

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

CWB MAXIUM FINANCIAL INC.

Plaintiff

and

1970636 ONTARIO LTD. o/a MT. CROSS PHARMACY,
UMAIR N. NASIM, SHRIKANT MALHOTRA, 1975193 ONTARIO LTD. dba
MTN RX & HEALTH and ANGELO KIRKOPOULOS

Defendants

**FACTUM OF THE DEFENDANT,
1975193 ONTARIO LTD. dba MTN RX & HEALTH**

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1975193 Ontario Ltd. dba MTN RX & Health

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PART I – OVERVIEW

1. The plaintiff and the Receiver of 1970636 Ontario Ltd. o/a Mt. Cross Pharmacy, msi Spergel Inc. ("Spergel", or "the Receiver"), seek an order expanding the receivership and appointing Spergel as the receiver over the defendant, 1975193 Ontario Ltd. dba MTN RX & Health ("MTN RX").
2. The defendant opposes the relief being sought by the Receiver. The relief sought is extraordinary and over-reaching, and would be damaging and unjust.

PART II – FACTS

Background

3. The plaintiff, CWB Maxium Financial Inc. ("CWB Maxium") brought a motion seeking a receivership Order against the defendants, pursuant to s. 243 of the Bankruptcy and Insolvency Act, and s. 101 of the Courts of Justice Act.
4. An interim receivership Order was issued on May 16, 2018 against the main defendant 1970636 Ontario Ltd. o/a Mt. Cross Pharmacy ("Mt. Cross"). A full receivership Order was subsequently issued against Mt. Cross, but not against MTN RX.

5. The plaintiff and the Receiver subsequently sought to expand the Receivership Order over each of the other defendants, including MTN RX.
6. 1975193 Ontario Ltd. ("1975193 Ontario") is a corporation owned and operated by Ahmed Kassim ("Kassim"), a licensed pharmacist. Kassim moved from Alberta to Ontario in May 2017. He sought to purchase a pharmacy or start up a new pharmacy on his own through the assistance of Greg Kesminas ("Kesminas"), who had experience operating medical clinics through his company, Doctor Source Inc.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 1-5.

7. Kesminas introduced Kassim to Angelo Kirkopoulos ("Kirkopoulos"), an accountant who agreed to assist with the incorporation of a company for Kassim. Kirkopoulos incorporated 1975193 Ontario and initially was listed as a director for the sole purpose of incorporation. He was removed as a director within a short time of incorporating. Kirkopoulos was never given permission and did not act as a director of 1975193 Ontario at any time. Kirkopoulos was also removed as a signing authority of the corporate bank account of MTN RX after Kassim attended the Bank recently and discovered that he had not been removed.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 6

Cross-examination of Ahmed Kassim held July 26, 2018 at para. 24-29.

8. While Kassim was in the process of starting his own pharmacy, Kirkopoulos had offered for him to work at Mt. Cross Pharmacy, which Kassim did so on a part-time, on-call basis from July, 2017 to March 9, 2018. Kassim had no knowledge of the finances or financial arrangements of Mt. Cross Pharmacy, 1970636 Ontario Ltd., or of any claims of the plaintiff, CWB Maxium against Mt. Cross or the other defendants, Umair Nasim, Shrikant Malotra, or Kirkopoulos. Kassim stopped working for Mt. Cross Pharmacy in March, 2018, when his new pharmacy MTN RX opened. Kassim was very surprised to learn that Kirkopoulos and Nasim had been charged criminally, and first learned of it when the RCMP exercised a search warrant on May 17, 2018. Kassim had previously been away on holiday in Sweden from April 29 to May 16, 2018.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 8-9.

9. Neither Kirkopoulos, Nasim, nor Malhotra had any involvement in the planning, design or construction of MTN RX. Kassim dealt with all assessments and approvals by the Ontario College of Pharmacists for MTN RX. After MTN RX opened, Greg Kesminas brought two physicians to share space at the premises of MTN RX.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 10-12.

