



Court File No.B200171
Estate No.11-2626936
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY
IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
FHC ENTERPRISES LTD.**

NOTICE OF MOTION

TAKE NOTICE that a Motion will be made by Royal Bank of Canada, to the presiding Judge via teleconference with the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, at 9:45 a.m., on April 6, 2020, for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An Order abridging the time for service and hearing of the within Notice of Motion.
2. A declaration pursuant to s. 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "**BIA**") that the Stay of Proceedings with respect to FHC Enterprises Ltd., pursuant to s. 69(1) of the *BIA*, no longer operates in respect of Royal Bank of Canada.
3. Such further relief as the circumstances may require and as this Honourable Court deems appropriate.

Part 2: FACTUAL BASIS

Summary of Relief Sought

1. As of March 19, 2020, the Respondents, FHC Enterprises Ltd. ("**FHC Enterprises**") and FHC Leasing Ltd. ("**Leasing**"), along with FHC Holdings Ltd. ("**FHC Holdings**"), Bargain Wholesale Ltd. ("**Bargain**"), McFrugals Discount Outlet Ltd. ("**McFrugals**"), and FHC Properties Ltd. ("**Properties**") are indebted to the Applicant, Royal Bank of Canada ("**RBC**"), in the amount of \$8,124,143.18, exclusive of all accruing interest, fees, costs, and expenses, pursuant to and in accordance with the terms of the agreements between RBC and FHC Enterprises and Leasing (collectively, the "**NOI Entities**").
2. As a result, RBC is seeking to terminate the stay of proceedings in the NOI Proceedings (as defined below) and allow RBC to make demand of the amounts owed by the NOI Entities to RBC and issue notices under section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**").

The Parties

3. RBC is a federally regulated financial institution under the OFSI (Office of the Superintendent of Financial Institution) as a Domestic Bank regulated under the *Bank Act*, S.C. 1991, c. 46 (the “**Bank Act**”), with an address for service, for the purpose of this action only, at 2600-1066 West Hastings Street, Vancouver, British Columbia.
4. The Respondent, FHC Enterprises, is a company registered pursuant to the laws of the Province of British Columbia with a registered office at 1130 – 400 Burrard Street, Vancouver, British Columbia.
5. The Respondent, Leasing, is a company registered pursuant to the laws of the Province of British Columbia with a registered office at 1130 – 400 Burrard Street, Vancouver, British Columbia.
6. FHC Holdings is a company registered pursuant to the laws of the Province of British Columbia with a registered office at 1130 – 400 Burrard Street, Vancouver, British Columbia.
7. Bargain is a company registered pursuant to the laws of the Province of British Columbia with a registered office at 1248 52nd Street, Delta, British Columbia.
8. McFrugals is a company registered pursuant to the laws of the Province of British Columbia with a registered office at 1248 52nd Street, Delta, British Columbia.
9. Properties is a company registered pursuant to the laws of the Province of British Columbia with a registered office at 1130 – 400 Burrard Street, Vancouver, British Columbia.

The Loan Agreements

10. RBC and FHC Enterprises entered into the following loan agreements setting out the terms of the loans granted by RBC to FHC Enterprises:
 - (a) an Amended and Restated Loan Agreement dated July 6, 2018 (the “**Amended and Restated Loan Agreement**”) between RBC, as lender, FHC Enterprises, as borrower, and FHC Holdings, Leasing, Bargain, McFrugals, and Properties, each as guarantors (collectively, the “**Guarantors**”);
 - (b) a Waiver, Consent and First Amendment to Amended and Restated Loan Agreement executed by each of FHC Enterprises and the Guarantors on October 11, 2018;
 - (c) a Second Amendment to Amended and Restated Loan Agreement executed by each of FHC Enterprises and the Guarantors on November 29, 2018;

- (d) a Waiver, Consent and Third Amendment to Amended and Restated Loan Agreement executed by each of FHC Enterprises and the Guarantors on May 2, 2019;
 - (e) a Fourth Amendment to Amended and Restated Loan Agreement executed by each of FHC Enterprises and the Guarantors on August 29, 2019;
 - (f) a Waiver, Consent and Fifth Amendment to Amended and Restated Loan Agreement executed by each of FHC Enterprises and the Guarantors on December 12, 2019;
 - (g) a Sixth Amendment to Amended and Restated Loan Agreement executed by each of FHC Enterprises and the Guarantors on January 27, 2020
- (collectively, the “**Loan Agreements**”).

