



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00707839-00CL DATE: August 9, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: **KEB HANA BANK v. MIZRAHI COMMERCIAL (THE ONE) LP et al**

BEFORE JUSTICE: **Justice OSBORNE**

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE OSBORNE:

1. There are three matters before the Court.
2. First, Mizrahi Inc. (“MI”), brings a motion seeking an order as set out in its Notice of Motion (subject to the agreement of the parties on certain issues as described below):
 - a. that any claims for set off advanced by the Court-appointed Receiver be and are restricted to claims that the Receiver identifies solely from a review of documentation provided by MI on or after May 27, 2024;
 - b. requiring the Receiver to increase the reserve set aside to address MI’s claim for payment in its pending motion from the current reserve of \$6 million to \$11 million;
 - c. requiring the Receiver to obtain, and if obtained, produce to MI, all documentation referable to the approval and/or denial of payments to MI, the approval and denial of construction draw requests for Project funds by MI, the payment of all approved payments and any other documentation in the possession of the Receiver or the Senior Secured Lenders; and
 - d. requiring the Receiver to produce to Mr. Sam Mizrahi (as opposed to MI) copies of all quantity survey reports, the daily logs of the Projects General Contractor, SKYGRiD, and updated construction schedules and budgets for the Project.
3. Second, the Receiver brings a motion for the Lien Claims Resolution Order, establishing a procedure for resolving Lien Claims asserted in Lien Notices delivered pursuant to the Lien Regularization Order of this Court dated March 7, 2024.
4. Third, Gamma Windows and Walls International Inc. (“Gamma”), brings a motion seeking an order granting leave to bring the motion; and if leave is granted an order directing the Receiver to pay Gamma the amount of \$702,104.26 as set out in Gamma’s Notice of Motion in respect of two Gamma invoices; an order declaring that any contract between Gamma and MI is terminated effective May 20, 2024; and an order directing a reference to determine the quantum of Gamma’s lien.
5. MI relies on the affidavit of Veronica Stasolla affirmed June 21, 2024, together with the exhibits thereto. Ms. Stasolla is a legal assistant at the firm of counsel to MI. Gamma relies on the affidavit of Jimmy Zhao affirmed June 4, 2024, together with exhibits thereto. The Receiver relies on the Second Supplemental Third Report dated August 8, 2024 and the Fourth Report of the Receiver dated July 29, 2024, each together with appendices thereto.
6. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

7. The motion for the Lien Claims Resolution Order is unopposed. The MI motion is opposed, in part, and the Gamma motion is proposed to be adjourned to permit consensual discussions among the affected parties, as more particularly set out below.

MI's Motion

8. In its pending payment motion to be heard this fall, MI is seeking payment by the Receiver for fees and costs that it says are owed to MI by the Project for post-receivership work. That motion has been outstanding for several weeks. Recently however, MI sought various additional relief, some of which is the subject of this motion.
9. MI and the Receiver have resolved on consent numerous elements of the MI motion, such that the outstanding issues relate to the request for copies of all quantity survey reports, the daily logs of the Project's construction manager, SKYGRiD, and updated construction schedules and budgets for the Project (collectively, the "Construction Documents").
10. MI submits that the Construction Documents are relevant to its payment motion and to the position of the Receiver advanced in response to that motion that it is entitled to set off various amounts it says are owing by MI.
11. At its core, the position of MI on this motion is that since the Receiver takes the position on the payment motion that MI received above-market payments as a general contractor, it (MI) should be entitled to see what the Receiver has paid the party who replaced MI, (SKYGRiD), as a comparator. Moreover, to ensure that the comparison is "apples to apples", it should also receive the daily logs and construction schedules to determine the rate of construction and whether it is proceeding more quickly or more slowly since MI has been replaced.
12. The Receiver objects to production of documents beyond those that have already been provided. As noted above, the parties of resolve the issue of MI's request for certain documents to be produced from the Senior Secured Lenders (see Appendix "A" to the Second Supplemental Third Report).
13. The position of the Receiver is essentially twofold. First, certain Construction Documents, including updated schedule and budget information, have already been made available to MI in the SISP Data Room and there is no evidence that MI or Mr. Sam Mizrahi require or are entitled to more detailed information about the ongoing construction.
14. Second, the courts have consistently held that a stakeholder in a receivership is entitled only to information relevant to issues in that receivership. The Receiver here submits that MI is in fact seeking this production for a collateral purpose not relevant to this receivership proceeding: it brings this motion really on behalf of Mr. Sam Mizrahi personally in order that he can evaluate his potential exposure as a guarantor of the debts of the Project.
15. In its Notice of Motion, MI submits that Mr. Sam Mizrahi "as owner of the Project and guarantor" is entitled to the Construction Documents because they are "relevant to his interest in the Project as owner and guarantor to the Project's debts" (see paragraphs 22 and 23). Subsequent correspondence to counsel for the Receiver from counsel to Mr. Mizrahi is to the same effect (see letter dated July 30, 2024, Appendix C to the Second Supplemental Third Report).
16. The potential liability of Mr. Mizrahi as guarantor is not an issue in this receivership proceeding. The Receiver is not a party to the underlying guarantee given by Mr. Mizrahi to secure certain amounts advanced by the Senior Secured Lenders, and there is no evidence (and the Receiver is not aware of any) that any action has been taken to enforce that guarantee. Accordingly, the Receiver ought not to be compelled to make such production to one stakeholder and it owes a fiduciary duty to all stakeholders to report and provide information. It submits (and I accept) that information requests to which a receiver is

