Court File No. 13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. and 2147650 ONTARIO INC.

Applicants

FACTUM OF THE APPLICANTS
(Responding Factum on Motion for Lifting of the Stay)
(Returnable October 14, 2014)

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON, M2N 7E9

Stephen Schwartz (LSUC #25980A)
Tel: (416) 218-1132
Fax: (416) 218-1832
Email: stephen@chaitons.com

Maya Poliak (LSUC#54100A)
Tel: (416) 218-1161
Fax: (416) 218-1849
Email: maya@chaitons.com

Lawyers for Applicants

TO: SERVICE LIST

I – OVERVIEW

1. Foremont Drywall Inc., 1382479 Ontario Inc., 1382503 Ontario Inc. and 2203579 Ontario Inc. (collectively, "**Foremont**") are seeking an order lifting the stay of proceeding and granting leave to continue an action against Silver Streams Homes (Puccini) Inc. ("**Puccini**"), Imran Jinnah and Asma Jinnah (the "**Silver Streams Defendants**") commenced in January 21, 2011.

2. The Silver Streams Defendants oppose Foremont's motion for lifting of the stay. Foremont has filed a proof of claim against the Applicants in the CCAA Claims Process (as defined below). The claim filed by Foremont in the CCAA Claims Process and the claim it seeks to advance in this motion is one and the same. If Foremont's claim is successful in the CCAA proceeding against the Applicants, Foremont will have recovered fully on its claim rendering any proceeding against the Silver Streams Defendants moot.

3. Foremont's motion is premature and unnecessary. There is no prejudice to Foremont from the continuation of the stay of proceedings until the completion of the Applicants' claim process. Foremont has failed to show that the present circumstances warrant departing from usual CCAA practice of insulating a debtor corporation and its directors from the burdens of distracting litigation during CCAA proceedings.

II - FACTS

(a) Background

4. The Applicants are affiliated Ontario corporations owned by Imran Jinnah. Silver Streams Homes Inc. ("**Silver Streams**") is a residential homebuilder in the Greater Toronto Area and is currently in the process of completing a project in Richmond Hill, Ontario referred to in these proceedings as the "Puccini Project". The Puccini Project is comprised of four phases. Title to the lands in Phases I, II and II are registered in the names of the numbered company Applicants. Puccini was incorporated for the purpose of selling the homes in the Puccini Project.

Affidavit of Imran Jinnah sworn August 12, 2014 (the "**Jinnah Affidavit**") at para. 4

5. In addition to the Puccini Project, Silver Streams to date developed three other residential housing projects.

Jinnah Affidavit at para. 5

(b) Foremont

6. In or around October 2009, Puccini retained Foremont to provide drywall services in connection with Phase I of the Puccini Project (the "**Phase I Contract**"). Neither Imran Jinnah ("**Imran**") nor Asma Jinnah ("**Asma**") are parties to the Phase I Contract.

Jinnah Affidavit at para. 6

Exhibit A to the Jinnah Affidavit

7. On January 21, 2011, Foremont commenced an action against the Silver Streams Defendants for recovery of monies owed to it by Puccini under the Phase I Contract for work performed by Foremont Drywall on Phase I of the Puccini Project. (the "**Foremont Action**") In its Statement of Claim, Foremont claimed breach of trust pursuant to sections 8 and 13 of the *Construction Lien Act* (Ontario) relating to the outstanding amount of $250,321.79 owing under the Foremont Contracts. The Foremont Action was defended.

Jinnah Affidavit at paras. 7 and 8

Exhibit B to the Jinnah Affidavit

8. In or around August 2011, Foremont expressed an interest in resuming its commercial relationship with Puccini. As a result, on or around August 23, 2011, Puccini retained Foremont to provide drywall services in connection with Phase II of the Puccini Project (the "**Phase II Contract**", and together with the Phase I Contract, the "**Foremont Contracts**"). Asma and Imran are not parties to this contract.

Jinnah Affidavit at para. 9

9. In October 2011, the Silver Stream Defendants and Foremont agreed to settle the Foremont Action and entered into Minutes of Settlement. Commencing in October 2011 and

ending in August 2012, the Silver Streams Defendants complied with their obligations under the Minutes of and made total payments of approximately $150,000. During this time period, Foremont also provided drywall services for Phase II of the Puccini Project.

Jinnah Affidavit at paras. 10-11

10. In 2012, the Applicants began experiencing financial difficulties with the Puccini Project. As a result of these financial difficulties, Silver Streams was unable to pay a number of its trade creditors, including Foremont.

