

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

CANADIAN WESTERN BANK

Applicant

and

2722959 ONTARIO LTD. and 2156775 ONTARIO LIMITED

Respondents

**FACTUM OF THE RESPONDENT
2156775 ONTARIO LIMITED
(Motion returnable July 24, 2023)**

DATED: July 12, 2023

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B E T W E E N:

CANADIAN WESTERN BANK

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and

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Respondents

**FACTUM OF THE RESPONDENT,
2156775 ONTARIO LIMITED**

PROCEEDINGS BY 215 ONTARIO

1. 2156775 Ontario Limited (215 Ontario) commenced three actions. The first against the Regional Municipality of Peel (Peel) for breach of contract, negligence, bad faith and breach of Peel's statutory duty arising out of excessive wastewater charges levied against 215 Ontario, the result of which there were a multitude of water disconnections by the Region of Peel, up to and including the issuance of the Notice of Action on August 19, 2020.
2. The second action commenced August 23, 2021 claims a declaration that certain Minutes of Settlement and a Full and Final Release signed by the Plaintiff and Peel be set aside, request an accounting and disclosure of all water charges and surcharges. It further requests full disclosure of bailiff's charges which it claims are inappropriate and excessive. The Plaintiff further claims that the tax lien be removed and discharged from the tax rolls and security be provided to the City of Mississauga until trial.
3. The third action encompasses the first two actions and brings a claim against Mr. Iannicca

arising out of his malicious and abuse of public office. The claim being asserted against Mr. Iannicca arises out of his intentional wrong doing which the Plaintiff asserts constitutes a misfeasance in the public office. The particulars have been pleaded in paragraphs 33 to 39 of the Statement of Claim.

Klar, *Tort Law*, Seventh Edition, Chapter 4, Misfeasance in a Public Office, pgs 408-417

4. 215 Ontario brings a claim against the Defendants, Elaine Gilliland, Steven Fantin and Bill Ford. It specifically pleads the facts giving rise to personal liability in that these Defendants were dishonest, acted in bad faith and were negligent in their reviewing, investigating and inspecting the wastewater discharge readings at the Plaintiff's premises and worked in concert with Khawer Rauf to deliver excessive and incorrect invoices.

5. 215 Ontario brings a claim against the Defendant, Khawer Rauf who was responsible for billing practices and invoices who knew that the invoices were incorrect, excessive, worked in concert with the other personal Defendants and developed methods and procedures that permitted excess billings. These are all independent tortious acts.

ADGA Systems International Ltd. v. Valcom Ltd., 1999 CanLII 1527 (ON CA) at pgs. 11, 12, 13, 16

6. The result of the aforementioned actions resulted in many water disconnections and ultimately contributed to the closing of the business and significant damages as claimed.

7. All three claims have been defended and the pleadings are complete.

8. In the first action, the Plaintiff and Peel have exchanged Affidavits of Documents. 215 Ontario has requested that the three actions be consolidated. The Defendants will not agree.

RECEIVERSHIP PROCEEDINGS

9. Canadian Western Bank commenced proceedings against 215 Ontario and a related company, 2722959 Ontario Ltd. It brought an application to appoint a Receiver. The Receiver was appointed pursuant to the Order of Justice Osborne dated November 3, 2022. Paragraph 13 of the said Order is the stay clause staying the within three proceedings.

10. The Receiver through its counsel does not oppose the lifting of the stay and has prepared a draft Order that 215 Ontario consents to.

11. The Region of Peel, the City of Mississauga and the individual Defendants oppose the lifting of the stay. This will in effect bring the proceedings to an end. The Plaintiffs will not be able to pursue the three actions to trial. It will suffer significant damages as claimed in the three actions. 215 Ontario therefore moves for an Order lifting the stay of the proceedings to allow it to pursue its actions to trial.

12. In support of this motion to lift the stay, Frank D'Angelo, the President of 215 Ontario has delivered three affidavits.

13. In his affidavit sworn February 13, 2023, in paragraphs 8 to 22 Mr. D'Angelo outlines the evidence with respect to the claim against Mr. Iannicca and the personal Defendants. He further outlines in two charts prepared by 215 Ontario, substantial over charges by Peel in excess of \$500,000.00.

14. In a supplementary affidavit sworn April 27, 2023, Mr. D'Angelo asserts in paragraph 8 that if damages are awarded to 215 Ontario, the funds will be used to pay substantial debts of 215. His estimate of the debts owing by 215 is in excess of \$10,000,000.00. He states at paragraph 10,

it is for the benefit of the creditors and to recoup for himself after creditors are paid that he brings these proceedings. In that affidavit, at paragraph 17, he outlines an agreement with CRA to reduce the indebtedness to CRA. At Exhibit "D" he produces a Fixed Asset Appraisal Report for D'Angelo Brands as of October 13, 2020 valuing equipment at \$10,766,300.00.

15. Mr. D'Angelo served a third affidavit sworn July 12, 2023 in which he produces financial statements of 272 Ontario from January 1, 2021 to August 31, 2021 (a review engagement). He also produced a compilation financial statement to January 31, 2022 and an unaudited pro forma balance sheet of 272 Ontario as of February 1, 2022, the date that 272 Ontario commenced operating.

16. In response to affidavit evidence filed by the Region of Peel, Mr. D'Angelo has produced laboratory reports of an independent laboratory (Gelda Laboratories) which supports the allegations of 215 Ontario that the charges from Peel were excessive, as set forth in Exhibit "J" to the affidavit of Mr. D'Angelo sworn July 12, 2023

THE ISSUES

17. 215 Ontario has demonstrated sound reasons for lifting the stay. The onus is on 215 Ontario as the moving party to convince this court that the relief should be granted. This court should look at the totality of the circumstances and the relative prejudice to both sides.

