COURT OF APPEAL FOR ONTARIO

CITATION: First National Financial GP Corporation v. Golden Dragon HO 10 Inc., 2019 ONCA 873
DATE: 20191105
DOCKET: M50969 (C67612)

Fairburn J.A. (Motion Judge)

BETWEEN

First National Financial GP Corporation

Applicant (Respondent)

and

Golden Dragon HO 10 Inc. and Golden Dragon HO 11 Inc.

Respondents (Appellants/Responding Parties)

David Preger and David Seifer, for the moving party, the receiver Deloitte Restructuring

Ian Matthews, for the Ministry of Municipal Affairs & Housing

Chad Kopach, for First National Financial GP Corporation

Karen Perron, for Royal United Investments

Martin Diegel, for the responding parties

Heard: November 4, 2019

REASONS FOR DECISION

A. OVERVIEW

[1] This motion for declaratory relief was heard yesterday. I granted that relief with written reasons to follow. These are my reasons.

[2] On September 22, 2017, Deloitte Restructuring Inc. was appointed as an interim receiver under s. 47 of the *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3. The order related to a two-building apartment complex at 345 and 347 Barber Street, Ottawa. Of the 110 units in the buildings, 30 units are used for affordable housing pursuant to agreements with the City of Ottawa and the Ontario Ministry of Municipal Affairs and Housing.

[3] Those properties are the subject of five mortgages extended by three mortgagees: (1) First National Financial GP Corporation (three mortgages); (2) Liahona Mortgage Investment Corp; and (3) the City of Ottawa and Ministry of Municipal Affairs and Housing. The total value of the mortgages exceeds $15,000,000.

[4] The receiver's powers were expanded on May 21, 2019. At that time, the motion judge issued a receiver and manager order which included an approved marketing and sale process for the properties. The receiver was authorized pursuant to that order to enter into a listing agreement for the properties. That process was followed and, ultimately, an agreement of purchase and sale ("APS") was entered into on August 27, 2019. The purchase was conditional on only one matter. That condition was waived on September 26, 2019.

[5] The APS requires that an approval and vesting order be granted within 21 days of the purchaser's waiver and that the transaction close within 10 days

following the issuance of that order. It further provides that the receiver may postpone the closing date for up to 60 days after the original closing date.

[6] The appellants, who are the debtors in this case, opposed the issuance of the approval and vesting order on the basis that the purchase price under the APS does not represent fair market value. In support of that claim, the debtors pointed to another "higher" offer. However, they admit that the "higher" offer was late, having been delivered to the receiver on September 19, 2019. Indeed, the "late offer" was provided after:

(i) the call for offers had closed on July 30, 2019,

(ii) the qualified offers had been identified and the offerors had been invited to resubmit their offers with improved terms by August 7, 2019,

(iii) the qualified offerors had complied with the August 7, 2019 deadline,

(iv) the best offer had been identified, and

(v) the APS had been signed by the purchaser and receiver on August 27, 2019.

[7] After the purchaser waived the sole condition upon which the APS rested and delivered written directions to the receiver, directing that title to the properties be placed in the names of certain designees upon closing, the late offer was replaced by an "amended late offer". The amended late offer was delivered to the

receiver on October 4, 2019, which was the day after the original return date for the receiver's motion for the approval and vesting order.

[8] The receiver did not consider either of the late offers to be credible ones. I will later explain why I agree with that position.

[9] The motion judge granted the approval and vesting order on the same day that the motion was heard, October 11, 2019, with written reasons following just over a week later.

[10] The debtors have filed a notice of appeal seeking to set aside the approval and vesting order. They signaled their intention to do so on October 17, 2019, right after the receiver informed them that the closing date was being moved to October 18, 2019. The closing date was moved to accommodate a religious holiday that conflicted with the original closing date.

[11] A new closing date was then chosen to accommodate having this motion heard. I was informed during oral submissions that the new closing date is November 6, 2019. Accordingly, there is urgency around deciding this matter.

[12] The receiver seeks directions to ensure that the closing proceeds on schedule. The receiver seeks the following relief:

(i) a declaration that the appeal from the approval and vesting order dated October 11, 2019 is governed by the *BIA*;

(ii) a declaration that the appellants do not have an automatic right of appeal under ss. 193(a) to (d) of the *BIA* (meaning that they must seek leave to appeal pursuant to s. 193(e) of the *BIA*); and

(iii) a declaration that the approval and vesting order is not automatically stayed pursuant to s. 195 of the *BIA* and, if it is stayed pursuant to that provision, an order cancelling the stay.

B. ANALYSIS

(1) Is the appeal governed by the *BIA*?

[13] The appellants agree that the appeal is governed by the *BIA*. In light of that concession, there is no need to address this issue.

(2) Do the appellants have a right to appeal under ss. 193(a) to (d) of the *BIA* or must they seek leave to appeal under s. 193(e) of the *BIA*?

[14] The appellants contend that their right to appeal lies under s. 193(c) of the *BIA*. Accordingly, I will only address the arguments advanced in respect of that provision. Section 193(c) reads:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> ...
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars.

