

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

FIRST SOURCE MORTGAGE CORPORATION

Applicant

- and -

**2267 INDUSTRIAL STREET INVESTMENTS LTD.,
FRED WEIDNER and MARLENE JOAN DOTZLAW**

Respondents

**FACTUM OF THE RECEIVER
(Motion Returnable February 26, 2015)**

February 18, 2016

**PALIARE ROLAND ROSENBERG
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**Lawyers for Collins Barrow Toronto
Limited, in its capacity as Receiver of the
property at 2267 Industrial Street,
Burlington, Ontario**

TO: Allan V. Mills, B.Sc., LL.B.
Barrister & Solicitor
15 John Street North
Hamilton, ON, L8R 1H1

Lawyers for the Execution Creditors

AND: Burstein & Greenglass LLP
TO: The Royal Bank Building
200-7481 Woodbine Avenue
Markham, ON L3R 2W1

Attention: Edward Burstein/
Martin Greenglass

Counsel for the Applicant,
First Source Mortgage Corporation

AND 2267 INDUSTRIAL STREET INVESTMENTS LTD.
TO: 2248 Kingsmill Crescent
Oakville, Ontario L6M 3X8

Attention: Fred M. Weidner

AND: Fred M. Weidner
TO: 2248 Kingsmill Crescent
Oakville, Ontario L6M 3X8

AND Marlene Joan Dotzlaw
TO: 1215 Grace Drive
Oakville, Ontario L6H 6W2

PART I – NATURE OF THE MOTION

1. This is a motion brought by Collins Barrow Toronto Limited, in its capacity as court-appointed receiver (the “Receiver”) of the property municipally known as 2267 Industrial Street, Burlington, Ontario (the “Property”) for an order substantially in the form of the draft attached as Schedule “A” to the Notice of Motion:

- a. authorizing the Receiver to enter into and carry out the terms of the agreement of purchase and sale in connection with the sale of the Property between the Receiver and Bilnia Investments Ltd., in trust for a company to be named (“Bilnia” or the “Purchaser”), dated February 3, 2016 (the “APS”) and vesting title to the Property in the Purchaser upon closing of the APS;
- b. approving the Receiver entering into the listing agreement with DTZ Canada Inc. (“DTZ”) in connection with the sale of the Property (the “Listing Agreement”);
- c. approving the Receiver’s conduct and activities to February 12, 2016, including its Statement of Receipts and Disbursements;
- d. approving the fees and disbursements of the Receiver and of the Receiver’s legal counsel, Paliare Roland Rosenberg Rothstein LLP (“Paliare Roland”), to February 12, 2016 and February 15, 2016 respectively;
- e. sealing Appendices “E”, “G” and “H” to the First Report of the Receiver dated February 16, 2016 (the “First Report”) until the closing of the purchase and sale transaction contemplated in the APS; and
- f. authorizing and directing the Receiver to distribute:

- i. to DTZ, the real estate commissions contemplated in the Listing Agreement;
- ii. any and all arrears of taxes, water or other utilities as may be owing in connection with the Property to the date of Closing;
- iii. the fees of the Receiver and counsel described in the Fee Affidavits; and
- iv. to First Source Mortgage Corporation ("First Source"), an amount up to the amount of the secured indebtedness owed to First Source after payment of the items set forth in subparagraphs (i) to (iii) above.

PART II - OVERVIEW

2. The Receiver has entered into an agreement to sell the Property to an arm's-length third party, subject to the approval of this court. The Receiver believes that the agreement represents a commercially reasonable disposition of the Property and recommends that the court approve the pending transaction because:

- a. the Property was publicly listed for sale;
- b. the Property was marketed by an experienced commercial real estate agency;
- c. a bidding process and deadline was established to receive offers on the Property;
- d. six offers were received at the bid deadline and the price contemplated by the APS represents the highest price of the six offers; and
- e. the APS has the support of First Source.

3. The Receiver has filed under seal appendices to the First Report containing the appraisals on the Property (Appendix "E"), summaries of the offers received (Appendix "G") and the APS ("Appendix "H"). The Receiver requests that these be sealed in order to avoid prejudice in the event that the contemplated sale does not close.

