Court File No. CV-20-00649154-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

CLEARFLOW COMMERCIAL FINANCE CORP.

Applicant

- and -

TRIGGER WHOLESALE INC., THE EN CADRE GROUP INC., MARK GDAK, JAIMEE LYNN GDAK and JAIMAK REAL PROPERTIES INC.

Respondents

APPLICATION UNDER Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3, Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 40.01 of the *Rules of Civil Procedure*

MOVING PARTY'S FACTUM (JAIMEE LYNN GDAK)

(Jamiee Lynn Gdak's motion to remove certain real property from the Receivership - returnable March 17, 2021)

March 12, 2021

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MOVING PARTY'S FACTUM

PART I - OVERVIEW

1. This is the Factum of the Moving Party and Respondent, Jaimee Lynn Gdak ("Jaimee"), on a motion to vary the Order of the Honourable Justice McEwen made on October 22, 2020 (the "Receivership Order") to remove reference to the property located at 250 Lions Court (the "Matrimonial Home").

2. Unlike other assets in receivership and assets that the Receiver now seeks to bring into the Receivership, there is no direct connection between the Matrimonial Home and funds originating from Clearflow Commercial Finance Corp. ("ClearFlow"). This is particularly so given that the home was purchased in 2005 – 10 years before the relationship between Trigger Wholesale Inc. ("Trigger") and ClearFlow began.

3. In any event, the Receiver is now seeking to list the Matrimonial Home for sale, which is resisted by Jaimee. Compounding the fact that the Applicant has shown no direct claim to the Matrimonial Home, sale of the home would result in undue hardship to Jaimee – a mother of two school-age children, one of whom has serious medical issues.

4. Jaimee was not represented by counsel and not present when the Receivership Order was made. Settlement discussions ensued, but the standstill agreement reached with the Receiver terminates on March 17, 2021 – the date of the return of the Applicant's motion for determination of individual liability under guarantees given by the individual Respondents.

5. Since the date of the Receivership Order, Jaimee has led evidence with respect to her lack of involvement or knowledge with respect to the scheme alleged in the Application, the compromised medical status of one of her children, negotiations that dated back to at least 2019 between Mark Gdak and ClearFlow with respect to the terms of ClearFlow's financing of Trigger's operations (which evidence was not disclosed by ClearFlow on the first or second return of the Application), and particulars of a mortgage on the Matrimonial Home.

PART II - SUMMARY OF FACTS

6. The substance of the allegations made against the Respondents in these proceedings date from 2015 forward. The Application for the appointment of a Receiver was predicated, *inter alia*, on the security ClearFlow holds over the assets of Trigger Wholesale Inc. and the En Cadre Group Inc.

7. The Matrimonial Home was purchased by the individual Respondents in 2005, which predates allegations in the Application by 10 years. The individual Respondents have made regular mortgage payments to the first mortgagee, Bank of Montreal, since the date of purchase.

> **Affidavit of Jaimee Lynn Gdak**, sworn February 26, 2021, at para 4 ("**Gdak Affidavit**").
>
> **Second Report of the Receiver**, February 12, 2021, at para 97 ("**Second Report**").

8. On July 2, 2019, the Matrimonial Home was transferred from joint title to Jaimee's name alone.

> **Second Report** at para 98.

9. The Receiver has identified a mortgage given to a Mr. Cuesta on or about May 22, 2015 (the "Cuesta Mortgage"), which the Receiver implicitly alleges was discharged in March 2018

with funds originating from ClearFlow. Of the funds advanced under the mortgage, \$20,000.00 was paid to ClearFlow and the remainder went into Trigger's operations. None of these monies were paid to Jaimee and she had no involvement whatsoever with the Cuesta Mortgage.

> **Second Report** at paras 99-100.
>
> **Gdak Affidavit** at paras 5, 7 and 8.

10. Jaimee has two school-age children at home, one of whom recently began having multiple seizures daily. That child had to be taken to the emergency room in the middle of the school day. The child's doctors have been unable to explain the seizures, though an initial diagnosis suggested epilepsy. Jaimee has no source of income and, if the matrimonial home were to be sold, she would have nowhere to live.

> **Gdak Affidavit** at para 10.
>
> **Affidavit of Jaimee Lynn Gdak**, sworn November 13, 2020, at para 10, Responding Application Record, November 13, 2020 ("**Gdak 2020 Affidavit**").

11. Lastly, as a result of the Receivership Order, Jaimee had no way of accessing e-mails between Trigger and ClearFlow, which she required to defend against the Applicant's position on her liability under a guarantee given to ClearFlow in 2015. Once she obtained access to these e-mails, it became clear that negotiations of the financing between ClearFlow and Trigger had been occurring since at least May 2019, including provision for release of the guarantee.

> **Affidavit of Jaimee Lynn Gdak**, sworn February 2, 2021, at paras 7 and 11-16, Supplementary Responding Application Record (Re: Individual liability of Jaimee Lynn Gdak, presently returnable March 17, 2021), February 3, 2021.

12. Remarkably, that evidence and the documentary evidence previously produced in the Gdak 2020 Affidavit, including the fact that the law firm representing ClearFlow in those negotiations was the same law firm that brought the *ex parte* Application for the *Mareva* injunction and appointment of the Receiver, was not put before the court by ClearFlow on the initial or second return of the Application.

> **Gdak 2020 Affidavit** at para 7.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

13. The herein Application was first returned *ex parte*. On the second return, Jaimee was not represented by counsel, nor present at the hearing.

14. Since that date, as set out in the Second Report, settlement discussions have been ongoing between the individual Respondents and the Applicant.

