



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-23-00696362

DATE: 19 March 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: FIRST SWISS MORTGAGE CORP

BEFORE JUSTICE: Steele

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
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Joe Latham	Dancap Private Equity Inc.	jlatham@goodmans.ca
Steve Graff	Brian Kremer, Lorne Rose and Samaron Holdings Inc.	sgraff@airdberlis.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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Richard Goldhar	Trustee	rgoldhar@goldhar.ca
Sean Zweig , Mitch Vininsky	KSV Restructuring Inc. Proposed Receiver	zweigs@bennettjones.com mvininsky@ksvadvisory.com
Maria Konyukhova	Jared Green, Dan Baum, Rose Baum	mkonyukhova@stikeman.com
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ENDORSEMENT OF JUSTICE STEELE:

1. This is an application under section 37 of the Mortgage Brokerages, Lenders and Administrators Act, 2006 (the “MBLAA”) by the Chief Executive Officer of the Financial Services Regulatory Authority (“FSRA”) for the appointment of KSV Restructuring Inc., as receiver, over the assets, property, and undertakings of First Swiss Mortgage Corp. (“First Swiss”).
2. FSRA brings this receivership application on an urgent basis, as a result of recent and very serious allegations of wrongdoing by First Swiss. Among other thing, it is alleged that First Swiss:
 - Under-reported the value of mortgages under administration in filings with FSRA;
 - Discharged mortgages represented to have been held in trust for individual investors, without notice to the investors and without repayment to them;
 - Failed to ever register on title certain mortgages that First Swiss represented were entered into on behalf of investors;
 - Ceased operations without accounting to investors for their funds; and
 - Declared itself to be insolvent and delivered a bankruptcy statement of affairs that does not account for investors’ funds.

Background

3. First Swiss is licensed as a mortgage brokerage and a mortgage administrator under the MBLAA. Its business is regulated by FSRA.
4. Beginning in March 2023, FSRA received a series of complaints concerning First Swiss and its representatives from certain parties that had invested in mortgages through First Swiss.
5. First Swiss filed an assignment in bankruptcy on March 15, 2023. The trustee in bankruptcy is not opposing this application.

Analysis

Jurisdiction of Court of Appoint Receiver

6. The MBLAA provides in para. 37(1) and (2) that:
 - (1) The Chief Executive Officer [of FSRA] may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of property that is in the

possession or under the control of a licensee or person or entity who the Chief Executive Officer believes, on reasonable grounds, is or was required to have a licence.

(2) If the court is satisfied that the appointment is in the public interest, the court may make the appointment and may impose such conditions as the court considers appropriate.

7. The Court also has authority under section 101 of the *Courts of Justice Act* to appoint a receiver or receiver and manager where it is just or convenient to do so.

Impact of Bankruptcy Proceedings

8. Section 69.3 of the BIA provides that “on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.” “Creditor” is defined in the BIA to mean “a person having a claim provable as a claim under [the BIA].”

9. FSRA submits that as it is not a creditor of First Swiss, and this proceeding does not involve the recovery of a claim provable in bankruptcy, no stay should apply. I agree. The language in the BIA contemplates a stay by creditors. It does not, however, contemplate that the regulator’s power to apply to the Court to appoint a receiver in circumstances where it may be in the public interest to do so is stayed.

10. FSRA submits that if the stay under section 69.3 of the BIA applies, it should be lifted under section 69.4 to allow the application to proceed. Under section 69.4 of the BIA, a creditor who is affected by a stay may apply to the Court for a declaration that the stay provisions no longer operate in respect of that creditor and the Court may make such a declaration if it is satisfied that (a) the creditor is likely to be materially prejudiced by the continued operation of the stay; or (b) that it is equitable on other grounds to make the declaration. Because FSRA is not a creditor and the stay, therefore, does not apply, it is not necessary to resort to section 69.4 of the BIA to lift a stay.

Appointment of Receiver

11. FSRA filed affidavit evidence from various investors in First Swiss. The evidence of Rose Baum, an investor, was that:

- In February 2023, she did not receive the required monthly interest payment from First Swiss in respect of her mortgage investments for the month of January 2023.
- Certain of the mortgages she invested in through First Swiss were never registered on title against the subject properties.
- Several of her active mortgage investments had been discharged without her knowledge. First Swiss has never notified her that these mortgages were discharged, nor has First Swiss repaid her the principal. Instead, she continued to receive monthly interest payments in respect of the discharged mortgages up until December 2022.
- On March 9, 2023, she received a notice from First Swiss which stated, among other things, that all payments and transactions were halted until further notice and First Swiss was unable to respond to emails or calls promptly due to a potential restructuring process.