PART III – FACTS

Background

4. The Property is an industrial complex comprising approximately 13,000 square feet. The Property consists of 10 rentable units of which 6 are currently being rented.¹

5. The Respondent, 2267 Industrial Street Investments Ltd. ("2267") purchased the Property in May 2013 for a purchase price of \$700,000.²

6. On the date that 2267 acquired title to the Property, First Source registered a mortgage against the Property in the amount of \$450,000 (the "First Source Mortgage"). The First Source Mortgage matured on June 1, 2015 but was not repaid.³

7. On November 2013, a second mortgage in the amount of \$150,000 was registered against the Property (the "Dotzlaw Mortgage") by Marlene Joan Dotzlaw ("Dotzlaw").⁴

8. On July 7, 2015, First Source's solicitor wrote to 2267 demanding payment of the First Source Mortgage and including Notices of Intention to Enforce Security pursuant to the *Bankruptcy and Insolvency Act*.⁵

¹ First Report of the Receiver dated February 16, 2016 (the "First Report") at para. 8.

² Ibid at para. 9

³ Ibid at para. 10

⁴ Ibid at para. 11

⁵ Ibid at para. 12

9. After the First Source Mortgage was still not repaid, First Source issued a Notice of Sale Under Mortgage on July 29, 2015.

10. As at November 13, 2015, First Source was owed \$466,402 in respect of its advances to 2267. As at February 11, 2016, First Source was owed \$529,158.

11. Dotzlaw is a secured creditor and lender to 2267. The Receiver understands that Dotzlaw advanced \$150,000, pursuant to the Dotzlaw Mortgage, to 2267 in or about November 2013, with the loan secured by a second mortgage on the Property (the "Dotzlaw Mortgage").

The Sale of the Property

12. By Order of the Ontario Superior Court of Justice dated November 12, 2015 (the "Receivership Order"), Collins Barrow Toronto Limited was appointed Receiver of the Property.⁶

13. Following its appointment, the Receiver obtained two appraisals for the Property.⁷

14. In or about mid-November 2015, the Receiver contacted DTZ and commenced discussions to retain DTZ to list and market the Property for sale. DTZ was familiar with the Property as it had been retained earlier by the Respondent 2267 Industrial Street Investments Ltd, to try to sell the Property.⁸

15. On December 7, 2015, the Receiver executed the Listing Agreement with DTZ in which authorized DTZ to list the Property for \$1.2 million. The Receiver, in consultation with DTZ, agreed to set a bid deadline for offers on the Property of January 28, 2016.⁹

⁶ Ibid at para. 1 and Appendix "A"

⁷ Ibid at para. 23 and Appendix "E"

⁸ Ibid at para. 25

⁹ Ibid at para. 26

16. On January 28, 2016, six offers were received.¹⁰
17. After reviewing the six offers, the Receiver determined that the offer from Bilnia was the highest and best offer.¹¹
18. The Receiver subsequently reviewed all the offers received with First Source. First Source advised the Receiver that it was supportive of the Receiver's decision to pursue the offer received from Bilnia.¹²
19. On February 3, 2016, the Receiver and Bilnia entered into the APS for the sale of the Property.¹³
20. On February 5, 2016, the Receiver received the deposit required under the APS.¹⁴
21. The closing of the sale is conditional upon this Court approving the transaction and the form of order vesting title in the Purchaser (the "Approval and Vesting Order").
22. The closing is scheduled for the second business day following the date on which the Approval and Vesting Order is obtained or such earlier or later date as agreed to by the parties.

Distribution to First Source

23. The Receiver obtained an opinion from counsel that the First Source mortgage is a valid first charge on the Property.¹⁵ The Receiver proposes to distribute to First Source an amount up to the First Source indebtedness after the payment of the real estate commissions, tax and water arrears and the Receiver's fees and those of its counsel.

