

CITATION: *KEB Hana as Trustee v. Mizrahi Commercial (THE ONE) LP et al.*,
2024 ONSC 1678

COURT FILE NO.: CV-23-00707839-00CL

DATE: 20240307

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND
SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED**

RE: KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT
REAL ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE
PLACEMENT REAL ESTATE FUND NO. 434, Applicant

AND:

MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT
GROUP (THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP
INC., Respondents

BEFORE: Peter J. Osborne J.

COUNSEL: *Brendan O'Neill, Christopher Armstrong, Mark Dunn and Jennifer Linde*, for the
Receiver

Jeremy Dacks and Michael De Lellis, for the KEB Hana Bank as trustee of IGIS
Global Private Placement Real Estate Funds Nos. 301 and 434

Jerome Morse and Steven Weisz, for Mizrahi Inc., Sam M Inc., and Sam Mizrahi

David Bish, Nina Perfetto and David Levangie, for Coco International Inc. and
12823543 Canada Ltd.

Edward Babin and Brendan Monahan, for CERIECO Canada Corp.

Adam Slavens, for Tarion Warranty Corp.

Harvey Chaiton, for Aviva Insurance Company of Canada

Stephen Ferguson, Josh Nevsky and Melanie MacKenzie, for the Receiver

HEARD: March 6, 2024

ENDORSEMENT

1. The Receiver brings this motion for various relief sought to be granted in two orders: a Lien Regularization Order and a Construction Continuance Order as set out in the motion record, all in respect of the project, which is an 85 story condominium, hotel and retail tower located at

the southwest corner of Yonge Street and Bloor Street West, Toronto currently under construction and known and marketed as “The One” (“the Project”).

2. At the conclusion of the hearing of this motion yesterday, I granted the motion subject to certain revisions to the draft orders submitted (a number of which were resolved on the consent of the parties), with reasons to follow. These are those reasons.

3. The Construction Continuance Order would:

- a. approve the engagement by the Receiver of SKYGRiD Construction Inc. (“SKYGRiD”) as construction manager of the Project on the terms set out in the SKYGRiD Engagement Letter dated February 26, 2024;
- b. extend the scope of the stay of proceedings already granted to SKYGRiD from the Effective Date of March 13, 2024 until further order of this Court and related relief;
- c. declare that Mizrahi Inc. in its capacity as the Former Developer shall have no liability in respect of the supply of services or materials to the Project on or after the Effective Date (a “Post-Disclaimer Supply”);
- d. require that the former developer and any other Person shall permit the Receiver to access and take possession of the Project Materials;
- e. declare that the Receiver, in making payments directly or indirectly to suppliers, contractors, subcontractors and other creditors, is not affirming or assuming (and has not affirmed or assumed) any agreement for the supply of goods or services to the Debtors, the Former Developer and/or the Project, and shall have no personal liability for any payments or other obligations under any such agreement; and
- f. approve the First Report of the Receiver dated February 26, 2024 and the activities set out therein.

4. The Lien Regularization Order would:

- a. stay the rights of any person (a “Lien Claimant”) who supplied labour, materials and/or services to the Project to serve, register, preserve or perfect liens with respect to the Project pursuant to the *Construction Act*, R.S.O. 1990, c.C.30, as amended, except as permitted by the Lien Regularization Order;
- b. require that any person who wishes to assert a Lien Claim in respect of the project, whether in respect of materials and/or services supplied before, on or after the Filing Date, do so by delivering a Lien Notice to the Receiver within the timeframe prescribed by the provincial Lien legislation;
- c. grant a Lien Charge against the project in favour of any Lien Claimant asserting a lien equivalent to, and only to the extent of, any security granted in respect of a Lien Claim under the provincial Lien legislation, subject to the quantification and verification of such Lien Charge as provided for in the Lien Regularization Order; and

- d. provide that the priority of a Lien Charge will be equivalent to the priority granted under the provincial Lien legislation with respect to other Lien Charges, rank subordinate to the Receiver's Charge and the Receiver's Borrowings Charge, and be equivalent to such priority with respect to other creditors of the Debtors, as is accorded to Lien Claims under the provincial Lien legislation and any applicable federal laws.

