Court File Number: CV-21-00663051-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Kingsett Mortgage Corporation
Plaintiff(s)

AND

Sunrise Acquisitions (Hwy 7) Inc.
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: ____________________

Counsel	Telephone No.:	Facsimile No.:

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto (**No formal order need be taken out)**

☐ Adjourned to: ____________________
☐ Time Table approved (as follows):

Order to go in accordance with the Endorsement attached hereto as Schedule A.

June 9, 2021
Date

W. Hon-Lut J.
Judge's Signature

☐ Additional Pages ________

SCHEDULE A

ENDORSEMENT

Kingsett Mortgage Corporation v. Sunrise Acquisitions (Hwy 7) Inc.

1. The applicant, Kingsett Mortgage Corporation, (the "applicant"), seeks the appointment of a receiver. The debtor, Sunrise Acquisitions (Hwy 7) Inc. (the "debtor"), opposes and seeks an adjournment.

2. The debtor is a single purpose corporation that has developed a property. In 2017, the debtor defaulted on a second syndicated mortgage previously arranged by Fortress Real Developments Inc. and currently administered by FAAN Mortgage Administrators Inc. ("FAAN"). On May 1, 2021, the debtor also defaulted on a first mortgage in favour of the applicant. As of May 31, 2021, it is understood that approximately $1.95 million is outstanding under the first mortgage and approximately $10.7 million is outstanding under the second mortgage. The loans in favour of the applicant secured by the first mortgage are guaranteed by Sajjad Hussain and Mazammil Kodwavi, the directors and officers of the debtor.

3. The remaining assets of the debtor available to repay the applicant and FAAN consist of five essentially completed townhouses. Depending upon the timing and the selling price of the remaining five houses, it is probable, but not certain, that the applicant will be repaid and it is certain that FAAN will not be repaid.

4. Accordingly, the sales of the remaining five townhouses are very important to both creditors. The debtor has entered into agreements of purchase and sale respecting each of these townhouses. The applicant and FAAN raise the following concerns regarding these agreements.

5. The purchase price does not meet the minimum threshold for a compliant sale under the loan arrangements with the applicant. Four of the five agreements are made with related parties, including three with the spouse of one of the guarantors. The deposits are unusually high, in some cases in excess of 50% of the sale price, but have not been retained in trust and therefore do not represent monies that will be delivered at closing. The debtor has stated that these deposits have been depleted in the construction of the townhouses but there is no evidence to confirm this.

6. The applicant, supported by FAAN, seeks the appointment of a receiver primarily for the purposes of preserving the five townhouses for sale and reviewing the circumstances surrounding these agreements of purchase and sale. It can be expected that they will seek an order permitting the receiver to disclaim these agreements if circumstances warrant

after the review is completed. For its part, the debtor, and more particularly one of the guarantors, seeks to complete these agreements given that the deposits no longer exist.

7. Dealing first with the debtor's request for an adjournment, Mr. Kodwavi says in an affidavit that he is trying to arrange financing that will allow the debtor to repay the applicant's debt in full. He seeks an adjournment of five weeks for this purpose or, alternatively, of two weeks to prepare responding application materials. In oral submissions, however, it became clear that Mr. Kodwavi's intention was to pay the outstanding amount due to the applicant in his capacity as a guarantor of the applicant's loans and thereby receive an assignment of the applicant's loan position. In these circumstances, Mr. Kodwavi would be able to implement a power of sale proceeding in order to sell the remaining townhouses if he were unable to reach a satisfactory agreement with FAAN regarding the remaining townhouses.

8. In the ordinary course, a debtor seeking to refinance a development project might obtain an adjournment at the first hearing after default if it were prepared to keep the outstanding debt current during the adjournment period and if there were a reasonable prospect of a refinancing. In this case, default on the first mortgage occurred on May 1. The applicant record was served and filed on or about May 28. However, the second mortgage has been in default since 2017. The debtor and its principals have had ample time to explore financing options. There is no evidence they have done so. In fact, their opposition to this motion, and their request for an adjournment, was only served on the morning of the hearing. Their motion materials do not contain any evidence of any efforts to seek a refinancing of either mortgage and no basis for believing that there is any possibility of any refinancing. Nor is there any offer to keep the creditors current during the period of any adjournment.

9. However, there is also a more fundamental reason for refusing the request for an adjournment. This is not a case in which the debtor, or its principal, proposes a refinancing to preserve its equity in a project by injecting monies that will pay out the existing creditors. Given the size of the second mortgage, the debtor has no equity in the project as there is no prospect of any refinancing of the second mortgage. The contemplated financing will not inject any additional monies into the project. Instead, Mr. Kodwavi seeks time in order to explore the possibility of a "re-financing" to take an assignment of the first mortgage for strategic purposes.

