Court of Appeal File No. COA-25-CV-0659
Court File No. CV-24-00715321-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N

CONSTANTINE ENTERPRISES INC.

Applicant

– and –

MIZRAHI (128 HAZELTON) INC. and
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

AMENDED NOTICE OF APPEAL
OF DAVID BERRY

(Appeal from decision released May 15, 2025 regarding ownership interest in Real Property and Receiver's request for disclaimer)

THE APPELLANT, David Berry ("**Berry**"), appeals to the Court of Appeal for Ontario from the order granted by the Honourable Justice Osborne (the "**Motions Judge**"), dated May 5, 2025 (the "**Decision**"), made at Toronto, Ontario.

THE APPELLANT ASKS FOR:

(a) an order setting aside The Decision;

(b) an order authorizing and directing the Receiver to transfer title of Unit 901 to Berry on an as-is, where-is basis;

(c) if necessary, leave to appeal pursuant section 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("***BIA***"); and

(d) costs of the motion below and Appeal be awarded to the Appellant; and

(e) such further and other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. On June 4, 2024, KSV Restructuring Inc. was appointed by the Court as the receiver and manager (in such capacity, the "**Receiver**") of: (a) certain condominium units located at 126 Hazelton Avenue, Toronto, Ontario and 128 Hazelton Avenue, Toronto, Ontario (as legally described in the Receivership Order dated June 4, 2024, and together, "**Hazelton Avenue**"); and (b) all of the assets, undertakings and properties of Mizrahi (128 Hazelton) Inc. ("**Hazelton**") and Mizrahi 128 Hazelton Retail Inc. ("**Retail**", together with Hazelton, the "**Debtors**"), or either of them, acquired for, or used in relation to a business carried on by the Debtors, or either of them, including all proceeds thereof.

2. On February 21, 2025, the Receiver brought a motion (the "**Motion**") for an Order authorizing the Receiver to disclaim the Agreement of Purchase and Sale dated August 16, 2019 between Berry and Hazelton in respect of Unit 901 of the condominium project located at Hazelton Avenue (the "**Residence**") (together with any related agreements thereto, the "**Unit 901 APS**").

3. Berry opposed the Motion on the basis that, among other things, he had acquired the ownership interest in the Residence at law through an institutional constructive trust as the Unit 901 APS had become specifically enforceable as a result of Berry's

agreements with the Debtors, including an agreement referred to as the "Supplementary Agreement", and amounts he had paid.

4. By the Decision, the Motions Judge granted the motion of the Receiver and authorized and directed the Receiver to disclaim any and all sale and related agreements between Hazelton and Berry for Unit 901, including the Unit 901 APS. As a result, Berry has commenced the within appeal.

5. In making the Decision, the Motions Judge made the following errors which, individually and taken together, require that the Decision be set aside:

(a) Erred in law and in principle by making a finding that the termination of the Unit 901/802 APS, and the subsequent "entire agreement clause" ("**Entire Agreement Clause**") in the Unit 901 APS was effective in ~~terminating~~ bringing the binding and controlling Supplementary Agreement to an end, thereby finding that the Supplementary Agreement (and namely, Article 5 of the Supplementary Agreement) was unenforceable;

(b) Erred in law and in principle by failing to apply the framework set out in *Tercon Contractors Ltd. v British Columbia Transportation and Highways)*, 2010 SCC 4 ("***Tercon***") to the Entire Agreement Clause in the Unit 901 APS, and namely, consider factors one and three: (a) whether the parties intended for the entire agreement clause to apply to the circumstances of this case (namely, to exclude the Supplementary Agreement); and (b) whether there were overriding policy factors to hold the clause unenforceable in the circumstances. Had the Motions Judge properly

applied *Tercon* and considered these mandatory factors, the Motions Judge would have been required to conclude that the Supplementary Agreement ~~was not terminated~~ did not come to an end by the entire agreement clause;

(c) Erred in law and in principle by misapprehending Berry's argument and failing to consider Berry's arguments regarding the Supplementary Agreement, including by failing to consider relevant evidence demonstrating that the Supplementary Agreement was still in effect after the parties entered into the Unit 901 APS, including Berry's arguments that: (a) the Entire Agreement Clause was a standard form clause in a contract that the parties did not turn their mind to; (b) the parties' conduct and actions demonstrated that they were still bound by the Ottawa Loan and corresponding Supplementary Agreement, and were not consistent with reliance upon nor an intention to be bound by the Entire Agreement Clause; (c) that the parties who entered into the Unit 901 APS did not have the authority to vary the Supplementary Agreement; and (d) misconstruing Berry's argument as only being based on section 6.8 of the Supplementary Agreement;

