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Sent: Wednesday, December 15, 2021 5:24 PM
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Subject: EXTERNAL: Dorr Capital Corporation v 665-671 Sheppard Avenue West Ltd. CV-21-00672299-00CL

Endorsement:

Rosen Goldberg Inc., in its capacity as court-appointed receiver and manager (the "Receiver") of the assets, undertakings, and properties of 665671 Sheppard Avenue West Ltd. (the "Debtor") moves for court approval of the sale of certain lands on Sheppard Avenue West in Toronto (the "Property") on terms that out in an agreement of purchase and sale ("APS") dated December 10, 2021 between the Receiver and 2869773 Ontario Inc. (the "Purchaser").

A few minutes before the hearing, counsel for the Receiver forwarded to me an email from counsel for the second mortgagee attaching a Letter of Intent (LOI) from an entity named Orion Cap Inc. to the Receiver expressing intent to acquire the Property. The LOI is not binding. No deposit was submitted. The LOI is expressed to be contingent on a joint venture with the second mortgagee on terms to be discussed. No date was specified for this joint venture to be concluded or for an offer to be presented. The purchase price in the LOI is significantly higher than the purchase price under the pre-filing agreement of purchase and sale described below and the estimate of value obtained by the Receiver. The APS requires that the Receiver bring a motion for approval of the APS and obtain approval by today. The closing date for the transaction is December 16, 2021. Interest is accruing on the first mortgage at approximately \$97,380 per month and delay in completing a sale of the Property will lead to erosion of the Debtor's estate.

The second mortgagee requested an adjournment of this motion so that the Receiver can investigate the LOI and determine whether the interests of all stakeholders will be served by pursuing a sale with Orion Cap. I declined to grant the requested adjournment. The second mortgagee has had ample time to find a buyer for the Property. The LOI is not a commitment of any kind. The Receiver has a binding agreement to sell the Property, and I am concerned that delay in completing the APS in accordance with its terms is very unlikely to result in a higher purchase price and will put closing of the APS at risk. In my view, the interests of all stakeholders will not be served by delaying completion of the APS.

The relevant facts in support of the Receiver's motion are set out in the Receiver's First Report dated December 13, 2021. These facts are summarized in the Receiver's Factum at paragraphs 3-21. The proposed sale was negotiated by the Receiver with the Purchaser following a pre-filing marketing and sale process by which the Property was actively marketed. Following this process, an agreement of purchase and sale was reached between a numbered company controlled by El Regency. This agreement was not completed because the Debtor could not convey clean title to the buyer. Shortly prior to the Receiver's appointment, El Regency's solicitors contacted the Receiver to advise that it remained interested in acquiring the Property at a lower purchase price. No assurances were given by the Receiver at that time.

The Receiver obtained an updated valuation of the Property and wait the potential benefit of embarking on a fresh marketing and sale process of between 90 to 120 days, against the associated increase in professional costs, and erosion of the Debtor's estate of over \$100,000 per month in interest accruing under the first mortgage. After reviewing the results of the pre-filing marketing and sale efforts, the receiver elected to engage in negotiations with El Regency. These negotiations ultimately led to the agreement of purchase and sale executed on December 10, 2021. The Purchaser is controlled by El Regency. The timelines prescribed under the agreement of purchase and sale are truncated to achieve a quick closing. The Receiver understands that El Regency's lender insists on funding before the end of the week of December 13, after which it will be closed for business until the new year. For its part, the Receiver wishes to minimize the accrual of interest under the first mortgage by satisfying it as soon as possible.

The salient terms of the agreement of purchase and sale are set out at paragraph 18 of the Receiver's factum. The purchase price is \$100,000 less than was payable under the pre-filing agreement of purchase and sale. The deposit is \$500,000. There are no due diligence conditions in favour of the Purchaser. The Properties being sold on an as is where is, without recourse basis.

The Receiver has obtained an opinion from its independent counsel regarding the validity and priority of the first mortgage. Subject to customary qualifications, counsel has opined that the first mortgage is valid and enforceable and ranks in priority to any other encumbrances registered against title to the Property, save and except for charges created under the Appointment Order and a construction lien (if valid, to the extent of any deficiency in the holdback required to be maintained under the Construction Act.

In the circumstances, I am satisfied that the proposed sale should be approved. In this regard, I accept the submissions made in the Receiver's factum at paragraphs 23-27. I rely on the statements made by Morawetz J. with respect to "quick flip" sales in *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009, at paras. 33-34, and *Tool-Plus Systems Inc. (Re)*, 2008 CanLII 54791 (ON SC), at para. 15.

I am also satisfied that the lien claim of the lien claimant has priority over the first mortgage which is limited to the extent of any deficiency in the holdback required to be maintained under the Construction Act.

Order to issue in form of attached order signed by me. I ask counsel for the Receiver to circulate this Endorsement and the Order to counsel who appeared at the hearing.


Cavanagh J.