COURT FILE NUMBER	2303 01855
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	Edmonton
PLAINTIFF	BANK OF MONTREAL
DEFENDANTS	1194038 ALBERTA LTD. and ALAN DOBISH, also known as ALLAN DOBISH
DOCUMENT	**Commercial Chambers Reasons on an Application to Stay a Receivership Order**

Background

[1] Mr. Dobish is the sole director and voting shareholder of 1194038 ("119"), and a guarantor of 119's indebtedness to BMO. 119 is in default under the terms of the loan agreements and the security. Mr. Dobish is in default under the terms of the guarantee.

[2] On August 11, 2022, BMO demanded payment of the Indebtedness from 119 and Mr. Dobish and served notices of intention to enforce security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* on each of them.

[3] BMO offered to enter into a forbearance agreement with the defendants, however they refused or declined to meaningfully participate in forbearance negotiations with BMO.

[4] Counsel for BMO advised the defendants on November 22, 2022 that in light of their failure to sign a forbearance agreement and repay the Indebtedness, BMO would be proceeding with the enforcement of its security.

[5] There is no dispute that as at January 17, 2023, the defendants owed over $2.7 million to BMO, not including costs and expenses incurred by BMO and legal costs, and interest has been accruing since then.

[6] Around February 8, 2023, BMO filed and served an application for an order appointing Ernst & Young Inc. as receiver and manager over the property, assets and undertakings of 1194038 Alberta Ltd. Apparently, 119's sole asset is commercial property leased to Canadian Tire.

[7] The application was originally scheduled to be heard on February 13, 2023. It was adjourned to February 28, 2023 and again to March 10, 2023 to allow the defendant, Mr. Dobish

to respond. An affidavit dated March 7, 2023 was prepared for his signature. Mr. Dobish was apparently in the U.S. when the affidavit was sworn. On March 10, 2023, the Court heard the application. The Court was provided an unsworn version of Mr. Dobish's affidavit and a Certificate of Remote Commissioning dated March 7, 2023. Counsel for the defendants undertook to file Mr. Dobish's affidavit when the original signed copy was received. The Court considered the contents of the affidavit on the application.

[8] On March 14, 2023, the Court gave oral reasons for granting BMO's application for a Receivership Order. On that date, counsel for the defendants expressed an intention to apply for a stay of the Order. The Court temporarily stayed the Order pending the stay application.

[9] The stay application was heard on March 17, 2023. As at that date, no Notice of Appeal or application for leave to appeal had been filed. Also as at that date, counsel for the defendants was still not in receipt of Mr. Dobish's original signed affidavit. To date, his affidavit has yet to be filed.

Analysis

[10] The tripartite test applies on an application for a stay pending appeal: *BG International Ltd v Canadian Superior Energy Inc*, 2009 ABCA 73 at para 12.

1. Is there a serious arguable issue on appeal?

[11] This element of the test does not require an examination of the merits of the case, but the appeal must not be frivolous or vexatious.

[12] The defendants will be required to seek leave to appeal the receivership order. Where a receiver is appointed under both the *Bankruptcy and Insolvency Act* and a provincial statute, the *BIA* applies as a matter of paramountcy: *BDBC v Astoria*, 2019 ONCA 269. There is no appeal as of right under ss. 193(a) or (c) of the *BIA* from an order appointing a receiver: *Business Development Bank of Canada v Pine Tree Resorts Inc*, 2013 ONCA 282 at para 14, *Buduchnist Credit Union Limited v 2321197 Ontario Inc*, 2019 ONCA 588 at para 12. "Future rights" under s. 193(a) are future legal rights, not procedural rights or commercial advantages or disadvantages that may result from the challenged order: *Pine Tree* at para 15. As for s. 193(c), an order appointing a receiver usually does not bring into play the value of the debtor's property as it simply appoints an officer of the court to preserve and monetize those assets subject to court approval: *Pine Tree* at para 17, *Hillmount Capital Inc v Pizale*, 2021 ONCA 364 at para 38.

