

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

THE HONOURABLE) WEDNESDAY, THE 17th
)
JUSTICE KOEHNEN) DAY OF JUNE, 2020

BETWEEN:

MELVYN EISEN, TRUSTEE

Applicant

- and -

DIAM DANFORTH PROPERTY INC.

Respondent

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*
Section 101 of the *Courts of Justice Act*, and Section 68(1) of the *Construction Act*

SALE APPROVAL AND VESTING ORDER

THIS MOTION, made by Rosen Goldberg Inc., in its capacity as the Court-appointed non-possessory receiver and construction lien trustee (in this capacity, the “**Receiver**”) of the real property municipally known as 2359 Danforth Avenue, Toronto, Ontario (the “**Real Property**”), and all other property, assets and undertakings of DIAM Danforth Property Inc. (the “**Debtor**”) acquired for, or used in relation to a business carried on by the Debtor, for an order (i) abridging the time for service of the notice of motion and motion record herein, (ii) approving the Second Report of the Receiver dated June 12, 2020 (the “**Second Report**”) and the activities described therein, (iii) declaring that the Asset Purchase Agreement between the Receiver and GAL Real Holdings Ltd. (the “**Purchaser**”) dated May 28, 2020 (the “**Initial APA**”) for the sale of the Real Property was conditional on a five day due diligence period pursuant to Section 6.4 of the Initial APA, (iv) authorizing the Receiver to enter into an Asset Purchase Agreement with the Purchaser dated June 9, 2020 (the “**Amended APA**”) for the Real Property, (v) approving the sale transaction

(the “**Transaction**”) contemplated by the Amended APA and vesting in the Purchaser, all right, title and interest of the Debtor in and to the assets and real property described in the APA (the “**Purchased Assets**”), and (vi) sealing Confidential Appendices 1, 2, 3 and 4 to the Second Report until the completion of the sale of the Real Property, or until further Order of this Honourable Court, was heard this day by judicial videoconference via Zoom at Toronto, Ontario due to the COVID-19 crisis.

ON READING the Second Report and on hearing the submissions of counsel for the Receiver, the Applicant, the Respondent, the Purchaser, Grounded Engineering Inc., Gillam Group Inc., and certain of the beneficiaries of the second and third mortgages over the Real Property, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Chad Kopach sworn June 15, 2020, filed,

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS AND DECLARES** that the Initial APA was conditional on a five day due diligence period pursuant to Section 6.4 of the Initial APA.
3. **THIS COURT ORDERS AND DECLARES** that the Receiver is authorized to enter into the Amended APA.
4. **THIS COURT ORDERS AND DECLARES** that the Transaction is hereby approved, and the execution of the Amended APA by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.
5. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Receiver’s certificate to the Purchaser substantially in the form attached as Schedule “A” hereto (the “**Receiver’s Certificate**”), all of the Debtor’s right, title and interest in and to the Purchased Assets described in the Amended APA, including without limitation the real property described on Schedule “B” hereto (ie, the Real Property), shall vest absolutely in the Purchaser, free and clear

of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Koehnen dated May 4, 2020; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule “C” hereto (all of which are collectively referred to as the “**Encumbrances**”, which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule “D”) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

6. **THIS COURT ORDERS** that upon the registration in the Land Titles Division for the Land Registry Office of Toronto (No. 66) of an Application for Vesting Order in the form prescribed by the *Land Titles Act*, the Land Registrar is hereby directed to enter the Purchaser as the owner of the Real Property in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in Schedule “C” hereto.

7. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

8. **THIS COURT ORDERS AND DIRECTS** the Receiver to file with the Court a copy of the Receiver’s Certificate, forthwith after delivery thereof, by sending it by e-mail to Dora.Charalambous@ontario.ca.

9. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

10. **THIS COURT ORDERS** that the Confidential Appendices “1”, “2” “3” and “4” to the Second Report, being, respectively, the Receiver’s summary of offers, the Initial APA, the affidavit of the Purchaser sworn June 9, 2020, and emails exchanged between the Receiver and its counsel, and the Purchaser’s counsel, dated June 2, 4, and 6, 2020 (collectively, the “**Confidential Appendices**”), shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

11. **THIS COURT ORDERS** that the Confidential Appendices shall remain under seal until the completion of the Transaction, or until further Order of the Court.

12. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

13. **THIS COURT ORDERS** that this Order is effective from today's date and is not required to be entered.



Schedule A – Form of Receiver’s Certificate

Court File No. CV-20-00640347-00CL

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

BETWEEN:

MELVYN EISEN, TRUSTEE

Applicant

- and -

DIAM DANFORTH PROPERTY INC.

Respondent

RECEIVER’S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Justice Koehnen of the Ontario Superior Court of Justice (the “**Superior Court**”) dated May 4, 2020, Rosen Goldberg Inc. was appointed as the non-possessory receiver and construction lien trustee (in this capacity, the “**Receiver**”) of the real property municipally known as 2359 Danforth Avenue, Toronto, Ontario (the “**Real Property**”), and all other property, assets and undertakings of DIAM Danforth Property Inc. (the “**Debtor**”) acquired for, or used in relation to a business carried on by the Debtor.

