



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: **31-2747949 (and other court files listed in Schedule "A" hereto)** DATE: **8 February 2023**

NO. ON LIST: _____

TITLE OF PROCEEDING: **IN THE MATTER OF THE BANKRUPTCY OF GROSS CAPITAL INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO AND IN THE MATTERS LISTED ON SCHEDULE "A"**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION – SEE ATTACHED PARTICIPANT SHEET

ENDORSEMENT OF JUSTICE KIMMEL:

1. Two groups of plaintiffs (described as the Liu Plaintiffs and the Xing Plaintiffs, or the "Moving Parties") in two separate civil actions (the "Actions") have brought motions in seven bankruptcy proceedings (the "Bankruptcy Proceedings") and three receivership proceedings (the "Receivership Proceedings"), as listed in Schedule "A" hereto, to lift the stay of proceedings in the Bankruptcy and Receivership Proceedings *nunc pro tunc* so that they can pursue their Actions.
2. The named defendants in the Actions include the entities that are the subject of the Bankruptcy and Receivership Proceedings, but also name other defendants that are not bankrupt or in receivership, including the individuals Mark Gross and Sheldon Gross who are alleged to be the directing minds and owners of the named corporate defendants (some of which are in bankruptcy and receivership and some of which are not).
3. The stay of proceedings under s. 69.3 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") applies to the entities that are the subject of the Bankruptcy Proceedings. Section 69.3 of the BIA provides as follows:

69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

4. There is a court ordered stay in all of the Receivership Proceedings.
5. Counsel advise that the BIA s. 69.3 stay and court ordered receivership stays have been interpreted as applying to the entirety of an action that names the person or entity in whose favour the stay operates, and not just the pursuit of claims against that person or entity. This is in part why the Moving Parties seek to lift the stays, because their Actions name other defendants as well, who are not the subject of the Bankruptcy or Receivership Proceedings.
6. The stay imposed under s. 69.3 of the BIA is subject to s. 69.4 that provides as follows:

69.4: A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

7. There is a court ordered stay of proceedings in respect of the entities that are the subject of the Receivership Proceedings, which contains the standard provision that the stay is imposed “pending further Order of this Court.” The considerations to be taken into account with respect to the lifting of a stay of proceedings under a receivership order are guided by the same principles applied to the lifting of a stay in bankruptcy pursuant to s.69.4. See *Rompsen Investment Corporation v. Courtice Auto Wreckers*, 2016 ONSC 1808, at para 18.
8. The trustees/receivers of all of the entities that are the subject of the Bankruptcy and Receivership Proceedings were served with this motion and, after some negotiation over the wording of the form of order, none of them oppose the relief now sought. The specific terms of the draft order sought have been drafted so as to avoid interfering with the bankruptcy/insolvency proceedings.
9. The proposed forms of order make it clear that no enforcement steps may be taken against the entities in the Bankruptcy and Receivership Proceedings or their property based on any judgment obtained in the Actions whether by default or otherwise and that such enforcement steps remain subject to the applicable stay in each such proceeding.
10. The proposed forms of order make it clear that while the Actions may proceed, including as against these entities that are the subject of the Bankruptcy and Receivership Proceedings, there is no expectation that the trustees/receivers will respond to or participate in those Actions (with a limited exception for possible document requests which may be made but remain subject to further orders of the court).
11. Since it is not expected that there will be any distributions to or recoveries for unsecured creditors the trustees/receivers have no economic interest in defending the claims or spending time and money to value them. It is thus not expected that the trustees/receivers will defend the Actions. At some point, the Moving Parties may seek default judgment against the entities that are the subject of the Bankruptcy and Receivership Proceedings.
12. The proposed forms of order make it clear that the leave granted to the Moving Parties to commence and continue to prosecute the Actions as against the entities subject to the Bankruptcy and Receivership Proceedings is for the purpose only of establishing the amount of the Moving Parties’ unsecured claims that they may submit with a proof of claim in the corresponding bankruptcies/receiverships.

