

COURT FILE NO. 1603 02314

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFFS THREE M MORTGAGES INC. and AVATEX LAND CORPORATION

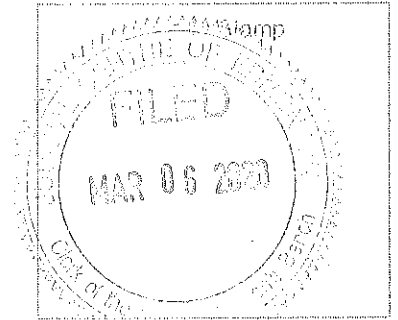
DEFENDANTS TODD OEMING, TODD OEMING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERTA OEMING AND THE ESTATE OF ALBERTA OEMING

DOCUMENT **APPLICATION BY 1705221 ALBERTA LTD. FOR A STAY OF THE ASSET SALE AND VESTING ORDER OF FEBRUARY 28, 2020**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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NOTICE TO RESPONDENTS:

This application is made against you. You are a Respondent. You have the right to state your side of this matter before the Master/Judge.

To do so, you must be in Court when the application is heard as shown below:

Date: March 12, 2020
Time: 8:30 a.m.
Where: Edmonton Law Courts Building
Before Whom: Mr. Justice D.R. Mah

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. An order staying in its entirety, pending appeal or application to the Court of Appeal, the Sale Approval and Vesting Order granted by this Honourable Court on or about February 28, 2020.
2. Such further and other relief this Honourable Court considers appropriate in the circumstances including, without restriction orders as to costs.

Grounds for making this application:

3. By Order of the Court dated October 10, 2019, BDO Canada Ltd. in its capacity as Receiver of Wild Splendour Development Inc. (the "Receiver") was authorized to, among other things execute a listing agreement with Avison Young Canada Inc. ("Avison") on the terms set out in a Proposal which was exhibited to a Confidential Supplement filed in support of the October 10, 2019 Order.
4. The Receiver entered into that listing agreement however the listing agreement has not been put into evidence before this Court whether confidentially or otherwise.
5. In order for the Court to approve a sale by a receiver, it is clear that the receiver must satisfy a test set out by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corporation* 1991 CanLII 2727 (ONCA) and in that regard the test requires the Court to consider four factors:
 - (a) Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - (b) Whether the interest of all parties has been considered, and not just the interest of the creditors or debtors;
 - (c) The efficacy and integrity of the process by which offers are obtained; and
 - (d) Whether there has been unfairness in the working out of the process.
6. The Receiver, and by extension Avison, as authorized by the Court to effect the sale, both had duties of candour to the Court in terms of the process by which offers are obtained, held and considered and what that process was, how it was communicated to bidders and what factors would be addressed in considering the offers.
7. In *Jaycap Financial Ltd. v. Snowden Block Inc.* 2019 ABCA 47, the Court of Appeal made the following statements with respect to receivership sales and the fairness and integrity in respect of the process leading to a sale. At paragraph 28:
 - (a) While insolvency proceedings are subject to special procedural rules and are understandably time sensitive, those considerations do not relieve the receiver from basic obligations to the parties and the Court to provide evidence to meet its burden of proof;
 - (b) The receiver, if appointed by the Court, is an officer of the Court appointed to discharge its duties prescribed by the appointment;

- (c) The receiver has duties not only to the Court but also to the parties interested in the debtor's assets, property and undertakings; and
 - (d) The receiver, and by extension its agents such as Avison, have a duty to discharge their obligations honestly and in good faith.
8. A critical part of meeting the evidentiary burden is providing evidence of what the process is. The Court should have before it the evidence of that process, including the listing agreement between the Receiver and Avison. That listing agreement has not been disclosed.
 9. The evidence disclosed in this proceeding indicates that the listing agent had in its hand an offer from the Applicant 1705221 Alberta Ltd., had advised the Applicant 1705221 Alberta Ltd., through 1705221 Alberta Ltd's realtor, that its offer was acceptable to the Receiver yet did not provide explanations on why acceptance was delayed appears to have worked with other buyers, including the successful buyer, in circumstances which lead to the inference that the Applicant's offer may have been shopped, a circumstance which is not denied by Avison. The Court made a finding that it was not so shopped.
 10. The failure to disclose the terms of the listing agreement, the process for acceptance of the offers and the failure to have that before the Court on the hearing of the approval application in circumstances where the process, and handling, have been challenged was an oversight on the part of the Receiver. The process cannot be found to be fair and reasonable without a complete record.
 11. In terms of the tripartite test for a stay is:
 - (a) There a serious question for appeal?
 - (b) Would the applicant suffer irreparable harm?
 - (c) Does the balance of convenience favour granting or refusing a stay?
 12. As outlined above, there is a serious question for appeal in respect of the evidence put before the Court on the process itself, its fairness and integrity.
 13. The applicant, if the stay is not granted, will lose the opportunity to buy this parcel of land. While land generally is not considered to be "unique" this parcel in particular is: it is a former game farm with a unique history and unique opportunities for use.
 14. Does the balance of convenience favour granting or refusing a stay? There is no indication that any party is going to walk away from their offers if this is stayed for a short period of time and no indication that the receivership estate will suffer harm.
 15. Such further and other grounds as counsel may advise and this Court may permit.

Material or evidence to be relied on:

16. All evidence before the Court on the Application of February 27 and 28, 2020.

Applicable rules:

17. Rules 1.4(2) and 14.48 of the Alberta Rules of Court.

Applicable Acts and regulations:

18. *Judicature Act*, s. 13(2).
19. Alberta Business Corporations Act.
20. Such further acts and regulations as counsel may advise and the Court permits.

Any irregularity complained of or objection relied on:

21. The Receiver's failure to include the listing agreement and evidence of the process communicated to bidders in the sale of these assets.

How the application is proposed to be heard or considered:

22. In person before the Honourable Mr. Justice D.R. Mah.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the Applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the Applicant(s) a reasonable time before the application is to be heard or considered.