Court File No.: CV-19-616261-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE, R.R.O., REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE STREET LOFTS INC.

FACTUM OF RESPONDENT DAVID POZO
(motion returnable April 22, 2020)

April 20, 2020

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Hi-Rise Capital Ltd.

AND TO: **Service List**

I. OVERVIEW

1. On Wednesday, April 22, 2020, this court will review the proposed sale of 263 Adelaide. Respondent David Pozo is an opt-out investor. He does not oppose this sale. But on Friday, April 17, 2020, Hi-Rise Capital Ltd. advised opt-out counsel that it treated the proposed transaction as a release of all of opt-out investors' claims, in addition to the expected discharge of their security. Hi-Rise counsel refused to clarify the scope of this purported release or adjourn the hearing to allow for a proper response.

2. David Pozo has had a separate action against Jim Neilas, Hi-Rise and their related parties on the civil list of the Superior Court since 2017. Hi-Rise and presumably Neilas are now trying to use the Commercial List approval of the sale of the property to end the Superior Court action.

3. Hi-Rise is citing the minutes of settlement, which were concluded behind closed doors and presented to opt-out investors as a *fait accompli*. But the minutes provide for a release only by those investors who are Representative Counsel's clients. And how can it be otherwise? Opt-out investors such as Pozo are not parties to the minutes, they were not invited to negotiate the minutes, Hi-Rise's notice of application does not refer to any release, and the appointment order specifically insulates opt-out investors from Representative Counsel's settlements. Representative counsel does not oppose David Pozo's position on this motion.

4. Yet today Hi-Rise is trying to tack an opaque undefined release of opt-out investors' rights on an omnibus court approval of a commercial transaction.

Preventing Hi-Rise from doing so will not prejudice the transaction and will protect opt-out investors.

II. FACTS

5. In 2011, David Pozo invested $1,000,000.00 in the 263 Adelaide syndicated mortgage through Hi-Rise. The amount currently owing to him under his share of the mortgage is about $325,000.00 plus accrued interest.[1]

6. On September 13, 2017, David Pozo started an action in Superior Court against Hi-Rise, Jim Neilas, Adelaide Street Lofts Inc., and other defendants, with the court file no. CV-17-582615. The pleadings in the action closed in June 2018, and he intends to move the action forward.[2]

7. In December 2019, Representative Counsel, Jim Neilas, his holding company 263 Holdings Inc., Hi-Rise, Adelaide Street Lofts Inc., and the proposed buyer of 263 Adelaide (Lanterra Developments Ltd.) entered into a settlement agreement to sell 263 Adelaide and discharge the syndicated mortgage, subject to investor vote and court approval.[3]

8. Neither David Pozo nor his counsel were invited to or participated in the negotiation of the settlement agreement of which Hi-Rise is now seeking court approval. He is not a party to this agreement, he did not consent to this agreement, and he is not bound by this agreement. He also has not released and has not agreed to release any party in connection with issues raised in this proceeding. The

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[1] Affidavit of David Pozo affirmed on April 20, 2020, responding record of David Pozo at tab 1, paras. 13–14 [*Pozo Affidavit*].
[2] Pozo Affidavit at para. 37.
[3] Pozo Affidavit at para. 16.

appointment order specifically exempts opt-out investors such as Pozo from being bound by actions of Representative Counsel. The appointment order also provides that investor vote in favour of the proposed transaction merely gives Hi-Rise the right to bring a motion for court approval of the transaction and conduct and fees of Representative Counsel and further directions (see para. 31 of the order).[4]

Unequal distribution of sale proceeds to investors

9. The proposed distribution separates syndicated mortgage investors into two groups: "registered" and "non-registered" investors. The plan provides that the former group will receive 100% of their investment back and the latter, only about 50%.[5]

