to it.

7. At all times, the Receiver, Peakhill, and the Purchaser knew that in entering into arrangements for refinancing, the Debtor would incur lending fees, commitment fees, legal fees, and other charges to secure the necessary funds. Moreover, the Receiver, Peakhill and the Purchaser knew full well that the Debtor was engaged in litigation with an alleged shareholder/lender claiming some interest in the Property. Finally, the Receiver, Peakhill and the Purchaser had full knowledge of the position of the second mortgagee Zaherali Visram. There appears to be no investigation undertaken by the Receiver as to the validity of the second mortgage.

8. Based on the aforesaid representations of the Receiver, the Debtor secured \$23,321,853.19 in financing to redeem this receivership, made up of the following:

- a. \$18,484,853.19 in net available funds under a new proposed first mortgage from Firm Capital Corporation (“FCC”);
- b. \$3,500,000.00 in net available funds under a refinance of the current second mortgage to Zaherali Visram (“Visram”); and
- c. \$1,337,000.00 in cash advanced into the Debtor’s counsel’s trust account.

9. **The aforesaid amount already includes \$169,000.00 to be paid to the Receiver to cover alleged contingencies and future costs.**

10. In addition to the foregoing, the Debtor spent significant time negotiating a settlement with 20 Regina JV Ltd. in order to obtain its consent.

11. On June 28, 2024, the Debtor therefore had \$69,974.93 more than required to redeem this receivership.

12. Contrary to the representations made, the Receiver and the Purchaser on the return of the motion took the position that the Debtor did not have sufficient funds BUT failed to advise how much now allegedly owing and without warning and for the first time raised other expenses.

13. This Court then adjourned this motion to Tuesday, July 2, 2024, and directed the Receiver and Purchaser to clarify the precise amount claimed.

PART III – THE POSITION OF THE DEBTOR

14. It is respectfully submitted that the Receiver and the disappointed purchaser have combined to frustrate the Debtor's attempt to redeem.

15. In court appointed receivership, the Receiver owes a duty to all interested parties to realize assets as though they were its own.

16. It is trite law that a Court-Appointed receiver must act with meticulous correctness, and as long as the Receiver acts in compliance with the Orders directing this position, it, as an officer of the Court, is spared criticism.

17. But in this case, the Receiver appears less than neutral.

18. While the initiating creditor Peakhill, knowing full well that its mortgage security would be fully paid out takes a neutral position on the debtor's right to redeem, the Receiver for some reason, has adopted an adversarial position designed to assist the disappointed buyer.

19. The Receiver, as an officer of this Court has a fiduciary duty to **all interested parties, including the Debtor.** The Receiver must act honestly and fairly, it must not prefer one party over another, and must act even handedly. The Receiver, it is submitted, has stepped outside of its boundaries and has crossed the borderland of neutrality.

20. The disappointed buyer monetized its risk the Break Fee which the Debtor will cover by a payment into Court. Again, on the *Soundair* principles, the scales weigh in favour of the redemption.

21. IN addition to the foregoing, the seemingly combined efforts of the Receiver and the Purchaser has caused the Debtor extreme prejudice. It worked tirelessly to show up to Court "with a cheque" in the amount of \$23,321,853.19. What it discovered when it arrived at the hearing was that the goalposts had been moved, through no fault of its own, and it is now left bearing the significant consequences.

22. It is respectfully submitted that the position of the Receiver, Purchaser and Peakhill has fundamentally undermined the Debtor's right to redeem. A redemption ought to have been granted at the June 28, 2024, hearing.

23. If this was not enough, the disappointed buyer now attempts to raise collateral issues designed to inflate their costs to interfere with the Debtor's right of redemption:

- a. The Purchaser raises issues with respect to the deposit paid by it in connection with the first APS which it itself sought to terminate. This issue is extraneous to the issue of redemption and will require juridical determination at a later date.
- b. The Purchaser submits late in the afternoon, after the redemption hearing, that it will suffer business losses if it fails to purchase the Property. That risk falls to the Purchaser who knew for two months the Debtor was attempting to redeem. IN the circumstances the prejudice to a Stalking Horse Buyer should not be weighed to the prejudice to the Debtor and Guarantors who backstopped the debt. The Purchaser can find another property; without redemption, the debtor and it's Guarantors suffer the obvious.

24. The prejudice to the Debtors and its Guarantors include the following:

- a. The Debtor's new first mortgage, having been advanced to the lender's solicitor, is now accruing interest as of at least June 28, 2024;
- b. The Debtor will necessarily incur additional legal fees and expenses; and
- c. Accruing the interest on the existing Peakhill mortgage which ought to have been discharged on June 28, 2024.

PART IV – RELIEF REQUESTED

25. It is respectfully submitted that the Debtor be permitted the right to redeem and that any costs or expenses raised at the eleventh hour by the Receiver, including any alleged "contingencies" beyond those already paid for, ought to be absorbed by it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, June 10, 2024.

Date: June 28, 2024



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Court File No. CV-23-00004031-0000

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PROCEEDING COMMENCED AT
NEWMARKET

**FACTUM OF THE RESPONDENT,
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