

Court File No. CV-21-00664778-00C

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

B E T W E E N:

SKYMARK FINANCE CORPORATION

Applicant

- and -

**MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD
CORPORATION**

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED

FACTUM OF THE APPLICANT
(application returnable July 20, 2021)
(re appointment of a Receiver)

July 19, 2021

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TO: THE SERVICE LIST

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FACTUM OF THE APPLICANT

PART I - OVERVIEW

1. This factum is filed by the Applicant, Skymark Finance Corporation (“**Skymark**”), in connection with its application for an order appointing KSV Restructuring Inc. (“**KSV**”) as receiver (“**Receiver**”) of the property, assets and undertakings (the “**Property**”) of Mahal Venture Capital Inc. (“**Mahal**”) and Golden Miles Food Corporation (“**Golden Miles**”, collectively with Mahal, the “**Debtors**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

2. The Debtors are related companies. Mahal is the registered owner of the land and building municipally known as 155 Adams Blvd., Brantford, Ontario (the “**Real Property**”). Once completed, Golden Miles will operate the flour mill located at the Real Property.

Application Record – Tab 2, Affidavit of Paul Millar sworn June 24, 2021 (the “**First Affidavit**”) at para. 3. A16

3. Skymark extended various loans to Mahal secured by mortgages on the Real Property (collectively, the “**Mahal Loans**”) and also extended loans to Golden Miles secured by equipment (collectively, the “**GM Loans**”).

First Affidavit at para. 4. A16

4. The Debtors have been persistently in default under the Mahal Loans and the GM Loans (collectively, the “**Loans**”). In March 2020, the parties entered into a Forbearance Agreement, which expired on June 30, 2021. Golden Miles disputes that it is a party to the Forbearance Agreement and that it agreed to its terms.

First Affidavit at para. 5 and 40; Responding Affidavit of Santokh Mahal sworn July 5, 2021 (“**Santokh Affidavit**”) at paras. 45-47. A16 A25 B-1-16

5. The various defaults include the following: i) the Debtors failed to make any payments prior to entering into the Forbearance Agreement; ii) the Debtors failed to make the payments contemplated under the Forbearance Agreement and failed to repay the Loans in full by June 30, 2021 as required, iii) the Debtors failed to have construction liens on the Real Property vacated or discharged by September 2020, iv) the Debtors failed to pay property taxes on the Real Property when due; and v) the Debtors encumbered the Real Property and the equipment to non-arm’s length parties when insolvent and without Skymark’s written consent or knowledge and in violation of the terms of the security and/or the Forbearance Agreement.

First Affidavit at paras. 37, 45-48, 51, 58-61. A24 A28 A30

6. On May 28, 2021, Skymark issued demand for payment and a Notice of Intention to Enforce its Security (“NITES”) to Mahal and Golden Miles pursuant to section 244(1) of the BIA.

First Affidavit at para. 5. A16

7. The Debtors are collectively indebted to Skymark in the approximate amount of \$29 million for principal and interest exclusive of legal costs.

First Affidavit at para. 6. A16

8. Skymark respectfully submits that in the circumstances it is just and convenient for the Court to grant an order appointing KSV as Receiver of the Property.

PART II - FACTS

Background

9. Skymark is a private corporation that is governed by the *Business Corporations Act* (Ontario) (the “**OBCA**”). Skymark is in the business of providing commercial and consumer financing. Paul Millar and Michael Slattery (“**Slattery**”) are directors of Skymark.

First Affidavit at para. 8. A17

10. Slattery owns a mortgage brokerage company, Skylark Holdings Limited (“**Skylark**”), which acts as the mortgage broker for loans advanced by Skymark.

First Affidavit at para. 9. A17

11. Mahal is a corporation that is governed by the *Canada Business Corporations Act*. It is a single purpose corporation that owns the Real Property. The sole officer, director and shareholder of Mahal is Jesse Mahal (“**Jesse**”), who is a certified professional accountant.

First Affidavit at para. 10; Exhibit “A” to the First Affidavit; Transcript from Examination of Jesse Mahal dated July 15, 2021 (the “**Jesse Transcript**”) at qq. 13-15, 6-11. A17

12. Golden Miles is a corporation that is governed by the OBCA. The sole officer, director and shareholder of Golden Miles is Santokh Mahal (“**Santokh**”), who is Jesse’s father.