(d) Erred by making the palpable and over-riding errors of fact by finding that Berry: (a) was still required to pay any amounts on account of Unit 901; and (b) he had not performed his contractual obligations with respect to the Unit 901 APS. As a result, the Motions Judge erred in both law and principle by misapplying the law in finding that Berry was not the

beneficiary of an institutional constructive trust and/or an equitable interest which passed prior to the Receivership, such that the Receiver could not disclaim his equitable interest;

(e) Erred by making the palpable and over-riding error of fact that Berry had only paid a deposit toward Unit 901 such that Berry was not entitled to an equitable interest in the property. In doing so, the Motions Judge ~~relied on~~ erroneously relied upon inapplicable case law while failing to consider the more relevant and controlling case law (such as ~~the~~ *Centurion Mortgage Capital Corp. et al. v Brightstar Newcastle Corp et al.*, 2022 ONSC 1059);

(f) Erred in law or in principle in the application of law in finding that Berry's entitlement to a constructive trust in respect of the Residence was a preference within the meaning of the test that the Receiver had to satisfy to demonstrate that disclaimer was fair and equitable, and further erred and misconstrued Berry's argument as conceding that there was such a preference, as Berry's ownership of the Residence was not a preference at law or otherwise;

(g) Had the Motions Judge not erred in concluding that the Supplementary Agreement was unenforceable, the Motions Judge would have been compelled to find that, even if Berry's entitlement to the Residence was a "preference" within the meaning of the disclaimer test, that the equities supported a preference to Berry for reasons including the fact that a disclaimer would have the effect of transferring Berry's ownership interest

in the Residence, that the effect of disclaimer was to transfer value from Berry (an arm's-length counterparty) to Constantine Enterprises Inc. ("**CEI**") who was a co-owner of the project, for no compensation, thereby extinguishing Berry's extant ownership interest in the Residence;

(h) Erred by making the palpable and overriding error of fact that the Supplementary Agreement was a "secret agreement" that was intentionally undisclosed to CEI despite Robert Hiscox, the Chief Executive Officer of CEI having had access to the Supplementary Agreement by virtue of his being a director and officer to the counterparty to the Supplementary Agreement, Mizrahi (138 Hazelton) Inc., and that Berry did not attempt to keep the Supplementary Agreement secret;

(i) Erred in law and by making the overriding and palpable error in fact in failing to make any findings as to whether the balance of certain loans made by Berry to affiliates of Mizrahi (~~138~~ 128 Hazelton) Inc. which, in part, determined the applicability and operability of the Supplementary Agreement ("**Ottawa Loans**"), had been repaid, despite there being no admissible evidence filed on the motion to contest Berry's evidence and position that the Ottawa Loans had not been repaid.

THE BASIS OF THE APPELLATE COURTS

6. Section 183(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), as amended, provides that an appeal lies to the Court of Appeal for an Order pursuant to the BIA;

7. Section 193 of the BIA provides that unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court without leave in, *inter alia*, if the point at issue involves future rights (section 193(a)); if the decision is likely to affect other cases of a similar nature (section 193(b)); or if the property involved in the appeal exceeds in value ten thousand dollars (section 193(c)); The point at issue involves Berry's future property rights in the Residence to which he had specifically enforceable rights; the decision will likely impact future disclaimer cases involving condominium units in the future that are specifically enforceable and the intersection of the long-standing law regarding institutional constructive trusts and the emerging law regarding disclaim of condominium units in receiverships and restructurings; and the Residence is worth far in excess of ten thousand dollars and Berry expended far in excess of the basic deposits for the Residence;

8. Section 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c C.45, as amended;

9. Leave to appeal is not required.

~~May 25, 2025~~

July 11, 2025

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CONSTANTINE ENTERPRISES INC.	-and-	MIZRAHI (128 HAZELTON) INC., ET AL
Applicant (Respondent on Appeal)		Respondents (Appellant)

ONTARIO COURT OF APPEAL

Proceeding commenced at TORONTO

NOTICE OF APPEAL

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