C. Pursuant to an Order of the Superior Court dated June 17, 2020, the Superior Court approved the asset purchase agreement made as of June 9, 2020 (the “**APA**”) between the Receiver and _____ (the “**Purchaser**”) and provided for the vesting in the Purchaser of the Debtor’s right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased

Assets; (ii) that the conditions to Closing as set out in the APA have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

D. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the APA.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the APA;
2. The conditions to Closing as set out in the APA have been satisfied or waived by the Receiver and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Receiver.
4. This Certificate was delivered by the Receiver at _____ on _____, 2020.

**ROSEN GOLDBERG INC., SOLELY IN ITS
CAPACITY AS COURT-APPOINTED
NON-POSSESSORY RECEIVER AND
CONSTRUCTION LIEN TRUSTEE OF
DIAM DANFORTH PROPERTY INC., AND
NOT IN A PERSONAL OR CORPORATE
CAPACITY**

Per: _____

Name:

Title:

Schedule B – Legal Description of Lands

PIN 21014-1184 (LT)

PART LOTS 5 S/S DANFORTH AV, 6 S/S DANFORTH AV, 7 S/S DANFORTH AV PLAN 90, PART 1 ON PLAN 66R29513; SUBJECT TO AN EASEMENT AS IN AT4880256; SUBJECT TO AN EASEMENT OVER PART LOTS 5, 6 & 7 S/S DANFORTH AV PLAN 90 PART 1 PLAN 66R29513, EXCEPT PART 1 PLAN 66R30236 AS IN AT4966195; CITY OF TORONTO

Schedule C – Instruments to be deleted from title

1. Instrument No. AT4012890 registered September 18, 2015, being a Charge/Mortgage in favour of Olympia Trust Company, securing the original principal sum of \$1,707,164.
2. Instrument No. AT4189990 registered April 4, 2016, being a Notice of an agreement amending Charge AT4021726.
3. Instrument No. AT4256822 registered June 23, 2016, being a Notice of an agreement amending Charge AT4021726.
4. Instrument No. AT4339970 registered September 13, 2016, being a Notice of an agreement amending Charge AT4021726.
5. Instrument No. AT5085371 registered February 28, 2019, being a Charge/Mortgage in favour of Melvyn Eisen and Community Trust Company in the principal amount of \$11,500,000.
6. Instrument No. AT5086649 registered February 28, 2019, is a Postponement by Olympia Trust Company postponing Charge AT4012890 to Charge AT5085371.
7. Instrument No. AT5086650 registered February 28, 2019, is a Postponement by The Guarantee Company of North America postponing Charge AT3936000 to Charge AT5085371.
8. Instrument No. AT5086651 registered February 28, 2019, being a Postponement by Olympia Trust Company postponing Charge AT4021726 to Charge AT3936000.
9. Instrument No. AT5198008 registered July 29, 2019, being a Charge/Mortgage in favour of Thrive Capital Management Limited in the principal amount of \$9,000,000.
10. Instrument No. AT5403306 registered April 7, 2020, being a Construction Lien registered by Gillam Group Ltd. in the amount of \$1,263,935.
11. Instrument No. AT5406454 registered April 14, 2020, being a Construction Lien registered by Cope Project Management Corp. in the amount of \$48,103.
12. Instrument No. AT5412952 registered April 22, 2020, being a Transfer of Charge by Melvin Eisen and Community Trust Company to Melvyn Eisen of Charge AT5085371.
13. Instrument No. AT5421361 registered May 1, 2020, being a Construction Lien registered by Gillam Group Ltd. in the amount of \$47,910.
14. Instrument No. AT5425526 registered May 8, 2020, being a Construction Lien registered by Skyview General Contracting Ltd. in the amount of \$74,970.

15. Instrument No. AT5428993 registered May 14, 2020, being an Application to register Court Order respecting an Order by the Ontario Superior Court of Justice appointing Rosen Goldberg Inc. as Receiver.
16. Instrument No. AT5433860 registered May 22, 2020, being a Construction Lien registered by Grounded Engineering Inc. in the amount of \$26,159.
17. Instrument No. AT5448469 registered June 10, 2020, being a Certificate of Action in respect of the Construction Lien of Skyview General Contracting Ltd. bearing Instrument No. AT5425526.
18. File no. 748765341 under the Personal Property Security Act (Ontario) (“PPSA”), being a financing statement registered by Melvyn D. Eisen.
19. File no. 741642318 under the PPSA, being a financing statement registered by Royal Bank of Canada.

Schedule D – Instruments to remain on title

1. Instrument No. CA131409 registered March 26, 1991, being a Development Agreement with The Corporation of the City of Toronto.
2. Instrument No. CA131410 registered March 26, 1991, being a Collateral Agreement with The Corporation of the City of Toronto.
3. Instrument No. AT3827337 registered March 6, 2015, being a Transfer from 2359 Danforth Avenue Limited to Diam Danforth Property Inc.
4. Reference Plan 66R29513 registered August 25, 2017.
5. Instrument No. AT4663929 registered August 25, 2017, being an Application to register Absolute Title.
6. Instrument No. AT4880256 registered June 6, 2018, being a Transfer of Easement to Rogers Communications Inc.
7. Reference Plan 66R30236 registered August 1, 2018.
8. Instrument No. AT4966195 registered September 25, 2018, being a Transfer of Easement to Enbridge Gas Distribution Inc.

MELVYN EISEN, TRUSTEE
Applicant

and

Court File No. CV-20-00640347-00CL
DIAM DANFORTH PROPERTY INC.
Respondent

ONTARIO
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[COMMERCIAL LIST]
Proceeding commenced at Toronto

SALE APPROVAL AND VESTING ORDER

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