

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

**KSV KOFMAN INC. IN ITS CAPACITY AS RECEIVER AND MANAGER
OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT
CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER)
LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858
ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK
(525 PRINCESS STREET) INC. and TEXTBOOK (555 PRINCESS
STREET) INC.**

Plaintiff

- and -

TEXTBOOK (256 RIDEAU STREET) INC.

Defendant

FACTUM OF TEXTBOOK (256 RIDEAU STREET) INC.

June 26, 2017

Dentons Canada LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, ON M5K 0A1

Kenneth D. Kraft
LSUC #: 31919P
Tel.: (416) 863-4374
Fax: (416) 863-4592
kenneth.kraft@dentons.com

Michael Beeforth
LSUC #: 58824P
Tel.: (416) 367-6779
Fax: (416) 863-4592
michael.beeforth@dentons.com

Lawyers for the Defendant

TO: **SERVICE LIST**

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PART I – OVERVIEW

1. This motion is for an order discharging the two certificates of pending litigation (the “**Ottawa CPLs**”) registered on title to the properties municipally described as 256 Rideau Street and 211 Besserer Street in Ottawa, Ontario (together, the “**Ottawa Property**”).
2. Textbook (256 Rideau Street) Inc. (“**Rideau**”) has completed the refinancing process for the Ottawa Property and, pending discharge of the Ottawa CPLs, will receive US \$15.5 million in funding within 45 banking days. Rideau has undertaken to pay \$1.501 million of those funds upon receipt into court or as otherwise directed so as to provide security for the Plaintiff’s claim. The Plaintiff will thus suffer no harm or prejudice if the Ottawa CPLs are discharged.

3. Rideau's undertaking, when taken together with the other relevant factors to be considered by this court (including the unique nature of the Ottawa Property to Rideau, the sufficiency of damages as a remedy to the Plaintiff's claim, and the harm that would be suffered by Rideau if the Ottawa CPLs are not discharged), justify this court exercising its discretion to grant the order sought.

PART II – FACTUAL BACKGROUND

Development of the Ottawa Property

4. In November 2015, Rideau purchased the Ottawa Property for approximately \$11 million for the purpose of developing a two-story student residence (the "**Rideau Project**"). Since purchasing the Ottawa Property, Rideau has invested significant time and money in developing it towards construction, including the following:

- (a) obtaining a zoning bylaw amendment in July 2016 to permit the Rideau Project's proposed height, density and use;
- (b) receiving staff approval for site plan control, with a Site Plan Agreement ready to be executed upon payment of development charges;
- (c) engaging an architect and construction manager to prepare the Ottawa Property for construction; and
- (d) submitting applications for building permits for excavation/foundation work and superstructure. The excavation permit is near approval (subject to minor clarifications) and excavation is scheduled to commence in September 2017.

5. Rideau has a significant equity interest in the Ottawa Property through its sole shareholder, Textbook Suites Inc. (“**Textbook**”), which has contributed approximately \$4.4 million towards the total development costs to date of \$15 million.

Thompson Affidavit at para. 4, Rideau Motion Record, Tab 2, p. 7.

6. The acquisition and development of the Ottawa Property has been partially funded through loans provided by KingSett Mortgage Corporation (“**KingSett**”), which are secured by two mortgages on the Ottawa Property. Although Rideau is currently in default on these mortgages, it has been actively working to secure replacement financing to pay out KingSett and continue developing the Rideau Project and, as discussed below, is now in a position to complete the refinancing.

Thompson Affidavit at para. 5, Rideau Motion Record, Tab 2, p. 7.

7. KingSett has commenced an application seeking to appoint a receiver to oversee a sale process of the Ottawa Property. On June 15, 2017, KingSett’s application was temporarily adjourned until June 27, 2017 to provide Rideau with additional time to complete its refinancing so as to pay out KingSett and obviate the need for the application.

Thompson Affidavit at para. 6, Rideau Motion Record, Tab 2, p. 7.

