



SUPERIOR COURT OF JUSTICE

**ENDORSEMENT**

COURT FILE NO.: CV-24-00713253-00CL DATE: March 8, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: Duca Financial Services Credit Union Ltd. v. West Eglinton Medical Centre Ltd.

BEFORE: JUSTICE BLACK

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party:**

Name of Person Appearing	Name of Party	Contact Info
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**For Defendant, Respondent, Responding Party:**

Name of Person Appearing	Name of Party	Contact Info
David Winer	West Eglinton Medical Centre Ltd.	<a href="mailto:dwiner@ksllp.ca">dwiner@ksllp.ca</a>

**ENDORSEMENT OF JUSTICE BLACK:**

[1] This was the Duca Financial Services Credit Union Ltd. (“Duca”)’s motion seeking to appoint msi Spergel Inc. (“Spergel”) as receiver (the “Receiver”), without security, of all the assets, undertakings and properties of West Eglinton Medical Centre Ltd. (the “Debtor”).

[2] It is important to note that these parties were before Steele J., in this matter on January 30, 2024, at which point Her Honour made an Order allowing the Debtor until February 26, 2024, to deliver materials responding to Duca’s motion (seeking the same relief as it sought before me today).

[3] Counsel for the Debtor advised me today that, notwithstanding Steele J.'s Order, he had gotten busy with another matter, and had therefore failed to deliver materials by the deadline in the Order, or at all.

[4] To be clear, and significantly in my view, even for today's hearing, 10 days beyond the deadline Steele J. had set for the Debtor's responding materials, the Debtor did not file those materials, or any materials at all.

[5] As such, going into the hearing, and for purposes of the hearing, I had no evidence whatsoever from the Debtor to contest or clarify any of Duca's evidence or positions. In response to various questions that I asked of the Debtor's counsel, the Debtor's principal, Dr. Adamo, did offer some input, but of course this input was neither under oath nor tested, and in my view, did not, in any event, provide any basis to doubt or even discount Duca's evidence.

[6] That evidence, I find, meets the "just and convenient" test for purposes of s. 243(1) of the *Bankruptcy and Insolvency Act* ("BIA") and s. 101 of the *Courts of Justice Act* ("CJA"). It also meets the various parameters articulated in the relevant case law as to the appropriate basis for a receivership Order to be made.

[7] In that regard, and by way of brief summary of relevant background facts:

- a. Pursuant to a Line of Credit Agreement (the "LOC Agreement") dated July 11, 2017 and a Revolving Demand Credit Facility dated July 12, 2017, Duca provided a credit facility to the Debtor in the amount of \$1.3 million;
- b. As security for the facility, the Debtor provided an agreement in favour of Duca for security on shares and deposits, also dated July 12, 2017;
- c. The Debtor also pledged all deposits in its savings account as collateral for the LOC Security Agreement, and Dr. Adamo provided an unlimited personal guarantee;
- d. Pursuant to a commitment letter dated October 13, 2021 (the "Commitment Letter"), Duca then provided to the Debtor a credit facility in the amount of \$5,810,000;
- e. As security for repayment of all amounts owing by the Debtor to Duca, including under the Commitment Letter, the Debtor provided, among other items, a General Security Agreement dated November 9, 2021 (the "GSA");
- f. Dr. Adamo also guaranteed the amounts owing, pursuant to an unlimited guarantee and postponement of claim (in favour of Duca) dated November 9, 2021 (the "2021 Guarantee");
- g. Pursuant to the Commitment Letter, on December 2, 2021, Duca registered a Charge and a Notice of Assignment of Rents-General with the Land Registry Office for the Land Titles Division of Toronto);
- h. Duca also made registrations pursuant to the PPSA;
- i. As of December 12, 2023, pursuant to the 2017 credit facility and the 2021 credit facility, the Debtor was indebted to Duca in the amount of \$6,613,547.65;
- j. In 2023, in response to Duca's annual review of the credit facilities in accordance with the Commitment Letter, the Debtor failed, over the course of many months, to deliver to Duca the financial information requested (and required);
- k. In addition, Duca learned that the Debtor had failed to pay and was in arrears of property tax owing on the Debtor's property at 2010 Eglinton Avenue West (the "Property") and that a construction lien had been registered against the Property in the amount of \$2.3 million;

- l. These events constituted defaults under Duca's security, and Duca wrote to the Debtor on November 17, 2023 demanding that the Debtor cure the defaults and provide proof of same by November 24, 2023;
- m. The Debtor did not respond with proof that it had cured the defaults (Duca later learned that the Debtor may have repaid some or all of the property tax debt);
- n. In the circumstances, Duca had its solicitor issue a formal demand for payment, and serve a Notice of Intention to Enforce Security pursuant to s. 244(1) of the BIA (as its security gave it the right to do);
- o. Duca's solicitor also sent a written demand to Dr. Adamo regarding the debt owing under the 2017 guarantee and the 2021 Guarantee; and
- p. The Debtor has not paid the debt owing to Duca.