5. Defined terms in this Endorsement have the meaning given to them in the motion record of the Receiver, the First Report or my earlier Endorsement made in this proceeding, except as otherwise stated.

6. The Receiver relies on the First Report and the Supplemental Report to the First Report dated March 6, 2024.

7. The motion materials were served on the Service List. For greater certainty, the Receiver has also served all known suppliers of goods or services to the Project, contractors, subcontractors and trades.

8. The relief sought today is unopposed save and except for objections to, or clarifications sought in respect of, certain terms of the Construction Continuance Order by Mizrahi Inc., Sam M Inc., and Sam Mizrahi (collectively "the Mizrahi Parties"). Those issues, as well as a motion brought by the Mizrahi Parties, are discussed below.

9. The relief sought by the Receiver today is strongly supported by the senior secured lenders, KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Funds Nos. 301 and 434 (collectively "the Lenders") and by Coco International Inc. and 12823543 Canada Ltd. (collectively "the Coco Parties").

10. I granted the Receivership Order and appointed the Receiver in this proceeding on October 18, 2023.

11. To permit and ensure that construction continued on the Project during these receivership proceedings, the Receivership Order authorized the Receiver as borrower, IGIS Asset Management Co. Ltd., as asset manager, and KEB Hana Bank as trustee of IGIS Global Private Placement Real Estate Fund No. 530 ("the RFCA Lender"), to enter into a \$315 million Receivership Funding Credit Agreement dated as of October 18, 2023 ("the RFCA"). The Lenders advise that as of today, already over \$100 million has been advanced pursuant to the RFCA to keep construction going.

12. When the Receiver was appointed, Mizrahi Inc. as the Former Developer was the developer and general contractor of the Project pursuant to the Construction Management Agreement and the GC Agreement. The Receivership Order permitted the Receiver to terminate or disclaim those agreements, which it has now done, with the consent of the RFCA Lender.

13. The Receiver seeks approval, as noted above, for the engagement of SKYGRiD as the new construction manager. The engagement would proceed for an interim period at least until the completion of a sales and investment solicitation process ("SISP"), for which approval is expected to be sought in the near future.

14. The Receiver recognizes that transition of a project of this magnitude and complexity to a new construction manager midstream may, and notwithstanding that it is necessary and in the best interests of this Project, cause uncertainty for contractors and trade suppliers who have contractual arrangements with the Former Developer, and present an increased risk that construction liens could be registered against the Project. Those in turn could negatively impact upon the ability of the Receiver to obtain future financing advances under the RFCA which are necessary to ensure the ongoing construction of the Project.

15. The overarching objective of the proposed Construction Continuance Order is to ensure that the transition of the Project to the new construction manager does not impact either the ongoing construction of the Project itself or prejudice the rights of any party.

16. The overarching objective of the Lien Regularization Order is to establish a court-supervised process to ensure that Lien Claims, if any, are addressed in an orderly and fair manner that does not risk a negative impact on the ability of the Receiver to access ongoing funding necessary for the continued construction of the project, while ensuring that the rights of any Lien Claimant are similarly not negatively impacted.

17. Those claimants will continue to enjoy the same substantive rights as are available to them under the provincial lien legislation and related regime. The proposed Lien Regularization Order is intended to achieve this while maximizing efficiency and removing the need (and associated costs and expenses) of having to bring a motion to lift the stay for any Lien Claimant individually, which Lien would then have to be preserved and perfected and ultimately vacated by posting security.

18. Accordingly, the issues on this motion are whether the court has the jurisdiction to grant the orders sought, and if so, whether the orders should be granted in this particular case.

