

CITATION: Romspen Investment Corporation v. Horseshoe Valley Lands Ltd., 2017 ONSC 426
COURT FILE NO.: CV-16-11468-00CL
DATE: 2017013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Romspen Investment Corporation, Applicant

AND:

Horseshoe Valley Lands Ltd. and Horseshoe Ridge Homes Inc., Respondents

BEFORE: Wilton-Siegel J.

COUNSEL: *Edward D'Agostino*, for the Applicant by Cross-Motion, Lotco Limited

Eric Golden, for the Respondent by Cross-Motion, Romspen Investment Corporation

David Preger, for the Receiver, Rosen Goldberg Inc.

HEARD: January 18, 2017

ENDORSEMENT

[1] In this receivership proceeding, Rosen Goldberg Inc., in its capacity as receiver of Horseshoe Valley Lands Ltd. ("HVL") (the "Receiver"), has brought a motion seeking an order authorizing it to disclaim an agreement of purchase and sale dated July 21, 2016, entered into between HVL and Garo Bostajian in trust for a company to be incorporated ("Lotco") (the "Grandview APS"). The Grandview APS pertained to a proposed sale by HVL to Lotco of 29 single-family lots in a residential development owned by HVL (the "Grandview Transaction"). Lotco opposes the Receiver's motion. Lotco has brought a cross-motion seeking, among other things, an order requiring that certain individuals attend for examinations as described below in aid of Lotco's position on the Receiver's motion. This Endorsement addresses Lotco's request to conduct such examinations.

Background

[2] Romspen holds a mortgage over the lands of HVL to secure an outstanding loan in the principal amount of over \$21.3 million (the "Romspen Loan").

[3] The Grandview APS was entered into on July 21, 2016.

[4] At the time, Romspen had commenced an application for the appointment of a receiver over the property of HVL based on a payment default of \$3 million under the Romspen Loan on May 30, 2016 (the "Application").

[5] On July 19, 2016, counsel for HVL provided counsel for Romspen with a copy of the Grandview APS that had not yet been executed and requested a meeting between HVL and Romspen. On July 26, 2016, counsel for HVL provided counsel for Romspen with an executed copy of the Grandview APS.

[6] Lotco waived a due diligence condition in its favour in the Grandview APS on July 28, 2016 thereby making the agreement binding between the parties thereto. Lotco also paid deposits totaling \$200,000 due under the Grandview APS on or about August 3, 2016.

[7] The meeting between Romspen and HVL occurred on July 28, 2016. At that meeting, Steve Mucha and Bill Ulicki ("Ulicki") attended on behalf of Romspen together with Romspen's lawyers Brendan Bissell ("Bissell") and Walter Traub. Jim Cooper ("Cooper") attended on behalf of HVL together with HVL's lawyers William Friedman ("Friedman") and Judy Hamilton.

[8] HVL and Romspen negotiated the general terms of a forbearance agreement between July 28, 2016 and August 1, 2016 (the "Forbearance Terms"). As a result of an agreement on the Forbearance Terms, Romspen adjourned the Application *sine die*. Among other things, the Forbearance Terms required HVL to pay a minimum of \$3.2 million net of all costs on or before September 30, 2016 out of proceeds of sale of HVL's property or otherwise. The Forbearance Terms contemplated the appointment of Rosen Goldberg Inc. as a Monitor whose consent was required to any sale of land by HVL.

[9] On or about August 21, 2016, the parties commenced drafting a forbearance agreement giving effect to the Forbearance Terms. The final version of the forbearance agreement, dated September 20, 2016 (the "Forbearance Agreement"), required payment on or before September 30, 2016 of "\$3.2 million less all applicable costs including, without limitation, real estate commissions, and legal fees and disbursements arising out of the sale of property subject to the [Romspen Mortgage] or otherwise". Lotco did not participate at all in the negotiations regarding the Forbearance Terms or the form of the Forbearance Agreement.

[10] In support of this cross-motion, Lotco has filed an affidavit of Paul Grespan ("Grespan") dated November 25, 2016 (the "Lotco Affidavit"). The Lotco Affidavit generally sets out the facts described above. The Lotco Affidavit further states that Lotco tendered the balance of the purchase price under the Grandview APS on September 22, 2016. Grespan states that on that date, in the absence of a discharge from Romspen, Lotco and HVL agreed to extend the closing to September 28, 2016. Grespan further states that HVL's counsel advised him on September 28, 2016 that Romspen would agree to a partial discharge under the Romspen Mortgage in respect of the 29 lots (the "Lots") if Lotco paid an additional \$500,000. Lotco was not prepared to pay the additional amount demanded by Romspen. However, it says it was, and remains, ready, willing and able to complete the Grandview Transaction.

[11] Ultimately, Romspen refused to discharge the Lots subject to the Grandview APS to allow the closing of the Grandview Transaction. Romspen says that the Grandview APS was an improvident offer.

