Court File No. 13-10362-00-CL

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.

FACTUM OF FOREMONT DRYWALL INC., 1382479 ONTARIO INC., 1382503 ONTARIO INC. AND 2203579 ONTARIO INC. CARRYING ON BUSINESS AS FOREMONT DRYWALL CONTRACTING
(Motion returnable August 25, 2014)
(Re Motion to Lift Stay of Proceedings and to Grant Leave to Continue Proceedings)

BIANCHI PRESTA LLP
Barristers and Solicitors
9100 Jane Street
3rd Floor. Building "A"
Vaughan, Ontario L4K 0A4

Domenic Presta
LSUC No. 025501P

Tel: (905) 738-1078
Fax: (905) 738-0528

Lawyers for the moving parties, Foremont Drywall Inc., 1382479 Ontario Inc., 1382503 Ontario Inc. and 2203579 Ontario Inc., carrying on business as Foremont Drywall Contracting

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PART I - NATURE OF MOVING PARTIES' MOTION

1. The moving parties, Foremont Drywall Inc., 1382479 Ontario Inc., 1382503 Ontario Inc. and 2203579 Ontario Inc. carrying on business as Foremont Drywall Contracting (hereinafter referred to as the "**Plaintiffs**") bring this motion for an Order, *inter alia*, lifting the stay of proceedings and granting leave to continue the action against Silver Streams Homes (Puccini) Inc., Imran Jinnah and Asma Jinnah commenced in the Newmarket Superior Court of Justice bearing Court File Number CV-11-102579 (hereinafter referred to as the "**Foremont Action**").

PART II - THE FACTS

Background on the Foremont Action

2. The Plaintiffs are corporations incorporated under the laws of the Province of Ontario and carry on business in the Province of Ontario as installers and suppliers of drywall.

Affidavit of Mary Montagner sworn July 16, 2014 ("**Montagner Affidavit**"), p.1, para. 2, Motion record, Tab 2.

3. Silver Streams Homes (Puccini) Inc. ("**Silver Streams**") is a corporation incorporated under the laws of the Province of Ontario and carries on business in the Province of Ontario as a general contractor and/or subcontractor.

Montagner Affidavit, p.1, para. 3, Motion record, Tab 2.

4. Imran Jinnah ("**Imran**") is an individual residing in the Province of Ontario. At all material times he was an officer and/or director and/or one of the persons having effective control of Silver Streams.

Montagner Affidavit, p.1, para. 4, Motion record, Tab 2.

5. Asma Jinnah ("**Asma**") is an individual residing in the Province of Ontario. At all material times she was an officer and/or director and/or one of the persons having effective control of Silver Streams.

Montagner Affidavit, p.1, para. 5, Motion record, Tab 2.

6. Pursuant to the contract between Silver Streams and the Plaintiffs, the Plaintiffs supplied and installed drywall at a construction site known as Symphony Series - Puccini, located at Bathurst Street and King Street, Richmond Hill.

Montagner Affidavit, p.2, para. 6, Motion record, Tab 2.
Contract, Motion Record, Tab A.

7. The Plaintiffs invoiced Silver Streams for the supply of materials and labour but Silver Streams failed and/or refused to pay for the outstanding amount due.

Montagner Affidavit, p.2, para. 7-8, Motion record, Tab 2.

8. The Plaintiffs commenced the Newmarket Action on January 21, 2011 against Silver Streams, Imran and Asma (hereinafter collectively referred to as the "**Defendants**") for breach of trust under Sections 8 and 13 of the *Construction Lien Act*. The amount of the claim is for $250,321.79.

Montagner Affidavit, p.2, para. 9-12, Motion record, Tab 2.

Statement of Claim, Motion record, Tab B.

9. The Defendants served a Statement of Defence on the Plaintiffs on March 2, 2011.

Montagner Affidavit, p.3, para. 14, Motion record, Tab 2.

Statement of Defence, Motion record, Tab D.

