



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**

BETWEEN:

DOWNING STREET FINANCIAL INC., IN TRUST

Applicant

- and -

**HARMONY VILLAGE-SHEPPARD INC., AS GENERAL PARTNER OF
HARMONY VILLAGE-SHEPPARD LP and CITY CORE DEVELOPMENTS INC.**

Respondents

FIFTH REPORT OF ROSEN GOLDBERG INC.

June 27, 2017

I. PURPOSE OF THIS REPORT

1. This Fifth Report of the Court-appointed Receiver in this proceeding is being filed in connection with an urgent motion regarding a Court-approved sale of real property which is scheduled to be completed on **June 30, 2017**. Specifically, the Receiver moves for: (i) a declaration that there is no automatic right of appeal with respect to the Approval and Vesting Order (hereinafter defined) under subsection 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “*BIA*”) (ii) a declaration that the Approval and Vesting Order is not automatically stayed pursuant to section 195 of the *BIA* by the filing of the Notice of Appeal; and



(iii) in the alternative, if the Approval and Vesting Order is stayed, an Order cancelling to stay so as to enable the Transaction (hereinafter defined) to be completed on June 30, 2017.

II. TERMS OF REFERENCE

2. In preparing this report, the Receiver has relied upon information from third party sources (collectively, the “**Information**”). Certain of the information contained herein may refer to, or be based on, the Information. As the Information has been provided by other parties, or obtained from documents filed with the Honourable Court in this matter, the Receiver has relied on the Information and, to the extent possible, reviewed the Information for reasonableness. However, the Receiver has not audited or otherwise attempted to verify the accuracy and completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards pursuant to the CPA Canada Handbook and, accordingly, the Receiver expresses no opinion or other form of assurance with respect to the Information.

III. BACKGROUND

3. By Order of Justice Hainey dated January 20, 2017 (the “**Appointment Order**”) Rosen Goldberg Inc. was appointed receiver (the “**Receiver**”) of the assets of Harmony Village-Sheppard Inc., as general partner of Harmony Village-Sheppard LP (the “**Debtor**”) and City Core Developments Inc. pursuant to section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. A copy of the Appointment Order is attached as **Appendix A**.

4. On June 19, 2017, Justice Hainey granted an Order (the “**Approval and Vesting Order**”) approving a sale transaction (the “**Transaction**”) under an agreement of purchase and sale between the Receiver, as vendor, and Pinnacle One Lands Inc. (“**Pinnacle**”), as purchaser, dated May 2, 2017 in respect of real property municipally known as 3260 Sheppard Avenue East, in Toronto (the “**Property**”). A copy of the Approval and Vesting Order is attached as **Appendix B**.



5. Concurrent with the granting of the Approval and Vesting Order, Justice Hainey dismissed a motion which had been served at 4:11 pm on June 16, 2017 by one of the Appellants, Derek Sorrenti (“**Sorrenti**”), for an Order directing the Receiver to accept an offer to purchase the Property made by Fortress Sheppard (2016) Inc. (“**Fortress 2016**”). A copy of the draft Order prepared by Sorrenti’s counsel dismissing his motion and approved by the Receiver is attached as **Appendix C**.

6. A copy of Justice Hainey’s Endorsement dated June 19, 2017 in connection with the above-noted orders is attached as **Appendix D**.

7. On June 21, 2017, the Appellants Fortress (2016), Fortress Real Developments and Sorrenti filed a Notice of Appeal dated June 21, 2017 with respect to the above-noted orders.

IV. THE PROPERTY

8. The Property is located at the northeast corner of Sheppard Avenue East and Warden Avenue, in Toronto. The Debtor had been developing the Property as a residential condominium project, marketed to seniors. The first phase of the project was to comprise 291 units in two (2) towers. At the time of the Receiver’s appointment, the Debtor had presold 223 units to purchasers (the “**Purchasers**”), although construction had not yet begun.

