

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

2292912 ONTARIO INC.

Applicant

-and-

2380009 ONTARIO LIMITED

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

AMENDED NOTICE OF MOTION

Collins Barrow Toronto Limited, the Court-Appointed Receiver (the “Receiver”) over the assets and undertakings of 2380009 Ontario Limited (“238”) will make a Motion to a Judge presiding over the Commercial List on Monday, May 29, 2017 at 10:00 a.m., or as soon after that time as the Motion can be heard at the court house, 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

PROPOSED METHOD OF HEARING: The Motion is to be heard (choose appropriate option)

in writing under subrule 37.12.1(1) because it is (insert one of on consent, unopposed or made without notice);

in writing as an opposed motion under subrule 37.12.1(4);

orally.

THE MOTION IS FOR:

- (a) An Order abridging the time for service and filing of the within Motion, declaring that service of this Motion has been validly effected on all necessary parties and declaring that this Motion is properly returnable today;
- (b) An Order authorizing the Receiver to list for sale the property known municipally as 2370 South Sheridan Way, Mississauga, Ontario (the "Property"), pursuant to the terms of a listing agreement with CBRE Limited ("CBRE") and engaging CBRE as the Receiver's agent for the purpose of marketing the Property for sale;
- (c) An Order requiring Elias Mancebo ("Mancebo") and Marcelo Hernandez to provide the Requested Information set out in paragraphs 5, 6, 7 and 8 of the Receiver's Supplemental Report to the Receiver within 7 days of this Order, failing which the Receiver shall be at liberty to conduct examinations of such persons as it deems necessary to obtain the Requested Information;
- (d) An Order authorizing the Receiver to market the Property for sale to prospective purchasers on a vacant possession basis, specifically, free and clear of the tenancy or other interest of the current lessee of the premises, BuiltRite Technologies Inc. ("BuiltRite");
- (e) An Order terminating the Lease dated January 15, 2014 (the "Lease") between 238 as landlord and BuiltRite as tenant, effective 10 days from the date of the Order, and requiring BuiltRite to vacate the premises within 10 days of the date of the Order, and requiring BuiltRite to leave the premises in a proper state of cleanliness and repair upon vacating;

- (f) In the alternative, an Order authorizing the Receiver to terminate the Lease on 60 days' prior written notice to both BuiltRite and 238, ~~the Lease dated January 15, 2014 (the "Lease") between 238 as landlord and BuiltRite as tenant~~ and requiring BuiltRite to vacate the premises in accordance with any such termination notice, and to leave the premises in a proper state of cleanliness and repair upon vacating;
- (g) an Order requiring BuiltRite and/or 238 to provide to the Receiver or its agent reasonable access to the Property during business hours for the purpose of showing the Property to potential purchasers, authorizing the Receiver to place signage on the Property advertising the Property for sale, provided such signage complies with all applicable laws and does not unreasonably interfere with BuiltRite's business operations, and requiring BuiltRite and 238 to cooperate with the Receiver generally in allowing the Property to be shown to prospective purchasers including providing such information regarding the Property as may be requested by the Receiver or its agents ;
- (h) ~~An Order authorizing the Receiver to terminate, on 60 days' written notice to both BuiltRite and 238, the Lease dated January 15, 2014 (the "Lease") between 238 as landlord and BuiltRite as tenant and requiring BuiltRite to vacate the premises in accordance with any such termination notice, and to leave the premises in a proper state of cleanliness and repair upon vacating;~~
- (i) An Order authorizing the Receiver to enter into an Agreement of Purchase and Sale in respect of the Property with a prospective purchaser, conditional upon Court approval of any proposed sale of the Property;

- (j) An Order declaring that any interest in the Property created by the Lease is subordinate to all charges registered against title to the Property and identified in the Receiver's First Report to Court;
- (k) An Order declaring that, until such time as the Receiver or the Court terminates the Lease pursuant to the terms of this Order and the tenant vacates the Property (the "Interim Order Period"), the Lease shall continue in full force and effect according to its terms, and requiring BuiltRite to abide by all terms of the Lease during the Interim Order Period, including, without limitation, the payment of basic rent, additional rent and HST, failing which the Receiver may terminate the Lease in accordance with the terms thereof;
- (l) An Order approving the First Report to Court of the Receiver and the Supplemental Report to the First Report of the Receiver and the activities of the Receiver outlined therein;
- (m) An Order approving the fees and disbursements of the Receiver and its counsel as shown in the Fee Affidavits filed in support of this Motion;
- (n) A sealing Order in respect of confidential exhibits "J", "K", "L" and "M" of the Receiver's First Report to Court;
- (o) Such further and other Relief as counsel may request and to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

