Court File No. CV-18-608356-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

BUDUCHNIST CREDIT UNION LIMITED

Applicant

- and -

2321197 ONTARIO INC., CARLO DEMARIA, SANDRA DEMARIA, 2321198 ONTARIO INC., SASI MACH LIMITED and VICAR HOMES LTD.

Respondents

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

TRANSCRIPT OF THE ENDORSEMENT OF THE HONOURABLE JUSTICE PENNY[1]

January 17, 2019

K. Kraft for Applicant, Buduchnist Credit Union Limited

A. Winton and P. Underwood for Respondents, 2321197 Ontario Inc., Carlo Demaria, 2321198 Ontario Inc. and Vicar Homes Ltd.

P. Carey and C. Lee for Respondent, Trade Capital Finance Corporation

Heard: January 16, 2019

The hearing today is one step in a series of matters originally brought on November 13, 2018 for the appointment of a receiver. A receiver was appointed over a property known as Elm Grove.

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[1] This transcript has been reviewed by Penny J. and contains only his minor typographical, grammatical changes and two omitted headings from the handwritten endorsement.

An interim receiver was appointed over a property known as Puccini. On December 4, 2018 I expanded the Puccini interim receivership to a full receivership.

I adjourned the application to appoint a receiver over Woodland (which is the respondent debtor, Mr. DeMaria's, home) and property on 5th Line in Egbert, Ontario (which is Mr. DeMaria's cottage), to yesterday, peremptory to DeMaria. DeMaria and one representative of BCU, Ms. Oksana Prociuk, have been cross-examined on their affidavits and a third person, Ms. Roma Bereza, a former employee of BCU was examined pursuant to Rule 39.03 at the request of DeMaria.

DeMaria opposes the application to appoint a receiver over Woodland and the Cottage. He bases this opposition on four grounds, in essence:

1. BCU misconduct disentitles it to equitable relief in two respects:

    a. increasing the size of a loan (the Vicar Loan) guaranteed by DeMaria without notice or authorization; and

    b. "falsely" witnessing signatures on loan documentation.

2. The unauthorized increases in the Vicar Loan vitiated or discharged DeMaria's guarantee (which is the principal source of liability in monetary terms - $1 Million);

3. The circumstances (standard mortgages over a residence and a cottage) do not justify the need for or appointment of a receiver; and

4. The source of DeMaria's financial woes is the Mareva injunction obtained by Trade Capital over 3 ½ years ago. The action to prove liability, which DeMaria hotly contests,

has not progressed. DeMaria proposes to bring a motion for a hearing in January or February seeking to set aside the Mareva injunction on the basis of the delay in the prosecution of the action. If that motion were granted, DeMaria says he would be in a position to redeem the mortgages, currently in default on the home and the Cottage. On this basis, he argues that any receivership over these properties should at least be stayed until his motion has been decided.

1. (a) <u>Misconduct – Increasing the Vicar Loan</u>

Although DeMaria says he thought the monthly payment he was making to BCU of $7,800 was keeping all of his obligations current, the burden of the evidence suggests DeMaria must have known this was insufficient and that his debt obligations were increasing. The real issue under this head is the alleged self-help exercised by BCU when it used the Vicar Loan (secured against the home and guaranteed by DeMaria to a limit of $1 Million) to fund shortfalls in a completely different account of another company, also owned by DeMaria, which was not secured or guaranteed by DeMaria. By doing so, DeMaria argues, BCU increased Vicar's debt obligation to DeMaria's prejudice and BCU's gain.

I am unable to agree with this argument. What happened was, several cheques totalling about $800,000 were deposited into the account of DeMaria's "Do You Know" account. Before the cheques were cleared, DeMaria instructed BCU to transfer the money from DYK to reduce the line of credit of Vicar. BCU did as instructed. The cheques bounced. BCU reversed the transfers, putting the Vicar LOC back where it was before the NSF cheque amounts were transferred from the DYK to the Vicar account.

I simply cannot agree that this was misconduct or motivated by a conflict of interest by BCU. No money was actually deposited to DYK. Therefore, the "transfer" of this money to reduce the Vicar LOC was really nothing more than an accounting error on the part of BCU. Had it waited for the cheques to clear, no funds would have been transferred and there would never have been a credit of $800,000 to the Vicar account. The problem arose, not from BCU misconduct, but from the fact that the cheques deposited to the DYK account were bad.

