SUPERIOR COURT OF JUSTICE

ENDORSEMENT

COURT FILE NO.: CV-23-00698395-00CL **DATE:** March 5, 2024

NO. ON LIST: 1

TITLE OF PROCEEDING: **ATRIUM MORTGAGE INVESTMENT CORPORATION et al v. STATEVIEW HOMES (NAO TOWNS II) INC. et al**

BEFORE: **Justice Black**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
George Benchetrit	Atrium Mortgage Investment Corp. and Dorr Capital Corporation	george@chaitons.com

Other:

Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE BLACK:

[1] This matter was before me on February 15, 2024. At that time, for the reasons set out in my endorsement of that date, I granted the AVO and Ancillary Relief Orders sought by the receiver, KSV Restructuring Inc. ("KSV"), subject to an additional holdback of $1,523,000.00, and adjourned the balance of the receiver's motion and the cross-motion on behalf of the putative class.

[2] The amount of the additional holdback that I ordered at that juncture was based on the putative class' assertion that an amount equivalent to 20% of deposits was warranted and was before KSV had had an opportunity to respond to the putative class' position in a fulsome way.

[3] The parties filed supplementary materials and factums in anticipation of the hearing scheduled for today (March 5, 2024).

[4] Within those materials, there was a disconnect evident. That is, the receiver KSV, in its materials, was clearly advancing arguments specifically in relation to the receivership at hand – the so-called NAO II project – whereas the putative class was making arguments with broader application, encompassing a number of other projects of Stateview Homes, in which other receiverships are underway and at various stages.

[5] Counsel clarified the disconnect at the outset of the hearing before me. That is, in what counsel for KSV accepts, as do I, was an innocent and honest misunderstanding, counsel for the putative class had the impression that by serving the receiver in the NAO II matter, he would effectively be providing notice to all interested parties.

[6] This was clearly not the case, as counsel for the putative class had come to recognize by the time the matter came before me today.

[7] In the circumstances, given his wish to make arguments that potentially impact other Stateview projects and other parties, and given that those parties had no notice of the cross-motion or today's attendance, he was seeking an adjournment of today's motion.

[8] Counsel for the Receiver, joined by counsel for Atrium Mortgage Investment Corporation (the "Lender"), submitted that today's motion could nonetheless proceed, inasmuch at the issues to be argued in this motion are referable to this specific receivership, and any decision could then be taken into account, if apt, in the motion relative to the other Stateview receiverships.

[9] In the alternative, it was the position of both KSV and the Lender that the court need not wait to make a determination about the appropriate (reduced) amount of holdback for the benefit of homeowners in the putative class. As set out in the supplementary materials and factum filed by KSV, KSV asserts that, based on further investigation since the attendance before me on February 15, 2024, KSV has concluded that, taking into accounts amounts expected to be paid by Tarion Warranty Corporation ("Tarion") to the homeowners pursuant to the *Ontario New Home Warranties Plan Act* ("ONHWP"), the amount of the potential shortfall can be no more than $37,191.65.

[10] It therefore argues, as its alternative position, that I should set that reduced amount as the holdback amount. It then argues that, if that is the appropriate amount to hold back, it makes little sense for the parties to spend their time and resources on arguing the full 3-hour motion scheduled before me today.

[11] Counsel for the putative class argues that it makes no sense to proceed with the full cross-motion today, in that the argument is constructed to have application to the full array of Stateview receiverships. Given that, owing to his misunderstanding, parties potentially impacted by the full sweep of his argument are not present (or otherwise on notice) he maintains that as a practical matter it would make no sense for the matter to be heard today (and then to have to repeat many or most of the same arguments on another day with the full collection of potentially impacted parties present).

[12] To that extent, I agree, and I decided to adjourn the bulk of the motion and cross-motion to another day (about which more below).

[13] However, I asked for his submissions as well relative to the substantially reduced hold back amount for which KSV and the Lender now contend.

[14] In response, counsel for the putative class essentially made two submissions.

[15] First, consistent with the position articulated in his factum, he argued that Tarion has not yet paid the vast majority of the homeowners in the NAO II matter, such that Tarion's subrogation rights and obligations have largely not yet been triggered.

[16] He asserted that therefore, combined with recent well-publicized suggestions that Tarion's resources to pay claims are currently stretched, there is no certainty about the amounts to be paid by Tarion here.

