Court File No. CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

MIZRAHI (128 HAZELTON) INC. AND
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

RESPONDING FACTUM OF THE APPLICANT CONSTANTINE ENTERPRISES INC. (DISCLAIMER MOTION)

February 19, 2025

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TO: **THE SERVICE LIST**

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PART I - INTRODUCTION

1. The Applicant in this receivership proceeding, Constantine Enterprises Inc. ("CEI"), is the senior secured creditor of Mizrahi (128 Hazelton) Inc. ("Hazelton"). CEI supports the Receiver's request for an order authorizing it to disclaim all sale and related agreements between David Berry and Hazelton relating to Unit 901 of the condominium project located at 128 Hazelton Ave.

2. There is no dispute that the Receiver has a duty to maximize recovery of Hazelton's assets or that this Court may authorize the disclaimer sought by the Receiver. The only question is whether this Court should, in applying the settled test, authorize the disclaimer sought.

3. CEI supports, but will not repeat below or at the hearing, the Receiver's arguments that Mr. Berry is an unsecured creditor, that disclaimer would enhance the value of the assets, and that failure to disclaim would amount to a preference in favour of Mr. Berry.

4. The specific focus of this brief submission is the equities of such a preference in favour of Mr. Berry. The equities do not favour Mr. Berry.

PART II - MISSTATEMENT AND OMISSION OF CERTAIN FACTS

5. Mr. Berry has misstated or omitted certain relevant facts in his factum, apparently in an attempt to create the impression that CEI, as the senior secured lender, does not deserve its rank in priority. Mr. Berry has done so by, for example:

(a) suggesting that CEI purchased the first secured creditor's debt to improve its position vis-à-vis Mr. Berry when, in fact:

(i) a receivership application was already pending – commenced by the then-first secured creditor – when CEI bought that debt;

(ii) the sale and related agreements for Unit 901 would very likely have been disclaimed in the context of that alternate receivership given that the value of Unit 901 is significantly higher than the consideration Mr. Berry asserts to have provided to Hazelton; and

(iii) prior to purchasing that debt, CEI was already a secured creditor and by far the largest secured creditor,[1] with priority over Mr. Berry;[2]

(b) claiming that a project in Ottawa to which Mr. Berry advanced loans and may be a creditor was "related" to Hazelton and relevant to CEI's priority when, in fact:

(i) CEI had nothing whatsoever to do with the Ottawa project;

(ii) the principal of the Ottawa project, Sam Mizrahi, and Mr. Berry ostensibly entered into agreements that they clearly intended to remain secret from CEI and others;[3] and

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[1] Additionally, the previous first ranking secured creditor only obtained that priority because CEI agreed in 2017 to subordinate its secured debt.

[2] First Report of the Receiver, s. 3.0, pp. 4-5, Appendix C to the Third Report of the Receiver (Motion Record, Tab 2C, pp. 56-57).

[3] Third Report of the Receiver, paras 2.2.7, 2.2.11 (Motion Record, Tab 2, p. 14); Confidentiality Agreement, Appendix "N" to Third Report of the Receiver (Motion Record, Tab 2N, pp. 213-214).

(iii) those secret agreements were superseded by subsequent agreements in any event.[4]

(c) claiming that he accepted a text message offer to close on Unit 901 on an as-is where-is basis when, in fact:

(i) he had already expressly rejected that offer;[5] and

(ii) his later supposed "acceptance" was expressly conditional on the parties being able to agree on the essential term of price (which they did not).[6]

6. When considering the equities, this Court should remain mindful that, unlike the Receiver, Mr. Berry has provided an inaccurate account of the facts with a view to obtaining an outcome in his favour that upends the priorities that creditors depend on when lending funds.

PART III - THE EQUITIES DO NOT FAVOUR MR. BERRY

7. Mr. Berry claims that the equities favour elevating him in priority, at the expense of the senior secured creditor. But his claims are based on:

(a) an as-is where-is agreement that was never in fact accepted and in respect of which the essential term of price remains uncertain; or

(b) secret agreements that he conspicuously did not disclose to CEI during his discussions while the receivership application was pending.

