

COUNSEL SLIP

COURT FILE

NO.: CV-22-00676500-00CL

DATE: April 1st 2022

NO. ON LIST 3

TITLE OF
PROCEEDING

BUSINESS DEVELOPMENT BANK OF CANADA
-v-
BLUGO ENTERPRISE INC

COUNSEL FOR:

PLAINTIFF(S)

APPLICANT(S)

PETITIONER(S)

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COUNSEL FOR:

DEFENDANT(S) Javed Siddiqui (self-rep)

RESPONDENT(S)

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JUDICIAL NOTES:

- [1] Business Development Bank Canada ("BDC") seeks an Order for the appointment of a receiver over the assets of the respondent, Blugo Enterprises Inc. ("Blugo"), acquired for or used in relation to a business or businesses of Blugo, including real property owned by Blugo municipally known as 46 Mimico Avenue, Toronto, Ontario.
- [2] BDC brings this application pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* and s. 101 of the *Courts of Justice Act*.
- [3] Blugo is indebted to BDC in connection with credit facilities made available by BDC pursuant to the terms of certain credit agreements. The credit agreements provide for loans which, as of December 6, 2021, were unpaid in the aggregate amount of \$1,064,666.71 together with applicable principal arrears, interest and other obligations owing thereunder.
- [4] The respondent, Javed Siddiqui, is the sole shareholder and a director of Blugo. Mr. Siddiqui is jointly liable as borrower with Blugo under one of the three loan facilities granted by BDC that remains unsatisfied. Mr. Siddiqui is also the sole owner and director of each of the corporate guarantors under the credit agreements with BDC.
- [5] Mr. Siddiqui acknowledges the indebtedness owing to BDC.
- [6] BDC is a secured creditor of Blugo. As security for the obligations owed to BDC under the credit agreements, Blugo provided security in favour BDC including:
 - a. a general security agreement from Blugo dated November 24, 2017 granting BDC, among other things, a security interest in any and all of Blugo's property, assets, and undertaking; and
 - b. a first ranking charge/mortgage granted by Blugo in favour BDC registered on December 1, 2017 in respect of real property at 46 Mimico Avenue, Toronto, Ontario (the "Real Property").

- [7] Blugo is the registered owner of the Real Property.
- [8] Blugo is in default of its obligations under the credit agreements including by failing to make required payments thereunder including from October 2020 to present. In a letter dated July 30, 2020, BDC had agreed to postpone payment of interest and principal until October 1, 2020 in light of Blugo's continued difficulties with repayment. Blugo failed to make payments under the credit facilities as required for each month since October 2020.
- [9] As of December 6, 2021, total of \$1,061,666.71 was owing under the credit agreements (plus accrued interest in recovery costs and expenses).
- [10] On November 12, 2021, BDC sent a letter to Blugo to provide formal notice of various defaults under the credit agreements. BDC advised that failure to pay the arrears and remedy the defaults by November 27, 2021 would result in a formal demand of repayment of the loans in full. BDC received no response to its pre-demand letter, and Blugo failed to remedy the defaults.
- [11] On December 9, 2021, a formal demand letter was served upon Blugo by counsel for BDC with demands for immediate payment of the indebtedness and accruing interest, together with all fees and any and all costs and expenses incurred by BDC. The demand letter enclosed BDC's Notice of Intention to Enforce Security pursuant to section 244 of the *BIA*.
- [12] On December 21, 2021, BDC sent an email to Mr. Siddiqui indicating its willingness to enter into a forbearance agreement with Blugo for a four month period and enter into a forbearance agreement with terms and conditions to be agreed upon that would include certain specified terms and conditions. Mr. Siddiqui provided no response. Mr. Siddiqui stated at the hearing that he was waiting for documents from BDC to give effect to the forbearance. The evidence is clear, however, that the necessary conditions for the proposed forbearance were not agreed to or satisfied. No forbearance agreement was entered into.
- [13] Since the issuance of the formal demand and notice, Blugo has failed to make satisfactory arrangements with BDC to repay amounts owed under the credit agreements.
- [14] BDC submits that the appointment of a receiver is necessary in order to ensure that the Real Property is secured and that a Court officer can ensure that it is properly maintained pending an orderly and transparent sales process. BDC submits that the appointment of a receiver is just and equitable and is necessary for the protection of the interests of BDC, as a secured creditor, and other stakeholders.
- [15] Mr. Siddiqui appeared in response to this application and provided a written response on his behalf and on behalf of Blugo. In the written response, Mr. Siddiqui acknowledges the indebtedness of \$1,074,000 owed to BDC. He explains the effect of the COVID-19 pandemic on Blugo's business. He explains the communications with RBC with respect to possible forbearance arrangements and his requests for additional time to make arrangements to satisfy the indebtedness owed to BDC.
- [16] Mr. Siddiqui appends to his written response a copy of agreement of purchase and sale of the Real Property with a numbered company as buyer for a purchase price of \$1,400,000. Mr. Siddiqui also appended a letter of intent for the share purchase of Blugo's business operating at the Real Property for \$340,000. The closing date for the proposed purchase of the Real Property is May 31, 2022.
- [17] Mr. Siddiqui relies on this purchase agreement and requests an adjournment of this application for the appointment of a receiver to a date following the May 31, 2022 closing date.
- [18] I do not accept that the purchase agreement for the Real Property should delay BDC in enforcing its security. Although the purchase agreement provides for a closing date of May 31, 2022, it expressly provides that this date may be extended by either party giving written notice five business days before

the stated closing date. Of more concern is that the purchase agreement is subject to other conditions (i) for the buyer to secure financing; and (ii) until May 31, 2022, for individuals (principals of the buyer) to successfully negotiate a share purchase agreement for the shares of the company that is the licensed operator of the daycare facility operating at the Real Property. The effect of these conditions is that there is no assurance that a private purchase of the Real Property will be completed by May 31, 2022, or at all.

- [19] Section 243(1) of the *BIA* provides that on an application by a secured creditor, a court may appoint a receiver to, among other things, take possession over the assets of an insolvent person and exercise any control that the court considers advisable over that property and over the insolvent person's business, where it is "just or convenient". The *CJA* enables the Court to appoint a receiver where would be "just or convenient" to do so.
- [20] In deciding whether the appointment of a receiver is just or convenient, the court must have regard to all of the circumstances but, in particular, the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of a secured creditor under its security. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered. Where the security instrument permits the appointment of a receiver, the question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This involves the examination of all the circumstances including the potential costs, the relationship between the debtor and creditors, the likelihood of maximizing the return on and preserving the subject property, and the best way of facilitating the work and duties of the receiver. See *Bank of Nova Scotia v. Freure Village on Claire Creek*, 1996 CanLII 8258 (ON SC), at paras. 10-12.
- [21] In the circumstances, I am satisfied that it is just and convenient for a receiver to be appointed. The technical requirements under the *BIA* have been satisfied. There has been a history of delays by Blugo in satisfaction of its obligations under the credit facilities. BDC has acted reasonably and giving accommodations to Blugo. Notwithstanding these accommodations, the loans have been outstanding for many months.
- [22] If the purchaser under the purchase agreement wishes to purchase the Real Property, it will be able seek to do so through the receivership process.
- [23] The appointment of a receiver will facilitate the sale of the Real Property through a transparent process under the supervision of the Court, through a court-appointed officer with duties to all stakeholders. In these circumstances, this process will ensure that Blugo's assets are realized on fairly and equitably.
- [24] Order to issue in form of Order signed by me today.