- (a) Pursuant to a Receivership Order dated February 7, 2017 issued by the Honourable Justice Newbould of the Commercial List, Collins Barrow Toronto Limited was appointed as Court-Appointed Receiver over the assets and undertaking of 238.
- (b) 238, an Ontario corporation, is the current registered owner of the Property.
- (c) The Property consists of 3.7 acres of land located in the City of Mississauga and includes a 78,964-square foot, free-standing industrial building (the “Building”). The Building comprises approximately 56,000 square feet of industrial area and 11,000 square feet of office space, together with a usable basement space.
- (d) The Receivership Order was issued on the application of 2292912 Ontario Inc. (“229”), the holder of the first-ranking mortgage registered against title to the Property.
- (e) In support of the receivership application, the Applicant filed the Affidavit of Andrew Jones, Vice-President of Timbercreek Mortgage Servicing Inc., the administrator of 229, sworn April 29, 2016. According to Mr. Jones’ affidavit:
 - (i) 238 defaulted in payment of the 229 mortgage in September, 2015;
 - (ii) On or about September 18, 2015, 229 issued written demand for payment of arrears, which was not complied with;
 - (iii) On October 13, 2015, a second demand was sent by 229 to 238 requiring payment in full of the total outstanding amount secured by the mortgage.

- (f) A tax certificate appended as an exhibit to Mr. Jones' Affidavit indicates that, as of October 8, 2015, the amount of \$332,889.87 was owing for municipal taxes, including taxes of \$162,302.57 for 2014, and \$170,587.30 for 2015.
- (g) BuiltRite is the sole occupant of the Property and carries on a manufacturing business. ~~Elias Mancebo~~ ("Mancebo") is the sole officer and director of BuiltRite. Mancebo is also recorded as the sole officer and director of 238. In other words, BuiltRite and its landlord are related entities, controlled by the same director.
- (h) The current parcel page for the Property shows four other mortgages registered against title.

The Lease

- (i) As stated above, 238 and BuiltRite are related parties and, therefore, the Lease dated January 15, 2014 is a non-arm's length Lease. The evidence suggests that the Lease does not represent a true reflection of the negotiation of commercial terms by truly arm's-length parties.
- (j) The evidence also suggests that the Lease was prepared under questionable circumstances. Specifically:
 - (i) Starting in 2015, Computershare, the prior holder of the mortgage, and later 229 have attempted to enforce the mortgage in question and there is considerable history to that proceeding, including numerous adjournments, requested by 238 to purportedly re-finance the Property. This never occurred. Despite the service of a Notice of Sale and Notice of Attornment

of Rents on 238/BuiltRite and despite the considerable history to this matter, the existence and specific terms of the Lease do not appear to have been specifically brought to the attention of 229 prior to the appointment of the Receiver despite ~~several~~ requests by 229 for same;

- (ii) The solicitor whose name appears as counsel for 238 in the “Notice” section of the Lease has advised counsel to the Receiver that his office was not in fact involved in the preparation of the Lease and did not represent 238 in connection with the Lease, as the “Notice” section of the Lease would suggest. The name of counsel, according to counsel named in the Lease, was apparently added to the Lease without the knowledge or consent of the counsel whose name appears thereon. The solicitor who purportedly acted as counsel for the tenant is deceased.

Analysis of the Lease

- (k) As part of the process of canvassing potential listing agents for the Property, the Receiver requested that three real estate brokers each provide estimated selling values for ~~the potential value of~~ the Property and marketing ~~strategies in respect~~ proposals for the sale of the Property.
- (l) Two of the real estate brokerages canvassed by the Receiver provided details of how the Lease’s terms are unusual for a commercial lease and are financially unfavourable to the landlord and significantly detracts from the market value of the Property. Both real estate brokerages have expressed the view that the Property would be worth a significantly higher amount if the Property could be sold on a

vacant possession basis (i.e. without the financial burdens imposed on the landlord by the Lease). The various aspects of the Lease that lead the Receiver to conclude that the Lease is heavily weighted in favour of the tenant are summarized in the Receiver's First Report to Court, and include lower-than-market base rent, unfavourable renewal terms and unusual and uneconomic (from the landlord's perspective) terms regarding the tenant's fixed sum monthly contribution to the landlord for payment of municipal taxes.