1. (b) Misconduct – False Witness

DeMaria relies on the Rule 39.03 examination of the former account manager to argue that the manager, Ms. Bereza, witnessed signatures on loan documents when she did not actually see the party sign.

As I read the evidence, Bereza admitted to doing this once, at DeMaria's request (or at least with his knowledge) in connection with a mortgage given to DeMaria's mother on a property called the Stavebank property.

Bereza seems to say she might have, but was not sure, done this one other time for DeMaria when he was out of town and she was sending him documents electronically for signature.

DeMaria argues that this conduct was dishonest and demonstrates, at the very least, a lack of proper procedure and internal control. He argues that such conduct taints the veracity of all the BCU's evidence and the reliability of its documentation. It shows a failure to protect its customer's interest.

Again, I am unable to agree. The only clearly admitted incident involved DeMaria's mother and a property which has nothing to do with this case. There is no evidence from DeMaria's mother.

This might have happened again, it might not. At worst, however, it appears if it was done on another occasion, it was done to facilitate DeMaria's schedule, being out of town. There is no evidence, or even suggestion, this was done for nefarious purposes. While it is hardly conduct to condone or be proud of, I cannot find in the circumstances of this case that it rises to the level of misconduct sufficient to deny BCU the appointment of a receiver if it is otherwise entitled to one.

2. Discharge of Guarantee

There is no dispute that DeMaria gave a personal guarantee of the Vicar LOC and that his guarantee is limited to $1 Million. However, DeMaria argues, relying on *Bank of Montreal v. Wilder* [1986] 2 SCR para 29, that "any material variation of the terms of the contract which is being guaranteed will discharge the debtors obligation under the guarantee".

DeMaria argues that increasing the LOC in excess of $1 Million was a material variation in the obligation being guaranteed. This increased the risk he would be called on the guarantee (even though the $1 Million limit did not change). Accordingly, his liability under the guarantee has been discharged.

This is no doubt the position at common law. However, a proper analysis of this question requires consideration of the agreements because it is equally trite law that these common law obligations may be varied by contract so long as the "contracting-out language" is clear and unambiguous.

A two stage analysis is required. First, it must be determined whether there was a material alteration. Even if there is, one has to consider whether the documents permit the material alteration.

In this case, they do.

The Vicar LOC agreement was signed by DeMaria as principal of Vicar and personally as guarantor. While it contemplates the amount to be advanced as $1 Million, the agreement expressly provides that BCU may "vary the limit without notice at any time."

The guarantee also signed by DeMaria guarantees the Borrowers indebtedness "on all accounts of the Borrower."

The LOC agreement signed by Demaria expressly permits an increase in the amount loaned to Vicar. The guarantee is an "all accounts" guarantee. The language is clear and unambiguous. The advances from the LOC over $1 Million, even if these were a material alteration, were contemplated by the parties, permitted by the language of the loan agreement and the guarantee and inherent in a continuing, all accounts guarantee subject, of course, to the $1 Million limit on the guarantee obligation itself, *Royal Bank of Canada v. Samson Management*, 2013 ONCA 313 at paras 51-52 and 61-63 (lv. denied).

This hearing, of course, is not a final ruling on the question. No doubt further evidence would be required in the event there are proceedings to enforce the guarantee.

But for purposes of establishing whether or not equitable relief should be denied. I am not prepared to say that the alleged discharge of the guarantee is a sufficient ground to do so.

3. Are Circumstances Such That a Receivership is Necessary?

DeMaria argues that these are standard mortgages on a home and a cottage. The Woodland mortgage does not contemplate a receiver (although the Cottage mortgage does). There is no

reason or need for a receiver – BCU can exercise its mortgage remedies in the usual ways at much less expense and intrusion into DeMaria's affairs.

Under the *CJA* s. 101, the Court has the power to appoint a receiver where it is "just and convenient" to do so. Whether the creditor has a right to appoint a private receiver is a consideration, as it goes to whether the relief is "extraordinary" in nature, among other things. The question ultimately coalesces around whether it is in the interests of the stakeholders, taken as a whole, to appoint a receiver.

Were these the only two parties and the only two properties involved, there would be much to be said for this argument. However, regrettably, there are already two properties under a court appointed receiver's supervision and authority. There is a very active dispute between two known creditors already, Trade Capital and BCU, over adequacy of security and priority issues. More creditors may well emerge. And, there are pending motions by Trade Capital to seek further receivership orders over other assets.