First Affidavit at para. 11; Exhibit “B” to the First Affidavit; Transcript from Examination of Santokh Mahal dated July 15, 2021 (the “**Santokh Transcript**”) at qq. 7-10. A17

Mahal Loans and Security

13. In early 2015, Santokh approached Slattery to obtain financing for the purchase of the Real Property on which he intended to build a flour mill.

First Affidavit at para. 13. A18

14. In June 2015, Skylark arranged for a term loan to be provided to Mahal in the amount of \$4,000,000 to be secured by a mortgage on the Real Property. An initial advance of \$1,000,000 was made by Merk Investments Ltd. (“**Merk**”), a company owned by Slattery, for the purchase of the Real Property. Subsequent amounts were advanced by Skymark as construction on the Real Property progressed.

First Affidavit at paras. 14-15. A18

15. In November 2016, Skymark extended a further loan in the amount of \$9,600,000 to Mahal which was to be used for construction of the flour mill and was granted a mortgage on the Real Property as security. The parties agreed that aside from the \$1,000,000 amount advanced by Merk under the \$4mm loan, the other amounts advanced would be transferred to the \$9.6mm loan.¹

¹ Santokh disputes that there was an agreement between the parties to transfer the funds advanced by Skymark under the \$4mm loan to the \$9.6 loan.

First Affidavit at para. 17. A19

16. In September of 2018, Mahal required a further loan as a result of increasing costs for the construction of the flour mill. Skymark extended a loan in the amount of \$6,400,000 to Mahal which was secured by a mortgage on the Real Property.

First Affidavit at para. 20. A20

17. Amounts under the Mahal Loans were to be advanced in stages as construction progressed, and as certified by J.H. Cohoon Engineering Limited (“Cohoon”), which acted as payment certifier for the project.

Reply Application Record – Tab 2, Paul Millar’s Reply Affidavit sworn July 9, 2021 (“Reply Affidavit”) at para. 10. A363

18. The Mahal Loans were for a term of one to two years payable interest only until maturity. No interest payments had been made by Mahal to Skymark for any of the loans. The last of the loans matured on September 4, 2019. Skymark did not enforce on its security as Mahal provided assurances that construction of the flour mill was progressing and nearing completion. Skymark was advised that once construction was complete, Mahal would refinance the Real Property to repay the loans.

First Affidavit at paras. 22-23, 37; Exhibits “C”, “D” and “F” to the First Affidavit. A21 A24

19. The Mahal Loans are syndicated loans. Skymark transferred participating interests in the mortgages to various lenders and services the mortgages on behalf of these lenders.

First Affidavit at para. 24. A22

Golden Miles Loans and Security

20. Starting in October 2017, Skymark made loans to Golden Miles to finance the purchase of equipment required in the operation of the flour mill and also on the security of owned equipment. Specifically, Skymark made five loans pursuant to Home Improvement Credit Application and Agreements (each, a “**HICA**”) dated October 25, 2017, December 6, 2017, March 14, 2018, January 22, 2019 and January 25, 2019.

First Affidavit at para. 26, Exhibit “H” to the First Affidavit. A22

21. Each of the GM Loans was for a term of 12 months. However, the terms and conditions to the HICA’s provide that each loan was to be automatically renewed for successive 12-month periods until the outstanding balances had been paid.

First Affidavit at para. 27. A23

22. Each HICA creates a security interest in favour of Skymark in specified equipment and in all proceeds thereof as security for payment of each of the loans.

First Affidavit at paras. 28. A23

Default, Forbearance and Demand

23. Despite the Loans requiring monthly interest payments, no payments were made to Skymark prior to March 2020, when the parties entered into a Forbearance Agreement.

First Affidavit at para. 37. A24

24. On May 16, 2019, Skymark learned that Vicano Construction Limited (“**Vicano**”), the designer and builder of the flour mill, registered construction liens against the Real Property in the amounts of \$4,640,577.52 and \$439,420.95 (the “**Vicano Liens**”). Vicano also commenced an

action against, among others, Golden Miles, Mahal and Skymark and claims that the Vicano Liens have priority over the mortgages in favour of Skymark.

