CITATION: Sears Canada Inc., et al. (Re), 2019 ONSC 4173
COURT FILE NO.: CV-17-00011846-00CL
DATE: 2019/07/16

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., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., 9845488 CANADA 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.

BEFORE: Hainey, J.

COUNSEL: *Alan Merskey and Stephen Taylor* for the Monitor

David Ullmann and J. Wuthmann for the Moving Landlords

Andrew J. Hatnay, Representative Counsel for Retirees

Kiran Patel, for Morneau Shepell Ltd.

Lily Harmer, for Superintendent of Financial Services

D. Smith for The Childrens' Place

Alan B. Dryer for The Gap

HEARD: May 7, 2019

ENDORSEMENT

Background

[1] This is a motion by the Monitor for a declaration enforcing the terms of a settlement agreement and for an order for the payment of $10,000 by Primaris Management Inc. ("Primaris") to Sears Canada Inc. ("Sears Canada").

[2] There is no dispute that the Monitor and six of Sears Canada's former landlords ("Disputing Landlords") entered into a settlement agreement in December 2018.

[3] The settlement agreement,

(a) sets out an agreed upon formula ("Landlord Claim Formula") for the resolution of the Disputing Landlord's claims against Sears Canada; and

(b) provides that Rent would be calculated:

i.) as detailed in the Proofs of Claims filed by the Disputing Landlords; or

ii.) if no Rent was detailed in the Disputing Landlords' Proofs of Claims, as evidenced by the books and records of Sears Canada.

[4] The Monitor and the Disputing Landlords agree there has been a settlement on these terms. However, they disagree as to how the settlement is to be performed. According to the Disputing Landlords the two following questions are at issue:

(1) Are the Disputing Landlords entitled to contest the amounts that the Monitor valued their claims at after the settlement was executed; and

(2) How has the Monitor arrived at the value of the Disputing Landlords claims?

Facts

The Settlement

[5] From October to December 2018, counsel to the Disputing Landlords, Blaney McMurtry, and counsel for the Monitor engaged in extensive settlement negotiations, including mediation, in an effort to resolve 22 claims advanced by the Disputing Landlords against Sears Canada ("Blaney Claims").

[6] As part of those negotiations, the Disputing Landlords requested that the Monitor provide them with the terms of a settlement arrived at with other Sears Canada landlords.

[7] The other Sears Canada landlords with similar claims against Sears Canada had previously entered into a settlement agreement with the Monitor which included the Landlord Claim Formula that outlined the formula for calculating those landlords' claims.

[8] During the negotiations between the Monitor and the Disputing Landlords leading up to the settlement the Monitor provided the Disputing Landlords with a spreadsheet that listed for each of the 22 Blaney Claims (i) the amount claimed in the corresponding Proofs of Claims and (ii) the amount recoverable for the claim under the Landlord Claim Formula ("Monitor's Spreadsheet").

[9] The Monitor's Spreadsheet listed a total value of $77,045,630 for all 22 of the Blaney Claims under the Landlord Claim Formula calculated by the Monitor using the Disputing Landlords' Proofs of Claims and Sears Canada's books and records. On November 8, 2018, Blaney McMurtry advised the Monitor's counsel that "We are confident that the aggregate amount recovered to [sic] our clients from the adjudication will be at least double the $77,000,000 currently offered."

[10] On November 15, 2018 the Disputing Landlords settled with the Monitor and agreed to the valuation of their claims "in accordance with the Landlord Claim Formula" provided that the Disputing Landlords received an additional $100,000 for each of the 22 claims.

[11] On December 3, 2018 the Monitor provided the Disputing Landlords with the final executed settlement agreement and final Joinder Agreements for each of the 22 Blaney Claims listing the settlement amounts calculated by the Monitor using,

(a) the Landlord Claim Formula;

(b) the Disputing Landlords' Proofs of Claims and Sears Canada's books and records; and

(c) the agreed upon increase of $100,000 per claim.

[12] The amounts listed in the final Joinder Agreements totaled $79,245,630 which was $2,200,000 greater than the amount set out in the Monitor's Spreadsheet reflecting the agreed upon $100,000 increase for each claim.

