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Docket: CI 19-01-23329
(Winnipeg Centre)
Indexed as: Royal Bank of Canada v. 6382330 Manitoba Ltd. et al.
Cited as: 2021 MBQB 72

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
ROYAL BANK OF CANADA,	)	Michael Dow
	)	for the plaintiff
plaintiff,	)	
- and -	)	Wayne Onchulenko
	)	for the defendants, 6382330
6382330 MANITOBA LTD. PGRP PROPERTIES INC., AND 6472240 MANITOBA LTD.,	)	Manitoba Ltd. and 6472240 Manitoba Ltd.
	)	
defendents.	)	Kelsey McIntyre
	)	for the defendant, PGRP Properties Inc.
	)	
	)	Ross McFadyen
	)	for the Receiver, Deloitte Restructuring Inc.
	)	
	)	Judgment delivered:
	)	April 1, 2021

EDMOND J.

Introduction

[1] On September 26, 2019, I granted a Receivership Order (the "Receivership Order") appointing Deloitte Restructuring Inc. as Receiver of all the assets, undertakings and properties of the defendants. The primary property of the defendants

is real property located at 620 – 626 Ellice Avenue in Winnipeg, Manitoba, including proceeds of rents, real property and personal property as defined in the Receivership Order as the Property.

[2] Paragraph 7 of the Receivership Order provides that no proceeding or enforcement process may be commenced against the Receiver except with the written consent of the Receiver or with leave of the court. Paragraph 17 of the Receivership Order provides that the Receiver shall incur no liability or obligation "save and except for any gross negligence or willful misconduct on its part".

[3] Two notices of motion have been filed; one by the defendant, 6382330 Manitoba Ltd. ("638") and 6472240 Manitoba Ltd. ("647") and one by PGRP Properties Inc. ("PGRP") seeking leave to commence an action or actions against the Receiver. Under the grounds for the motions, the defendants allege that they have suffered loss and damage as a result of the "gross negligence" of the Receiver in failing to replace Armour Property Management ("Armour") as the property manager of the Property.

[4] The affidavit material filed on behalf of the defendants also alleges that the Receiver was grossly negligent in not accepting an offer to purchase the Property for a price of $2.8 million or $2.875 million made shortly after the Receivership Order was granted.

[5] Before reviewing the relevant facts and the details that were provided in the affidavits filed by the defendants as well as the reports filed by the Receiver, I propose to address the tests that should be applied by the court to grant leave to commence an action against the Receiver.

The Test for Leave

[6] A review of the relevant authorities establishes that the courts have applied two different standards:

a) Leave should be granted unless it is perfectly clear that there is no foundation for the claim or the proposed action is frivolous or vexatious; or

b) A more stringent and "strong *prima facie* case" test (see ***Bank of America Canada v. Willann Investments Ltd.***, [1993] 23 C.B.R. (3d) 98 (Ont. Gen. Div.), [1993] O.J. No. 3039; ***GMAC Commercial Corp. - Canada v. T.C.T. Logistics Inc.***, 2006 SCC 35, [2006] 2 S.C.R. 123; ***Holmes v. Schonfeld Inc.***, 2016 ONCA 148; ***1117387 Ontario Inc. v. National Trust Co.***, 2010 ONCA 340, [2010] O.J. No. 1908).

[7] I agree with the submission made on behalf of the Receiver that the more stringent, strong *prima facie* test applies when the factual and legal issues underlying the moving parties' proposed claim has been previously considered and approved by an order of the court.

[8] The less stringent, frivolous and vexatious test would apply where there is no underlying previous order. For example, in the ***GMAC Commercial Corp. – Canada***, the court was dealing with a proposed proceeding against an interim receiver/trustee in bankruptcy as opposed to a receiver appointed pursuant to s. 243 of the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3 as amended ("***BIA***").

[9] As pointed out in paras. 9 and 10 of the ***Willann Investments Ltd.*** case, the frivolous and vexatious test is too low a standard to be applied when the conduct sought to be impugned by the party seeking leave has already been approved by the court.