Non-Payment of HST

- (m) The Receiver has ascertained that, since the inception of the term of the Lease, the tenant has been paying rent at the flat rate of \$18,000 per month, without remitting HST. In other words, from its inception, the Lease has been in default and continues in default. The Receiver has seen no evidence of 229 taking any steps against 238 to enforce its rights for breach of covenant or to recover HST arrears.

Attempts to Obtain Information Regarding the Lease

- (n) Since its appointment, the Receiver, and its counsel, have taken steps to obtain from 238 information regarding various matters, including the status and the origins of the Lease. These efforts have included exchanges of e-mails between the representatives of the Receiver and representatives of 238/BuiltRite, along with communications between counsel for the Receiver and the lawyer who is noted as counsel for the landlord in the "Notice" section of the Lease.

Necessity to Terminate the Lease

- (o) The tenant has failed to pay the May rent of \$18,000 plus HST due on May 1, 2017. Reminders of non payment and requests to pay the May rent have been ignored and the tenant continues to be in default of its covenant to pay rent.
- (p) The Receiver is concerned that the Lease could represent an attempt by 238 to encumber the Property to the detriment of 238's creditors, but to the benefit of BuiltRite's creditors and shareholders, and could constitute evidence of an intent on the part of 238, ~~with the active assistance of BuiltRite,~~ to hinder, defeat or delay the creditors of 238.
- (q) Specifically, the Receiver is concerned by the possibility that the intention of the parties to the Lease may have been to ensure that, if default occurred on the mortgage and the Property is sold under Power of Sale or sold by a Receiver, BuiltRite will maintain its tenancy paying below-market rent along with having the benefit of the other terms of the Lease that disfavour the landlord.
- (r) Selling the Property with the Lease in place will result in a lower recovery for 238's creditors. If the Property is sold subject to the Lease, a purchaser could be expected to pay a discounted price to reflect the under-market lease terms of the Lease. The purchaser could then be in a position to elect to terminate this Lease at the first opportunity and sell the Property on a vacant basis or re-let the Property at market rates. In other words, a significant upside economic benefit could in short order be realized by a purchaser, at the expense of the creditors of 238.

- (s) The Receiver is of the view that there is a basis on which to conclude that the execution of the Lease by the parties thereto could, on its face, constitute oppression pursuant to s. 248 of the Ontario *Business Corporations Act*, or a fraudulent transaction pursuant to the *Fraudulent Conveyances Act* or the *Assignments and Preferences Act*.

Proposed Listing of the Property

- (t) The Receiver proposes to list the Property for sale using CBRE as its listing agent pursuant to a listing agreement substantially in the form attached as an ~~confidential~~ appendix to the Receiver's First Report, on a non-priced bid date process basis.

Business Operations of BuiltRite

- (u) The Receiver has met with representatives of 238/BuiltRite and has attended at the premises. The Receiver appreciates and understands that BuiltRite operates an active business from the premises and that the termination of the Lease could have an adverse effect on BuiltRite's business.
- (v) The Receiver has considered the interests of all relevant parties in this matter and has come to the conclusion that the greatest overall benefit for 238's creditors will be achieved if the Property is able to be marketed to potential purchasers on both an occupied, or on a vacant-tenancy basis without the Lease.
- (w) The Receiver is requesting an Order of the Court that:
- (i) the Lease is terminated effective 10 days from the date of the Order; and

- (ii) requiring BuiltRite to vacate the premises within 10 days of the date of the Order.

- (x) ~~The Receiver is therefore requesting the authority to terminate the Lease,~~ In the event the Court does not grant an Order for termination of the Lease as set out in (w) above, the Receiver seeks an Order authorizing it to terminate the Lease if it deems it necessary to do so, on 60 days' written notice to BuiltRite and 238.

Relevant Sections of the Receivership Order

- (y) The Receivership Order appointing the Receiver contains the following clauses:

3...

- (c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, **cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor** [emphasis added];

- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

...

- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

...

- (r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations

- (z) Based on the above sections, the Receiver is empowered to apply to the Court for the Order sought.

- (aa) The Receiver's conduct, as outlined in the First Report, to Court is reasonable and ought to be approved by the Court.
- (bb) The Receiver's fees and those of its counsel are reasonable and ought to be approved by the Court.
- (cc) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The First Report of the Receiver;
- (b) The Supplemental Report to the First Report of the Receiver;
- (c) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

May 24, 2017

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TO: **THE SERVICE LIST**

2292912 ONTARIO INC.
Applicant

-
-and- 2380009 ONTARIO LIMITED
Respondent

Court File No. CV-16-011354-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

AMENDED NOTICE OF MOTION

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RCP-E 4C (May 1, 2016)