19. For the reasons set out below, I am satisfied that both proposed orders should be granted.

Construction Continuance Order

20. I am satisfied that the engagement of SKYGRiD by the Receiver should be approved. The Receivership Order made earlier at paragraph 4(e) gives the Receiver the authority to retain a construction manager. The statutory basis for court approval is found in s. 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (“the BIA”).

21. Given the fundamental importance of the role to be performed by SKYGRiD if this receivership is to be successful, however, the Receiver seeks specific authority to retain SKYGRiD on the terms set out in the SKYGRiD Engagement Letter which is attached to the First Report.

22. The circumstances leading to the negotiation and execution of the SKYGRiD Engagement Letter are fully set out in the First Report. The Receiver solicited proposals on a confidential basis from two construction managers to manage the Project, including for an interim period until the completion of the SISF.

23. SKYGRiD was selected as the successful candidate. I observe that it was willing to accept an engagement for only an interim period up and until the completion of the SISF with the

understanding that the ultimate owner of the Project could decide whether or not to continue its retention.

24. The Receiver is satisfied that its fees are competitive with prevailing market rates and are lower than the fees that the Former Developer asserts are payable to it in respect of project management. Finally, the RFCA Lender consented to the retention of SKYGRiD (as is required according to the terms of the RFCA).

25. The engagement of SKYGRiD on the terms set out in the SKYGRiD Engagement Letter is approved. The Receiver is authorized to enter into the SKYGRiD Construction Agreement.

26. It follows that SKYGRiD should benefit from the limited stay of proceedings already granted in this matter (particularly as set out in paragraphs 14 and 15 of the Receivership Order) to the extent that such proceedings, rights and remedies affect the Project or the performance by SKYGRiD of its obligations in connection thereto. I observe that the same limited stay protection was similarly provided in the Receivership Order to the Former Developer.

27. I am satisfied that this relief is what practicality demands, as well as what justice dictates, as contemplated by the Supreme Court of Canada when it concluded that the “very expansive wording” of s. 243(1)(c) of the *BIA* gives this Court the jurisdiction to expand the scope of the stay in this matter where appropriate: *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para 148, citing *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226 at para 20; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508 at para 57; and *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*, 1994 CanLII 7468, 114 D.L.R. (4th) 176 (Ont Ct J (GD)) at para 16.

28. This Court and other Canadian courts have granted stay protection in favour of third parties where necessary and appropriate to facilitate restructuring efforts. In determining whether or not such relief is appropriate, the factors to be considered include whether extending the stay to the third party in question would help maintain stability and value during the restructuring proceedings: *JTI-Macdonald Corp. Re*, 2019 ONSC 1625 at para 15; *McEwan Enterprises Inc.*, 2021 ONSC 6453 at paras 42-43; and *Laurentian University of Sudbury*, 2021 ONSC 659 at para 40.

29. The Construction Continuance Order is either supported or not opposed by any party present in court today, with the limited exception of the Mizrahi Parties. While they do not oppose the order generally or what it seeks to achieve, they raised objections with respect to certain particular terms of the proposed form of order, as discussed below.

Lien Regularization Order

30. The proposed Lien Regularization Order would establish a court-supervised, streamlined, claims process to be administered by the Receiver. It would stay the rights of Lien Claimants to register any lien against the Project, but substitute such rights with the ability to file a Lien Claim with the Receiver and benefit from a court-appointed Lien Charge, all consistent with rights established under the provincial lien legislation.

31. I am satisfied that my jurisdiction to make such an order, where appropriate, flows from s. 243(1)(c) of the *BIA* referred to above.

32. The proposed Lien Regularization Order is, in effect, in the nature of a claims procedure order. Those orders are granted by Canadian courts in similar proceedings on a regular basis. It is critical that such orders be tailored to the particular circumstances of each individual case. The specific provisions that are appropriate in one proceeding may not be appropriate or necessary in another. The overarching objective is to establish a claims process that is efficient, flexible and fair.