10. The Plaintiffs and Defendants executed Minutes of Settlement in October, 2011, wherein it was agreed that the Defendants would pay $253,769.53 to the Plaintiffs. The Minutes of Settlement provide that upon default by the Defendants, the Defendants have fifteen (15) business days from the date that a notice of default is mailed to the Defendants by registered mail at their business address of 103 Naughton Drive, Richmond Hill, Ontario L4C 8B3 to remedy said default. The Minutes of Settlement further provide that the Plaintiffs may obtain judgment against the Defendants in the Foremont Action for the amount owing less any payments made where the default is not remedied within the aforementioned time period.

Montagner Affidavit, p.3, para. 15, Motion record, Tab 2.

Minutes of Settlement, Motion record, Tab E.

11. The Defendants made their last payment under the Minutes of Settlement in August, 2012 and have made no further payment to the Plaintiffs. The outstanding balance of the amount owed is $151,285.75.

Montagner Affidavit, p.3, para. 16, Motion record, Tab 2.

12. On December 17, 2012, Silver Streams executed an escrow agreement with the Plaintiffs and other parties regarding the distribution of proceeds upon lot closings. As the lots closed, the escrow

agent paid for new work performed by the Plaintiffs but not for the old work that is the subject of the claim in the Foremont Action.

Montagner Affidavit, p.3-4, para. 17-18, Motion record, Tab 2.

Escrow Agreement, Motion record, Tab F.

13. The Plaintiffs sent notices of default to Silver Streams on January 16, 2014 and June 24, 2014. The Defendants have failed to rectify their default.

Montagner Affidavit, p.3, para. 15 and p.4, para. 23, Motion record, Tab 2.

Notice of Default (1st), Motion record, Tab H.

Notice of Default (2nd), Motion record, Tab K.

CCAA Proceedings

14. The within CCAA proceedings were commenced by Silver Streams and others in December, 2013. On December 17, 2013, Justice Newbould granted an initial order, *inter alia*, appointing a monitor for Silver Streams and staying all proceedings against it and its directors and officers, Imran and Asma ("**Initial Order**").

Montagner Affidavit, p.4, para. 19, Motion record, Tab 2.

Order of Justice Newbould, Motion Record, Tab G.

15. The stay on proceedings was extended three times on January 16, April 17 and June 26, 2014. The current stay period will expire on September 26, 2014.

Montagner Affidavit, p.4-5, para. 21, 22, 24, Motion record, Tab 2.

Order of Justice Wilton-Siegel, dated January 16, 2014, Motion record, Tab I.

Order of Justice Newbould, dated April 17, 2014, Motion record, Tab J.

Order of Justice Brown, dated June 26, 2014, Motion record, Tab L.

PART III – ISSUES AND LAW

16. The *Companies' Creditors Arrangement Act* ("**CCAA**") enables the court to order a stay of

proceedings in order to maintain the status quo while the debtor company develops a compromise.

Re Canadian Airlines Corp. (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para. 12.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02.

17. There are no statutory provisions governing the lifting of the stay and accordingly, the lifting of the stay is discretionary. In determining whether to lift the stay, the court has developed the "sound reasons" test. There should be sound reasons consistent with the scheme of the CCAA for the stay to be lifted. The factors that may be considered regarding what constitutes "sound reasons" are: (a) the balance of convenience; (b) the relative prejudice to the parties; and (c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay. The court should also consider the good faith and due diligence of the debtor company.

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd., 2007 SKCA 72 (Sask. C.A.) at paragraph 67.

18. The following is a list of situations in which the court will lift a stay as articulated by R. H. McLaren and that the courts have considered in determining whether to lift a stay:

(a) When the plan is likely to fail.

(b) 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).

(c) 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 company's existence).

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

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

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

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

(h)It is necessary to allow the applicant to perfect a right that existed.

(i) It is in the interests of justice to do so.

Bank of Montreal v. NFC Acquisition GP., 2012 ONSC 1244 (Sup. Ct. J.). at para. 11.