Refinancing is Complete

8. On May 1, 2017, Rideau obtained a binding commitment from a lender for an unsecured loan of US \$15.5 million (the “**Refinancing**”). These funds will be advanced to Rideau within a maximum of 45 banking days of payment of a US \$2.0 million security deposit (the “**Security Deposit**”). The Refinancing was subsequently formalized through a Loan Agreement executed on June 21, 2017.

Thompson Affidavit at para. 7, Rideau Motion Record, Tab 2, pp. 7-8.

Loan Agreement between RA Global Consulting Europe Inc. and GenerX (Byward Hall) Inc. dated June 21, 2017, Rideau Motion Record, Tab 2A, pp. 13-94.

9. In order to fund the Security Deposit, on May 16, 2017, Rideau entered into an agreement for short-term funding of US \$3.0 million (the “**Bridge Financing**”) to be secured by a third mortgage (behind KingSett) on the Ottawa Property. The Bridge Financing funds are in escrow and ready to be released to Rideau, subject to signing loan documents and the lender placing its mortgage on title.

Thompson Affidavit at paras. 8-9, Rideau Motion Record, Tab 2, p. 8.

Email correspondence between Walter Thompson and William Julian dated June 13, 2017, Rideau Motion Record, Tab 2D, pp. 101-104.

Email correspondence from William Julian dated June 26, 2017, Rideau Motion Record, Tab 2E, pp. 105-106.

10. Rideau intends to use the Bridge Financing to fund the Security Deposit, bring the interest arrears on KingSett’s mortgages current, and maintain them until the Refinancing proceeds are advanced.

Thompson Affidavit at para. 10, Rideau Motion Record, Tab 2, p. 8.

Rideau Will Post Full Security for Plaintiff’s Claim

11. In order to complete the Bridge Financing, Rideau requires the Ottawa CPLs to be discharged from title so that the third mortgage can be registered on title and the funds advanced. Once the Bridge Financing is complete, the Refinancing proceeds will be advanced within a maximum of 45 banking days.

Thompson Affidavit at paras. 7 and 12, Rideau Motion Record, Tab 2, pp. 7-10.

12. The Refinancing proceeds of US \$15.5 million are more than sufficient to pay out KingSett and to provide sufficient security for the Plaintiff's claim underlying the Ottawa CPLs, which relates to two payments totalling \$1.501 million. In this respect, Rideau has undertaken to pay this amount from the Refinancing proceeds into court or as otherwise directed as security.

Thompson Affidavit at para. 13, Rideau Motion Record, Tab 2, p. 10.

Notice of Action at para. 6, Motion Record of the Plaintiff, p. 392.

Third Report of KSV Kofman Inc. as Receiver and Manager at s. 2.1.2, Motion Record of the Plaintiff dated May 16, 2017, p. 12.

PART III – ISSUES AND LAW

Decision to Discharge a CPL is Discretionary

13. Section 103 of the *Courts of Justice Act* provides that the court may make an order discharging a certificate of pending litigation (“CPL”) where, amongst other things, the interests of the party at whose instance the CPL was issued can be adequately protected by another form of security, or on any other ground that is just.

Courts of Justice Act, R.S.O. 1990, c. C.43 [CJA] at s. 103(6).

14. The decision as to whether to grant an order discharging a CPL is discretionary. A court must look at all of the relevant matters between the parties and exercise its discretion in equity in determining whether or not to grant a discharge. Case law identifies a number of factors (referred to as the “Dhunna factors”) to be considered by the court:

- (a) whether the plaintiff is a shell corporation;
- (b) whether the land is unique;
- (c) the intent of the parties in acquiring the land;

- (d) whether there is an alternative claim for damages;
- (e) the ease or difficulty in calculating damages;
- (f) whether damages would be a satisfactory remedy;
- (g) the presence or absence of a willing purchaser; and
- (h) the harm to each party if the certificate is or is not removed, with or without security.

