CITATION: Cosman Mortgage v. Larson Properties, 2024 ONSC 3465
COURT FILE NO.: CV-23-00001179-0000
DATE: 20240617

SUPERIOR COURT OF JUSTICE – ONTARIO
APPLICATION UNDER s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3 and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

RE: Cosman Mortgage Capital Corporation, Applicant

AND

Larson Properties Partnership Corp., Respondent

BEFORE: Justice Spencer Nicholson

APPEARANCES: I. Aversa and M. Lici for the Receiver, Ira Smith Trustee & Receiver Inc.

G. Oddy for the Applicant and 1st Mortgagee, Cosman Mortgage Capital Corporation

K. Larson (non-lawyer) for the Respondent, Larson Properties Partnership Corp.

I. Lavrence for 2nd Mortgagee, Bennington Financial Corp.

P. Willows (non-lawyer) for 3rd Mortgagee, Olympia Trust Investments

J. Rizakos for Proposed Purchaser, Devcor Capital Inc.

HEARD: June 14, 2024

REASONS ON MOTION FOR COURT APPROVAL OF SALE UNDER RECEIVERSHIP ORDER

NICHOLSON J.:

Nature of the Motion:

[1] Cosman Mortgage Capital Corporation, ("Cosman") applied to the Ontario Superior Court of Justice for an Order appointing a receiver with respect to its debtor, Larson Properties Partnership Corp (the "Debtor"). By Order of Howard J., dated September 15, 2023, (the "Receivership Order") Ira Smith Trustee & Receiver Inc. (the "Receiver") was appointed as receiver of the lands and premises of the Debtor.

[2] The primary asset of the Debtor was property known municipally as 31-33 Market Place, Stratford, Ontario ("the Real Property").

[3] The Receivership Order authorized the Receiver, among other things,

> (j) 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.

[4] The Receiver retained Cushman & Wakefield Waterloo Region Ltd. ("Cushman") to assist with the marketing and sale of the Real Property.

[5] The Real Property was listed on MLS as of December 1, 2023. Three offers were submitted from two separate parties. Two of those offers were from Devcor Capital Inc. ("Devcor")

[6] On May 15, 2024, the Receiver accepted an Agreement of Purchase and Sale ("APS") dated May 8, 2024 in respect of the Real Property between the Receiver as vendor and Devcor as purchaser. The APS is conditional upon the issuance of court approval and vesting order and closing the transaction by 6:00 pm on June 28, 2024.

[7] It was contemplated by the Receiver that the motion for approval would not be hotly, or perhaps at all, contested. However, Ms. P. Willows, a member of a private investors group called "Olympia Trust Investments" ("Olympia"), appeared on the motion to contest approval of the sale.

[8] On June 13, 2024, the day before the return date of the motion, at approximately 4:00 pm, Olympia made a competing offer on OREA form. Mr. Aversa notes the following about the offer:

> (a) The purchaser is a corporation to be formed later;
> (b) The price is higher than the offer from Devcor that the Receiver accepted, although it includes HST. Mr. Aversa indicates that this makes the Olympia offer about $120,000 higher than the accepted Devcor offer;
> (c) The deposit is only $25,000, which is a tenth of the deposit in the Devcor offer;
> (d) The closing date is September 11, 2024, which is 75 days later than the closing date in the Devcor offer.

[9] Despite not having filed evidentiary material, I heard submissions from Ms. Willow and Mr. Larson, the principal of Larson Properties Partnership Corp. I also heard from counsel for Cosman, the first mortgagee, counsel for Bennington Financial Corp. ("Bennington"), the 2nd mortgagee, and some brief comments from counsel for Devcor.

[10] At the end of the hearing, I reserved my decision and granted a temporary sealing order in respect of the Receiver's Confidential Supplement to the First Report ("Confidential Supplement").

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Sealing Order:

[11] I recognize the importance of the "open court principle", as discussed, for example, in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 SCR 75.

[12] Court proceedings are presumptively open to the public and court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy (*Sherman*, at para. 1). However, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. In order to infringe on the open court principle, for example, by granting a sealing order, the court must be satisfied that openness presents a serious risk to a competing interest of public importance.

[13] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522, the Supreme Court of Canada recognized that a commercial interest can be sufficient to justify a confidentiality order.

[14] It is my view that a sealing order, limited in temporal scope, is appropriate in the context of the circumstances before me, with respect to the Receiver's Confidential Supplement.

[15] To permit the court to examine the propriety of the proposed sale, the court must be privy to the offers that have been made on the Real Property, including the offer under consideration. However, disclosure of that offer carries a risk of tainting the market in respect of the Real Property in the event that the court does not approve the sale, or the sale falls through.

[16] I note that, like *Sierra Club*, the parties to this proceeding treated the information as confidential, and that Ms. Willow, for example, was asked to sign a confidentiality agreement before the Confidential Supplement was shared with her.