Jinnah Affidavit at para.12

11. In December 2012, pursuant to the terms of an Escrow Agreement dated December 17, 2012 (the "**Escrow Agreement**"), Puccini and the numbered Applicants, among others, entered into a global settlement with a number of their trade creditors, including Foremont, for payment of all of the Applicants and their related parties' existing indebtedness to these trade creditors for the work performed on the Puccini Project and certain other projects developed by the Applicants and their affiliates.

Jinnah Affidavit at para. 13

Exhibit G to the Jinnah Affidavit

12. The Escrow Agreement was intended to and did replace the Minutes of Settlement. As consideration for this new global settlement, pursuant to the terms of the Escrow Agreement, the Applicants agreed, among other things, to grant Foremont preferred trade status in respect of the work to be done on Phases III and IV of the Puccini Project. The Applicants also agreed to a payment plan in respect of the total indebtedness to Foremont from the proceeds of the future homes.

Jinnah Affidavit at para. 14

13. The Applicants would not have entered into the Escrow Agreement or continued to work with Foremont had the terms of the Minutes of Settlement continued to be in force and effect.

Jinnah Affidavit at para. 15

14. Pursuant to the terms of the Escrow Agreement, commencing in December 2012 and until December 2013, net proceeds from the sale of the homes from the Puccini Project were directed to the escrow agent who in turn administered the sale net proceeds in accordance with the terms of the Escrow Agreement to the extent it was applicable thereto. As a result, the Silver Stream Defendants were not required to make any further payments under the Minutes of Settlement.

Jinnah Affidavit at para. 16

15. On November 7, 2013, Foremont caused to be registered in the Land Registry Office (No.65) a claim for construction lien against the Puccini homes.

Jinnah Affidavit at para. 17

16. On November 14, 2013, Foremont also commenced an action against the Applicants and a number of the Applicants' secured creditors for recovery of $434,577.93 allegedly owing by the Applicants to Foremont. In this statement of claim, Foremont claims a priority over the mortgages and charges of the secured creditors named as defendants in this action. Imran and Asma are not parties to this proceeding.

Jinnah Affidavit at para. 18

17. As a result of the CCAA proceeding, the lien claim was not defended by the Applicants.

Jinnah Affidavit at para. 19

(c) The Applicants' CCAA Proceeding

18. On December 17, 2013, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act* (**"CCAA"**) pursuant to an order of Mr. Justice Wilton-Siegel (the **"Initial Order"**).

Jinnah Affidavit at para. 20

Exhibit I to the Jinnah Affidavit

19. The Initial Order appointed Grant Thornton Limited as monitor of the Applicants in these proceedings (the "**Monitor**"). Pursuant to paragraph 17(k) of the Initial Order, the Monitor was directed and empowered to exercise control over the receipts, disbursements and bank accounts of the Applicants and to receive and collect all monies and accounts of the Applicants in respect of the Applicants' property. Accordingly, pursuant to the terms of the Initial Order, the Applicants were unable to comply with the terms of the Escrow Agreement.

Jinnah Affidavit at para. 21

20. The Initial Order also granted a stay of proceedings as against the Applicants and their directors and officers until and including January 16, 2014 or such later date as the Court may order. The stay of proceedings has been extended by previous orders of this Court to January 16, 2015.

Jinnah Affidavit at para. 22

21. At the time of the CCAA filing, there were 10 remaining homes in Phases II and III of the Puccini Project (the "**Puccini Homes**") that were in various stages of completion. The objective of the Applicants' CCAA proceedings is to complete and sell the Puccini Homes and to pay the net sale proceeds, after payment of operating costs and the costs of these proceedings, to satisfy their creditors' claims in the priority to be determined by the Court. Eight out of the ten Puccini Homes have been sold with the approval of the Court. Seven of these transactions have now closed with the eighth transaction scheduled to close on November 30, 2014.

Jinnah Affidavit at para. 23

22. On January 16, 2014, this Court granted, among other things, an order (the "**Claims Process Order**") approving a claims process for the purpose of determining the validity, quantum and priority of claims against the Applicants' Property (each as defined in the Claims Process Order) (the "**Claims Process**").

Jinnah Affidavit at para. 25

23. The Claims Process Order established a claims filing deadline of 5:00 pm on February 14, 2014. Foremont filed a proof of claim against the Applicants in the Claims Process. The

claim filed by Foremont in the Claims Process and the claim that it seeks leave to advance on this motion is one and the same.

Jinnah Affidavit at paras. 26 and 27

24. Pursuant to the Claims Process Order, the Claims Process is being administered by the Monitor with the assistance of the Vetting Committee (as defined in the Claims Process Order).

Jinnah Affidavit at para. 28

25. On June 24, 2014, the Monitor served and filed with the Court its Third Report which, among other things, summarized the status of the Claims Process. With respect to the claims of construction lien holders, the Monitor recommended that the construction lien claims be determined in the context of a binding arbitration by a claims adjudicator.