[13] On December 10, 2018 the Disputing Landlords provided the Monitor with modified Joinder Agreements for all 22 Blaney Claims. The amounts listed by the Disputing Landlords in the modified Joinder Agreements totaled $97,725,437 which was approximately $ 18.5 million higher than the total value of the amounts in the final Joinder Agreements prepared by the Monitor.

[14] In the covering letters accompanying the modified Joinder Agreements, Blaney McMurtry stated as follows:

> We have taken the opportunity to review the amount calculated by the Monitor with our client against our client's account and the terms of the term sheet and the lease. We would like to draw your attention to the changes in the Agreed Claim Amount. The changes to the Agreed Claim Amount reflect the most current calculations of lost future rent for the property based on the definition of "rent" for the lease.

[15] On December 14, 2018, counsel for the Monitor wrote to Blaney McMurtry with respect to the modified Joinder Agreements. Among other things, the Monitor stated as follows:

(a) The Final Amounts in the Final Joinder Agreements were agreed in the Final Executed Agreement and had been the basis of negotiations over the past 9 months;

(b) Blaney McMurtry had impermissibly altered the agreed upon Final Amounts in the Final Joinder Agreements; and

(c) Blaney McMurtry's proposed amendments were directly contradictory to the terms of the Final Executed Agreement, which was binding on the Disputing Landlords.

[16] On December 18, 2018, Blaney McMurtry wrote to counsel for the Monitor and stated as follows:

> ... We disagree completely that there was ever a discussion, never mind an agreement, as to the precise value of our client claims under the formula at any point during the mediation under which the settlement was reached. There is nothing in the settlement which requires

> us to accept the Monitor's calculation of our client's claims under the formula. The settlement agreement is an agreement to accept that the formula will determine our client's claims, which has presumably been the case with all the parties who have executed it. Our response to the Joinder Agreements (which you provided after the settlement was agreed to) is our calculation of those claims. If you have a dispute about how that is calculated, we are of course prepared to enter into a reasoned discussion of same, but we will not accept that the Monitor is entitled to merely dismiss our calculation out of hand, as it seems to have done. If the Monitor intended to limit our claims to some calculation, you were obliged to raise that in the negotiations. Indeed you will recall that we added 5 days in the settlement agreement to review and execute the joinder which we inserted into the agreement specifically because we knew we would require that time to review the Monitor's calculations with our clients (as we diligently did following their receipt). We could never have agreed to a settlement that left the calculation of our clients claims up to the Monitor's sole discretion.

[17] As a result of this disagreement the Monitor brought this motion.

Sears Canada's Mistaken Payment

[18] In October 2017, Sears Canada made a payment in error in the amount of $418,698.50 to Primaris ("Mistaken Payment"). Sears Canada did not owe this amount to Primaris.

[19] The Monitor and Primaris' counsel, Blaney McMurtry, reconciled the amount actually owing to Primaris. On December 10, 2018, Blaney McMurtry wrote to the Monitor's counsel in respect of the Mistaken Payment and stated that the amount of the mistaken payment should be reduced by "our reasonable substantial indemnity costs of addressing these matters" in the amount of $10,000.

[20] The Monitor's counsel responded that the amount on account of legal fees should not be deducted because the Monitor had not agreed to pay the legal fees of any other landlords for similar work in respect of other mistaken payments.

[21] On February 19, 2019, Blaney McMurtry wrote to the Monitor's counsel enclosing a cheque that was in the amount requested by the Monitor "minus $10,000" and stating that if the Monitor deposited the cheque, Blaney McMurtry would "take this to represent a definitive determination by the Monitor that there are no further amounts owing".

[22] The Monitor cashed the cheque and brought this motion to obtain the court's direction regarding Primaris' deduction of its legal fees from the payment.

Issues

[23] I must decide the following issues:

- Are the Disputing Landlords entitled to disclosure of the basis upon which the Monitor valued the Blaney Claims and production of the documents relied upon in arriving at those values?

- Are the Disputing Landlords entitled to dispute the Monitor's valuation of the Blaney Claims?

- Was Primaris entitled to withhold $10,000 on account of its legal fees from the return of the Mistaken Payment?

