



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-21-00664778-00CL
CV-22-00692309-00CL

DATE: June 4, 2024

NO. ON LIST: 1 &2

TITLE OF PROCEEDING: SKYMARK FINANCE CORPORATION v. MAHAL VENTURE
CAPITAL INC. et al

AND

PRICEWATERHOUSECOOPERS INC. IN ITS CAPACITY AS COURT-APPOINTED RECEIVER
AND MANAGER OF BRIDGING FINANCE INC. ET AL v. SKYMARK FINANCE CORPORATION
et al

BEFORE: JUSTICE STEELE

PARTICIPANT INFORMATION

For Moving Party:

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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

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ENDORSEMENT OF JUSTICE STEELE:

Overview

- [1] This motion arises following a sale by a receiver of certain assets in respect of which an approval and vesting order was granted. Several months following the closing of the transaction, the municipality issued omit tax bills in respect of taxation years prior to the sale.
- [2] The issue before the Court is who, as between the vendor and the purchaser, is liable for the payment of the tax. It is a matter of interpretation of the agreement between the parties and the approval and vesting order granted by the Court.
- [3] KSV Restructuring Inc. (the “Receiver”), the receiver of the assets of Mahal Venture Capital Inc. (“Mahal VC”) and Golden Miles Food Corporation (“Golden Miles”), brings the motion seeking an order that the Receiver and Mahal VC are not liable to pay 12175622 Canada Ltd. (the “Purchaser”) or the City of Brantford (the “City”) on account of the Omit Tax Claims. Alvarez & Marsal, the receiver for Skymark Finance Corporation, supports the position of the Receiver.
- [4] MNP Ltd. (the “Purchaser’s Receiver”), the receiver of the Purchaser, takes the position that the Receiver is liable for the Omit Tax Claims. Santokh Mahal supports the position of the Purchaser’s Receiver.
- [5] Mr. Mahal was the principal behind Mahal VC and Golden Miles and was also the principal behind the Purchaser.
- [6] For the reasons set out below, I have determined that the Purchaser’s Receiver is liable for the Omit Tax Claims.

Background

- [7] The Receiver was appointed over the property of Mahal VC and Golden Miles on October 1, 2021.
- [8] On November 22, 2021, the Court approved a sale process for the Receiver to sell the property of Mahal VC and Golden Miles.
- [9] On or about October 27, 2021, the Receiver notified the City that it required a statement of property tax arrears in respect of the real property located at 155 Adams Boulevard, Brantford (the “Real Property”).
- [10] On or about October 28, 2021, the City provided a statement of account for the Real Property showing minimal outstanding taxes. The City advised the Receiver that “this property is still not properly assessed” and that the City had submitted a request to MPAC in the spring [2021]. The City further noted that “[t]his will result in additional taxes being added to the property and omitted tax notices being issued.”
- [11] On November 15, 2021, the Receiver filed an assignment in bankruptcy under the *Bankruptcy and Insolvency Act* on behalf of the debtor companies pursuant to paragraph 3(r) of the receivership Order. KSV was appointed as the Trustee of the debtor companies.
- [12] In January 2022 the Receiver followed up with the City regarding the MPAC assessment and inquired as to whether MPAC had a timeline for the completion of the assessment. In addition, the Receiver asked whether the City could estimate the approximate assessment value range for the Real Property. The City replied that MPAC had responded to the City’s inquiry and had requested building permit information, which the City provided to MPAC. The City followed up with MPAC on January 18, 2022 to get an update and timeline for the valuation of the Real Property.
- [13] On or about February 7, 2022, MPAC notified the City that there was a freeze on inspections (due to COVID restrictions) until the end of February.
- [14] On March 18, 2022, the Purchaser and the Receiver entered into the agreement of purchase and sale pursuant to which the Purchaser agreed to buy substantially all of the assets and property of Mahal VC and Golden Miles, including the Real Property (the “Transaction”).
- [15] Farm Credit Canada (“FCC”) provided financing to the Purchaser for the Transaction.
- [16] On April 11, 2022, the Court granted an approval and vesting order with respect to the Transaction.
- [17] The Transaction closed on May 18, 2022.