V. SECURED CLAIMS AGAINST THE PROPERTY

9. The Property is subject to the following encumbrances:

- (a) Downing Street Financial Inc. (“**DSFI**”) holds the first ranking charge, which secures payment of approximately \$20 million;
- (b) the second ranking charge, held by JYR Capital Mortgage Investment Corporation and Li Ruixia, as tenants in common, secures payment of approximately \$1,395,000; and



- (c) the third ranking charge, registered in favour Sorrenti and fractionally assigned to various assignees, secures payment of approximately \$31 million.¹

10. The Receiver understands that the second and third charges are controlled by Fortress Real Developments, a mortgage syndicator. Fortress 2016 is also controlled by Fortress Real Developments. For ease of reference, Fortress 2016 and Fortress Real Developments are hereinafter referred to interchangeably as “**Fortress**”.

11. According to Fortress, the third ranking mortgage is syndicated to 542 investors.

VI. ABORTED TRANSACTION WITH FORTRESS PRIOR TO RECEIVER’S APPOINTMENT

12. Prior to the Receiver’s appointment, DSFI had commenced power of sale proceedings in respect of the Property. Following expiry of the redemption under DSFI’s notice of sale, DSFI had entered into an agreement of purchase and sale with Fortress Financial, an affiliate of Fortress, pursuant to which Fortress was to buy out DSFI’s position. The transaction aborted because Fortress was unable to secure the consent of the Debtor’s principal, Jack Pong, which was a condition precedent to the deal being completed.

VII. STALKING HORSE PROCESS AND REPUDIATION OF STALKING HORSE BID

13. Pursuant to the Appointment Order, a stalking horse sale process (the “**Stalking Horse Process**”) was approved with respect to the Property and an agreement of purchase and sale between the Receiver and Fortress (2016), as purchaser, was approved as the stalking horse bid (the “**Stalking Horse Bid**”).

¹ There is also a construction lien registered against the Property. The lien was settled for the sum of \$36,000. Pursuant to subparagraph 6(a) of the Approval and Vesting, payment of the lien is to be made from the proceeds of sale.



14. The Stalking Horse Bid was predicated upon Fortress assuming the Debtor's agreements of purchase and sale with the Purchasers. It was also, in part, a credit bid. Although DSFI was to have been paid in full on closing, the purchaser was to have assumed the existing debt secured under the second and third charges.

15. Although a number of interested parties surfaced during the Stalking Horse Process - which was widely publicized in the National Post and The Globe and Mail Report on Business - no competing bids were received by the bid deadline of March 21, 2017.

16. The hearing of the Receiver's motion to approve the sale on the terms set out in the Stalking Horse Bid and vest title to the Property in Fortress was scheduled to be heard on April 7, 2017.

17. On the afternoon of April 6, 2017, the Receiver was advised that Fortress would not complete the purchase of the Property pursuant to the Stalking Horse Bid, as it no longer wished to assume the Purchasers' agreements of purchase and sale.

18. On April 7, 2017, Justice Myers ordered the Stalking Horse Bid terminated and the deposit paid by Fortress thereunder of \$350,000 forfeited to the Receiver. A copy of the Order is attached as **Appendix E**.

VIII. SUBSEQUENT SALE EFFORTS

19. As the Property had been widely exposed during the Stalking Horse Process and no competing offers had emerged, the Receiver did not believe that an extensive remarketing program would be accretive. Instead, it wrote to fifteen (15) parties who had signed confidentiality agreements and obtained access to the Receiver's online data room during the Stalking Horse Process to notify them that the Property was available for sale.

20. Additionally, the Receiver met with Jack Pong, the principal of the Debtor, to discuss 2016's repudiation of the Stalking Horse Bid and to invite him to submit an offer. The Receiver



was also contacted by six (6) parties who had not previously expressed interest in the Property, one (1) of whom signed a confidentiality agreement and was given access to the Receiver's online data room.

21. The Receiver's counsel also communicated extensively with counsel to Fortress regarding the terms under which the Receiver would consider entering into a new agreement of purchase and sale with Fortress.

IX. OFFERS RECEIVED

22. As reported in the Receiver's Fourth Report dated June 9, 2017 (the "**Fourth Report**"), the Receiver received three (3) offers in the course of its sales efforts after the Stalking Horse Process was terminated, each of which was conditional upon the Purchasers' rights under their agreements of purchase and sale being vested out on closing.

