

COURT FILE NUMBER Q.B. No. 1195 of 2020

**COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY**

JUDICIAL CENTRE SASKATOON

APPLICANT BTA REAL ESTATE GROUP INC.

RESPONDENT FAMILY FITNESS INC.

**IN THE MATTER OF THE RECEIVERSHIP
OF FAMILY FITNESS INC.**

NOTICE OF APPLICATION

NOTICE TO THE RESPONDENT

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court. To do so, you must be in Court when the application is heard as shown below:

Where:	Court of Queen's Bench for Saskatchewan 520 Spadina Crescent East Saskatoon, SK S7K 3G7
Date:	Tuesday, October 13, 2020
Time:	1:30 p.m.

Go to the end of this document to see what you can do and when you must do it.

APPLICATION FOR RECEIVERSHIP ORDER

PARTICULARS OF APPLICATION

The Applicant seeks the following remedy or order:

1. An Order, substantially in the form of the draft Order filed herewith, pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), and, to the extent necessary, section 64(8) of *The Personal Property Security Act*, 1993, SS 1993, c P-6.2 (the "**PPSA**"), and section 65(1) of *The Queen's Bench Act*, 1998, SS 1998, c Q-1.01 (the "**QBA**"), appointing Alvarez & Marsal Canada Inc. as Receiver and

manager of all of the Property (as that term is defined below) owned or used in the business of the Respondent, Family Fitness Inc. (the “**Debtor**”).

2. Such further and other relief as counsel may request and this Honourable Court may allow.

The Applicant’s grounds for making this application are:

3. Section 243(1) of the BIA authorizes the Court to appoint a receiver over all of the property of an insolvent debtor upon the application of a secured creditor, provided it is just or convenient to do so.
4. Section 64(8) of the PPSA authorizes this Court to appoint a receiver over a debtor’s property in circumstances involving a debtor’s personal property encumbered by a security interest.
5. Section 65(1) of the QBA authorizes this Court to appoint a receiver in broad circumstances where it is appropriate or convenient to do so.

The Applicant’s summary of the material facts is as follows:

6. In this Originating Application:
 - (a) “**Debtor**” shall mean Family Fitness Inc.;
 - (b) “**Locations**” shall mean the locations in Regina, Saskatchewan, wherein the Debtor carries on business, including the following civic addresses, without limitation:
 - (i) 358 McCarthy Boulevard North;
 - (ii) 3615 Pasqua Street;
 - (iii) 2121 East Quance Street; and
 - (iv) 1846 Scarth Street.
 - (c) “**Property**” shall mean all present and after-acquired property of the Debtor (and its proceeds) including any property relating to the operations of the Debtor and

the business name “Evolution Fitness Gym”, including all Property situated at or related whatsoever to the Locations, as the Receiver in its sole discretion may determine to be included therein; and

- (d) “**Receiver’s Mandate**” shall mean all of the powers and authorizations granted in favour of the Receiver pursuant to the draft Receivership Order and, in particular, pursuant to paragraph 3 thereof.

Commercial Relationship between BTA and the Debtor

7. The Applicant, BTA Real Estate Group Inc. (“**BTA**”) is a commercial landlord. The Debtor is BTA’s tenant.
8. The Debtor operates at least four gyms or fitness centres in the City of Regina, Saskatchewan, under the business name “Evolution Fitness Gym”.
9. On or about July 1, 2013, BTA entered into a commercial lease agreement (the “**BTA Lease Agreement**”) to lease space to the Debtor. To secure performance of the Debtor’s obligations, BTA required the Debtor to grant BTA a general security interest in all of the Debtor’s present and after-acquired property (the “**Security**”) as a condition of BTA’s entry into the BTA Lease Agreement. The terms of the security agreement between BTA and the Debtor expressly provided that BTA would have the right to appoint a receiver and manager over the whole of the Debtor’s property in the event of default.