- [18] At the time of closing, an undertaking to readjust was executed by the parties, which provided for a 45-day readjustment period (expiring on July 4, 2022). The Receiver undertook to re-adjust all items on the statement of adjustments during such period. This undertaking included municipal property tax.
- [19] In connection with the closing of the Transaction, the Receiver obtained tax certificates for the Real Property from the City, which disclosed that \$167,560 was due and owing in respect of property taxes, water arrears, interest and penalties as of the anticipated closing date.
- [20] On or about May 25, 2022, the Receiver paid the City the outstanding taxes on the Real Property of \$167,402.
- [21] On or about October 28, 2022, MPAC reassessed the taxes (\$1,091,423) based on the value of the building on the Real Property.
- [22] On November 24, 2022, the City issued Omit Tax Bills to the Purchaser in the total amount of \$1,091,423 in respect of the taxation years 2020, 2021 and 2022.
- [23] The Purchaser provided the Receiver with the Omit Tax Bills on February 24, 2023.
- [24] On March 5, 2023, the Purchaser appealed the tax reassessment, which appeal was subsequently withdrawn.
- [25] In August 2023 the Receiver obtained authorization from the Court to reserve \$1,500,000 from the sale proceeds pending the Court's determination of the Omit Tax Claims issue.

Analysis

- [26] As noted above, the only issue for the Court on this motion is who, as between the Receiver and the Purchaser's Receiver, is responsible to pay the Omit Tax Claims.
- [27] The Receiver takes the position that under both the asset purchase agreement and the approval and vesting order, the liabilities in respect of the Omit Tax Claims belong to the Purchaser/Purchaser's Receiver.
- [28] The Purchaser's Receiver takes the opposite position.

Summary

- [29] Although the Purchaser's Receiver places some emphasis on the fact that the Receiver was aware that there was an MPAC reassessment, in my view this matter turns on the terms of the relevant documents. The Receiver may have known that there was an MPAC

assessment, but the Receiver did not know the timing or the likely quantum of the reassessment, if any. In addition, because the principal of the Purchaser was the same as the principal of the debtor companies, Mr. Mahal would have had knowledge regarding the changes made to the land and the potential for a tax reassessment. Further, the tax assessment information provided on the Closing indicated that it was subject to reassessment.

- [30] As discussed in further detail below, it is my view that the relevant documentation supports the Receiver's position that the Purchaser's Receiver is liable for the Omit Tax Claims. The Asset Purchase Agreement ("APA") and Approval and Vesting Order ("AVO") provide that the Purchaser is responsible for the "Permitted Encumbrances," which include encumbrances for taxes that relate to or secure Liabilities that are not yet due or are not in arrears. The APA also provides that the Purchaser assumes only the "Assumed Liabilities," which are liabilities related to the purchased assets that arise on or after the Closing Date. As noted above, the Receiver provided an undertaking to readjust "all items on the Statement of Adjustments" within 45 days from the closing date of the Transaction. Accordingly, had there been a tax reassessment within the 45-day period, it would have been covered by the undertaking.
- [31] The Purchaser's Receiver's position is that under the *Municipal Act*, reassessed taxes are deemed to have been assessed as at January 1 of the year in which the reassessment is made. However, this does not mean the taxes were outstanding liabilities on the Closing Date. The liability in respect of the Omit Tax Claims could not have arisen until the Omit Tax Bills were issued on November 25, 2022. The Omit Tax Bills themselves, issued on November 2022, refer to the amount past due as \$0 and set out the future instalment payments for the amounts due under those bills.
- [32] It is important for a purchaser buying assets out of a bankruptcy to be able to rely on the Court's approval and vesting order. That does not change in the instant case. The AVO issued by the Court reflected the terms on permitted encumbrances that were present in the contractual deal of the parties, and, in this case, the contractually permitted encumbrances would include the liability in question.