> **Second Report**, para 103.

15. The principles governing a motion to vary an order in the context of the *BIA* are that:

> (i) The issue on the application is whether the order should remain in force because of changed circumstances or fresh evidence and not, as on appeal, whether it ought to have been made.
>
> (ii) Fresh evidence in this context means that it is material, substantial in nature, and something that, with reasonable diligence, could not have been known at the time of the original application.
>
> (iii) The application must be made promptly, within a reasonable time of acquiring knowledge of the order.
>
> (iv) Review jurisdiction is exercised sparingly; it is a matter of indulgence that must be carefully guarded.
>
> (v) In exercising its discretion, the court must consider the rights not only of the debtor and of the creditors but also of the public.

> (vi) The court should resort to its s. 187(5) jurisdiction if it is just and expedient in the control of its own process.
>
> (vii) Trustee conduct is a factor where statutory non-compliance results in lack of notice, particularly if it negatively affects the integrity of the bankruptcy system.
>
> (viii) The applicant bears the onus of establishing that exercise of the review jurisdiction is warranted.
>
> *Vince v Cinezeta Internationale Filmproduktionsgesellschaft MHB & CO KG*, 2013 SKQB 423 at para 27 (CanLII), https://canlii.ca/t/g2g84#par27 [*Vince*].

16. Jaimee submits that there is fresh evidence before the court with respect to:

    (a) Her lack of involvement or knowledge with respect to the scheme alleged in the Application;

    (b) The medical status of one of her children;

    (c) The correspondence that has been put into the record subsequent to the October 22, 2020 Order of the Honourable Justice McEwen, in particular the negotiations between Mark Gdak and ClearFlow with respect to the terms of Trigger's financing, including the releases of Jaimee's guarantee;

    (d) The fact that ClearFlow is presently represented by the same firm involved in those negotiations; and

    (e) The particulars of the Cuesta Mortgage.

17. In these circumstances, ought the Court to exercise its discretion to vary the Receivership Order to delete reference to the Matrimonial Home? Jaimee submits the answer to that question is "yes" for two reasons: (a) the Receiver has not established a connection between the equity in the

home and ClearFlow funds; and (b) permitting the marketing and sale of the home would cause undue hardship on Jaimee and her children.

a) No connection to asset

18. At the motion for approval of the Second Report, the Receiver seeks to bring a series of assets into the receivership, including a Range Rover, a boat, various personal watercraft, ATVs and jewelry.

Second Report paras 48-87.

19. In each case, the Receiver has opined that these assets were purchased with ClearFlow funds that flowed through Trigger bank accounts.

Second Report para 85.

20. The same cannot be said of the Matrimonial Home. There is necessarily equity in the home that accrued to the joint benefit of Jaimee and Mark Gdak in the period between 2005 and 2015. Additionally, while the Application alleges a significant portion of Trigger's revenue was generated through the scheme alleged in the Notice of Application, ClearFlow's position implicitly concedes that at least some of Trigger's revenues were from legitimate sales. The Second Report distinguishes between ClearFlow-factored accounts receivable (which are tainted with the alleged scheme) and non-factored accounts receivable, the latter of which have been valued at $944,073 by Mark Gdak.

Second Report at para 15.

21. No judgment has been rendered in the Application and the allegations of fraud have yet to be tested. Jaimee vehemently denies any knowledge of or participation in the scheme alleged in

the Application. Marketing and sale of the Matrimonial Home would amount to execution before judgment.

> **Gdak 2020 Affidavit** at para 11.

b) Hardship

22. Jaimee submits that the same principles apply to the Receiver marketing and selling the Matrimonial Home that apply when a trustee in bankruptcy invokes the court's assistance in a *Partition Act* application. Namely, the court must weigh the relative hardship that would be caused by making or refusing the order sought.

> *Slan v. Blumenfeld*, 1997 CanLII 12259 (ON SC), Link to case; click ▼ to jump to pinpoint.

23. In the present case, the Receiver's sale of the Matrimonial Home would leave Jaimee and her two school-aged children (one with a serious medical condition) with nowhere to live. Jaimee has no source of income.

24. Conversely, ClearFlow will suffer little if any prejudice if Jaimee remains in possession of the Matrimonial Home while the Application continues. The *Mareva* terms set out in the Honourable Justice Gilmore's Order of October 13, 2020 were continued in the Order made by the Honourable Justice McEwen on October 22, 2020. The Respondents are therefore barred from taking any steps to deal with the Matrimonial Home. Further still, the *Mareva* Order was granted in ClearFlow's favour on an incomplete record.

* * *

25. Whether the Court should exercise its discretion to vary the Receivership Order is a question of equity. Jaimee submits that, for the reasons set out above, the equities lie in her favour.

> *Vince* at para 50, https://canlii.ca/t/g2g84#par50.

PART IV - ORDER REQUESTED

26. For the foregoing reasons, Jaimee asks that this Honourable Court order as follows:

(a) That the Order of the Honourable Justice McEwen made on October 22, 2020 in these proceedings (the "Receivership Order") be varied to remove all reference to the property municipally known as 250 Lions Court, Waterloo, Ontario;

(b) That all and any reference to the property municipally known as 250 Lions Court Matrimonial Home in Schedule "A" to the Receivership Order be deleted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of March, 2021.

Jaimee Lynn Gdak, by her counsel
Benjamin G. Blay (62688Q)

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Slan v. Blumenfeld*, 1997 CanLII 12259 (ON SC), https://canlii.ca/t/1w4tx.

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