Two factors in particular persuade me that a receivership is appropriate. First, given the number of competing claims, the extent of the ongoing litigation and the number of properties / assets involved, it seems to me critical to move matters "under one roof" so to speak. It seems to me the potential for chaos increases if some proceedings are through court-appointed receivers while others are pursuing private enforcement remedies.

The second is that, given the receiver has already been appointed for two properties, and given the risk of added cost through private enforcement and lack of coordination and oversight, it is not at all clear to me that extending the receiver's powers to these two properties as well is the "high cost" alternative.

For these reasons, I conclude that it is just and convenient to appoint a receiver over the home and the Cottage which secure the mortgage financing advanced by the BCU.

4. Motion to Set Aside *Mareva*

Finally, there is the issue of the Mareva injunction, now extant for 3 ½ years, in circumstances where discovery has not even taken place, and the pending motion to lift, in whole or in part, the Mareva injunction as it relates to DeMaria's property. DeMaria argues that his motion is not frivolous. He also argues, somewhat persuasively given the evidence, that the cause of all his troubles with the BCU is the Mareva injunction obtained by Trade Capital.

DeMaria points out that the arrears (leaving aside the principal amount loaned on the Cottage which is due and owing) is less than $20,000. DeMaria says it would be possible to restructure the Mareva injunction, even if not lifted in its entirety, to prevent the seizure and sale of his home. Thus, Demaria argues that at the very least, enforcement of a receivership order on these two properties should be stayed until his motion to set aside the Mareva has been heard.

Against this, BCU argues that this is speculative and that nothing has prevented DeMaria from seeking tailored relief of this nature for the last 3 ½ years. It is also the case that DeMaria made such applications in 2015, which were unsuccessful on the motion and at the Divisional Court.

Nevertheless, DeMaria argues that the quid pro quo of a Mareva injunction is a speedy trial. A plaintiff cannot obtain a Mareva, tie up the defendant's assets and sit on his rights.

This motion of course, is not before me (it has not even been brought yet) and Mr. Carey, who acts for Trade Capital, took no position on the BCU motion. I have no doubt he will have something to say about setting aside the Mareva when the time comes.

The point is, at this juncture, simply whether enforcement against DeMaria's home and Cottage, which are secured, should be delayed for a few months to see whether some relief might emerge from his proposed motion that would enable him to redeem the mortgage (on his home at least).

In my December 4, 2018 ruling on the Puccini property, I found that the accumulation of tax arrears created a situation akin to a wasting asset. That contributed to my conclusion that the receiver's full powers should be applied to that asset. Here, the evidence is that property tax arrears on Woodland have been paid although property tax arrears (relatively modest) have accrued on the Cottage.

And, while the mortgage payments arrears are less than $20,000 at present, they too are accumulating monthly. Finally, the Cottage mortgage is overdue, so that principal of in the neighbourhood of $180,000 is owing on that mortgage.

Conclusion

In all of the circumstances, I exercise my discretion under the just and convenient test as follows.

The application for the appointment of a receiver over the Cottage is granted. Cottages are luxury items. The mortgage grants BCU the right to a private receiver. The taxes are accruing, the debt is not being serviced. The full amount of the principal is due and owing. No plan has been advanced for how that debt will be satisfied.

The application for the appointment of a receiver over the Woodland home is also granted, but enforcement is stayed for 60 days or the disposition of DeMaria's motion to set aside the Mareva injunction is heard, whichever comes first. The stay is on the following terms:

1. DeMaria shall provide the receiver monthly with evidence that the following are current:

    1) Heat;

    2) Hydro;

    3) Property taxes; and

    4) Property insurance on the Woodland property.

2. Upon the expiry of 60 days or the disposition of the motion to set aside the Mareva injunction (or sooner if necessary) the parties shall schedule a 9:30am appointment to report on the status of the proposed next steps which are to be taken.

Costs

Counsel asked to have the result from today before addressing costs.

Anyone seeking costs should do so by filing a brief submission, not to exceed two typed double spaced pages and cost outline within 7 days.

Anyone wishing to respond to such a request shall do so by filing their own cost outline (had they been seeking costs) together with a brief submission of the same length.

Penny J.