COURT FILE NO.: 07-CL-6897
DATE: 20070731

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

RE: Credit Union Central of Ontario Limited (Applicant) v. Heritage Property Holdings Inc. and Heritage Properties Development Inc. (Respondents)

BEFORE: Justice Cumming

COUNSEL: ***M. Valente,*** for the Interim Receiver

Derek Schmuck, for Construction Lien Holders

H. Whiteley, for the Applicant Credit Union Central mortgagee

R. Weston, for the Respondent Heritage Companies and for The Federated Guaranty and Trust Company, mortgagee

E. Vanderkloet for GolfNorth Properties Inc., 2137276 Ontario Limited and 2063225 Ontario Inc.

DATE HEARD: July 19, 2007

E N D O R S E M E N T

The Motions

[1] My Endorsements dated May 17, 31 and June 22, 2007 set forth the history of this Receivership to date: see *Credit Union Central of Ontario Ltd. v. Heritage Property Holdings Inc.*, [2007] O.J. Nos. 1974,1978 and 2456. Five motions were heard by the Court at the hearing July 19, 2007.

Motions of GolfNorth and of the City of Hamilton re realty taxes

[2] These two motions raise novel issues.

[3] GolfNorth Properties Inc. and/or 2137276 and/or 2063225 ("GolfNorth") is the purchaser of the Mystic golf course property from the Receiver. The transaction was closed June 7, 2007.

[4] GolfNorth brings a motion for declaratory relief in respect of anticipated increased municipal realty taxes relating to the subject golf course which will arise as the result of a reassessment underway by the City of Hamilton ("City") for periods prior to June 8, 2007, being

the date of the filing of the Receiver's Certificate, being Schedule "A" of the Sale and Vesting Order ("Vesting Order") dated May 29, 2007.

[5] GolfNorth submits that it is not liable to the City for taxes arising from the reassessment after the closing for periods prior to the closing given paragraphs 11 and 12 of the Vesting Order. GolfNorth argues in the alternative that if it is liable to the City for such reassessed taxes then the Receiver is obliged to indemnify GolfNorth.

[6] By paragraphs 11 and 12 of the Vesting Order, the golf course property vested in GolfNorth "free and clear of and from…taxes…[and] the net proceeds from the sale shall stand in the place and stead of the Real Property… and shall stand charged with all Claims or future Claims as existed in respect of the Real Property…."

[7] The City moves for a declaration that (1) it has a statutory "special lien" on proceeds from the sale received by the Receiver in priority to the mortgagees, lien claimants and subsequent encumbrances and also (2) has a statutory "special lien" on the two parcels of land comprising the subject golf course. The City submits the special lien arises in respect of putative outstanding property taxes and supplementary or omitted taxes through an as yet inchoate reassessment for 2005 to 2007.

[8] Although the reassessment is not yet finalized (this being anticipated to be in August, 2007) the City estimates that the reassessment will result in a total of some $89,211.32 additional taxes payable to the City for 2005, 2006 and 2007 up to June 7, 2007 and some $34,052.87 in additional taxes subsequent to June 7, 2007 for the balance of 2007.

[9] GolfNorth acknowledges it will be solely responsible for the additional taxes through the reassessment that arise for all periods subsequent to June 7, 2007.

[10] GolfNorth submits that the Receiver is liable for the additional taxes for the periods prior to June 8, 2007. The Receiver and the Respondents assert the contrary, that is, they submit GolfNorth is responsible for the additional, supplementary taxes through the reassessment for the periods prior to June 8.

[11] The City states that it was not advised of a change of use of the property from farm land (with a residential component) to commercial by reason of the golf course operation which commenced on or about September 1, 2005.

[12] Hence, the property is being reassessed pursuant to the *Assessment Act* R.S.O. 1990, c. A.31, ss. 33,34 and taxes will be determined and collected through an adjusted tax roll in accordance with the *Municipal Act* S.O. 2001 c. 25, ss. 340, 341.

[13] The purpose of this statutory regime is to secure revenue to the municipality. Transactions between persons, unless excepted by statute, are subordinate to that of the Crown or the municipality in its claim and special lien for taxes.