23. Given the commercial sensitivity of the offers, they were attached as confidential appendices to the Fourth Report and ordered sealed pursuant to paragraph 11 of the Approval and Vesting Order.

24. The first offer to the Receiver was submitted by Fortress 2016 on April 13, 2017 (the "**Fortress Offer**"). The financial terms were similar to the Stalking Horse Bid (i.e. DSFI would be paid in full and the second and third ranking charges would be assumed), except that it provided for a somewhat higher deposit being submitted upon acceptance. The Receiver nonetheless considered the deposit to be insignificant in view of the proposed purchase price.

25. The second offer to the Receiver was submitted on April 24, 2017 by a well-known builder. The purchase price offered was unacceptable to the Receiver.

26. The third offer was submitted by Pinnacle and accepted by the Receiver on the evening of May 2, 2017 (the "**Pinnacle Bid**"). Pinnacle is a reputable builder of large residential condominium projects, both in the Greater Toronto Area and outside of Ontario.



X. RECEIVER'S DEALINGS WITH FORTRESS

27. Prior to Fortress's repudiation of the Stalking Horse Bid, it emerged that Fortress planned to assign its rights under the Stalking Horse Bid to Pinnacle. At the time the Receiver learned of this, it had not had any prior dealings with Pinnacle, and the Receiver obtained assurance from counsel to Fortress that the assignment would not result in Fortress receiving a financial "lift" that would otherwise flow into the Debtor's estate if the Property were sold directly to Pinnacle.

28. Given Fortress's repudiation of the Stalking Horse Bid and its prior plan to assign its rights as purchaser (which suggested that Fortress's control over completing a transaction may be limited), the Receiver, through its counsel, advised Fortress's counsel that a substantially larger deposit, in the range of 10% of the purchase price for the Property, would be required and the Receiver would need to be satisfied of Fortress's financial ability to close. A copy of the Receiver's counsel's email of April 13, 2017 is attached as **Appendix F**.

29. On April 19, 2017, Fortress's counsel responded by email that Fortress had loan commitments in place to finance the purchase of the Property, which it offered to disclose upon the Receiver agreeing to hold them in confidence. A partially redacted copy of the email is attached as **Appendix G**. In the email, the Receiver's request for an increased deposit was rejected.

30. On April 20, 2017, the Receiver was notified that Fortress's first mortgage financing commitment to purchase the Property had expired. A copy of a partially redacted email from Fortress's counsel is attached together with the enclosure thereto (also partially redacted) as **Appendix H**. In the email, Fortress's counsel urged the Receiver to accept the Fortress Offer as Fortress had secured a mezzanine commitment for subordinate financing and expected to have replacement first mortgage financing arranged shortly.

31. On April 24, 2017, the Receiver was notified that Fortress was prepared to increase the deposit payable under the Fortress Offer by \$100,000.



32. On April 24 and 25, 2017, counsel for Fortress and the Receiver exchanged emails in which it became apparent that Fortress did not have the requisite financing in place. Copies of the partially redacted email threads between the lawyers are attached as **Appendix I**.

33. On April 27, 2017, the Receiver's counsel again requested evidence of Fortress's financial ability to complete the Fortress Offer. A copy of the email is attached as **Appendix J**. No such evidence was provided to the Receiver.

34. During the Receiver's efforts to assess the likelihood of Fortress completing the Fortress Offer, the Receiver was also communicating with Pinnacle regarding the Property.

35. On April 28, 2017, the Receiver's counsel received a heated letter from Fortress's counsel, a partially redacted copy of which is attached as **Appendix K**. In the letter, Fortress's counsel advised that it had come to their attention that the Receiver was negotiating with the Pinnacle, asserted that the negotiations were improper and amounted to a breach of confidence on the part of the Receiver. Counsel for the Receiver immediately responded in writing that the Receiver had not breached any duties, was taking reasonable steps to market the Property to all potential purchasers and reiterated that Fortress had not provided evidence of its financial ability to close. A partially redacted copy of the letter is attached as **Appendix L**.

