



SUPERIOR COURT OF JUSTICE

ENDORSEMENT

COURT FILE NO.: CV-23-00696362-00CL DATE: May 29, 2023

NO. ON LIST: 6

TITLE OF PROCEEDING: CHIEF EXECUTIVE OFFICER V FIRST SWISS MORT CORP

BEFORE: **Madam Justice STEELE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Sean Zweig / Thomas Gray	Lawyers for the Receiver	zweigs@bennettjones.com / grayt@bennettjones.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Cullen, Laura	Lawyer for FSRA	LauraC@chaitons.com
Mitch Vininsky, Nisan Thurairatnam	KSV Restructuring Inc.	mvininsky@ksvadvisory.com; NThurairatnam@ksvadvisory.com
Mark Adilman	Lawyer for Winnick Realty Corp. and Winrep Holdings Inc.	madilman@mblaw.ca
Yana Papanyan	Former lead underwriter of First Swiss	yana.pa2021@gmail.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Kyriazakos, George	represents an investor, Cedric Daley	George@gklawfirmmpc.com

ENDORSEMENT

[1] This is a motion (heard May 19, 2023 via Zoom) by KSV Restructuring Inc. ("KSV"), in its capacity as the receiver of all of the assets of First Swiss Mortgage Corp. ("First Swiss") for:

- An order (the "Ancillary Order"), among other things:
 - i. directing each borrower with an active mortgage registered in favour of the Company (collectively, the "Borrowers") to pay to the Receiver (and not any other party) all principal, interest and other payments as and when due under such Borrower's mortgage;
 - ii. directing Shinhan Bank Canada ("Shinhan"), which the Receiver understands to have been the bank where the Company and 6807771 Canada Corp. ("680"), the Company's sole shareholder, most recently held their accounts, to provide certain information requested by the Receiver as it relates to the Company's accounts and those of 680;
 - iii. directing Bank of Montreal ("BMO") (i) to provide the Receiver with all available information regarding the Company's and 680's historical accounts with BMO since January 1, 2014, and (ii) to advise the Receiver whether account 00022/1565844 is owned or controlled by Reza Nezami-Nia, the Company's sole named director, or one of the Company's other principals, and if so, to provide the Receiver with account statements for the last 12 months, or such longer period as the Receiver may request;
 - iv. directing Mr. Nezami-Nia, 680, and the Company's auditor, Syed A. Raza Professional Corporation (the "Auditor"), to provide the Receiver with all nonprivileged books and records in their possession related to the Company and 680;
 - v. directing that Mr. Nezami-Nia, the Auditor and any other party having in its possession or control books or records relating to the period since January 1, 2014 (the "Relevant Time"), for any entity in which Mr. Nezami-Nia is or was during the Relevant Time, whether directly or indirectly, a director, officer, majority shareholder, partner, or controlling mind of any kind, subject to privilege exceptions;
 - vi. directing Mr. Nezami-Nia to (i) provide any electronic devices (including any cellphone and laptop) he used in connection with the Company's business to Kroll Consulting Canada Co. ("Kroll") or another third party information technology specialist agreed upon between the Receiver and Mr. Nezami-Nia to allow for both devices to be imaged and the data (the "Data") uploaded to Relativity or another ediscovery platform acceptable to the Receiver and Mr. Nezami-Nia; and (ii) provide the Data to the Receiver, except for any correspondence with a lawyer or law firm;
 - vii. directing Mr. Nezami-Nia, Patrick Dookram (the Company's former Vice President of Trading and Portfolio Management), Yana Papayan (the Company's former Lead Underwriter) and/or any other parties with information relevant to this proceeding to attend for an examination, with or without counsel, if served with a Notice of Examination

- by the Receiver, and to provide the Receiver at such examination with any non-privileged information requested by the Receiver related in any way to the Company and/or 680;
- viii. directing Mr. Nezami-Nia to prepare and provide to the Receiver a sworn net worth statement and submit to examinations under oath in respect of same;
 - ix. declaring that the Investors do not have trust claims against the Company, including in respect of mortgages registered by the Company;
 - x. approving the fees of the Receiver and its counsel, Bennett Jones LLP ("Bennett Jones"); and
 - xi. approving the Receiver's activities as set out in the Second Report of the Receiver dated May 12, 2023 and the First Report of the Receiver dated March 31, 2023. 2.
- An order (the "Amended Appointment Order"), among other things:
 - i. approving the loan agreement entered into between the Receiver and certain Investors (the "Loan Agreement"), and certain related relief;
 - ii. amending paragraph 30 of the Appointment Order to include the fees and disbursements of Marciano Beckenstein LLP ("Marciano"), counsel to one of the Investors, incurred up to March 27, 2023; and
 - iii. granting the Receiver certain additional typical powers that were removed from the Appointment Order to limit the Receiver's initial mandate.