10. The web-site referenced by the Receiver in its First Report was never owned by Mt. Cross, but was created by Kesminas for his company Doctor Source Inc. in 2014. Mt Cross has never had its own web-site and the subject web-site is not proprietary to it and was never intended to be proprietary for Mt. Cross. The web-site simply referenced Mt. Cross, and was used by Kesminas for the medical practice when he had brought in two of his physicians to be affiliated with Mt. Cross. This occurred after Kirkopoulos had asked Kesminas to become affiliated with Mt. Cross, after Concession Wentworth Medical Clinic Inc. ("CWMC"), including its 5-6 physicians, had ceased its affiliation with Kirkopoulos and Mt. Cross in May or June, 2017. The subject web-site is also not proprietary to MTN RX. MTN RX is in the process of developing its own web-site, typical of a pharmacy web-site, which would have its own detailed information concerning services offered.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 8-9.

Affidavit of Giedrius (Greg) Kesminas, sworn July 10, 2018, para. 7-8.

11. When this matter was first before the Court on June 14, 2018 the Receiver claimed that 675 client files were improperly transferred to MTN RX without authorization. That claim proved to be unfounded. By the Receiver's own admission, the number in dispute is now only 261 as it concerns MTN RX. MTN RX further denies any improper systematic transfer of patients, who were always and remain at liberty to obtain prescriptions from any pharmacy and may initiate files with more than one pharmacy at any time. Patients have complete free choice in this regard. MTN RX denies that Angela Abrantes actively advised patients that Mt. Cross had moved its location to the premises of MTN RX, and denies that Angela or any other employee transferred patient files without voluntary consent. No merger of the Mt. Cross Fillware software with MTN RX occurred and there was no orchestrated design as alleged to mass transfer patient files to MTN RX.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 20 - 23.

Examination of Ahmed Kassim, at questions 317- 318;

12. MTN RX also disputes the Receiver's allegations that it received revenue of approximately \$80,000 on a monthly basis due to improper transfers of Mt. Cross patients and also disputes that Mt. Cross has suffered losses of \$31,154.76 per month (\$373,857.12 annualized). MTN RX further disputes that any damages have been caused by MTN RX to Mt. Cross, whose demise resulted from Mt. Cross' own mismanagement and activities and the refusal of insurance companies to reimburse patients filling prescriptions at Mt. Cross. MTN RX has provided the Receiver copies of bank statements for the months of May, June, and July 2018. These demonstrate that in fact MTN RX is operating at a loss as the pharmacy starts up its' operations and purchases medicines to build up inventory.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 17-22.

13. The basis for many of the Receiver's statements concerning the alleged losses caused to Mt. Cross, which are denied, have come from statements made by the defendant Nasim, who has been charged criminally by the RCMP, or from the defendant, Malhotra. There is no indication that the statements were obtained by the Receiver under oath, and both Nasim and Malhotra are subject to similar motions by the plaintiff, seeking a receivership appointment over their assets and undertakings. The lack of weight to be given to Nasim's assertions is clearly demonstrated by his grossly inflated claim that 675 patients had transferred to MTN RX when in fact the number in dispute is no more was 261. Regardless, the evidence does not in any way support the Receiver's allegations as to the significant number of patient transfers and loss of revenues.

Interim Receiver's First Report dated June 6, 2018, at 4.0.9; 4.0.12 – 4.0.17

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 16, Exh. D.

14. MTN RX has never had any financial dealings with and is not indebted to the plaintiff. No loans or security were granted in favour of the plaintiff and any ownership or other relationship with Mt. Cross, Kirkopoulos, or any of the other defendants is denied. MTN RX further denies that Mt. Cross holds any valid security interest over any of its assets or undertakings. MTN RX further disputes the position that the patients Mt. Cross has lost may be considered to be property subject to CWB Maxium's security interest over Mt. Cross. MTN RX is an independent, licensed pharmacy serving patients and those patients

can attend any pharmacy they wish to fill prescriptions. The free choice of a patient cannot be considered property.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 8-9.

15. The appointment of a receiver over the defendant, MTN RX would cause irreparable harm to MTN RX, which has already suffered losses due to negative media reports concerning Mt. Cross and Kirkopoulos. As with any pharmacy, MTN RX has paid employees and a licensed pharmacist who rely upon the operations of the pharmacy for their livelihood. There are also licensed medical practitioners who are affiliated with MTN RX who are operating medical practices and serving patients.

Affidavit of Ahmed Kassim, sworn July 10, 2018, para. 18.

