



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-23-00701809-00CL

DATE: 21 July 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: **THE TORONTO-DOMINION BANK v.
2668438 ONTARIO INC.**

BEFORE JUSTICE: **MADAM JUSTICE STEELE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Tim Hogan	Lawyer for the Applicant, The Toronto-Dominion Bank	thogan@harisonpensa.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Eric Golden	Lawyer for the Proposed Receiver, MNP Ltd.	egolden@blaney.com
Matthew Lem	Proposed Receiver	

ENDORSEMENT OF JUSTICE STEELE:

Overview

1. Application heard via Zoom on July 21, 2023. The applicant, Toronto-Dominion Bank, seeks to appoint MNP Ltd, as receiver over the assets of the respondent, 2668438 Ontario Inc. (“266”).
2. For the reasons set out below, the application is granted.

Background

3. The Debtor is an Ontario corporation, with its registered office located in Brampton. It carries on business as “Frontec Metal Fab.”
4. Michael Gonsalves is the principal of the Debtor and a guarantor of the financing obligations.
5. No one attended the virtual hearing or filed materials on behalf of the Debtor, nor did the Court receive a request for an adjournment. The proposed receiver’s counsel brought to the Court’s attention certain recent correspondence with Mr. Nalli at the MF Email Address (defined below). The proposed receiver also filed a supplementary report on the eve of the application to bring the Court up to speed on recent developments.

Analysis

Should the Court make an Order for Substituted Service?

6. The Bank seeks an order validating service of the applicant’s notice of application and application record on 266 by delivery by e-mail to the email address Michael.frontecmetalfab@gmail.com (the “MF Email Address”) on June 28, 2023.
7. The order validating service to the MF Email Address shall be made.
8. Under Rule 16.02 of the *Rules of Civil Procedure* service on a corporation is to be carried out by “leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business.” Under Rule 16.03, where the head office of a corporation cannot be found, “service may be made on the corporation by mailing a copy of the document to the corporation or to the attorney for service in Ontario, as the case may be, at that address.”
9. Rule 16.04 permits the Court to make an order for substituted service “where it appears to the court that it is impractical for any reason to effect service.”
10. The Bank advised that the Debtor is no longer operating from the registered head office location of the company. There is another business now operating at that location, which is unrelated to the Debtor. Accordingly, it would not be fruitful for the Bank to serve the Debtor company by mailing documents to that address.
11. Both the Bank and the proposed receiver have taken steps to try to locate the Debtor, the principal of the Debtor (Michael Gonsalves), and the leased property (discussed further below), as outlined in the materials, to no avail. The Bank was exchanging emails with Mr. Gonsalves at the MF Email Address until recently.
12. Recently emails to the MF Email Address have been responded to by Peter Nalli, whose emails (until the most recent one) included the following signature line: Peter Nalli, Management 2668438 Ontario Inc.
13. Given that the Debtor is not operating at the location of its registered office, the Bank cannot affect service at that location. The Bank’s efforts to track down the current location of the Debtor (and the leased equipment) have not been successful. The Bank has, however, continued to email with Mr. Gonsalves, and recently Mr. Nalli (Management of 266) at the same email address.

14. In the circumstances, I am satisfied that the order sought is appropriate.

Is it just or convenient for the Court to appoint a receiver over the Debtor's Property?

15. Pursuant to s. 243 of the BIA, the Court has the power to appoint a receiver where it is “just or convenient” to do so. In determining whether it is just or convenient to make the appointment, the Court must have regard to all of the circumstances, including the nature of the property and the rights and interests of all parties: *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007, at para. 24, citing *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.), at para. 10
16. Under the terms of the general security agreement, the Debtor agreed to certain remedies if there was a default. Among other remedies, the Debtor agreed that the Bank was entitled to appoint a receiver or apply to the Court to appoint a receiver.
17. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant seeking the appointment of the receiver is relaxed. Generally, the appointment of a receiver is an extraordinary equitable remedy. However, the Courts do not regard the remedy in this way where the relevant security documents permit the appointment. This is because the applicant is seeking to enforce a term of an agreement that both parties made: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, at para. 27, *Hands-On Capital Investments Inc. v. DMCC Holdings Inc.*, April 19, 2023 (Ont. S.C.J.), at para. 48.
18. The following additional “just or convenient” factors identified in *Confederation Life Insurance Co. v. Double Y Holdings Inc.* 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List)), paras. 19-24 may also be considered:
- a. The lender's security is at risk of deteriorating;
 - b. There is need to stabilize and preserve the Debtor's business;
 - c. Loss of confidence in the Debtor's management; and
 - d. Positions and interests of other creditors.
19. The Debtor owes approximately \$1.7 million to the Bank (operating loan and leases over certain pieces of equipment). Mr. Gonsalves is a guarantor.
20. Among other things, the Bank has leases in respect of five pieces of equipment held by the Debtor. The Bank has been unable to locate this equipment. The Bank's information is that the Debtor's business is now “mobile”, and the equipment has been moved to Thunder Bay. The Bank requested information and access to the equipment, which was not provided.
21. In addition, in March 2023, the Debtor deposited two cheques to the operating line totaling more than \$330,000, which were drawn upon. However, the checks that were deposited were returned NSF and, as a result of the withdrawals, the operating line is overdrawn by about \$245,000. The Bank calls this type of transaction an “unusual banking transaction.”
22. The Bank has made demand on the operating loan and on Mr. Gonsalves, as guarantor. The loans have not been repaid. The Bank made first made request for payment on April 13, 2023, followed by

demands in May 2023. The Bank also issued the notice of intention to enforce its security under the *Bankruptcy and Insolvency Act* on or about May 19, 2023.

23. On or about May 30, 2023, the Bank received a letter from Economical Insurance, which notified the Debtor that the insurer was canceling its property insurance for the non-payment of premiums. The insurance cancellation was effective as of June 16, 2023, resulting in certain of leased equipment no longer being insured.
24. I agree with the Bank that it is just and convenient in the circumstances to appoint a receiver for the reasons set out at para. 43 of the applicant's factum, including that the Debtor is not operating from its registered location and has failed to provide requested information to the Bank, events of default have occurred and demand has been made, the Bank is unable to locate the leased equipment, the insurance on certain equipment has been cancelled, and the Debtor agreed to the appointment of a receiver upon their default under the contract terms.
25. Order attached.

A handwritten signature in blue ink, appearing to be "J. Hill", is located in the lower right quadrant of the page. The signature is written in a cursive style with a horizontal line extending to the right.