

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

MELVYN EISEN, TRUSTEE

Applicant

- and -

DIAM DANFORTH PROPERTY INC.

Respondent

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*
and Section 101 of the *Courts of Justice Act*

FACTUM OF THE APPLICANT
(Receivership Application)
(Returnable May 4, 2020)

May 2, 2020

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto (ON) M5G 1V2

R. Brendan Bissell (LSO# 40354V)
Tel: 416-597-6489
Email: bissell@gsnh.com

Joël Turgeon (Student-at-Law)

Lawyers for the Applicant, Melvyn Eisen,
trustee

PART I – NATURE OF THE APPLICATION

1. This application is for the appointment of Rosen Goldberg Inc. (“**Rosen Goldberg**”) as receiver and manager (the “**Proposed Receiver**”) of the property, assets and undertakings of the Respondent (the “**Property**”), without security, pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) and s. 101 of the *Courts of Justice Act* (the “**CJA**”).

PART II – FACTS

a. Applicant is the First-Ranking Secured Creditor

2. With the possible exception of construction liens for holdback deficiencies, the Applicant is the first ranking secured creditor, by way of a mortgage registered on February 29, 2019 (the “**Mortgage**”), on the Respondent’s only asset of high value, being the land located at 2359 Danforth Avenue, Toronto (the “**Land**”) and the planned condominium project thereon (the “**Project**”). The Respondent also granted the Applicant a general security agreement (the “**GSA**”) registered on March 4, 2019 on all its personal property.¹
3. The Mortgage and the GSA are to secure repayment of a \$11,500,000 loan extended by the Applicant to the Respondent on January 16, 2019 in respect of the Project.²

b. Defaults, Demand, Consent to Enforcement

4. Among other possible defaults under the Mortgage and the GSA, the Respondent is in default to pay the Respondent \$11,666,985.75 (as of April 23, 2020)³ and owes \$104,671.02 in taxes to the City of Toronto (the “**City**”) (as of April 27, 2020).⁴
5. The Applicant sent the Respondent a demand letter and a Notice of Intention to Enforce Security on April 23, 2020.⁵ The Respondent consented to immediate enforcement on April 24, 2020.⁶

¹ Affidavit of Melvyn Eisen sworn May 1, 2020 (the “**Affidavit**”), Tab 2 of the Applicant’s Application Record, paras. 14-17.

² Affidavit, para. 15.

³ Affidavit, paras. 31-33.

⁴ Affidavit para. 36.

⁵ Affidavit, para. 33.

⁶ Affidavit, para. 34.

c. City Work Order, Respondent's Failure to Comply, Lack of Clarity on Actual Emergency

6. This is the primary problem giving rise to this receivership application.
7. The Project is stalled since January 2019 as a 3-storey open-sky excavation with temporary shoring.⁷
8. On April 15, 2020, an engineer working on the Project, Mr. Michael Porco, sent a letter to Toronto Buildings, with a copy to the Respondent's only officer and director, setting out:
 - i. the engineer's opinion that the Project excavation poses a public safety concern;
 - ii. his recommendation that this "*be addressed immediately, as follows: implement the recommendations of the shoring remediation plan and carry on with construction of the below-grade structure (i.e. continue placement of concrete foundations, subfloor drainage system, and concrete slabs/walls/columns by **no later than May 1, 2020**; and complete construction of the P1 suspended slab by **no later than 90 days thereafter, or by July 30, 2020***" (bold in original);
 - iii. the engineer's opinion that such work could be performed during the COVID-19 pandemic due to being captured by s. 31 of Schedule 2 of the Ontario Regulation number 82/20, *Order under subsection 7.0.2(4) – Closure of Places of Non-Essential Business*;
 - iv. that "*should construction activities fail to commence in a significant way by May 1, 2020, in [the engineer's] professional opinion the excavation (sic), a backfilling operation must be undertaken to berm the site up to the equivalent to P1 elevation by no later than July 30, 2020*"; and
 - v. that "*should [the engineer] not receive confirmation from the project team that construction activities are re-commencing by May 1, 2020, [the engineer] will*

⁷ Affidavit, paras. 18.

