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Date: April 24, 2015

RE: IN THE MAPPETER OF THE PROPOSAL OF CASIMIR CAPITAL LTD.
COURT FILE NO.: 31-1836747

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CITATION: In the Matter of the Proposal of Casimir Capital, 2015 ONSC 000
COURT FILE NO.: 31-1836747
DATE: 20150424

ONTARIO

SUPERIOR COURT OF JUSTICE

IN BANKRUPTCY AND INSOLVENCY

COMMERCIAL LIST

IN THE MATTER OF THE PROPOSAL OF CASIMIR CAPITAL LTD. A COMPANY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

COUNSEL: *Peter-Paul E. Du Vernet* for Casimir Capital, the Moving Party

Steven L. Graff and Miranda Spence
For Crowe Soberman Inc., trustee in bankruptcy of Casimir Capital Ltd., a bankrupt

Robert B. MacDonald for Royal Capital Management Corp.

Christopher Stanek for Gowling Lafleur Henderson LLP

James B. Camp for Adam Thomas

John Salmas for Fidessa Canada Corp.

BEFORE: **L. A. Pattillo J.:**

HEARD: **January 27, 2015**

ENDORSEMENT

Introduction

[1] Casimir Capital Ltd. (the "Debtor") moves by way of appeal from or review of the decision of the Proposal Trustee at the July 28, 2014 first meeting of creditors (the "Meeting") permitting certain creditors to vote.

[2] At the Meeting, 93.7% of the creditors, with proofs of claim totaling $1,446,600.13 voted against Casimir's proposal (the "Proposal"). Only 6.3% of creditors, with proofs of claim totaling $97,247.63 voted in favour of the Proposal.

[3] The Debtor now moves pursuant to s. 135(5) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985. C. B-3 as amended ("BIA"), to set aside or annul the deemed assignment in bankruptcy; to set aside the Proofs of Claim of Royal Capital Management Corp. ("RoyCap"), Gowling Lafleur Henderson LLP ("Gowlings"), Adam Thomas ("Thomas") and Fidessa Canada Corp. ("Fidessa") (collectively the "Disputed Creditors") and the votes cast by the Disputed Creditors at the Meeting; and a declaration that the Meeting was ineffective or adjourned.

[4] For the reasons that follow, I dismiss the Debtor's motion. In my view, the Proposal Trustee was correct in permitting the Disputed Creditors to vote on the Proposal at the Meeting. Further, and even if the votes of the Disputed Creditors are set aside, 69.4% of the remaining creditors whose claims were not disputed voted against the Proposal such that it would not have passed in any event.

Background

[5] The following are my findings of fact from the material filed.

[6] The Debtor is an Ontario company and carried on the business as an intermediary or broker of various underwritings and placements. Up until January 31, 2014 when it resigned, it was a member and registered as a securities dealer with the Investment Industry Regulatory Organization of Canada ("IIROC"). It is wholly owned by Casimir Capital Group, LLC, a holding company based in New York, which in turn is owned by Richard Sands ("Sands") who is a director of the Debtor.

[7] On February 11, 2014, the Debtor filed a Notice of Intention to Make a Proposal. Crowe Soberman Inc. was the Proposal Trustee. The Debtor filed the Proposal on March 11, 2014. As part of the Proposal proceedings, the Debtor's creditors filed proofs of claim with the Proposal Trustee. The creditors who filed proofs of claim included RoyCap ($650,000); Gowlings ($246,823.14), Thomas ($103,517.00) and Fidessa ($225,258.68).

[8] At the time of filing its Notice of Intention to make a proposal, the Debtor filed a statement of affairs, sworn by Sands, which listed the assets and liabilities, and included a listing all of the creditors of the Debtor and the amounts owing to them which totaled $3,926,161.05. The listing specifically included the amounts owing to RoyCap, Gowlings, Thomas and Fidessa. The assets listed consisted of cash on hand and accounts receivable and totaled $490,839.26. No amounts were listed for claims against the Disputed Creditors.

[9] On March 18, 2014, the Proposal Trustee sent Notice of the Proposal to all of the Debtor's creditors as listed by it along with a Notice of the First Meeting of Creditors on March 31, 2014, the Proposal Trustee's Report on the Proposal, the Debtor's Statement of Affairs, a Proof of Claim form, voting letter and general proxy.

