



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00722934-00CL

HEARING DATE: July 24, 2024

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TITLE OF PROCEEDING: CROWE SOBERMAN LLP v. NOIR PROPERTY MANAGEMENT LTD. et al
BEFORE: JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

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For Defendant, Respondent, Responding Party:

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	unsecured creditor and plaintiff in CV-23-00702920-0000	
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ENDORSEMENT OF JUSTICE KIMMEL:

- [1] Crowe Soberman Inc. ("Crowe") in its capacity as proposal trustee (in such capacity, the "Proposal Trustee") of Noir Property Management Ltd., Noir Property Management (Durham) Ltd., Noir Design & Consulting Inc., Noir Product Trading Ltd., Noir Real Estate Inc., Cora Boutique Design Inc., 2689014 Ontario Inc., and 2664566 Ontario Inc. (collectively, the "Noir Group" or the "Companies") brings this application to be appointed as the interim receiver (the "Proposed Interim Receiver") over the property, assets and undertakings of the Noir Group pursuant to section 47.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, as amended ("BIA").
- [2] The Noir Group filed notices of intention to make a proposal under the BIA on June 20, 2024 ("NOIs").
- [3] Loans totaling approximately \$10.1 million were made to the Noir Group under Master Agreements (estimated 9 in total as at July 2023) and Selectable Agreements (estimated 300 in total as at July 2023), under a business model and lending scheme that for the provision of short-term construction loans for the purpose of funding renovation/construction projects at properties that were owned by the Companies' clients. The details of the vast majority of these loans need to be verified and reconciled. The financial records of the Noir Group are, according to the Proposal Trustee, sub-optimal. It is estimated that more than two-thirds of the loans advanced by the more than 300 lenders require reconciliation.
- [4] Starting in or around June 2023, some of the short-term unsecured construction Lenders the Noir Group commenced litigation seeking repayment of their loans. In the context of those proceedings, MNP Ltd. ("MNP") was appointed to act as court-appointed expert under a reference that was ordered. Given the NOIs filed by the Noir Group, MNP, through its counsel, advised that it intends to be discharged as court-appointed expert under the Reference.
- [5] After determining the best approach to extract value from the Noir Group assets, it will be necessary to engage in a robust claims process that will ensure the merits of any submitted claim and the monetary entitlement of each claimant. This claims review may require

investigations by the Proposed Interim Receiver of certain impugned transactions and payments. The complexities of this matter necessitate the appointment of an interim receiver to preserve the assets and protect the interests of all stakeholders.

- [6] Collectively, the Noir Group originally owned nine properties. Four have been sold. There were only net sale proceeds from one of the sales, of Noir Terrace at 0 Donald Cousens Parkway in Markham, of approximately \$2.3 million (the "Remaining Funds"). The Remaining Funds are currently held in the trust account of Wagman Sherkin, counsel for the Noir Group.
- [7] As part of this application, the Proposed Interim Receiver will seek that the Remaining Funds are transferred to its control. The Proposed Interim Receiver wants to use the Remaining Funds to preserve the properties and assets of the Noir Group at the discretion of the Proposed Interim Receiver and, in certain circumstances, with further Order of the Court.
- [8] There are creditors who assert claims to these Remaining Funds, including Mr. Newman. Conversely, there were some distributions already made from the sale of Noir Terrace that are in dispute (the "Disputed Payments"). Since Mr. Newman's mortgage security was discharged when that property was sold, it was agreed that pending a resolution or determination of his claims to the Remaining Funds and any Disputed Payments that he may have benefited from (which may be undertaken in conjunction with or part of the later proposed claims process), there will be a trust created over a portion of the Remaining Funds equal to his claims, totaling \$449,881.87 (the "Trust Funds").
- [9] With the exception of on property (25 Myrtle, which is unencumbered), all of the remaining Properties are subject to mortgages that are in default and most owe outstanding property taxes. Of particular relevance to this motion,
 - a. there is a first-ranking mortgage held by Concrete Mortgage Capital Inc. ("Concrete Mortgage") on 190 Henderson; and
 - b. there is a first-ranking mortgage held by Owemanco Mortgage Holding Corporation ("Owemanco") on 4585 Lloydtown.
- [10] Concrete Mortgage Capital has commenced power of sale proceedings and it has advised that it does not want to be impeded in the exercise of its enforcement rights by the appointment of the Interim Receiver. Owemanco has indicated that it has various grounds upon which it may oppose the appointment of an Interim Receiver if its rights and remedies are affected, including a potential conflict challenge. Counsel appearing for both of these mortgagees indicated that there was insufficient time to file material in response to this motion. It was proposed, and they agreed (without opposition from any other party)

that these mortgagees would be carved out of the receivership at this early stage and on a without prejudice basis (the "Excluded Mortgages").