First Affidavit at paras. 34-35, Exhibits “K”, “L” and “M” to the First Affidavit. A24

25. In June 2019, Skymark demanded that arrangements be made to pay the Mahal Loans and was advised that the flour mill would be in production shortly. The flour mill did not become operational and so in September 2019, Skymark demanded that monthly payments for all facilities should be made commencing October 1, 2019.

First Affidavit at paras. 36-37, Exhibits “N” and “O” to the First Affidavit. A24

26. On November 21, 2019, Mahal and Golden Miles, among others, commenced an action against Skymark and others, claiming damages in the amount of \$60,000,000 for *inter alia*, breach of fiduciary duty, breach of contract and breach of the duty of good faith (the “**Mahal Litigation**”).

First Affidavit at para. 39, Exhibit “P” to the First Affidavit. A25

27. On March 12, 2020, the parties entered into a Forbearance Agreement. Due to an administrative error, an execution line for Golden Miles was not inserted. Golden Miles disputes that it is a party to the Forbearance Agreement and that it agreed to its terms. However, the Forbearance Agreement was negotiated by Skymark with Jesse on behalf of the Debtors. It was admitted by Jesse on examination that he reviewed and amended the amounts set out in the Forbearance Agreement owing by Golden Miles and that he initialled the changes therein.

First Affidavit at para. 40, Exhibit “D” to the Further Supplementary Affidavit of Paul Millar sworn July 13, 2021 (“**Further Supplementary Affidavit**”); Santokh Affidavit at paras. 45-47; Jesse Transcript at qq. 166. A25 A443 B-1-16

28. The Forbearance Agreement provided, among other things, the following:

- Skymark would not take any steps to enforce its security until the earlier of (i) June 30, 2021 or (ii) upon the occurrence of an event of default;
- the Debtors were required to make specified monthly payments for the Loans starting July 1, 2020 (the “**Monthly Payments**”);
- Skymark agreed to extend a term loan in the amount of \$1,600,000 to Jesse in his personal capacity to be used solely to pay for the balance of the construction on the Real Property (the “**Jesse Loan**”), to be secured by a second-ranking mortgage on 6845 Second Line West, Mississauga, Ontario;
- the Debtors covenanted that they would have the Vicano Liens vacated or discharged by September 1, 2020; and
- the parties agreed that within 30 days after execution of the Forbearance Agreement, the Debtors would have the Mahal Litigation dismissed.

First Affidavit at para. 41. A25

29. Under section 7.1(a) of the Forbearance Agreement, an event of default occurs, *inter alia*, with the non-payment when due of any principal and interest payable by the Debtors to Skymark or when the Debtors fail to comply with any of their other covenants under the agreement. Under section 7.2 of the Forbearance Agreement, upon the occurrence of an event of default, the balance of the indebtedness under the Mahal Loans and GM Loans shall, at Skymark’s option, become immediately due and payable and the Security (as defined therein) shall become enforceable, including by way of the court-appointment of a receiver.

First Affidavit at paras. 43-44; Exhibit “D” of the Further Supplementary Affidavit. A27 A443

30. The following events of default, among others, have occurred and are continuing under the Forbearance Agreement:

- Monthly Payments were to commence on July 1, 2020. The Debtors did not make a payment until August 2020, which was applied to the July 2020 amount. The Debtors then failed to make monthly payments for August and September 2020 and have made only partial payments for February, March and April 2021, with no further payments made thereafter²;
- The Mahal Loans and GM Loans were not fully repaid by June 30, 2021, when the Forbearance Agreement expired;
- the Debtors have failed to pay property taxes when due on the Real Property and an approximate amount of \$117,700 in accrued taxes remains unpaid; and
- The Debtors failed to have the Vicano Liens vacated or discharged by September 1, 2020 or at all.

First Affidavit at paras. 45, 51-52, 60; Exhibit “Z” to the First Affidavit; Exhibit “D” of the Further Supplementary Affidavit at s. 6.4, 6.5, 3.2, 6.10(b), 6.2 and 7.1(g). A27 A257 A443

31. On May 28, 2021, Skymark demanded payment of the Mahal Loans in the sum of \$18,786,820.20 inclusive of interest, plus costs and for payment of the GM Loans in the sum of \$10,146,759.56 inclusive of interest, plus costs. Skymark also issued the NITES for both Mahal and Golden Miles.

