

**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

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 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

**NOTICE OF MOTION
(*Advice and Directions*)**

TAKE NOTICE that Alvarez & Marsal Canada Inc. in its capacity as receiver and manager (in such capacities, the “**Receiver**”), without security, of all of the assets, undertakings and properties of Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc., and Mizrahi Commercial (The One) GP Inc. (collectively, the “**Debtors**”), will make a motion to the Court on a date to be fixed at the court house at 330 University Avenue, Toronto, Ontario or by Zoom videoconference.

THE MOTION IS FOR:

1. An Order authorizing and directing the Receiver to continue using the Concrete Pump currently located on the Staging Area to continue construction of the Project (all as defined below).
2. Costs of this motion, if it is opposed.

THE GROUNDS FOR THE MOTION ARE:

Overview

1. The Receiver was appointed in order to, among other things, continue construction of the Project (as defined below) and maximize recoveries for the benefit of all stakeholders.
2. The Debtors have used a concrete pump (the “**Concrete Pump**”) located in a staging area on a portion of Balmuto Street (the “**Staging Area**”) to build the Project since 2020. Construction of the Project cannot proceed without use of the Concrete Pump. The Concrete Pump cannot legally be operated anywhere except the Staging Area. The Debtors have, and continue to maintain, a permit issued by the City of Toronto to operate the Concrete Pump in the Staging Area.
3. A contingent unsecured litigation creditor in this proceeding, Mappro Realty Inc. (“**Mappro**”), alleges that the Concrete Pump interfered (and continues to interfere) with Mappro’s enjoyment of a property that it owns on Balmuto Street, known municipally as 19 Bloor Street West (the “**Mappro Property**”). Mappro alleges,

- among other things, that the Receiver is liable to it for “wilful misconduct” because the Debtors continued using the Concrete Pump and Staging Area after the Receiver was appointed. Mappro served a motion for leave to commence a claim against the Receiver. Mappro ultimately withdrew this aspect of its motion, but claims the right to re-assert it at any time.
4. Mappro’s allegations have put the Receiver in a difficult position. Mappro asserts that the Receiver is engaging in wilful misconduct, but the Receiver cannot fulfill its core mandate of continuing the construction of the Project without use of the Concrete Pump. The Receiver therefore seeks direction with respect to how it should proceed.
 5. The Receiver believes that it should be directed to continue to use the Concrete Pump for the construction of the Project. Continued construction is the only way to maximize recoveries and complete the Project for the benefit of all stakeholders. If construction stops, or is paused, stakeholders will suffer significant losses. The prejudice to Mappro is limited and significantly mitigated by an impending sale of the Mappro property to a developer.

Background

6. The Debtors are entities established for the purpose of developing a mixed-use development project located at the southwest corner of Yonge Street and Bloor Street West in Toronto, Ontario, marketed as “The One” (the “**Project**”).

7. On October 18, 2023, pursuant to the Order (Appointing Receiver) (the “**Receivership Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”), the Receiver was appointed as receiver, without security, of all of the assets, undertakings and properties of the Debtors, acquired for, or used in relation to, a business carried on by the Debtors, including, without limitation, in connection with the Project.
8. As noted, a core aspect of the Receiver’s mandate has been (and continues to be) ensuring that the Debtors continue to build the Project with a view to maximizing recoveries for the benefit of all stakeholders. Construction has continued since the Receiver was appointed. As described below, construction cannot proceed without the Concrete Pump.

The Staging Area

9. Construction of the Project requires an enormous volume of concrete. The Debtors required a concrete pump close to the Project so that this concrete could be supplied to the Project and used in construction.
10. On July 14, 2020, the City granted a temporary street occupation permit over a five metre wide and 17 metre long portion of Balmuto Street (defined above as the “**Staging Area**”). The Debtors erected the Concrete Pump in the Staging Area, and have used that Concrete Pump to supply concrete required for the Project.

11. Given that the permit issued on July 14, 2020 was temporary, Mizrahi sought a longer-term permit. A multi-year permit was granted by City Council on November 25, 2020, for a term of November 30, 2020 to November 30, 2022.
12. The permit has been extended several times. First, to March 31, 2023, then to April 1, 2024, then to July 31, 2024, and most recently to February 1, 2026.
13. Mappro unsuccessfully opposed the Debtors' permit application, and has unsuccessfully opposed each renewal of the permit. As a condition to the March 2023 renewal of the permit, the City required that the Debtors implement significant noise reduction procedures. The Debtors took all of the steps that they were directed to take.

