

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O 1990 C. C.43, AS AMENDED

B E T W E E N:

**ANTONIETTA DEL ROSSO, MAURO DEL ROSSO,
CANADIAN WESTERN TRUST COMPANY, MARY LORBER,
457351 ONTARIO INC., JOEL S. GUBERMAN PROFESSIONAL CORPORATION,
RITA ROTILIO and ALEXANDER SKORIC**

Applicants

and

DIANE MARTHA DEVENYI

Respondent

FACTUM OF BANK OF MONTREAL

May 9, 2024

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PART I - OVERVIEW

1. Bank of Montreal (“BMO”) opposes the application by the first mortgagees to appoint a receiver manager of the property owned by Diane Martha Devenyi at 154 Shuter Street, Toronto (the “Property”).
2. There is no dispute that the mortgages are in default, and BMO does not dispute the first mortgagees’ entitlement to enforce its mortgage and sell the Property.
3. However, it is also apparent that the first mortgage will be paid in full from the proceeds of sale, and BMO will incur a deficiency loss on its second mortgage.

4. BMO states that the Applicants have not set out any facts or circumstances that demonstrate that the Property requires management by a court appointed receiver. In the circumstances, the costs of a receiver manager will not impact the first mortgagees, but will serve to increase the deficiency loss to BMO. Accordingly, BMO submits that it would be neither just nor convenient to appoint a receiver manager.

PART II - FACTS

5. On June 9, 2022, BMO registered a mortgage in the principal amount of \$1,218,160 (the “BMO Mortgage”) on title to the Property. As of January 12, 2024, the outstanding balance owing under the BMO Mortgage was \$1,317,227.62.¹

6. The BMO Mortgage ranks second in priority to a charge registered on title to the Property on June 9, 2022 in favour of the Applicants, securing the principal amount of \$1,700,000 (the “First Mortgage”). In the Application, the Applicants state that the outstanding balance owing under the First Mortgage was \$1,712,010.83 as of February 13, 2024.²

7. On November 30, 2023, BMO obtained an appraisal of the Property from Ridgepoint Appraisals. The appraised value of the Property was \$2,700,000.³

¹ Affidavit of Jocelyne Sauve, sworn April 9, 2024 (the “Sauve Affidavit”), at para 2

² Sauve Affidavit, at para 3

³ Sauve Affidavit, at para 4

8. The Property is a residential property containing four apartment units. Three of the apartment units are used as short-term rental units through AirBnB, that the fourth is occupied by the Respondent, Ms. Devenyi.⁴

9. BMO's information is that vacant possession of the Property will be available for the purpose of any sale and closing.⁵

10. It is apparent that BMO will incur a deficiency loss following the sale of the Property. There are no issues regarding the Property or the debts that require management by a Court-appointed receiver. The appointment of a receiver will add an unnecessary layer of costs to the sale of the Property, which can be sold by power of sale. BMO opposes the court appointment of a receiver and manager of the Property.⁶

PART III - ISSUES, LAW & ARGUMENT

11. Bank of Montreal agrees that the sole issue is whether it is just and convenient for the Court to appoint a receiver over the Property.

12. The law relating to the appointment of a receiver manager is not in dispute, However, the Applicants fail to set out any facts that indicate that the appointment of a receiver and manager is required, and have not met the test of establishing that it would be just and convenient to appoint a receiver.

⁴ Sauve Affidavit, at para 5-6

⁵ Sauve Affidavit, at para 6

⁶ Sauve Affidavit, at para 8

13. The onus is on the Applicants to meet the test for the appointment of a receiver and manager based on evidence demonstrating that it would be just and convenient to do so.

14. It is submitted that the Applicants do not address the test by indicating that there may be other options open to BMO and characterizing BMO's decision as to how to proceed in its interest (which is not before the Court) as a "failure to enforce the second mortgage". If anything, BMO's decision in this connection points to the conclusion that a receiver would be an excessive and unnecessary step, as there is no substantive conflict or underlying dispute between the parties.

15. BMO has indicated that its information is that obtaining vacant possession of the building will not be an issue. While the Applicants challenge the evidentiary value of BMO's information, tellingly, they do not seek to refute this in anyway. It is not for BMO to establish that securing vacant possession will not be an issue, although that is BMO's information. The Applicants have not sought to demonstrate that there will be, or even that there may be, an issue in that regard except in the vaguest of terms, and without disclosing any particulars which could provide an evidentiary basis for the relief sought. It is submitted that it is not for the Court to speculate as to whether there may be difficulty in securing possession, or managing the Property.