¹⁰ Ibid at para. 28

¹¹ Ibid at para. 29 and Appendix "B"

¹² Ibid at para. 30

¹³ Ibid at para. 31

¹⁴ Ibid at para. 32

¹⁵ Ibid at para. 18 and Appendix "C"

PART IV – ISSUES, LAW AND ARGUMENT

24. The Receiver's motion gives rise to the following two legal issues:
- a. Should the court approve the APS?
 - b. Is it appropriate for the court to seal the confidential appendices to the Receiver's First Report pending the closing of the transaction contemplated by the APS?

The Court Should Approve the APS

25. The factors to be considered by this court in its assessment of the approval of a sale by a receiver are well established. A court should consider:
- a. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
 - b. the interests of all parties.
 - c. the efficacy and integrity of the process by which offers are obtained.
 - d. whether there has been unfairness in the working out of the process.¹⁶
26. Having regard to the foregoing, the Receiver submits that this court should approve the APS and the related relief sought by the Receiver in order to give effect to the transaction contemplated by the APS. In particular, the Receiver notes the following:
- a. the Property was publicly listed for sale;

¹⁶ *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (C.A.) at para. 16.

- b. the Property was marketed by DTZ, an experienced commercial real estate agency;
- c. a bidding process and deadline was established to receive offers on the Property;
- d. six offers were received at the deadline and the price contemplated by the APS represents the highest price of the six offers; and
- e. the APS has the support of First Source.

The Court Should Seal the Confidential Appendices

27. The limited circumstances in which this court should seal part of a record before it were described by the Supreme Court of Canada in the case of *SierraClub of Canada v. Canada (Minister of Finance)*¹⁷.

28. In that case, that court observed that a confidentiality order should be granted in only two circumstances:

- i. when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and,
- ii. when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

29. In the context of court-supervised sale proceedings, this court has routinely applied *SierraClub* and held that it is appropriate to seal information and

¹⁷ *SierraClub of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822 (S.C.C.) [“*SierraClub*”]

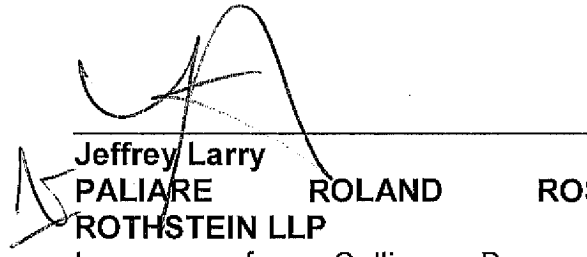
documentation which need to be provided to the court so that it can fulfill its supervisory role, but which, if made available to the general public, might prejudice the receiver's ability to maximize returns in the event that the contemplated transaction does not close.¹⁸

PART V – ORDER REQUESTED

30. Further to the foregoing, the Receiver respectfully requests an order in the form attached as Schedule "A" to the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 17, 2016



Jeffrey Larry
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ROTHSTEIN LLP
 Lawyers for Collins Barrow Toronto
 Limited, in its capacity as Receiver of the
 property at 2267 Industrial Street,
 Burlington, Ontario

¹⁸ *Wells Fargo Financial Corporation Canada v. Algonquin Group Inc.*; Court File No. 09-8298-00CL, Endorsement of Morawetz J., dated December 11, 2009.

TAB A

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (C.A.)
2. *SierraClub of Canada v. Canada (Minister of Finance)*, 2002 CarswellN (S.C.C.)
3. *Wells Fargo Financial Corporation Canada v. Algonquin Group Inc.*, Court File No. 09-8298-00CL, Endorsement of Morawetz J., dated December 11, 2009

TAB B

SCHEDULE "B" – STATUTORY AUTHORITIES

Courts of Justice Act, R.S.O. 1990, c. C.43

Vesting orders

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

**FIRST SOURCE MORTGAGE
CORPORATION**

Applicant

vs.

**2267 INDUSTRIAL STREET
INVESTMENTS LTD., et al.**

Respondents

Court File No. CV-15-4228-00

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceedings commenced at
BRAMPTON

FACTUM OF THE RECEIVER

**PALIARE ROLAND ROSENBERG
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