

**CITATION:** Kingsett Mortgage Corp. v. Mapleview Developments Ltd., et al., 2024 ONSC 1983

**COURT FILE NO.:** CV-24-00716511-00CL

**DATE:** 20240321

**ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) 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:** KingSett Mortgage Corp., Applicant

**AND:**

Mapleview Developments Ltd., Pace Mapleview Ltd. and 2552741 Ontario Inc.,  
Respondents

**BEFORE:** Peter J. Osborne J.

**COUNSEL:** Sean Zweig and Aiden Nelms, for the Applicant  
Nicole Maragna, for Foremont Drywall Inc., Foremont Drywall Contracting, et al., Lien Claimant  
Alexander Soutter, for Aggregated Investments Inc. and Drewlo Holdings Inc.  
Olivia Hy, for Con Drain Company Ltd. and Northgate Farms Ltd.  
Maya Poliak, for MarshallZehr Group Inc.  
Montana Licari, for Aviva Insurance Company of Canada  
Andrew Wood, for Sunbelt Rentals of Canada Inc., Lien Claimant  
Patrick Martina, for Dino Sciavilla and Yvonne Sciavilla  
Dave Rosenblat, for KSV, Proposed Receiver  
Catherine Litinsky, for Quality Rugs of Canada o/a Quality Sterling Group  
Stewart Thom, for Rivervalley Masonry Group Ltd., Creditor

**HEARD:** March 21, 2024

**ENDORSEMENT**

[1] The Applicant, KingSett, seeks the appointment of KSV Restructuring as Receiver of the Real Property and other property as set out at Schedule A to the proposed receivership order. That comprises all of the property of the Debtors with the exception of Deposit Monies representing deposits paid by homebuyers in respect of certain lots sold by the Debtors, which funds will remain in trust.

[2] The Applicant also seeks a first ranking super priority charge in favour of the Receiver and its counsel and a second ranking super priority Receiver's Borrowing Charge for the purpose of funding the receivership.

[3] Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated. The Applicant relies on the Affidavit of Daniel Pollock sworn March 14, 2024 together with exhibits thereto.

[4] The Debtors, Maplevue Developments Ltd., Pace Maplevue Ltd., and 2552741 Ontario Inc., did not appear today, although properly served. As noted below, however, the principals of these entities are personal guarantors under the Loan Facilities, and they were represented today in that capacity.

[5] Vector Financial Services Limited held until yesterday a first priority mortgage over one of the PINs comprising the property. Yesterday, that position was assigned to Aggregated Investments Inc. (AI). AI consents to the relief sought today and the proposed receivership includes that PIN.

[6] There are also 10 construction liens registered against title to the property, the most significant of which is held by Con-Drain Company (1983) Limited. That company has filed a notice of appearance. All lienholders are on notice. None opposes the relief today.

[7] Other creditors include Westmount Guarantee Services and the MarshallZehr Group, the latter of which is represented today. The security of both of those creditors is subordinated and postponed to that of the Applicant, and neither opposes the relief sought today.

[8] The Debtors have been developing the real property at 700 – 780 Maplevue Drive East, Barrie, Ontario. The project is a residential real estate development being developed in phases on 50 acres of land.

[9] Phase 1 includes 193 units of which 91 are freehold townhomes and 12 are stacked townhomes. 181 of those units have closed.

[10] Phase 2 includes 119 units all of which are freehold townhomes. 83 of these units have closed.

[11] Phase 3 comprises property where servicing is materially complete but the construction for a proposed 209 units has not yet begun.

[12] Phase 4 comprises property where servicing is in progress but not yet completed. 321 stacked townhomes are proposed.

[13] Phase 5 and Phase 6 include properties where neither servicing nor construction has begun but for which 210 senior homes and 81 stacked townhomes, respectively, are planned. The proposed receivership does not include phase 6.

[14] The Debtors entered into various Loan Facilities with KingSett to finance development of the project, which in the aggregate have a maximum principal amount of \$105,762,112.

[15] The Maturity Date has already been extended on agreement several times. The Loan Facilities matured on February 1, 2024 and have not been repaid. As of February 1, 2024, the aggregate indebtedness was \$47,099,842.63, with interest, fees and costs continuing to accrue.

[16] Payment and performance of all obligations under the Loan Facilities has been unconditionally guaranteed by Dino Sciavilla and Yvonne Sciavilla pursuant to a Guarantee dated November 30, 2022. The Guarantors are represented in Court today and do not oppose the relief sought. They are also principals of the Debtors.

[17] The Security in favour of KingSett includes first ranking mortgages, a General Security Agreement and General Assignments of the leases and material contracts together with other security as set out on motion materials.

[18] Demand letters and section 244 *BIA* notices were issued on February 16, 2024. They enumerated the Listed Events of Default which include various covenant defaults in addition to the failure to repay.

[19] The Applicant has a contractual right to the appointment of a receiver in the event of default.

[20] The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

[21] In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

[22] Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

[23] The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 43-44.

[24] As I observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2<sup>nd</sup> ed. (Toronto, Carswell, 1999) listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25):

- a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;
- b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;
- c. the nature of the property;
- d. the apprehended or actual waste of the debtor's assets;
- e. the preservation and protection of the property pending judicial resolution;
- f. the balance of convenience to the parties;
- g. the fact that the creditor has a right to appointment under the loan documentation;
- h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- i. the principle that the appointment of a receiver should be granted cautiously;
- j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- k. the effect of the order upon the parties;
- l. the conduct of the parties;
- m. the length of time that a receiver may be in place;
- n. the cost to the parties;
- o. the likelihood of maximizing return to the parties; and
- p. the goal of facilitating the duties of the receiver.

[25] How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54).

[26] Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

[27] For all of the above reasons I am satisfied that the answer to that question is yes.

[28] The Applicant has provided a form of order that is generally consistent with the Model Order of the Commercial List. While that is not determinative of the appropriateness of any terms in any particular case, it does assist the Court.

[29] I am satisfied that the proposed terms of the receivership set out in the draft order are appropriate here.

[30] I observe that the proposed order allows the Receiver to make certain limited critical prefilings payments with the written consent of the Applicant. That is appropriate where they are critical to the continued operation of the debtor: *Macquarie Equipment Finance Limited v. Validus Power Corp et al* (August 2, 2023), Toronto, CV-23-00703754-00CL ONSC 4772 (Order Appointing Receiver) at para 30; *33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership (Cresford Group)* (March 27, 2020), Toronto, CV-20-00637297-00CL (Order appointing Receiver) at para 28.

[31] I am also satisfied that the proposed Borrowings Charge is appropriate. I observe that the quantum is limited; that charge is not intended and nor is it sufficient to fund construction of the completion of the project.

[32] The other terms of the proposed order are appropriate.

[33] KSV is qualified and is appropriate to be appointed to be the Receiver, an appointment to which it consents.

[34] The Application is granted. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Osborne J.