Examination of Ahmed Kassim, at questions 310 – 317; 328;

16. Contrary to the Receiver's allegations, MTN RX has not been continuing to subversively transfer patients from Mt. Cross as alleged. Although a percentage of current patients may be said to have been former patients of Mt. Cross, there is a significant percentage of new independent patients and prescriptions which continue to be serviced, which have no connection whatsoever to Mt. Cross. MTN RX has provided its patient list and other information to the Receiver, and there is no danger of assets being dissipated by MTN RX. There is no prejudice to the Receiver in respect of pursuing any claim for damages or lost revenue against MTN RX. Any claim or continued investigation in respect of Mt. Cross by the Receiver may be advanced without the appointment of a receiver over MTN RX. Contrary to the Receiver's allegations as to misappropriation of significant profits, MTN RX has not been profitable, but has experienced monthly losses due to the purchase of medications, not uncommon to start-up pharmacies. MTN RX is not a front as alleged by the plaintiff and the Receiver.

Affidavit of Ahmed Kassim, sworn July 30, 2018.

Examination transcript of Ahmed Kassim, at questions 232 – 255.

PART III – ISSUES

17. This motion raises the issue of the burden and threshold required to warrant the extraordinary remedy of a full receivership appointment by a creditor over a non-related third party. This motion also raises the issue of whether a pharmacy's patients may be considered to be property subject to a security interest, and whether in the specific circumstances and the evidence before the Court, whether a third party's servicing of former patients of a pharmacy which has lost public confidence, sufficiently warrants the appointment of a receiver over it.

PART IV - THE LAW

18. The onus is upon the plaintiff to establish the grounds and necessity for the appointment of a receiver over a third party.
19. Section 243 of the *Bankruptcy and Insolvency Act*, (the "BIA") permits a *secured creditor* to seek the appointment of a receiver over all or substantially all of the inventory, accounts receivable, or other property of an insolvent person or a bankrupt.

243 (1) Court may appoint receiver – 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.

s. 243, *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

It is respectfully submitted that the plaintiff, CWB Maxium is not a secured creditor of the defendant, MTN RX, under any security instrument or otherwise, and therefore s. 243 of the BIA does not apply.

20. Section 101 of the *Courts of Justice Act* (the "CJA") also provides that the Court may appoint a receiver "where it appears to a Judge of the Court to be just or convenient to do so".

s. 101, *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended.

21. However, the appointment of a s. 101 CJA receiver is an extraordinary remedy which should be granted sparingly.

Royal Bank v. Chongsim Investments Ltd., 1997 CarswellOnt 988 (Ont. S.C.J.).

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011) 2011 CarswellOnt 5676, 2011 ONSC 4136 (Ont. S.C.J.).

22. Importantly, the plaintiff does not seek the appointment of an 'investigative receiver', but rather a full receiver over all of the assets and property of the defendant, MTN RX.
23. While less drastic than a full receiver, even the appointment of an investigative receiver is an extraordinary and intrusive remedy, and one that should only be granted after the careful balancing of the effect of such an order on all of the parties and those who may be affected by the order.

Akagi v. Synergy Group (2000) Inc., 2015 ONCA 368, 2015 CarswellOnt 7407 (Ont. C.A.).

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), *supra*.

24. An investigative receiver has been appointed in circumstances where the company is intricately connected, inter-twined, and inter-dependent with companies already in receivership and it is necessary to review and ascertain transactions within the network of companies. In *WestLB AG Toronto Branch v. Rosseau Resort Developments Inc.*, the corporation sought to be put into receivership was a shell company, and owned by the same shareholder as the company already in receivership. It is respectfully submitted that the circumstances at hand involve an independent, and un-related third party corporation, and the plaintiff and the Receiver have failed to satisfy the burden of proof in respect of their allegations against the defendant, MTN RX.

WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc., [2009] O.J. No. 4285 (Ont. S.C.J. [Commercial List]).

25. The fact is that the Receiver is seeking to seize alleged assets of Mt. Cross through direct interference with MTN RX's business, in the absence of any judgment against MTN RX.

"The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a Mareva injunction, an exception to the general principal that our courts do not grant execution before judgment.

As Salhany L.J. S.C. observed in *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, above, a para 6):

There is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is in effect, an execution before judgment unless there is strong evidence the creditors' right to recovery is in serious jeopardy..."

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), *supra*.

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of) (1987), 16 C.P.C. (2d) 130 (Ont. H.C.).

26. The factors which a Court may consider in determining whether it is appropriate to appoint a receiver include the following:
- 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 of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
 - i) 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.

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002) 2002 ABQB 430, 2002 CarswellAlta 1531 (Alta Q.B.).

