CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp., 2022 ONSC 2777
COURT FILE NO.: CV-22-00674810-00CL
DATE: 20220509

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: KINGSETT MORTGAGE CORPORATION, Applicant

AND:

30 ROE INVESTMENTS CORP., Respondent

BEFORE: Cavanagh J.

COUNSEL: *Richard Swan*, *Sean Zweig*, and *Joshua Foster*, for the Applicant

Symon Zucker, for the Respondent

Ben Frydenberg and *Darren Marr* for Canadian Imperial Bank of Commerce

Chris Armstrong for proposed Receiver, KSV Restructuring Inc.

HEARD: May 6, 2022

ENDORSEMENT

Introduction

[1] The Applicant, Kingsett Mortgage Corporation, brings this application for an order appointing KSV Restructuring Inc. ("KSV") as receiver and manager, without security, of real property owned by the Respondent, 30 Roe Investments Corp., (the "Real Property") and other property as described in the Notice of Application (collectively, the "Property").

[2] For the following reasons, I grant the Applicant's application.

Procedural background

[3] The Real Property consists of nine residential condominium units within a thirty-five story, 397 unit, condominium known as "Minto 30 Roe" located at 30 Roehampton Avenue in Toronto. The Applicant is a second mortgagee in respect of the Real Property.

[4] This application was commenced by a Notice of Application issued on January 7, 2022. The application first came before me on January 17, 2022. At that appearance, the Respondent was not represented by legal counsel. Mr. Raymond Zar, a director and principal of the Respondent, requested an adjournment of the application to allow the Respondent to retain counsel and respond to the application. The request for an adjournment was supported by the first mortgagee, Canadian Imperial Bank of Commerce

("CIBC"). I granted the request for an adjournment and the application was adjourned to be heard on February 22, 2022.

[5] On February 22, 2022, counsel who had just been retained appeared on behalf of the Respondent. There was evidence that the Respondent had made other attempts to retain counsel but had been unable to do so because of conflicts. Counsel for the Respondent requested an adjournment to prepare responding materials and respond to the application. This request was opposed by the Applicant. I granted the Respondent's request for an adjournment and the application was adjourned to March 28, 2022. I directed counsel to agree on a timetable for the application.

[6] A case conference was held before me on March 8, 2022. At that case conference, counsel for the Respondent advised that they were moving for an order removing them as lawyers of record for the Respondent. I was advised that the Respondent would be opposing this motion. A hearing date for this motion was set for April 11, 2022. As a result of the scheduling of this motion, I concluded that the hearing of the Applicant's application seeking the appointment of a receiver needed to be adjourned. The adjournment was opposed by the Applicant. A new hearing date for the application was set for May 6, 2022. In my endorsement, I wrote that "[t]he Respondent is responsible for retaining counsel, if necessary, and following a timetable to meet this hearing date".

[7] The motion by counsel for the Respondent to be removed as counsel of record was heard on April 11, 2022. On that day, Justice Penny released an endorsement and made an order removing counsel for the Respondent as counsel of record. The Respondent was served with the formal Order on April 20, 2022.

[8] A case management conference was held before me on April 20, 2022. This was arranged at the request of the Applicant to set a timetable for the hearing of the application on May 6. I approved a timetable and I directed the parties to comply with it.

[9] The Respondent retained new legal counsel on May 2, 2022. A supplemental affidavit of Mr. Zar was sworn on May 5, 2022. Some other documents relating to the Respondent's efforts to refinance were uploaded to CaseLines, including a letter of intent from Firm Capital Corporation dated May 4, 2022.

Analysis

[10] The issues raised at the hearing of the application were (i) whether the Respondent's request for an adjournment of the hearing should be granted, and, if not, (ii) whether the Applicant's application for the appointment of a receiver should be granted.

Request for adjournment

[11] The Respondent requested an adjournment of the hearing of the application for 30 days to allow time for the Respondent to complete the refinancing of the Real Property and pay out the second mortgage. The Applicant opposed this request. At the hearing, I denied the request for an adjournment. These are my reasons.

[12] The Firm Capital letter of intent is not a binding commitment and is simply an expression of interest in providing refinancing. The Respondent has had many months to arrange to refinance. There is no assurance that if a further adjournment were to be granted for 30 days, as requested, the Respondent would be successful in paying out the indebtedness secured by the applicant's second mortgage.

[13] I granted adjournments to allow the Respondent to retain counsel and to accommodate the motion by former counsel to move to be removed as counsel of record. These adjournments were opposed by the Applicant. I set the hearing date for this application on February 22, 2022 that would having regard to the motion by former counsel for the Respondent to be removed as counsel of record.