[17] Counsel opposite responded that, acknowledging that for certain technical reasons the homeowners' claims to Tarion in relation to the NAO II project had been delayed, Tarion argued the motion before Steele J. in this matter (*KingSett Mortgage Corp. v. Stateview Homes (Minu Towns) Inc.*, 2023 ONSC 7105) on the basis that it accepted its obligation to pay homeowner claims (subject to Her Honour's decision in that motion).

[18] Having read Steele J.'s decision, I believe that that characterization is apt. It appears evident that Tarion was seeking clarification of its obligations in the specific circumstances animating the motion. There is no suggestion that Tarion was taking issue with its obligations generally, nor of its ability to fulfil those obligations if Her Honour found against Tarion (as she ultimately did).

[19] Counsel for the putative class also argued that, in accordance with an argument of general application that he will make when all potentially affected parties are present, the creditors, including the Lender, have no right to the deposit funds, which are impressed with a trust in favour of the homeowners.

[20] I will not comment on that argument at this point; the court should wait to hear full argument on all sides, based on a full record, before venturing any view on that issue.

[21] However, I do not view that argument as particularly impacting the question of the appropriate hold back in the context of the matter before me.

[22] That is, assuming that Tarion is prepared to meet its obligations relative to the homeowners' claims in the NAO II matter, then whatever the fate of the deposit funds once the court decides on the trust-based and related arguments that the putative class proposes to make, the NAO II homeowners, assuming as I do that Tarion will honour their claims, will still only be out of pocket to the extent of the modest amount in excess of the $100,000.00 maximum amount that Tarion will be called upon to pay in most instances here.

[23] Counsel for the putative class cautioned that Tarion may decline to accept and pay the full amount claimed in each case. If that is so, I expect it will be on the basis that Tarion is not satisfied that the full amount has been proved or is otherwise appropriate in those instances, and that the homeowners' recourse, in that hypothetical scenario, will be against Tarion and within the ONWHP process.

[24] I am advised and accept for current purposes that the shortfall amount in other Stateview receiverships may be larger, and that therefore the contested amounts in those other receiverships will be more than de minimus. That does not change the relevant calculus for homeowners in the NAO II context and does not impact my determination about the appropriate hold back amount in this setting.

[25] In the absence of specific competing evidence about the holdback amounts, I find that reducing the holdback amount to $37,195.65 is appropriate here.

[26] I had advised the parties before me that I would give further consideration to the amount of the holdback and would release a decision (this decision) on that score. I suggested to counsel for KSV that, if the figure proved (as it has) to be the de minimus amount for which KSV (and the Lender) argued, it may impact on his determination as to whether or not to participate in the larger hearing to be convened.

[27] He pointed out in response that he is in fact counsel for KSV in its capacity as receiver in some of the other Stateview receiverships, and so will be present in any event.

[28] It remains to schedule that motion.

[29] Counsel suggested, and I accept, that the parties before me can discuss what procedures will be required, and a realistic timetable, to identify and notify all necessary parties (potentially impacted by the putative class' motion) and to account for any additional materials to be filed. They suggest that once they have done so, or while that is underway, it would be appropriate to convene a case conference before me to confirm the steps to be taken and the timing for those steps.

[30] Accordingly, counsel will arrange a case conference before me at the appropriate point in the coming days or weeks.

[31] I should deal with two remaining stray points.

[32] First, notwithstanding the frank acknowledgement by counsel for the putative class that he misunderstood the need to serve all interested parties such that the need for an adjournment was entirely his responsibility, opposing counsel graciously advised that, given that they accept that this was an honest mistake, they would not be seeking costs of today. Accordingly, I make no order as to costs.

[33] Second, counsel for the putative class asked me to confirm in my decision that the basis for this decision did not and does not reflect any finding about the dispute between the parties as to the extent of the common areas at the NAO II project. I confirm that I have made no determination in that regard, and as I conveyed to the parties, the evidence before me would not have allowed the court to make a finding on that issue.

[34] That said, my decision about the appropriate hold back amount is on the basis set out above, and no determination about the contested extent of the common areas would enter into or impact my decision in that regard.

[35] The parties advised that they are content if I hear the full motion to be argued by the putative class. While I am not seized of the matter, I am prepared to hear that motion if the timing works out to permit that to happen. In the meantime, as noted above, I am certainly prepared to preside over the proposed case conference to be convened in the near term.

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J. BLACK