COURT OF APPEAL FOR ONTARIO

CITATION: B&M Handelman Investments Limited v. Drotos, 2018 ONCA 581
DATE: 20180625
DOCKET: M49307 (C65474)

Paciocco J.A. (Motion Judge)

In the Matter of the Bankruptcy of Christine Drotos, of the City of Toronto, in the Province of Ontario

BETWEEN

B&M Handelman Investments Limited, Flordale Holdings Limited, M. Himel Holdings Inc., 1530468 Ontario Ltd., Maxoren Investments, and Sheilaco Investments Inc.

Applicants (Responding Party)

and

Christine Drotos

Respondent

Eric Golden, for the moving party, Rosen Goldberg Inc.

P. James Zibarras, Leslie Dizgun, and Caitlin Fell, for the responding party, World Finance Corporation

David Preger, for the responding party, B&M Handelman Investments Limited

Adam J. Wygodny, for the responding party, Money Gate Investment Corp.

Miranda Spence, for the purchaser, Frederic P. Kielburger

Heard: June 13, 2018

On a motion for directions and leave to appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated June 1, 2018.

Paciocco J.A.:

OVERVIEW

[1] Rosen Goldberg Inc. is the receiver (the "Receiver") of property known municipally as 4 Birchmount Avenue, Toronto (the "Birchmount Property"). At all material times, the Birchmount Property was registered to Ms. Christine Drotos (the "Debtor").

[2] On June 1, 2018, Dunphy J. made an Approval and Vesting Order approving the Receiver's sale of the Birchmount Property (the "Order"). The Order authorizes the transfer of the Birchmount Property to Mr. Frederic P. Kielburger (the "Purchaser") free and clear of all mortgages.

[3] On June 7, 2018, World Finance Corporation ("World Finance"), a mortgagee of the Birchmount Property, filed a notice of appeal challenging the Order. In its notice of appeal, World Finance asserts that its appeal was as of right pursuant to s. 193(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). In the alternative, it sought leave to appeal the Order pursuant to s. 193(e).

[4] If World Finance was appealing as of right, the Order would have automatically been stayed pending World Finance's appeal pursuant to *BIA*, s. 195. This stay would have prevented the Receiver from completing the sale of the Birchmount Property, which was set to close on June 14, 2018.

[5] On June 11, 2018, the Receiver brought the instant motion on an urgent basis seeking directions regarding World Finance's appeal. The Receiver took the

position that s. 193(b) did not apply and that no leave to appeal should be granted under s. 193(e). The Receiver sought an order declaring that the Order was not stayed by World Finance's notice of appeal and approving the closing of the sale on June 14, 2018.

[6] After denying an adjournment motion brought by World Finance, I abridged the time for service and heard the Receiver's motion on June 13, 2018. At the conclusion of the hearing, I held that World Finance does not have an appeal as of right pursuant to s. 193(b). I denied leave to appeal pursuant to s. 193(e). And I also approved the sale pursuant to the Order. I indicated that reasons for my decision would follow in writing. These are my reasons.

THE RECEIVERSHIP AND THE APPLICATION FOR THE APPROVAL AND VESTING ORDER

[7] The Birchmount Property is a partially constructed 12,900 square-foot home located in the Scarborough Bluffs neighborhood. At all material times, the Birchmount Property was vacant, in need of repairs, and unfit for occupancy. There were three mortgages on title

[8] The first mortgagee, Pillar Capital Corporation ("Pillar"), claims that as of May 29, 2018 it was owed $2,534,582.27 under its mortgage.

[9] The second mortgage is held by a group of corporations comprising the applicants in the proceedings below. B&M Handelman Investments Limited

("B&M") is one of the second mortgagees. It claims that as of June 11, 2018, $1,164,755.78 was owing under the second mortgage, excluding legal fees.

[10] The third mortgage is held 69.9% and 30.1% by World Finance and Money Gate Mortgage Investment Corporation ("Money Gate"), respectively. World Finance alleges that the total amount owing under this third mortgage was approximately $6.7 million as of May 14, 2018.