[10] In this case, the conduct and activities of the Receiver were previously approved by order granted on December 16, 2020 and in my view, the more stringent, "strong *prima facie* case" test should apply.

[11] I also agree that the strong *prima facie* case test is more appropriate where the issues could have been raised earlier by the parties seeking leave. At the December 16, 2020 hearing I reviewed the evidence presented and found as follows:

a) The Receiver made sufficient effort to get the best price for the Property and did not act improvidently;

b) The best interests of the parties were satisfied by completing the transaction to sell the property to Vida Living (2019) Inc. ("VLI") as soon as was reasonably possible;

c) The marketing process undertaken by the Receiver and its real estate agent was commercially fair and reasonable and carried out with efficacy and integrity;

d) The plaintiff/lender, RBC supported the transaction; and

e) There had been no unfairness in the marketing process which concluded with the purchase and sale agreement to VLI.

[12] While the Receiver requested a discharge order at the same time as the approval and vesting order, the request for a discharge was opposed by the defendants and as a result, the request for a discharge of the Receiver was adjourned to permit the defendants to file evidence to support their allegations. Nevertheless, it is clear that after considering all of the evidence, including the Receiver's first report and the confidential appendices, I made the above findings.

[13] The Receiver's first report makes numerous references to the continued engagement and involvement of Armour acting as property manager of the Property. In my view, the proposed action by the defendants purports to challenge the very conduct and activities of the Receiver which were approved by previous court order. Accordingly, in my view, the strong *prima facie* case test is applicable in the circumstances of this case. The strong *prima facie* case threshold was considered in the ***Bank of America Canada*** case and requires the moving party to establish a "reasonable cause of action" or "a strong *prima facie* case".

[14] I recognize that the defendants did not have access to the confidential report prior to the December 16, 2020 hearing. That report was sealed by court order granted at that time. That is one of the reasons I refused to grant the Receiver's request for a discharge order at that time. The Receiver was instructed to release the confidential report to the defendants when the transaction approved pursuant to the approval and vesting order closed and the court set timelines permitting the defendants to file motions, affidavit evidence and motion briefs to support their allegations against the

Receiver. Subsequent to the release of the confidential report, the defendants filed their notices of motion seeking leave to commence an action against the Receiver.

[15] Based on the applicable authorities, I summarize the principles governing a motion seeking leave to bring an action against a receiver as follows:

a) The court must consider and apply the terms of the Receivership Order, in this case:

   i) paragraph 7 provides that no proceeding or enforcement process may be commenced against the Receiver except with the written consent of the Receiver or leave of the court;

   ii) paragraph 17 of the Receivership Order provides that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of the Receivership Order, save and except for any gross negligence or willful misconduct on its part;

b) The general test applied is that leave should be granted unless it is perfectly clear that there is no foundation for the claim or the proposed action is frivolous or vexatious;

c) Where the factual and legal issues underlying the moving party's proposed claim have been previously adjudicated and approved by a court order, the court applies a more stringent, strong *prima facie* case test;

d) The strong *prima facie* case test may apply and is appropriate in situations where the matters complained of could have been raised by the moving party previously;

e) In applying the last principle, the court should consider when the moving parties received the information or facts to advance a cause of action and whether they acted with reasonable diligence to advance the claim;

f) In applying the test, the process of reviewing the proposed claim is not to be perfunctory. That said, the court is not required to make a final assessment of the merits of the claim before granting leave. The court should examine with some care the foundation of the alleged claim with a bias against exposing its appointed officer to unnecessary or unwarranted litigation. (see ***GMAC Commercial Corp. – Canada***, paras. 54-61; ***Alberta Treasury Branches v. Elaborate Homes Ltd.***, 2014 ABQB 350, 590 A.R. 156 (QL), at paras. 31-33);

g) Addressing the issue of what is "gross negligence or willful misconduct", the moving parties must present evidence that the Receiver demonstrated a "very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct." (see ***Alberta Treasury Branches*** at para. 39)

The Allegations against the Receiver

[16] PGRP seeks leave to issue a statement of claim naming the Receiver as a defendant. A draft of the statement of claim is attached as exhibit "I" to the affidavit of Patrick Gilbert Roy Penner, affirmed March 8, 2021 ("Penner affidavit").