36. Given Fortress's repudiation of the Stalking Horse Bid, its apparent inability to raise the necessary financing and its unwillingness (and perhaps its inability) to offer a significant deposit on account the purchase price, the Receiver was not prepared to accept the Fortress Offer. The Receiver was also concerned with the potential chilling effect that a second failure on the part of Fortress to complete a transaction could have on an eventual realization.

XI. PINNACLE BID

37. The Receiver is holding a deposit of \$4,200,000.00 in trust under the Pinnacle Bid on account of the purchase price.



38. Apart from the purchase price, which the Receiver is treating as confidential, the salient terms of the Pinnacle Bid as compared to the Fortress Offer are as follows:

Salient Terms	Successful Bid	Fortress Offer
Manner of Payment	All cash on closing	Payment of priority payables and DSFI on closing, assumption of second and third ranking charges by way on new second and third mortgages, subordinate to financing required to satisfy priority payables and DSFI
Conditions	Purchasers' rights under their agreements of purchase and sale being vest out on closing	Purchasers' rights under their agreements of purchase and sale being vest out on closing
Closing	5 business days after Approval and Vesting Order	5 business days after Approval and Vesting Order

39. In its Fourth Report, the Receiver recommended that the Pinnacle Bid be approved by the Court for the following reasons:

- (a) although the Property was widely exposed to the market during the Stalking Horse Process, no competing offers were received;
- (b) all parties who expressed interest in the Property during the Stalking Horse Process were contacted by the Receiver and advised that the Property was available for sale;
- (c) it is highly unlikely that a longer, more formal remarketing process would have yielded a superior outcome;
- (d) the accrual of interest under secured creditors' claims and the professional costs associated with a longer, more formal remarketing process would have been considerable;



- (e) given Fortress's inability to obtain the financing required to complete the Fortress Offer and its unwillingness (and possibly its inability) to submit a substantial deposit, the Receiver considered the Pinnacle Bid to be the only credible offer;
- (f) the Pinnacle Bid was open for acceptance by the Receiver until the evening of May 2, 2017. Pinnacle indicated that it would be unwilling to revive its offer following expiry;
- (g) Pinnacle is a reputable builder of large residential condominium projects and the deposit the Receiver is holding under the Successful Bid is substantial;
- (h) the purchase price under the Pinnacle Bid is favourable as compared to the appraised values of the Property;
- (i) DSFI, the first mortgagee, supports the Successful Bid.

XII. SORRENTI MOTION TO COMPEL RECEIVER TO COMPLETE FORTRESS OFFER

40. On May 9, 2017, Justice Newbould scheduled the hearing of the Receiver's Motion for approval of the Pinnacle Bid for June 19, 2017. A copy of His Honour's endorsement is attached as **Appendix M**.

41. At 4:11 pm on June 16, 2017, counsel for Fortress served the Receiver with a Motion Record on behalf of Sorrenti in respect of a motion, also returnable on June 19, 2017, directing the Receiver to complete the Fortress Offer. The affidavit filed in support of the motion was sworn by Vince Petrozza, an officer and director of Fortress. Mr. Petrozza deposed that "Fortress has secured a financing commitment from MarshallZehr which will generate loan proceeds sufficient to pay the cash component of the [Fortress] Offer, all closing costs and the costs of the MarshallZehr financing." The MarshallZehr commitment was not marked as an



exhibit or a confidential exhibit to Mr. Petrozza’s affidavit. An excerpt from Mr. Petrozza’s affidavit is attached as **Appendix N**.

42. At 4:19 pm on June 16, 2017, counsel for Fortress wrote to counsel for the Receiver and provided a copy of the MarshallZehr commitment dated June 16, 2017 on the basis that it was to be kept strictly confidential and not released to any party. Without revealing the financial terms, the conditions of the MarshallZehr commitment include, but are not limited to, the following:

