

CITATION: People's Trust Company v. Rose of Sharon (Ontario) Retirement Community,
2014 ONSC 892
COURT FILE NO.: CV-11-9399-00CL
DATE: 20140206

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: People's Trust Company, Applicant
AND:
Rose of Sharon (Ontario) Retirement Community, Respondent
BEFORE: D. M. Brown J.
COUNSEL: C. Prophet, for the Applicant
E. Golden, for the Receiver
J. Baichoo, for Unimac Group Ltd and 2383431 Ontario Inc.
HEARD: February 6, 2014

ENDORSEMENT

I. Unimac - Peoples priority issue

[1] At the hearing I granted the relief sought by Peoples Trust Company in paragraph 1 of its Amended Notice of Motion dated September 4, 2013. As per paras. 17 to 20 of the Mallich April 4, 2013 affidavit, the first mortgage held by Peoples was registered on May 18, 2007. Its 2007 GSA was registered under the PPSA on March 27, 2007.

[2] As per paras. 7 and 8 of my December 27, 2012 Order, the issues of the liability, timeliness and quantum in the Construction Lien Action will be determined before a Master; the issue of the priority of the construction lien vis-à-vis any other encumbrance will then be determined by a judge on the Commercial List.

[3] Unimac argued that it enjoyed some additional security against the Property in the way of some equitable security arising under a combination of a pledge of "unsold Life Lease units (minimum of 6 units) as security to Unimac Group Ltd. and its sub-trades for all payments certified by project architect" found in para. 4 of a Memorandum of Understanding with Rose of Sharon dated October 17, 2008. Unimac also relies on a set of Right to Occupy Agreements ("RTOAs") entered into thereafter with Rose of Sharon in late 2008 and 2009.

[4] To the extent that the pledge of the RTOAs created some interest in the land – which seems very doubtful – section 93(3) of the *Land Titles Act* governs and the prior charge held by

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Peoples has priority. To the extent the pledge creates a security interest in personalty, it was unperfected and, in any event, subsequent in time to the perfected GSA of Peoples. Either way, the Peoples earlier security enjoys priority and therefore I granted the order sought.

[5] As to costs, Peoples sought \$22,000 on a substantial indemnity basis; Unimac submitted partial indemnity costs of \$5,000 would be appropriate. Although there was no merit to Unimac's argument, I think at this stage partial indemnity costs are appropriate. I have reviewed the Bill of Costs submitted by Peoples. I have taken into account the factors enumerated under Rule 57, including the time spent, the result achieved, and the complexity of the matter, as well as the application of the principle of proportionality: Rule 1.04(1). In addition, I have considered the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3rd) 291 (C.A.) and *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant. I conclude that given the number of prior appearances relating to this issue, an award of partial indemnity costs in the amount of \$8,000.00 would be a reasonable one in the circumstances, and I order Unimac to pay Peoples that amount within 30 days.

II. Responsibility for the approved costs of Representative Counsel

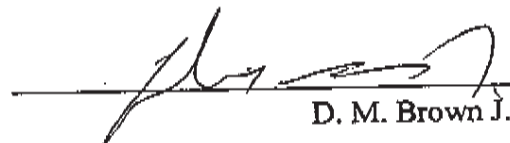
[6] The costs of Representative Counsel have been approved by prior order of this Court. By order made April 11, 2013 Mesbur J. granted a charge against the estate for approved fees of up to \$150,000. The second mortgagee - which now by operation of a couple of assignments is 2383431 Ontario Inc. - advised that it opposes extending that charge to cover the additional \$100,000 in approved fees and, indeed, it wishes to bring a motion to vary the April 11, 2013 Order of Mesbur J. on the basis that it was made without notice to the second mortgagee. In her December 13, 2013 endorsement Mesbur J. made several findings regarding 238's position that it had no notice. Nevertheless, counsel for 238 advised that his client wants to bring the motion to vary.

[7] Since Mesbur J. now is acting as the Family Team Leader, I will take over the case management of this Commercial List proceeding. I advised counsel for 238 that if his client brought a motion to vary, it could be risking an award of costs on an elevated scale, including full indemnity costs. I raised that point because some weight must be given to the findings made by Mesbur J. on December 13, 2013. Counsel wanted an opportunity to seek instructions from his client. I will afford him that opportunity. If, after discussion between counsel and client, 238 wishes to proceed with a motion to vary, counsel shall attend at a 9:30 appointment before me to schedule the motion and pre-hearing steps.

[8] When I asked applicant's counsel whether this was a receivership in which the senior secured would suffer a shortfall, he advised that it was too early to tell. From that I infer that this is an estate which is on the cusp, in the sense of whether any funds will be available for subsequent secured creditors. It goes without saying, but let me say it anyway, that the greater the number of interlocutory motions brought in this proceeding, the much greater the chance that no monies will be available for subsequent secured creditors. I would hope that those with

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economic interests in this estate will approach the need for further litigation on a very pragmatic, cold-blooded, dollars and cents basis.



D. M. Brown J.

Date: February 6, 2014