

CITATION: Sears Canada Inc. (Re), 2018 ONSC 540
COURT FILE NO.: CV-17-11846-00CL
DATE: 20180124

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC.,
S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES
INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS
INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR
COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO
INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO
LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886
CANADA INC. AND 3339611 CANADA INC.

APPLICANTS

BEFORE: HAINEY J.

COUNSEL: *Jeremy Dacks and Shawn Irving*, for the Applicants, Sears Canada
Alan Merskey and Evan Cobb, for the Monitor, FTI Consulting Canada Inc.
Susan Ursel and Katy O'Rourke, Employee Representative Counsel
Mudasir Marfatia, for Oxford Properties Group
Bevan Brooksbank, for Sears Holdings
Mark Ross and Sarah Walker, for Remington Properties
Lily Harmer, for Superintendent of Financial Services
Pamela Huff and Kiran Patel, for Morneau Shepell in its capacity of Pension Plan
Administrator
Lou Brzezinski and Andy Seretis, for 1291079 Ontario Limited
Sean Zweig, for the Board and Special Committee
Edmond Lamek, for RioCan and CT REIT
Linda Galessiere, for various landlords, Ivanhoe, Cushman, Morguard, Triovest,
Crombie, Cominar
David Ullmann, for Bentall Kennedy, Quadreal, Primaris, Westcliff (landlords)
Andrew Hatnay, Representative Counsel for Pensioners/Retirees
Natasha MacParland, for Cadillac Fairview

HEARD: January 22, 2018

ENDORSEMENT

[1] Remington Properties Inc. (“Remington”) moves for an order for advice and directions regarding whether Remington’s invoice dated June 21, 2017 in the amount of \$191,651.71 for property taxes is properly considered an amount owing under a real property lease for the period of time commencing from and including the date of my order dated June 22, 2017 (“Initial Order”) or whether it should otherwise be payable.

[2] In 1998, Remington entered into a lease agreement with Sears Canada Inc. (“Sears”) for a portion of the property at 70 Glendeer Circle SE Calgary, Alberta (“Lease”).

[3] In accordance with s. 8.1(a) of the Lease, Sears is required to:

pay and discharge on or before the date when the same or the installments for the same come due:

(a) All real property taxes...

[4] From the outset of the Lease, the practice of the parties had been as follows with respect to the annual property taxes for 70 Glendeer Circle:

- At the end of May every year, Remington received its annual property tax bill for 70 Glendeer Circle from the City of Calgary;
- In accordance with s. 8.1(a) of the Lease, Remington issued an invoice to Sears for Sears’ portion of the property tax bill for the entire year;
- Remington required that Sears pay its portion of the annual property tax bill by June 30th of the year in which it was sent, as the bill was due and payable to the City of Calgary by June 30th every year;
- It had been the usual practice of the parties over the past 20 years for Sears to pay its portion of the annual property tax in one payment in June when the taxes were due to the City of Calgary.

[5] On June 22, 2017, Sears was granted protection under the *Companies’ Creditors Arrangement Act* by the Initial Order. Paragraph 11 of the Initial Order provides as follows:

REAL PROPERTY TAXES

11. THIS COURT ORDERS that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Sears Canada Entities shall pay, without duplication, all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under its lease, but for greater certainty excluding accelerated rent or penalties, fees or other charges arising as a result of the insolvency of any or all of Sears Canada Entities or the making of this Initial Order) or as otherwise may be negotiated between the applicable Sears Canada Entity and the landlord from time to time (“Rent”), for the period commencing from and including the date of this

Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

[6] In May 2017, Remington received the annual property tax bill for 70 Glendeer Circle from the City of Calgary. Remington issued an invoice to Sears on June 21, 2017 in respect of Sears' portion of the annual property taxes, which was due and owing June 30, 2017 in the amount of \$191,651.71.

[7] Sears paid Remington \$66,159.22 which is the portion owed for property taxes from the date of the Initial Order to the date that Remington's lease was disclaimed as of October 25, 2017 ("post-filing tax amount").

[8] The amounts which are the subject of this motion are: (i) the amount attributable to the pre-filing period – January 1, 2017 to June 21, 2017 – \$90,312.59 ("pre-filing tax amount"); and (ii) the amount attributable to the period commencing from October 25, 2017, the effective date of the disclaimer of the Remington Lease, to December 31, 2017, \$35,179.36 ("post-disclaimer tax amount").