572383 Ontario Inc. v. Dhunna, 1987 CarswellOnt 551 (Master) at paras. 10-18, Rideau's Book of Authorities, Tab 1.

931473 Ontario Ltd. v. Coldwell Banker Canada Inc., 1991 CarswellOnt 460 (Gen. Div.) at paras. 61-65 and 70, Rideau's Book of Authorities, Tab 2.

15. In discharging a CPL, the court has discretion to impose such terms as to the giving of security or otherwise as it considers just. In situations where a transaction was imminent and would generate funds sufficient to provide security, courts have discharged CPLs on the condition that the future transaction proceeds would be paid into court.

CJA, supra at s. 103(6).

Aztec Investments Ltd. v. Wynston, 1988 CarswellOnt 408 (S.C.), Rideau's Book of Authorities, Tab 3.

Baker v. Jakobek, 2008 CarswellOnt 3311 (S.C.J.), Rideau's Book of Authorities, Tab 4.

16. In the case at hand, both the imminent availability of security and a balanced consideration of the Dhunna factors support this court exercising its discretion to discharge the Ottawa CPLs.

Rideau will Post Security

17. Rideau has undertaken to pay from the Refinancing Proceeds the amount of \$1.501 million claimed by the Plaintiff into court or as otherwise directed. This undertaking provides the

Plaintiff with complete security for its claim and, as a result, the Plaintiff will suffer no prejudice if the Ottawa CPLs are discharged.

Thompson Affidavit at para. 13, Rideau Motion Record, Tab 2, p. 10.

Dhunna Factors Support Discharging CPLs

18. When considered on balance, the Dhunna factors militate in favour of the Ottawa CPLs being discharged:

- (a) The Ottawa Property is unique to Rideau. Rideau has completed significant work to ready the Ottawa Property for construction. It has obtained a zoning by-law amendment specific to the proposed height, density and use of the Rideau Project (a two-story, 250-unit development with 14 parking spaces), and Rideau expects an excavation/foundation permit shortly so as to allow for excavation in September 2017. In contrast, the Ottawa Property holds no unique significance to the Plaintiff other than as a piece of land that can be realized upon.

Thompson Affidavit at paras. 11 and 15, Rideau Motion Record, Tab 2, pp. 9-11.

- (b) The Ottawa Property was acquired by Rideau for development purposes. As noted above, Rideau has invested significant time and expense in developing the Ottawa Property since its acquisition.

Thompson Affidavit at para. 11, Rideau Motion Record, Tab 2, pp. 9-10.

- (c) There is an alternative claim for damages, and damages would be a satisfactory remedy. The Plaintiff seeks damages as an alternative remedy in its pleading.

Notice of Action at paras. 1(a), 6 and 9, Motion Record of the Plaintiff dated May 16, 2017, pp. 387-394.

- (d) Damages are easily calculable. The Plaintiff has identified specific payments to Rideau that it alleges to have been improper. There is no issue as to quantum of damages.

Third Report of KSV Kofman Inc. as Receiver and Manager at ss. 2.0-2.2, Motion Record of the Plaintiff dated May 16, 2017, pp. 11-14.

- (e) No alternate purchaser has been identified. There is no evidence that the Plaintiff has identified a potential buyer for the Ottawa Property, and there is no market for apartment or condominium developers seeking to construct a project with only 14 parking spaces. Any buyer that might be identified will likely seek to buy at a discount to market value because of the incremental cost of constructing underground parking. Rideau is prepared to continue developing the Rideau Project which will add incremental value to the Ottawa Property.

Thompson Affidavit at para. 15, Rideau Motion Record, Tab 2, p. 11.

- (f) Plaintiff will suffer no harm if CPLs are discharged, while Rideau will suffer harm if they are not. In light of the imminent Refinancing and Rideau's undertaking to immediately post security from the proceeds thereof, the Plaintiff will suffer no harm if the CPLs are discharged. In contrast, if the CPLs are not discharged, Rideau will be unable to complete the Refinancing and KingSett will likely sell the Ottawa Property as a distressed asset. Rideau will thus lose both its significant equity interest in the Ottawa Property and the ability to further develop the Rideau Project.