compelled to respond are limited to those that are “reasonable” and relate to a “specific purpose” directly relevant to issues in the receivership: *SA Capital Growth Corp. v. Mander Estate*, 2012 ONCA 681 at paras. 7-9; *Re Battery Plus Inc.*, 2002 CanLII 49569 at paras. 19-21; and *Pinnacle v. Kraus*, 2012 ONSC 6376 at para. 27.

17. In any event, the sale and investment solicitation process (“SISP”) is currently ongoing. In connection with that SISP, the Receiver has established the Data Room in order to share information about the Project with participants in the process.
18. Mr. Mizrahi expressed an interest in submitting a bid on June 21, 2024 through Mizrahi Real Estate Group, Inc., and received access to the Data Room the same day he executed the non-disclosure agreement.
19. The Receiver submits that the Data Room contains many of the Construction Documents sought by MI on this motion and in particular:
 - a. a “cost to date” which captures all costs incurred on the Project up to March 12, 2024 and an estimated “cost to complete” which captures the forecasted cost of completing the Project. The cost to complete is dated June 11, 2024 but is prepared as of March 12, 2024, although it includes all forecasted costs through to completion;
 - b. schedules and projected dates of completion for all major construction and procurement activities and milestones for the Project, including an “all tasks” schedule for the Project, which in turn provides detailed information with respect to each significant task and milestone required to complete the Project and when it will occur; and
 - c. while the Data Room does not include cost reports from the cost consultant retained by the Senior Secured Lenders, those reports do form the basis for the “cost to date” and “cost to complete” information that is in the Data Room.
20. The Receiver submits that, given the above, the only remaining category of documents at issue consists of the daily construction logs which include a high-level summary of daily construction activities on site, including the number of workers in various trades, weather conditions, and other day-specific information. The Receiver submits that such information is not relevant to either MI or Mr. Mizrahi.
21. I generally accept the position of the Receiver. In my view, the Court of Appeal has been clear that a stakeholder cannot compel the production of information for purposes collateral to the receivership. (see *SA Capital*). As is clear from the Notice of Motion of MI itself, the Construction Documents sought beyond those already produced are sought so that Mr. Mizrahi might assess his exposure under guarantees. Those guarantees are not part of this receivership proceeding, and as such, the purpose is collateral. If and when the Senior Secured Lenders take steps to enforce that guarantee, Mr. Mizrahi will have his rights as a party to that proceeding.
22. In any event, I am satisfied that save for the limited exception discussed below, both Mr. Mizrahi and MI, (and emphasizing that MI is the party to the payment motion) have already got access to the Construction Documents they seek through the SISP Data Room. Moreover, since Mr. Mizrahi has openly declared his interest in being a bidder in the SISP, I would be concerned about providing one bidder additional information not available to other potential bidders and the effects of such uneven production on the integrity and fairness of the sales process generally.
23. I observe that there is no affidavit from Mr. Mizrahi or indeed any officer, director, or even employee of MI in the record on this motion, explaining why such detailed additional information is required. This is in contradistinction to the MI payment motion, with respect to which MI has filed two supporting affidavits from employees, including Mr. Mizrahi.

24. With respect to the pending payment motion, the Receiver has not yet filed its responding materials which will presumably come in the form of a subsequent Receiver's report. While I accept that the Receiver has previously indicated that it intends to take the position both that MI has been paid above-market rates and that it may be entitled to assert setoff, the objective fact is that those materials are not yet in the record. (The Receiver asserts that the delay has been caused by the failure of MI to produce the Project Records and financial documents required by the Receiver to complete its investigation until last week). The Receiver submits that its material is filed, MI can pose written questions as appropriate and reasonable at that time, and seek production of documents if necessary. Until then, however, this motion is premature.
25. In my view, and for the above reasons, MI is not entitled to any of the additional Construction Documents it seeks at this time with one exception. As set out above, the Data Room includes estimates of "cost to complete" since MI was replaced in March, 2024. I accept the submission of MI that certain of those previously forecasted costs have now, some four months later, in fact been incurred. For example, SKYGRiD has in fact been paid from March until July or August. MI is entitled to know, at a very general all-inclusive level, what those amounts are. I accept that, given the position of the Receiver that MI was paid above-market, some information about those general amounts could be relevant to the position of MI on the payment motion. The weight to be given to such evidence on the payment motion is for another day.
26. Given my concerns above about maintaining the integrity and fairness of the ongoing SISF, that general information about the amounts actually paid to SKYGRiD should be made available to MI at the same time and in the same manner that they are made available to all other potential bidders. Accordingly, the Receiver should make them available to MI through the Data Room.
27. If MI and the Receiver cannot agree that such documents as MI may wish to rely on in the payment motion can be filed in the public record, they should be filed in a confidential supplementary motion record, and the parties can seek a sealing order at that time. I observe that the Receiver confirms that a summary of the economic terms of the SKYGRiD contract is already available in the Data Room. It may be that the information that I am directing be produced now amounts to little more than confirmation that payments have been made in accordance with that contract for the period from March, 2024 to the present in respect of which they were previously forecasted.
28. In my view, and subject to that limited exception, MI has not established that it is not entitled to the balance of the Construction Documents it seeks at this time. I am satisfied that it has available to it sufficient documents and details to assess the rate of construction without production of the daily logs.

