VANCOUVER
FEB 13 2024
REGISTRY

NO. S-240358
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

NATIONAL BANK OF CANADA

PETITIONER

AND:

1326 MANN FARMS INC., K P DRYWALL LTD., 13 MANN FARMS B.C. LTD., and DYKE VALLEY BERRY FARMS LTD.

RESPONDENTS

RESPONSE TO PETITION

Filed by: Petition Respondent 1326 Mann Farms Inc., K P Drywall Ltd., 13 Mann Farms B.C. Ltd., and Dyke Valley Berry Farms Ltd. (the "Mann Respondents")

THIS IS A RESPONSE TO the Petition filed January 18, 2024

Part 1: ORDERS CONSENTED TO

Bhullar Respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the Petition: **NONE**

Part 2: ORDERS OPPOSED

Bhullar Respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the Petition: **ALL**

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

Bhullar Respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the Petition: **N/A**

Part 4: FACTUAL BASIS

1. Mann Respondents adopt the definitions set out in the Petition filed in this proceeding on January 18, 2024, without making any admissions towards the same.

2. The petition respondents rely upon the facts of the first affidavit of Komalpreet Singh Mann

in support of this petition response.

3. The Petitioner has not alleged any shortfall or risk to the security of the Petitioner.

Part 5: LEGAL BASIS

1. The proceeding where the relief relates to land and is for "a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge " or " ad declaration that settles the priority between interest or charges" – in other words, a foreclosure proceedings. However, the Petitioner does not seek the relief typically sought in a foreclosure petition, including foreclosure of the Borrowers' equitable right to redeem mortgaged property. Instead, the Petitioner attempts to do an end run around the usual foreclosure practice, by cherry-picking the relief that it seeks (declarations of entitlement with respect to order for sale in the guise of the appointment of receiver), without seeking an order of foreclosure (whether Nisi or absolute). The Court should not countenance this.

2. If the Petitioner wishes to foreclose the Borrowers' equity of redemption it should be required to follow the practice prescribed by Rule 21-7 (Foreclosure and Cancellation) and not by way of a hybrid process of invoking the court's equitable jurisdiction to appoint receivers with powers of sale.

Order Nisi

3. In his seminal article on foreclosure practice ["On Foreclosure Practice", 41 Advocate (Vancouver) 583 (1983)], former Chief Justice McEachern described "the usual Order Nisi of foreclosure". He wrote (at pp. 584-585):

   On such an application, assuming a default, and personal and proper substituted service upon the mortgagors and guarantors, and upon every other interest sought to be foreclosed, the usual Order Nisi of foreclosure includes only:

4. A declaration that a mortgage is registered against described property. This must be established by filing a certificate of the state of title from the Land Title Office. The Court does not declare that the mortgage is a "first" or "second" mortgage as a priority are not established at this stage.

5. A declaration that a mortgage is in default. This must be established by statements of fact in the Petition, verified by affidavit. A declaration that the whole amount is owing such is the case. This is the effect of the acceleration clause. If the mortgage requires notice to be given before the acceleration clause operates, there must be proof of such notice, and that the time required by the notice has elapsed.

6. The fixing of the redemption period of 6 months from the date of this Order Nisi.

7. Personal Judgments against the mortgagor(s) and the guarantor(s) of the amount due on the date of the Order Nisi.

8. An order for a summary accounting of the amount required to redeem the mortgage, i.e. the amount payable on the date of the application and the per diem thereafter.

9. Leave to apply to further accounting where there is a variable interest rate in the case the petitioner receives any monies during the redemption period, or has to make disbursements for taxes or insurance, etc.

10. Costs..

Redemption

11. Chief Justice McEachern went on to comment (at p.585) that,

> Generally speaking, the period of redemption should not be more or less than 6 months from the date of the order Nisi. It should only be more than 6 months where very special circumstances are shown which cannot be accommodated upon an application for extension for the redemption period. The redemption period should not be less than 6 months unless, the premises are abandoned or are suffering waste. The mortgagor has no equity and is unlikely to be able to refinance and the mortgagee will likely suffer a loss or an increased loss if the usual order is made.