33. In similar circumstances where the registration of liens against a development project has risked causing delays and disruption to the progress of construction or imperiling restructuring efforts, this Court has exercised its jurisdiction to establish a claims process for lien claimants similar to that proposed here: See, for example, *Comstock Canada Ltd., et al* (7 August 2013), Ont. Sup. Ct. J [Commercial List] CV-13-10181-00CL (Lien Regularization Order); *FirstOnSite GP Inc.*, (21 April 2016), Ont. Sup. Ct. J [Commercial List] CV-16-11358-00CL (Amended and Restated Initial Order); *Carillion Canada Inc., et al* (14 March 2018), Ont. Sup. Ct. J [Commercial List] CV-18-590812-00CL (Lien Regularization Order, and subsequent Amended Lien Regularization Order dated May 23, 2019).

34. I am satisfied that such circumstances exist here. The proposed terms of the Lien Regularization Order recognize the rights of Lien Claimants while ensuring the Receiver's continuing access to financing available under the RFCA through the following proposed process, the particulars of which are set out in the motion materials and the First Report:

- a. the rights of Lien Claimants to serve, register, preserve or perfect liens pursuant to the provincial lien legislation will be stayed, and Lien Claimants wishing to assert lien rights against the Project will be required to comply with the process now established;
- b. any Lien Claimant will be able to preserve its rights available under the provincial lien legislation whether in respect of materials and/or services provided before, on or after the Appointment Date by delivering a Lien Notice to the Receiver within the timeframe prescribed by the provincial lien legislation;
- c. any Lien Claimant that has delivered (or is deemed to have delivered) a Lien Notice will be granted a Lien Charge equivalent to, and only to the extent of, any security granted in respect of a Lien Claim under the provincial lien legislation. In all cases, such a Lien Charge will be subject to the quantification and verification in accordance with the procedures established;
- d. the Lien Charge will rank subordinate to the Receiver's Charge and the Receiver's Borrowing Charge, all of which is consistent with the priorities established under the Receivership Order and will otherwise be subject to the priority as is accorded to Lien Claims under the provincial lien legislation and the applicable federal laws;
- e. any outstanding liens registered against the Project at the time of the granting of the proposed Lien Regularization Order will be vacated and the applicable Lien Claimant will be deemed to have delivered a Lien Notice. I pause to observe that to the knowledge of the Receiver, as of the date of today's motion, there are no outstanding liens registered against title to the Project; and

- f. any Lien Claimant with a Lien Claim that has been vacated prior to the granting of the order will also be deemed to have provided a Lien Notice, although I observe again that to the knowledge of the Receiver there are no such vacated liens.

35. I am satisfied that this relief is appropriate in the circumstances of this case. While not determinative of whether such relief should be granted, I observe that it is strongly recommended by the Receiver, is consistent with the relief granted by this Court in other cases referred to above, and is not opposed today by any contractor, subcontractor, supplier or trade, all of which (to the extent their existence is within the knowledge of the Receiver) have been put on notice of the motion today. None has appeared.

36. Finally, and as noted above, there are, to the knowledge of the Receiver, no liens registered against the Property as of today's date, with the result that while the proposed order provides for how any such liens should be treated, there are none. Accordingly, the proposed relief is prospective and prophylactic in nature and does not seek to retroactively affect any liens already registered on title to the Project.

37. All parties present in court today (including for greater certainty the Mizrahi Parties) either support or do not oppose the Lien Regularization Order.

38. I am also satisfied that my jurisdiction to grant such an order is fair and reasonable since the rights granted to any Lien Claimant are substantively consistent with those granted to such parties under the provincial lien legislation, with the result that they are not prejudiced by the making of this order. In short, they have the same rights as the statutory regime provided under the *Construction Act* already gives them.