[17] A sealing order is proportionate, in my view, if it expires at the closing of the transaction involving the Real Property or upon further order of the court. Further, there are no reasonably alternative measures to granting this order.

[18] Accordingly, I grant a temporary sealing order in respect of the Confidential Supplement to the First Report of the Receiver, which expires upon further order of the Court, or the closing of the agreement of purchase and sale of the Real Property located at 31-33 Market Street, Stratford, Ontario, whichever occurs first.

Further Background:

[19] The Real Property consists of a conjoined one and two storey historic building. The building is subject to three mortgages, as follows:

(a) First Mortgage—Cosman in the amount of approximately $2.4 million;

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(b) Second Mortgage—Bennington in the amount of approximately $350,000; and
(c) Third Mortgage—Olympia in the amount of approximately $1.6 million.

[20] Olympia is a trustee in respect of the mortgage held by a group of private investors in a syndicated investment.

[21] Prior to the Receiver's appointment by the court, the Debtor had listed the Real Property for sale with another brokerage on August 24, 2023. The Receiver and that brokerage agreed to maintain the status quo with the listing. No offers were presented to the Receiver and on October 24, 2023, the Receiver terminated the listing agreement.

[22] As noted above, the Receiver retained Cushman and the property was listed on MLS on December 1, 2023. All three mortgagees were provided with a link to the MLS listing, including Olympia through its counsel. Mr. Larson was also aware of the listing. All parties were advised that in the event they or someone known to them had interest in participating in the marketing and sale process, they should contact Cushman.

[23] Three offers were made on the property, including two separate offers from Devcor, over a period of 207 days, or almost 6 months. The Confidential Supplement provides the court with the confidential details of the rejected offers that were submitted to the Receiver and the Receiver's concerns in respect of the rejected offers. The Confidential Supplement also contains an appraisal of the Real Property, as of October 20, 2023.

[24] I have considered that evidence, although I am not prepared to describe that evidence in these Reasons. A key document is the Report from Cushman to the Receiver dated May 23, 2024 describing the marking and sales efforts in respect of the Real Property.

[25] I am prepared to disclose that the Receiver and Devcor engaged in negotiations before arriving at the price now proposed. Mr. Rizakos, for Devcor, advised the court during the hearing that Devcor would not extend the closing date and would withdraw if required to increase the asking price.

[26] I am also prepared to advise that the amount of interest in the property, or lack thereof, was an important factor in the Receiver's decision.

[27] In respect of the 11th hour offer from Olympia, the Receiver argues that the modest increase in price is eroded by the costs that would be incurred by the extension of the closing date to September. This would include the Receiver's fees, disbursements involving property management, penalties and interests on unpaid city taxes and interest that would continue to accrue on the Cosman loan.

[28] The Receiver also points out that Devcor has expended considerable resources in negotiating in good faith with the Receiver.

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[29] The Receiver points out the disparity in the deposits and the risks inherent with dealing with a corporation to be formed later should the transaction not close.

[30] Ms. Willows, as an investor in Olympia, articulated concern for her substantial investment in the property, as well as the investments of her co-investors. The investments represent the life savings for many of these investors. She indicates that while the investors knew that there had been offers, they were not provided with any specifics of those offers. Furthermore, they were denied access to the Real Property itself. She warranted that the collective net worth of the group was substantial such that there was little risk of the transaction falling apart. She and the other investors were seeking time to work on their proposal.

[31] Mr. Larson also articulated that the proposed transaction was inadequate given the value of the property. He too felt that he had been denied information by the Receiver with respect to the appraised value and offers that were made.

[32] I reiterate that I had no proper admissible evidence from either Ms. Willows or Mr. Larson. They were served with the motion on June 4, 2024, Olympia through counsel. Ms. Willows advised that Olympia's counsel was not available on the return date of the motion.

[33] Cosman, despite the shortfall it will face, is content with the proposed sale to Devcor.

[34] Bennington recognizes that it is unlikely to recoup any amount regardless of the court's decision and thus, takes no position.

[35] Devcor obviously wishes to have the transaction approved by the court.

Legal Analysis—Court Approval:

[36] The leading case is *Royal Bank of Canada v. Soundair Corp*., 1991 CanLII 2727 (ON CA). Galligan J.A., noted therein that the sale of the airline in that case was a very complex process and the best method of selling an airline at the best price was "something far removed from the expertise of a court". Thus:

> "when a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be viewed in the light of the specific mandate given to him by the court."

[37] Galligan J.A., then set out the duties of the court in deciding whether a receiver is acting properly when selling a property, as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

[38] I will now examine these factors in the case before me. I reiterate that neither Mr. Larson nor Olympia tendered evidence on the motion, despite being advised of the motion ten days in advance of the hearing date. However, I did allow submissions from both and, respectfully, they did not convince me that the process has been unfair such as to derogate from the authority given to the Receiver by Howard J.'s Receivership Order.

