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ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00728653-00CL

DATE: 06 December 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: **EQUITABLE BANK v. MALEKI IN HIS CAPACITY
AS ESTATE TRUSTEE OF THE ESTATE OF NGA
TU TROUNG, ALIREZA ET AL.**

BEFORE: JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Catherine Francis	Counsel for the Applicant, Equitable Bank	cfrancis@foglers.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Peter Naumis	Representative of BDO Canada Limited	
Wojtek Jaskiewicz	Counsel for the Receiver, BDO Canada Limited	wjaskiewicz@weirfoulds.com
Ali Maleki	Representative (Daughter) of Alireza Maleki	

ENDORSEMENT OF JUSTICE J. KIMMEL:

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- [1] BDO Canada Limited ("BDO"), in its capacity as the Court-appointed Receiver (in such capacity, the "Receiver"), without security, of all assets, undertakings and properties of Alireza Maleki in his capacity as estate trustee of the estate of Nga Tu Truong (the "Debtor"). The Debtor is the sole registered owner of the real property located at 1201 St. Clair Avenue West, Toronto, Ontario (together, the "Property"). The Receiver seeks an order for vacant possession and a writ of possession in respect of the Property, an order for substituted service or an order dispensing with service of the motion on the occupant of the Property and for the approval of its First Report dated November 27, 2024 (the "First Report") and its activities described therein.
- [2] The Property is subject to a first ranking mortgage in favour of the applicant, Equitable Bank (the "Bank"). The Bank consents to the relief sought on this motion by the Receiver.
- [3] The October 24, 2024 order appointing the Receiver (the "Appointment Order") empowered and authorized, but did not obligate the Receiver to, among other things:
- a. take possession of and exercise control over the Real Property and any and all proceeds, receipts and disbursements arising out of or from the Real Property;
 - b. market the Property on such terms and conditions of sale as the Receiver deems appropriate; and
 - c. sell, convey, transfer, lease or assign the Property.

Order Validating Service of this Motion on the Occupant of the Property

- [4] The First Report describes in detail the efforts that the Receiver has made to bring this receivership to the attention of Jose R. Quintanilla, the person believed to be occupying one of the residential units located at the Property (the "Occupant"). Despite numerous attempts (described in paragraphs 31 to 38 of its First Report), and despite the clear indications that there is someone living at the Premises, including because of the persistent presence of at least one barking dog at each visit to the Property, the Receiver has been unable to personally serve the Occupant with the Appointment Order since it was made on October 24, 2024, or to discuss the Property with the Occupant. The Receiver advises that it has exhausted all available avenues in an effort to contact the Occupant.
- [5] The affidavit of service of the Receiver's process server sworn November 29, 2024 describes the efforts that were made to serve this motion on the Occupant, as follows:
- a. On November 28, 2024, at approximately 3:05 p.m., attempts were made to personally serve Jose Quintanilla with a true copy of the Motion Record of the

Receiver (returnable December 6, 2024) by attending 1201 St. Clair Avenue West, Apt. 1 & 2, Toronto, Ontario, M6E 1B5. There was no answer and therefore personal service of the Motion Record could not be effected upon the Occupant.

- b. On November 28, 2024, at approximately 3:10 p.m., as instructed by the law firm WeirFoulds LLP, Jose Quintanilla was served with true copies of the Motion Record of the Receiver (returnable December 6, 2024) by taping the said documents in sealed envelopes addressed to Jose Quintanilla to the front door of 1201 St. Clair Avenue West, Toronto, Ontario, M6E 1B5 for Apartment 1 & 2.

- [6] In addition to the steps described in the First Report, the Receiver's representative, in his capacity as an officer of the court, advised the court that the Appointment Order had been left taped to the door of the Occupants' apartment with a business card and note to call the Receiver, and that upon re-attending at the Property on a subsequent occasion, the material that had been left taped to the door was no longer there. This leads to the reasonable inference that the Occupant removed it, and therefore is aware, or has willfully chosen not to be aware, of these proceedings. It also leads to the reasonable inference that the Occupant received the motion record that was left taped to the door last week when the process server attempted to serve it.
- [7] It is reasonable to infer that the Occupant is aware, or is wilfully choosing not to become aware, of the relief sought by this motion and is evading service.
- [8] Pursuant to Rule 16.08 (a) and (b) of the *Rules of Civil Procedure*, where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that the document came to the notice of the person to be served or the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.
- [9] The Receiver proffered the following cases to support its submission that the court must either be satisfied that the document came to the notice of the person to be served or that did not come to the person's notice because the person evaded service: See *MTCC No. 1025 v. Hui*, 2021 CarswellOnt 12305, 2021 ONSC 5839, at paras. 20 and 21; *Maison Prive v. Moazzani*, 2020 CarswellOnt 19918, 2020 ONSC 8199, 335 A.C.W.S. (3d) 389, 70 C.P.C. (8th) 424, at paras. 19 and 20; *Canadian National Railway Company v. John Doe, Jane Doe and Persons Unknown*, 2020 CarswellOnt 7049, 2020 ONSC 3033, 318 A.C.W.S. (3d) 662, at paras. 17 and 18.
- [10] I am satisfied that if the Appointment Order and the Motion Record for this motion seeking possession and leave to issue a writ of possession in respect of the Property likely has come to the Occupant's attention by the efforts that have been undertaken by the G24