Lien Claims Resolution Order Motion

29. The Lien Claims Resolution Order was contemplated at the time I granted the Lien Regularization Order on March 7, 2024. The basis and rationale for the relief sought today is set out in the Fourth Report at sections 4.1 to 6.1.
30. As of the date of the Fourth Report, four Lien Notices have been delivered or deemed to have been delivered pursuant to the Lien Regularization Order, one of which is that filed by Gamma.
31. The proposed relief sought today will address the unresolved Lien Notices delivered to date and the possibility of further Lien Notices being delivered in the future, through establishing a mechanism to resolve disputed Lien Notices.
32. The mechanics of that proposed dispute resolution process are fully set out in the Fourth Report and in the proposed order. As noted above, this relief is unopposed.
33. In my view, the proposed Lien Claims Resolution Order will provide a fair, equitable and expeditious process for the resolution or determination of disputed Lien Notices and will do so in a manner that is fair

to the directly affected parties and to the other stakeholders in this proceeding who have an interest in the equitable, but also timely, determination of Disputed Lien Claims.

34. The Receiver proposes that The Hon. Thomas J. McEwen and Mr. Joel Richler be appointed as Claims Officers, pursuant to and within the scope of the proposed Lien Claims Resolution Order. Each of the proposed Claims Officers is extremely experienced, well qualified and is an appropriate candidate to fulfil the duties as a Claims Officer.

35. For all of these reasons, the Lien Claims Resolution Order is granted.

Gamma Motion

36. Gamma has served a motion seeking to compel the Receiver to make payment of certain amounts as set out above that are the subject of the Gamma Lien Notice and it further seeks to have the balance of its claim referred to an Associate Judge for quantification.

37. At the case conference in this proceeding held on July 15, 2024, I accepted the position of the Receiver that the Gamma motion was premature and also that it should be resolved in accordance with the process contemplated by the proposed Lien Claims Resolution Order now sought and granted today, in order that Lien Claims could be dealt with fairly, uniformly and efficiently. For those reasons, I directed at the case conference that the Gamma motion be spoken to today.

38. Gamma wants its lien determined expeditiously, and also wants a determination with respect to its request that its contract be terminated. I am advised that Gamma and the Receiver are in discussions and the Receiver confirms that those discussions will continue promptly, with a view to resolving or at a minimum narrowing the issues between those two Parties with respect to both the termination of the contract and the quantification of the Gamma Lien Claim.

39. With respect to the contract termination, Gamma submits that it maintains personnel on the Project site and has certain equipment on site, although it appears from the record and the submissions of the parties that the actual work being done is minimal at best. Those parties are going to have discussions about whether and the extent to which Gamma personnel need to remain on site at all.

40. At the same time, it remains important that all Lien Claims be dealt with fairly and equitably, and that is precisely the purpose of the Lien Claims Resolution Order. Moreover, one of the submissions to be made by Gamma on that motion relates to the interpretation and effect of paragraph 17 of the receivership order made in this proceeding. MI has been equally clear that it will advance the same argument, and my view remains the same as it did at the July 15 case conference that judicial economy and consistency in result will be best achieved if those motions are heard at the same time, or at a minimum, the motion of Gamma is not heard in advance of the MI payment motion, which is broader in scope and significantly more significant in quantum (recognizing that neither of those factors is determinative of the position of Gamma).

41. Against that, I must balance the right of Gamma to have its motion determined, and the position of the Receiver that it challenges the amounts alleged to be owing to Gamma, and that if the issues cannot be consensually resolved, they should be addressed through the process contemplated by the Lien Claims Resolution Order. For all of these reasons, the parties will continue their ongoing discussions with a view to narrowing or resolving the issues, and the scheduling of the issues that remain and cannot be resolved will be addressed at a further date.

Result and Disposition

42. Order to go to give effect to these reasons. The Lien Claims Resolution Order is effective immediately and without the necessity of issuing and entering.

A handwritten signature in black ink, appearing to read "McEwen, J.", is located at the bottom right of the page.