



ONTARIO SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-23-00707839-00CL

DATE: March 29, 2025

NO. ON LIST: #2

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

BEFORE: JUSTICE OSBORNE

**PARTICIPANT INFORMATION**

**For the Applicant:**

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**For the Respondents:**

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**Heard: March 24, 2025**

## **ENDORSEMENT OF JUSTICE OSBORNE:**

- [1] Mizrahi Inc. requested this case conference to seek on an urgent basis directions with respect to two issues related to the pending companion motions: the motion of Mizrahi for payment, and the cross-motion of the Receiver. One additional issue was raised on consent - an amendment to the schedule.
- [2] First, Mizrahi objects to the proposed Rule 39.03 examination by the Receiver of Ms. Jenny Coco. Second, Mizrahi objects to the filing by the Receiver of the affidavit of Niall Finnegan sworn February 27, 2025. I will address these in turn.
- [3] With respect to the proposed examination of Ms. Coco, the Receiver advised on February 28 that it intended to conduct that examination pursuant to Rule 39.03. The position of the Receiver is that Ms. Coco can be cross-examined by both the Receiver and Mizrahi. It submits that there is no obligation under the Rules or otherwise to conduct the Rule 39.03 examination before delivering evidence as a moving party, and the only restriction on the right to examine is that it must be exercised with reasonable diligence. Even if the evidence of Ms. Coco were considered to be reply evidence, it is not improper.
- [4] Mizrahi submits, among other things, that the examination of Ms. Coco ought not to be necessary, and that the parties ought to be able to agree on stipulated evidence as to the issues to which her evidence would relate anyway. Counsel are continuing to have cooperative discussions with respect to possible stipulations. I am confident that if the examination can be avoided and costs minimized, that will be done.
- [5] If the parties cannot agree, however, in my view, there is nothing improper about a Rule 39.03 examination of Ms. Coco. To state the obvious, each of the Receiver and Mizrahi would have the right to cross-examine the witness.
- [6] In his affidavit affirmed January 20, 2025 sworn on these motions, Mr. Mizrahi states that Ms. Coco agreed to certain aspects of the "Mizrahi Inc. Payment Practices". The Receiver seeks to obtain Ms. Coco's own evidence with respect to those statements by Mr. Mizrahi. The Mizrahi Inc. Payment Practices are a central issue on these motions.
- [7] In addition, I am satisfied that the Receiver has acted with reasonable diligence. As noted, Mr. Mizrahi's affidavit was delivered only in late January, and the proposed Rule 39.03 examination can be accommodated without compromising the schedule I have already set for these motions.
- [8] With respect to the affidavit of Mr. Finnegan, it is tendered by the Receiver in reply to the affidavit filed by Mizrahi from Mr. Jeff Murva. Mr. Murva was Mizrahi's Director of Project Management for this Project. In his affidavit, Mr. Murva states that certain aspects of the Mizrahi Inc. Payment Practices are "common knowledge" of "larger Cost Consultants involved with residential, multifamily high-rise projects in the GTA".
- [9] In my view, the Receiver is entitled to reply to the statements of Mr. Murva. The Receiver is not splitting its case, but rather, is replying directly and specifically to the statements in Mr. Murva's affidavit, which in my view, were not reasonably foreseen. They are at odds with the advice provided to the Receiver by experienced construction professionals who work in the same sphere.
- [10] Reply evidence is admissible and appropriate where a responding party has raised a new matter that could not be reasonably anticipated or where the proposed reply evidence responds to an issue enlarged or expanded by the opposing party in a manner that could not have been reasonably foreseen. Ultimately, it is

a balancing exercise, with the goal of ensuring that each party has a fair opportunity to present its case and respond to the case put forward by the other party: *Johnson v. North American Palladium Ltd.*, 2018 ONSC 4496 at paras. 13-15.

- [11] Mr. Finnegan is not tendered as a proposed expert but rather is a fact witness whose anticipated evidence will be about the advice he gave to the Receiver as to certain facts or positions that are squarely at issue on these motions. Mizrahi takes the position that the Receivership Order (and particularly paragraph 17 thereof) requires the Receiver to make payments based on the Mizrahi Inc. Payment Practices. The Receiver takes the position that those Payment Practices were not commercially reasonable.
- [12] As always, the fact that the examination of Ms. Coco, if required, may proceed, and the fact that Mr. Finnegan's evidence is admissible as reply evidence, do not limit in any way the submissions that the parties may make at the hearing of these motions as to what if any, weight ought to be accorded to that evidence.
- [13] Finally, the parties have agreed on certain amendments to the previously imposed case management schedule for the motions. Those amendments are set out at Schedule "A" to the aide memoire filed by the Receiver. They are approved.

A handwritten signature in green ink, reading "O'Brien J.", is positioned in the lower right area of the page. The signature is written in a cursive, flowing style.