Mappro and the Mappro Action

14. As noted, Mappro owns the Mappro Property. The Mappro Property is located on the southeast corner of Balmuto Street and Bloor Street. A portion of the Mappro Property extends south from Bloor Street on Balmuto Street.
15. The Staging Area is located on Balmuto Street, adjacent to the Mappro Property. The Staging Area does not encroach on the Mappro Property.
16. On September 7, 2022, Mappro commenced an action (the “**Mappro Action**”) against Mizrahi Developments Inc. and the City of Toronto seeking, among other relief:

- (a) an injunction to prohibit further use of the Staging Area (the “**Injunction**”);
and
 - (b) damages in the amount of \$3,000,000.
- 17. The Mappro Action was still at an early stage when the Receiver was appointed. Documentary discovery had not occurred and few steps had been taken to move the action forward.
- 18. The Mappro Action has been stayed since the Receiver’s appointment, although the Receiver consented to a limited lifting of the stay in October 2024 because Mappro asserted that certain amendments to its claim were required before a limitation period expired.

Mappro’s Motion for Leave to Commence an Action against the Receiver

- 19. On October 2, 2024, Mappro served a motion seeking (among other relief) to lift the stay of proceedings and commence a claim against the Receiver and SKYGRiD Construction Inc. (“**SKYGRiD**”), the construction manager the Receiver retained in March 2024.
- 20. The Receivership Order prohibits any claims against the Receiver, except for gross negligence or wilful misconduct. Mappro asserted that the Debtors’ use of the Staging Area and the Concrete Pump after the Receiver’s appointment constituted “wilful misconduct” within the meaning of the Receivership Order.

21. By e-mail dated October 28, 2024, Mappro advised that it would not “be seeking leave to add the Receiver or SKYGRiD as defendants in the action at this time.” Mappro still seeks to lift the stay so that it can proceed with the Mappro Action, including the Injunction.

B. The Receiver requires direction

22. As noted, the Concrete Pump and the Staging Area are essential to continuing construction of the Project. Construction is part of the Receiver’s core mandate.
23. Mappro has alleged that the Receiver has engaged in wilful misconduct, and that it is continuing to engage in wilful misconduct. Mappro has abandoned this allegation for now, but reserves the right to re-assert it at any time.
24. The Receiver is currently caught between the need to continue construction and the risk of an allegation that continuing construction constitutes wilful misconduct within the meaning of the Receivership Order. The Receiver therefore seeks direction from this Court with respect to this issue.
25. In the Receiver’s view, it is necessary and appropriate to continue using the Concrete Pump in the Staging Area until construction of the Project is complete. If the Concrete Pump cannot be used, then construction of the Project will stop. It is unclear if, or when, construction would continue under such circumstances.
26. Mappro suggests in the Mappro Action that the Concrete Pump could be moved to another location. The Debtors do not have the right to legally operate the Concrete Pump in any other location. Even if the Debtors could secure permission to move

the Concrete Pump, the process of securing permission to move the Concrete Pump and then subsequently moving it would take at least one year. The costs of delaying the Project for this extended period would be astronomical.

C. Mappro

27. Mappro alleges in the Mappro Action that the noise from the Concrete Pump interferes with its ability to rent part of the Mappro Property to a new tenant.
28. The Receiver understands, however, that Mappro has entered into a conditional agreement of purchase and sale with a third-party developer. The developer has applied for permission to build a 95-storey mixed use condominium building on the Mappro Property. The pending sale of the Mappro Property, and the demolition of the space that Mappro plans to rent, would likely make it difficult to rent the vacant portion of the Mappro Property even if the Concrete Pump were to be removed.

D. Conclusion

29. In light of the foregoing, the Receiver has concluded that the harm caused by stopping the use of the Concrete Pump and the Staging Area would significantly exceed the harm (if any) caused by continuing such use. Accordingly, the Receiver has brought this motion for a direction that it continue using the Concrete Pump and Staging Area until it is no longer required for construction of the Project, subject to the continuing renewal of the street occupation permit, as required.
30. The provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, including sections 183 and 243(1)(c).

31. Section 14(1) of the *Bankruptcy and Insolvency General Rules*, CRC, c 368.
32. Section 101 of the *Courts of Justice Act*, R.S.O 1990, c. 43, as amended.
33. Rules 1.04, 1.05, 2.01, 2.03, 3.02, 16, 30, and 37 of the *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194, as amended.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

34. The Seventh Report of the Receiver, to be filed; and
35. Such further and other material as counsel may advise and as this Honourable Court may permit.

November 12, 2024

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

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Proceeding commenced at Toronto

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(Advice and Directions)

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