



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00698637-00CL
CV-23-00698632-00CL
CV-23-00699067-00CL

DATE: March 19, 2024

NO. ON LIST: 2, 3, & 4

TITLE OF PROCEEDING: DORR CAPITAL CORP. -v- STATEVIEW HOMES (BEA TOWNS) INC.

BEFORE: JUSTICE PENNY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|---------------|--------------|
| | | |
| | | |

For Defendant, Respondent, Responding Party:

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|---------------|--------------|
| | | |
| | | |

For Other, Self-Represented:

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|-----------------------------|--|
| Dan Rosenbluth | Receiver, KSV Restructuring | Daniel.rosenbluth@paliareroland.com |
| Jeff Larry | Inc. | jeff.larry@paliareroland.com |
| Adam Slavens | Tarion Warranty Corp. | aslavens@torys.com |
| | | |
| | | |

ENDORSEMENT OF JUSTICE PENNY:

Overview

[1] The Receiver moves for the termination and disclaimer of certain pre-sale purchase agreements in order to facilitate claims by affected homebuyers for deposit reimbursement from Tarion Warranty Corporation.

[2] Quite a number of home buyers appeared at the hearing of the motion, which was conducted virtually by Zoom. I heard from several of the home buyers but the available time did not permit me to hear from everyone who attended. The home buyers are quite naturally, and justifiably, concerned over the failure of these projects and the fact that their deposits have been tied up for so long. Not all of the home buyers may be able to recover their entire deposit through the Tarion warranty system, if the deposit exceeds the statutory maximum. These deposits represent significant amounts of money, by any standard, and for most home buyers, likely represent the only means by which they may be able to purchase a home.

[3] For reasons I will explain below, the motion is granted.

Background

[4] The Receiver was appointed in May 2023 over various Stateview entities, including BEA Towns, Elm and Highview. Each of the respondent debtors are single purpose real estate development corporations which owned specific property and proposed to build freehold homes on the three projects.

[5] In June 2023, this Court issued a sales process approval order. The sale of the Highview was approved by the Court in September and closed in October 2023. The sale process remains ongoing regarding the BEA and Elm properties. As of this date, no acceptable offers have been received. It is in the context of these ongoing efforts that the Receiver brings the present motion.

[6] The heart of the problem being grappled with by the Receiver and Tarion in this motion is that hundreds of *bona fide* home buyers paid pre-sale deposits on freehold homes proposed to be constructed on the Highview, BEA and Elm properties. The statutory regime for freehold homes, unlike, for example, the condominium regime, does not require pre-sale deposits to be held in trust. In this case, the evidence is that 100% of the deposit monies on these three projects, representing over \$34 million, was spent by Stateview in advance of these proceedings.

[7] The Receiver has concluded that there can be no value maximizing transaction in relation to the BEA and Elm properties without termination of the pre-sale purchase agreements. This is because Stateview spent all of the deposit monies prior to these proceedings. No potential purchaser is willing to take on the presale purchase agreement liabilities without the offsetting benefit of receiving the deposit monies.

[8] Also, the evidence is that it is unlikely there will ever be sufficient funds in the applicable estates of these three Stateview entities to make any contribution toward payment of the deposit claims of the pre-sale purchasers. Indeed, the evidence is that there will be a shortfall in recovery for the secured creditors.

[9] There is a proposed class action on behalf of the pre-sale purchasers, but that is separate from these proceedings and not before the Court on this motion. There is no evidence, or suggestion, that the class proceedings will be in any way prejudiced by the termination and disclaimer of the pre-sale purchase agreements in the circumstances.

Analysis

[10] Under the *Warranties Act*, if a new home purchaser is entitled to a refund of their deposit from a vendor and is unable to obtain that refund, then the purchaser can make a claim against Tarion's guarantee fund for recovery of 10% of the purchase price, up to a maximum of \$100,000. Tarion then has a statutory claim over against the vendor.

[11] In November of last year, Tarion sought, on its own behalf and on behalf of over 700 Stateview home buyers, a declaration from this Court that their deposits were subject to either an express trust or a constructive trust arising because of unjust enrichment, such that the deposit return claims would rank in priority ahead of Stateview's secured creditors. The motion was dismissed: *Kingsett v. Stateview*, 2023 ONSC 7105. In essence, the Court found that the homebuyers were unsecured creditors in relation to their deposits. The pre-sale purchasers all entered into agreements with the Stateview entities in which they agreed that the secured lenders would have priority. The pre-sale purchasers, therefore, had contracted out of any possible argument that the secured lenders could not have priority over the purchaser's interest. In addition, the Court found that the *Bankruptcy and Insolvency Act* sets out a federal statutory scheme of priorities in bankruptcy; in essence, secured creditors have priority over unsecured creditors except in certain defined situations, none of which applied in this case. The applicable legislation for purchases of new freehold homes did not require the recipient of the deposit funds to hold them in trust. There were also no express trusts created (other than in certain limited circumstances which were found to be inapplicable). No appeal was taken from this decision.

[12] Since that time, Tarion has worked with the Receiver to come up with an acceptable process to govern and to expedite the filing and payment of warranty claims for the pre-sale purchasers. Warranty claims against the guarantee fund appear, at this point, to be the only likely means of recovery of the home buyers' deposits.