Jinnah Affidavit at para. 29

26. Counsel for the Applicants has engaged in discussions with counsel for a number of the lien claimants to have a number of issues, including the validity of the construction lien claims and the priority of those lien claims over certain mortgages determined by arbitration. The terms of the draft order referring the matter to arbitration have not yet been finalized.

27. It is preferable for the benefit of all of the Applicants' stakeholders to have all of the lien claims litigated in these CCAA proceedings rather than have the Applicants defend multiple claims in various courts.

Jinnah Affidavit at para. 31

28. Foremont should not be granted leave to continue the Foremont Action at this time. If it is determined by the arbitrator in the Claims Process that Foremont's claim should be allowed, Foremont may be paid in full. If Foremont is successful in proving its claim in the CCAA proceedings, it will have recovered fully on its claim rendering any proceeding against the Silver Streams Defendants moot.

Jinnah Affidavit at para. 30

IV - LAW AND ARGUMENT

(a) Test for Lifting of the Stay

29. A stay of proceedings in a CCAA proceeding is designed to preserve the status quo among the creditors of the debtor company. The stay prevents "manouvers for positioning" among creditors and prevents one creditor from getting a "leg up" on others.

> *Canadian Airlines Corp. (Re)* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at paras. 17-19

30. Lifting a stay is a discretionary decision. The party seeking a lifting o the stay faces "a very heavy onus" in obtaining a lift stay. In considering whether to grant a lift stay, the court should consider whether there are sound reasons for lifting the stay consistent with the objectives of the CCAA, including the balance of convenience, relative prejudice to the parties and, where relevant, the merits of the proposed action.

> *Canwest Global Communications Corp. (Re.)* (2009), 61 C.B.R. (5th) 2000 (SCJ) ("***Canwest***") at paras. 32-33

31. The following factors, set out first by Professor R. H. McLaren but adopted by this Court on a number of occasions, have been identified in determining whether or not to grant a lift stay:

i. When the plan is likely to fail.

ii. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

iii. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

iv. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

v. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

vi. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

vii. There is a real risk that a creditor's loan will become unsecured during the stay period.

viii. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

ix. It is in the interests of justice to do so.

Canwest, supra at para. 33

(b) The Lift Stay Should Not Be Granted

32. Foremont has submitted no evidence that would warrant a lifting of the stay at this time.

33. In its factum, Foremont argues that the lifting of the stay is necessary to preserve their interest in the amounts owing under the Minutes of Settlement through judgment against the Silver Streams Defendants. Foremont also states that if the stay is not lifted it has to maintain the Foremont Action to avoid administrative dismissal.

34. The Foremont Action is stayed by the stay of proceedings prescribed by the Initial Order. So long as Foremont notifies the relevant court of the stay of proceedings under the Initial Order, there should not be an administrative dismissal of the Foremont Action.

35. Foremont is seeking a lifting of the stay so that it can bring a motion in the Foremont Action for the enforcement of the Minutes of Settlement. It is the Applicants' evidence and position that the Minutes of Settlement are not enforceable and the Applicants raise a number of trialable issues which would require the expenditure of time and resources to resolve.

36. It is not consistent with the purposes of the CCAA to allow one creditor to get ahead of all other claims before a claims process has been completed. The Applicants, the lien

claimants and the Monitor are finalizing an order for the adjudication of the priority disputes between the construction lien claimants and the mortgage holders within the Claims Process. If the lien claimants, including Foremont are successful in proving their claims, their claims will be paid out in full.

37. The balance of convenience militates in favour of denying Foremont's motion. There is no prejudice to Foremont from the continuation of the stay of proceedings until the completion of the Claims Process. Foremont's rights in the Foremont Action are preserved by the stay of proceedings. In contrast, if the stay is lifted and Foremont is allowed to proceed with the Foremont Action, the Applicants and their principals will be forced to incur substantial legal fees in defending this proceeding in circumstances where the entire proceeding may be rendered moot upon the resolution of the Claims Process.

V – RELIEF SOUGHT

38. The Applicants respectfully requests an order dismissing Foremont's motion, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: October 10, 2014

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON, M2N 7E9

Maya Poliak (LSUC#54100A)
Tel: (416) 218-1161
Fax: (416) 218-1849
Email: maya@chaitons.com

Lawyers for the Applicants

SCHEDULE "A" – List of Authorities

1.	*Canadian Airlines Corp. (Re)* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.)
2.	*Canwest Global Communications Corp. (Re.)* (2009), 61 C.B.R. (5^{th}) 2000 (SCJ)