[2] At the outset, the Receiver advised that certain issues pertaining to Mr. Nezami-Nia have been adjourned on consent. The schedule for those items is set out below.

Amended Appointment Order

[3] There was no objection raised to the relief sought with regard to the amendment of the appointment order. Among other things, the Receiver asks that certain powers that were not included when the appointment order was granted, which are typical in receiverships, be included. Given that the Receiver's role has expanded, it is appropriate to include the powers that are typically granted.

[4] The Receiver indicated that following the last Court attendance, Dancap, the largest investor, formed an ad hoc investor advisory committee which consists of a representative from Dancap and representatives from four other large investors (the "Advisory Committee"). The Receiver worked with the Advisory Committee to prepare a loan agreement, which was provided to all known investors to present the opportunity and allow them to participate. It provides for a loan of up to \$400,000 at a 15% interest rate, compounded semi annually, and payable on maturity. The loan obligations are to be secured by the Receiver's borrowing charge and the loan principal will rank senior to all other creditors (*pari passu* with FSRA's loan), other than the Receiver's charge for fees. The interest of the loan will rank immediately following the loan principal/FSRA loan.

[5] The Receiver advised that it has received approx. \$335,000 of the \$400,000 from about 30 lenders.

[6] The Receiver recommends that the Court approve the loan agreement for numerous reasons, including:

- The Loan Agreement was developed with and is supported by the Investor Advisory Committee:
- All known Investors were provided the opportunity to participate in the Loan; and
- The Loan will allow the Receiver to further advance this proceeding.

[7] I am satisfied that the Loan Agreement is appropriate.

Ancillary Order

[8] The relief sought (other than the adjourned relief) in the Ancillary Order is generally unopposed other than the direction for Yana Papanyan to attend at an examination with or without counsel if served with a Notice of Examination and to provide any non-privileged materials. This is discussed below. I also requested additional information from the Receiver regarding the request for a declaration that investors do not have trust claims against the company, which is also addressed below.

[9] The Receiver seeks for greater certainty language in the Order to make it easier for borrowers to understand who they are to pay. In the circumstances, where there are multiple borrowers confused as to who they should be paying, this is an appropriate order to make.

[10] The Receiver seeks information from Shinhan Bank and BMO in respect of certain accounts. No person, including Mr. Nezami-Nia, opposes this relief.

Attendance at Examinations/production of information

[11] Under the *Mortgage Brokers, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29, at s. 37(2), the Court may impose such conditions as the court considers appropriate.

[12] Under the initial appointment order, the Receiver was given broad powers, including the power:

3(d) to have access to all electronic storage and record databases, including but not limited to, icloud, email inboxes, dropbox, and to examine and make copies of any document or record contained therein;

3(g) to deliver notices of examination to and examine any person (including, without limitation, Reza Nezami, Patrick Dookram, and any other officer, director, or employee of the Debtor) under oath who has knowledge of the business and affairs of the Debtor;

[13] The initial order gives the Receiver the power to examine any person under oath, who has knowledge of the business and affairs of the Debtor, which would include Yana Papanyan. The Receiver wants further clarity in the Order regarding the requirement to attend at examinations where a Notice of Examination is served, whether with or without counsel. As noted above, Yana Papanyan, has indicated that she will not attend an examination without counsel.

[14] Ms. Papanyan did not provide any legitimate basis for her refusal to attend at an examination.

[15] The Receiver, in its Second Report, notes that there is a significant discrepancy between the active mortgage registrations held by the Company compared to the value of the mortgages that the Company had been reporting. Further, the Receiver states that there have been inconsistencies related to the information

provided by Mr. Nezami-Nia compared with the information provided by Mr. Dookram. Accordingly, the Receiver considers it appropriate to examine parties under oath.

