

CITATION: D'Amore v. Banwell Development Corp. Ont. Ltd., 2015 ONSC 6249
COURT FILE NO.: CV-11-17088
DATE: 20151008

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kevin D'Amore, Applicant

AND:

Banwell Development Corporation, 928579 Ontario Limited, Scott D'Amore and Royal Timbers Inc., Respondents

BEFORE: Thomas J.

COUNSEL: Tony Van Klink and Sherry A. Kettle, Counsel, for BDO Canada Limited, Court appointed Receiver of Banwell Development Corporation and Royal Timbers Inc.

Raymond G. Colautti, Counsel, for the Respondent, Scott D'Amore

Robert J. Reynolds, Counsel for the Respondent, J. Murray Troup and 928579 Ontario Limited

James K. Ball, Counsel, for the Execution Creditor, M.R. Dunn Contractors Ltd.

Craig J. Allen, Counsel for D'Amore Construction (2000) Ltd.

Philip S. Chandler, Counsel, for the Estate of Patrick D'Amore and Simba Group Developments Limited

HEARD: October 6, 2015

ENDORSEMENT

[1] I have today reviewed the confidential supplement to the Ninth Report prepared by Miller Thomson LLP, counsel for the receiver BDO. The supplement considers the claims and defences in the Consolidated Action and provides two alternative recommended causes of action. It is clear that receiver's counsel wishes to sever the action from the receivership so that the creditors are not left to collectively fund the litigation and it can move on to conclude its mandate.

[2] Counsel for the shareholders, Kevin and Scott D'Amore, take no position on the position of Miller Thomson. Mr. Reynolds for Troup strongly opposes the Miller Thomson proposal and wants the litigation to remain within the umbrella of the receivership whether the stay is lifted or not. Mr. Reynolds suggests that since the shareholders are unable to cooperate with each other to excise this litigation from the receivership will effectively mean it will expire by judgment or dismissal and a potential corporate asset will be lost.

- [3] The mandate of BDO as facilitated by its counsel is to liquidate, in an orderly, way the corporate assets of Banwell and the related corporate entities and then to satisfy the claims of creditors with the balance to be distributed to the shareholders. Its mandate is not to pursue speculative litigation consuming time, resources, and the proceeds of the receivership. If the shareholders believe there is money to be made from the Consolidated Action they can choose to pursue it and fund it. If the shareholders choose to do nothing or cannot cooperate to press the litigation forward to resolution it is simply another price that must be paid as a consequence of their dysfunctional relationship.
- [4] To leave this litigation within the receivership and not lift the stay perpetuates an unquantified potential liability that acts as a roadblock to distribution. Eventually creditors need to be paid and the receivership needs to end.
- [5] As a result, the stay of proceedings imposed upon the Consolidated Action and, in particular, action no. 06-CV-6763 commenced in Windsor is lifted and the Consolidated Action in its entirety is free to proceed.
- [6] Because Kevin D'Amore continues to be a shareholder of D'Amore Construction it is impractical to impose the second alternative suggested by receiver's counsel, that is an assignment of the cause of action to the highest bidding shareholder. Instead, I am ordering that the causes of action asserted in the Consolidated Action are excluded from the property subject to the receivership. Any shareholder(s) who wish to fund Banwell and Royal Timbers to continue the pursuit of the litigation may do so outside of the receivership, recognizing, however, that all shareholders by virtue of being shareholders will ultimately share in any net benefit realized from the litigation whether or not they participated in the funding of the costs.



Bruce Thomas
Justice

Date: October 8, 2015