10. In its January 13, 2020 letter concerning the proposed sale, Representative Counsel wrote about its position on this distinction. According to Representative Counsel, "registered" investors are those who participated in the syndicated mortgage through a trust company by way of a "registered" plan such as an RRSP. "Non-registered" investors participated in the mortgage through Hi-Rise. On property title, both types of investments were bundled into the same second mortgage registered to Hi-Rise and the trust company but according to Representative Counsel, "non-registered" investors agreed to subordinate their interest in the second mortgage to that of "registered" investors contractually by way of their agreements with Hi-Rise. Representative counsel referred to a

[4] Pozo Affidavit at para. 18.
[5] Pozo Affidavit at para. 19.

corresponding provision of a loan participation agreement and attached copies of pages from sample agreements to its letter. Representative counsel referred to the same theory in its Fourth Report.[6]

11. The only time David Pozo agreed to subordinating Hi-Rise's interest in the second mortgage was in 2011. At that time, D. Sud & Sons Limited provided a short-term loan of $2 million to Hi-Rise in return for a portion of the mortgage held by Hi-Rise. Hi-Rise specifically represented to David Pozo that once this loan is paid in full, Hi-Rise will assume the entire mortgage and will not postpone its interest in the mortgage further.[7]

12. David Pozo did not consent to subordination of his investment to other second-ranked mortgages such as investments held through Canadian Western Trust or Community Trust Company.[8]

13. The agreements that David Pozo executed do not contain the subordination provision referred to by Representative Counsel as the basis for classifying investors as "non-registered" for purposes of the distribution of the sale proceeds.[9]

14. David Pozo objects to any treatment of him as a "non-registered" investor and to any corresponding reduction of his share of sale proceeds in relation to any other investor.[10]

15. Nevertheless, he is entitled to his share of the proceeds of any sale of the property as provided by his loan participation agreement with Hi-Rise.

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[6] Pozo Affidavit at para. 20.
[7] Pozo Affidavit at para. 21.
[8] Pozo Affidavit at para. 22.
[9] Pozo Affidavit at para. 23.
[10] Pozo Affidavit at para. 24.

Representative Counsel confirmed that it would include opt-out investors in the distribution of sale proceeds. David Pozo has not previously taken steps in this proceeding to oppose the proposed sale in reliance on this representation of Representative Counsel.[11]

Hi-Rise's last minute assertion of a release from opt-out investors' claims

16. On January 9, 2020, Representative Counsel disclosed the Minutes of Settlement in its Fourth Report. David Pozo did not know the terms of the proposed transaction until then.[12]

17. On the same day, David Pozo's lawyer wrote to Representative Counsel and expressed his concern about the ambiguity of the Fourth Report on including opt-out investors in the distribution of sale proceeds. The Report provided that opt-out investors will participate in the distribution in accordance with the Minutes. But as David Pozo's lawyer wrote to Representative Counsel, the Minutes "specifically exclude opt-out investors from distribution by using only the term 'Investors' in paragraph 10(e)." He further wrote that the Minutes "define this term to exclude opt-outs (see the second whereas clause)." Another opt-out counsel also wrote to Representative Counsel with the same concern.[13]

18. On January 13, 2020, Representative Counsel replied to opt-out counsel and wrote that opt-out investors will be included in the distribution under the terms of the Appointment Order and that the Minutes "need not reflect this." In the same

[11] Pozo Affidavit at para. 25.
[12] Pozo Affidavit at para. 26.
[13] Pozo Affidavit at para. 27.

email, Representative Counsel wrote: “I will pass this email along to Hi-Rise as well.”[14] Presumably, Hi-Rise knew about the issue of whether the Minutes bind opt-out investors in January but did not give notice of its position until the Friday before the hearing.