*recommend that Toronto Buildings issues (sic) an emergency order to demand the immediate backfilling of the site to reinstate the pre-existing grades.”*⁸

9. On April 17, 2020, Mr. Jackson Kwok, Building Specialist at the City, issued to the Respondent an Order to Remedy Unsafe Building Pursuant to Subsection 15.9(4) of the *Building Code Act, 1992* (the “**Work Order**”). It sets out:
- i. that an inspection found the building to be in an unsafe condition as defined in s. 15.9(2) of the *Building Code Act, 1992*; and
 - ii. that the Respondent is “*hereby ordered to take the required actions itemized below by the dates listed below, or by May 1, 2020*”, followed by the table reproduced below.⁹

Description and location	Required action and compliance date
<p>The attached engineering report from Michael Porco of Grounded Engineering regarding the Shoring System Serviceability Failure & Public Safety Concern dated April 15, 2020. The temporary shoring system that is well past its service life after May 1, 2020 and this poses a significant public safety concern.</p>	<p>You are required to do the remedial action as prescribed by the engineer in the said report. The action should be supervised by a Geotechnical Engineer who should issue a report when it is completed.</p> <p>P.S. In light of the COVID-19 pandemic, the work described above falls under O.Reg. 82/20 `Closure of Places of Non-Essential Businesses, as amended on April 3, 2020. Specifically, clause 31 of the revised Schedule 2 of the Updated Emergency Order, which reads: 31. Construction and maintenance activities necessary to temporarily close construction sites that have paused or are not active and to ensure public safety.</p>

10. The Respondent has done nothing towards compliance with the Work Order and cannot effect the requested measures within the time imposed.¹⁰

⁸ Affidavit, para. 19.

⁹ Affidavit, para. 21.

¹⁰ Affidavit, para. 22.

11. Through counsel, the Applicant communicated with Mr. Porco (the engineer who issued the first letter to Toronto Buildings, alleging safety issues), Mr. Kwok (the Building Specialist at the City who issued the Work Order), and Mr. Kwok's supervisor, Mr. Grant, to discuss any possibility to extend the May 1, 2020 deadline and advise of the Applicant's intention to seek the appointment of the Proposed Receiver to handle the matter, including commissioning any necessary work, and possibly an eventual sale of the Land and Project in which the purchaser would undertake the same.¹¹

12. The result of those communications is as follows:
 - i. Mr. Kwok says the City's hands are tied until a City engineer issues a report favourable to extending the May 1, 2020 deadline, which could be possible if satisfactory interim measures were proposed;¹²
 - ii. Mr. Grant stated that if Mr. Porco's report to the City was not varied by May 1, 2020, then the City will be issuing a non-tendered contract to a supplier to begin the process of backfilling the Land;¹³
 - iii. Mr. Porco appeared inconsistent and confusing, especially on the urgency of the situation and justification of the timing imposed in his letter to Toronto Buildings. Some of those inconsistencies are as follows:
 - A. in Mr. Porco's letter to the City, he states that backfilling is required by July 30, 2020, and that to avoid it, foundation work must commence by May 1, 2020, failing which he will recommend the immediate backfilling of the site, without explanation as to why the earlier-mentioned July 30 date would no more be appropriate.
 - B. in an email to the Respondent on April 30, 2020, Mr. Porco stated that one option acceptable to him would be for the Respondent to commit to work starting by May 15, 2020 instead, without explanation as to why the

¹¹ Affidavit, para. 24.

¹² Affidavit, para. 25.

¹³ Affidavit, para. 26.

May 1, 2020 work start date mentioned in his previous letter would no more be necessary.