[14] In his May 5, 2022 affidavit, Mr. Zar gives evidence of his attempts to retain counsel for the Respondent. According to his affidavit, Mr. Zar did not contact any prospective counsel between February 22, 2022 and April 11, 2022. After April 11, 2022, Mr. Zar contacted several counsel who had conflicts or were not available. Mr. Zucker was retained on May 2, 2022.

[15] In my view, the Respondent has not acted reasonably and in accordance with my February 22 and March 8, 2022 endorsements by not seeking to identify counsel who could represent the Respondent after February 22, 2022 and waiting until April 11, 2022 to contact new counsel who would be available to replace former counsel for the Respondent, if the motion by former counsel to be removed were to succeed. I made it clear in my March 8, 2022 endorsement that May 6, 2022 was a firm date, and that the Respondent was expected to act diligently to ensure that counsel was retained and able to meet this hearing date. In my view, there was ample time for the Respondent to do so if efforts to contact counsel who could act on this matter were made between February 22 and April 11, 2022.

[16] The Applicant's mortgage loan has been past due for many months. The Applicant is entitled to seek remedies to enforce payment of this loan. In the circumstances, I concluded that it would not be just to the Applicant to grant a further adjournment to accommodate the Respondent's continuing efforts to refinance. The request for an adjournment was denied.

Has the Applicant shown that it would be just or convenient for a receiver to be appointed?

Loan and security

[17] The Applicant is a party to a commitment letter dated March 29, 2019 with the Respondent pursuant to which the Applicant agreed to provide, among other things, a non-revolving demand loan secured by a second mortgage against the Real Property. This loan was originally advanced on April 8, 2019.

[18] The parties entered into four amendments to the original commitment letter which, among other things, increased the loan facility from $1,500,000 to $1,875,000 and provided three extensions to the maturity date to December 1, 2021. The Applicant's evidence is that as at December 13, 2021, the total indebtedness under the commitment letter, as amended, is $1,895,958.85.

[19] As general and continuing security for the payment and performance of its obligations under the commitment letter, as amended, the Respondent granted the Applicant various security including (a) a second charge/mortgage in respect of the Real Property securing the principal amount of $1,875,000, (b) a General Assignment of Rents and Leases dated April 8, 2019 pursuant to which, among other things, the Respondent assigned to the Applicant all of its rights in and to the Leases and Rents (as defined in the Assignment of Rents) in respect of the Real Property, (c) an Assignment of Material Agreements dated April 8, 2019, (d) a General Security Agreement dated April 8, 2019 pursuant to which, among other things, the Applicant was granted a security interest in all of the present and future undertakings and property of the Respondent which is located at or related to or used or required in connection with or arising from or out of the Charged Property (as defined in the second mortgage).

Default by Respondent

[20] The original maturity date of the loan facility was in April 2021. The Applicant granted extensions to the maturity date to and until December 1, 2021. In the amendment letter dated October 25, 2021 in respect of the fourth amendment, the Respondent acknowledged that "there shall be no further extensions of the Term beyond December 1, 2021".

[21] On December 1, 2021, the Respondent failed to make its monthly interest payment. By letter dated December 6, 2021, the Applicant advised the Respondent that (a) as result of the defaulted payment of interest, the loan facility was in default and an event of default had occurred under the loan documents; (b) the December 1, 2021 interest default was particularly concerning because it was not the first interest-related default under the loan facility; (c) the loan facility matured on December 1, 2021; and (d) unless the Respondent paid the December interest payment by 4 o'clock p.m. on December 8, 2021, the Applicant would demand the immediate repayment of the loan facility and enforce the security it held.

[22] On December 13, 2021, the Applicant issued a demand letter to the Respondent advising that the mortgage was in default and demanding repayment of the indebtedness. The demand letter was delivered to the Respondent contemporaneously with a Notice of Intention to Enforce Security in accordance with s. 244 of the *Bankruptcy and Insolvency Act*. The Applicant demanded payment of $1,895,958.85.

[23] Mr. Zar submits that there is evidence that the Applicant implicitly agreed to extend the loan until April 1, 2022 by debiting the extension fee from the Respondent's account on January 4, 2022, and again in February 2022, and leaving the interest rate at 9%. Mr. Zar's evidence is that the Applicant only returned the extension fee after he brought it to the Applicant's attention in settlement talks. He states that it was a shock and surprise to him when he heard about the application seeking the appointment of a receiver.

[24] In the affidavit of the Applicant's Senior Director with responsibility for this loan, Daniel Pollack, he explains that the Applicant's finance department made an error in debiting the extension fee. A draft fifth amendment to the commitment letter (that, if agreed upon, would have extended the maturity date to January 1, 2022) had had been under

consideration and would have provided for an extension fee. The draft fifth extension was not executed and did not become effective. When the error was discovered, the Applicant's finance department was instructed to correct the error (which was done when the Applicant debited the Respondent's account for the December interest payment, less the extension fee).