[13] If the Court of Appeal hears the appeal, this Court's decision to appoint a receiver will be considered a discretionary decision which is owed deference on appeal: *BG International* at para 19. As BMO's security documentation provides for the appointment of a receiver, BMO was not required to establish irreparable harm if a receiver is not appointed, and the extraordinary nature of the remedy sought was less essential to the inquiry: *Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430 at paras 27-28. The defendants' position before this Court on the receivership application was that alternate remedies - being foreclosure and the assignment of rents - were more appropriate, in particular given what it submits is 119's significant equity in the property.

[14] The threshold on this part of the test is low. Despite the above challenges, it cannot be said that the defendants' appeal would be frivolous or vexatious.

2. Will there be irreparable harm if a stay is not granted?

[15] The defendants must point to evidence of irreparable harm, being harm that cannot be compensated by an award of costs or damages or otherwise satisfactorily redressed. Irreparable harm must be shown to be likely. It is not to be presumed, although there are circumstances where irreparable harm may be found to be inevitable: *CNOOC Petroleum North America ULC v 801 Seventh Inc*, 2020 ABCA 212 at paras 40-41.

[16] Counsel for the defendants submitted that the lease income generated from the Canadian Tire lease is the sole source of income for 119, and for Mr. Dobish. There is no evidence before the Court that it is the sole source of income for Mr. Dobish. It does appear based on the information provided in his affidavit to be the sole income source for 119. However, the undisputed evidence is that over $2.7 million is currently due and owing to BMO and 119 has allowed writs for unpaid corporate income tax and GST to be attached to the property, contrary to the provisions of the security documentation.

[17] On the receivership application, the defendants acknowledged that it is open to BMO to exercise its rights of foreclosure and its rights under the assignment of rents and they argued that these would be more appropriate alternative remedies. There is nothing preventing BMO from proceeding with a foreclosure. The defendants have not pointed to evidence that establishes that the outcome under the receivership would cause irreparable harm when compared to foreclosure. In both cases 119 would receive its equity, if any, in the property which could then be used to generate future income.

[18] The defendants submit that a receivership would damage its relationship with Canadian Tire. This is not a situation as in *BG International* where it was held that the receivership posed a danger to the company's reputation and share price. 119 apparently operates no business *per se* and has no employees or trade suppliers. BMO argues it is going to enforce is security one way or the other, and Canadian Tire will be pulled into the process. Given BMO's intention to realize on its security, whether by receivership or foreclosure, it is difficult to understand how a receivership would be more detrimental to 119's relationship with Canadian Tire. BMO submits that foreclosure would put Canadian Tire in a worse position as there would be no intermediary to address its concerns, and the same can be said for exercising its rights under the assignment of rents.

[19] The defendants argue that 119 will suffer as a result of the liquidated sale value, however the same concerns would arise in relation to foreclosure.

[20] The defendants also submit that they are denied the foreclosure redemption period, however 119 has been unable to re-finance to date, and its prospects will not improve if BMO exercises its rights under the assignment of rents which the defendants acknowledge is open to BMO.

[21] Mr. Dobish's affidavit outlined a plan to position 119 so that it would have better chances at obtaining re-financing, however there is no evidence before the Court of Mr. Dobish's or 119's financial situation and therefore it is impossible to determine whether there is any realistic prospect of refinancing in the foreseeable future. As BMO points out, if there really is significant excess equity in the property, it is difficult to understand why re-financing has been such a challenge.

3. Does the balance of inconvenience weigh in favour of a stay?

[22] The third criterion requires the Court to be satisfied that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

[23] The defendants argue that 119 is current on all its payments, there is an excess of equity, other mortgage holders are subordinate to BMO, the tax liabilities are minimal and there is a plan to pay them out.

[24] The defendants point to statements in the affidavit to the effect that sale proceeds from the sale of unrelated lands will be used to pay out the GST debt. BMO points out that there is no actual evidence of monies available from such a sale.