[15] In the event of an appeal as of right under s. 193(c) of the *BIA,* a stay of the order appealed from is automatically triggered by virtue of s. 195 of the *BIA*. Therefore, in light of the "broad nature of the stay imposed by s. 195 of the *BIA*",

the right to appeal under s. 193(c) (as opposed to seeking leave to appeal under s. 193(e)) has been narrowly construed: *Enroute Imports Inc., Re.,* 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. Accordingly, s. 193(c) has been granted a restrictive interpretation, one that accords with the "needs of modern, 'real-time' insolvency litigation": *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 347 O.A.C. 226, at para. 53.

[16] In keeping with that narrow interpretation, the total value of the property that forms the subject of the impugned order does not inform whether "the property involved in the appeal exceeds in value ten thousand dollars." As Blair J.A. held in *Business Development Bank of Canada v. Pine Tree Resorts, Inc., et al.,* 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17, to allow an appeal as of right under s. 193(c) of the *BIA* every time property value exceeds $10,000 would be to permit an appeal as of right in almost every case.

[17] To bring some meaningful limit to the parameters of s. 193(c), the court must instead focus upon the value of the "loss" that results from the impugned order: *Bending Lake*, at para. 64. The evidentiary record must be considered to determine the question of "loss". As Brown J.A. held in *Bending Lake,* at para. 69:

> Taken together, those facts do not disclose any basis in the evidentiary record for the Debtor's assertion that the sale would result in a loss of rights greater than $10,000 because the Receiver could have obtained a higher price for the Debtor's property. Accordingly, I am not persuaded that there is any evidentiary basis to the

> Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

[18] When determining the amount of loss in a situation like this case, the court looks beyond the simple question of whether a higher price for the subject property could be obtained. In *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173, a case that is very similar to this one, Tulloch J.A. emphasized the fact-specific nature of the inquiry into potential loss and the need to determine loss by way of a "substantive assessment of competing offers" and not a "mere comparison of formal prices": *Downing Street,* at para. 28.

[19] The appellants argue that there is a clear loss in excess of $10,000 arising from the approval and vesting order in this case. The appellants say that the purchase price under the APS is $3.5 million below the late offer and $2 million below the amended late offer. They say that this proves that the purchase price, as encapsulated under the APS, and as approved by the impugned order, does not reflect fair market value.

[20] They go on to disavow any suggestion that they are simply comparing prices. Instead, they claim that the differential between the current purchase amount and the late offers should give the court pause about the actual value of the subject properties. The appellants argue that the late and amended late offers should be considered against the backdrop of the vacancy rate for the building,

which lies at about 8 to 10 percent and which they argue is well above market average. They also submit that the value of the buildings should be considered in relation to the value of the units on a per unit basis. That comparison is said to yield a fair market value well exceeding the current purchase price. The appellants also claim that there was insufficient marketing done on the property and that it was not properly exposed to the market, including the failure to list it on MLS.

[21] In all of these circumstances, the appellants say that the court should be satisfied that the loss exceeds $10,000 and that they come within s. 193(c) of the *BIA*.

[22] I disagree.

[23] I start with the late and amended late offers. I agree with the receiver that neither of those offers were credible and cannot be used to set the benchmark for the fair market value of the subject properties. I say this for a number of reasons:

(i) I note that the purchaser under the late offer is the director of a company that registered a collateral third mortgage over one of the properties five days after the original appointment order was made. That collateral third mortgage was later discharged and deleted by the court.

(ii) The terms of the late offer are not credible, including that:

  (a) The deposit of $50,000 was entirely out of proportion to the purchase price offered;

  (b) the offer was conditional on the purchaser obtaining a mortgage to finance the purchase;

(c) the closing date was into December; and

(d) the purchaser wanted the vendor to obtain estoppel certificates from all tenants within the complex.

[24] Both the proposed purchaser and the terms of the late offer render it highly suspicious, full of risk, uncertain, and difficult for the vendor to comply with (particularly the insistence upon estoppel certificates). The offer was entirely dependent on financing and there is no evidence that the financing was even realistic. This is to be contrasted with the solid APS as approved by the court, one that rested on a single condition that was waived early in the process. I agree with the receiver that, unlike the actual APS, the late offer was not a serious or credible offer.

[25] In my view, the revised late offer was no better. The purchase price went down by $1.5 million, and the deposit rose by $50,000 to $100,000 in total. That deposit was still out of proportion to the actual purchase price being offered. The closing date was moved up by a couple of weeks, but the offer had become entirely conditional upon the purchaser convincing First National to allow the purchaser to assume the First National mortgages over the property. First National is not prepared to entertain that request. Accordingly, and importantly, even if the late amended offer had been a *bona fide* offer (which I do not accept), it would not have survived the test of time.

[26] In my view, the late offers were not credible and should not be used as a benchmark for "loss" under s. 193(c).

[27] Moreover, I do not agree with the appellants' suggestion that the motion judge erred by failing to take into account the "per unit" price to calculate the value of the property and determine whether fair market value had been achieved. The motion judge specifically rejected the appellants' evidence on that point. He was entitled to do so and his conclusion attracts deference by this court.

