Court File No. CV-19-00628085-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

GRANT THORNTON LIMITED in its capacity as Court-appointed Receiver of MONEY GATE MORTGAGE INVESTMENT CORPORATION

Applicant

- and -

2450531 ONTARIO LIMITED

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

FACTUM OF THE APPLICANT

(Re Appointment of a Receiver)
(Application returnable November 25, 2019)

November 20, 2019

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FACTUM OF THE APPLICANT

PART I - OVERVIEW

1. This factum is filed by the Applicant, Grant Thornton Limited ("**GTL**"), in its capacity as Court-appointed Receiver (the "**MGMIC Receiver**" or the "**Applicant**") of Money Gate Mortgage Investment Corporation ("**MGMIC**") for an order appointing GTL as receiver of the real property owned by the Respondent, 2450531 Ontario Limited (the "**Debtor**") and municipally known as 293 Euclid Avenue, Toronto, Ontario (the "**Property**") pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "**CJA**").

2. The Debtor is a company related to MGMIC. The Property is a semi-detached residential house that appears to have been converted into four rental units. The Applicant has no knowledge regarding the lease arrangements between various tenants occupying the Property and the Debtor, despite repeated requests for information made by the Receiver, including service of a Demand for Particulars under the *Mortgages Act*.

3. It is just and convenient in the circumstances to appoint GTL as receiver of the Property to market and sell the Property in an open and transparent manner under this Court's supervision. The Property cannot be sold at market value by the Applicant without a receivership order because: (i) the Applicant has no information about the residential tenants occupying the Property or the lease arrangements between these tenants and the Debtor; and (ii) the MGMCI would not be able to gain access to the Property (and the tenant's premises) to conduct showings or even provide an accurate description of the Property and its status to interested parties.

4. To avoid duplication of court-officer costs to MGMIC's investors, the Applicant recommends that GTL be appointed as receiver over the Property.

PART II - FACTS

The Parties

5. MGMIC is an Ontario corporation that carried on business as a mortgage investment corporation that raised money from investors for the purpose of, among other things, making loans secured by mortgages against the borrower's property. Morteza Katebian, also known as Ben

Katebian ("**Ben**") and Payam Katebian ("**Payam**") are each a director, officer and directing mind of MGMIC.

> Affidavit of Jonathan Krieger sworn September 24, 2019 (the "**Krieger Affidavit**"), Tab 2 of the Application Record at paras. 3 and 4

6. GTL was appointed as MGMIC Receiver pursuant to an order of this Court dated November 6, 2018 on an application of Ontario Securities Commission ("**OSC**") pursuant to section 129 of the *Securities Act*. The OSC has also commenced proceedings against Ben and Payam under the *Securities Act*.

> The Krieger Affidavit, Tab 2 of the Application Record at para. 5

7. The Debtor is an Ontario corporation and is the owner of the Property. Although the Debtor's corporate profile lists Pantea Sahebdivani, Ben's common law spouse, as the sole director and officer of the Debtor, Payam is the directing mind of the Debtor.

> The Krieger Affidavit, Tab 2 of the Application Record at paras. 8-10

The Property

8. The Property is a semi-detached home located in Toronto, Ontario which appears to contain four rental units. Counsel for the Applicant has made numerous requests for information regarding the leases which have gone unanswered. On August 19, 2019, counsel for the Applicant served a Demand for Particulars under the *Mortgages Act* (Ontario) on counsel for the Debtor. No response was received from the Debtor to the Demand for Particulars despite numerous follow-ups by the Applicant's counsel. Since the Property appears to be tenanted, the Applicant is unable to get access to the Property without an order of the Court.

> The Krieger Affidavit, Tab 2 of the Application Record at paras. 11-12

The MGMIC Loan

9. In September 2016, Payam caused MGMIC to make a loan to the Debtor in the principal amount of $282,500 (the "**Loan**"). The Loan is secured by a second mortgage (the "**MGMIC Mortgage**") against the Property in favour of MGMIC in the principal amount of $282,500.

The Krieger Affidavit, Tab 2 of the Application Record at para. 13

10. The MGMIC Mortgage matured on April 30, 2019 and has not been repaid. As at the date of this Factum, there is approximately $311,000 owing to MGMIC under the MGMIC Mortgage, exclusive of costs and fees.

The Krieger Affidavit, Tab 2 of the Application Record at para. 15

11. The first mortgage against the Property is held by Home Trust Company (the "**Home Trust Mortgage**"). The Home Trust Mortgage has been in arrears since August 1, 2019. The Receiver understands that as at the date of this Factum, there is approximately $1.1 million owing to Home Trust Company under its mortgage.

The Krieger Affidavit, Tab 2 of the Application Record at paras. 16 to 17

PART III - ISSUES

(a) Is it just and convenient for the Court to appoint a receiver over the Property?

PART IV - LAW AND ARGUMENT

Test for the Appointment of a Receiver

12. Section 243 of the BIA provides as follows:

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(*a*) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(*b*) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(*c*) take any other action that the court considers advisable.

