Court File No. CV-21-00661434-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

1951584 ONTARIO INC. DBA MAXIUM FINANCIAL SERVICES

Applicant

– and –

PULSE RX INC. and FAMILY PHARMACY CLINIC INC.

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3 AS AMENDED AND SETION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

FACTUM OF THE APPLICANT

June 1, 2021

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(June 1, 2021)

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FACTUM OF THE APPLICANT

PART I – OVERVIEW

1. The respondents, Pulse Rx Inc. (hereafter **"Pulse"**) and Family Pharmacy Clinic Inc. (hereafter **"Family Pharmacy"**) (collectively, the **"Debtors"**) are jointly indebted to the Applicant in connection with a Fixed Rate Promissory Note between the Debtors and the Applicant's predecessor in title, Desante Financial Services Inc. (hereafter the **"Desante"**), for the principal amount of $1,395,450.00 as amended by an amending agreement dated August 27, 2020 to, *inter alia*, extend the date of final payment (hereafter the **"Promissory Note"**).

2. As security for its obligations to the Applicant, including, without limitation, its obligations under the Promissory Note, each of the Debtors granted security in favour of the Applicant including, without limitation, pursuant to a general security agreement granted by each

of the Debtors in favour of Desante (hereafter the **"General Security Agreements"**). Family Pharmacy further pledged shares in Pulse to Desante as an additional form of security (hereafter the **"Share Pledge Agreement"**).

3. The Debtors have defaulted on their obligations to the Applicant under the Promissory Note. Demands were made on the Debtors prior to the receivership application. Attempts were made to negotiate a plan for payment of the outstanding balance owing under the Promissory Note, which were unsuccessful. There are legitimate concerns over the Debtors' financial viability and the nature of the Debtors' business is such that there is an implicit risk.

4. As a corollary of the above and in light of the prevailing jurisprudence with respect to the appointment of receiver-managers, the terms of the General Security Agreements entitle the Applicant to an Order appointing a receiver-manager, without security, of the assets, undertakings and properties of the Debtors acquired for or used in relation to the business carried on by the Debtors, including all proceeds thereof (hereafter the **"Property"**).

PART II - FACTS

Execution of the Promissory Note, General Security Agreements and Share Pledge Agreement

5. On or about July 29, 2016, the Debtors executed the Promissory Note with Desante wherein, pursuant to section 1, the Debtors agreed to repay Desante for a loan that Desante provided to the Debtors in the principal sum of $1,395,450.00.

Reference: Affidavit of Benjamin Wyett (hereafter **"Wyett's Affidavit"**), para 9, Exhibit A

6. Among the Debtors, Family Pharmacy is the holding company while Pulse is the operating business. Pulse operates a business as a pharmacy focusing on servicing long-term care and retirement residences.

Reference: Wyett's Affidavit, para 7

7. On or about July 29, 2015, the Debtors each executed General Security Agreements, which provided *inter alia* that Desante had a security interest in the Debtors' Property (section 4), the Debtors would be in default of the General Security Agreements in the event of a default under any agreement with Desante (section 15) and in the event of default, Desante may require repayment of any or all payment obligations owed to Desante in full, whether matured or not, that Desante would be entitled to possession of the Debtors' Property upon the occurrence of an event of default and that Desante may appoint a receiver and manager of the Property (section 16).

Reference: Wyett's Affidavit, paras 10-11, Exhibit B

8. In or around July 2015, Family Pharmacy executed the Share Pledge Agreement with Desante, wherein Family Pharmacy agreed to pledge 100 common shares of Pulse in favour of Desante as collateral for Family Pharmacy's obligations to Desante under the Promissory Note.

Reference: Wyett's Affidavit, para 12, Exhibit C

9. In 2016, Maxium Financial Services Inc. and Desante were amalgamated pursuant to articles of incorporation dated March 1, 2016, with the Applicant, 1951584 Ontario Inc. dba. Maxium Financial Services (hereafter **"195"**), being the name of the newly amalgamated corporation. As such, 195 is the successor in all right, title and interest to Desante.

Reference: Wyett's Affidavit, para 3

The Debtors' Default and Refusal to Pay

10. By July 16, 2020, the Debtors were in arrears in the amount of $31,085.72 with respect to monthly payments due under the Promissory Note.

