

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

B E T W E E N:

**KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL
ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE PLACEMENT
REAL ESTATE FUND NO. 434**

Applicant

- and -

**MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT GROUP
(THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP INC.**

Respondents

**AIDE MEMOIRE OF MIZRAHI INC
(Case Conference Returnable June 12, 2024)**

1. Mizrahi Inc (“MI”) provides this Aide Memoire to update the court on the issues that have arisen between it and the court-appointed receiver, Alvarez & Marsal Canada Inc. (“AM”) since the last case conference on March 18, 2024, and to set out MI’s position on the receiver’s intended motion and MI’s cross-motion.

Update since Last Case Management Conference

2. MI has brought a motion for payment of outstanding costs and fees owed to it for post-receivership work pursuant to section 17 of the Receivership Order. In response, the receiver advised, among other things, it intended to advance a set-off defence. At the time of the last case conference, the receiver identified a number of potential sources of set-off defences, but had not confirmed or committed to advancing any of these claims. The court rejected MI’s request to bifurcate MI’s motion for payment with any of the unidentified claims for a set-off by the receiver. The court endorsed a timetable that required the receiver to deliver a responding motion record by May 31.

3. The receiver seeks to bring a motion (without having delivered a Notice of Motion or Motion Record) for production of MI's unredacted bank records pursuant to paragraph 8 of the Receivership Order. MI has agreed to produce any and all banking records related to the Project on the condition that it can redact non-project related information. This interpretation of the meaning of the term "Records" is consistent with the purpose of paragraphs 8 and 10 of the Receivership Order, which require MI, among others, to produce documentation "solely in relation to the Project".
4. MI, as the former general contractor to the Project, received and paid out funds for the Project. It acknowledges and agrees that the receiver is entitled to documentation in MI's possession establishing the flow of Project funds. However, because MI manages multiple development projects at once and also used its bank accounts to address internal matters, such as employment and human resources issues, the flow of Project funds into MI's bank accounts were not segregated from non-Project related funds. To date, MI has produced all banking records that do not need redaction to remove reference to non-Project related funds.
5. Counsel for the receiver acknowledged that the receiver does not seek "to understand how MI used funds paid to it by the Debtors for its services". Of course, the receiver's mandate is limited to the Project and the use of Project funds. MI has undertaken to produce all of its remaining banking records related to the Project redacted to exclude non-Project related information.
6. The Receiver will not agree to receive banking records redacted to remove non-Project related information. It refuses to agree to redactions despite having been unable to identify any significant discrepancy between the records in their possession, which establish what MI was paid, what the Senior Lender, its administrator and the cost consultant approved to be paid to MI and the fact that there are no extant claims for non-payment by subtrades for pre-receivership work (the only outstanding claim for non-payment for any period is brought by Gamma).

The Receiver has not delivered Responding Materials to the Payment Motion

7. In advance of the agreed upon deadline to deliver a responding motion record of May 31, the receiver identified one claim for a sett-off for the repayment of commissions paid to MI for the sale of units that the receiver has purported to cancel due to the alleged default of the purchasers. This claim by the receiver, which is denied by MI, amounts to \$1,816,012.85.

Counsel for the receiver identified this potential claim in a letter dated May 15. MI does not agree that there is any amount owing for the repayment of commissions, in part because MI is owed in excess of \$20 million by the Project for a Residential Development Fee, a liquidated claim that, like the payment of commissions, predates the Receivership Order. MI's claim for a Residential Development Fee is not part of MI's Payment Motion, which is limited to a claim for the non-payment of fees and expenses owed to MI for post-receivership work pursuant to paragraph 17 of the Receivership Order.

8. On May 27, MI produced all remaining MI banking documentation that does not require redactions to remove reference to non-Project related information. On June 9, MI produced all project records from MI's email accounts, which were compiled and prepared for distribution by a third party consultant, Ricoh. The process of compiling the project records took Ricoh much longer than anticipated.
9. On May 28, counsel for MI wrote to counsel for the receiver indicating that the receiver should deliver its responding motion record by May 31, which could be supplemented for any claim for set-off the receiver identified from documentation that was recently or subsequently produced.
10. For reasons unexplained, the receiver filed nothing on or after May 31 in response to the Payment Motion. MI seeks an order restricting the receiver's claim to a set-off to any claims it can identify based on the banking documentation and project records recently produced, or any banking records produced going forward (whether redacted or unredacted).

The Reserve Should Be Increased

11. The receiver undertook to set aside \$6 million to address MI's claim for payment at issue in the Payment Motion. At that time, MI's claim under the payment motion had not crystallized. Since that time, MI's claim for payment has increased substantially. Including interest up to the end of May 2024, MI claims \$11,422,315.32, which includes \$4,822,846.53 that MI understands are owed to third parties. MI understands the receiver has undertaken to pay the outstanding third party costs, but MI requires confirmation so that it may finalize and crystallize its claim to payment at issue on the Payment Motion. For example, the exact quantum of payments to these third parties for post-receivership work that predates MI's termination as general contractor must be known to calculate MI's claim to a 5% construction management fee on these costs. Included in MI's claim for payment on the Payment Motion is

\$697,460.58 as a 5% construction management fee on the release of holdbacks, recently approved by the Court.

12. MI therefore seeks an increase in the reserve set aside by the receiver to address its claim for payment. Without an increase in the reserve, MI will be prejudiced and faced with the possibility of non-payment, especially given the recent approval of the SISP for the Project.

Sam Mizrahi, as Project Owner and Guarantor, Seeks Production of Project Documentation

13. As reviewed in the motion materials reviewed with the court on June 6, Mr. Mizrahi is both co-owner of the Project and a guarantor under certain of the Project's liabilities. Mr. Mizrahi seeks production, on a confidential basis, of the quantity survey reports, the daily log reports of Skygrid, the general contractor, and the updated schedule and budgets of the Project. This information was requested from counsel for the receiver on May 29, and no response was received.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of June, 2024.

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Applicant

Respondents

Court File No. CV-23-00707839-00CL

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PROCEEDING COMMENCED AT TORONTO

AIDE MEMOIRE OF MIZRAHI INC

MORSE SHANNON LLP

133 Richmond Street West Suite
501
Toronto ON M5H 2L3

Jerome R. Morse (21434U)
jmorse@morseshannon.com

David M. Trafford (68926E) dtrafford@morseshannon.com

Tel: 416.863.1230
Fax: 416.863.1241

Lawyers for the Respondents