13. While it appears to be appropriate in this case (having regard to the economics of the estates) to allow the unsecured claims of the Moving Parties to be crystalized and confirmed through their continued pursuit of the Actions, notwithstanding the existence of the Bankruptcy and Receivership Proceedings, that may not always be the case. There are often situations in which it is considered to be preferable for all claims to be determined in the insolvency proceedings. This case appears to be an exception rather than the norm.
14. Counsel for the Moving Parties advised the court that counsel for the individual defendants Mark and Sheldon Gross did receive a copy of this motion. They did not appear or indicate any position in advance. In the absence of these other parties, I wish to note that the court does not intend by granting the requested orders lifting the stay of proceedings to permit the Actions to continue against the entities that are the subject of the Bankruptcy and Receivership Proceedings (which may result in default judgments against those entities) to take away any existing defences or procedural rights that the other defendants to those Actions may have, including with respect to the merits of the claims against any defendants against whom default judgment is obtained after the stay of proceedings is lifted.
15. The Actions were commenced after the Bankruptcy and Receivership Proceedings for the purpose of preserving limitation periods. This was a legitimate concern and I am satisfied it was not done to undermine the Bankruptcy or Receivership Proceedings. This does not render the Actions a nullity. It is an irregularity that the court may cure by lifting the stay *nunc pro tunc*. See *Royal Bank of Canada v Streetsville Eyecare Inc.*, 2022 ONSC 4609, at paras. 27-46. See also *Rompsen*, at para. 40.
16. I am satisfied with the terms that have been incorporated into the proposed forms of order to address the concerns raised by KPMG and for the reasons indicated herein, that it is fair and equitable and appropriate in the circumstances of these proceedings to grant the orders to lift the stay of proceedings. Various other terms of the proposed forms of order were reviewed and explained and I consider them to be appropriate in the circumstances of this case.
17. Orders to go in the forms signed by me today.

A handwritten signature in black ink, appearing to read "Kimmel J.", written in a cursive style.

KIMMEL J.

PARTICIPANT SHEET

Allan Fogul - Moving Parties (Yi Jin and Awei Liu on the first motion; Yuchuan Shao, Sanlin Shao, Jun Xing and Jianzhong on the second motion)

Alexia Parente - KPMG Inc. and the Applicants in the KPMG Inc. receiverships (observing)

Evan Cobb – Independent Counsel for KPMG Inc.

Allan Fogul

Tel/Fax: (416) 485-1653

Email: allan@fogul.ca

Alexia Parente

Tel: 416-863-2417

Fax: 416-863-2653

Email: alexia.parente@blakes.com

Evan Cobb

Tel: 416-216-1929

Fax: 416-216-3930

Email: evan.cobb@nortonrosefulbright.com

allan@fogul.ca; alexia.parente@blakes.com; evan.cobb@nortonrosefulbright.com

SCHEDULE "A"

In addition to the title of proceedings set out on the Order as follows:

Court File No. 31-2747949

**IN THE MATTER OF THE BANKRUPTCY OF
GROSS CAPITAL INC.
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

this Order is also made in the following proceedings:

Court File No. 31-2810419

**IN THE MATTER OF THE BANKRUPTCY OF
SHELDON GROSS LIMITED
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

Court File No. 31-2842640

**IN THE MATTER OF THE BANKRUPTCY OF
100 COLBORNE HOLDINGS INC.**

Court File No. 31-2842641

**IN THE MATTER OF THE BANKRUPTCY OF
240 OLD PENETANGUISH HOLDINGS INC.**

Court File No. 32-2842635

**IN THE MATTER OF THE BANKRUPTCY OF
2478658 ONTARIO LTD.**

Court File No. 32-2869843

**IN THE MATTER OF THE BANKRUPTCY OF
2009 LONG LAKE HOLDINGS INC.**

Court File No. 32-2869845

**IN THE MATTER OF THE BANKRUPTCY OF
65 LARCH HOLDINGS INC.**

Court File No. CV-21-00664273-00CL

**AMERICAN GENERAL LIFE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, AND
THE VARIABLE ANNUITY LIFE INSURANCE COMPANY**

Applicants

- and -

**SOUTHMOUNT HEALTHCARE CENTRE INC., 180 VINE INC., 2478658 ONTARIO LTD., 2009 LONG
LAKE HOLDINGS INC., 65 LARCH HOLDINGS INC., 100 COLBORNE HOLDINGS INC., 240 OLD
PENETANGUISH HOLDINGS INC., GROSS PROPERTIES INC., 180 VINE PURCHASER INC., AND
2413667 ONTARIO INC.**

Respondents

Court File No. CV-21-00656098-00CL

ADDENDA CAPITAL INC.