[25] I accept the evidence from Mr. Pollack that the extension fee was debited in error and, when the error was discovered, it was corrected. I do not accept the Respondent's submission that by debiting the extension fee in error, the Applicant should be taken to have implicitly agreed to extend the maturity date for the mortgage until April 1, 2022. I note that, in any event, April 1, 2022 has passed, and the mortgage debt remains unpaid.

[26] Section 243 (1) of the *BIA* and s. 101 of the *Courts of Justice Act* provide that the Court may appoint a receiver where it is just or convenient to do so.

[27] In determining whether it is just or convenient to appoint a receiver, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, at para. 11.

[28] In *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd*., 2013 ONSC 6866, Morawetz J., at para. 27, accepted the submission that while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. Morawetz J., at para. 28, accepted that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have a receiver appointed.

[29] In *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, Koehnen J., at paras. 43-44, held that when the court is dealing with a default under a mortgage, the relief becomes even less extraordinary, citing *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511, at para. 20. Koehnen J., at para. 45, referenced four additional factors set out by Farley J. in *Confederation Life*, at paras. 19-24, that the court may consider in determining whether it is just or convenient to appoint a receiver:

a. the lenders' security is at risk of deteriorating;

b. there is a need to stabilize and preserve the debtors' business;

c. loss of confidence in the debtors' management; and

d. positions and interests of other creditors.

[30] In the third and fourth amendments to the commitment letter, the Respondent consented to the Applicant's appointment of a receiver, either privately or court appointed, in the event of a default by the Respondent beyond the applicable cure period. In the General Security

Agreement, the Respondent agreed that after the occurrence of an event of default, the Applicant will have the right to appoint a receiver.

[31] On this application, there is no evidence that the second mortgage against the Real Property is at risk of deteriorating. The evidence is that the condominium units are rented and rents are being paid. The Respondent is continuing to pay interest on the mortgage debt. The first mortgagee, CIBC, is willing to continue to defer and forbear from taking any enforcement steps in connection with its mortgages for a period of thirty days commencing May 6, 2022, in order to allow the Respondent an opportunity to complete its refinancing with Firm Capital Corporation. CIBC does not take a position in opposition to the application.

[32] Mr. Pollack has stated in his affidavit that the Applicant has lost confidence in the Respondent's management to continue to satisfy the Respondent's obligations, obtain refinancing and manage the Real Property. I do not regard this to be a statement in the air and without objective evidentiary support, as the Respondent submits. The Applicant's mortgage loan matured on December 1, 2021 and the Respondent has had five months to refinance but has not done so. The Respondent submits that the appointment of a receiver is an extreme remedy that is not needed when "less aggressive" remedies are available, but the only alternative course of action the Respondent submits should have been taken was for the Applicant to have commenced private power of sale proceedings. The Applicant was under no obligation to do so, and has brought this application to seek a remedy to which the Respondent has contractually agreed.

[33] The Respondent submits that there is evidence that the Applicant is not acting in good faith by seeking to appoint a receiver. In support of this submission, the Respondent relies on the evidence of Mr. Zar in his May 5, 2022 affidavit that in discussions between his former lawyer and a lawyer for the Applicant, the Applicant's lawyer advised "in highly defamatory terms what his clients thought of me and wanted to do to me". Mr. Zar states that it was clear to him and his former counsel that the Applicant is using the application to appoint a receiver to cause him significant harm, such that this application is excessive and unnecessary, and is brought in bad faith.

[34] The Applicant's application was brought after extensions of the maturity date for the loan had been given, the mortgage debt had matured, and demands for payment had been made. This, objectively, provides a good faith basis for this application. The information given by Mr. Zar in his affidavit (that he obtained from the Respondent's former counsel) of what was said in the telephone conversation in question is vague and accompanied by Mr. Zar's characterization of what was said. Mr. Zar does not recite any particular statements that were made by the Applicant's counsel to the Respondent's former counsel. If Mr. Zar's hearsay evidence is admitted into evidence notwithstanding rule 39.01(5) of the *Rules of Civil Procedure*, it is far from sufficient to allow me to draw the inference I am invited to make, that the Applicant lacks good faith in bringing this application. I do not draw this inference.

[35] The Applicant's loan has been overdue since December 1, 2021. The Applicant is entitled to take steps under its security to enforce payment of the indebtedness owing to it. The

Applicant is not required to do so only through private power of sale proceedings. The appointment of a receiver will provide an effective and appropriate means to realize on the mortgage security by a court-appointed officer who owes duties to all stakeholders.

[36] I have considered the relevant circumstances and I am satisfied that the Applicant has shown that the appointment of receiver is just and convenient in the circumstances.

Disposition

[37] For these reasons, I grant the Applicant's application.

[38] Order to issue in form of Order signed by me today.

Cavanagh J.

Date: May 9, 2022