19. On April 16, 2020, opt-out counsel again raised the issue that opt-out investors are not covered by the Minutes. He requested an amendment to the draft order to reflect an understanding among all the parties that opt-out investors will have the same rights with respect to the distribution of the sale proceeds as opt-in investors.[15]

20. In response this email, counsel for Hi-Rise John Birch wrote that in the Minutes, “Opt-Outs are merely a subset of ‘Investors’ not a different group.” This was the first time Hi-Rise shared this position with opt-out counsel.[16]

21. David Pozo’s lawyer wrote back to John Birch:

> My concern is with Mr. Birch's position that opt-out investors are a subset of "Investors" for the purposes of the Minutes of Settlement. If this position relates only to the payout of the sale proceeds, that is not an issue.
>
> But if this position is understood more broadly to mean that the Minutes bind opt-out investors, I disagree with it. Paragraph 10(e) of the Minutes provides for a payout to "Investors" and it provides that such payout is "in full satisfaction of all claims each Investor may have in relation to the Property and the Project." This appears to be a full release by the "Investors" with a broad scope of the "Property and the Project".
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> Opt-out investors are not parties to the Minutes. Hi-Rise did not seek such release in its notice of application. Rep counsel cannot bind opt-outs. The appointment order is very clear on this. There is no legal

[14] Pozo Affidavit at para. 28.
[15] Pozo Affidavit at para. 29.
[16] Pozo Affidavit at para. 30.

> basis for opt-outs to lose their claims because third parties entered into an agreement. The court cannot approve the Minutes that purport to disentitle opt-out investors of substantive legal rights without notice to opt-out investors. The only notice of prejudice to their rights that opt-outs received was the notice of application which sought the power to discharge the security for less the full outstanding amount. Everything else is either between rep counsel, Hi-Rise and third parties or off the table where opt-outs are concerned.
>
> We have not opposed Hi-Rise's motion in reliance on the language of the Minutes which specifically excludes opt-out investors from the term "Investors" and consequently from the term that the payout is "in full satisfaction of all claims each Investor may have in relation to the Property and the Project." In the second WHEREAS clause of the Minutes, "Investors" are defined as "all individuals and/or entities" that "Miller Thomson LLP was appointed as Representative Counsel ... to represent." This definition then expressly excludes opt-out investors: "except for those Investors who opted out of representation by Representative Counsel in accordance with the terms of the Appointment Order (collectively, the “Opt-Out Investors”)."
>
> This is the first time we learned of a potential issue that Hi-Rise may be seeking a release of all claims by opt-out investors in addition to the discharge of their security. If this is actually the case, we will seek an adjournment of Hi-Rise's motion so we can prepare a response. The adjournment shouldn't be an issue as Lanterra is seeking to move the closing date forward anyway.[17]

22. In response, John Birch admitted that opt-out investors are not parties to the Minutes but asserted that the Minutes nevertheless bind opt-out investors and release opt-out investors’ claims against Hi-Rise and other related parties. When asked about the scope of the purported release, John Birch refused to answer.[18]

23. These emails from John Birch were the first time Hi-Rise or any party asserted that court approval of the proposed transaction would release Hi-Rise and

[17] Pozo Affidavit at para. 31.
[18] Pozo Affidavit at para. 32.

related parties from all of opt-out investors' claims. Hi-Rise did not mention this in any of its information statements before the investor vote.[19]

24. On April 17, 2020, in response to these emails, Representative Counsel again confirmed that

a. "the Minutes do not specifically spell out 'Opt-Out Investors'."

b. "the language in the Minutes doesn't specifically include 'Opt Out Investors' with respect to Distribution."[20]

25. On the same day, Representative Counsel also confirmed that "As for the issue related to the release, this is a matter between Opt Outs and Hi Rise/Adelaide directly, and has nothing to do with Rep Counsel. We are taking no position on this."[21]

III. ISSUES, LAW AND ARGUMENT

26. It appears that Hi-Rise intends to use this court's approval to by-pass the normal legal process and prejudice opt-out investors' rights. Hi-Rise should not be allowed to add a poison pill to the proposed transaction and to put the transaction in violation of the principles in *Royal Bank v. Soundair Corp*. In particular, the approval of the transaction should "consider the interests of all parties" and it should "consider whether there has been unfairness in the working out of the process."[22]

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[19] Pozo Affidavit at para. 34.
[20] Pozo Affidavit at para. 35.
[21] Pozo Affidavit at para. 36.
[22] *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), <http://canlii.ca/t/1p78p>, retrieved on 2020-04-20, at para. 16 (in the version found in Hi-Rise BoA, tab 5).