Default and Demand

10. The Debtor defaulted on its obligation to pay the rent owing pursuant BTA Lease Agreement on or about August 1, 2017, and has failed to bring outstanding rent amounts current at any point since that time.
11. On or about May 7, 2019, BTA demanded that the Debtor pay the rent arrears owing to BTA under BTA Lease Agreement in full, and served on the Debtor a Notice of Intention to Enforce a Security pursuant to section 244(1) of the BIA.
12. On or about June 15, 2019, BTA and the Debtor entered into a forbearance agreement (the “**June 2019 Forbearance Agreement**”). In exchange for BTA’s forbearance from

the immediate realization on the Security, the Debtor agreed to pay all rent obligations on a go-forward basis and to pay the full value of its rent arrears in monthly instalments.

13. As a condition of securing BTA's forbearance, the Debtor executed and delivered to BTA a consent receivership order (the "**Consent Receivership Order**") at the time of entry into the June 2019 Forbearance Agreement.
14. The Debtor defaulted on its obligation to make payments BTA in accordance with the June 2019 Forbearance Agreement or about April 1, 2020, and has remained in default since that time.
15. Rent arrears owing by the Debtor to BTA currently stand at \$1,032,067.07, with interest accumulating thereon at a rate of 18% *per annum*.

Insolvency of the Debtor

16. The Debtor has failed to make payment of amounts owing to BTA and at least one other landlord as they become due.
17. BTA submits that the Debtor has ceased paying current obligations in the ordinary course of business. Further, given the significant value of the rent arrears owing to BTA, it is submitted that the Debtor is unable to meet its liabilities generally as they become due. Finally, the assets of the Debtor appear to be insufficient, if liquidated, to enable payment of all its obligations due or accruing due. The Debtor, therefore, is an "insolvent person" within the meaning of section 2 of the BIA.

The Appointment of a Receiver is Just or Convenient

18. BTA respectfully submits that it is just or convenient to appoint a Receiver with the full Receiver's Mandate for numerous reasons including, without limitation:
 - (a) the Debtor has expressly agreed that BTA would be entitled to appoint a Receiver in the event of its default by way of its execution of the Security and the Consent Receivership Order;
 - (b) BTA and the Debtor's other stakeholders will suffer irreparable harm in the event that a Receiver is not appointed, as BTA's abrupt seizure of the Security will invariably cause the Debtor to cease carrying on business as a going

concern, thereby depriving BTA and the Debtor's other stakeholders of the opportunity to realize on the value of the Debtor's intangible property—particularly, Debtor's business name and goodwill, the value of which will be irreparably damaged if its fitness facilities close, even temporarily;

- (c) given the Debtor's past and ongoing misconduct—particularly, its refusal to comply with its reporting obligations to BTA—BTA can reasonably anticipate that it will encounter difficulty with the Debtor if it is required to seize the Security without the appointment of the Receiver;
- (d) appointment of the Receiver under an Order is necessary to enable the Receiver to carry out its duties more efficiently and effectively, as a private appointment is impractical and risky in the circumstances; and
- (e) the balance of convenience favours the appointment of a Receiver, as BTA's enforcement of its security interest in the whole of the Debtor's property outside of a Court-Ordered receivership will necessarily prevent the Debtor from carrying on its business and risks a disorderly realization process with attendant adverse consequences including, *inter alia*, the mass layoff of substantially all of the Debtor's employees, the probable loss of substantially all of the members of the Debtor's fitness facilities and distress or other enforcement by the Debtor's third-party landlords.

Material or evidence to be relied upon:

- 19. In support of this application, the Applicant relies on the following material or evidence:
 - (a) this Notice of Application;
 - (b) the Affidavit of Fazal Anwar, sworn October 8, 2020;
 - (c) a draft Receivership Order (redlined against the Saskatchewan Template Receivership Order);
 - (d) a Consent to Act as Receiver executed by the proposed Receiver;
 - (e) a Brief of Law (to be filed);
 - (f) the pleadings and proceedings herein; and

(g) such further and other material as this Honourable Court may allow.

DATED at Saskatoon, Saskatchewan, this 8th day of October, 2020.

The W Law Group LLP



Per: _____
Mike Russell and Kevin N. Hoy,
Counsel for BTA Real Estate Group Inc.

NOTICE

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

CONTACT INFORMATION AND ADDRESS FOR SERVICE

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