[14] The City's statutory "special lien" on land for taxes arises even in the instance of neglect, omission or error on the part of the municipality through taking no action to register a tax arrears certificate. Taxes are collected in accordance with an adjusted tax roll as if the adjustments had formed part of the original tax roll: ss. 341(2), 349(3), *Municipal Act*.

[15] The liens arising from taxes payable for the years 2005, 2006 and 2007 are deemed to be effective on January 1 in each year respectively: *Municipal Act,* s. 307. Once the reassessment process is completed and the additional taxes determined, those taxes will be imposed and due to the City with a special lien on the subject lands in priority to every claim, privilege, lien or encumbrance of every person except the Crown: *Municipal Act*, s. 349(3).

[16] Taxes may be recovered with costs as a debt due to the municipality from the taxpayer originally assessed for them and from any subsequent owner of the assessed land. If the lien arises prior to the date of sale then the purchaser, as a subsequent owner, is liable to the City. If the lien arises subsequent to the date of sale then the purchaser is liable to the municipality as the taxpayer originally assessed for the property: s. 349(1) of the *Municipal Act*.

[17] As stated above, GolfNorth claims that it is not responsible for reassessed taxes for the periods prior to the sale date, June 7, 2007. GolfNorth submits that such property tax liability is payable by the estate in Receivership.

[18] The Vesting Order approves the Sale Agreement entered into between the Receiver as vendor and GolfNorth as purchaser. Paragraph 11 of the Vesting Order in part provides:

> THIS COURT ORDERS that effective immediately upon the filing of the Receiver's Certificate, all right, title and interest …shall vest in the Purchaser …free and clear of and from …taxes…charges…whether such claims came into existences [sic] prior to, subsequent to…by operation of law or otherwise…"

[19] The Revised Statement of Adjustments on the closing, adjusted as of June 7, 2007, adjusts property taxes on the known 2006 taxes and the agreed-upon estimate for the 2007 taxes.

[20] Paragraph 18 of the Sale Agreement provides:

> ADJUSTMENTS; Any …realty taxes …shall be apportioned and allowed to the day of completion [ie. June 7, 2007], the day of completion itself be apportioned to Buyer [sic].

[21] This undertaking to adjust seen in paragraph 18 is found in the Ontario Real Estate Association standard printed form Agreement of Purchase and Sale.

[22] However, Schedule "D" to the Sale Agreement in the situation at hand provides specifically:

> Notwithstanding anything in the attached printed form to the contrary, the following terms and conditions shall apply to the Agreement of Purchase…
>
> 10. CLOSING ADJUSTMENTS
>
> The Buyer acknowledges that there will be no undertaking to readjust given by the Seller on closing. The Buyer further acknowledges that there will be no holdback from closing proceeds relative to potential readjustment of any items on the Statement of Adjustments.

[23] In my view, and I so find, paragraph 10 of Schedule "D" supercedes paragraph 18 in the Sale Agreement. As such, there is no contractual undertaking to readjust for any as yet contingent, additional property tax liability consequential to a reassessment made subsequent to closing for periods prior to closing.

[24] In my view, paragraph 11 of the Vesting Order is not in conflict with Schedule "D" paragraph 10 of the Sale Agreement. The Vesting Order does not grant title to the purchaser free and clear of the *contingent* potential tax liability to be determined by a reassessment because as of the date of the Sale Order there was no crystallized additional tax liability due to the City.

[25] I add that if had been determined there is a conflict between paragraph 11 of the Order and paragraph 10 of Schedule "D" of the Sale Agreement then I would grant the Receiver's request for alternative relief by amending paragraph 11 of the Vesting Order, and rectifying the Register in respect of the subject real property, because of the contractual intention of the parties. Such amendment would provide that:

> …title is vested…free and clear of and from all claims save for the Real Property Permitted Encumbrances as defined by this Sale and Vesting Order and any potential liability for increased realty taxes as a result of the …reassessment

[26] GolfNorth's affiant states that in response to enquiries GolfNorth became aware immediately prior to the closing that the municipal tax reassessment process was underway. GolfNorth requested an Undertaking to Readjust but was advised by the Receiver it would not provide same given Schedule "D" paragraph 10 of the Sale Agreement. .

