

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

GENERX (BYWARD HALL) INC.

Respondent

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*
and Section 101 of the *Courts of Justice Act*

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on **Thursday June 15, 2017**, at 9:30 a.m., before a judge presiding over the Commercial List at 330 University Avenue, 7th Floor, Toronto ON, M5G 1R7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date _____ Issued by _____
Local Registrar

Address of Superior Court of Justice
court office: 330 University Avenue, 7th Floor
Toronto, ON M5G 1R7

TO: SERVICE LIST

APPLICATION

1. The Applicant, KingSett Mortgage Corporation (“**KingSett Mortgage**”) makes application for:
 - (a) if necessary, an order abridging the time for service and filing of this Notice of Application and the Application Record, validating service effected to date, and an order dispensing with service thereof on any party other than the persons served;
 - (b) an order appointing KSV Kofman Inc. (“**KSV**”) as receiver (in such capacities, the “**Receiver**”), without security of certain real property and related assets of the Respondent further described in the supporting affidavit to this application (the “**Property**”), as further described below;
 - (c) an order approving the Sale Process as described in the Receiver’s Pre-Filing Report (the “**Pre-Filing Report**”);
 - (d) an order authorizing and approving the Receiver entering into an agreement with SVN Rock Advisors Inc. to market and sell the Property, as described in the Pre-Filing Report;
 - (e) against the Respondent, the costs of this application, plus all applicable taxes, on a full indemnity basis; and
 - (f) such further and other relief as to this Honourable Court may seem just.

2. **THE GROUNDS FOR THE APPLICATION ARE:**

- (a) the Respondent, formerly named Textbook (256 Rideau Street) Inc. (“**Rideau**”), is the registered owner of the properties municipally known as 256 Rideau Street, Ottawa and 211 Besserer Street, Ottawa (the “**Real Property**”);
- (b) the Real Property is vacant land upon which the Respondent intended to construct a student residence;
- (c) KingSett Mortgage provided financing to Rideau for the purpose of acquiring the Real Property, which is secured by a first mortgage and a second mortgage registered against title (the “**Mortgages**”), and other security including but not limited to, a General Security Agreement;
- (d) on or about February 1, 2017, Rideau defaulted in meeting its payment obligations under the Mortgages;
- (e) despite written demand for payment, service of a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act* (“**BIA Notice**”) and service of Notices of Sale under Mortgage pursuant to the *Mortgages Act*, R.S.O. 1990, c. M.40 (the “**Notices of Sale**”), the Respondent has failed to pay the amounts outstanding under the Mortgages to KingSett Mortgage;
- (f) the time period provided in the BIA Notice and the deadline for payment under the Notices of Sale have both expired;

- (g) as of May 30, 2017, the amount owed to KingSett Mortgage for principal and interest under the Mortgages was \$8,798,864.68;
- (h) the officers and directors of the Respondent corporation are John Davies and Walter Thompson;
- (i) certain corporations owned by Mr. Davies and Mr. Walters have been the subject of a Financial Services Commission of Ontario (“FSCO”) investigation which resulted in the appointment of a Trustee over certain of these companies known as the “Davies Developers” and ultimately the appointment of KSV as receiver and manager of certain properties owned by several of the Davies Developers (the “**Receivership Companies**”);
- (j) on May 17, 2017, KSV in its capacity as receiver manager of the Receivership Companies attended in Court on an *ex parte* basis and sought a Certificate of Pending Litigation (the “CPL”) to be registered on title to the Real Property;
- (k) the evidence provided to the Court in support of the CPL motion included evidence that amounts in excess of \$3 million may have been transferred to Rideau from the Receivership Companies in violation of the prohibitions in certain agreements, as further detailed therein, related to those companies and those funds may or may not have been used by Rideau to purchase the Real Property;
- (l) the Court granted the Order sought by KSV on May 17, 2017 and the CPL is presently registered on title to the Real Property;

- (m) at the time of the *ex parte* hearing, KingSett Mortgage was in the process of considering a listing agreement with a broker to attempt to continue with its enforcement against the Real Property under its power of sale proceedings in order to sell the Property;
- (n) the KingSett Mortgage security provides for the appointment of a receiver upon default;
- (o) in light of the CPL and the evidence which has been put forward related thereto, it is appropriate that KingSett Mortgage seek the appointment of a receiver over the Property so that a judicial sale of the Real Property can be conducted;
- (p) there are also two construction liens registered against title to the Real Property with claims totalling \$906,657.38;
- (q) to the extent that the Real Property is sold for an amount which is greater than the amount necessary to discharge the security of KingSett Mortgage, the receivership will provide a means for the distribution of those surplus funds and provide an efficient forum to determine the validity and priority of the lien claims and the claims which form the basis of the CPL;
- (r) it is in the interests of all the stakeholders that the Real Property be immediately marketed for sale;
- (s) KSV has consented to act as Receiver of the Property;

- (t) the Pre-Filing Report contains a recommended sale process for the Real Property, including the proposed appointment of SVN Rock Advisors Inc., as the broker for the sale;
- (u) Subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;
- (v) Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C43, as amended;
- (w) Rules 1.04, 2.03, 3.02 and 38 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and
- (x) such further and other grounds as the lawyers may advise or as are set out in this Application Record.

3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the application:

- (a) Affidavit of Justin Walton and the exhibits thereto sworn June 9, 2017;
- (b) Consent of KSV to Act as Receiver;
- (c) Pre-Filing Report of KSV in its capacity as proposed Receiver of the Respondent (to be filed separately); and
- (d) such further and other evidence as the lawyers may advise and this Honourable Court may permit.

June 9, 2017

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

David T. Ullmann (LSUC #42357I)

Tel: (416) 596-4289

Fax: (416) 594-2437

Lea Nebel (LSUC #45484C)

Tel: (416) 593-3914

Fax: (416) 594-2969

Alexandra Teodorescu (LSUC #63889D)

Tel: (416) 596-4279

Fax: (416) 594-2437

Lawyers for the Applicant

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COMMERCIAL LIST

Proceeding commenced at Toronto

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BLANEY MCMURTRY LLP

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2 Queen Street East, Suite 1500

Toronto ON M5C 3G5

David T. Ullmann (LSUC #42357I)

Tel: (416) 596-4289

Fax: (416) 594-2437

Lea Nebel (LSUC #45484C)

Tel: (416) 593-3914

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Lawyers for the Applicant