13. The Court has the power to appoint a receiver where it is "just or convenient" to do so. In making its determination, the Court must have regard to all of the circumstances, including the nature of the property and the rights and interests of all parties in relation thereto.

> *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 ["***Carnival***"], Tab 1 of the Applicant's Book of Authorities at para. 24
>
> *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CarswellOnt 2328 (Gen. Div.) ["***Freure***"], Tab 2 of the Applicant's Book of Authorities at para. 10,
>
> BIA, s. 243
>
> Courts of Justice Act, R.S.O. 1990, c. 43, section 101

14. It is not essential that the moving party establish that it will suffer irreparable harm if a receiver is not appointed.

> *Carnival,* Tab 1 of the Applicant's Book of Authorities at para. 28

15. It is likewise not essential that the moving party establish that the situation is urgent before a receiver will be appointed, only whether it is necessary to protect the interests of the secured creditor.

> *Carnival,* Tab 1 of the Applicant's Book of Authorities at para. 29
>
> *Bank of Nova Scotia v. D. G. Jewelry Inc.* 2002 CarswellOnt 3443 (S.C.J.)["***D.G. Jewelry***"], Tab 3 of the Applicant's Book of Authorities at para. 3

16. The fact that an applicant has a right under its security to appoint a receiver is an important factor to be considered in favour of the appointment. The court should not lightly step in to relieve parties from contractual terms they no longer wish to honour. The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. Where the mortgagor has provided an express covenant agreeing to the appointment of a receiver in the event of default, the court should not ordinarily interfere with the contract between the parties.

> *Carnival,* Tab 1 of the Receiver's Brief of Authorities at para. 27
>
> *Freure,* Tab 2 of the Applicant's Book of Authorities at para. 12
>
> *United Savings Credit Union* v. *F&R Brokers Inc.* 2003 CarswellBC 1084 (S.C. [In Chambers]), Tab 4 of the Applicant's Book of Authorities at paras. 16 and 17

17. This Court has held that an applicant does not have to demonstrate that other remedies are defective before being entitled to a court-appointed receiver.

> *D.G. Jewelry,* Tab 3 of the Applicant's Book of Authorities at para. 3.

18. The authors of Marriott & Dunn, "Practice in Mortgage Remedies in Ontario" set out a list of factors that a court may consider on an application to appoint a receiver in a mortgage enforcement action, which include:

(a) the mortgagee has the right to appoint a receiver under the mortgage or debenture;

(b) where difficulties with the mortgagor are anticipated; and

(c) the appointment is necessary to carry out the enforcement.

Marriott and Dunn, *Practice in Mortgage Remedies in Ontario* (5th ed.) (Toronto: Carswell, 2009), Tab 5 of the Applicant's Book of Authorities at 54.1

19. The Applicant submits that it is just and convenient to appoint a receiver in the circumstances. The MGMIC matured seven months ago and remains unpaid. The Applicant has the contractual right to appoint a receiver under the mortgages upon default.

20. It is necessary in the circumstances for a receiver to be appointed to realize upon the Property in an orderly manner under Court supervision to maximize value for the benefit of all of the Debtor's stakeholders, including MGMIC and its investors. In the absence of a receivership order, the Applicant would be unable to: (i) get access to the Property to market the property or conduct showings of same; (ii) conduct a meaningful marketing process since it has no information regarding the leases between the tenants occupying the Property and the Debtor; and (iii) maximize the sale price of the Property.

21. If the receivership order is not granted, the Applicant would be forced to proceed to attempt to sell the Property under power of sale or by way of a privately appointed receiver without having access to the Property, which would significantly limit the Applicant's ability to generate the best and highest price for the Property.

PART V - RELIEF SOUGHT

22. The Applicant respectful submits that the Court grant an order appointing GTL as receiver of the property, assets and undertakings of the Debtor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of November, 2019

Maya Poliak

Maya Poliak

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007

2. *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CarswellOnt 2328 (SCJ)

3. *Bank of Nova Scotia v. D. G. Jewelry Inc.* 2002 CarswellOnt 3443 (S.C.J.)

4. *United Savings Credit Union* v. *F&R Brokers Inc.* 2003 CarswellBC 1084 (S.C. [In Chambers])

5. Marriott and Dunn, *Practice in Mortgage Remedies in Ontario* (5th ed.) (Toronto: Carswell, 2009)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended**

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(*a*) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(*b*) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(*c*) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(*a*) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(*b*) the court considers it appropriate to appoint a receiver before then

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(*a*) is appointed under subsection (1); or

(*b*) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (*a*) or subparagraph (*b*)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(*b*).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements"

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

Courts of Justice Act, R.S.O. 1990, c. 43, as amended

Injunctions and receivers

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

GRANT THORNTON LIMITED, et. al.	-and-	2450531 ONTARIO LIMITED
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PROCEEDING COMMENCED AT
TORONTO

FACTUM

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