18. This court is not precluded from considering the merits of the proposed actions where they are relevant to the issue of whether there are "sound reasons" for lifting the stay.

In Re Francisco, [1995] O.J. No. 917, @ para. 1, Justice Adams states,

"In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one

of ensuring that sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act exist for relieving against the otherwise automatic stay of proceedings.”

These reasons were approved by the Court of Appeal.

Re Francisco, [1996] O.J. 2024

Re Ma, 2001 CarswellOnt 1019 @ paras. 2 and 3

Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community, 2012 CarswellOnt 16827 @ para. 5

19. The proposed actions and the facts pleaded therein demonstrate that the Plaintiff has substantial causes of action against Peel, Mississauga and the personal liability of the individual Defendants. There are sound reasons for lifting the stay. If the stay is not lifted, 215 Ontario will suffer substantial prejudice without having its day in court.
20. The lawyers for Peel, Mississauga and the individual defendants oppose the stay. They wish to bring the proceedings to an end.
21. The issues on lifting of the stay should not be used as a process similar to a motion for summary judgment to dismiss the proceedings or a motion to strike the Statements of Claim.
22. Mr. Boghosian, the lawyer for the Defendants in the third action has served a motion before a Judge, which motion is dated November 4, 2022 striking out the Statement of Claim without leave to amend pursuant to Rule 25.06. There is no return date for the motion.
23. The lawyers for Peel and the City of Mississauga brought separate motions for security for costs. Mississauga's Motion Record is dated November 1, 2022 and Peel's Motion Record is dated December 14, 2022. The motions were originally returnable February 23, 2023 but have been adjourned in view of the Receivership Order dated November 3, 2022.

24. The Plaintiff will resist both motions for security for costs and will also resist the motion to dismiss the third action pursuant to Rule 25.06.

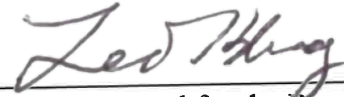
ORDER REQUESTED

25. This court should grant an order, which has been approved by counsel for the Receiver, as annexed hereto, and accordingly, the stay should be lifted.

26. Further, this court should order costs to be paid by the defendants opposing the motion on a scale to be determined by this court.

Dated: July 12, 2023

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Leo Klug, of Counsel for the Respondent,
2156775 Ontario Limited

SCHEDULE "A"
LIST OF AUTHORITIES

1. *ADGA Systems International Ltd. v. Valcom Ltd.*, 1999 CanLII 1527 (ON CA)
2. Klar, *Tort Law*, Seventh Edition, Chapter 4, Misfeasance in a Public Office, pgs. 408-417
3. *Re Francisco*, [1995] O.J. No. 917
4. *Re Francisco*, [1996] O.J. 2024
5. *Re Ma*, 2001 CarswellOnt 1019
6. *Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community*, 2012 CarswellOnt 16827

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.
JUSTICE OSBORNE

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●, THE ●
DAY OF ●, 2023

B E T W E E N:

CANADIAN WESTERN BANK

Applicant

and

2722959 ONTARIO LTD. and 2156775 ONTARIO LIMITED

Respondents

**ORDER
(Partial Lift of Stay)**

THIS MOTION made by 2156775 Ontario Limited (“215”) for an Order partially lifting the stay of proceedings (the “Stay”) effected under the Receivership Order of this Court dated November 3, 2022 (the “Receivership Order”) was heard this day at 330 University Avenue, Toronto, Ontario, by videoconference.

ON READING the Motion Record of 215, and on hearing the submissions of counsel for 215, counsel for the Receiver and counsel for the Applicant and such other party as listed on the counsel slip, no one else appearing although duly served as evidenced from the affidavit of service, filed:

SERVICE

1. **THIS COURT ORDERS** that the time and manner for service of the Motion Record is hereby abridged and validated so that this application is properly returnable today, and hereby dispenses with further service thereof.

PARTIAL LIFT OF STAY

2. **THIS COURT ORDERS** that the Stay be and is hereby lifted for the sole purpose of allowing the continuation of the action styled *2156776 Ontario Inc. cob D'Angelo Brands and The Regional Municipality of Peel* bearing Ontario Superior Court of Justice file number CV-20-00002978-0000, the action styled *2156775 Ontario Inc. cob as D'Angelo Brands and The Regional Municipality of Peel and the City of Mississauga* bearing Ontario Superior Court of Justice file number CV-21-00003036-0000, and the action styled *2156776 Ontario Inc. cob D'Angelo Brands and The Regional Municipality of Peel, Nando Iannica, Elaine Gilliland, Steven Fantin, Bill Ford, and Khawer Rauf* bearing Ontario Superior Court of Justice file number CV-21-00003482-0000 (collectively, the "**215 Actions**"), provided however that any judgment or order made in the 215 Actions against either of the Respondents herein shall remain subject to the Stay and the Receivership Order.

3. **THIS COURT ORDERS** that the Respondents herein shall not use or allow others to use any of their Property (as defined in the Receivership Order) to pay or secure payment of any Order made in the 215 Actions against one or both of the Respondents herein, including, but not limited to, any Order for costs or any Order for security for costs, without a further Order of the Court in the within proceeding.

GENERAL

4. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be added to the service list in each of the 215 Actions and shall be kept apprised of the status of the 215 Actions.
 5. **THIS COURT ORDERS** that there will be no costs of this motion.
 6. **THIS COURT ORDERS** that this Order and all its provisions are effective from the date it is made without any need for entry and filing.
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CANADIAN WESTERN BANK - and - 2722959 ONTARIO LTD. et al

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

**ORDER
(PARTIAL LIFT OF STAY)**

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Proceedings commenced at Toronto

**FACTUM OF THE RESPONDENT,
2156775 ONTARIO LIMITED**

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