11. The following terms, among others, are specified as Events of Default pursuant to the Loan Agreements:

- (a) FHC Enterprises fails to make any payment to RBC when due and payable;
- (b) FHC Enterprises breaches a Material Contract or any Material Contract terminates, expires or ceases to be legal, valid, binding and enforceable;
- (c) FHC Enterprises or its Guarantors undertake any course of action to commence any petition, proposal, notice of intention to file a proposal, case, proceeding or other action under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization, suspension of operations, conservatorship or relief of debtors, seeking to have an order for relief entered with respect to it or seeking appointment of a custodian, receiver, liquidator, assignee, trustee or sequestrator (or similar official) for it or any substantial part of its properties;
- (d) any final judgment or judgment for the payment of money in excess of the Minimum Actionable Amount is rendered against FHC Enterprises or its Guarantors; and
- (e) any other event occurs which constitutes a Material Adverse Effect.

12. In accordance with the Loan Agreements, RBC made a revolving credit loan facility for \$10,000,000 available to FHC Enterprises which may be increased to \$13,000,000 at the sole discretion of RBC (the “**Credit Facility**”).

The General Security Agreements

13. As security for all amounts owing from FHC Enterprises to RBC under the Loan Agreements and Credit Facility, FHC Enterprises and the Guarantors granted the following:

- (a) General Security Agreement executed April 30, 2012 by FHC Enterprises in favour of RBC (the "**FHC Enterprises GSA**");
 - (b) General Security Agreement executed April 30, 2012 by FHC Holdings in favour of RBC (the "**FHC Holdings GSA**");
 - (c) General Security Agreement executed April 30, 2012 by Leasing in favour of RBC (the "**Leasing GSA**");
 - (d) General Security Agreement executed April 30, 2012 by Bargain in favour of RBC (the "**Bargain GSA**");
 - (e) General Security Agreement executed April 30, 2012 by McFrugals in favour of RBC (the "**McFrugals GSA**"); and
 - (f) General Security Agreement executed December 21, 2012 by Properties in favour of RBC (the "**Properties GSA**").
14. The FHC Enterprises GSA, the FHC Holdings GSA, the Leasing GSA, the Bargain GA, the McFrugals GSA, and the Properties GSA are collectively referred to herein as the "**GSAs**".
15. The GSAs provide that, if an event of default occurs, RBC may "institute proceedings in any court of competent jurisdiction for the appointment of such a Receiver".

Bank Act Security

16. As further security, FHC Enterprises granted the following security pursuant to section 427 of the *Bank Act*, S.C. 1991, c. 46 security documents (the "**Bank Act Security**") in favour of RBC comprised of:
- (a) Notice of Intention to Give Security under Section 427 of the Bank Act executed by FHC Enterprises in favour of RBC on April 23, 2012;
 - (b) Agreement as to Loans and Advances and Security under Section 427 of the Bank Act for Such Loans and Advances executed by FHC Enterprises in favour of RBC on April 30, 2012;
 - (c) Promise to Give Security Under the Bank Act and Warehouse Receipts and/or Bills of Lading executed by FHC Enterprises in favour of RBC on April 30, 2012;
 - (d) Agreement under Section 427 of the Bank Act Special Security in respect of Specified Property or Classes of Property executed by FHC Enterprises in favour of RBC on April 30, 2012
(collectively, the "**Bank Act Security Documents**").