Sufficient Effort and Improvident Sale:

[39] The Confidential Supplement describes the marketing efforts with respect to the Real Property, as does the report from Cushman dated May 23, 2024. I am satisfied that the Receiver exposed the Real Property to the market at large and that there was simply little interest garnered.

[40] In *Soundair*, Galligan J.A. quoted from *Cameron v. Bank of Nova Scotia* (1981), 1981 CanLII 4762 (NS CA), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11, per MacDonald J.A., as follows:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[41] *Soundair* had some factual similarity to the case before me. The Court of Appeal noted that the subsequent offer for the airline in that case, at a higher price, "is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one". Accordingly, unless the disparity between offers is so great as to call into question the adequacy of the mechanism which had produced the offer, the 11th hour offer by Olympia adds little to the issue before me.

[42] The higher offer Olympia now presents does not make the Devcor offer unreasonable. As noted in *Soundair*, to allow Olympia to thwart a good faith bargain entered into between

Devcor and the Receiver after the expense and time expended on negotiations would be unfair to Devcor.

[43] The offer presented by Olympia, is, in my view, too late and, while perhaps higher, is not a "substantially higher bid" given the expenses that will be incurred during the extended closing. That offer also does not present the equivalent certainty of the Devcor offer.

[44] I do not find the proposed purchase price, even if below the appraised value of the property, to be improvident. The price of real estate is what an open and free market will bear. Here, the Receiver received no competing offer that suggests that the proposed purchase price to Devcor is improvident.

Interests of All Parties:

[45] In considering the interests of the various parties, *Soundair* makes it clear that while the primary interest is that of the creditors, "it is not the only or overriding consideration".

[46] I accept that the investors that make up Olympia will suffer personal loss. It must be kept in mind that the investors took that risk from the outset. That risk was inherent in a situation in which they were the third mortgagee, ranking behind both Cosman and Bennington. While the investors' losses are unfortunate, I am satisfied that Olympia had ample opportunity over the nearly six months that the property was for sale to tender a competitive offer but did not do so. There is no explanation offered for their late entry into the bidding process.

[47] *Soundair* indicates that the interests of the debtor should also be considered. Mr. Larson, although not in proper evidentiary form, indicated that he found the purchase price to be well below market. I have already rejected that the price is improvident. I further note that given the extent of the outstanding mortgage debt, Mr. Larson was never going to be in position to recover any monies following the sale of the Real Property in any event.

[48] *Soundair* also stated that the interests of the purchaser, in this case Devcor, should be considered. Devcor bargained at some length and expense with the Receiver and is not prepared to either extend its closing or engage in a further bidding war for the Real Property. Given the arrival of the offer by Olympia at the 11th hour, I find that Devcor should not be required to reopen the bidding. Commercial certainty requires that the Court respect good faith negotiations entered into between court appointed receivers and arms-length purchasers.

[49] Finally, I note that Cosman, who stands to recover only a fraction of its debt supports the sale to Devcor, and Bennington, who will recover nothing, does not oppose the sale.

[50] The interests of the parties do not militate against approving the sale.

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The Efficacy and Integrity of the Process:

[51] Again, the Cushman letter of May 23, 2024 describes the marketing efforts with respect to the Real Property. It notes the state of the Stratford Market during the six months that the Real Property was listed and the feedback of potential buyers with respect to concerns they raised with the Real Property.

[52] The report describes comparables in the Stratford market, that were also listed and one that conditionally sold. The comparables were listed during the same time frame as the Real Property.

[53] Galligan J.A., in *Soundair*, noted that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an asset. "It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them".

[54] I have no concerns with respect to the process by which the Real Property was offered to the market and ultimately sold to Devcor.

Was there Unfairness in the Process?:

[55] I am not persuaded that there was any unfairness in the process. As noted, Olympia has offered no explanation for why it made no offer in the nearly six months that the Real Property was listed. It must also be kept in mind that the property had been listed prior to the Receivership Order and remained on the market for an additional two months prior to the Cushman listing. I am also satisfied that the Receiver was in sufficient contact with Olympia through its legal counsel.

Disposition:

[56] For the foregoing reasons, despite the objections of the Olympia investors and the Debtor, I approve the sale of the Real Property to Devcor on the terms as set out in their Agreement of Purchase and Sale.

[57] I have reviewed the reports of the Receiver. I am satisfied that the Reports and the conduct and activities of the Receiver are appropriate, are reasonable and are consistent with the duties imposed by the Receivership Order. I therefore approve the reports.

[58] I have also reviewed the fees proposed by the Receiver. I received no objections during the hearing with respect to those fees. The Receiver's fees, including legal fees incurred, are hereby approved, including the estimate of future fees.

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[59] I have executed the Draft Approval and Vesting Order and Draft Ancillary Relief Order, accordingly.

Justice Spencer Nicholson

Date: June 17, 2024

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