[9] Sears submits that Remington's claim for the pre-filing tax amount is stayed pursuant to the Initial Order and there is no basis for its claim for the post-disclaimer tax amount because the Lease was not in force during this period.

[10] Remington submits that it is entitled to full payment of the pre-filing tax amount and the post-disclaimer tax amount because the invoice it issued to Sears Canada was for a lump sum for the entire 2017 tax year that became due in full on June 30, 2017. Remington also argues that it is unfair to treat it as if it has a lease that provides for monthly payments and that Sears is attempting to "re-write" the Lease to avoid paying the balance of the annual property tax bill.

[11] I do not accept Remington's submissions for the reasons that follow.

[12] Remington's argument ignores the distinction between when an obligation to pay is incurred (*i.e.*, when the service is rendered) and when an obligation to pay crystallizes (*i.e.*, when an invoice becomes payable). In my view, it is when the obligation to pay is incurred that determines whether it is a pre-filing or post-filing obligation.

[13] Paragraph 11 of the Initial Order makes it clear that realty taxes can only be paid by Sears "for the period commencing from and including the date" of the Initial Order. Paragraph 9 of the Initial Order prohibits Sears from making any payments to its creditors not otherwise permitted by the Initial Order. This includes the payment of rent and realty taxes. These paragraphs of the Initial Order make it clear that Sears cannot pay Remington the pre-filing tax amount.

[14] Further, because the Lease was disclaimed as of October 25, 2017 it was no longer in force after that date. Accordingly, no obligation on the part of Sears to pay realty taxes after that date can arise. Sears is therefore not responsible for the post-disclaimer tax amount.

[15] My conclusion that Sears is not required to pay the pre-filing tax amount or the post-filing tax amount is supported by two decisions of Morawetz J. (as he then was). In both *Nortel*

Networks Corp. and *Windsor Machine & Stamping Ltd.*,¹ Justice Morawetz considered an analogous issue in the context of severance payments. Like property taxes, severance payments are debts that crystallize and become payable at a fixed point in time, but relate to obligations incurred over the duration of a previous period.

[16] In *Nortel*, Morawetz J. held that severance payments related to employment in the pre-filing period constituted pre-filing obligations, even though the severance payments only became due and payable post-filing. At para 67 of his judgment he concluded that the determinative factor was not when the debt became due, but when the underlying obligation was incurred. He stated as follows:

The exact time of when the payment obligation crystallized is not, in my view, the determining factor... Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he is entitled to compensation benefits for such current service.

[17] In *Windsor*, Morawetz J. also concluded that when a lump sum debt crystallizes post-filing, the Court can divide the total debt into amounts attributable to services rendered pre-filing and services rendered post-filing, with different payment obligations attaching to each pro-rated portion. He held that where employees had provided both pre-filing and post-filing employment services to the debtor, the amount of severance payable as a post-filing claim could be pro-rated by the duration of the service. He also held that severance pay attributable to pre-filing services constituted pre-filing claims that were stayed and that incremental increases to severance pay resulting from post-filing services constitute payable post-filing claims.

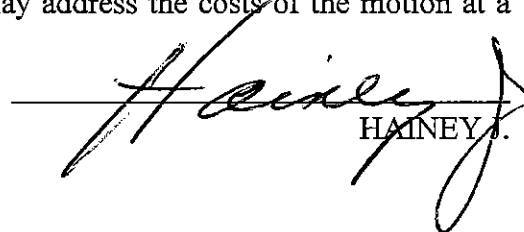
[18] In my view the principles enunciated by Justice Morawetz in *Nortel* and *Windsor*, with which I agree, apply to and are determinative of Remington's motion. I note that Sears' position is supported by counsel for the Monitor, representative counsel for the retirees and representative counsel for the employees.

[19] I also reject Remington's submission that it is being treated unfairly because Sears is attempting to re-write the Lease. The Initial Order effectively re-writes the Lease by prohibiting Sears from paying any pre-filing debts including property taxes. To accept Remington's position would be unfair to Sears' other creditors as it would give Remington a priority to which it is not entitled.

[20] For all of these reasons Remington's motion is dismissed. The balance of its invoice dated June 21, 2017 is not required to be paid by Sears.

[21] If counsel cannot settle the issue of costs they may address the costs of the motion at a 9:30 a.m. attendance with me.

Date: January 24, 2018


HAINEY J.

¹ *Nortel Networks Corp, Re*, [2009] O.J. No. 2558 [*Nortel*]; *Windsor Machine & Stamping Ltd, Re*, [2009] O.J. No. 3195 [*Windsor*].