



SUPERIOR COURT OF JUSTICE  
**COUNSEL SLIP / ENDORSEMENT**

COURT FILE

NO.: CV-22-00685439-00CL

DATE: 27 -OCT-2022

3

TITLE OF  
PROCEEDING

THE TORONTO-DOMINION BANK  
v.  
2314251 ONTARIO INC. ET AL.

BEFORE JUSTICE OSBORNE

**NAMES OF COUNSEL AND PARTY:**

- APPLICANT(S)  
- M. Lici (Counsel to TD BANK)  
- M. Spence (Counsel to TD BANK)
- PLAINTIFF(S)

PHONE (416) 863-1500;  
(416) 865-3414

EMAIL [mlici@airdberlis.com](mailto:mlici@airdberlis.com);  
[mspence@airdberlis.com](mailto:mspence@airdberlis.com)

**NAMES OF COUNSEL AND PARTY:**

- RESPONDENT(S)  
- J. Rosenstein (for Respondents)
- RESPONDENT(S)
- DEFENDANT(S)
- DEFENDANT(S)

PHONE (416) 635-9614

EMAIL [jrosenstein@rosensteinlaw.ca](mailto:jrosenstein@rosensteinlaw.ca)

PHONE \_\_\_\_\_

EMAIL \_\_\_\_\_

**ENDORSEMENT OF JUSTICE OSBORNE:**

[1] The Applicant, TD Bank, seeks the appointment of a receiver or all of the assets of 2314251 Ontario Inc. [the "Debtor" or "231"], and judgment against each of the individual Respondents, Mohammad Abdul Hafiz ["Hafiz"] and Kawser Zahan ["Zahan"] in accordance with their joint and several guarantees in favour of TD. Each of those guarantors is a 50% owner, officer and director of 231. 231 operates an Esso gas station at its property in Sutton West, Ontario.

[2] On this motion, TD is proceeding only with its request for appointment of a receiver, and is not seeking judgment against the guarantors, which component of the relief is to be adjourned.

[3] Pursuant to a credit agreement dated November 17, 2021, TD provided 231 with a demand operating facility and a term loan, the latter facility to refinance existing loans.

[4] As security for the loan facilities, 231 granted to TD a collateral mortgage on the property and a general security agreement. Each of the Respondents provided an unlimited guarantee by which each of them jointly and severally guaranteed the payment by 231 to TD of all obligations plus interest from the date of demand.

[5] The credit agreement includes relatively typical covenants of 231 to provide prompt notice of any event of default or event that will cause a material adverse change in the financial condition, business operations or prospects of 231, to advise within 10 days of the nonrenewal of any fuel supply contract, to maintain all material contracts in good standing, and to provide annual review engagement financial statements.

[6] The credit agreement also defines typical events of default, including where any representation, warranty or statement "of the debtor" made in connection with the delivery of the credit agreement was false or misleading, if there was a breach or non-performance of any term or condition of the agreement and if, and the determination of TD, a material adverse change occurred in the financial condition, business operations or prospects of 231.

[7] In the spring of 2022, and in accordance with the credit agreement, 231 delivered to TD review engagement financial statements for the year ended December 31, 2021. Those financial statements were purportedly issued by an accounting firm, Fareed Sheik LLP.

[8] In reviewing those financial statements, TD personnel noted they were missing a cash flow statement. TD contacted the accounting firm who advised that the firm had no record of 231 as a client, nor of preparing any financial statements for that company and that the accounting firm had not used its name on letterhead of financial statements for some years [in contradistinction to the financial statements that had been provided to TD].

[9] TD had also relied on financial statements for the years 2019 and 2020, on the same accounting firm letterhead, in connection with its review of 231's original loan application and approvals, prior to entering into the credit agreement. As a result, submits TD, 231 had therefore provided false financial reporting.

[10] TD personnel then visited the gas station property, where TD discovered that there was no gas being offered for sale and assign was posted which stated: "sorry we don't have any gas. We have had no gas since January and we don't know when we will get it again."

[11] 231 had never advised TD of the discontinuance of its gas station operations or the termination of any fuel contract, both of which were covenant obligations under the credit agreement as described above. Accordingly, TD concluded that there had been a material adverse change as well as other events of default.

[12] As a result, on July 11, 2022, TD delivered a formal demand on 231, together with the usual 10 day notice under section 244 of the BIA. On the same date, TD delivered formal demands upon each of the guarantors.

[13] The operating facility is repayable on demand and the term loan is repayable upon the occurrence of an event of default. TD's position in its Notice of Application is that it has received no payment on the demand for the term loan and that non-payment also constitutes a further event of default. As of the date of the demands, approximately \$2.4 million plus costs was due and owing by 231.

[14] Under the general security agreement, TD has the right to appoint a receiver upon the occurrence of an event of default. It seeks that appointment on this motion, and will pursue the balance of the relief sought in the application [i.e., judgment on the guarantees] at a later date.

[15] TD also states that 231 had been referred to TD, together with financing opportunities for a number of other gas stations, by a real estate broker who claimed to specializing gas stations. TD has identified five other different corporate borrowers, all of whom were involved with the same broker, where the accountant who was

identified on the financial statements of the borrower has advised that they did not prepare the financial statements submitted.

[16] TD relies upon the affidavit of an account manager, Amanda Bezner, sworn July 28, 2022. Ms. Bezner has primary responsibility for the management of the loans to 231.