Conditions	Receiver’s Concerns
MarshallZehr successfully syndicating the loan with other lenders	No information was provided in the Sorrenti Motion Record indicating whether the condition would be satisfied or waived
No additional financing is permitted without MarshallZehr’s prior consent	Given that the Fortress Offer contemplated that the second and third ranking mortgages would be assumed by Fortress on closing, the question of whether Marshall Zehr would waive this condition or whether the investors in the second and third mortgagees would lose their security was not addressed in the Sorrenti Motion Record
MarshallZehr being satisfied with the financial performance and condition of the borrower and 4 corporate guarantors and 2 individual guarantors, including Mr. Petrozza	No information was provided in the Sorrenti Motion Record indicating whether the condition would be satisfied or waived
MarshallZehr’s satisfactory review and acceptance of a soils test/geotechnical report	No information was provided in the Sorrenti Motion Record indicating whether the condition would be satisfied or waived
MarshallZehr’s satisfactory review and acceptance of an appraisal of the Property	No information was provided in the Sorrenti Motion Record indicating whether the condition would be satisfied or waived
MarshallZehr’s satisfactory review and acceptance of Phase 1 environmental assessment report	No information was provided in the Sorrenti Motion Record indicating whether the condition would be satisfied or waived
MarshallZehr’s satisfactory review and acceptance of a fully executed joint venture or co-tenancy agreement between Fortress and a qualified developer or construction manager	Mr. Petrozza deposed that “Fortress has also entered into a Joint Venture Agreement with an affiliate of the Cortel Group (“Cortel”). It is anticipated that the anticipated profits from the new project will result in the second mortgage (JYR) and third mortgage (Sorrenti) being fully repaid. The terms of the Joint Venture Agreement entered into Cortel are confidential at this time.” As the Joint Venture Agreement was not disclosed to the Receiver, it was unable to assess the likelihood of



	recovery to investors in the second and third mortgages.
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XIII. MOTION JUDGE ACCEPTS RECEIVER'S RECOMMENDATION

43. In his Endorsement (attached as **Appendix D**), the Motion Judge wrote:

I am satisfied that this motion should be granted. I accept the Receiver's recommendation in its Fourth Report that the Pinnacle offer to purchase should be approved by the Court as it is the best offer to purchase the Property from the point of view of the majority of stakeholders. I am not persuaded that the Fortress Offer is preferable to the Pinnacle Offer and Fortress' Motion is dismissed.

XIV. EXTENSION OF CLOSING DATE TO JUNE 30, 2017

44. Under the terms of the Pinnacle Bid, the Transaction is required to be completed by June 26, 2017. After being served with the Notice of Appeal, the Receiver negotiated an extension of the closing date until June 30, 2017.

45. The Receiver was in a position to close as early as June 22, 2017 and will be ready and able to close the Transaction by the extended closing date of June 30, 2017.

XV. RISKS ASSOCIATED WITH A STAY OF THE APPROVAL AND VESTING ORDER

46. The prejudice associated with a stay of the Approval and Vesting Order would include:

- (a) the loss of the Pinnacle Bid. Pinnacle has indicated that it is not prepared to extend the closing date beyond June 30, 2017;
- (b) the loss of the cash recoveries that 542 investors in the third ranking mortgage will receive if the Pinnacle Bid is lost;



- (c) the risk that the Fortress Offer will not close given the significantly conditional nature of the MarshallZehr commitment and the absence of evidence in the Sorrenti Motion Record as to whether the conditions in the MarshallZehr commitment would be satisfied by Fortress or waived by MarshallZehr;
- (d) the risk, if the Fortress Offer is completed, that investors in the second and third mortgages will, in a best case scenario, be subordinated to MarshallZehr for an amount in excess of what is currently owing to DSFI, and, in a worst case scenario, lose not only their security but their investments entirely; and
- (e) the risk that a third Court-supervised sale process is likely to have a serious chilling effect on the market for the Property, particularly given the purchase price offered under the second offer that was submitted to the Receiver on April 24, 2017 and the current economic climate in the real estate market.

All of which is respectfully submitted,

Dated at Toronto, Ontario, this 27th day of June 2017.

**ROSEN GOLDBERG INC., SOLELY IN ITS CAPACITY AS
COURT-APPOINTED RECEIVER AND MANAGER OF
HARMONY VILLAGE-SHEPPARD IN., AS GENERAL
PARTNER OF HARMONY VILLAGE-SHEPPARD LP
and CITY CORE DEVELOPMENTS INC.**