[16] Ms. Papayan has informed the Receiver that she cannot afford to retain counsel and she did not qualify for legal aid. Ms. Papayan asks that the estate pay for her counsel. The Receiver's position is that this is not a cost that ought to be borne by the estate.

[17] I agree with the Receiver that this is not a cost that the estate should be required to cover.

Declaration re Trust Claims

[18] The Receiver asks the Court to grant declaratory relief in respect of the non-existence of trust claims and seeks the following order:

This court orders and declares that the parties that advanced funds to the Debtor in respect of intended mortgage investments do not have valid trust claims against the Debtor, including in respect of any mortgages registered by the Debtor.

[19] I requested additional submissions from the Receiver regarding its request to include this relief. The Receiver states that it is not uncommon for courts to grant declaratory relief in the context of insolvency proceedings, and cites the following examples:

- Declaring that certain claims against a debtor company were "equity claims" [*Sino-Forest Corp., Re*, 2012 ONSC 4377; Order dated July 27, 2012, *Sino-Forest Corp., Re*, Court File No. CV-12-9667-00CL].
- Declaring that certain directors subject to litigation had the benefit of certain releases [*Fraser Papers Inc., Re*, 2012 ONSC 4882].
- Declaring that receiver's demand on a performance bond was proper and declaring that the performance bond obliged the counterparty to elect one of four options in the performance bond [Order dated September 25, 2019, *In the Matter of the Receivership of 2423402 Ontario Inc.*, Court File No. CV-18-610236-00CL].

[20] The Receiver did not provide the Court with an example of another matter where declaratory relief such as that sought in respect of the potential trust claims has been previously granted.

[21] The Receiver submits that similar to the *Sino-Forest* case, (i) it has been clear since the outset of these proceedings that this issue – whether the claims of Investors would be considered trust claims – would have to be determined, and (ii) no party can be said to be prejudiced if this threshold issue is determined at this time because the threshold issue does not depend upon a determination of quantification of any claim.

[22] However, *Sino-Forest* is different. *Sino-Forest* was proceeding under the *Creditors' Companies Arrangement Act* ("CCAA"). The company sought an order directing that certain claims, resulting from the ownership of an equity interest in SFC, were "equity claims" as defined in s. 2 of the CCAA. The Court was essentially asked to make a determination whether certain claims were creditor claims or equity claims. This issue was put squarely before the Court with a full record. That is not the case here.

[23] The Receiver states that granting this declaratory relief will provide certainty regarding the use of funds repaid by borrowers, avoid potential costly disputes in the future, and allow the Receiver to focus its efforts on its investigation and recovery for the benefit of the Investors and other creditors.

[24] While I understand that a declaration of the type requested may be desirable, based the record before me I am unable to grant this declaration. Whether a trust exists at law is determined based on whether the three certainties have been met. If there is a trust relationship, the beneficiary of the trust would presumably have certain rights. There are documents that have previously been provided to the Court that suggest there may have been an intention to create one or more trust relationships (see, for example exhibit A to the affidavit of Rose Baum, dated March 15, 2023, exhibit C to the affidavit of Daniel Baum, dated March 15, 2023, exhibit A to the affidavit of Jared Green, dated March 15, 2023, exhibit A to the affidavit of Elias Toby, dated March 15, 2023). Paragraph 12 of the affidavit of Daniel Baum states: "Pursuant to the terms of the mortgage loan servicing agreement and the trust and beneficial owner agreement dated April 18, 2011 ..., I was the beneficial owner of the Heatherleigh Mortgage. These terms reflect First Swiss' representations that investors fully owned the mortgages which they invested in."

[25] The Receiver's First Report and Second Report notes that "the accounts were not used in a manner that would be consistent with a trust." There may be issues of breaches of trust related to the handling of trust funds (including funds being improperly applied or transferred between accounts), but that does not negate a trust relationship if one exists.

[26] The First Report of the Receiver provides in section 6.3(d) (and the Second Report in section 9(3)(e)) that "to the extent that strict rules of a trust did exist ... the Receiver is aware of case law providing that the application of strict legal rules has been set aside in favour of rateable sharing in certain circumstances, including the existence of a Ponzi scheme." This case law may be of assistance to the Court.