[12] As a result of Romspen's refusal to provide a partial discharge, the Grandview Transaction did not close and HVL failed to make the payment required on September 30, 2016 under the Forbearance Agreement. HVL and Romspen disputed whether such non-payment constituted a default under the Forbearance Agreement. HVL alleged that it was understood and agreed by Romspen that the Grandview Transaction would be completed and that the proceeds of sale of the Grandview Transaction would be the funding source for the payment required under the Forbearance Agreement on or before September 30, 2016. For its part, Lotco has registered a caution against the Lots.

[13] Subsequently, HVL also failed to make a further payment that was required under the Forbearance Agreement to be made by November 30, 2016.

[14] As a result of the foregoing events, Romspen brought on the Application. The Receiver was appointed pursuant to an order of Newbould J. dated November 29, 2016 (the "Receivership Order").

The Lotco Cross-Motion

[15] In its cross-motion, Lotco seeks a declaration confirming that the Receiver is obligated to complete the Grandview Transaction.

[16] At this time, to support that position, Lotco seeks interim relief in the form of an order requiring that the following individuals attend for an examination on their affidavits filed in the Application: (1) two Romspen representatives, being Mark Hilson, who swore affidavits dated July 22, 2016 and November 15, 2016, and Ulicki, who swore an affidavit dated November 21, 2016; and (2) Cooper, who swore a responding affidavit on November 16, 2016 on behalf of HVL. In addition, Lotco seeks to examine Friedman and Bissell, as the lawyers who negotiated the Forbearance Terms and the Forbearance Agreement on behalf of HVL and Romspen, respectively.

[17] In its factum on this cross-motion, Lotco states that it wishes to obtain evidence to show that "[HVL] was authorized by Romspen to complete the [Grandview APS] and that, as at the time when the Forbearance Agreement was signed, Romspen did not require [HVL] to obtain the written consent of [the Monitor] to do so." Essentially, Lotco's position is that (1) Romspen committed to HVL to grant a partial discharge of the Romspen Mortgage respecting the Lots on the closing of the Grandview Transaction and to waive any requirement for Monitor approval of the Grandview Transaction, and (2) that Romspen then defaulted on that obligation after concluding that the value of the Lots had risen following the execution of the Grandview APS.

[18] Romspen has raised a preliminary objection that Lotco has no right to examine on the affidavits filed in the Application on the grounds that they are spent. While this may be technically correct, it does not address the substance of Lotco's cross-motion, which is that it wishes to examine the individuals named above as third parties to the events giving rise to Romspen's refusal to grant a partial discharge under the Romspen Mortgage in respect of the Lots. Accordingly, I have proceeded on the basis that Lotco seeks an order that these individuals attend an examination under Rule 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Analysis and Conclusions

[19] As mentioned, Lotco seeks the right to examine the individuals identified above in order to obtain evidence to support its position that Romspen defaulted on a commitment given by it to HVL to grant a partial discharge of the Lots upon the closing of the Grandview Transaction and to waive any requirement for Monitor consent to this transaction. For the purposes of this cross-motion, I have proceeded on the basis that the examinations sought by Lotco would demonstrate the existence of such a commitment although, to be clear, I am not making any finding to such effect. The issue for the Court is one of relevance, that is, whether the subject-matter of the proposed examinations would be relevant to the Receiver's motion seeking court approval to disclaim the Grandview APS.

[20] The examinations sought by Lotco, given the questions it wishes to put to the individuals named above, are directed toward the issue of whether there is direct or inferential evidence that Romspen made such a commitment. If such a commitment by Romspen is a relevant consideration on the Receiver's motion, then I consider that the Lotco cross-motion should be granted, except insofar as it extends to the examination of Bissell, which I would deny on the ground that it would entail a breach of solicitor-client privilege that cannot be justified in the present circumstances.

[21] Accordingly, the question on this cross-motion can be stated as follows: is the issue of whether Romspen defaulted on a commitment to HVL to grant a partial discharge over the Lots a relevant consideration in the determination of the Receiver's motion to disclaim the Grandview APS?

[22] I conclude on the basis of the following reasoning that, even if established by such examinations, the alleged Romspen default of an obligation to HVL would not be a relevant consideration for a court on the Receiver's disclaimer motion. The principal reason for this conclusion is that, as discussed below, Romspen did not owe any contractual or other duty to Lotco and the Receivership Order did not change this legal position, or the equities, between Lotco and Romspen.

[23] It is important to note that, in this case, Romspen had no direct contractual obligation to Lotco to grant a partial discharge. At the time of execution of the Grandview APS, Lotco could have required that HVL provide it with an undertaking by Romspen to provide a partial discharge of the Lots on closing, but it did not do so. Further, the Grandview APS does not contain a covenant of HVL to obtain such a discharge from Romspen. Instead, the existence of a partial discharge is effectively a condition of closing. In addition, Lotco does not plead that Romspen made any representations, or took any other actions, that would give rise to a duty of Romspen to Lotco to grant a partial discharge on the closing of the Grandview Transaction.