[13] Typically, pre-sale purchasers are only able to file deposit refund claims with Tarion in defined circumstances which, generally, require the completion of a transaction where the purchaser of the real property decline to assume the pre-sale purchase agreements. The BEA and Elm properties have thus far proved challenging to market and sell; it is unknown how long it may be before an acceptable transaction comes along. Accordingly, given the uncertainty of

the timing to complete a sale of the BEA and the Elm real properties, the Receiver has negotiated with Tarion the terms of a statutory declaration that will: (i) facilitate the termination of the pre-sale purchase agreements; and (ii) enable the pre-sale purchasers to file a claim with Tarion even though the applicable real properties have not yet been sold. The proposed statutory declaration, however, requires the Receiver to terminate the BEA and Elm pre-sale purchase agreements.

[14] With respect to Highview, the relevant pre-sale purchase agreements were not terminated at the time of the sale, nor were they assumed by the purchaser. It was the Receiver's understanding at the time that there were no extant purchase agreements, having been advised by Stateview that there had already been mutual termination agreements executed in respect of each purchase agreement. Since then, however, some pre-sale purchasers have advised the Receiver that they did not receive a return of their deposits. Even though there has not been a formal termination/disclaimer of the Highview pre-sale purchase agreements, Tarion is apparently accepting claims for deposit refunds by Highview pre-sale purchasers. In order to regularize this process, however, the Receiver is also seeking authorization to terminate the Highview pre-sale purchase agreements to ensure the pre-sale purchasers are not prejudiced by the absence of a formal disclaimer.

[15] The Court's jurisdiction to direct a receiver to disclaim pre-sale purchase agreements in the context of receivership sales of real property developments is well established. Disclaimers are a valuable tool by which a receiver can maximize the value of the assets of the estate for the benefit of the stakeholders.

[16] The considerations for determining whether a Court should authorize a receiver to disclaim pre-sale purchase agreements were set out by Justice Fitzpatrick in *Forjay Management Ltd. v. 0981478 BC Ltd.*, 2018 BCSC 527 at paras. 131-132:

- (a) the respective legal priority positions as between the competing interests;
- (b) whether a disclaimer would enhance the value of the assets, and, if so, whether a failure to disclaim would amount to a preference in favour of one party; and
- (c) if a preference would arise, whether the party seeking to avoid a disclaimer has established that the equities support that result.

[17] On August 18, 2023 and on September 14, 2023, this Court authorized the Receiver to disclaim pre-sale purchase agreements relating to Stateview Homes (Hampton Heights) Inc. and On the Mark, respectively, each of which is an entity within the Stateview group. On February 15, 2024, this Court authorized the Receiver to disclaim pre-sale purchase agreements relating to Stateview Homes (NAO II) Inc., another entity within the Stateview group.

[18] As such, the relief sought on this motion is consistent with the terms on which the related Stateview receiverships have been administered under the Court's ongoing supervision and approval. The circumstances and factors in those other Stateview receivership proceedings are analogous to this motion, namely: (i) the entities were single-purpose real estate development companies that operated an incomplete project; (ii) the entities had entered into pre-sale purchase agreements with purchasers for freehold homes that had not closed; (iii) the disclaimer was necessary to facilitate a value maximizing transaction; and (iv) no potential transaction or offer existed that provided for the assumption of the entity's obligations under the pre-sale purchase agreements.

[19] Of most importance, the pre-sale purchasers themselves will benefit from the termination and disclaimer. As set out in the Receiver's Eighth Report, termination of the pre-sale purchase agreements is necessary to enable the pre-sale purchasers to make claims to Tarion for deposit refunds. Several pre-sale purchasers have already corresponded with the Receiver and with its counsel expressing a strong desire to move forward with the Tarion claim process as quickly as possible.

[20] As things stand: a) the pre-sale purchase agreements must be terminated in order to effect any value-maximizing sale of these properties, as contemplated in the earlier sales process order, for the benefit of creditors generally and in order to facilitate home buyers' Tarion warranty claims; b) any realization from the sale of these properties is unlikely to generate sufficient net proceeds to repay the secured creditors in full, in any event; and, c) the presale purchasers are unsecured creditors, standing behind the secured creditors in priority of distribution. In the circumstances, the alternative to granting the requested order for termination and disclaimer of the pre-sale purchase agreements (that is, *not* granting the termination order) will result in nothing more than further delay in the ability of the home buyers to make their warranty claims to Tarion and to receive the refund of their deposits up to the statutory maximum under the *Warranties Act*.

[21] It is for these reasons I have concluded it is just and reasonable to grant the order sought and to terminate and disclaim the pre-sale purchase agreements for the Highview, BEA and Elm properties. This will enable the pre-sale purchasers to file their Tarion warranty claims promptly and expedite recovery of the allowable amount of their deposits with a minimum of additional delay, stress and bother.

[22] The Receiver's report is also acceptable to me and is approved.

[23] Orders to issue in the form signed by me this day.

[24] I ask the Receiver to ensure all stakeholders, including those in attendance at the hearing earlier today, receive copies of this endorsement and the orders issued.

A handwritten signature in blue ink, appearing to read "Penny J.", followed by a period.

Penny J.