[11] On April 10, 2018, B & M applied, pursuant to BIA s. 243(1), for the appointment of a receiver. On April 13, 2018, the requested Appointment Order was made, appointing the Rosen Goldberg Inc. as receiver over the Debtor's lands and premises, including the Birchmount Property.

[12] The Appointment Order contains the usual Model Order clauses granting the Receiver the power to engage consultants and appraisers, market the property, and negotiate the terms and conditions of sale. The Appointment Order also permits the Receiver to report to, meet with, and discuss with affected Persons (as defined in the Appointment Order) "as the Receiver deems appropriate" and to share information subject to confidentiality terms. It permits the Receiver to sell the Birchmount Property with court approval and to apply for a vesting order to convey the property to a purchaser free and clear of encumbrances.

[13] After obtaining the Appointment Order, the Receiver secured an appraisal of the Birchmount Property which set the value at $3.2 million. The Receiver

considered different sale options and determined that an MLS listing process was the optimal method. After reviewing various listing proposals, it entered into a 90-day listing agreement with Chris Kelos of Re/Max Corbo & Kelos Realty Ltd. ("Kelos"). Kelos listed the Birchmount Property on the MLS on April 30, 2018 at a sale price of $3.8 million.

[14] On May 3, 2018, an unconditional offer to purchase for $2.5 million was submitted. The Receiver did not accept this offer.

[15] On May 8, 2018, the Receiver received an unconditional offer to purchase from the Purchaser. Following negotiations, the Purchaser increased his offer to $3.45 million, an amount higher than the appraised value. Nonetheless, it was evident that insufficient proceeds of sale would be generated by this offer to fully retire the encumbrances. In fact, B&M would suffer a shortfall and World Finance would recover nothing. The Receiver accepted this offer subject to court approval.

[16] The Receiver then brought an application before Dunphy J. in the instant Debtor's bankruptcy proceedings, seeking approval of the sale of the Birchmount Property. At the same time, the Receiver also applied for approval of the sale of four other properties from the separate bankruptcy proceeding of Comfort Capital. The sale approvals raised similar issues, but the two bankruptcies involve different debtors and different subsequent mortgagees. World Finance claims to be interested in both of the bankruptcies. Although the Receiver brought both

applications at the same time, no formal consolidation order was made linking or joining the two applications. The form of receivership order in both cases is effectively identical.

[17] With respect to the instant Debtor's bankruptcy proceedings, the parties disputed who had the authority to speak in respect of the third mortgage on the Birchmount Property. World Finance appeared and opposed the Receiver's application. Money Gate appeared and supported the Receiver's position.

[18] World Finance's key complaint before Dunphy J. was that the Receiver failed to consult World Finance about the sale and marketing process and the listing price. In its view, had the Receiver discharged its duty, a higher purchase price would have resulted. In support of its assertion that the property was undervalued, World Finance relied on the opinion of a realtor who states that he would have listed the Birchmount Property at between $4 million to $4.5 million, and would not have accepted an offer of $3.4 million.

THE DECISION OF DUNPHY J.

[19] Dunphy J. granted the Order respecting the Birchmount Property. He considered the criteria in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), [1991] O.J. No. 1137 and the procedure adopted by the Receiver in selling the property:

> ...In each case, the first step the Receiver took was to seek appraisals. These are a necessary pre-condition to

