

Court File Number: CV-21-00655331-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

ROYAL BANK OF CANADA

Applicant

AND

**UNIQUE RESTORATION LTD., JOHN KENNEDY, MONICA KENNEDY, STEVEN
LEBLANC AND LINDA LEBLANC**

Respondents

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Email/Facsimile No:
Catherine Francis for The Fuller Landau group, as Receiver		
Adam Marchioni for VGNA Holdings Inc.		
Brendan Bissell for Crowe Soberman Inc. as Proposal Trustee of Unique Restoration Ltd.		
Rory McGovern for Unique Restoration Inc.		
P. Masic for Roma Building Restoration Ltd.		
Louis Raffaghello for Claudio and Rosanna Bevilacqua		

Order Direction for Registrar (**No formal order need be taken out**)
 Above action transferred to the Commercial List at Toronto (**No formal order need be taken out**)

Adjourned to: _____
 Time Table approved (as follows): _____

DATE OF HEARING:

February 14, 2022

ENDORSEMENT

Introduction

[1] The Fuller Landau Group Inc. (the “Receiver”), in its capacity as receiver of certain of the assets, undertakings and properties of Unique Restoration Ltd. (“Unique”) brings this motion for an order providing advice and directions with respect to a second mortgage registered in favour of Roma Building Restoration Limited (“Roma”) on September 5, 2019 over property municipally known as 1220 Matheson Blvd. East, Mississauga, Ontario (the “Property”).

Factual Background

[2] Present to the order of the Honourable Justice Gilmore dated February 3, 2021, the Receiver was appointed as receiver of certain of the assets, undertakings and properties of Unique, including the Property. The Receiver was appointed for the purpose of realizing on the Property.

[3] Unique was in the business of building maintenance and restoration, servicing the multi-unit residential, commercial and institutional sectors within the provinces of Ontario and British Columbia. The Property consisted of land and a building, which building contained offices and warehouse space.

[4] Royal Bank of Canada (“RBC”) provided secured loans to Unique and its then subsidiary, 2039638 Ontario Inc. (“203”). Unique and 203 amalgamated on March 1, 2020 and continued as Unique. RBC demanded its loans on March 26, 2020. Unique has not carried on business since March 2020.

[5] On January 4, 2021, Unique filed a Notice of Intention to file a Proposal under the *Bankruptcy and Insolvency Act* (“NOI”). Crowe Soberman Inc. (the “Proposal Trustee”) was appointed as the trustee under the NOI.

[6] The Receiver entered into an agreement to sell the Property and, by a Sale Approval and Vesting Order dated May 14, 2021, the proposed sale transaction was approved. The transaction was completed on June 28, 2021. Following completion of the transaction, the Receiver distributed \$3,752,042.66 to RBC on account of its secured indebtedness. After payment of the interim fees and disbursements of the Receiver and its counsel approved by the Court, the Receiver continues to hold the sum of \$1,291,578.76.

[7] The second ranking mortgage in favour of Roma (the “Second Mortgage”) was registered on September 5, 2019. At the time of this registration, the Second Mortgage secured a stated principal

amount of \$600,000. The Second Mortgage states that the interest rate is 6.0% per annum. The maturity date was February 21, 2020. A notice increasing the stated principal amount of the charge from \$600,000 to \$1,300,000 was registered on May 15, 2020.

[8] The Second Mortgage was assigned to VGNA Holdings Inc. (“VGNA”) on November 17, 2020 for consideration of \$300,000. The Second Mortgage was assigned by VGNA to Claudio and Rosanna Bevilacqua (the “Bevilacquas”) on February 4, 2021, as security for a \$600,000 loan made to VGNA.

[9] On June 29, 2021, after the completion of the sale of the Property, counsel for VGNA provided a discharge statement with respect to the Second Mortgage, seeking payment of \$1,418,070.58 allegedly owing by Unique to VGNA under the Second Mortgage. Counsel for the Receiver requested documents in support of this request and, on July 8, 2021, counsel for VGNA provided a package of documents related to the Second Mortgage. From the Receiver’s perspective, there were a number of gaps, discrepancies and questions arising from this information. The Receiver sought additional information from counsel for each of Unique, Roma, VGNA and the Bevilacquas to satisfy itself as to the legitimacy of the Second Mortgage and the advances thereunder.