- C. Mr. Porco varied the May 1 work start date again in an email from Mr. Porco to counsel for the Respondent and counsel for the Proposed Receiver on April 30, 2020, where he stated that **(i)** the deadline to start work could be on or about May 8 or May 15, 2020, **(ii)** he had “to express what leverage [he] can on this situation”, **(iii)** he requested, in order to relax the work start date by 1 or 2 weeks, to be presented with an actual construction schedule (likely a multi-million dollar contract) either by the Receiver (yet to be appointed) or by a purchasing developer (implying a sale of the Land and Project) by no longer than May 4 (i.e. 4 days later, over a weekend), and **(iv)** that otherwise, he would recommend backfilling on May 4, 2020.¹⁴

13. This lack of clarity and justification on variation of dates, and the apparent conflation between the necessary work start date and what the Application or a receiver could or should do such as sell the Land or hire a contractor, seems to warrant submitting Mr. Porco’s opinions, recommendations and requirements to reasonable scrutiny, including whether there is an actual emergency to start remediation work on the very short term.¹⁵

d. Other Stakeholders, Notice

14. The materials for this application have been served on all persons appearing on a recent *Personal Property Security Act* search report and parcel register for the Land.
15. Prior communications between the Applicant and other stakeholders include **(i)** contact with Gillam Group Ltd., claimant under a \$1,263,935 construction lien registered on the Land on April 7, 2020, regarding initial requests for information made on the Respondent pursuant to s. 39 of the *Construction Act*, and **(ii)** contact with investors in the Olympia Trust Company,

¹⁴ Affidavit, para. 27 and Exhibits “H”, “J” and “K”.

¹⁵ Affidavit, para. 28.

who postponed its security on the Land in favour of the Applicant on February 28, 2019, who were told to consider retaining legal counsel.¹⁶

e. Proposed Receiver’s Actions and Financing; Urgency of Application

16. The Applicant understands that if appointed, at the first stage of the receivership, the Proposed Receiver intends to urgently review how to respond to the work order, which may include either contracting certain work to address it, or pursuing a sale of the Land and Project to a purchaser who would undertake to do so.¹⁷
17. The Applicant is prepared to finance the proposed receivership, but given the presence of liens and the present situation as a whole, only through a Receiver’s Borrowings Charge.¹⁸
18. In light of the above circumstances and the May 4, 2020 deadline, the herein application is urgent and therefore brought on limited notice time.¹⁹

PART III – ISSUE AND THE LAW

a. Overview of Relief Sought

19. The draft order, filed (the “**Draft Order**”),²⁰ does not differ from the Commercial List model receivership order in any material respect, except its paragraph 4, which creates a non-possessory receivership. This is because the Proposed Receiver advises that in the circumstances, it expects being unable to obtain property insurance. Thus, the Proposed Receiver is not prepared to take possession of the property, and is only prepared to act in a non-possessory manner.²¹

b. Whether Relief Sought is Just and Convenient

20. The Applicant is a secured creditor and the Respondent consented to immediate enforcement in accordance with BIA s. 244(2) and 243(1.1).²² Those requirements of BIA s. 244(1) are

¹⁶ Affidavit, para. 42.

¹⁷ Affidavit, para. 35.

¹⁸ Affidavit, para. 39.

¹⁹ Affidavit, para. 43.

²⁰ Tab 1A of the Applicant’s Application Record.

²¹ Affidavit, paras. 29-30.

²² Affidavit, paras. 14-17, 34.

met. Thus the only remaining issue is whether the relief sought is “just and convenient” per BIA s. 244 and CJA s. 101.

21. Relevant caselaw-developed factors guiding this analysis include:
 - i. whether irreparable harm might be caused if no order were made, although it is not essential for the applicant to establish irreparable harm;
 - ii. the risk to the security holder;
 - iii. whether the applicant has a contractual right to appoint a receiver under a security document;
 - iv. the nature of the property;
 - v. the apprehended or actual waste of the debtor’s assets, and the need for protection or safeguarding of the assets;
 - vi. the conduct of the parties;
 - vii. the goal of facilitation the duties of the receiver; and
 - viii. the balance of convenience.²³
22. Applied herein those factors support granting the relief sought.
23. Although the Applicant need not prove irreparable harm, here irreparable harm might be caused if the relief sought were not granted. If the City backfills the Project site, as it represented it will do²⁴ unless other measures are agreed to or a stay is imposed, **(i)** the costs to do so will be lienable on and take priority over the Applicant’s claim against the Land,²⁵ and **(ii)** such material setback in the Project will diminish the value of the Land, as any building project thereon would require re-excavating and shoring. This is a substantial risk to the Applicant as the first-ranking security holder, and, by extension, to all stakeholders in

²³ See Lloyd W. HOULDEN, Geoffrey B. MORAWETZ and Janis P. SARRA, [The 2019 Annotated Bankruptcy and Insolvency Act, Toronto, Thomson Reuters.](#), ¶ L3, *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007, paras. 23-24 and 27, and *Callidus v Carcap*, 2012 ONSC 163, paras. 41-44.