> a Receiver having a sense of what the property being marketed is worth. The Receiver obtained two appraisals in respect of the High Point property, one appraisal in respect of the Bridge property, one appraisal for the Loyalist property, two for the Caldwell property, and one for the Birchmount property.
>
> The Receiver also consider [*sic*] how best to market these properties. In considering that question, the Receiver had to have regard to the state of these properties. At least two of them were in a very challenging state [...] The Birchmount property is a partially constructed shell with a roof that has a hole in it and has become a home for wild animals.
>
> Among other things, the Receiver also had to consider the carrying costs of these properties in terms of accrued reality [*sic*] taxes, which are in arrears on many of the properties, and the state of the market and other relevant considerations.
>
> After considering the matter, the Receiver determined that proceeding to market through the MLS process was the optimal process to follow in relation to the five properties that are the subject matter of these motions.
>
> The Receiver also considered possible listing agents and in considering that question looked at the experience of the brokers considered, looked at their experience in the areas, considered their recommendations as to listing price and considered that in relation to appraisals...
>
> [...]
>
> In the case of the B&M receivership, which is to say the Birchmount property, an information package was prepared, there were online and advertising and email blasts, open houses, newspaper coverage was arranged...

[20] Justice Dunphy concluded that fair market value had been obtained. He referred to the realtor's opinion of value that World Finance relied upon to support

its position that a higher value could be obtained, stating that while this report had some helpful comments, it did "not have any solid valuation evidence that I can attach weight to in it." Justice Dunphy concluded that the Receiver's business judgment had been applied and informed by the appraisals responsibly sought.

[21] He applied the *Soundair* principles to the argument that the Receiver failed to consult World Finance. He was not prepared to accept the criticism that the Receiver acted too quickly. In his view, the MLS marketing process was designed to obtain offers as soon as reasonably practicable and in each case multiple offers were received. Nor was Dunphy J. persuaded that the Receiver failed to consider the interests of all parties. He stated:

> There has been some confusion about who those other parties are and how much their claims are. Who is entitled to speak for them has also been an issue in this case. Ultimately, however, the interests of all of the parties is the same. Their interest is in obtaining the highest and best price reasonably available.

[22] Justice Dunphy dismissed the specific complaint that World Finance ought to have been consulted on the marketing process and given a greater degree of input, concluding as follows:

> This objection runs into a number of factual walls. Firstly, the appraisals were obtained in this case and they were available to the creditors if they chose. The receivership order allowed the Receiver to share information with creditors subject to appropriate NDAs. At least some of the stakeholders did obtain the appraisals and signed NDAs. I cannot say that this was not available to others. Nobody in this case contacted the Receiver until the time

> came to begin the process of seeking court approval, which does not speak well for the level of interest they had in seeking to shape the process.

THE ISSUES

[23] The issues on this motion are: (1) whether the proposed appeal of the Order is as of right pursuant to s. 193(b);[1] and (2) alternatively, whether leave to appeal should be granted pursuant to s. 193(e). If the appeal is not as of right, and leave is not appropriate, the Receiver asks this court to approve the sale to the Purchaser, as provided for in the agreement of purchase and sale.

[24] Section 193 of the *BIA* provides, in relevant part:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> [...]
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> [...]
>
> (e) in any other case by leave of a judge of the Court of Appeal.

---

1 While World Finance raised the potential application of s. 193(c) in its factum, it did not seek to rely on that subsection in oral argument. In any event, reliance on that subsection would not have been tenable given World Finance's emphasis on process-related errors: *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 54.

ANALYSIS

(1) Subsection 193(b) does not apply

[25] World Finance contends that it has the right to appeal the Order under s. 193(b). It claims that any order made in connection with its appeal of the Approval and Vesting Order related to the Birchmount Property will likely affect other cases of a similar nature relating to Approval and Vesting Orders made in the Comfort Capital bankruptcy.

[26] World Finance contends that although there are two separate bankruptcies involved, in substance the application to approve the sale of the five properties was only one bankruptcy proceeding within the meaning of s. 193(b). It notes that the Receiver brought the applications together before the same judge. Each application raised the same course of conduct by the Receiver. And one set of reasons was provided. World Finance argues that it would be met with an issue estoppel argument if it raises the same issues in subsequent proceedings to approve vesting orders on other properties. It contends that s. 193(b) should be interpreted purposively, giving World Finance an appeal as of right so that it is not left, unfairly, without an avenue to challenge the Order.