[10] Over the next two months, the Receiver obtained additional information. On September 7, 2021, the Receiver, through its counsel, followed up again for further documents and, in response, on September 9, 2021, counsel for Unique advised that it had no further documents to provide in connection with the matter.

[11] The Receiver scheduled a motion for directions. In its Second Report, the Receiver recommended that \$600,000 be dispersed to the Bevilacquas. The Receiver was not satisfied that the Notice registered on May 15, 2020, increasing the principal amount secured by the Second Mortgage was valid and enforceable against the creditors of Unique. Accordingly, the Receiver recommended that the balance of funds on hand, after payment of \$600,000 to the Bevilacquas and the fees and expenses at the receiver and its counsel up to the date of the discharge of the Receiver, be paid to the Proposal Trustee for distribution to Unique’s unsecured creditors.

[12] The Receiver’s motion which was originally scheduled for hearing on October 7, 2021 was adjourned to November 10, 2021. VGNA’s counsel delivered a letter with additional documents and on November 4, 2021, VGNA delivered a Responding Motion Record containing an affidavit of Enzo Cirillo, an officer of VGNA. On November 5, 2021, counsel for Roma provided a letter and additional documents for consideration by the Receiver. On November 10, 2021, at the request of VGNA, the motion was adjourned.

[13] On December 14, 2021, Marcello Battisti, the president of Roma, delivered an affidavit providing further details of the dealings between Unique and Roma including documents and other information that had not previously been provided to the Receiver. Steven Leblanc, a representative of Unique, was examined as a witness on December 21, 2021. Mr. Battisti was cross-examined on January 12, 2022.

Analysis

[14] The issues on this motion are:

- a. Has VGNA shown that money was advanced by Roma to Unique that is secured by the Second Mortgage?

- b. Is the registration of the Notice on May 15, 2020 giving notice of the increase of the stated amount of the principal secured by the Second Mortgage void as against Unique's creditors as a preference under the *Assignments and Preferences Act*?
- c. Is the increase of the principal amount of the Second Mortgage void as against creditors of Unique under ss. 95 or 96 of the BIA?

Has VGNA shown that money was advanced by Roam to Unique that is secured by the Second Mortgage

[15] It is trite law that a mortgage is only security for the loan of funds advanced under it: *S.A. v. A.A.*, 2017 ONCA 243, at para. 46. The Receiver submits that the evidence does not support VGNA's claim that Roma advanced money to Unique that is secured by the Second Mortgage.

[16] A letter dated August 5, 2019 was sent by Roma to Unique (described as a Letter of Agreement) regarding the proposed purchase of Unique's B.C. operations and Toronto equipment (the "Letter Agreement").

[17] The Letter Agreement states that Unique has offered to sell its business to Roma and, prior to acceptance of the offer, Roma will need to conduct its process of due diligence. The Letter Agreement states that it serves as a formal agreement between Roma and Unique whereby both parties have mutually consented to the arrangement in which Roma will provide ongoing operational funding and the payment of outstanding debts to suppliers and sub-trades to which Unique has sustained, in advance, for the purpose of preserving Unique's business while Roma conducts its due diligence. The Letter Agreement states that Roma will be purchasing various used equipment from Unique. The Letter Agreement states that all monies advanced from Roma to Unique are for the sole purpose of preserving Unique's ongoing operations, including the payment of outstanding debts to suppliers and sub-trades, and cannot be used for personal use or gain by the owners and/or principals of Unique.

[18] The Letter Agreement states:

During the course of RBR's [Roma's] due diligence process, URL [Unique] will agree to convert all funding provided by RVR, into a mortgage to be secured by the property located at 1220 Matheson Blvd East, Mississauga ON L4W1R2. RVR reserves the exclusive right to decline URL's offer, and will be reimbursed by URL in full for all funding, noted above. Once RVR is reimbursed in full, all collateral against this property, namely 1220 Matheson Blvd East, Mississauga, ON L4W1R2, will be discharged.

[19] The Letter Agreement was executed by Mr. Leblanc on behalf of Unique and by Mr. Battisti on behalf of Roma.