[17] The allegations advanced by 638 and 647 are set forth in two affidavits of Stephen Glen Collins, affirmed February 22, 2021 and March 9, 2021 ("Collins affidavits"). A draft statement of claim against the Receiver is attached to the first affidavit and the allegations are summarized in the motion brief of 638 and 647 as follows:

> a. Shortly after the pronouncement of the Receivership Order, the Defendants (proposed Plaintiffs) made a proposal to the Receiver to manage the Property and to replace Armour Property Management;
> b. The Defendants advised the Receiver that Armour Property Management would be grossly negligent in its management of the Property. The Defendants advised the Receiver that if Armour was to remain in place, it would grossly mismanage the finances of the Property and engage in poor tenant selection. In particular, the Plaintiffs advised the Receiver that that Armour has a propensity to place gang members inside of properties it managed, and this would cause the number of tenants to be reduced;
> c. The Receiver was grossly negligent in its failure to accept the information that was provided to it, and grossly negligent in its continued retainment of Armour as the property manager;
> d. The gross negligence of the Receiver allowed Armour to continue with the placement gang members, and mismanagement of finances;
> e. Due to the Receiver's gross negligence in failing to remove Armour, the value of the Property decreased significantly. To illustrate, in or around April 2015, the Property was fully tenanted and appraised at 4.8 million dollars. However, following Armour's management, the value of the Property was reduced. On December 18, 2020 the Property was sold on at a reduced value of 2.2 million; f. Further, the Receiver was grossly negligent in its failure to accept the offer on the Property of $2,800,000.00, received on or about September 27, 2019;
> g. The Receiver knew or ought to have known that Armour was committing the above-described acts and that the Defendants would suffer damages and losses and in fact did suffer the same.

[18] PGRP and Mr. Penner advance similar allegations in the Penner affidavit which they submit amount to gross negligence, supporting their request for leave to commence an action against the Receiver. The defendants did not advance the position the actions of the Receiver amounted to willful misconduct. Nevertheless, leave may be granted if the evidence establishes a reasonable cause of action based on gross negligence or willful misconduct.

Analysis and Decision

[19] In essence, the defendants advance two positions based on the facts set forth in the Collins' affidavits and the Penner affidavit. The defendants submit that their principals advised the Receiver that it would be grossly negligent to continue to retain Armour as the property manager and that the Receiver was grossly negligent in failing to heed their warnings. Secondly, the defendants submit the Receiver was grossly negligent in his failure to maintain the value of the property and in its failure to accept a previous offer to purchase which it is alleged was made shortly after the receivership Order was granted in the amount of either $2.8 million or $2.875 million.

[20] The role of the court is to perform more than a perfunctory examination of the facts to determine whether the defendants have met the strong *prima facie* case test. While the court is not required to make a final assessment of the merits of the claim, a review is required to determine whether legitimate claims can or ought to be advanced.

[21] In my view, a review of the facts set forth in the Receiver's reports, the defendants' affidavits, including the recent affidavit of Mark Thiessen, affirmed March 29, 2021, does not satisfy me that leave should be granted to the defendants to issue a

statement of claim against the Receiver. The defendants have failed to meet the strong *prima facie* case test or put another way, have failed to satisfy me that there is a reasonable cause of action to establish that the actions and conduct of the Receiver were grossly negligent or amount to willful misconduct in the circumstances. I propose to briefly address the defendants' allegations.

Armour Property Management

[22] At the time the Receivership Order was granted, Armour was the property manager for the defendants and had been so for approximately four years. Although there was some reference to replacing Armour by the defendants prior to the Receivership Order, no steps were taken to do so. The defendants fell into arrears on the loan owing to the plaintiff and in accordance with its security, the plaintiff moved to appoint a receiver.