[27] First, I do not agree that s. 193(b) should be interpreted in the expansive manner that World Finance submits. In *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173, at para. 20, Tulloch

J.A. described the "clear direction in recent case law in favour of a narrow construal of the rights to appeal in ss. 193(a) to (d) of the *BIA*", citing *Re En Route Imports Inc.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. This "narrow construal" is incompatible with World Finance's position, and there are good reasons for it.

[28] In *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 49, Brown J.A. explained that initially the *BIA* provided only for appeals as of right. The inclusion in 1949 of a leave to appeal provision removed the need for a broad interpretive approach to ss. 193(a) to (d). More importantly, the appeal as of right provisions should be read harmoniously with the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which requires leave for all appeals from orders made under the statute.[2] Reading s. 193's appeal as of right subsections narrowly avoids disharmony between the two insolvency regimes.

[29] In *Bending Lake*, Brown J.A. explained at para. 32 that s. 193(b) applies where there is a real dispute that is likely to affect another case in the same bankruptcy proceedings. The Order that World Finance proposes to appeal was made in the instant Debtor's bankruptcy and pertains only to this bankruptcy proceeding. The fact that the outcome of the proposed appeal could affect cases

---

2 See also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 24, where a majority of the Supreme Court held that the *BIA* and the *CCAA* should be read harmoniously to the extent possible.

arising out of the Comfort Capital bankruptcy is insufficient to give rise to an appeal as of right. There is no appeal as of right in this case under s. 193(b).

[30] Second, this outcome does not operate to unfairly deny World Finance an opportunity to challenge the Order that it says will likely affect other cases it will be involved in. This is because a party whose interest are likely to be affected in other case of a similar nature arising in other bankruptcy proceedings can move to protect those interests by seeking leave to appeal, where an appeal as of right is not available. Where leave is warranted in the circumstances, it will be granted.

[31] I turn, then, to World Finance's alternative position that leave to appeal should be granted under s. 193(e) in this case.

(2) Leave to appeal should not be granted

[32] The granting of leave to appeal under s. 193(e) is discretionary and contextual. The test for leave described by Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, was adopted by a panel of this court in *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697, at para. 3. The proposed appeal must:

> a) raise an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this [c]ourt should therefore consider and address;
>
> b) be *prima facie* meritorious; and

c) [not] unduly hinder the progress of the bankruptcy/insolvency proceedings.

[33] As Doherty J.A. noted in *Ravelston Corp. (Re)*, [2005] O.J. No. 5351 (C.A.), 24 C.B.R. (5th) 256, at para. 28, the leave inquiry should begin with some consideration of the merits of the proposed appeal, for if the appeal cannot possibly succeed, "there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal."

[34] World Finance argues that its proposed appeal is *prima facie* meritorious. It contends that the Receiver failed to consider World Finance's interests, and that the process used was unfair because the Receiver did not consult with World Finance on the marketing process, or the price at which the Birchmount Property would be listed. It urges that Dunphy J. misapplied the *Soundair* principles in finding otherwise.

[35] Specifically, World Finance claims that Dunphy J. erred in law when finding that the Receiver had considered World Finance's interests by assuming that all parties had the same interest, namely, obtaining a higher sale price. It further submits that he erred in law in finding the process to have been fair by considering irrelevant or improper explanations for the Receiver's failure to consult with World Finance about the marketing process and listing price.

[36] In my view, World Finance's grounds of appeal are not legitimately arguable points. They do not present a realistic possibility of success and therefore lack *prima facie* merit.

[37] First, there is no reasonable prospect that fault could be found in Dunphy J.'s conclusion that, in seeking the highest and best price reasonably available, the Receiver was considering the shared interest of all of the parties. World Finance's argument that, as a fulcrum creditor, it had unique interests in the marketing strategy and list price that were not considered has no traction. Marketing strategy and list price are means to an end, namely, achieving the highest and best price reasonably available, the very thing that Dunphy J. considered.