[20] Mr. Battisti's evidence is that the Second Mortgage registered against the Property was to secure repayment of monies that were advanced by Roma to Unique. Mr. Battisti's evidence is that the Second Mortgage, including the amendment to it which increased the stated principal amount from \$600,000 to \$1.3 million, accurately reflected the terms of the advances that were made from Roma to Unique. The Second Mortgage provides for interest at the rate of 6% per annum.

[21] Roma made payments to Unique by cheques drawn on its bank account and made payable to Unique as follows: (a) \$300,000 on August 15, 2019; (b) \$300,000 on August 20, 2019; (c) \$330,000 on

September 11, 2019; (d) \$570,000 on September 17, 2019. Copies of the deposit cheque stubs were produced and Unique's bank statements show the deposits of these amounts. Of the \$1,500,000 that was advanced, \$1,165,000 was used to pay down the indebtedness owing to RBC. Mr. LeBlanc's evidence is that the remaining \$335,000 was used to cover Unique's payroll obligations or other business expenses of Unique.

[22] Mr. Battisti's evidence is that \$450,000 was repaid from the money advanced by Unique. No other amount was repaid.

[23] Mr. Battisti's evidence is that Unique and Roma agreed to a list of assets that would be acquired by Roma for \$200,000 which would be credited to repayment of Roma's debt. A handwritten list of these assets was produced by Mr. Battisti. Mr. Battisti's evidence is that Roma did not acquire any other assets from Unique.

[24] Among the documents provided to the Receiver are four promissory notes executed by Mr. Leblanc dated August 15, 2019 (\$300,000), August 20, 2019 (\$300,000), September 11, 2019 (\$330,000), and September 17, 2019 (\$570,000). The promissory notes do not provide for interest. The first two notes state that for the value received "Secretary/Treasurer of Unique Restoration Inc., the borrower promises to pay Roma Building Restoration LTD, noteholder the principal amount of \$300,000 payable in full". The second two promissory notes state that "Roma Building Restoration LTD has loaned the shareholders of Unique Restoration a further value of [\$330,000 and \$570,000] effective today's date". The Receiver and the Proposal Trustee submit that these promissory notes call into question whether Roma made loans to Unique.

[25] On his examination, Mr. Leblanc gave evidence that the promissory notes were given as additional security but that none of the shareholders received any benefit from the advances made by Roma. This evidence is supported by Unique's bank statements showing that Roam advanced funds to Unique. I accept this evidence. There is no direction in evidence showing that Roma was directed to make loan advances to Unique by another borrower. This also supports my finding that the principal loan advances were made by Roma to Unique.

[26] I am satisfied that VGNA has shown that Roma made advances totalling \$1,500,000 to Unique. I am satisfied that Unique, and not Mr. Leblanc or other shareholders of Unique, was the principal borrower. I am satisfied based on the Letter Agreement and the evidence given by Mr. Leblanc and Mr. Battisti that Roma and Unique agreed that the advances were to be secured by a mortgage on the Property. The Second Mortgage as registered provides for payment of interest at 6% per annum. Mr. Battisti's evidence is that the registered charge accurately reflects the terms of the advances. The registered mortgage was signed on behalf of Unique. On the evidence before me, I find that Roma and Unique agreed that the loan advances would bear interest at the rate of 6% per annum shown in the Second Mortgage.

Is the increase of the stated amount of the principal secured by the Second Mortgage on May 15, 2020 void as against Unique's creditors as a preference under the *Assignments and Preferences Act*?

[27] The Receiver submits that the increase of the principal amount of the Second Mortgage from \$600,000 to \$1.3 million on May 15, 2020 is a preference because the increase was made with the intent to give Roma an unjust preference over other creditors or any one or more of them and, as such, is void as against creditors of Unique pursuant to s. 4(2) of the *Assignments and Preferences Act*.

[28] In *Harry Snoek Limited Partnership (Re)*, 2011 ONSC 6667, the motion judge had to decide whether security granted by a bankrupt created improper preferences under the *Assignments and Preferences Act*. The lenders took the position that the impugned transaction did nothing more than provide mortgage security to them for the full amount of their loans, which was agreed upon when the loans were made. The motion judge, at para. 46, accepted that the lenders would succeed on this argument if they showed that they were promised security at the time the loans were advanced. The motion judge concluded that there was no promise of security at the time the loans were advanced.