[28] Nor did the motion judge accept the appellants' criticism of the receiver's failure to have the property marketed on MLS. Indeed, there was evidence before the motion judge, which he accepted, that marketing a property of that value through MLS is not a suitable means to attract buyers. In fact, the appellants are known to have marketed similar large-scale properties in the past and foregone any use of MLS as a marketing tool. Again, deference applies to the motion judge's factual determination on this point.

[29] As for the vacancy rate, I do not accept the appellants' submission that it impacts the amount of loss. The appellants say that the motion judge erred by not considering the vacancy rate, for which they say the receiver is responsible, in determining the fair market value. The appellants argue that, had the vacancy rate been at the market standard, the building would have attracted a higher purchase price.

[30] I do not accept this submission. Although a higher occupancy rate may have attracted a higher price, the fact is that the occupancy rate for the buildings was vastly improved under the receivership, going from about 60% occupancy when the receiver originally took over, to about 90% or more. Even if that occupancy rate was still below the average occupancy rate for that area in Ottawa, the receiver had made great strides in achieving an increase in the occupancy rate which no doubt assisted in increasing the market value for the buildings. There is no evidence to support the suggestion that the receiver could have achieved an even higher occupancy rate.

[31] The fact is that the properties were appraised. While the purchase price as reflected in the APS is below the appraised value, this court has been provided with information explaining the gap. That information was filed in this court on the consent of the parties. Included in that information is reference to the purchaser's estimated capital expenditure upon closure, which will well exceed the differential between the purchase price and the average appraised value of the properties. In these circumstances, it is unsurprising that the motion judge granted the approval and vesting order.

[32] While the appellants also maintain that the real estate market was gaining in strength after the appraisals were done, and they do not, therefore, reflect the true market value of the buildings, I see nothing in the record to support that submission.

[33] In my view, the granting of the approval and vesting order did not result in a loss of more than $10,000 because there is no credible evidence to support the position that the receiver could have obtained a higher sales price for the debtors' property. Nor is there credible evidence that, when looked at on a more substantive and general level, the receiver could have obtained a better offer.

[34] Accordingly, the appeal is not governed by s. 193(c) of the *BIA* and the appellants must seek leave to appeal under s. 193(e) of the *BIA*.

[35] Although the appellants ask that leave to appeal be granted as a form of relief in their factum in response to this motion, they have not sought leave to appeal to this court under s. 193(e). No such application has been filed and no material in support of that application has been given. There is simply a notice of appeal.

[36] In light of the absence of a leave to appeal application, I am not inclined to determine the issue of leave.

[37] For the reasons that follow, though, even if the appellants had a right to appeal or were granted leave to appeal, triggering a s. 195 *BIA* stay of the approval and vesting order, I would cancel that stay. Accordingly, and in the alternative, I will address the issue of a stay.

(3) Does section 195 of the *BIA* apply and, if so, should the stay be cancelled?

[38] Among other things, s. 195 of the *BIA* allows for an automatic stay where there is an appeal from an approval and vesting order unless the stay is cancelled for a reason deemed proper. Section 195 of the *BIA* reads:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper. [Emphasis added.]

[39] Even if there was a properly constituted appeal before this court, I would cancel the stay so that the transaction can be completed by tomorrow.

[40] In doing so, I emphasize two points: (a) the appeal is lacking in merit; and (b) the relative prejudice to the parties arising from a stay of the approval and vesting order.

[41] In my view, the grounds do not raise a serious issue to be appealed. The notice of appeal refers to only very general grounds, which are largely complaints about findings of fact and appear to be based upon a desire to factually relitigate the matter that was already determined by the motion judge. Accordingly, even if the appeal was properly constituted, I am not satisfied that there is any substance to the appeal.

[42] The fact that the appeal is lacking in merit combines with the prejudice that would arise and costs that would be accumulated if a stay under s. 195 (assuming s. 195 is invoked) were allowed to continue. The appellants (debtors) have no money. They are broke. Importantly, therefore, any costs arising from the continued operation of the buildings, and any risk associated with those buildings, comes out of the pockets of the creditors. The monthly costs are exorbitant. For example:

(i) $60,000 monthly interest is accruing under the mortgages registered on title;
(ii) $22,000 per month insurance costs are accruing;
(iii) utility costs are rising with the winter coming; and
(iv) the receiver's costs continue to accumulate.

[43] Moreover, I agree with the receiver that if this transaction is lost, there will be "a serious chilling effect on the market" and a "risk that another buyer would not assume the affordable housing agreement with the City of Ottawa and the Province. That agreement is critical to many people residing in that affordable housing.

[44] In my view, the integrity of the sale process, combined with the costs currently being incurred, and the risks associated with this transaction not being completed, pitted against what I determine to be a very weak appeal, all favour the lifting of any stay that may be operative under s. 195 of the *BIA*.

C. CONCLUSION

[45] I conclude that this appeal is not brought under s. 193(c) of the *BIA* and, therefore, leave to appeal must be sought. Leave to appeal has not been properly sought. Even if the appeal is properly constituted under s. 193(c) or leave should be granted under s. 193(e), pursuant to the powers under s. 195 of the *BIA*, I would cancel any stay of the approval and vesting order.