Reference: Wyett's Affidavit, para 17

11. By letter dated July 31, 2020 (hereafter the **"Demand Letter"**), 195 provided formal notice to the Debtors of the payment default under the Promissory Note. The Demand Letter also made formal demand of all remaining amounts owed under the Promissory Note, as permitted by Section 3. Payment of such amounts was required on or before August 10, 2020. The Demand Letter further advised the Debtors that, if payment was not made by the required date, 195 would proceed with legal action.

Reference: Wyett's Affidavit, para 18, Exhibit E

12. On August 27, 2020, the Debtors executed an amending agreement with 195, wherein 195 agreed to defer the balance of the payment obligations of the Debtors under the Promissory Note (hereafter the **"Amending Agreement"**). Pursuant to the Amending Agreement, the final

August 15, 2020 payment was amended to become payable, along with an extension fee, on September 15, 2020 in the aggregate amount of $832,143.03. The then-outstanding payment for July 15, 2020 was expected to be paid by the Debtors shortly after the execution of the Amending Agreement, but such payment was not made by either of the Debtors. The Amending Agreement further provided that except as set out in the Amending Agreement, all other terms and conditions of the Promissory Note would remain in full force and effect.

Reference: Wyett's Affidavit, paras 19-20, Exhibit F

13. Payment was not made pursuant to the Amending Agreement or otherwise, notwithstanding a further extension of time to pay until October 21, 2020.

Reference: Wyett's Affidavit, paras 21-23, Exhibit G

The Applicant's Enforcement Steps

14. Other than 195, Pulse's secured creditors, based on PPSA searches current as of April 4, 2021 (hereafter the **"PPSA Search"**), are McKesson Canada Corporation since July 2015 (with security solely over inventory), 2047944 Ontario Inc. o/a National Pharmacy (hereafter **"National Pharmacy"**) since December 2014 (with security over all collateral except consumer goods and, according to a representative of the company, security in the form of a general security agreement), LPG Pharmaceutical Advisors Inc. (hereafter **"LPG"**) since October 2016 (with security over all collateral except consumer goods and, according to a representative of the company, security in the form of a general security agreement) and Erinwood Ford Sales Inc. (hereafter **"Erinwood"**) since September 2017 (with security over consumer goods, accounts,

other and a motor vehicle listed as a 2016 Tesla). The PPSA Search shows that there is no other secured creditor with registrations as against Family Pharmacy other than 195.[1]

Reference: Wyett's Affidavit, paras 15-16, Exhibit D

15. On or about November 3, 2020, 195's legal counsel sent letters to the Debtors and the Debtors' secured creditors as provided in the PPSA Search (hereafter the **"Enforcement Letters"**) putting the Debtors and the other secured creditors on notice that 195 would be enforcing the Debtors' debt to 195 and the General Security Agreements.

Reference: Wyett's Affidavit, para 24, Exhibit H

16. Subsequent to the sending of the Enforcement Letters, both National Pharmacy and LPG indicated that they do not intend to take any steps to enforce their security rights, even though they were owed monies. No responses were ever received from McKesson Canada Corporation or from Erinwood.

Reference: Wyett's Affidavit, paras 25-26

17. No response was ever received from either of the Debtors to the Enforcement Letters. Attempts by 195 to engage in a dialogue between 195, on the one hand, and the Debtors, on the other hand, have been met with only promises of payment made from time to time that would occur once a large deal (for which no concrete specifics were ever provided) was closed by either of the Debtors.

[1] It should be noted that an updated search conducted by counsel for the Applicant on May 31, 2021 revealed no new PPSA registrations (or amendments to existing registrations) after April 4, 2021 for either Pulse or Family Pharmacy.

Reference: Wyett's Affidavit, paras 27 and 30

18. On November 16, 2020, after the failure of the Debtors to respond to the Enforcement Letters, 195 commenced an action in the Superior Court of Justice at Newmarket bearing Court File No. CV-20-00003321-0000 (hereafter the **"Action"**) against the Debtors and also against their guarantors. All of the defendants in the Action have been noted in default and a motion for default judgment has been scheduled to be heard on June 9, 2021 and the motion record for that motion has been served on all defendants in the Action. None of the defendants have taken any steps with respect to the Action.