[8] In his submissions before me, and in the absence of evidence, counsel for the Debtor advised that he understands that the property tax arrears have now been paid. He also advised that he has been in discussions with counsel for the party who registered the construction lien. While these submissions were somewhat uncertain, and again not tethered to any evidence, it sounds as if the first lien has in fact been removed (perhaps discharged but that is unclear) but that another construction lien has been registered in its place.

[9] By way of purported explanation for the pattern of non-responsiveness, counsel advised that a key person at the Debtor, on whom Dr. Adamo relied for various purposes in managing the Debtor's operations, recently died from injuries sustained while visiting Israel at the time of the October 7, 2023 attacks.

[10] This is of course tragic, but does not explain, and nor is there other evidence to explain, the periods of non-responsiveness both before and after the tragic passing of the gentleman in question.

[11] Nor does Dr. Adamo, frankly, inspire much confidence that any kind of meaningful response, let alone payment of the debt, will be forthcoming in the near term. In the intervals during the hearing at which Dr. Adamo spoke, albeit not under oath, his information was to the effect that he was still in the process of looking for relevant documents and other information, and that he was very busy running the collection of medical facilities of which the Debtor's premises and operations are but a small part.

[12] I did learn from Dr. Adamo, in response to a question I asked, that there are approximately 10 employees of the Debtor (out of a total of 120 or so employees across all of the clinics in which Dr. Adamo has an interest).

[13] Both Dr. Adamo, and his counsel, were essentially just asking for more time. Counsel advised that he is about to be away on March break, but that he could deliver responding materials later in the month.

[14] In my view, against the backdrop of non-compliance with Duca's requests, non-compliance with the deadline ordered by Steele J. for responding materials, and the absence of materials even as of today's hearing, there is little reason for confidence that the Debtor will assemble a record that will address in a meaningful way the defaults and non-compliance.

[15] If in fact the Debtor gets its act together and is able to attract alternate financing to pay out Duca's position, the Debtor will have the opportunity to do so within the setting of a receivership.

[16] I am granting the receivership Order sought by Duca for reasons including the following key findings:

- a. Duca has valid and persisting security, and the Debtor is in default of its obligations;
- b. Duca has the right under its GSA to appoint a receiver;

- c. Spergel has consented to act as the receiver;
- d. The Debtor has failed to provide financial information in response to Duca's requests, including requests contemplated by the Commitment letter, and in fact has exhibited a pattern of non-responsiveness. That problematic pattern has continued up to and through the hearing today, in that the Debtor has provided no responding materials, despite Steele J.'s Order for it to do so by February 26, 2024, and despite then having another 10 days before today's hearing to do so;
- e. As a result of this and other conduct, Duca has understandably and legitimately lost confidence in the Debtor and in Dr. Adamo;
- f. As recent events have demonstrated, the Debtor's conduct, including its non-attention to tax obligations, and its failure to report events of default to Duca in a timely fashion, risk compromising Duca's security and collateral;
- g. While it is not clear that employees will necessarily lose their positions as a result of and during the course of the receivership, it appears that there is a relatively small number of employees of the Debtor who may be at risk; and,
- h. If, as the Debtor's counsel and Dr. Adamo suggest will be the case, the Debtor is able to find alternatively financing within the next two to three months, then it can approach the Receiver with that opportunity.

[17] The evidence is clear that Duca served notice on the Debtor (in December of 2023) of Duca's intention to enforce its security. The 10-day notice period has long since expired and, despite approximately three months having passed since the delivery of notice, the Debtor has taken no steps to pay the debt.

[18] In circumstances, as here, where a creditor's security documentation provides for the appointment of a receiver, the court will not regard the appointment of a receiver as an extraordinary remedy (*Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866).

[19] Justice Osborne, in *Ten 4 System Ltd. et al.*, Ont. S.C.J. [Commercial List], CV-00705869-00CL, aff'd 2023 ONCA 839, sets out a list of touchstones for the appointment of a receiver. In my view, in the circumstances of this case, Duca meets virtually all of those tests. As Osborne J. notes, quoting the British Columbia Supreme Court, and I also accept, "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance LP v. Otso Gold Corp.*, 2022 BCSC 136.

[20] I find that in the case before me, having regard to the uncontested evidence, and the fact that Duca's evidence meets most of the typical factors to be considered, the overall circumstance makes it just and convenient to appoint Spergel as the Receiver.

[21] Accordingly, an Order is to issue in the form of Order provided by Duca with its materials in this motion (as revised, at Caselines A451).



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Black J.