



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-22-00677227-00CL

DATE: July 12, 2023

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TITLE OF PROCEEDING: **PRUDENT EXCELLENCE MORTGAGE INVESTMENT CORP V.
TRIUMPH DEV HK BRADFORD TWIN REGENCY INC.**

BEFORE **JUSTICE CAVANAGH**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Dom Michaud Anisha Samat	Court Appointed Receiver- BDO Canada Limited	dmichaud@robapp.com asamat@robapp.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Paul Hancock	Delbrook Triumphant Builders Inc., and 10853828 Canada Incl	phancock@dv-law.com
Catherine Fangqi Qin	Xiaofeng Fu and Meng Sun (third mortgagees)	catherine2sunsionlaw.com

Nafi Yujiao Zhou	Xiaofeng Fu and Meng Sun (third mortgagees)	nafi@sunsionlaw.com
Yishan Wu	Counsel for Lu Shen, a director of Triumph Development HK Bradford Twin Regency Inc.	ywu@llaw.ca

ENDORSEMENT OF JUSTICE CAVANAGH:

This is a motion by BDO Canada Limited in its capacity as the Court-appointed receiver (the “Receiver”) of the property municipally known as 2362 Line 8, Bradford West Gwillimbury, Ontario (the “Property”) for an order approving and authorizing the settlement of the lien claims of Delbrook Triumphant Builders Inc. (“Delbrook”) (the “Delbrook Lien”) and 10853828 Canada Inc. (“108”) (the “108 Lien”) in accordance with the terms of the Settlement of Lien Claims Agreement between the Receiver, Delbrook and 108 (the “Settlement Agreement”) and authorizing the distribution to Delbrook in the amount of \$114,800 and the distribution to 108 in the amount of \$705,200 in accordance with the Settlement Agreement.

At the hearing of this motion, counsel for the third mortgagees appeared and requested an adjournment of six months of the hearing of this motion on the basis that the third mortgagees oppose the motion and wish to tender evidence to support their opposition. In addition, counsel for Lu Shen, a director and possibly one of the indirect owners of the debtor, Triumph Development HK Bradford Twin Regency Inc., appeared and also requested an adjournment on the ground that Mr. Shen opposes the settlement and wishes to tender evidence in support of his opposition.

In the Receiver’s Supplement to the Fourth Report dated July 10, 2023, the Receiver set out information concerning contact by Mr. Shen in respect of the construction lien claims. T

The Receiver refers to an email sent by Mr. Shen on June 27, 2023 (prior to the release of the Fourth Report) in which he stated that due to his limited proficiency in English and unaffordable legal fees, he was unable to adequately respond and present his position in court. He states that when he received information from the receivership that the construction liens were deemed as valid liens, he was shocked and decided to step forward to tell the truth. He states that he believes that the two construction liens are invalid and fraudulent and that he opposes the proposed settlement. He advises that he seeking the assistance of a lawyer to help him prepare an affidavit and collect relevant evidence. Mr. Shen requested cancellation of the Receiver’s motion.

In the Supplemental Fourth Report, the Receiver reports that Mr. Shen was contacted by the Receiver through his counsel while the Receiver was investigating the validity of the construction liens. This was done during the Receiver’s investigation of the validity of the construction liens in the context of alleged common ownership among Triumph, Montanaro Project Management Professional Inc. (“Montanaro”, the project management company incorporated to manage development of the Property pursuant to a Project Management Agreement dated June 8, 2017), 108 Canada and Delbrook which the Receiver determined to be untrue. The Receiver reports that Mr. Shen has not provided the Receiver with any of Triumph’s books and records nor has he provided any information in respect of the construction liens. The Receiver reports that it understands that Mr. Shen is currently in China.