- 27. In respect of the above factors, this is not a situation where a secured creditor has the right to appoint a receiver under loan documentation or the security it holds in respect of its borrower, which is 1970636 Ontario Ltd. o/a Mt. Cross. Instead, a receivership appointment is sought in respect of an un-related third party, MTN RX.
- 28. In respect of the nature of the property in issue, the patients which the plaintiff and the Receiver state have been improperly transferred, have been mischaracterized by the Receiver as 'assets' or 'property' which have allegedly been misappropriated by MTN RX from Mt. Cross. It is submitted that neither Mt. Cross nor MTN RX has any proprietary interest in any patient, and any patient is free at any time to choose any health care provider, or in this case any pharmacy from which to receive service.

Maximum Financial Services Inc. v. 1144517 Alberta Ltd., 2015 ABQB 646, 2015 CarswellAlta 1934 (Alta Q.B.)

- 29. In the situation at hand, the Receiver has not sought to claim damages against MTN RX or to pursue a constructive trust or fraudulent conveyance type claim, which it is at liberty to pursue, but has instead sought to seize and take control of MTN RX's business.
- 30. MTN RX has been co-operative and forthright in providing the Receiver with information concerning MTN RX's patient list and other information. There has been no dissipation of assets and there is no risk of dissipation of assets of the defendant. Even if it is considered that the former patients of Mt. Cross may be said to be 'property' of Mt. Cross, the Receiver has failed to prove that MTN RX has either willfully misappropriated or continued to misappropriate or transfer patients to MTN RX as alleged.

31. MTN RX is a fully operating pharmacy, which is licensed and approved by the Ontario College of Pharmacists. There are licensed medical practitioners affiliated with MTN RX who are operating medical practices and serving patients. To appoint a receiver over MTN RX would detrimentally affect the company and the livelihood of its principal and employees. MTN RX states that it has already suffered losses due to media reports concerning Mt. Cross and Kirkopoulos. While there have been losses due to the pharmacy seeking to establish itself, it cannot be said as alleged by the Receiver that there is no business or that the present business is simply a front in which the principal has no real interest.
32. The Receiver has not demonstrated that it has or will suffer any prejudice, sufficient to warrant the onerous and extraordinary appointment of a receiver over the defendant, MTN RX. Any claim by the Receiver made in respect of lost revenue, which claims are denied, may be advanced by the Receiver without the appointment of a receiver over MTN RX.
33. The plaintiff and the Receiver remain at liberty under the present receivership order to continue their investigation in respect of Mt. Cross and the other defendants. To extend the receivership and to appoint a receiver over MTN RX would be over-reaching and unjust.
34. The well-established principle that the appointment of a receiver is extraordinary relief and should be granted cautiously and sparingly, ought to be paramount in these circumstances.
35. It is therefore respectfully submitted that the Receiver has failed to satisfy the burden required to appoint a receiver or to expand its receivership over the defendant, MTN RX, a non-related third party.

PART IV – ORDER REQUESTED

36. The defendant, 1975193 Ontario Ltd. dba MTN RX & Health, respectfully requests:
 - (a) dismissal of the plaintiff's motion for the appointment of a receiver over the defendant, 1975193 Ontario Ltd. dba MTN RX & Health;
 - (b) costs of this motion on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of August, 2018.



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AUTHORITIES CITED

TAB

1. *Royal Bank v. Chongsim Investments Ltd.*, 1997 CarswellOnt 988 (Ont. S.C.J.).
2. *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011) 2011 CarswellOnt 5676, 2011 ONSC 4136 (Ont. S.C.J.).
3. *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368, 2015 CarswellOnt 7407 (Ont. C.A.).
4. *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, [2009] O.J. No. 4285 (Ont. S.C.J. [Commercial List]).
5. *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.).
6. *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002) 2002 ABQB 430, 2002 CarswellAlta 1531 (Alta Q.B.).
7. *Maximum Financial Services Inc. v. 1144517 Alberta Ltd.*, 2015 ABQB 646, 2015 CarswellAlta 1934. (Alta Q.B.)

STATUTES CITED

TAB

- A. s. 243, *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.
- B. s. 101, *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended.

Tab A

Court may appoint receiver

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.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

s. 243, Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended.

Tab B

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

s. 101, *Ontario Courts of Justice Act*, R.S.O. 1998, c. C.43, as amended.

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