39. Accordingly, no element of the provincial lien legislation regime is being circumvented or compromised. Rather, it is either being complied with, or is deemed to have been complied with, albeit on a streamlined basis. I am satisfied that compliance with the proposed Lien Regularization Order, which will have the effect of removing the requirement in respect of each lien of obtaining a motion to lift the stay, filing, perfecting and registering that lien and then vacating that lien upon the posting of security, is accretive to maximizing value for the benefit of all stakeholders. Importantly, it is accretive in a way that does not prejudice the rights of any Lien Claimant. It is approved.

Approval of the First Report and Activities of the Receiver

40. The Receiver seeks approval of the First Report and the activities summarized therein. Such motions are brought regularly in this Court and make good practical sense where appropriate in that they allow court-appointed officers to move forward with next steps, they bring the activities of that court-appointed officer before the court for scrutiny, they allow an opportunity for the concerns of stakeholders to be addressed and problems to be rectified on a periodic and timely basis and before they are magnified or continued, and enable the court to be satisfied that the activities have been conducted in a prudent and diligent manner, and in accordance with the mandate granted: *Target Canada Co, Re*, 2015 ONSC 7574 at para 12; *Laurentian University of Sudbury*, 2022 ONSC 2927 at paras 13-14; and *Triple-I Capital Partners Limited v. 12411300 Canada Inc*, 2023 ONSC 3400 at para 66.

41. With the exception of the position of the Mizrahi Parties referred to above and discussed below, approval of the First Report and the activities of the Receiver is not opposed, and is supported by the Lenders.

42. I am satisfied that the activities undertaken by the Receiver were necessary, appropriate and consistent with the mandate given to the Receiver in the Receivership Order. One of my overarching objectives in appointing the Receiver on the terms set out in the Receivership Order in the first place, was to ensure that construction on the Project continued in an orderly and cost-effective way, all with a view to minimizing delays and preserving value. I am satisfied that the activities of the Receiver have been consistent with that objective.

43. Subject to the caveat referred to below with respect to the Mizrahi Parties, the First Report and the activities of the Receiver are approved.

The Mizrahi Parties: Their own Motion and Objections or Requests for Clarification with respect to the Construction Continuance Order

44. The objections of the Mizrahi Parties arise in large part out of, and are related to, their own motion in respect of which materials were just recently delivered.

45. In essence, the Mizrahi Parties seek an order requiring the Receiver to pay to them fees they say are owing in respect of their project management services provided between the date of the appointment of the Receiver and the Effective Date of the transition to SKYGRiD, as well as declaratory relief with respect to certain Disputed December Payment Letters and other relief.

46. The Mizrahi Parties submit that the Receivership Order and particularly paragraph 17 thereof compelled the Former Project Manager to continue to provide services, but on terms that it would be paid for those services provided post-appointment of the Receiver. Their position is that they have provided those services, but have not been paid, and therefore seek an order compelling the Receiver to make those payments. They want that motion scheduled as soon as possible, citing an urgent need for funds as well as the fact that fairness dictates that the motion be heard and determined.

47. The Receiver, strongly supported by the Lenders and by the Coco Parties, takes the position that it needs an opportunity to first investigate the underlying facts, and then prepare and file responding materials. As set out in the First Report and particularly in the Supplemental Report to the First Report, the Receiver has concerns with various payments already made to the Mizrahi parties and the basis for those payments, as well as numerous other issues relating to the entitlement of the Mizrahi Parties to the fees they say are owing. The Receiver anticipates taking the position on that motion that rights of setoff apply in a quantum that would exceed the amounts said to be owing to the Mizrahi Parties in any event.

48. Finally, the Receiver submits that paragraph 17 of the Receivership Order does, as submitted by the Mizrahi Parties, require the Receiver to pay for goods and services received after the date of that order. However, the Receiver submits that paragraph 17 also contemplates that such fees as may be owing to the Mizrahi Parties (or others) must be determined by the Receiver, agreed by the parties, or ordered by the court, with the result that nothing in paragraph 17 is inconsistent with its position that amounts claimed by the Mizrahi Parties must be investigated, proven and determined following the hearing of the motion that is now pending.

