

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

FACTUM OF THE MOVING PARTY RE MOTION TO EXPEDITE APPEAL

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FACTUM OF THE MOVING PARTY RE MOTION TO EXPEDITE APPEAL

PART I - INTRODUCTION AND SUMMARY OF FACTS

1. KSV Restructuring Inc., the court-appointed receiver and manager (the **Receiver**) of the assets, undertakings and properties of Mizrahi (128 Hazelton) Inc. and Mizrahi 128 Hazelton Retail Inc. (collectively, the **Debtors**) moves to expedite this appeal.

2. The Debtors were involved in a luxury condominium development located at 128 Hazelton Avenue in Toronto. The Applicant, Constantine Enterprises Inc., was a major creditor of the Debtors. The Debtors failed to pay amounts due to Constantine, and Constantine sought the appointment of the Receiver. The Receiver is now tasked with maximizing recoveries for the Debtors' creditors.

3. The penthouse unit of the development, Unit 901, is not complete. Unit 901 was the subject of an agreement of purchase and sale (**APS**), through which it would be purchased by David Berry, the appellant in this appeal.

4. The Receiver considered the cost of completing Unit 901, its expected value if sold on the open market and the terms of Mr. Berry's agreement. Based on that information, it concluded that the best course of action was to disclaim Mr. Berry's APS and all related agreements. The Receiver brought a motion for leave to disclaim the APS, which was opposed by Mr. Berry and supported by Constantine.

5. Justice Osborne granted the Receiver's motion. He found that Mr. Berry was an unsecured creditor of the Debtors and that requiring the Receiver to transfer Unit 901 to Mr. Berry would prefer Mr. Berry's unsecured debt over the debts of existing secured creditors.

6. Mr. Berry is appealing that order. The Receiver, Mr. Berry and Constantine all support the appeal being expedited. For the reasons detailed below, the Receiver respectfully requests an expedited appeal date.

PART II - STATEMENT OF ISSUES, LAW & AUTHORITIES

7. This Court may grant an expedited hearing of an appeal where it is satisfied that it is appropriate to do so. Section 12.1 of the current Practice Direction Concerning Civil Appeals advises that:

- (a) appeals that may delay the progress of an ongoing proceeding will be automatically expedited; and
- (b) other appeals may be expedited if the judge hearing the motion is satisfied that the urgency of the matter requires an earlier hearing date.

[Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario, s. 12.1](#)

8. This appeal will delay the progress of the ongoing receivership application. A gating issue to completing the proceeding is determining whether the Unit 901 APS is disclaimed. If it is, the Receiver will need to retain a construction manager to complete Unit 901, the unit will have to be completed and then it will have to be marketed and sold. All of this must occur before the receivership concludes and none of that process can commence until this appeal has been determined. Professional fees will continue to be incurred while the determination of the status of the Unit 901 agreements remains outstanding, which will reduce the amount available for distribution to creditors.

Fourth Report of KSC Restructuring Inc., ss. 2.0.2 and 2.0.4

9. Aside from the delay to the ongoing receivership, there are additional reasons to expedite this appeal. Existing residents of the condominium building, who have no stake in this proceeding,

are frustrated with the unfinished construction and are eager to have work completed. That cannot occur until this appeal has been decided. In addition, Mr. Berry has an interest in knowing whether or not he will be able to acquire Unit 901, as he is operating in a state of uncertainty until the appeal is concluded. Mr. Berry originally agreed to purchase Unit 901 in 2016. He is anxious to have this matter resolved.

Fourth Report of KSC Restructuring Inc., ss. 2.0.3 and 2.0.05


10. Mr. Berry's appeal was filed on June 9, 2025, and so must be perfected by July 9, 2025. While the Receiver and Constantine are entitled to 60 days thereafter to deliver responding material (September 8, 2025), they are prepared to cut their response time and deliver by August 15, 2025. The Receiver seeks a date in September or as soon thereafter as possible.

PART III - ORDER REQUESTED

11. The Receiver, supported by the other parties to this appeal, respectfully request a hearing date in September or as soon thereafter as the Court can accommodate.

12. The Receiver estimates it needs 10 minutes to argue this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of June, 2025.



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Court of Appeal File No. COA-25-CV-0659

Court File No. CV-24-00715321-00CL

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Applicant (Respondent in Appeal)

-and-

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Respondents (Respondents in Appeal)

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PROCEEDING COMMENCED AT
TORONTO

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EXPEDITE APPEAL**

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