²⁴ Affidavit, para. 26.

²⁵ *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, sections 386(3)-(6) and 314(3).

the Respondent, the Project and the Lands. It is also a waste of resources invested in the Project.²⁶

24. Further, the Applicant has a contractual right to appoint a receiver because the Respondent is in default under the Mortgage and GSA.²⁷
25. Lastly, because of the Respondent's inability to act and the possible doubts, as highlighted above, about the accuracy and completeness of Mr. Porco's assessment as to whether emergency measures must be completed on the very short term, the balance of convenience supports granting the relief sought.

c. Issues regarding the Work order

26. While the Applicant does reserve its position to challenge the soundness of Mr. Porco's conclusions and suggested actions, as well as the appropriateness of any steps that the City may take in reliance on them, there have been productive discussions with the City and its counsel about consensual arrangements that may allow the parties to look for further information and practical solutions.

PART IV – NATURE OF THE ORDER SOUGHT

27. The Receiver therefore request orders substantially per the Draft Order, filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of May, 2020.

R. Brendan Bissell, counsel for the Applicant

²⁶ Affidavit, para. 37.

²⁷ See the GSA, Exhibit "D" to the Affidavit, art. 9.

SCHEDULE A – LIST OF AUTHORITIES

1. [Lloyd W. HOULDEN, Geoffrey B. MORAWETZ and Janis P. SARRA, *The 2019 Annotated Bankruptcy and Insolvency Act*, Toronto, Thomson Reuters, 2019, p. 1136.](#)
2. *Bank of Montreal v Carnival National Leasing Limited*, [2011 ONSC 1007](#)
3. and *Callidus v Carcap*, [2012 ONSC 163](#)

SCHEDULE B – RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3:

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101:

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A:

385 (1) If the City is satisfied that a contravention of a city by-law passed under this Act has occurred, the City may make an order requiring the person who contravened the by-law or who caused or permitted the contravention or the owner or occupier of the land on which the contravention occurred to do work to correct the contravention.

386 (1) If the City has the authority under this or any other Act or under a by-law under this or any other Act to direct or require a person to do a matter or thing, the City may also provide that, in default of it being done by the person directed or required to do it, the matter or thing shall be done at the person's expense.

(3) The City may recover the costs of doing a matter or thing under subsection (1) from the person directed or required to do it by action or by adding the costs to the tax roll and collecting them in the same manner as property taxes.

(4) The costs include interest calculated at a rate of 15 per cent or such lesser rate as may be determined by the City, calculated for the period commencing on the day the City incurs the costs and ending on the day the costs, including the interest, are paid in full.

(5) The amount of the costs, including interest, constitutes a lien on the land upon the registration in the proper land registry office of a notice of lien.

(6) The lien is in respect of all costs that are payable at the time the notice is registered plus interest accrued at the rate established under subsection (4) to the date the payment is made.

314 (1) Taxes may be recovered with costs as a debt due to the City from the taxpayer originally assessed for them and from any subsequent owner of the assessed land or any part of it.

(3) Taxes are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the City or its agents or through taking no action to register a tax arrears certificate

**APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT
AND SECTION 101 OF THE COURTS OF JUSTICE ACT BETWEEN MELVYN EISEN,
TRUSTEE, APPLICANT, AND DIAM DANFORTH PROPERTY INC., RESPONDENT**

Court File No. CV-20-00640347-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced in TORONTO

FACTUM OF THE APPLICANT
(Receivership Application)
(Returnable May 4, 2020)

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto (ON) M5G 1V2

R. Brendan Bissell (LSO# 40354V)
Tel: 416-597-6489
Email: bissell@gsnh.com

Joël Turgeon (Student-at-Law)

Lawyers for the Applicant, Melvyn Eisen, trustee