49. All of these issues are for another day, and are not properly or necessarily determined as part of the motion before the court.

50. I observe that part of the relief sought by the Receiver in the Construction Continuance Order relates to the provision of relevant books and records from various parties, including but not limited to the Mizrahi Parties. Simply put, the Receiver is still trying to investigate the underlying facts, gather and evaluate the relevant documentation, and then consider its position. I further observe that the transition from the Mizrahi Parties to SKYGRiD as project manager is not even yet effective, with the result that the facts that may ultimately be relevant to a determination of what amounts may be owing to the Mizrahi Parties have themselves not fully crystallized.

51. The parties have submitted dueling case management timetables for the delivery of materials and the scheduling of that motion. As I advised the parties at the conclusion of the hearing, that motion is properly scheduled at a Case Conference (for which I will make myself available as supervising judge) but those issues are not ripe for determination or even scheduling today. Counsel to the court-appointed Receiver will coordinate discussions among the key stakeholders.

52. The quantum of the fees at issue are significant and the issues are important to this proceeding. Fairness to all parties requires that that motion be fully briefed and determined on the basis of a full record.

53. With respect to the alleged prejudice that, as submitted by the Mizrahi Parties, will result from any delay, I observe the commitment of the Receiver made in court that it will hold an amount of not less than \$6 million pending a consensual resolution of the issues with the Mizrahi Parties or the determination of the motion they have now brought, such that the risk that there will be no funds available to satisfy a possible order made, is thereby mitigated.

54. The submissions of the Mizrahi Parties that need to be addressed today are those that flow from this outstanding motion but which relate to the specific terms of the Construction Continuance Order sought today.

55. Their opposition, or concern for clarification, with respect to the Construction Continuance Order, is directed towards their concern that their pending motion not be prejudiced by relief being granted now.

56. Some of the concerns were resolved through the cooperation and negotiation among the key parties and particularly the Mizrahi Parties and the Receiver. Those are reflected in the revised draft order and in the commitment to hold funds referred to above. (I pause to observe that similar cooperation resulted in paragraph 15 of the proposed order, which resolved on the consent of the parties the concerns expressed by Tarion that the limitations of liability provided for in the order do not extend to obligations or liabilities arising under the *Ontario New Home Warranty Plan Act*, which continues to apply).

57. The remaining concern of the Mizrahi Parties related to paragraphs 14 and 16 of the draft Construction Continuance Order.

58. Paragraph 14 provides that in making payments to suppliers, contractors, subcontractors and other creditors, the Receiver is not affirming or assuming (and has not affirmed or assumed)

any agreement or mandate for the supply of goods and/or services to the Debtors, the Former Developer, the Construction Manager and/or the project, and the Receiver shall have no personal liability for any payments or other obligations.

59. I am satisfied having heard the submissions of counsel for the Mizrahi Parties that the claims they wish to assert are asserted as against the Project assets and not the Receiver in its personal capacity in any event, and are further addressed by the commitment to hold funds as noted above.

60. Further, and more fundamentally, the effect of paragraph 14 is to preserve the status quo, in the sense that the Receiver is making payments to suppliers and others to keep the Project going, but in doing so is not prejudicing its position and nor is it deemed to have affirmed or assumed any agreement. It is simply making payments to keep the construction activities going. I am satisfied that this paragraph, which I observe is consistent with the terms of the Receivership Order already made in any event, is appropriate.

61. Paragraph 16 provides for the approval of the activities of the Receiver. For the reasons set out above, I am satisfied that the activities should be, and they are, approved. To be clear, however, that approval does not prohibit the Mizrahi Parties from advancing the claims made in their pending motion, which as noted above will be determined on a full record another day.

Result and Disposition

62. The motion of the Receiver is granted. The Construction Continuance Order and the Lien Regularization Order are approved in the revised form submitted to me. I have signed both orders and they are effective immediately and without the necessity of issuing and entering.

Osborne J.