[38] World Finance's claim that Dunphy J. considered irrelevant and improper explanations for the Receiver's failure to consult directly with World Finance about the marketing and listing price for the Birchmount Property is also without merit.

[39] World Finance has not presented any authority for the proposition that a receiver has a positive obligation to consult with subsequent mortgagees as to a particular sales process and the listing price.

[40] Indeed, the Appointment Order in this case expressly permits the Receiver to report to, meet with, and discuss with affected Persons "as the Receiver deems appropriate" and to share information subject to confidentiality terms. The Receiver had discretion under the order to proceed as it did.

[41] Moreover, even if a general duty to consult applied in this case, Dunphy J. was clearly entitled to come to the decision he did, for the reasons he expressed.

[42] As he pointed out, in this case there was confusion as to the secured creditors' true identities and who represented their interests. There were also fraud allegations at play, which explained why the Receiver was not more proactive in its dealings with certain creditors. Moreover, those creditors previously showed a low level of interest in seeking to shape the process. In these circumstances, Dunphy J. found that making the appraisals available to those creditors who chose to consult them was sufficient.

[43] None of these factors are irrelevant or improper considerations. Dunphy J. was entitled to consider them. As Blair J.A. pointed out in *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), [2004] O.J. No. 2744, at para. 23, courts exercise considerable caution when reviewing a sale by a court-appointed receiver and will interfere only in special circumstances. Moreover, defence is owed to the decision Dunphy J. made: 22.

[44] Finally, I accept the Receiver's submission that World Finance's proposed appeal lacks merit for the simple reason that even if the Birchmount Property were to sell for the amount World Finance claims it could have achieved, World Finance would still receive nothing. World Finance's process-based complaint is therefore an idle appeal. There is no material wrong it can complain of.

[45] Even if World Finance's proposed appeal had *prima facie* merit, I still would have denied leave to appeal, as neither of the other two leave to appeal requirements are satisfied.

[46] World Finance's proposed appeal does not raise an issue that is of general importance to the practice in bankruptcy matters or to the administration of justice as a whole. It is a fact-specific dispute about the propriety of this particular sale transaction.

[47] In my view, granting leave to appeal would also unduly hinder the bankruptcy proceeding. If the sale was delayed, additional interest and costs payable on the first mortgage would have continued to accrue, serving only to further denude the second mortgagee's position.

[48] Moreover, the agreement of purchase and sale provided specific timelines for the obtaining of court approval and for the closing of the sale. It permitted postponement of the closing date for only 60 days after the original closing date. The sale transaction was originally scheduled to close on June 11, 2018 and was postponed until June 14, 2018. If leave to appeal had been granted, the additional delay required for the disposition of the appeal could have resulted in the loss of this transaction.

[49] Accordingly, I denied leave to appeal pursuant to s. 193(e).

[50] I granted the Receiver's request to approve the sale under the agreement of purchase and sale because Dunphy J. found that the Receiver made efforts to obtain the best price and achieved the offer to purchase after considering the interests of all parties in a fair process that had integrity. Moreover, postponement of the sale would have created the prejudice described above.

DISPOSITION

[51] For these reasons, I granted the Receiver's motion. I declare that World Finance does not have an appeal as of right pursuant to s. 193(b) and hold that leave to appeal pursuant to s. 193(e) of the *BIA* should not be granted. The Order approving the closing of the sale to the Purchaser on June 14, 2018 is also approved.

[52] Costs are assessed by a judge of the Superior Court of Justice, Commercial List in insolvency proceedings. I will not interfere with that judge's discretion to do so, and therefore will make no costs order relating to the costs claimed by the Receiver and B&M.

[53] Money Gate was not served with the motion but appeared and exercised its right of standing, as its interests were at stake. World Finance will pay costs, on a partial indemnity basis, to Money Gate in the amount of $2,000, inclusive of HST and disbursements.

[54] The Purchaser also requested nominal costs. It did not play an active role in the proceedings. In my view, a costs award in favour of the purchaser is not warranted so I decline to make one.

Released: JUN 2 5 2018