[27] The principal of the Respondent Heritage Property Holdings Inc. ("Heritage"), Mr. Roland Berger, states in his affidavit of July 17, 2007 that he met with Mr. Shawn Evans of GolfNorth on several occasions in March and April, 2007, in an attempt to reach a consensual arrangement whereby GolfNorth would invest $7 million in exchange for a 70% equity interest

in Heritage. Mr. Berger says he advised Mr. Evans at the time that there would be a tax reassessment once construction was complete.

[28] As stated above, taxes for the year shall be collected in accordance with the adjusted tax roll as if the adjustments had formed part of the original tax roll and the local municipality: *Municipal Act*, s. 341(2). Taxes are recoverable from the taxpayer originally assessed for them and from any subsequent owner: *Municipal Act*, s. 349(1). See generally *Storrie v. Niagara-on-the –Lake (Town)* (1996), 36 M.P.L.R. 92d) 245 (Ont. Gen. Div.).

Disposition of GolfNorth Motion and Disposition of the City's Motion

[29] For the reasons given, this Court declares that the City has a special lien upon the two parcels of land comprising the subject golf course property in priority to the interests of GolfNorth, their successors and assigns and any and all charges, encumbrances or other claims that are subsequent thereto or arise therefrom: *Municipal Act*, s. 349(1) and (3).

[30] For the reasons given, the GolfNorth motion is dismissed. For the same reasons, the Receiver's motion for directions is granted as follows.

[31] This Court orders that the contingent tax liability relating to the period prior to closing of the sale of the property, when crystallized into a certain tax liability upon completion of the reassessment process, is payable by GolfNorth. Given the contractual agreement in Schedule "D" paragraph 10 of the Sale Agreement here is no obligation upon the Receiver to readjust on account of the inchoate reassessment as of the date of closing in respect of the then contingent tax liability to the City when additional taxes become determined with certainty through such reassessment.

[32] For the reasons given, the City is entitled to exercise its special lien in respect of the subject properties and require payment of the additional taxes through the reassessment from GolfNorth. For the reasons given, the City's motion and GolfNorth's motion are dismissed against the Receiver.

Costs in respect of the City's Motion

[33] GolfNorth challenged the existence of the City's lien claim on the basis of ss. 11 and 12 of the Vesting Order. There was no agreement as between the Receiver and GolfNorth as to any admission that the Court should find either GolfNorth or the Receiver liable for the reassessed taxes with the parties agreeing to save the City harmless and guarantee the reassessed taxes would be paid in all events. The City's motion was reasonable in the circumstances.

[34] Costs should normally follow the event, and as such, costs are properly payable to the City in respect of its motion on a substantial indemnity scale. While the issues raised as to the interpretation of the Vesting Order are novel and subtle, costs are properly payable by the party, GolfNorth, who is unsuccessful in its motion.

[35] The City's detailed Bill of Costs was submitted and reviewed by all parties. Costs are awarded to the City in the amount of $14,774.18, (inclusive of $13,248,00 for fees, GST of $794.88 and disbursements of $731.30), payable by GolfNorth to the City forthwith.

The Motion of the Construction Lien Claimants

[36] The construction lien claimants brought a motion for an Order granting partial summary judgment, specifying what material facts are not in dispute and defining the issues to be tried by this Court in Hamilton, however, the motion was not proceeded with.

[37] A detailed Bill of Costs was submitted by counsel for the construction lien claimants for their services from the inception of their involvement May 1, 2006 to the date of the return of the motions at hand, being July 19, 2007.

[38] There is some question as to whether it was necessary or appropriate for the construction lien claimants to participate in the Receivership proceedings to the extent they have, given that it was agreed upon early in the proceedings that the determination of the validity of the liens is to be dealt with in the Hamilton Consolidated Lien Action. However, no party raised objections to unnecessary costs being incurred in this regard until the July 19, 2007 hearing with Federated then questioning whether any costs were properly payable.

[39] Given that the construction lien issues are to be determined by the Court in Hamilton, it is appropriate that costs of the lien claimants to date be fixed by myself. I have fixed the costs of the lien claimants in this proceeding on a partial indemnity basis at $26,586.33 (inclusive of all fees, disbursements and GST) to be paid in the cause in the Hamilton Consolidated Lien Action out of the monies paid to the credit of the Hamilton Superior Court of Justice File No. 05-21118.