[17] Ms. Bezner was neither the TD employee who contacted the accounting firm [see para 15] nor was she the bank representative who attended for a site business at the property of 231 [see para 17].

[18] TD has also filed two affidavits of Mr. Peter Hanke. In the first, sworn August 26, 2022, he includes the email exchange between TD [albeit represented by a different employee, Ms. Chen] and Mr. Sheik on July 6, 2022 in which Mr. Sheik on behalf of the accounting firm states that 231 is not their client and they had never issued the financial statements. In his second affidavit sworn August 29, 2022, Mr. Hanke includes emails from a colleague within TD [Mr. Cohen] relating to the site visit at the business premises of 231 by a TD representative named Syed Barakat as described in the affidavit of Ms. Bezner.

[19] 231 takes the position that this evidence is hearsay.

[20] 231 filed an affidavit of Afreen Hafiz sworn August 29, 2022 in which Ms. Hafiz states that she is the daughter of the two individual Respondents and has operational responsibility for 231. She states that she has made no inquiries of the accounting firm and therefore has no information one way or the other about its relationship with the financial statements. She goes on to state in her affidavit that she has never had any direct communications with the accounting firm and instead, obtained the financial statements through the efforts of an individual named Vickram Malhotra ["Malhotra"]. She says that the vendor of the gas station property and business who sold it to her parents introduced them to Malhotra.

[21] According to Ms. Hafiz, Malhotra offered to assist 231 and broker the preparation of financial statements by taking from Ms. Hafiz relevant financial information for the business and delivering it to accounting professionals whom he knew following which she would coordinate with the accountants to prepare statements to satisfy the requirements of TD.

[22] Ms. Hafiz does admit in her affidavit that the gas station has not been able to sell fuel for "a number of months" due to "a dispute with its fuel supplier, Parkland". She goes on to describe the dispute with Parkland related in part to the branding of the gas station as Esso as opposed to Ultramar. That dispute, she says, resulted in part in this gas station being compelled to adjust its fuel prices with the further result that it was either selling at a loss or not selling at all. Accordingly, she says, 231 made the business decision to cease selling fuel until the dispute with Parkland is resolved [see paras 22 – 34].

[23] Finally, Ms. Hafiz states that, in the interim and notwithstanding the dispute with Parkland, 231 has at all times kept current in all of its payments with TD, and will continue to do so.

[24] TD takes the position that whether or not its evidence about the accounting firm and the financial statements is in fact inadmissible, the admitted fact is that the gas station has not been selling gas for some months, and this is clearly a material adverse change as defined in the credit agreement which is in turn an event of default entitling it to the appointment of a receiver.

[25] 231 argues that the appointment of a receiver is not just and convenient since there has been no payment default by 231. Moreover, Ms. Hafiz states in her affidavit that, without conceding that the Parkland dispute is a material adverse change, 231 accepts that TD wants the loan paid off in 231 is content to do that.

[26] On information from her father, the Respondent Hafiz, and her belief in that information, Ms. Hafiz states that her father owns real estate in Bangladesh and that he is in the process of selling one or more properties.

Those anticipated proceeds of sale exceed the balance on the loan and the sale should be completed and funds available in Canada by February, 2023.

[27] In addition, Ms. Hafiz says that the current fair market value of the business property of 231 from which the gas station was operated is approximately \$3.5 million, which exceeds the balance of the loan, and 231 will consent to an order, which may be registered on title, the 231 will not permit any disposition of any interest in the property until the loan is repaid.

[28] Finally, 231 relies on an affidavit from Hafiz himself in which he says that he has reviewed, and agrees with, the statements in his daughter's affidavit. He provides further particulars of the properties he says he owns in Bangladesh [albeit without specific addresses or property descriptions of any kind] and states that they have a value equivalent in Canadian dollars of approximately \$9 million in the aggregate.

[29] Hafiz confirms the agreement on behalf of 231 to an order as described above.

[30] Having considered all of the evidence and relevant factors, I decline to appoint a receiver at this time, specifically on terms that:

- a. TD is entitled to immediately register an order on title to the property at which the business of 231 is carried out, as described above. TD can prepare that draft order and submit it directly to me through the Commercial List Office;
- b. 231 shall remain current in all payment obligations to TD;
- c. 231 shall remain current in all other obligations and covenants under the credit agreement, including without limitation all reporting requirements. 231 and the individual Respondents shall provide forthwith to TD any and all information and documentation TD may reasonably require relating to the financial affairs and operations of the business of 231, further including without limitation any and all information about the dispute with Parkland and the resolution thereof; and
- d. the individual Respondent Hafiz shall provide forthwith to TD all information and documentation TD may reasonably require relating to his properties in Bangladesh, specific identifying information related to each property [i.e., what would be equivalent in Ontario to a legal description and municipal address of each property], the status of his efforts to sell those properties, and any information relating to any valuation or appraisal information for those properties.

[31] If the Respondent 231 defaults on any payment obligation to TD, or fails or refuses to cooperate and provide the information and materials described above, or if the respondent Hafiz fails or refuses to cooperate and provide the information and materials described above in respect of the Bangladesh properties, TD may seek the return of this motion on an urgent basis before me. Nothing in this endorsement prejudices any rights of TD including, without limitation, any relief it may seek on the return of the motion and/or application.

Owen, J.