First Affidavit at para. 56; Exhibit “Y” to the First Affidavit. A30

² Majority of the payments were made by Golden Miles in the amounts consistent with the terms of the Forbearance Agreement.

Reviewable Transactions

32. A sub search of the Real Property discloses that Mahal granted a charge on the Real Property in favour of Golden Miles in the amount of \$35,000,000 on March 26, 2021, without the prior knowledge or consent of Skymark and in contravention of the terms of the Forbearance Agreement. On examination, Jesse indicated that the advances secured by this mortgage were made over a period of years commencing 2015. An undertaking by Jesse to provide the dates and amounts of advances has not yet been fulfilled.

First Affidavit at para. 58; Exhibit “D” of the Further Supplementary Affidavit at s. 6.13; Jesse Transcript at qq. 263-266. A30 A443

33. A *Personal Property Security Act* (Ontario) search against Golden Miles revealed a registration by Santokh in December of 2020 in respect of what appears to be a general security agreement in favour of Santokh. On examination, Santokh claims to have advanced amounts to Golden Miles over a period of years commencing 2015. An undertaking by Santokh to provide a copy of the security agreement and the dates and amounts of advances has not yet been fulfilled.

First Affidavit at para. 61; Exhibit “J” to the First Affidavit; Santokh Transcript at qq. 296-310. A31 A120

34. The granting of this security by Mahal and Golden Miles may constitute fraudulent preferences.

PART III - ISSUES

35. The sole issue on this application is whether it is just and convenient for the Court to appoint a receiver over the Property of the Debtor.

PART IV - LAW AND ANALYSIS

Test for the Appointment of a Receiver

36. Section 243 of the *BIA* provides as follows:

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable. [emphasis added]

S. 243(1), *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "**BIA**").

37. Section 101 of the *CJA* provides as follows:

101 (1) In the Superior Court of Justice ... a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. [emphasis added]

S. 101(1), *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended (the "**CJA**").

38. In determining whether it is just or convenient to appoint a receiver under both the *BIA* and the *CJA*, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property.

[*Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 CarswellOnt 896 \(S.C.J.\)](#) [**"Carnival"**] at para. 24 citing [*Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CarswellOnt 2328 \(Gen. Div.\)](#) [**"Freure Village"**] at para. 10.

39. It is not essential that the moving party establish that it will suffer irreparable harm if a receiver is not appointed.

Carnival at para. 28 citing Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. 1995 CarswellOnt 39 (Gen. Div. – Commercial List) at para. 28.

40. It is likewise not essential that the moving party establish that the situation is urgent before a receiver will be appointed, only whether it is necessary to protect the interests of the secured creditor.

Carnival at para. 29, citing Bank of Nova Scotia v. D. G. Jewelry Inc. 2002 CarswellOnt 3443 (S.C.J.) [D.J. Jewelry] at paras. 1 and 3.

41. It is also not necessary that an applicant demonstrate that other remedies are defective before being entitled to a court-appointed receiver.

D.J. Jewelry at para. 3.

Debtors Opposition to Receivership

42. The Debtors oppose the receivership application on the following grounds: 1) they dispute the amounts owing under the Loans; 2) Skymark did not pay Vicano on a timely basis resulting in Vicano walking off the job site and allegedly causing the Debtors damages; and 3) Skymark did not advance the full amounts under the Loans.

Dispute as to Amounts Owing

43. Skymark claims that as of June 21, 2021, the amounts owing under the Mahal Loans is \$19,045,486.60 and the amount owing under the GM Loans is \$9,972,437.18. In contrast, Santokh admits that as of July 2, 2021, the amount of \$17,859,772.45 is due under the Mahal Loans and

\$1,139,433.97 is due under the GM Loans and disputes the balance of the amounts claimed by Skymark.

First Affidavit at para. 6; Santokh Affidavit at para. 58. A16 B-1-18

44. On examinations, Skymark has produced evidence of advances under the Loans and the calculations for the amounts claimed. The Debtors have failed to provide their calculations of the amounts they admit owing to Skymark.