[24] These circumstances define the remedies that would have been available to Lotco if the receivership had never occurred. In such circumstances, Lotco may have had an unsecured claim against HVL for breach of contract. However, Lotco's entitlement to a mandatory injunction requiring Romspen to grant a partial discharge of the Lots from the charge under the Romspen Mortgage to permit completion of the Grandview Transaction would be governed by the absence of any legal duty of Romspen to grant such a partial discharge. Further, while Lotco says that,

prior to the Receivership Order, it would have been able to stand in the shoes of HVL and obtain an order requiring Romspen to grant a partial discharge on behalf of HVL, there is no case law of which Lotco's counsel, or the Court, is aware that would support such a right. Further, and in any event, as HVL consented to the Receivership Order, HVL has waived its right to assert such a claim against Romspen on this basis.

[25] The Receivership Order provides that the Receiver steps into the shoes of HVL but it does not alter or otherwise affect the rights of HVL's creditors relative to HVL. Nor does it alter Lotco's position vis-à-vis Romspen. Lotco's claim against Romspen will continue to be governed by the absence of a legal duty of Romspen to Lotco.

[26] Lotco argues that, in determining the disclaimer motion, a court will be required to have regard to all of the equities between the parties. In this regard, it relies on the decision of Strathy J. (as he then was) in *Royal Bank of Canada v. Penex Metropolis Ltd.*, 2009 CanLII 45848 (Ont. Sup. Ct.). Lotco says that, in addition to the legal relationship between Lotco and Romspen as described above, a relevant equitable consideration would be that Romspen caused the receivership proceedings by defaulting on its obligation to grant HVL a partial discharge in respect of the Lots to permit HVL to close the Grandview Transaction. Lotco says that, as a result of that default and the appointment of the Receiver, Romspen is benefitting from the Receiver's ability to bring the disclaimer motion. Lotco says this is inequitable because Romspen is effectively benefitting from its own default and that this inequity should be addressed by enforcing the Grandview APS rather than permitting the Receiver to disclaim it.

[27] There are three problems with this analysis.

[28] First, I agree that, in making its determination on the Receiver's disclaimer motion, a court will have regard to other considerations in addition to the absence of any legal duty or obligation of Romspen in favour of Lotco. Specifically, the right of the Receiver to disclaim Lotco's interest will depend upon, among other things, the nature of Lotco's interest (i.e. whether it is contractual or proprietary), the relative priorities of the Romspen Mortgage, the evidence regarding the equity in the Lots, and the operation of the doctrine of marshalling, if applicable.

[29] However, Lotco's right to rely on such factual and legal circumstances, to the extent that they support its position, has not been affected in any way by the Receivership Order. Romspen has not improved its position relative to Lotco as a result of the receivership. Even if it could be established that Romspen's default of a commitment to HVL to deliver a partial discharge on the closing of the Grandview Transaction set off a chain of events that has ultimately resulted in the receivership as HVL suggested, this is a matter solely between HVL and Romspen.

[30] Second, as a matter of law, I do not see any support in the decision in *Royal Bank of Canada v. Penex Metropolis Ltd.* for the proposition that the cause of a receivership is an equitable consideration on its own.

[31] The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27,

“[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96.”

[32] In accordance with this standard, a receiver’s duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must therefore be exercised within the framework established by the respective priorities of the creditors. The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[33] Third, and most importantly, I do not accept the premise of Lotco’s argument that Romspen is benefitting from the receivership in a manner that is relevant to any consideration of whether to permit the Receiver to disclaim the Grandview APS. Simply put, as discussed above, the Receivership Order did not change the legal position or the equities between Lotco and Romspen.

[34] Lotco argues, however, that Romspen will benefit from the Receiver’s ability to seek court approval to disclaim the Grandview APS. However, the Receivership Order involves only a procedural rather than a substantive change in circumstances. The Receivership Order effected a stay of any proceedings that Lotco might otherwise have brought seeking a mandatory injunction against Romspen. Under the receivership, Lotco’s entitlement to such relief will be determined in the context of the Receiver’s motion to disclaim the Grandview APS. However, to repeat, the Receivership Order, and the principles governing a receiver’s right to disclaim a contract, do not alter in any way the substantive rights that Lotco can assert on that motion.

[35] Based on the foregoing, I conclude that, even if Lotco could establish that Romspen defaulted on a commitment to HVL to grant a partial discharge of the Lots, Romspen’s rights relative to Lotco have not increased as a result of the receivership nor have Lotco’s rights relative to Romspen been diminished or prejudiced. On this basis, a Romspen default of its obligations to HVL, even if established, would not be a relevant consideration for a court in its determination of the Receiver’s disclaimer motion. Accordingly, Lotco’s motion for an order requiring that the individuals identified above attend examinations is denied on the grounds that such examinations are not directed to a matter of relevance on the disclaimer motion.

[36] The parties have agreed that costs of this motion are to be reserved for the motion judge hearing the Receiver’s motion for authorization to disclaim the Grandview APS.



Wilton-Siegel J.

Date: February 13, 2017