Receiver to serve him and leave copies of the materials at the Property at the entrance to the apartment that he is occupying. In any event, I find that, if they have not come to his attention, it is because he has attempted to evade service, based on the Receiver's detailed description of its efforts to serve the Occupant set out in the First Report. The order validating service of this motion on the Occupant is granted. G25

Order for Possession and Writ of Possession

- [11] Rent has not been paid in years and the rent arrears to November 2024 is estimated to be \$61,534. 51. The Bank has not received any payments under the mortgage since the passing of the Debtor, Nga Tu Truong, in or around September 8, 2023. The Receiver believes that the municipal property taxes have also not been paid and continue to accrue. The Bank is owed in excess of \$420,000 and the actions of the Occupant are interfering with the Bank's ability to realize upon its security and prejudicing the Bank and other creditors of the Debtor.
- [12] The First Report outlines a number of serious issues with the Property, including:
- a. the gas utility to the property was disconnected prior to the receivership and the Property is without a source of heat;
 - b. the Occupant has not paid rent for years;
 - c. as of March 2024, the Occupant was in arrears in excess of \$43,724, with the current amount being materially higher;
 - d. the Occupant is allegedly breeding pit bull dogs;
 - e. the Occupant is allegedly occupying more than just one residential unit;
 - f. the Occupant is denying access to the Property including, but not limited to, the unit that the Occupant initially rented; and
 - g. the Receiver is unable to obtain property insurance with the Occupant present in the Property which is compromising the value of the entire Property.
- [13] Further, winter and cold temperatures are approaching and the Receiver is concerned the lack of heat may potentially cause damage to the Property through frozen and broken water pipes, etc. The main water supply to the Property cannot be turned off. The Property is adjoining other retail properties and contains a sprinkler system to help manage any fire outbreaks. Turning off the water main would compromise the sprinkler system and would not be authorized by Toronto Fire.

- [14] Additionally, the lack of heat is a potential threat to the Occupant's health and safety. The Receiver is further concerned what steps the Occupant may take to keep himself and the dog(s) warm, which may further compromise the Real Property and neighbouring properties.
- [15] The amount of the rent arrears and other potential costs for damages to the Property that the Receiver would claim from the Occupant who is refusing to vacate the Property exceeds the monetary jurisdiction of the Small Claims Court, and therefore also of the Residential Tenancy Board (the "Board"). Accordingly, under s. 207(2) of the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17, this court has the jurisdiction in the context of a proceeding before it to exercise any powers that the Board could have exercised if the proceeding had been before the Board and within its monetary jurisdiction, including granting leave to terminate a tenancy (insofar as a tenancy exists with the Occupant) and issue a writ of possession in respect of the Property. See also *Kaiman v. Graham*, 2009 ONCA 77, at para. 14.
- [16] A writ of possession may be issued pursuant to r. 60.10 only with leave of the court. Rule 60.10(2) of the Rules sets out criteria to be met for the court to exercise its discretion to grant leave to issue a writ of possession. The Receiver has applied for the order for possession and leave to issue a writ of possession in this proceeding on the basis of the outstanding occupancy rent and other costs the Occupant may be liable to the Debtor for, the collection of which fall within the Receiver's mandate under the Appointment Order made in this proceeding.
- [17] The court is entitled to exercise its discretion to grant leave to issue a writ of possession "only where it is satisfied that all persons in actual possession of any part of the land have received sufficient notice of the proceeding in which the order was obtained to have enabled the moving party to apply to the court for relief": See *C.C.C. No. 88 v. Yousef*, 2024 ONSC 2693, at para 23.
- [18] I am satisfied that the Occupant has received sufficient notice of this proceeding and the relief sought by this motion, for the same reasons indicated in the previous section of this endorsement dealing with the order validating service on him.
- [19] The Receiver has been unable to fulfil its mandate under the current conditions, due to the conduct of the Occupant and his refusal to acknowledge the receivership or engage with the Receiver. The delays are prejudicing the creditors of the Debtor's Estate and also potentially compromising the security over the Property, among other concerns noted above. This is an appropriate case in which to exercise my discretion to make an order for possession and grant leave to issue a writ of possession in respect of the Property.
- [20] For all of these reasons, the Receiver's requests for an order for possession and leave to issue a writ of possession are granted.

- [21] Lastly, the Receiver seeks approval of its activities as described in the First Report. Interim approval of the Receiver's activities has become an accepted practice in this court, subject to the reliance restriction which has now been included in the revised draft order.
- [22] The revised form of order signed by me today may issue.

A handwritten signature in dark ink, appearing to read "Kimmel J.", with a stylized, cursive script.

KIMMEL J.