Exhibit “Y” to the First Affidavit; Exhibit “J” to the Reply Affidavit. A249 A406

45. There is no dispute that Skymark has valid mortgages on the Real Property and security on the equipment pursuant to the HICA’s. The dispute is limited to the amounts advanced by Skymark under the Loans. If the Court orders the appointment of a Receiver, the Receiver will be required to review all evidence and documentation in respect of the Loans to verify the amount of Skymark’s secured claims prior to any distribution of the sale proceeds.

Delayed Payments to Vicano

46. There is no evidence to support the Debtors’ allegation that Vicano walked off the job site as a result of Skymark’s failure to advance payment under the Mahal Loans. Instead, there is evidence that supports Vicano was ordered off the job site due to a dispute with Golden Miles. In a letter dated March 4, 2019, Santokh complained about the timeliness, cost and quality of Vicano’s work. During his examination, Santokh denied having sent the letter and baldly alleged that Skymark sent the letter without his knowledge.

Exhibit “G” to Reply Affidavit; Santokh Transcript at qq. 110-121. A385

47. The Debtors filed a statement of defence and counterclaim to the Vicano Lien action which makes no reference to any delay in payment by Skymark but instead alleges delays, cost overruns and negligently performed work by Vicano. During his examination, Santokh admitted that the allegations contained in the statement of defence and counterclaim are true.

Exhibit "I" to Reply Affidavit; Santokh Transcript at qq. 107-108. A391

48. The allegation against Skymark that the Debtors now advance was never even made by the Debtors in the Mahal Litigation that was dismissed on consent pursuant to the Forbearance Agreement.

Skymark did not advance the full amounts under the Loans

49. The Debtors allege that Skymark failed to fully advance the Loans. Skymark advanced amounts under the Mahal Loans only once it was provided with a payment certificate by Cohoon and authorization to advance from Mahal. Similarly, amounts were advanced under the GM Loans once Skymark received an invoice and direction to make payment from Golden Miles.

Reply Affidavit at paras. 10 and 20. A363 A365

50. The Debtors have failed to provide any evidence of a request for a further advance under the Loans that was refused by Skymark.

It is Just and Convenient to Appoint a Receiver

51. As described above, various defaults have occurred under the Loans and Forbearance Agreement and are continuing. The Loans have matured and have not been repaid. The Debtors agreed to the appointment of a receiver upon default under the Forbearance Agreement.

52. As a result, Skymark respectfully submits that it is just and convenient that the Receiver be appointed in order to, among other things, preserve, market and sell the Debtors' assets and take steps to ensure that same are disposed of in a commercially reasonable manner with a view to maximizing value for the Debtors' stakeholders, under the supervision of the Court.

53. Further, this Court's assistance will likely be required to resolve priority disputes and determine the validity of the security granted by the Debtors to related parties.

54. Santokh, on behalf of the Debtors, has proposed to post a bank letter of credit as security for the amounts claimed by Skymark pending determination of the disputed amounts. Santokh has not produced any evidence of a commitment or offer of finance from a bank to provide a letter of credit.

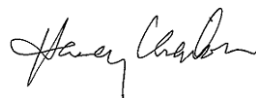
Santokh Affidavit at para. 61. **B-1-19**

55. In the event that the Court exercises its discretion not to appoint a receiver, the Applicant respectfully requests that the Debtors be required to immediately pay Skymark the undisputed amounts owed under the Mahal Loans and GM Loans and post security for the balance of the amount claimed by Skymark, together with additional interest and costs as a condition of such order.

PART V - RELIEF SOUGHT

56. The Applicant respectfully submits that the Court grant an order appointing KSV as receiver over the Property of the Debtors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2021.



CHAITONS LLP

Lawyers for Skymark Finance Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007
2. *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* 1995 CarswellOnt 39 (Gen. Div.- Commercial List) [H+ swiss bank](#)
3. *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (S.C.J.)
4. *Bank of Nova Scotia v. D. G. Jewelry Inc.* 2002 CanLII 12477 (ON S.C.J.)

SCHEDULE “B”**TEXT OF STATUTES, REGULATIONS & BY - LAWS*****Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended*****Court may appoint receiver**

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Courts of Justice Act, R.S.O. 1990, c. 43, as amended**Injunctions and receivers**

101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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A485

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