[25] The defendants suggest that it could be a condition of the stay that it will be lifted if 119 defaults in its monthly payments. BMO points out that the entire amount has been due and owing for 7 months.

[26] The defendants submit that 119 has a good relationship with Canadian Tire and can work with it if BMO were to exercise rights of foreclosure or under the assignment of rents. BMO notes the Receiver has an obligation to conduct the affairs of 119 in an impartial and commercially reasonable manner. Mr. Dobish appears to spend considerable time in Phoenix which does not put him in as good a position to manage the property.

[27] BMO submits that 119's property, including its lease agreement with Canadian Tire, will be best preserved if third party rights are stayed by the terms of the Order. The Receivership Order will preserve the lease, and the Receiver can use lease proceeds to start paying out encumbrancers.

[28] BMO further notes that 119 continues to fail to deposit lease revenues at BMO and to bank exclusively with BMO, and 119 and Mr. Dobish continue to fail to provide financial reporting. These proceedings have not resulted in the defendants remedying either default or committing to do so in the foreseeable future. As a result, BMO's position continues to be prejudiced as it has no insight into the operations of 119 or the financial standing of either defendant. The lease revenues are being deposited somewhere else and BMO has no knowledge of where that revenue is going. BMO notes that Mr. Dobish has stated in his affidavit that 119 diverted lease revenues to pay expenses of third parties while there were CRA writs against the property.

[29] BMO notes that the defendants have not provided recent income tax or GST statements. BMO cannot determine whether the GST situation is deteriorating, nor does it have any control over that situation. BMO submits that it can be inferred that delay will likely result in CRA's super priority increasing. The delay will further dilute BMO's security position and further jeopardize the prospect of it being repaid. The Receiver will address the tax issues, which will benefit 119 since current management has fallen short on this to date.

[30] Counsel for the defendants argues that the crux of the matter is the equity in the property which the defendants submit greatly exceeds the debt owing to BMO. The defendants take the position that BMO is very well secured and therefore there is little inconvenience to BMO in a stay. As discussed in the reasons for granting the receivership application, the evidence of current value is inconclusive. Insofar as the defendants are concerned that the property may be listed at a price that does not reflect its true value, this may be addressed through a requirement in the

Order that the Receiver obtain agreement on the list price, failing which the Receiver may apply to the Court for approval.

Conclusion

[31] The defendants have not established that the test favours a stay in this case. I note that it was within the defendants' control to remedy the failure of 119 to bank at BMO and the failure to provide financial information for both defendants as required under the security documents. Had these defaults been remedied, the defendants may have been in a position to argue more compellingly in favour of a stay.

[32] The intended appeal would not be frivolous or vexatious. However, having considered all the circumstances, I find there is no evidence of irreparable harm that cannot be compensated by an award of costs or damages or otherwise satisfactorily redressed. Further, the balance of convenience favours denying a stay.

[33] However, I hereby amend the order to require that the Receiver obtain agreement on the list price failing which there may be an application to the Court for approval – as this was stated by defendants' counsel to be at the heart of the defendants' concern. If counsel cannot agree on the wording, they may seek the Court's input.

Note

[34] Just prior to the Court releasing this decision on March 20, 2023, counsel for the defendants emailed a document to the Court apparently executed on March 20, 2023 on behalf of a numbered company, for refinancing with a closing date of April 14, 2023. It is not signed by 119 or Mr. Dobish. Counsel indicated in the email that she proposed to exhibit it to an affidavit for filing on March 21, 2023.

[35] The application was heard on March 17, 2023. As noted, there is still no filed affidavit on behalf of the defendants. The additional document was provided after the hearing and is not included in an affidavit and therefore it is not properly before the Court.

☒ Counsel to Prepare Order: Ms. Trace

DATE OF DECISION: 2023-03-20

Justice Signature: ______________________________
J.A. Fagnan