Applicant

- and -

**249 ONTARIO STREET HOLDINGS INC.,
GROSS PROPERTIES INC.
and 2413667 ONTARIO INC.**

Respondents

Court File No. CV-21-00665375-00CL

**AMERICAN GENERAL LIFE INSURANCE COMPANY and
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.**

Applicants

- and -

**e
and THE PARTIES LISTED ON SCHEDULE "A"**

Respondents

SCHEDULE "A"

Individuals
Allan Gross
Errol Yim and Andrea Yim, jointly
Ava Gross
Karen Nakagawa and Calvin Nakagawa, jointly
Carol Jaxon
Carole Kai Onouye
Diane Curtis
Dwight Otani and Theresa Otani, jointly
Edward Bugarin
Ellen Fleishman
Gemie Arakawa
George Tamashiro
Guy Pace and Caroline Berdusco, jointly
Heidi Berger
Henry Ko
Hongwei Su
James Brand
Janis L. Lai Trustee
Jean Morel
Jian Zhang
Johann Strasser
John Dattomo and Daniela Dattomo
Kelly Ann Hiraki and Jonathan Wah Hee, jointly
Randall Y.C. Ho
Robert Atkinson
Roberta Sunahara and Paul Sunahara, jointly
Seymour Kazimirski
Stanley Salcedo

Trusts
Charlyn Shizue Honda Masini Trust, by and through its trustee(s)
Fleishman Family Trust, by and through its trustee(s)
J. Zachery Jones Trust, by and through its trustee(s)
Jane Shigeta Revocable Living Trust, by and through its trustee(s)
Jasen Takei Revocable Living Trust, by and through its trustee(s)
Melvin Shigeta Revocable Living Trust, by and through its trustee(s)
Ruth Hisaye Honda Trust, by and through its trustee(s)
S. Bucky Revocable Living Trust & Bruce E. Bucky Revocable Living Trust, by and through its trustee(s)
Wallace K. Tsuha Trust, by and through its trustee(s)
Corporations / Partnerships
1236068 Ontario Limited
1649750 Ontario Inc.
1818019 Ontario Limited
Citydrill Inc.
Gross Capital Inc.
Dirk and Dale IRA LLC
Gross Medical Opportunities Fund LP
Hybrid Activities Inc.
Mark Craig Gross Holdings Inc.
Randy 88, LLC
Rastogi Medicine Professional Corporation
RMK IRA LLC

SCHEDULE "B"

1. Stayed by receivership order in Court File No. CV-21-00656098-CL (Deloitte as receiver)
 - a. Gross Properties Inc., as it relates to any "Property" as defined in the aforementioned receivership order dated March 9, 2021
 - b. 249 Ontario Street Holdings Inc., as it relates to any "Property" as defined in the aforementioned receivership order dated March 9, 2021
2. Stayed by receivership order in Court File No. CV-21-00664273-00CL (KPMG as receiver)
 - a. Gross Properties Inc., as it relates to any "Property" as defined in the aforementioned receivership order dated June 29, 2021
 - b. 2009 Long Lake Holdings Inc.
 - c. 65 Larch Holdings Inc.
 - d. 100 Colborne Holdings Inc.
240 Old Penetanguish Holdings Inc.
 - e. 2478658 Ontario Ltd.
3. Stayed by receivership order in Court File No. CV-21-00665375-00CL (KPMG as receiver)
 - a. Gross Capital Inc., as it relates to any "Property" as defined in the aforementioned receivership order dated August 3, 2021
 - b. Victoria Avenue North Holdings Inc.
4. Stayed by s.69.3 of the *BIA* (KPMG as trustee)
 - a. 100 Colborne Holdings Inc. (Estate/Court File No. 31-2842640)
 - b. 240 Old Penetanguish Holdings Inc. (Estate/Court File No. 31-2842641)
 - c. 2478658 Ontario Ltd. (Estate/Court File No. 31-2842635)
 - d. 2009 Long Lake Holdings Inc. (Estate/Court File No. 31-2869843)
 - e. 65 Larch Holdings Inc. (Estate/Court File No. 31-2869845)
5. Stayed by s.69.3 of the *BIA* (KSV as trustee)
 - a. Gross Capital Inc. (Estate/Court File No. 31-2747949)
 - b. Sheldon Gross Ltd. (Estate/Court File No. 31-2810419)
6. Not under bankruptcy or receivership
 - a. Mark Gross
 - b. Sheldon Gross
 - c. 86 Angeline Street Holdings Inc.
 - d. Morrison Street Holdings Limited
 - e. Portage Road Holdings Limited
 - f. 800 Princess Street Holdings Limited
 - g. 132 Second Street Purchaser Limited
 - h. 2753703 Ontario Inc.
 - i. 2771840 Ontario Ltd.
 - j. 2771837 Ontario Inc.
 - k. 2771839 Ontario Limited

2771841 Ontario Corp.