[10] In deciding whether to allow or disallow a creditor's proof of claim as filed, the Proposal Trustee reviewed the documents accompanying the proof of claim and determined that:

a) The liabilities and the amounts claimed by the creditor had been listed in the statement of affairs sworn by Sands on behalf of the Debtor;

b) The liabilities and amounts claimed by the creditor had been disclosed to the Proposal Trustee by the Debtor at the time of filing the notice of intention to make a proposal;

c) The proof of claim had been completed in accordance with the provisions of the BIA; and

d) The creditor's proof of claim contained the proper supporting documentation that corroborated the amount claimed.

[11] The first meeting of creditors proceeded on March 31, 2014. Counsel for the Debtor tabled a letter containing proposed amendments to the Proposal along with two Notices of Dispute regarding the proofs of claim filed by RoyCap and Gowlings.

[12] The Debtor's Notice of Dispute with respect to the RoyCap claim for $650,000, which is the balance owing on a loan, outlined certain events which the Debtor claimed led to a loss of capital and business in excess of the amount of RoyCap's claim. Specifically the Debtor alleged that RoyCap conspired with Thomas (the Debtor's former CEO) to attempt to acquire the Debtor and gain IIROC approval for repayment of $800,000 to RoyCap; and that RoyCap made a demand for payment of its loan which was contrary to the provisions of the loan agreement. The Debtor claimed damages and asserted an equitable set-off in respect of RoyCap's claim.

[13] The Notice of Dispute with respect to Gowling's claim of $246,823.14, which is for legal services rendered, outlined certain events which the Debtor claimed led to a loss of capital and business in excess of the amount of Gowling's claim. The Debtor alleged that Gowlings ceased acting for it in the spring of 2013 and then represented Thomas and his interests in conflict to the Debtor; that Gowlings deliberately withheld invoices which distorted the Debtor's balance sheet with respect to certain capital requirements mandated by IIROC and permitted a payment to RoyCap which in turn impaired the Debtor's capital. As with RoyCap, the Debtor asserted that it had suffered substantial damages and was entitled to set off any amount found due to Gowlings. No evidence or documents were filed to support either of the claims.

[14] The letter from Debtor's counsel accompanying the two Notices of Dispute stated that if there was no release of directors in the final Proposal "the debtor disputes the claim of Adam Thomas for the reasons reflected in the disputes of the claims of RoyCap and Gowlings."

[15] Following the above noted claims review process, the Proposal Trustee admitted each of the Disputed Creditors' proofs of claim, as filed, and conducted itself through the Proposal proceeding as if the claims had been admitted.

[16] At the first meeting on March 31, 2014, the Debtor entered into discussions with RoyCap and Gowlings with respect to the potential settlement of claims and verbally agreed to provide a settlement proposal within 48 hours. The meeting was

then adjourned by the creditors to permit settlement discussions to arrive at an acceptable proposal.

[17] Following the meeting, no settlement offer was forthcoming from the Debtor. Accordingly, on May 22, 2014, the Proposal Trustee sent notice to all creditors reconvening the First Meeting on June 2, 2014. On June 2nd, as a result of continuing discussions between RoyCap, Gowlings and the Debtor, the First Meeting was again adjourned by the creditors to July 11, 2014. On July 11, 2014, the First Meeting was again adjourned due to settlement discussions.

[18] On July 15, 2014, the Proposal Trustee advised the Debtor that a vote would be called at the next meeting of creditors and, based on the votes of the creditors that had been filed with it, the Proposal would be defeated resulting in a deemed bankruptcy pursuant to s. 57(a) of the BIA.

[19] On July 18, 2014, the Proposal Trustee advised the Debtor that the resumption of the first meeting of creditors would take place on July 28, 2014. A notice of the reconvened meeting for July 28, 2014 was sent to all known creditors on July 21, 2014.

[20] On July 24, 2014, counsel for the Debtor wrote to the Proposal Trustee and advised that the Debtor intended to commence proceedings to invalidate the claims of RoyCap, Gowlings and Thomas. No further details were provided but the letter did say that "a detailed analysis with supporting documents substantiating the claims is available ... and the documents for your use to conduct an inquiry and investigation of the claims if you are so advised."

[21] In an email the following day, the Debtor's counsel confirmed that the Debtor requested that the Proposal Trustee investigate the circumstances giving rise to RoyCap's, Gowlings' and Thomas' claims. The email ended by stating: "accordingly it would not be appropriate to consider any meeting or administration until the Casimir claim is determined and the disputed creditor claims resolved."

[22] On July 28, 2014, prior to the Meeting, the Proposal Trustee pointed out to counsel for the Debtor that based on the votes received, even if the claims of RoyCap, Gowlings and Thomas were removed, the Proposal would not pass. In response, counsel indicated that the Debtor would also look to invalidate the claims of Fidessa and two other individuals.