12. Similar evidence was filed by investors Daniel Baum and Jared Green.

13. The evidence of the Chief Operating Officer of Dancap Private Equity Inc. (“Dancap”), the largest single investor in First Swiss, was as follows:

- As at December 31, 2022, Dancap has 36 mortgage investments in Ontario and 24 mortgage investments in British Columbia through First Swiss as broker and administrator, for a total principal amount of approximately \$6.7 million.
- Dancap has not received a distribution in respect of its investments for the December 20, 2022 statement or for any later periods, but had previously received payments for all monthly statements.
- Dancap’s counsel undertook real property searches of the various properties it had mortgages over. As a result of the searches, Dancap learned that of the 36 Ontario mortgages, only 8 were still actively registered against the subject properties, 6 were never registered, and the remaining 22 mortgages had been discharged between September of 2017 and August of 2022.
- Dancap was never advised of any of these mortgage discharges or cancellations. Further, for months, and in some cases years, First Swiss continued to report monthly interest payments on properties where the mortgage had been discharged or cancelled.
- Dancap supports FSRA in its request to appoint a receiver to, among other things, take control of First Swiss’ bank accounts, assets and its books and records.

14. The Court heard submissions from FSRA. FSRA proposes that a receiver be appointed with all the necessary powers to investigate and report back to the Court within 2-3 weeks. At that time, there would be another Court hearing to determine next steps. FSRA states that at this point there is much that is unknown. However, the claims to date are approximately \$13 million, about half of which are attributed to Dancap. FSRA further states that trust claims may also arise.

15. FSRA submits that it is justified and in the public interest for the Court to grant the requested relief in the circumstances.

16. First Swiss filed a letter indicating that it was not taking a position on FSRA’s application to have a receiver appointed “except to express the concern that the appointment of the receiver will likely be costly and will eat into any money that investors could recover from the corporation.”

17. Certain of the investors also made submissions.

18. Winnick Realty Corp (“Winnick”) and Winrep Holdings Inc. (“Winrep”) indicated that, although they do not take a position on the appointment of the receiver, they have issues with the proposed order. Specifically, it is proposed that the receiver would be appointed as receiver of all the assets of First Swiss, including “any assets or property held by [First Swiss] in trust for any third party.” Winnick and Winrep argue that their trust property should not be the subject matter of the order. The issue is that First Swiss investors generally invested such that First Swiss was holding the mortgage as trustee for the benefit of the investor (the beneficial owner). However, as noted by Dancap, there are concerns that the trust funds were commingled, among other things.

19. Winnick and Winrep referred to *Ontario (Securities Commission) v. Consortium Construction Inc.*, 1992 CarswellOnt 176, 11 C.P.C. (3d) 352 (ONCA). The Court of Appeal has made it clear that the Court's discretion to make an order that covers trust assets in a receivership, "should be sparingly exercised."
20. Based on the jurisprudence, I am satisfied that the Court can make the order covering trust property: *Consortium*, at para. 10. I understand that this discretion should be used sparingly by the Court. However, given the circumstances, I am satisfied that this is a situation where the Court should exercise its discretion. In particular, the Court was advised that the investors are aware of at least one instance of potential overlap of trusts between investors. There is much that is unknown at this stage regarding how the investors' assets have been held by First Swiss, including whether there was commingling of trust funds. There may be numerous competing trust claims.
21. Concerns were raised regarding the breadth of the powers proposed to be granted to the receiver under the draft order. Certain creditors were concerned that the proposed powers are far too expansive for this stage of the process. I agree. At this stage, the receiver requires expansive investigatory and examination powers, but not, for example, the power to sell. I have amended the powers in the Order granted. If the receiver is of the view that it requires another power not provided under the amended Order in the next 2 weeks, which I do not anticipate it will, it may return to Court on an urgent basis before me.
22. The other concerns raised by investors related primarily to the costs of the investigation, which FSRA is initiating. Under section 37(5) of the MBLAA, the appointee's fees and expenses are in the discretion of the Court. As noted above, at this stage FSRA proposes an interim order for a limited time period for the receiver to investigate then return to Court to report on April 3, 2023. In my view the scope of the mandate is reasonable.
23. On the record before me and having heard the oral submissions of counsel for FSRA and certain investors, I am satisfied that it is appropriate and in the public interest to appoint a receiver in the circumstances. However, the receiver will be required to return to Court on April 3, 2023 at 10 am to report to the Court the results of its preliminary investigation.
24. Order to go in accordance with the attached.