Evidence

12. On evidence, the Chief Justice noted (at p. 585):

> In this completion reliable appraisal or other evidence should be furnished. The judges tend to be skeptical about "walk past" or "drive past" opinion on value unless they persuasively suggest a range far above or below the amount required to redeem, or unless they update an earlier appraisal.

Conduct of sale

13. with respect to the conduct of sale, he said (at pp. 558-589):

> The first principle is that, in the absence of special circumstances, a first mortgage is not entitled to an order for conduct of sale, or for sale, until after the expiration of the redemption period. [Citing pope v. Roberts (1979), 10 B.C.L.R. 50 (C.A.)]. The reason for this, of course, is that in order for conduct of sale, or for sale, before the expiration of the redemption period abridges the mortgagor's opportunity to redeem his property.

Every order for conduct of sale made during the redemption period should lapse upon the expiration of the redemption period. If, however, the circumstances are such that an immediate Order Absolute could be made because of abandonment, waste, or no equity, then it may be good practice to make both an Order Nisi (with the usual or an abridged period) and an order for conduct of sale.

The Petitioner seeks to Bypass the usual Foreclosure Process.

14. By its petition, the petitioner seeks to take advantage of certain aspects of the usual foreclosure practice, while at the same time asking for the appointment of a receiver with the conduct of sale to market any or all of the Property and to sell or convey without the approval of the court under $500,000 and aggregate consideration for all such transaction does not exceed $1,000,000, thus effectively foreclosing the Borrower's equity of redemption, without any evidentiary justification for such a radical departure from the foreclosure practice.

15. Nowhere, however, does the Petitioner seek a declaration that the Mortgage is in default. Nor does it seek Order Nisi of foreclosure. Instead, presumably to avoid the inconvenience of affording the Borrowers of their equity of redemption, it seeks the appointment of a receiver pursuant to section 243(1) of *Bankruptcy and Insolvency Act*, [RSBC 1985] c. B-3 (the "BIA") and s. 39 of the *Law and Equity Act* [RSBC 1996] c. 253 (the "LEA"), appointing a receiver of the Property and all the personal property of the Debtors located at, related to the Debtors.

16. Pursuant to the draft terms of the order sought by the Petitioner, the Receiver would be immediately empowered and authorized to "marked any or all of the Property, including advertising and soliciting offers in respect to the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver considers appropriate", and to "sell, convey, transfer, lease or assign the Property or any parts thereof out of the ordinary course or business".

17. In short, the Petitioner seeks immediate conduct of sale of the Property and any Property, assets of the Guarantors without affording the respondent Borrowers the usual six months equity of redemption. The court should not countenance this.

18. The Security, of all of the assets, undertaking and property of the Guarantors should not be put under receivership as no shortfall has occurred towards the redemption amount of the Petitioner.

Should the Receiver be Appointed at all?

19. The Petitioner has not advanced any evidence to suggest that the appointment of a receiver in this proceeding would be "just and equitable". For this reason alone, the petition seeking appointment should be dismissed.

20. In *Textron Financial Canada Limited v. Chetwynd Motels Ltd.,* 2010 BCSC 477 **("Textron"),** the court considered whether a receiver of a hotel property should be

appointed and whether the receiver should have conduct of sale of the undertaking and property of the hotel prior to judgment and without a redemption period. With respect to the former, Justice Wilcock, as he then was, said:

> [55] ... I conclude that ***the statutory requirement that the appointment of a receiver be just and convenient does not permit 01· require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made.*** Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance.* ***That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in Cal Glass when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.***

21. A similar analysis was applied by the court in Bank of Montreal v. Gian's Business Centre Inc., 2016 BCSC 2348 ("Gian's Business Centre"). There, Justice Fitzpatrick said (at paras. 22-24):