The Trademark Security

17. As further security, FHC Holdings entered into a Trademark Security Agreement dated April 30, 2012 in favour of RBC.

Guarantees

18. As further security, the Guarantors granted the following guarantees (collectively, the "**Guarantees**") in favour of RBC:
 - (a) a Guarantee and Postponement of Claim executed April 30, 2012 by FHC Holdings in favour of RBC regarding the indebtedness of FHC Enterprises (the "**FHC Holdings Guarantee**");
 - (b) a Guarantee and Postponement of Claim executed April 30, 2012 by Leasing in favour of RBC regarding the indebtedness of FHC Enterprises (the "**Leasing Guarantee**");
 - (c) a Guarantee and Postponement of Claim executed April 30, 2012 by Bargain in favour of RBC regarding the indebtedness of FHC Enterprises (the "**Bargain Guarantee**");
 - (d) a Guarantee and Postponement of Claim executed April 30, 2012 by McFrugals in favour of RBC regarding the indebtedness of FHC Enterprises (the "**McFrugals Guarantee**"); and
 - (e) a Guarantee and Postponement of Claim executed December 21, 2012 by Properties in favour of RBC regarding the indebtedness of FHC Enterprises (the "**Properties Guarantee**").
19. On August 22, 2014, First West Credit Union, FHC Enterprises, FHC Holdings, Leasing, Properties, Serendipity Family Trust, ETI Essential Trading Inc., 0953963 B.C. Ltd., and Jason McDougall entered into a Subordination and Standstill Agreement ("**First West Subordination and Standstill Agreement**") in favour of RBC.
20. On October 11, 2018, a Postponement and Assignment of Claim was granted by Jason McDougall (the "**Jason McDougall Postponement Agreement**" or the "**Postponement**") in favour of RBC.

RBC's Demands

21. On March 6, 2020, FHC Enterprises and Leasing filed Notices of Intention to Make a Proposal (collectively, the "**NOIs**") in Court Action No. 11-262936 and 11-2626912 (the "**NOI Proceedings**").
22. In March 2020, RBC, the Borrower and the Guarantors entered into a Carve-Out Agreement respecting the NOI Proceedings (the "**Carve-Out Agreement**").

23. The terms of the Carve-Out Agreement include, among other terms, the following:
- (a) the Borrower and Guarantors acknowledged that they committed acts of defaults under the Loan Agreements and the Lender's Security (as defined in the Carve-Out Agreement);
 - (b) RBC and the indebtedness owed to RBC by the Borrower and Guarantors is excluded from the NOI Proceedings;
 - (c) RBC is not prevented from realizing on the Lender's Security; and
 - (d) if RBC pursued an Application pursuant to 69.4 of the *BIA* for an Order declaring that RBC is not impacted by the stay in the NOI Proceeding, the Borrower, and the Guarantors shall not object to that Application.
24. All amounts owing under the Loan Agreements are immediately due and payable. To this effect, on March 19, 2020, RBC delivered to a letter demanding payment of the obligations under the Loan Agreements and Guarantees (collectively, the “**Demands**”) to each of FHC Holdings, Bargain, McFrugals, and Properties. On that same day, RBC delivered to each of FHC Holdings, Bargain, McFrugals, and Properties notices of its intention to enforce its security by delivering a Notice of Intention to Enforce pursuant to s. 244 of the *BIA* (collectively, the “**Notices**”).

Reasons for Terminating Stay

25. RBC will be materially prejudiced if an Order is not granted lifting the stay in the NOI Proceedings.
26. It is just, convenient, and appropriate for the stay to be terminated as it impacts RBC given the risk of loss to RBC and the fact that the NOI Entities will not be making a proposal to RBC.
27. RBC does not have a present intention to appoint a receiver of the NOI Entities. RBC is the largest creditor of the NOI Entities by a significant margin.
28. However, if things change in this very uncertain time, RBC would like to be in a position to act quickly, and, if necessary, to take control of the assets of the NOI Entities and the Guarantors by the appointment of a Receiver.

Part 3: LEGAL BASIS

1. *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the “*BIA*”), Section 69.
2. *Bankruptcy and Insolvency General Rules*, CRC 1978, Rule 11.
3. Upon the filing of a Notice of Intention, a Stay of Proceedings is imposed.

BIA, s. 69(1)

4. A creditor who is affected by the imposition of a Stay of Proceedings, may apply to the Court for a declaration that s. 69 to 69.31 of the *BIA* no longer operate in respect of that creditor or person.

BIA, s. 69.4

5. The Court may make such a declaration, subject to any qualifications it 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.

BIA, s. 69.4 (a) & (b)

6. The material prejudice in s. 69.4(a) is objective prejudice, it refers to the degree of prejudice suffered by the creditor in relation to the indebtedness and its security held, not to the extent such prejudice may affect the creditor as a person, organization or entity. The fact the creditor is a financially strong organization is therefore immaterial.

Cumberland Trading Inc., Re, 1994 CarswellOnt 255, at para. 11

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit of Tania Litsos made on April 1, 2020.

The applicant estimates that the application will take 10 minutes.

- This matter is within the jurisdiction of a registrar in bankruptcy.
- This matter is not within the jurisdiction of a registrar in bankruptcy.

Dated: April 3, 2020



Signature of William E. J. Skelly

lawyer for applicant

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