In the Supplemental Fourth Report, the Receiver also addresses the position taken by the third mortgagees. The Receiver reports that the third mortgagees' initial position was that the construction liens were invalid given alleged common ownership of Triumph, Montanaro, 108 Canada and Delbrook. The Receiver reports that following service of the Fourth Report, the Receiver received a letter dated July 10, 2023 from counsel representing the third mortgagees in which counsel requested a six-month adjournment of the Receiver's motion for an order approving the Lien Settlement Agreement and distributions. In her letter, counsel for the third mortgagees advised, first, that it is necessary to investigate whether the liens were properly preserved and perfected. Second, counsel for the third mortgagees advised that from a visual inspection of the Property, there are no signs of construction activity and, therefore, substantial performance of the construction contracts in the two liens being "preserved" and "protected", are questionable. Counsel also refers to the fact that Mr. Shen was not called upon to provide information. Third, counsel for the third mortgagees advises that the debtor's position was absent until June 27, 2023 when Mr. Shen sent an email advising that he opposes the settlement and stating that the two construction liens were invalid and fraudulent, and that he would provide relevant facts and evidence.

In the Supplemental Fourth Report, the Receiver appends the response of its counsel dated July 10, 2023 to the letter from counsel for the third mortgagees. In this letter, counsel for the Receiver confirms that the Receiver conducted a proper analysis into the validity of the construction liens as shown by the legal opinion set out at Appendix H of the Receiver's Fourth Report in which the construction liens are analyzed and determined to be valid and enforceable. Counsel for the Receiver states in his letter that documentation to support the determination of the preservation and perfection of the construction liens is clearly set out in Appendix G of the Second Report of the Receiver dated October 7, 2022. In his letter, counsel for the Receiver states that, in fact, the Receiver did not fail to reach out to Mr. Shen in respect of the lien claims. Counsel refers to paragraph 8 of the First Report of the Receiver dated September 8, 2022 and paragraph 12 of the Second Report reporting that, despite repeated attempts, the Receiver was unable to obtain any information from the Debtor's Officers and Directors. Counsel for the Receiver refers to the email sent by Mr. Shen on June 27, 2023 and advises that this was the first contact the Receiver had with Mr. Shen. Counsel advises that since Mr. Shen sent this email, no information was received from him, or any other party, which would cause the Receiver to question its conclusion and recommendation of the settlement of the construction liens. Counsel for the Receiver confirms that the Receiver conducted a robust investigation and analysis into the construction liens and stands by its recommendations to the Court and that the Receiver tends to proceed with the motion scheduled for July 12, 2023.

The third mortgagees have known for many months that that Receiver was investigating the lien claims. The third mortgagees first objected to the validity of these construction liens on the ground that there was common ownership among Triumph, Montanaro, 108 and Delbrook. This was the time for the third mortgagees to object on other grounds. As a result of the position taken by the third mortgagees, the Receiver scheduled a motion for advice and directions focusing on this issue. Based on the evidence gathered by the Receiver, the Receiver concluded that there was no evidence to demonstrate commonality of ownership (legal or beneficial) among these entities that would invalidate the construction liens. The third mortgagees decided not to pursue their objection to the validity of the construction liens on this ground and, as a result, the motion for directions was withdrawn (as confirmed by Justice Penny in his endorsement dated March 1, 2023).

At the hearing, counsel for the third mortgagees advised that the third mortgagees had previously been in contact with Mr. Shen concerning the validity of the construction liens but he was not cooperative. They took no steps to compel his evidence. No affidavit was filed showing the nature of this contact or the responses from Mr. Shen, if any. Now, at the eleventh hour, Mr. Shen has advised that he wishes to provide information to oppose the Receiver's recommendation concerning the construction liens. This, after failing to cooperate or provide any information or documents over a period of many months when asked to do so.

I was provided with an endorsement by Myers J. in another action in which he sentenced Mr. Shen to an interim, initial period of incarceration of thirty days and issued a Warrant of Committal for him to be taken into custody. The sentence was for a finding that Mr. Shen was in contempt of a *Mareva* injunction. Justice Myers deferred the rest of the sentence. Justice Myers recorded in his endorsement that Mr. Shen has gone back to China. Justice Myers refers to the submission made by Mr. Shen's counsel that a fine of \$100,000 would be sufficient

punishment for Mr. Shen's contempt of Court. I infer from this submissions that, at least as of this date, Mr. Shen had access to funds and was not unable to pay for legal advice. Mr. Shen did not provide an affidavit supporting his assertion that he was unable to pay for legal advice in relation to the construction liens.