[23] While the Collins' affidavits and Penner affidavit state that shortly after the Receivership Order was granted, the Receiver was advised that it would be "grossly negligent" to have Armour continue to act as the property manager, the e-mails that were exchanged at that time do not support those allegations and I must say that it is hard to believe that they used that language in the circumstances. An e-mail dated October 2, 2019 from Mr. Collins presented two alternative proposals to the Receiver in respect of management of the Property and it is clear that proposal "A" contemplated the continued involvement of Armour as the property manager. That proposal is inconsistent with what you would reasonably expect from a person who alleges he

warned the Receiver that it would be "grossly negligent" to have Armour continue as property manager.

[24] On November 13, 2019, Mr. Collins sent the Receiver a further e-mail referencing a "feud" between Armour and the caretakers of the Property. There was no reference in that e-mail to Armour being replaced as the property manager. Instead, Mr. Collins suggested that someone else from Armour "interface" with the caretakers and this e-mail is also inconsistent with the allegations that are now being advanced by the defendants that a warning was provided to the Receiver respecting the continued involvement of Armour as the property manager.

[25] It is unnecessary to review all of the details of the steps taken by the Receiver, as I am satisfied on the basis of my review of the first report and the further details provided by the Receiver in the third report of the following:

a) The Receiver provided a fair and comprehensive overview of its dealings with the principals of the defendants including Mr. Collins, Mr. Penner and Mr. Arsenault;

b) The Receiver provided a rationale for continuing to involve Armour in the management of the Property;

c) The Receiver provided details of the inquiries made of other parties about replacing Armour, contacted other property management firms and found no alternative was available; and

d) The Receiver provided details and an explanation as to issues that were experienced in the collection of rents from tenants, the general increase in

vacancy rates at the Property starting in the latter part of 2020, the gang activities, the detrimental effect of the COVID-19 pandemic on the ability to evict tenants as well as the problems experienced with the caretakers.

[26] On the basis of my review of all the evidence, the conduct of the Receiver in continuing to engage Armour in the management of the Property was reasonable in the circumstances and certainly does not represent a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that the Receiver knew what it was doing was wrong or was recklessly indifferent in its conduct.

[27] I am not satisfied the defendants have established a strong *prima facie* case of gross negligence on the part of the Receiver regarding the decision to maintain Armour as the property manager in this case.

Purchase Price

[28] All parties acknowledge that the plaintiff and the defendants wanted to maximize the price received for the Property in order to satisfy the defendants' outstanding indebtedness to the plaintiff. The question that the court must consider is whether the actions of the Receiver in failing to accept an offer of $2.875 million, if such an offer was made, amounts to a strong *prima facie* case of gross negligence against the Receiver.

[29] To the extent that the principals of the defendants expressed an interest in acquiring the Property, the evidence provided by the Receiver establishes that the owners were encouraged to move as quickly as possible to provide the Receiver with an

offer to purchase the Property. However, no offer was ever submitted to the Receiver by the defendants during the receivership proceedings.

[30] Insofar as the offer submitted by Mr. Thiessen is concerned, it does appear that his affidavit establishes that an offer was submitted to purchase the Property for either $2.85 million or $2.875 million (referred to in the confidential report as the "ReMax Offer"). Although the Collins' affidavits reference an offer of $2.8 million, it is believed the references are to the ReMax offer. The confidential report filed by the Receiver refers to the ReMax Offer submitted by Mr. Thiessen (see paras. 11-14) and is consistent with the evidence in his affidavit.

[31] The Receiver reported to the plaintiff and followed up with Mr. Thiessen to determine whether the offeror of the ReMax Offer was still interested in the Property and if so, to deliver a counter-offer at $3.4 million. Mr. Thiessen advised the Receiver that his client was not interested in increasing the offer above $3.0 million. The Receiver continued dialogue with Mr. Thiessen while the appraisal of the Property was finalized. Once the appraisal was received, the Receiver received instructions from the plaintiff to list the Property for sale with Cushman Wakefield-Stevenson ("Cushman") at a list price of $3.45 million.

[32] The third report makes specific reference to the meeting held with Mr. Collins and Mr. Thiessen concerning the ReMax Offer. At that time an appraisal had not been completed and the Receiver determined that a Solicitation Process (as defined in the first report and the confidential report) was appropriate to solicit interest in the Property from realtors, property managers and investors. This process is detailed in the first

report and the confidential report and was supported by the principals of the defendants and RBC.