[23] At the Meeting, counsel for the Debtor requested the Proposal Trustee to mark the claims of RoyCap, Gowlings and Thomas together with Fidessa and the

two other individuals raised that morning as "objected to" and suggested an adjournment in order to allow for the opportunity to seek direction from the court. The request was denied by the creditors in attendance and, following a motion to vote on the Proposal, 93.7% of the creditors with proofs of claim totaling $1,446,600.13 voted against the Proposal. Only 6.3% of creditors with proofs of claim totaling $97,247.63 voted in favour of the Proposal.

[24] The proofs of claim of the Disputed Creditors totaled $1,225,598.82. If those proofs of claim are expunged, creditors with proofs of claim totaling $318,248.94 remain. Of these remaining creditors, 69.4% or $221,001.31 of claims voted against the Proposal.

Position of the Parties

[25] The Debtor submits that in light of its claims for damages against the Disputed Creditors, the Proposal Trustee erred in allowing the Disputed Creditors to vote at the Meeting. The Debtor submits its claims are for amounts that exceed the Disputed Creditors' claims and accordingly, operate to expunge the Disputed Creditors' claims pursuant to equitable set-off. Having marked the proofs of claim "objected to", the Proposal Trustee was obliged to have considered the Debtor's claims which it failed to do.

[26] As part of its submissions to this court, the Debtor has set out the basis of its claims in some detail. It concedes that given the nature of the claims and the credibility issues that the claims raise, that such claims cannot be resolved on this motion. It submits that a trial of an issue should be directed to determine the validity of its claims and, in the event they are successful, whether equitable set-off is available to reduce or expunge the Disputed Claims in their entirety. In the interim, the vote on its Proposal should be held in abeyance.

Discussion

[27] Section 66(1) of the BIA provides that all provisions of the BIA (except Division II which is not applicable) apply to proposals.

[28] Section 108 of the BIA provides as follows:

> 108 (1) The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

(2) Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.

(3) Where the chair is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

[29] Section 135(5) of the BIA provides: "The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of a debtor if the trustee declines to interfere in the matter."

[30] A proposal under the BIA is a voluntary procedure. It is initiated by an insolvent person or entity. It is clear from the provisions in the BIA dealing with proposals and in particular the time limits provided that the procedure is to be carried out in a timely and cost effective manner.

[31] While the cases are somewhat divided on whether a proceeding under either s. 108 or s. 135(5) of the BIA is an appeal on the record or *de novo*, in my view, in the circumstances of this case where the challenge relates to a proposal trustee's decision to allow a proof of claim at the first meeting of creditors for the purposes of voting, the review should be on the record and not *de novo*. See: *Re Galaxy Sports Inc.*, 2004 BCCA 284 (BCCA); *Nalcor Energy v. Grant Thornton Poirier Ltd.*, [2015] N.B.J. No. 26 at paras. 19 to 21.

[32] It makes no sense, particularly in this case where a trial of the issue is required, to proceed with a hearing *de novo*. Such a procedure will only delay the bankruptcy for an indefinite period while exhausting the limited funds available to the Debtor in expensive legal proceedings. Nor is it appropriate in my view, to allow the Debtor a second kick at the can, so to speak, by placing evidence before the court that was not before the Proposal Trustee at the time. See: *Re Canadian Triton International Ltd.* (1997), 49 C.B.R. (3d) 192 (Ont. S.C.) at para. 5.

[33] The standard of review in respect of an appeal of the chair's decision to admit or reject a proof of claim for voting under s. 108 of the BIA or the trustee's decision to allow or disallow a proof of claim under s. 135 of the BIA is correctness: *Re Galaxy Sports*.

[34] In my view, based on the facts of this case, the Debtor's appeal is more appropriately pursuant to s. 108. The issue involves the question of whether the

Disputed Creditors should have been permitted to vote at the Meeting which is the subject matter of s. 108. By contrast, s. 135(5) deals with expunging or reducing proofs of claim where the trustee declines to interfere.

[35] Further, and notwithstanding that the Proposal Trustee marked the Disputed Creditors' proofs of claim as "objected to", I consider that the appeal is pursuant to s. 108(1) of the BIA and not s. 108(3). It is clear from the record and I find that the Proposal Trustee had made the decision to admit the Disputed Creditors proofs of claim for the purposes of voting prior to the Meeting. The Debtor provided no new information concerning its claims against the Disputed Creditors at the Meeting. The Proposal Trustee only marked the disputed proofs of claim "objected to" at the request of the Debtor's representative and not because he was in any doubt about them.