8. Mr. Berry also relies on what he says he was told by CEI. But he has played fast and loose in his factum with what CEI actually said about Unit 901. It is telling that he largely

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[4] Third Report of the Receiver, para 2.1.3 (Motion Record, Tab 2, p. 13); Unit 901 APS, ss. 1 and 33, Appendix G to Third Report of the Receiver (Motion Record, Tab 2G, pp. 130, 140).
[5] E-mail from David Berry to Nitin Kawale, attached as Exhibit "X" to the Affidavit of David Berry (Responding Record, Tab 1X, p. 282).
[6] Text message from David Berry, attached as Exhibit "W" to the Affidavit of David Berry (Responding Record, Tab 1W, p. 276).

paraphrases what he was told when in fact he recorded those conversations (while apparently not recording his conversations with Sam Mizrahi about their secret agreements). CEI never said that it would complete and close the sale of Unit 901, and Mr. Berry has not included in his evidence any quotes from recorded conversations to support such a claim.

9. Mr. Berry has also attempted to obscure the context in which his discussions with CEI took place. It is plain and obvious from Mr. Berry's own evidence of his discussions with CEI that CEI was not prepared to close on Unit 901 at that time. Otherwise, they would have closed. Mr. Berry's allegation in the air that CEI has failed to meet its duty of good faith with respect to these proceedings is disappointing to say the least.

10. In any event, whatever CEI may have intended or believed at that time, once the Receiver was appointed, it was required to discharge its mandate to maximize value. Even if CEI had made the "representations" that Mr. Berry claims (which CEI strongly denies), CEI had no ability to bind the Receiver as a matter of law. The Receiver is an officer of this Court, not CEI's agent.

11. Mr. Berry also plays fast and loose in his factum with what Justice Cavanagh actually said in his Endorsement granting the receivership Order, which Mr. Berry relies on heavily to support his claim that completing the sale of units was one of "this Court's reasons for granting the Receivership Application in the first place." But Justice Cavanagh actually held that the "appointment of a receiver will (a) ***<u>allow</u>*** for the completion of the sale of units already subject to agreements of purchase and sale",[7] not that it would ***<u>require</u>*** completion. Not surprisingly, the receivership Order does not require the Receiver to complete units or close sale agreements.

12. Mr. Berry does not focus on the other reasons for the appointment of the Receiver set out by Justice Cavanagh: (i) to "facilitate the marketing and sale of the remaining Hazelton Project units in order to realize value of the Property and repay creditors"; and (ii) to "preserve the value

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[7] Endorsement of Justice Cavanagh, para 44, attached as Exhibit "HH" to the Affidavit of David Berry (Responding Record, Tab 1HH, p. 353.

of the Property and allow for its realization in a transparent manner in the interests of all stakeholders."[8] These objectives are precisely what the Receiver aims to accomplish with the disclaimer, entirely consistent with Justice Cavanagh's Endorsement.

13. There is nothing to warrant a preference in favour of Mr. Berry. The priority scheme exists for good reason. CEI has incurred significant costs and suffered significant losses in connection with the Hazelton project. It should not be prejudiced further based on part-truths and secret agreements. The equities do not favour Mr. Berry.

14. Finally, this receivership proceeding is not the appropriate forum in which to adjudicate Mr. Berry's allegations of "misrepresentation" by CEI. That is a matter between Mr. Berry and CEI, not a matter that should impact on the Receiver's mandate to maximize value. Mr. Berry remains at liberty to pursue relief, if he truly believes he is entitled to it, in a separate proceeding.

15. In other words, in granting the Order sought by the Receiver, this Court would not be leaving Mr. Berry without a remedy if he is actually entitled to one.

PART IV - ORDER REQUESTED

16. CEI supports the Receiver's request for authorization to disclaim any and all sale or related agreements between Hazelton and Mr. Berry for Unit 901.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of February, 2025.

CASSELS BROCK & BLACKWELL LLP

[8] Endorsement of Justice Cavanagh, para 44, attached as Exhibit "HH" to the Affidavit of David Berry (Responding Record, Tab 1HH, p. 353.

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