16. Further, the Applicants rely on the heritage designation of the Property to support their application. However, the Applicants do not indicate what issues or challenges this presents, or what benefits a receiver would bring to dealing with or resolving any such issues or challenges.

17. It is submitted that the Applicants are asking the Court to speculate that there would be some unspecified special challenge that the receiver, or the Court, would need to deal with. It is submitted that there are no such challenges. Whether this Property is sold by power of sale or pursuant to a court-appointed receivership, presumably competent experienced appraisers and agents will be appointed to value, market, and sell the Property. The involvement of a receiver and manager will simply add a layer of expense and possibly delay to the sale process.

18. BMO acknowledges that the Property owner is not disputing this application. Neither the Property owner nor BMO disputes the first mortgagees' right to enforce their mortgage.

19. BMO submits that the absence of any fundamental or substantial dispute on any issues other than the costs further supports the conclusion that a receiver is not required.

20. BMO further submits that the absence of any substantive dispute underscores that this matter is substantially distinguishable from the cases relied upon by the Applicants, in which a receiver was appointed not merely because the applicants had a contractual right to appoint a receiver, but because a receiver could benefit the realization process.

21. Further, in BMO's submission, it would be unjust to permit the Applicants to take the most expensive course in the enforcement of its security absent any evidence of the necessity to do so.

22. In *30724453 Nova Scotia Company v 1623242 Ontario Inc.*, Price J stated;

A mortgagee may claim certain costs as just allowances on the mortgage. The mortgagee is entitled to be indemnified for the costs that it reasonably incurs to

respond to a default by a mortgagor, and to preserve its security. The costs claimed must, of course, be reasonably and properly incurred. Mortgage jurisprudence has recognized that the standard charge terms of mortgage agreements are not a “carte blanche” for a mortgagee to incur and charge fees. The mortgagee does not have an unfettered right to incur expenses of a legal nature and to pass them on to the mortgagor simply because it is related to the mortgage. To be recovered, such expenses must be reasonably incurred to preserve the mortgaged property or to protect the security, and they must be just to all parties. They must be “necessarily incurred”.⁷

23. In *Bank of Canada v. CFNDRS Inc.*, Myers J. declined to appoint a receiver in circumstances where there was no evidence before the court as to why the court should do so. Upon reviewing the established test for the appointment of a receiver, Myers J stated:

In my view, the issue that usually tips the balance is whether there is a reason to incur the expense and procedural formality of appointing a third party to exercise neutral, transparent, accountable stewardship of the assets of the debtor while interested parties jostle on the merits of whatever their dispute may be. If the parties’ dispute puts the business assets at risk or where realization options may be impaired by leaving the business in the debtor’s hands or requiring the secured creditor to bear the risk of indemnifying a privately appointed receiver, the court will usually intervene. Often, simple default on secured debt will be sufficient to attract a receivership where the risk to the business is implicit in the nature of the business or the dispute between the creditor(s) and the debtor(s). However, as with all equitable remedies, context is everything and each case turns on its own facts.⁸

PART IV – RELIEF REQUESTED

24. Bank of Montreal respectfully requests that the application for an order appointing Rosen Goldberg Inc. as receiver and manager of the Property be dismissed.

⁷ 30724453 *Nova Scotia Company v 1623242 Ontario Inc.*, 2015 ONSC 2105 (CanLII), <<https://canlii.ca/t/ghkqt>> at para 126

⁸ *Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661 (CanLII), <<https://canlii.ca/t/hpgpl>> at para 10

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: May 9, 2024



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SCHEDULE “A”**LIST OF AUTHORITIES**

1. *30724453 Nova Scotia Company v 1623242 Ontario Inc.*, 2015 ONSC 2105 (CanLII), <<https://canlii.ca/t/ghkqt>>
2. *Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661 (CanLII), <<https://canlii.ca/t/hpgpl>>

DEL ROSSO et al
Applicants

-and- DEVENYI
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Court File No. CV-24-00716046-00CL

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PROCEEDING COMMENCED AT
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RCP-F 4C (September 1, 2020)