Asset Purchase Agreement and Approval and Vesting Order

- [33] I now address the relevant provisions of the APA and the AVO in greater detail. The Receiver submits that the Omit Tax Claims were "Assumed Liabilities," which were assumed by the Purchaser under the asset purchase agreement. In addition, the Receiver submits that the Omit Tax Claims were "Permitted Encumbrances" that remained with the property on the sale pursuant to the terms of the APA and the AVO.
- [34] Section 2.2 of the APA provides that at closing the Purchaser agrees to assume only the "Assumed Liabilities":

2.2 At the Closing Time, on and subject to the terms and conditions of this Agreement, the Purchaser shall assume and agree to pay when due and perform and discharge in accordance with their terms, the Assumed Liabilities. Notwithstanding any other provision of this Agreement, the Purchaser shall not assume any Liabilities other than the Assumed Liabilities, except as required under Applicable Law. [emphasis added]

- [35] “Assumed Liabilities” is defined in the APA to include: “all Liabilities relating to the Purchased Assets or Related to the Business arising on or after the Closing Date.”
- [36] The Omit Tax Claims relate to the Purchased Assets because they are tax liabilities that were assessed on the Real Property that was purchased.
- [37] The parties disagree on whether the Omit Tax Claims are liabilities “arising on or after the Closing Date [May 18, 2022].”
- [38] The Receiver submits that because the Omit Tax Claims were made in November 2022, more than six months after closing, they arose after the Closing Date even though they are in respect of a pre-closing period tax liability.
- [39] The Purchaser’s Receiver submits that the liability for the Omit Tax Claims arose before the closing of the transaction. The Purchaser’s Receiver states that the fact that the quantum of the liability was not assessed until after the close of the Transaction does not impact when the liability arose.
- [40] The Purchaser’s Receiver points to section 307(3) of the *Municipal Act, 2001*, which provides that taxes assessed under the *Assessment Act* (as was the case here) are deemed to have been imposed and to be due on January 1 of the year to which they relate unless the by-law imposing the tax provides otherwise. The Purchaser’s Receiver submits that under this provision the Omit Tax Claims were due January 1, 2020, January 1, 2021 and January 1, 2022. I am not persuaded by this argument because the contracting parties specifically addressed the division of liabilities between them. The *Municipal Act* contemplates that assessed taxes may be recovered from the taxpayer originally assessed for them and from any subsequent owner of the assessed land: s. 349, *Municipal Act, 2001*.
- [41] I am of the view that the Omit Tax Claims are “Assumed Liabilities.” The liability for the Omit Tax Claims did not arise until the bills were issued about 6 months after the Transaction closed. In the APA, the parties contractually set out who was to be responsible for what, and specifically carved out certain liabilities that the purchaser would assume on closing. The parties also contemplated a 45-day adjustment period following closing. The Omit Tax Claims are a liability related to the purchased assets that clearly arose after the closing date. As noted above, the bills themselves in respect of the Omit

Tax Claims, which were issued months after the 45-day adjustment period, refer to the amount past due as \$0 and set out the payment schedule for future instalments.

- [42] I am also of the view that the Omit Tax Claims (and any encumbrance that secures them) were not claims that were vested out of the Real Property under the APA or the AVO (discussed below).
- [43] Section 2.1 of the APA provides that the vendor will sell to the purchaser its interest in the purchased assets, free of all encumbrances, other than “Permitted Encumbrances:”
- 2.1 At the Closing Time, on and subject to the terms and conditions of this Agreement, the Sale Procedure and the Approval and Vesting Order, the Vendor shall sell to the Purchaser, and the Purchaser shall purchase from the Vendor, all of the Debtors’ and the Vendor’s right, title and interest, if any, in and to the Purchased Assets, which shall be free and clear of all Encumbrances other than Permitted Encumbrances, to the extent and as provided for in the Approval and Vesting Order.
- [44] “Permitted Encumbrances” is defined in the APA to include: “Encumbrances related to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities that in each case are not yet due or are not in arrears or, if due or in arrears, the validity of which is being contested.”
- [45] The Receiver’s position is that the Omit Tax Claims, and any corresponding encumbrances, were not yet due or were not in arrears as of the closing date of the Transaction. The Receiver notes that the Omit Tax Claims were not even made until November 25, 2022, more than six months after the closing of the Transaction.
- [46] The terms of the approval and vesting order are consistent with the APA. Section 4 of the AVO provides that the purchased assets will be delivered and vest in the Purchaser free and clear of any security interests, other than the permitted encumbrances listed on Schedule “C” to the Order, which includes:
- (a) Encumbrances to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities that in each case are not yet due or are not in arrears or, if due and in arrears, the validity of which is being contested.
- [47] The Purchaser’s Receiver points to the Court of Appeal’s decision in *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc.*, 2008 ONCA 167, 99 C.B.R. (6th) 273 (“*Heritage Property*”). The Purchaser’s Receiver submits that *Heritage Property* precludes the Court’s acceptance of the Receiver’s position that the Omit Tax Claims are the Purchaser’s obligation.

