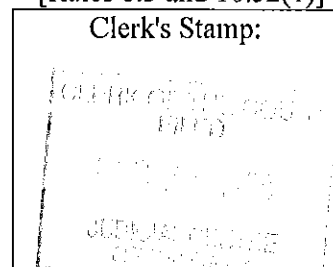


Clerk's Stamp:



COURT FILE NUMBER 1201 15430

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF STANLEY EISENBERG, BRENDA EISENBERG, JACK EISENBERG,
LYNN EISENBERG and EISENBERG'S PROPERTIES LTD.

DEFENDANT 910234 ALBERTA LTD., RANDY CALMUSKY, THERESA
CALMUSKY, KYLE CALMUSKY, CALE HUMENIUK and JORDAN
RINTOUL

DOCUMENT APPLICATION

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

Field LLP
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Calgary AB T2P 1M7
Lawyer: Douglas S. Nishimura
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File No. 56679-3

NOTICE TO RESPONDENT

This Application is made against you. You are a Respondent.

You have the right to state your side of this matter before the Master/Judge.

To do so, you must be in Court when the application is heard as shown below:

DATE	<u>Friday, February 28, 2014</u>
TIME	<u>2:30 p.m. – Commercial List</u>
WHERE	<u>Court House, Calgary, Alberta</u>
BEFORE WHOM	<u>Madam Justice B. E. C. Romaine</u>

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. The Applicant, Grant Thornton Limited, Receiver-Manager and Trustee in Bankruptcy of 910234 Alberta Ltd. (the "Receiver" or "Trustee"), respectfully seeks an Order:
 - (a) Abridging the time for service of this Application and the supporting materials, as necessary, and deeming service thereof to be good and sufficient.

- (b) Permitting the Receiver to attach the \$45,000.00 currently held in the trust account for Theresa Calmusky, Gary Calmusky and Mary Calmusky (the "**Calmuskys**") in respect of the amounts owing to the estate of 910234 Alberta Ltd. ("**910**").
- (c) Such further and other relief as counsel may advise and this Honourable Court deem fit.

Grounds of the Application:

- 2. The Receiver was appointed as receiver and manager of the assets, properties and undertakings of 910 pursuant to the Receivership Order granted on December 10, 2012, by the Honourable Mr. Justice S. J. LoVecchio, as amended and restated on January 14, 2013, by the Honourable Madam Justice K. M. Horner (collectively referred to as the "**Receivership Order**").
- 3. On October 3, 2013, pursuant to an Order granted by the Honourable Mr. Justice G. C. Hawco, the Calmuskys were directed to repay sums owing to the estate of 910 in respect of interest they improperly received with respect to a mortgage loan by 910 to Trickle Creek Homes Ltd. ("**Trickle Creek**"). The Order also awarded costs as against the Calmuskys which was later determined to be in the amount of \$5,000.00. Theresa Calmusky is also subject to a costs award of \$3,000.00 with respect to a July 11, 2013 Order.
- 4. The Calmuskys appealed the October 3, 2013 Order, but the appeal was dismissed. Costs are payable to the Receiver by the Calmuskys in respect of the appeal, but the amount has not yet been set.
- 5. Prior to the appeal, on October 15, 2013, prior to the appeal, the Calmuskys sought and obtained a stay of the October 3, 2013 Order. As a condition of the stay, the Calmuskys were required to provide an undertaking in damages and security in respect of that undertaking in the amount of \$45,000.00.
- 6. On October 24, 2013, counsel for the Calmuskys advised counsel for the Receiver that he held the sum of \$45,000.00 in respect of the above condition. No other purported claim with respect to those funds was indicated.
- 7. Following the dismissal of the appeal, counsel for the Receiver suggested to the Calmuskys that the \$45,000.00 could be used as a partial payment of the interest and costs amount owing by the Calmuskys. In response to that suggestion, counsel for the Calmuskys inquired as to whether this would mean that no further damages were being sought by the Receiver in respect of the stay. Counsel for the Receiver advised that he would seek instructions but that, if the pay down of the

amounts owing with the \$45,000.00 was agreeable, the Receiver would likely commit to seeking no further damages.

