ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: **CV-23-00703161-00CL** **DATE:** **7 February 2024**

NO. ON LIST: **1**

TITLE OF PROCEEDING: **ROMSPEN INVESTMENT CORPORATION v. TUNG KEE INVESTMENT CANADA LTD. et al**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Maya Pollak	Tung Kee Investment Canada LTD.	maya@chaitons.com
	Tung Kee Investment Limited Partnership	

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Eric Golden	Ernst & Young, Intervenor	egolden@blaney.com
Justin Chan	DX Strategies, Lien claimant	jchan@jtcprofcorp.com
Robert B. Macdonald	2149602 Ontario Inc.	rmacdonald@foglers.com
	Frank Pa & Stephen Tung	

ENDORSEMENT OF JUSTICE KIMMEL:

1. A full day omnibus hearing for the determination of the amounts owing to the third mortgagee, the fourth mortgagee and the fifth mortgagee and the validity and quantum of DX Strategies' lien claim was scheduled to take place on February 16, 2024 by Conway J.'s endorsement of November 30, 2023. A timetable was set for the exchange of materials and other pre-hearing steps. The issues involving the first and second mortgages were resolved and those mortgages have been paid out.
2. The Receiver's Report was delivered. Motion materials were delivered on behalf of 2149602 Ontario Inc., Frank Pa and Stephen Tung, on January 12, 2024.
3. The respondents undertook further investigations and made inquiries after November 30, 2023 which led them to advise the other parties that they were not going to meet the January 12, 2024 deadline for the delivery of their motion material and to suggest that the parties agree to an adjournment of the February 16, 2024 motion date so that additional issues associated with the third and fourth mortgages, that might in turn impact the availability of funds to satisfy the fifth mortgage and Lien Claim, could be adjudicated
4. A placeholder statement of claim was issued on January 24, 2024 by the respondents which they say was done to preserve limitation periods. They maintain that the narrower issues that they seek to raise and have the court adjudicate in respect of the third and fourth mortgages (some of which overlap with the issues raised in the statement of claim) can be addressed in the context of a motion in this proceeding, namely:
    a. Did 2149602 Ontario Inc. ("214"), 1825793 Ontario Inc. ("182"), Kenneth Chung ("Chung") and 2394049 Ontario Inc. ("239"), said to be affiliates of each other and of the third mortgagee, recover more than what was legally owed to them under the $6 million mortgage registered by Chung in favour of 214 (the "214 Mortgage") that was purportedly repaid and the proceeds used to fund the third mortgage in January 2022, and, if so, what was the quantum of the overpayment?
    b. If the amounts were improperly recovered, are the Respondents entitled to set off the overpayments against the amounts owing to 214, Tung, Pa and Chung under the third mortgage;
    c. Determination of the amounts owing to 214 under its third mortgage registered in 2022? and
    d. Determination of the amounts owing to the fourth mortgagee?
5. The respondents propose that the determination of the validity of the lien registered against the Respondents' property by DX Strategies Inc. (the "Lien Claimant") and the amount owing to the fifth mortgagee be adjourned until after the issues associated with the third and fourth mortgages have been determined. Those parties agree to the proposed adjournment.
6. The parties represented by Mr. MacDonald (third and fourth mortgagees) oppose the request for the adjournment and ask that the court proceed with its adjudication of the omnibus motion on February 16, 2024 to determine the amounts owing under the remaining mortgages and the Lien (without the benefit of responding materials which, even if delivered before then would now be late) and leave the new issues about overpayments to be determined in the normal course through the recently issued statement of claim.
7. The fourth mortgagee is concerned that interest that continues to accrue (at the per diem rate of $6,800 if their interest claims are upheld) will not be secured by the funds held in escrow if the matter is adjourned. It was suggested that there might be prejudice to the third and fourth mortgagees if the escrowed funds from the sale proceeds prove to be insufficient to cover the total amounts they claim if they are successful. However, they were not able to demonstrate that theoretical prejudice on the math presented. Their assertion of prejudice assumed certain amounts that would be paid in priority to both the Receiver and the Lien Claimant, the latter of which is far from certain in light of the Receiver's security opinions contained in its report. The other arguments in opposition to the adjournment request

go to the merits of the set off claims that the respondents seek to have adjudicated on this motion and cannot be determined on a scheduling appointment.

8. The respondents argue that there is no prejudice to the third and fourth mortgagee from the adjournment, which they say was not sprung by surprise but was an inevitable outcome of ongoing investigations and communications in December 2023 and January 2024, even if only now formally requested today. They say that there are sufficient net proceeds being held and available to pay out the amounts claimed as owing by the third and fourth mortgagees even if they succeed on the motion. Further, the only fulcrum stakeholders in addition to the respondents, namely the Lien Claimant and the fifth mortgagee, consent to the adjournment request and the Receiver does not oppose it.
9. It is not in the interests of justice, nor does it assist the court's process, for this matter to be pushed forward to the hearing on February 16, 2024, by which time the respondents will have delivered materials (they say by the end of this week or early next week) to raise the additional issues that they seek to have adjudicated. In the grand scheme of things, a two month delay is not significant. Since there is no demonstrated prejudice, the February 16, 2024 hearing date is vacated and a new full day hearing has been scheduled to address the issues associated with the third and fourth mortgages on April 18, 2024.
10. The parties participating in this motion shall adhere to the following timetable for the pre-hearing steps:
    a. The 214, Tung, Pa motion record has been delivered.
    b. Respondents' motion record shall be delivered by February 13, 2024.
    c. Reply/responding record from 214, Tung and Pa shall be delivered by February 27, 2024.
    d. Reply record of the respondents shall be delivered by March 5, 2024.
    e. All cross examinations and r. 39.03 examinations to be completed by March 19, 2024, on a schedule to be agreed to by counsel.
    f. If any party believes as a result of the evidence in the record following the completion of cross-examinations that there may be a need for the court to hear *viva voce* evidence on this motion, they shall request a case conference (preferably with the judge assigned to hear the motion on April 18, 2024) for directions regarding such evidence in advance of the hearing.
    g. The 214, Tung, Pa factum shall be delivered by April 2, 2024.
    h. The Respondents' factum shall be delivered by April 9, 2024.
    i. Reply factum, if any, of 214, Tung and Pa shall be delivered by April 15, 2024.
    j. All materials for motion (to be heard on April 18, 2024) shall be uploaded onto CaseLines by no later than April 16, 2024.
11. This adjournment is peremptory to the respondents.
12. The aspects of the omnibus motion to determine the amounts owing to the fifth mortgagee and Lien Claimant are adjourned, on consent, to a date to be set (if necessary) once the issues associated with the third and fourth mortgages have been determined.
13. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.

Kimmel J.

KIMMEL J.