[33] As a result of the Solicitation Process, the Receiver entered into a listing agreement with Cushman. The Cushman listing agreement was discussed with Mr. Collins and it was agreed that Cushman would reduce the commission rate applicable if the successful purchaser was one of the directors or officers of 638, including Mr. Collins, Mr. Penner, Mr. Arsenault, or any entity controlled either directly or indirectly by one or more of them.

[34] While there were further discussions with Mr. Collins about one or more of the defendants acquiring the Property, no written offer was ever received from the defendants or an entity controlled either directly or indirectly by the defendants.

[35] Ultimately, the only offer to purchase received pursuant to the Solicitation Process and in the form required by the Receiver and RBC was the VLI offer.

[36] In reviewing all of the evidence submitted, I am not satisfied that the defendants have shown that they have a strong *prima facie* case that the Receiver was grossly negligent in marketing the Property and dealing with offers and specifically the ReMax Offer.

[37] In hindsight, had the Property been sold in 2019, it is likely that the purchase price may have been greater than the amount ultimately paid for the Property. It was reasonable for the Receiver to take the necessary steps to receive an appraisal and develop a Solicitation Process that was fair before accepting any offer that may have been received in 2019. At that time, the parties, including the real estate brokers

involved, believed the Property may be worth more than $3.0 million. The party that made the ReMax offer in 2019 had every opportunity to present a new offer to purchase to Cushman once the listing agreement was in place. No offer to purchase in the required form was presented. There is no dispute that the Solicitation Process was required to ensure the sale process was fair and that the Property sold for the best price. There are numerous reasons why the Property value decreased in 2020 and the explanations and details are outlined in the Receiver's reports.

[38] It is also important to recognize that the amount paid for the Property cannot be the sole factor applied to assess whether the defendants have satisfied the required test. As stated earlier, gross negligence or willful misconduct requires some evidence that the acts or omissions of the Receiver amount to a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that the Receiver knew what it was doing was wrong or was recklessly indifferent in its conduct. In my view, the moving parties have not met the onus of establishing a reasonable cause of action or a strong *prima facie* case that the steps taken by the Receiver amount to gross negligence or willful misconduct.

Collateral Attack

[39] The Receiver advanced a submission that the motions for leave to sue the Receiver ought to be dismissed based on the doctrines of collateral attack and issue estoppel. In essence, the Receiver submits that the Receiver's actions and conduct were approved by the court on December 16, 2020 by way of the approval and vesting

order. Since the defendants did not appeal the approval and vesting order, the Receiver submits that the leave motions of the defendants represent an impermissible collateral attack on the approval and vesting order.

[40] In my view, it is unnecessary to decide this issue. The defendants did appear at the hearing on December 16, 2020, and did advance submissions opposing the discharge of the Receiver. While the approval and vesting order was granted based on the evidence that was presented, the defendants were given an opportunity to file evidence and seek leave of the court to commence proceedings against the Receiver. In the circumstances of this case, I granted an adjournment of the request for discharge and permitted the defendants to file evidence so that a further hearing could be held to consider whether leave to commence an action would be granted.

[41] In the circumstances, it is unnecessary to consider whether the requirements of issue estoppel apply in this case. The fact that I previously approved the conduct and activities of the Receiver, simply means that the court should apply the more stringent test as I have done in this case.

Conclusion

[42] I am not satisfied that the defendants have established a strong *prima facie* case of gross negligence against the Receiver or willful misconduct which is required to grant leave to commence an action against the Receiver. I am satisfied the conduct and activities of the Receiver described in the various reports establish that the Receiver acted in a reasonable manner and the evidence filed fails to satisfy me that the

Receiver acted in a manner which amounted to a very marked departure from the standards applicable in the circumstances.

[43] Accordingly, the defendants' motions are dismissed with costs. The discharge order previously submitted in accordance with the court's model order is granted. If costs cannot be agreed to they may be spoken to by arranging a one-hour hearing by contacting the manager of trial and motion coordination.

_____ J.