[29] In *Banton v. Westcoast Diversion Corp.*, 2003 BCSC 1400 (CanLII), a lender demanded that the borrower execute a mortgage that had been agreed upon in a written agreement when the loan was made. The demand was made two days after a judgment against the borrower was granted. The judgment creditor asserted that the mortgage was a fraudulent preference. The application judge was satisfied that the mortgage was not a fraudulent preference because it was made in good faith by way of security for an actual payment of money made in good faith. The fact that the lender did not elect to perfect its security until after the granting of the judgment was held to be immaterial because the lender's right to the security existed prior to the rendering of the judgment. See *Banton*, at paras. 36-46.

[30] I have found that Roma and Unique agreed when the Letter Agreement was made that the advances to be made by Roma to Unique would be secured by a mortgage on the Property. The registration by Roma under s. 71 of the *Land Titles Act* of a Notice increasing the principal amount secured by the Second Mortgage from \$600,000 to \$1,300,000 gives effect to this agreement. I am satisfied that Roma and Unique had agreed under the Letter Agreement that Roma would receive mortgage security for the loan advances it made to Unique. In these circumstances, the registration of the Notice increasing the stated principal amount secured by the Second Mortgage is not a preference.

Is the increase of the principal amount of the Second Mortgage void as against creditors of Unique under ss. 95 or 96 of the BIA?

[31] The Receiver submits that the increase of the Second Mortgage is also void and unenforceable as against Unique's creditors under ss. 95 and 96 of the BIA.

[32] The evidence shows that Roma and Unique are arm's length parties.

[33] Under s. 95(1)(b) of the BIA, a charge on property made by an insolvent person in favour of a creditor who is dealing at arm's length with the insolvent person with a view to giving that creditor a preference over another creditor is void as against the trustee if it is made during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of bankruptcy.

[34] Unique filed the NOI on January 4, 2021. This is the date of the initial bankruptcy event under the BIA. The Notice giving notice that the stated principal amount secured by the Second Mortgage was increased was registered on May 15, 2020, nearly eight months before the initial bankruptcy event. Section 95 of the BIA does not apply to the Second Mortgage. In any event, for reasons I have given, the registration of the Notice was not done with a view to giving Roma a preference over another creditor.

[35] Section 96 of the BIA applies to transfers at undervalue. The Second Mortgage was given to secure the amount of advances made by Roma. There is no evidence that Unique made a transfer of property at undervalue to Roma. In any event, the Receiver does not have status to bring an application under s. 96 of the BIA.

If the Second Mortgage is not invalid, what amount is secured thereby?

[36] The evidence shows that Roma advanced a total of \$1,500,000 to Unique under the Letter Agreement. Roma acquired equipment from Unique for the agreed amount of \$200,000. Roma and Unique agreed that the outstanding loan balance would be reduced by this amount. On or about November 9, 2019, Unique repaid \$400,000 of the advanced funds. On or about November 11, 2019, Unique repaid \$50,000 of the advanced funds. No other repayment of the advanced funds was made.

[37] The principal amount outstanding under the Second Mortgage is \$850,000.

[38] The amount of interest that has accrued on the outstanding principal balance from time to time calculated at the rate of 6% per annum is \$130,241.09, as at February 14, 2022.

[39] The total principal and interest owing under the Second Mortgage as at February 14, 2022 is \$980,241.09. The amount owing to the Bevilacquas is \$641,507.54. The amount owing to VGNA is \$338,733.55.

Disposition

[40] For these reasons, I make an Order:

- a. Declaring that the Second Mortgage is valid and enforceable.
- b. Directing that the Receiver pay \$641,507.54 to Claudio and Rosanna Bevilacqua, jointly, and \$338,733.55 to VGNA Holdings Inc. from the proceeds from the sale of the Property.

[41] VGNA seeks costs of this motion. The Bevilacquas, as assignees by way of security of the Second Mortgage, also seek costs. If the parties are unable to resolve costs, I may be spoken to.

Cavanagh J.

February 14, 2022