10. While this proposed action is certainly available to a debtor/guarantor, I do not think that it is deserving of the Court's exercise of discretion when balanced against the legitimate concerns of both creditors for an appropriate sales process for the remaining townhouses. The proposed adjournment will not contribute in any way toward such a sales process. It will simply hold it up for a period of time and increase the accrued interest on the outstanding loans.

11. In addition, I do not see any material prejudice to the debtor or the guarantors to the denial of the requested adjournment insofar as they oppose any future disclaimer of the agreements for the sale of the townhouses. The matters that the debtor/guarantors wish to raise by way of responding materials pertain to the legitimacy of the sales agreements given past practice and otherwise. These are the very matters that will be investigated by the receiver as a court appointed receiver. They would also have to be addressed by the Court in any future motion by the receiver seeking the authority to disclaim such contracts. There will therefore be an opportunity for the debtor/guarantors to put forward their position on the appropriateness of the sale agreements both to the receiver and ultimately to the Court should the receiver move to disclaim the agreements. I also note that there is no evidence of any operating business that would be affected by a receivership.

12. Accordingly, the request for an adjournment, on either basis sought by the debtor, is denied for the reasons above.

13. I turn then to the request for the appointment of a receiver under s. 234(1) of the *Bankruptcy and Insolvency Act* and s. 101 of the *Courts of Justice Act*.

14. There is no doubt that, if this application had been brought by FAAN as the second mortgagee, the "just and convenient" requirement for the appointment of a receiver would have been satisfied. The second mortgage has been in default since the spring of 2017 and there is no prospect of any refinancing to pay out this debt. FAAN has a significant interest in maximizing the net sales proceeds from the sale of the remaining townhouses as the syndicated mortgagees that it represents are entitled to all of the residual equity in the project after payment of the applicant's loans. FAAN has lost all trust and confidence in the debtor and its principals generally. In addition, significant questions have arisen regarding the agreements of purchase and sale which only reinforce that lack of trust and confidence. The apparent strategy of the guarantor to seek leverage against FAAN through its contemplated "refinancing" in order to achieve completion of these agreements only adds to this view of the debtor and its principals. In these circumstances the appointment of a receiver to preserve the property and to investigate the circumstances regarding these agreements is eminently reasonable.

15. In his materials filed today, Mr. Kodwavi says that he is prepared to inject an additional $800,000 in total into the four sales to avoid the appointment of a receiver. This offer has been rejected by the creditors and, in particular, by FAAN. The Court cannot force such an arrangement on the parties. In the circumstances, the creditors' rejection of this offer is a further indication of the extent of the lack of trust between the debtor and the creditors regarding the existing sale arrangements that is reflected in the request for the appointment of a receiver for the purposes described above.

16. The debtor argues, however, that the application should be denied because it is brought by the applicant, the first mortgagee, rather than FAAN. It says that the applicant has no

interest that requires protection in the form of a receiver, because it is possible or even probable that the applicant will be paid out on the sale of the townhouses.

17. I do not agree for the following reasons.

18. Until completion of the sale of the five townhouses, the applicant has, and will have, a real interest in ensuring that the sale of the townhouses proceeds in an orderly fashion in as short a period of time as possible in order to maximize the sales proceeds and thereby the likelihood that it will be paid out. This reflects the fact that, until completion of the sales, there remains uncertainty as to the exact payout to the applicant from these sales. In addition, the related party nature of four of the executed agreements, and in particular of the three that were executed by the wife of one of the guarantors, raises the question of whether the purchasers will be able to complete the transactions given the present economic circumstances of the debtor.

19. The Applicant and FAAN also argue that the Court should consider the interest of all the creditors, even if the applicant is a first secured creditor who is likely to be paid out. While I am not sure that is correct in all circumstances, in this case, the sale of these townhouses will require a discharge from the second mortgage which is best effected co-operatively between the two creditors. FAAN supports the application and, at the present time, is acting in concert with the first mortgagee to the benefit of the syndicated mortgagees that it represents by minimizing their legal and professional costs. The fact that the situation could change if the debtor or a guarantor were to take an assignment of the applicant's position is in my view too speculative to override the foregoing considerations in favour of a receiver based on current circumstances. For these reasons, I think the protection of the interest of the second mortgagee, FAAN, with a view to minimizing its loss, is a legitimate consideration. In this respect, I also reject the debtor's argument that the appointment of a receiver will result in unnecessary costs given that FAAN, as the party that will effectively bear such costs, supports the appointment of a receiver nonetheless.

20. Based on the foregoing, the debtor's motion for an adjournment is denied and the applicant's motion for the appointment of a receiver on the basis described above is granted.

Wilton-Siegel J.

Released: June 9, 2021