The Motion of the Applicant, Central, for a distribution to it of $5,837,007.19, given that it has priority in or to the proceeds of sale of the assets of the Heritage ahead of Federated.

[40] Central agreed by letter dated January 7, 2004 to provide financing to Heritage in connection with the construction of what became known as the Mystic golf course. Central advanced $5 million with interest at prime plus 1.75% pursuant to standard charge terms under a mortgage against the subject real property. Heritage also executed a General Security Agreement in favour of Central. The existing creditor, Federated, and the borrower, Heritage, executed a Postponement and Subordination of Creditor's Loan Agreement dated June 4, 2004 in favour of Central.

[41] Heritage defaulted and Central agreed to forbear by a "standstill agreement" dated September 1, 2006, whereby Heritage agreed to pay all reasonable present and future legal and agent fees and to waive any right Heritage may have to assess any of such fees. By a "standstill amending agreement" dated November 21, 2006 Heritage agreed to pay interest at prime plus 4% thereafter. Heritage released Central from any and all claims it might have up to November 21, 2006.

[42] In response to an invitation by counsel for Heritage, given that an execution was in the hands of the sheriff against the property of Heritage, Central commenced proceedings January 19, 2007, as a claimant under the *Creditors' Relief Act* R.S.O. 1990, c. C.45, which resulted in the local registrar of this Court issuing a Certificate of Proof of Claim in the amount of $5,268,285.51 for the principal, accrued interest and expenses to December 31, 2006.

[43] Federated raised in oral submissions at the hearing July 19, without any responding material to the motion of Central as to the proper quantum of its claim, that Central is not entitled to the legal fees and expenses claimed and that Central's rights are limited such that it is not entitled to the interest claimed under the standstill amending agreement. I disagree.

[44] The affidavits of Suzanne Fisher, affiant for Central, dated June 11, July 3, and July 18, 2007, and the evidentiary record set forth clearly and authoritatively the history of the Central financing, the legal documentation in support of Central's position and the quantification of the indebtedness of Heritage to Central.

[45] The total claimed indebtedness of Heritage to Central as of July 19, 2007 is $5,827,007.19, consisting of the unpaid principal balance of $5,000,000, accrued interest of $437,739.74 and expenses of $389,267.45.

[46] In my view, and I so find, the evidentiary record clearly and fully supports the quantum of this claim as set forth by Central.

[47] Central's claim has priority to the claim of Federated as previously determined at the hearing June 21, 2007 and the consequential Order signed July 19, 2007.

[48] Accordingly, the Motion of Central, supported by the Receiver, is granted. The Receiver is directed to pay $5,837,007.19 out of the proceeds to Central.

The Receiver's Motion in its Fourth Report for approval thereof, approval of an Interim Distribution of Proceeds and to the Establishment of a Reserve as Appropriate to Protect the Respective Interests of Canada Revenue Agency ("CRA"), the City of Hamilton and the Construction Lien Claimants

[49] The Receiver moves for approval of its Fourth Report dated July 16, 2007. The conduct of the Receiver and its agents as detailed in the Fourth Report is approved. The Receiver's Statement of Receipts and Disbursements as at July 16, 2007 is approved. An order authorizing the Receiver to make a distribution to the Applicant has been approved and the Receiver has been authorized to establish reserves to protect the City, CRA and the construction lien claimants.

[50] An Order was signed at the conclusion of the hearing July 19, 2007 dealing with some of the above matters. A further Order will issue in accordance with these reasons in respect of the matters reserved (in particular, the motions of GolfNorth and the City) for consideration at the conclusion of the July 19, 2007 hearing. Directions have been given to the Receiver by this Endorsement with respect to the issue of additional realty taxes through a reassessment by the

City. (The reserve of $135,000.00 stipulated by the July 19, 2007 Order to protect the City's interest in additional realty taxes through the inchoate reassessment shall remain in place pending any appeal of my dismissal of the City's and GolfNorth's motions as against the Receiver.)

[51] Two issues that remain to be addressed at a future hearing are the status of Federated's claimed security and any possible claim by CRA.

CUMMING

DATE: July 31, 2007