- [48] The Court of Appeal in *Heritage Property* considered a similar issue; however, the key documents in that case were different. In *Heritage Property* the motion judge had determined that the AVO “d[id] not grant title to the purchaser free and clear of the contingent potential tax liability to be determined by a reassessment”: *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc.*, 36 C.B.R. (5th) 121 (Ont. S.C.) (“*Heritage Property (ONSC)*”), at para 24 [emphasis removed]. The Court of Appeal allowed the appeal and found that the Receiver was responsible for the increased realty taxes up to the closing date. The Court of Appeal in *Heritage Property*, at para. 27, stated that the increased realty taxes were “a future claim for realty taxes that existed at the time of closing but remained to be quantified.” Under the terms of the AVO, the Court of Appeal determined that the purchaser took the property free and clear of the increased realty taxes.
- [49] The Receiver submits that *Heritage Property* is clearly distinguishable upon its facts. I agree.
- [50] In *Heritage Property*, the AVO considered by the Court of Appeal had similar language vesting the purchased property in the buyer free and clear of all encumbrances, other than permitted encumbrances. Where that case differs is the Schedule “C” permitted encumbrances. In *Heritage Property*, the “[permitted] encumbrances listed relate to subdivision control by-laws and Hamilton Airport zoning regulations”: *Heritage Property*, at para 15. This is very different from the permitted encumbrances in Schedule “C” in the instant case. As noted above, the permitted encumbrances in the instant case specifically refer to encumbrances to taxes arising by operation of law that relate to or secure liabilities that are not yet due.
- [51] Further, the language vesting the property in the purchaser in *Heritage Property* is broader than the instant case. In *Heritage Property*, the Court order provided that the purchaser was vested in the property free and clear of “any and all estate, right, title, interest, hypothecs, [...] taxes, [...] whether such claims came into existence prior to, subsequent to, or as a result of any previous order of this Court, contractually, by operation of law or otherwise [...]”: *Heritage Property*, at para 14 [emphasis added]. The vesting language in the order in the instant case does not include, among other things, the underlined language from the vesting order in *Heritage Property*.¹

¹ Paragraph 4 of the AVO provided: 4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver’s certificate to the Purchaser substantially in the form attached as Schedule “A” hereto (the “Receiver’s Certificate”), all of the Receiver’s and the Companies’ right, title and interest in and to the Purchased Assets described in the APA shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “Claims”) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice McEwen dated October 1, 2021; (ii) all charges, security interests or claims evidenced by registrations pursuant to the Personal Property Security Act (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule “B” hereto (all of which are collectively referred to as the “Encumbrances”, which terms shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule “C”) and, for greater certainty, this Court orders that all of the Encumbrances affecting or

[52] All the parties agree that vesting orders are important, and purchasers need to be able to rely upon them. However, they disagree as to whether the terms of the vesting order in the instant case, and, in particular, the carve out for permitted encumbrances, included the Omit Tax Claims.

[53] In my view, the permitted encumbrances, which were permitted to remain on the transferred property, include the Omit Tax Claims. The Omit Tax Bills were issued months after the transaction closed, and months after the 45-day adjustment period provided for in the undertaking. The contracting parties turned their minds to what the permitted encumbrances would be in the APA and then replicated that language in the AVO. I am of the view that the tax liability was not yet “due” at the time of closing. As noted above, this is supported by the Omit Tax Bills themselves, which when issued in November 2022 referred to the amount past due as \$0 and set out the future schedule for when instalment payments were to be due.

Disposition

[54] The Purchaser’s Receiver is responsible for the Omit Tax Bills.

A handwritten signature in blue ink, appearing to be 'J. Lee' or similar, written in a cursive style.

Date of Release: June 18, 2024