- [11] To be fair and mitigate the prejudice to all remaining mortgagees whose enforcement rights and remedies will be affected by the requested order to allow the preliminary review to be undertaken by the Proposed Interim Receiver, at this time the Proposed Interim Receiver is not asking that any mortgage security be primed by the Administrative Charge to be granted in favour of the Interim Receiver and there is a provision in the order that per diem incremental interest will be paid on mortgages (except the Excluded Mortgages) from and after the appointment.
- [12] The Proposal Trustee has conducted a preliminary review of the status of each of the Properties to determine which projects should be sold on an "as- is" basis and which projects might be appropriate for further investment. It intends, if appointed as Interim Receiver, to conduct a further investigation and review of each of the Properties and make a firm proposal. It will prioritize the two Properties that are the subject of disputes regarding the Excluded Mortgages (above). It also intends, if appointed as Interim Receiver, to develop and propose a claims process for determining the many claims by lenders and others.
- [13] Subject to the carve outs for the Excluded Mortgages and the Trust Funds, there was no opposition to the requested order appointing the Crowe as Interim Receiver and establishing an Administrative Charge in its favour (with the exceptions for other secured lenders).
- [14] A 90 minute hearing has been scheduled on August 16, 2024 commencing at 11:00 a.m., at which time the Interim Receiver will make its recommendations and proposal regarding the timeline and process for establishing a claims procedure, the timeline and procedure for addressing any issues that require adjudication in respect of the Excluded Mortgages and the Trust Funds, and for an extension in the 45 day period for filing a proposal, if needed.
- [15] Section 47.1 of the BIA provides the Court with express jurisdiction to appoint an interim receiver where a notice of intention has been filed under section 50.4 of the BIA. The trustee acting in the proposal is presumed to be able to bring the application. See Bankruptcy and Insolvency Law of Canada, 4th Edition, 3:120 and Endorsement of Justice McEwen in *KSV Restructuring Inc. v. 2896401 Ontario Inc.*, CV-22-00686556-00CL (Unreported).
- [16] I am satisfied that the appointment of the Proposed Interim Receiver is necessary for both the protection of the Companies and the interests of the general creditor body (as s. 47.1(3) of the BIA requires), for the reasons detailed in the factum filed by the Proposal Trustee in support of this motion at paragraphs 71 – 84, which I will not repeat in this endorsement. Such appointments have been made in analogous situations, such as are noted in paragraphs 68 and 69. The added complexity of the multitude of potential lenders,

Disputed Payments, and different stages of development of the Properties reinforces the need for an Interim Receiver with the enhanced powers over a Proposal Trustee.

- [17] If an order for appointment of the Interim Receiver is made under section 47.1 of the BIA, the court has the jurisdiction to make any order respecting the payment of fees and disbursements of the interim receiver, including an order giving the interim receiver security, over any or all of the assets of the debtor in respect of the interim receiver's claim for fees and disbursements if the court is satisfied that all secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make submissions to the Court.
- [18] Similarly, under section 64.2 of the BIA, the Court may make an order granting a charge in favour of the proposal trustee and its counsel on notice to the secured creditors who are likely to be affected by the charge.
- [19] Charges in favour of professionals are common in insolvency proceedings, including interim receiverships. See for example, *Comstock Canada Ltd., Re*, 2013 ONSC 4700, at paras 14, 21; *Mustang GP Ltd, Re*, 2015 ONSC 6562, at para 32-33.
- [20] While that administrative charge may rank in priority to any security interest, that priming is not being sought at this time. The Administrative Charge will be subordinate to each registered charge/mortgage of land that is valid and enforceable, subject to further order of this Court.
- [21] Both the appointment of the Interim Receiver and the Administrative Charge are approved on the terms set out in the revised draft order provided after the hearing on July 24, 2024.
- [22] The revised form of order signed by me today shall have immediate effect without the necessity of formal issuance and entry.



KIMMEL J.

July 25, 2024