19. It is submitted that there are sound reasons for lifting the stay of proceedings in relation to and granting leave to continue the Foremont Action against the Defendants. The moving parties seek to bring a motion for judgment for $151,285.75 to enforce their right to judgment under the Minutes of Settlement. In particular, paragraph 3 of the Minutes of Settlement states that: "If the Defendants do not remedy the default within fifteen (15) business days of mailing the notice of default, the Plaintiff will be at liberty to obtain judgment against the Defendants for the amount of the Debt less any amount actually received by the Plaintiff pursuant to these Minutes of Settlement." Two notices of default have been sent and the Defendants have not remedied the default.

(a) The Balance of Convenience

20. The balance of convenience favours the lifting of the stay to permit the timely and cost-effective conclusion of the Foremont Action. The Plaintiffs have been entitled to judgment for two (2) years on the outstanding balance, but have been unable to exercise that right under the Minutes of Settlement due to its indulgences granted to the Defendants and the commencement of the within CCAA proceedings.

21. The Plaintiffs should not be required to wait until the conclusion of the CCAA proceedings to bring a motion to exercise its right tó judgment. It would futile for the Defendants to oppose the motion for judgment as they have already agreed to said judgment in the event of a default under the Minutes of Settlement.

(b) Relative Prejudice to the Parties

22. The Defendants would suffer little prejudice given that their default under the

Minutes of Settlement has entitled the Plaintiffs to judgment on the outstanding balance and, therefore there is limited, if any, basis for the Defendants to oppose a motion for judgment. If the Plaintiffs are unable to continue their action, then they will have to wait until the conclusion of the within CCAA proceedings to exercise their right to judgment.

(c) Merit to the Proposed Action

23. As indicated to above, the Defendants have agreed to judgment on the outstanding balance upon their default on the Minutes of Settlement. The Plaintiffs should be permitted to bring a motion for judgment to conclude the Foremont Action in a timely and cost-effective manner.

(d) Good faith and Diligence of Silver Streams

24. Since the Defendants' default under the Minutes of Settlement in August, 2012 the Plaintiffs have received no payments or any response whatsoever from the Defendants regarding their default. The Defendants have failed to uphold the terms of the settlement. After the execution of the escrow agreement in December, 2012, no further payments made by the Defendants on the labour and/or materials supplied by the Plaintiffs to which the Foremont Action relates.

Applicable Situations where the Stay Should be Lifted

25. Lifting the stay to permit a motion for judgment will permit the Plaintiffs to preserve their interest in the outstanding balance of $151,285.75 through judgment against the Defendants. If the stay is not lifted, the Plaintiffs have to maintain the Foremont Action to avoid administrative dismissal.

26. It is in the interests of justice to permit the Plaintiffs to proceed with their motion for judgment, particularly when the limited basis to oppose the motion would likely mean no or limited distraction from the CCAA proceedings at hand.

PART IV - ORDER REQUESTED

27. The Plaintiffs request an Order:

(a) abridging the time for service and filing of the Notice of Motion and the Motion Record, and dispensing with service on any person other than those served;

(b) lifting the stay of proceedings and granting leave to continue the Foremont Action against Silver Streams Homes (Puccini) Inc.;

(c) lifting the stay of proceedings and granting leave to continue the action against Imran Jinnah and Asma Jinnah for the purpose of continuing the Foremont Action notwithstanding paragraph 16 of the Order of Justice Newbould dated December 17, 2013;

(a) for costs of this motion on a substantial indemnity basis, or in the alternative, on a partial indemnity basis; and

(b) such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of August, 2014.

BIANCHI PRESTA LLP
Per:

Domenic Presta

Lawyers for the moving parties,
Foremont Drywall Inc., 1382479
Ontario Inc., 1382503 Ontario Inc.
and 2203579 Ontario Inc., carrying
on business as Foremont Drywall
Contracting

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.).

2. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72 (Sask. C.A.)

3. *Bank of Montreal v. NFC Acquisition GP.*, 2012 ONSC 1244 (Sup. Ct. J.).

SCHEDULE "B" - RELEVANT STATUES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

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Proceeding Commenced at Toronto

FACTUM OF THE MOVING PARTIES

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Barristers and Solicitors
9100 Jane Street
3rd Floor, Building "A"
Vaughan, Ontario L4K 0A4

Domenic Presta (025501P)

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(905) 738-0528 (fax)

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