

CITATION: West End Motors v. 189 Dundas Street West Inc., 2019 ONSC 5124
COURT FILE NO.: CV-18-601159-00CL
DATE: 20190904

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WEST END MOTORS AND TRAILER PARK LIMITED, Applicant

AND:

189 DUNDAS STREET WEST INC., Respondent

BEFORE: Dietrich J.

COUNSEL: *Eric Golden*, for the Applicant

Chris Reed, for the Respondent

Lisa S. Corne, for the Receiver

George Corsianos, for the Second Mortgagees

D. J. Miller, for Helmsbridge Holdings ULC and Plazacorp Investments Limited

HEARD: July 30, 2019

ENDORSEMENT

Overview

[1] The subject matter of this dispute is undeveloped valuable land and premises municipally known as 189 Dundas Street West in the City of Mississauga (the "Property"). The Property is encumbered by a valid first mortgage in the principal amount of approximately \$9,000,000. The second mortgage, in the principal amount of \$5,700,000, is presently the subject of litigation between the second mortgagees and the Respondent mortgagor (the "Debtor"), who is the registered owner of the Property.

[2] This court appointed Rosen Goldberg Inc. (the "Receiver") as receiver of the Property by order of Justice McEwen dated May 3, 2019. In the same Order, the Receiver was granted a broad discretion to market and sell the Property.

[3] The Receiver brings this motion for an order approving the marketing and sale of the Property by tender, with the assistance of an experienced real estate broker, as detailed in its First Report of the Receiver dated July 11, 2019 (the "First Report"). It also seeks an order approving the activities of the Receiver set out in the First Report and an order sealing a Confidential Appendix to the First Report pending the sale of the Debtor's assets by the Receiver.

[4] The Debtor brings its own motion. It seeks an order directing the Receiver to accept an offer, dated July 18, 2019, made by its financial backer, Helmsbridge Holdings ULC and Plazacorp Investments Limited (collectively, the "Purchaser"), and to effectively abandon its plan to market and sell the Property by tender. It also seeks a sealing order in respect of a confidential affidavit and all exhibits attached thereto, including the Purchaser's offer, pending the sale of the Debtor's assets by the Receiver.

[5] For the reasons that follow, I decline to grant the Debtor's request to order the Receiver to accept the Purchaser's offer and I approve the marketing and sale process proposed by the Receiver in the First Report. I will grant both sealing orders.

Positions of the Parties

[6] The Debtor asserts that if the Purchaser's offer is accepted, it will likely maximize the realization for the benefit of all stakeholders and preserve the possibility that the Debtor and the unsecured creditors may receive some of the equity in the Property.

[7] Specifically, the Debtor asserts that if the Purchaser's offer exceeds the appraised value of the Property, as obtained by the Receiver, then it would be in the best interests of all stakeholders with an interest in the receivership to accept the Purchaser's offer. The Debtor has not seen the latest appraisal obtained by the Receiver (set out in the Confidential Appendix to the First Report). However, the Debtor asserts that the Purchaser's offer will exceed the appraised value obtained by the Receiver if the Purchaser's offer includes a per square foot buildable rate that is higher than the per square foot buildable rate set out in the Receiver's appraisal.

[8] The Receiver asserts that even if the Purchaser's offer includes a per square foot buildable rate that is higher than the rate set out in the appraisal, the Purchaser's offer would not be in the best interests of the stakeholders once the risks associated with the Purchaser's offer are factored into the analysis. For example, the Purchaser's offer includes a significant mortgage against the Property, which would not be discharged until density approvals were obtained, which would confirm the buildable square feet of gross floor area. The Receiver further asserts that the inevitable delay in obtaining density approvals, and the mortgage, carry considerable risk to the stakeholders that would have to be factored into the sale process in determining the best interests of all stakeholders.

[9] Further, the Receiver asserts that the Purchaser's offer, which provides a minimum upfront payment based on the minimum potential density, and a potential bonus based on additional approved density, is an atypical offer. It submits that the offer is favourable to the Purchaser as it postpones any payment for any density above the minimum density expected. Accordingly, the stakeholders would await payment of their full entitlement for an indeterminate period while density approvals were negotiated and determined. The Receiver argues that if the Property were exposed to the market, as part of the process it proposes, any potential purchaser would consider a density higher than the minimum expected. The Receiver submits that its appraisal is based on the assumption that offers received following a listing and marketing of the Property would not include a bonus payment for density (as the Purchaser's does) and would be based on an all cash payment to the vendor. Accordingly, the appraisal cannot be compared meaningfully to the Purchaser's offer, which is not an all-cash offer and includes a bonus payment for density.

[10] The Receiver also submits that the Property should be exposed to the market and that the sales and marketing process set out in its First Report is fair, reasonable and transparent and allows for competitive bids. Therefore, it asserts, there is nothing preventing the Purchaser from making its offer as part of that process, the same as any other interested party.