8. After some passage of time and exchange of correspondence, counsel for the Receiver reiterated his understanding that the discussion between counsel was about using the \$45,000.00 as a pay down of the amounts currently owing to the estate of 910 by the Calmuskys in exchange for the Receiver's agreement to seek no further damages against the Calmuskys. Counsel for the Calmuskys indicated, for the first time, that he had not been seeking the concession as to damages in furtherance of a negotiated settlement, but rather simply as information. He further indicated to counsel for the Receiver for the first time, that the funds were held, not only as security for the undertaking and damages, but also as a "retainer" for his fees. Counsel for the Receiver requested documentation in support of this alleged retainer, but none was provided.
9. The Calmuskys have, in support of their position, provided evidence by way of an Affidavit of a legal assistant to counsel for the Calmuskys. The Affidavit was sworn on the basis on information derived solely from a "review of the file" and oral advice from counsel for the Calmuskys. The Affidavit does not contain any statement as to belief in the truth of that information.
10. In Questioning, the legal assistant deposed that her sole understanding was that the funds were held as security for the undertaking in damages. Questions relating to the source of the funds were refused. She was unable to provide any further information as to the substantive portions of her Affidavit such as the state of the Calmuskys finances or the alleged retainer agreement.
11. In written undertakings following the Questioning, the legal assistant attached documentation (which was not specifically requested) indicating that Randy Calmusky, the principal of 910 and a related party, provided the funds. The email communications attached to the undertakings did not refer to the funds as a retainer, although they did say, if the funds "became available", they "may be held and applied" against invoices. There was no indication that no other use of the funds was permitted.
12. Such further and other materials as counsel may advise and this Honourable Court deem fit.

Material or evidence to be relied on:

1. The Receivership Order;
2. The Attachment Order;
3. The December 21, 2012 Order;

4. The January 14, 2013 Order;
5. The February 19, 2013 Order;
6. The April 5, 2013 Order;
7. The September 4, 2013 Order;
8. The November 21, 2013 Order;
9. The Affidavit of Stanley Eisenberg sworn December 4, 2012, filed;
10. The Affidavit of Jack Eisenberg sworn December 4, 2012, filed;
11. The Affidavit of Richard Comstock sworn December 6, 2012, filed;
12. The Receiver's Second Report – January 9, 2013, the Receiver's Third Report – February 13, 2013, the Receiver's Fourth Report – March 26, 2013, the Receiver's Sixth Report – August 27, 2013, the Receiver's Supplemental Report – September 26, 2013, the Receiver's Seventh Report - November 15, 2013 and the Receiver's Eight Report – February 6, 2014.
13. The Receiver's Ninth Report dated February 24, 2014, filed concurrently with this Application;
14. Portions of the Affidavit of Simone Assailly sworn January 31, 2014 and the transcripts of the Questioning of Simone Assailly held February 12, 2014;
15. The pleadings filed in this proceeding; and
16. Such further and other material as counsel may advise and this Honourable Court may permit.

Applicable Rules:

17. Rules 1.3, 6.2, 6.3, 6.4(b), 6.9(1), 6.28, 10.55 and 13.5(2) of the *Alberta Rules of Court*; and
18. Such further and other rules as counsel may advise.

Applicable Acts and Regulations:

19. *The Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3;
20. Sections 17 and 22 of the *Civil Enforcement Act*, R.S.A. 2000, c. C-15;
21. The inherent jurisdiction of this Honourable Court; and

22. Such further and other Acts and regulations as counsel may advise.

Any irregularity complained of or objection relied on:

23. N/A

How the Application is proposed to be heard or considered:

24. This Application is proposed to be heard in Justice Chambers.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the Applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the Applicant.