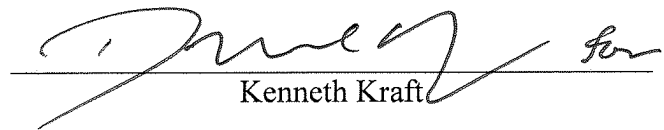
Thompson Affidavit at paras. 13-14 and 16, Rideau Motion Record, Tab 2, pp. 10-11.


19. The proposed Refinancing is the best alternative for all stakeholders, as it ensures the repayment of KingSett in full and will provide the Plaintiff with security for its claim. In all of the circumstances, it would be just and equitable for this court to exercise its discretion to discharge the Ottawa CPLs.

PART IV – ORDER REQUESTED

20. Rideau respectfully requests an order discharging the Ottawa CPLs from title to the Ottawa Property on its undertaking to post \$1.501 million in security, into court or as otherwise directed, upon receipt of the Refinancing proceeds.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of June, 2017.


Kenneth Kraft


Michael Beeforth

Lawyers for the Defendant

Schedule "A" – List of Authorities

1. *572383 Ontario Inc. v. Dhunna*, 1987 CarswellOnt 551 (Master)
2. *931473 Ontario Ltd. v. Coldwell Banker Canada Inc.*, 1991 CarswellOnt 460 (Gen. Div.)
3. *Aztec Investments Ltd. v. Wynston*, 1988 CarswellOnt 408 (S.C.)
4. *Baker v. Jakobek*, 2008 CarswellOnt 3311 (S.C.J.)

Schedule "B" – Text of Statutes, Regulations & By-Laws

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Rule 42 – Certificate of Pending Litigation

DISCHARGE OF CERTIFICATE

42.02 (1) An order discharging a certificate of pending litigation under subsection 103 (6) of the *Courts of Justice Act* may be obtained on motion to the court. R.R.O. 1990, Reg. 194, r. 42.02 (1).

Factum

(2) Each party to a motion under subrule (1) shall, unless the motion is made on consent, serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 24.

(3) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 19.

(4) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 19.

Courts of Justice Act, R.S.O. 1990, c. C.43

Certificate of pending litigation

103 (1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).

Registration

(2) Where a certificate of pending litigation is issued under subsection (1) it may be registered whether the land is registered under the *Land Titles Act* or the *Registry Act*.

Exception

(3) Subsections (1) and (2) do not apply to a proceeding for foreclosure or sale on a registered mortgage or to enforce a lien under the *Construction Lien Act*.

Liability where no reasonable claim

(4) A party who registers a certificate under subsection (2) without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration.

Recovery of damages

(5) The liability for damages under subsection (4) and the amount thereof may be determined in the proceeding in respect of which the certificate was registered or in a separate proceeding.

Order discharging certificate

(6) The court may make an order discharging a certificate,

(a) where the party at whose instance it was issued,

(i) claims a sum of money in place of or as an alternative to the interest in the land claimed,

(ii) does not have a reasonable claim to the interest in the land claimed, or

(iii) does not prosecute the proceeding with reasonable diligence;

(b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or

(c) on any other ground that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

Effect

(7) Where a certificate is discharged, any person may deal with the land as fully as if the certificate had not been registered. R.S.O. 1990, c. C.43, s. 103.

KSV KOFMAN INC.
Plaintiff

and

TEXTBOOK (256 RIDEAU STREET) INC.
Defendant

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Proceeding commenced at TORONTO

FACTUM OF THE DEFENDANT

Dentons Canada LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, ON M5K 0A1

Kenneth D. Kraft
LSUC #: 31919P
Tel.: (416) 863-4374
Fax: (416) 863-4592
kenneth.kraft@dentons.com

Michael Beeforth
LSUC #: 58824P
Tel.: (416) 367-6779
Fax: (416) 863-4592
michael.beeforth@dentons.com

Lawyers for the Defendant