[27] At the very least, it is premature for the Court to make this declaration and, it certainly cannot be made on the record before me.

Receiver's Fees and Expenses

[28] The Receiver seeks approval of its fees and expenses and those of its counsel. The fees of the Receiver and Bennett Jones from the commencement of the proceeding to April 30, 2023 total \$126,766 and \$141,292, respectively, plus disbursements and HST. Fee affidavits have been provided.

[29] Under s. 37(7) of the *Mortgage Brokers, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 the receiver's fees and expenses are in the discretion of the Court.

[30] In determining whether to approve the fees and disbursements in a receivership under the *Bankruptcy and Insolvency Act*, the Court should consider whether the fees incurred in carrying out the receivership were fair and reasonable taking into consideration, among other things, the factors set out in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at paras. 33 and 45. These factors include the nature, extent and value of the assets, the complications and difficulties encountered, the Receiver's knowledge and skill, the responsibilities assumed and the result of the Receiver's efforts. In my view, these factors ought to similarly apply to a receivership under the MBLAA.

[31] There was no opposition raised to this relief. I note that Ms. Papanayan referred to the quantum of the legal costs of the Receiver and its counsel when making her request for payment of legal fees out of the estate.

[32] The Receiver is of the view that Bennett Jones' hourly rates are consistent with the rates charged by other law firms practicing in the restructuring area in Toronto. The Receiver is of the view that its fees are reasonable and appropriate in the circumstances.

[33] I am satisfied that the fees and expenses are fair and reasonable.

Adjournment of Certain Relief

[34] The Receiver and Mr. Nezami-Nia have agreed to adjourn the following relief that was originally sought by the Receiver as part of the Ancillary Order (collectively, the "Adjourned Relief"):

(a) directing that Mr. Nezami-Nia, the Auditor and any other party having in its possession or control books or records relating to the period since January 1, 2014 (the "Relevant Time"), for any entity in which Mr. Nezami-Nia is or was during the Relevant Time, whether directly or indirectly, a director, officer, majority shareholder, partner, or controlling mind of any kind, to provide those books and records to the Receiver, subject to privilege exceptions;

(b) directing Mr. Nezami-Nia to (i) provide any electronic devices (including any cellphone and laptop) he used in connection with the Company's business to Kroll Consulting Canada Co. ("Kroll") or another third party information technology specialist agreed upon between the Receiver and Mr. Nezami-Nia to allow for both devices to be imaged and the data (the "Data") uploaded to Relativity or another e-discovery platform acceptable to the Receiver and Mr. Nezami-Nia; and (ii) provide the Data to the Receiver, except for any correspondence with a lawyer or law firm;

(c) directing Mr. Nezami-Nia to attend for an examination, with or without counsel, if served with a Notice of Examination by the Receiver, and to provide the Receiver at such examination with any non-privileged information requested by the Receiver related in any way to the Company and/or 680;

(d) directing Mr. Nezami-Nia to prepare and provide to the Receiver a sworn net worth statement and submit to examinations under oath in respect of same.

[35] The Receiver and Mr. Nezami-Nia have agreed to the following timetable for the return of the motion in respect of the Adjourned Relief:

- Responding materials of Mr. Nezami-Nia - May 31 by 5:00 p.m.
- Reply materials of the Receiver, if any - June 5
- Cross-examination of affiant(s) by counsel to the Receiver - June 7
- Submission of written interrogatories to Receiver on its Reports - June 7 [should the Receiver's reply materials include affidavit evidence, counsel to Mr. Nezami-Nia reserves the right to cross examine on any such affidavit on June 7]
- Receiver's responses to written interrogatories - June 12
- Written follow up questions regarding Receiver's responses to written interrogatories - June 15

- Factum of the Receiver - June 16
- Receiver's written response to follow up questions - June 19
- Factum of Mr. Nezami-Nia - June 23
- Reply factum of the Receiver, if any - June 27
- Hearing of motion for Adjourned Relief – **July 27 at 10 am (2 hours)**; provided that if that date is not acceptable to the parties, they may reach out to the trial coordinator to reschedule.

[36] Orders attached.



Madam Justice STEELE

Date: May 29, 2023