In these circumstances, and in the absence of any evidence explaining why Mr. Shen refused to provide information to the Receiver, or to the third mortgagees, concerning the construction liens when asked, I conclude that no purpose would be served by a delay of the Receiver's motion to allow Mr. Shen to offer unspecified information (that he had previously failed to supply) supporting his bald, declaratory statement that the construction liens are "invalid and fraudulent" where the Receiver, through diligent efforts and at considerable expense, has concluded that the liens are valid. I am satisfied that to allow the process to be derailed for this purpose would only serve to unnecessarily delay the proceedings and increase the expenses of the receivership.

In these circumstances, I declined to adjourn the hearing of the Receiver's motion.

In the Fourth Report, the Receiver reports that the Delbrook Lien and the 108 Lien (together, the "Construction Liens") relate to supplied labour and consulting services for project and construction management and other "soft-costs" or improvements/work completed by other subcontractors towards an application for site plan approval that remain unpaid by the debtor. Another construction lien filed by Gerrits Engineering Limited (the "Gerrits Lien") did not present an issue with respect to validity and enforcement. The Gerrits Lien related to unpaid "soft-costs" incurred for engineering work for conceptual design. The Gerrits Lien stipulated that upon making payment for the Gerrits Lien, that the Delbrook Lien and the 108 Lien would be reduced, to the extent that each of these liens included amounts claimed in the Gerrits Lien.

The Receiver engaged BDO's Construction Services Group to vet the Construction Liens. BDO's Construction Services Group conducted a thorough analysis of the Construction Liens, including a weighted average methodology, and is satisfied that both 108 and Delbrook performed services on a *quantum meruit* basis that improved the Property.

The Receiver entered into settlement discussions with Delbrook and 108 to settle the Construction Liens. The Receiver's independent counsel, Robbins Appleby LLP, provided the Receiver with an opinion regarding the Construction Liens that is appended to the Fourth Report. Independent counsel provided its view that the Construction Liens are valid and enforceable pursuant to the *Construction Act* and were registered and perfected in time and that both 108 and Delbrook perfected their liens and issued claims and commenced proceedings in the Ontario Superior Court of Justice which were set down for trial on or before the two-year anniversary of the commencement of the claims, in compliance with the Act. The opinion of counsel is that the Construction Liens have full priority over the Third Mortgage.

The principles set out in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (Ont. C.A.), although dealing with approval of sale transactions, have also been applied in the context of settlement approval motions in receivership proceedings. The Court must consider (a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently; (b) the interests of the parties; (c) the efficacy and integrity of the process by which offers are obtained; and (d) whether there has been unfairness in the process. With respect to the first step of this test, when the Receiver is considering how to deal with a cause of action, the Receiver can meet its responsibility by settling the matter as long as the proposed compromise is commercially reasonable. See *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, at para. 50.

The Settlement Agreement resulted from months of investigation and negotiations by the Receiver. I am satisfied that the Settlement Agreement is commercially reasonable and that the principles in *Soundair* are satisfied. I approve the Settlement Agreement.

I am satisfied that the Receiver's activities and statements of interim receipts and disbursements should be approved. I am also satisfied that the fees and disbursements of the Receiver and its counsel should be approved.

The Receiver also request an order expanding its mandate beyond the Property. The Order appointing the Receiver provides that the Receiver is authorized and empowered to apply to the Court for assistance in carrying out the terms of the Receivership Order. The Receiver has the task of attending to various CRA - related issues concerning the debtor and the Property (including HST filings, making the Delbrook and 108 Distributions and filing the Receiver's final report. The Receiver believes that an expansion of the receivership beyond the Property to the Debtor is necessary for it to complete its duties as contemplated by the Receivership Order. Given that the debtor was incorporated for the sole purpose of owning and developing the Property. I accept that it is fair and equitable to expand the scope of the Receiver's mandate as requested.

Order to issue in form of Order signed by me today.