> 22] I am aware that there is some divergence in our Court concerning the test to be applied in respect of appointing a receiver in these circumstances. On one hand, there are two decisions of Justice Burnyeat in United Savings Credit Union v. F & R Brokers Inc., 2003 BCSC 640 and CIBC v. Can-Pacific Farms Inc., 2012 BCSC 437. In both decisions, Burnyeat J. took the view that where a receivership order is sought by a secured creditor and default under the security is proven, a receiver should be granted as a right unless there is some other compelling reason why the order should not be made.
>
> [23] On the other hand, there is Justice Masuhara's decision in Maple Trade Financing Inc. v. CY Oriental Holdings Ltd., 2009 BCSC 1527. At para. 25 of Maple Trade, the Court refers to various factors from Bennett on Receivership which may be considered in determining whether it is appropriate to appoint a receiver. Maple Trade was subsequently followed and applied in Textron Financial Canada Limited v. Chetwynd Motels Ltd., 2010 BCSC 477 by Justice Willcock, as he then was. Both of these decisions are to the effect that while it is not necessary for a secured creditor to show jeopardy before a receiver is appointed, no such presumption of appointment should be made; rather, the court should review the matter holistically and decide whether on the whole of the circumstances it is, in fact, just and convenient to appoint a receiver. The Court in Textron also considered and applied Korion Investments Corporation v. Vancouver Trade lvlart Inc. [1993] B.C.J. No. 2352 (S.C.), a decision which was referred to me by Gian's counsel.
>
> [24] I followed Maple Trade and Textron in my later decision on the issue: Cascade Divide Enterprises, Inc. v. Laliberte, 2013 BCSC 263 at para. 77. I propose to follow the same approach here. Accordingly, relying on the second line of authorities outlined above,

the analysis calls for a 1·obust 1·eview of all the circumstances. [Emphasis a ded]

22. The principles governing the court's power to appoint receivers were more recently summarized by Justice Fitzpatrick in her reasons in Vancouver Coastal Health Authority v. Seymour Health Centre Inc., 2023 BCSC 1158 ("Vancouver Coastal Health"), at paras. 47 et seq:

47. The relevant legal bases and principles that apply [to the appointment of a receiver] are not in dispute.

48 VCH applies for the appointment of a receiver under s. 39 of the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA], s. 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA], s. 66 of the Personal Property Security Act, R.S.B.C. 1996, c. 359 and Supreme Court Civil Rules, R. 10-2.

49Under s. 39 of the LEA, the central question is whether it appears to the court that the appointment is "just or convenient" in the circumstances.

50 As I stated in Cascade Divide Enterprises, Inc. v. Laliberte,2013 BCSC 263, at para. 81, the granting of a receivership order is "extraordinary relief which should be granted cautiously and sparingly."

51 The governing authorities have invariably endorsed the Court's consideration of many different factors in deciding whether the appointment of a receiver is justified. These non-exhaustive factors are found in Bennett on Receiverships, 2nd

ed. (Toronto: Carswell, 1999), at p. 130, and were applied in Maple Trade Finance Inc. v. CY Oriental Holdings Ltd., 2009 BCSC 1527, at para. 25, Textron Financial Canada Limited v. Chetwynd Motels Ltd., 2010 BCSC 477, at para. 50, and many other cases.

52 The *Maple Trade* factors include:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the'need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement ofrights under a security instrument where the security- holder encounters or expects to encounter difficulty with the debtor and others;

the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

53 Justice Gomery has recently confirmed that the above factors are not a checklist but are to be viewed holistically: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54; and *Royal Bank of Canada v. Canwest Aerospace Inc*, 2023 BCSC 514 at para. 9.

23. Here, a "holistic" review of the facts does not reveal any compelling reason to appoint a receiver.

24. The Petition seeks a conduct of sale, it ordinarily should not be granted that power until after the expiration of a fixed period of redemption: F.B.D.B. v. F.J.H. Construction Ltd., 1988 Carswell BC, 24 B.C.L.R. 92d) 100 (C.A.) at para 27.

25. The Petitioner has not advanced any evidence of special circumstances that would justify an order for sale before the expiry of an appropriate redemption period. There is no evidence before the court that value of the Petitioner's security is diminishing. The Borrowers have put in evidence an appraisal as such there is no risk to the security of the Petitioner.

26. The Borrowers have never defaulted on missing the payment and it was the Petitioner on them won't stopped collecting the payment.

27. The Borrowers should be afforded the usual six months redemption period, during which to attempt to either sell or refinance the Property and replace the Petitioner.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Komalpreet Singh Mann sworn on February 12, 2024

The Petition Respondents estimate that the application will take **20-minutes**.

Dated: February 12, 2024

Signature of lawyer for the Petition Respondents
JAGMOHAN SINGH

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