[11] The second mortgagees, a group of corporations who provide bridge financing to other corporations undertaking real estate development in the Province of Ontario, support the Receiver's motion and oppose the Debtor's motion. They assert that if the court were to order the Receiver to accept the Purchaser's offer, there would be a substantial shortfall to them. The second mortgagees are of the view that the sales process presented by the Receiver in its First Report will result in a higher sale price than that offered by the Purchaser and has a better chance of generating more value for the second mortgagees.

Issue

[12] The issue in this matter is whether the sale process recommended by the Receiver is a fair and commercially reasonable process that ought to be followed in the circumstances, or the Receiver should be ordered to accept the offer made by the Purchaser.

Law and Analysis

[13] A court-appointed Receiver derives its authority from the order by which it is appointed. In this case, Justice McEwen's Order appointing the Receiver, at para. 3(m), expressly authorizes the Receiver "with court approval, to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate."

[14] In *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.*, 2012 ONSC 1750 (SCJ) at para. 6, Justice Brown, as he then was, having considered the test set out by the Court of Appeal for Ontario in *Royal Bank of Canada v. Soundair Corp.*, identified three factors to be considered on a motion to approve a proposed sale and marketing process for the assets of an insolvent debtor: a) the fairness, transparency and integrity of the proposed process; b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[15] I find that the proposed marketing and sale process is fair and transparent. The Receiver proposes to employ a process whereby the Property will be marketed by tender to potential buyers through advertising and the Receiver's internal database in conjunction with the advice and marketing efforts of an experienced commercial real estate agent. The Purchaser is no way precluded from this process, which permits offers from any interested buyer and access to a data room containing a detailed description of the Property. There is no stalking horse offer.

[16] I also find that the proposed marketing and sale process is commercially efficient in light of the circumstances. The Receiver has chosen to use a tender process to avoid paying a potentially significant commission to a listing broker. The record shows that the Receiver is experienced in selling real property by tender and has already received expressions of interest from prospective buyers.

[17] I also find that the proposed process will optimize the chances of securing the best sale price for the Property under the circumstances. The process will expose the Property to the market for an extended duration that will allow the maximum number of interested purchasers to undertake due diligence and submit competitive offers. Again, the Purchaser is invited to make its offer, which has a chance of succeeding against competing offers in the proposed process.

[18] Further, I adopt the reasoning of Justice Newbould with respect to the deference to be afforded to a receiver respecting its proposed sale process as set out in *Bank of Montreal v. Dedicated National Pharmacies Inc.*, 2011 ONSC 4634 at para. 43:

Where a receiver or manager has acted reasonably, prudently and not arbitrarily, as is the case here, a court ought not to sit in appeal from a receiver or manager's decision or review in every detail every element of the procedure by which the receiver or manager made its decision. To do so would be futile, duplicative and would neutralize the role of the receiver or manager.

[19] The Receiver has put forward persuasive rationale for its decision not to accept the Purchaser's offer and for preferring its proposal to list and market the property in accordance with the process articulated in its First Report. I accept that the Purchaser's offer cannot be compared meaningfully to the appraisal obtained by the Receiver as the Receiver's appraisal is based on an all-cash offer that does not require the stakeholders to await payment or assume any risk relating to density approvals. It is appropriate and commercially reasonable that the Property be exposed to the market, which can test the fair market value of the Property and optimize the chances of securing the best possible price under the circumstances for all the stakeholders.

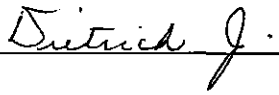
[20] The Debtor has not persuaded me that the Purchaser's offer will likely maximize realization for the benefit of all stakeholders and preserve the possibility that the Debtor and the unsecured creditors may realize some of the equity in the Property. The evidence of the second mortgagees is that the Purchaser's offer, if accepted, would result in a shortfall in the amount owing to the second mortgagees irrespective of the outcome of the litigation between the Debtor and the second mortgagees. Further, the Purchaser's offer has not been tested in the open market and therefore cannot be said to be one that will likely maximize realization.

[21] Both the first mortgagee and the second mortgagees support the Receiver's proposed sale process. The Debtor has not made any attack on the fairness, transparency and integrity of the sale process proposed by the Receiver. Similarly, the Debtor had not advanced any attack on the commercial efficacy of the proposed process or the expectation that it will optimize the chances of securing the best possible price under the circumstances. In my view, the Receiver is acting reasonably, prudently and not arbitrarily regarding the proposed sale process.

Disposition

[22] The Receiver has succeeded in its motion and an order shall issue: i) approving the marketing and sale process for the assets under the Receiver's administration, as proposed in the First Report; ii) approving the activities of the Receiver set out in the First Report; and iii) sealing Confidential Appendix 1 to the First Report pending the completion of the sale of the Property by the Receiver.

[23] The Debtor's motion is dismissed except for its request for a sealing order. An order shall issue sealing the Confidential Affidavit of Paul Goldfischer sworn on July 23, 2019, together with all exhibits to that affidavit, pending the completion of the sale of the Property by the Receiver.


_____ **Dietrich J.**

Date: September 4, 2019