Positions of the Parties

[24] The Monitor submits that the Disputing Landlords agreed to the valuation of the Blaney Claims in the settlement they entered into in December 2018. According to the Monitor "the quantum of Rent is a defined term in the Landlord Claim Formula and the quantum of rent for each of the Disputing Landlords must be calculated in accordance with that defined term". The value of their claims has been calculated by the Monitor in accordance with the Landlord Claim Formula and the Disputing Landlords are not entitled to unilaterally increase that valuation using information from their own records.

[25] The Disputing Landlords submit that the Monitor should be required to produce the documentary evidence and calculations that support its valuation of the Blaney Claims. They argue that the settlement agreement and, in particular, the Landlord Claim Formula does not require them to "blindly accept the Monitor's valuation of their claims without documentation supporting those valuations." They rely upon the fact that they have provided the Monitor with detailed documentation and calculations that indicate that the Blaney Claims are valued at approximately $18.5 million more than the Monitor's valuation. They submit that they are entitled to challenge the Monitor's calculation of their claims.

Analysis

The Settlement

[26] According to the Monitor there was an agreement on the "quantum" of rent under the Landlord Claim Formula and that since this is a defined term in the Landlord Claim Formula, the quantum of rent must, therefore, be calculated in accordance with that defined term.

[27] The Monitor submits that this is what it did to arrive at the amounts in the final Joinder Agreements which amounts are in accordance with the terms of the settlement agreement.

[28] The Disputing Landlords argue that they are entitled to disclosure of the basis for the Monitor's calculation of these amounts. I agree with this submission. The parties agreed upon a formula for the calculation of the amounts owing to the Disputing Landlords, but I do not interpret the settlement agreement to specify the actual calculation of those amounts. The Monitor's Spreadsheet is not included in the settlement agreement and it was well known to the Monitor that the Disputing Landlords did not agree with the amounts set out in that spreadsheet.

[29] In my view, the Disputing Landlords are entitled to disclosure of the supporting calculations and documentation relied upon by the Monitor in calculating the amounts said to be owing to them under the Landlord Claim Formula. The settlement agreement does not require the Disputing Landlords to accept the Monitor's calculation of the amounts owing to them without knowing how those amounts were calculated. This is particularly important to the Disputing Landlords whose calculation of the amount owing to them is $18.5 million more than the Monitor says they are owed. Under these circumstances the Disputing Landlords are entitled to know the basis for the Monitor's calculation and to challenge it if they disagree with the calculation.

[30] However, I agree with the Monitor that the Landlord Claim Formula identifies only two sources of information for the calculation of rent owing to the Disputing Landlords. Those sources are first the Disputing Landlords' Proofs of Claims, if they provide details of rent, and otherwise the books and records of Sears Canada. The Disputing Landlords are entitled to know, and if they disagree, to challenge how the Monitor has used those two sources of information to calculate the amounts owing to them in the final Joinder Agreements.

The Mistaken Payment

[31] There is no question that Primaris was obliged to return the mistaken payment to Sears Canada otherwise it would have been unjustly enriched.

[32] I agree with the Monitor that there was no legal basis for Primaris to withhold $10,000 from the repayment for its legal fees without an agreement with the Monitor that it could do so. The cashing of the cheque by the Monitor cannot, without agreement by the Monitor, amount to accord and satisfaction of the full amount owing to Sears Canada by Primaris.

[33] Primaris has no right to keep the $10,000 and must repay it to Sears Canada.

Conclusion

[34] I have concluded that the Monitor must disclose the calculations and documentation upon which the calculation of the Blaney Claims has been made. I have also concluded that the Disputing Landlords may dispute the Monitor's calculation of these amounts but only in the context of the Landlord Claim Formula. In other words, the Disputing Landlords are restricted to only two sources of information to challenge the Monitor's calculation of their claims, their Proofs of Claims and the books and records of Sears Canada.

[35] For these reasons the Monitor is ordered to provide the Disputing Landlords with this information at the earliest opportunity.

[36] Primaris is ordered to pay $10,000 to Sears Canada within 10 days.

Costs

[37] I have decided in these unique circumstances that there will be no order for costs.

[38] I am grateful to counsel for their helpful submissions.

HAINEY J.

Date: July 16, 2019