[36] Based on the information before the Proposal Trustee leading up to and at the Meeting on July 28 2014, I am satisfied that the Proposal Trustee, as the chair of the Meeting, was correct in allowing the Disputed Creditors to vote.

[37] The Debtor, who was clearly insolvent, voluntarily initiated the proposal proceeding. As part of that proceeding, the Debtor filed a statement of affairs which listed the Debtor's creditors and included the Disputed Creditor's claims without any qualification or listing of its alleged claims against them. In such circumstances, the steps taken by the Proposal Trustee in reviewing and validating the proofs of claims filed, including the Disputed Creditors, for the purpose of voting at the first meeting were more than sufficient.

[38] Further, the Debtor only raised its claims against the Disputed Creditors at the first meeting of creditors on March 31, 2014 and thereafter provided very general information, no back up documentation and took no steps to pursue the claims in the courts although it had more than four months to do so. The claims are contingent and unliquidated. There was simply no way, based on the information and more specifically the lack of information before it, that the Proposal Trustee could have evaluated the claims in order to disallow the Disputed Creditors' proofs of claim and their vote.

[39] If and when a bankruptcy occurs, the Proposal Trustee, then the Trustee in Bankruptcy will have sufficient time to review the bona fides of any claim by the bankrupt in considering whether to allow a Disputed Creditor's claim in the bankruptcy.

[40] In my view, the Debtor or its principal attempted to use the alleged claims to delay the proposal process in order to arrive at a settlement with the Disputed Creditors. It was only when that didn't happen that it has embarked on this motion to annul the Disputed Creditors votes and set aside the Meeting, all to avoid bankruptcy.

[41] The Trustee submits that the Debtor's motion to have its deemed bankruptcy set aside fails in any event given that even if the Disputed Creditors' claims are disallowed and their votes are disregarded, the result of the votes of the remaining creditors establishes the Proposal would not have passed in any event.

[42] The Debtor disagrees. It submits that if the Disputed Creditors' claims are disallowed, a new meeting should be called to consider the acceptance of its Proposal or amended Proposal. It submits that when it went to the Meeting on July 28, 2014, it was under the understanding a settlement had been reached with the creditors. It was blindsided when its settlement was rejected at the meeting and the vote proceeded with. It submits that another meeting, properly constituted, would permit it to place a revised Proposal before all creditors.

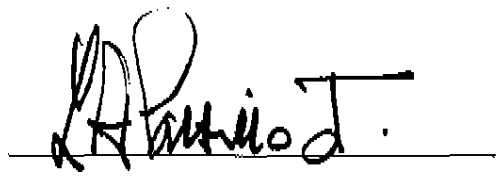
[43] I reject the Debtor's submissions that there was any settlement reached prior to the meeting or that it was blindsided at the meeting. There is no evidence in the record of such events. The record does indicate that beginning with the first meeting on March 31, 2014, the Debtors and the creditors were talking settlement. The meeting kept getting adjourned because of settlement discussions. But there is no indication a settlement or even a tentative settlement was ever reached. Any settlement would have to come in the form of an amended Proposal. There is no indication the Debtor ever filed an amended Proposal. Although it lodged $300,000 with the Proposal Trustee in respect of a revised Proposal, on July 25 2014, three days before the Meeting, the Debtor requested the Proposal Trustee return the deposited funds to it. That step, in my view, is more indicative of no settlement being reached. In my view, the Debtor simply wants the opportunity to put an amended Proposal before the creditors. The Debtor had that opportunity up until the Meeting. It has long since passed.

[44] I agree with the Trustee that the Debtor's motion to have its deemed assignment set aside fails in any event because even if the Disputed Creditors votes are set aside, the votes of the remaining creditors still defeat the Proposal.

Conclusion

[45] For the above reasons, therefore, the Debtor's motion is dismissed.

[46] The Proposal Trustee and the Disputed Creditors requested costs. The Debtor has very little funds. To order costs against it would deplete the few assets available to the creditors. The Proposal Trustee's costs should be recovered in the bankruptcy. All parties who opposed submitted that costs should be awarded against Casimir Capital Group, LLC, the Debtor's parent. While I have no doubt that the parent and Sands were the directing minds behind the Debtor's motion, neither is a party to the proceedings. Accordingly, no order as to costs.



L. A. Pattillo J.

Released: April 24, 2015