27. Allowing Hi-Rise to interpret the transaction as imposing some sort of vague, undefined, and unlimited release on opt-out investors is contrary to the interests of opt-out investors.

28. Allowing such interpretation on the backdrop of the closed-door, *fait accompli* process that parties to the minutes of settlement used will create unfairness in the process and tarnish the proposed transaction. It appears that of all the parties to the minutes of settlement only Hi-Rise and presumably Neilas and his entities are asserting a release by opt-out investors (apart from the normal and expected discharge of security interests in 263 Adelaide).

29. In its factum, Hi-Rise refers to its other application before this Court. It was similar to this one and was related to 799 College Street in Toronto. In that application, this Court approved a sale of that property for less than the total outstanding amount. That order was made without prejudice to investors' rights to pursue their claims for any deficiency.[23] There is no reason why this Court should not make the same order in the present case.

30. In *Canadian Imperial Bank of Commerce v. Costodian Inc. et al*, this Court again denied a party similar to a trustee a request for a release in an insolvency context. A bank sought an interpleader order where it froze disputed funds and wanted to pay them into court but at the same time it sought an order protecting it from liability for freezing the funds improperly and causing losses. This was in an insolvency context similar to the Hi-Rise situation. This Court granted the

[23] Endorsement and Order of Justice Hainey dated February 28, 2019 in Hi-Rise Capital Ltd. v Superintendent of Financial Services et. al. (CV-19-00614404-00CL), Hi-Rise BOA, Tab 2.

interpleader but denied the bank protection from liability for handling third parties' property.[24]

31. There is no reason why this Court should depart from its jurisprudence in the present case.

32. Finally, Hi-Rise's apparent effort to use this Court to determine a proceeding on the civil list violates the rule against multiplicity of proceedings[25] and the requirement that Hi-Rise give notice of any relief it intends to seek. Hi-Rise did not refer to any release in its notice of application.

IV. RELIEF SOUGHT

33. Respondent Pozo requests that any court approval of the transaction or other order made at the return of this motion be without prejudice to any of his claims (other than claims for a security or other interest in 263 Adelaide).

34. If the issue of priorities in distribution of the sale proceeds to investors is raised at the hearing, David Pozo requests that any order treat him as a registered investor.

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[24] *Canadian Imperial Bank of Commerce v. Costodian Inc. et al*, 2018 ONSC 6680 (CanLII), <http://canlii.ca/t/hw142>, retrieved on 2020-04-20 at para. 37.
[25] *Courts of Justice Act*, RSO 1990, c C.43, s. 138.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20TH DAY OF APRIL 2020

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SCHEDULE A—LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), <http://canlii.ca/t/1p78p>, retrieved on 2020-04-20.

2. Endorsement and Order of Justice Hainey dated February 28, 2019 in Hi-Rise Capital Ltd. v Superintendent of Financial Services et. al. (CV-19-00614404-00CL), Hi-Rise BOA, Tab 2.

3. *Canadian Imperial Bank of Commerce v. Costodian Inc. et al*, 2018 ONSC 6680 (CanLII), <http://canlii.ca/t/hw142>, retrieved on 2020-04-20.

SCHEDULE B—TEXT OF STATUTES AND REGULATIONS

Courts of Justice Act, RSO 1990, c C.43

138 As far as possible, multiplicity of legal proceedings shall be avoided. R.S.O. 1990, c. C.43, s. 138.

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Proceeding commenced at Toronto

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