Reference: Wyett's Affidavit, paras 28-29, Exhibit I

19. Furthermore, requests have been made for updated financial information related to the Debtors in order to permit 195 to determine the financial situation of the Debtors and to determine if their respective consolidated debt service coverage ratios have been maintained in accordance with the terms of the General Security Agreements. This financial information has not been provided and LPG and National Pharmacy have indicated that they were owed monies as well, raising concern for the financial status of the Debtors and 195's security interests.

Reference: Wyett's Affidavit, paras 31-33

20. Moreover, Pulse's business operations involve the servicing of pharmacy needs of various long-term care and retirement residences in Ontario and 195 is unaware of the current status of any contractual arrangements between Pulse and such long-term care or retirement residences. There is a concern that the contracts may permit a long-term care or retirement

residence to terminate its contractual relationship with Pulse, which would affect a liquidation scenario for Pulse.

Reference: Wyett's Affidavit, para 34

21. The proposed receiver, MNP Ltd., has consented to its appointment as receiver and manager.

Reference: Consent of MNP Ltd., Application Record, Tab 5.

PART III – STATEMENT OF ISSUE AND APPLICATION OF THE LAW

22. The primary issue before this Honourable Court is whether the Applicant is entitled to have a receiver-manager appointed for the management of the Debtors' Property.

The Debtors Are Bound to Their Agreements

23. As a starting point, the Debtors are presumed at law to have intended the legal consequences flowing from the execution of the Promissory Note, the General Security Agreements and the Share Pledge Agreement. In the absence of fraud or misrepresentation, persons are bound by the agreements that they have signed.

Reference: *Fraser Jewellers (1982) Ltd. v Dominion Electric Protection Co.* https://canlii.ca/t/6hbb (1997), 34 O.R. (3d) 1 (C.A.) at 10

24. By signing the General Security Agreements, the Debtors expressly agreed, *inter alia*, that any breach of an agreement (including the Promissory Note) with 195's predecessor in title would constitute an event of default of the General Security Agreements, that 195's predecessor in title would be entitled to possession of the Debtors' Property and that 195's predecessor in title could appoint a receiver and manager.

25. With respect to the Debtors' failure to pay in accordance with the Promissory Note, it is trite law that "the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not 'open ended' beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent".

Reference: *Toronto-Dominion Bank v Pritchard* https://canlii.ca/t/g9g13 (1997), 154 D.L.R. (4th) 141 (Div. Ct.) at paragraph 5.

Bank of Montreal v Carnival National Leasing Ltd., https://canlii.ca/t/2fqm3 2011 ONSC 1007 (Comm. List) at paragraph 13.

26. The Applicant has been patient in its dealings with the Debtors. The Application Record was issued on April 27, 2021, which is approximately nine months after the Applicant had made formal demand on the Debtors for payment of the outstanding balance of the Promissory Note on July 31, 2020. Repeated attempts were made to engage in a substantive dialogue with the Debtors for repayment of their obligations under the Promissory Note, which have been unsuccessful.

Appointment of Receiver-Manager

27. Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (hereafter the **"BIA"**) provides, in part, that on an application by a secured creditor, a court may, where the court considers it just and convenient to do so, appoint a receiver to take possession of the accounts, inventory and other property of an insolvent person and exercise control over that person's property and business.

28. Section 101 of the *Courts of Justice Act*, RSO 1990, c C.43 (hereafter the **"CJA"**) provides, in part, that the Ontario Superior Court of Justice may grant an interlocutory order appointing a receiver and manager where it appears to a judge to be just or convenient to do so.

29. In *Royal Green Enterprises*, by Endorsement of the Commercial List, the applicant's request for the appointment of a receiver and manager pursuant to section 243 of the BIA was granted. For one, the court acknowledged that the terms and conditions of the general security agreement provided for the appointment of a receiver. Moreover, the court stated that in light of (i) the inability of the respondent in making the agreed upon payments, (ii) the eroding position of the applicant, (iii) the continued default of the respondent and (iv) the lack of evidence of an alternative position to satisfy the respondent's obligations to the applicant, it was both just and convenient to appoint a receiver and manager.

Reference: *Business Development Bank of Canada v Royal Green Enterprises Ltd.*, 2012 ONSC 478 (Comm. List) [*Royal Green Enterprises*] https://canlii.ca/t/fpqvk at paragraphs 6 and 24-25

30. In *CFNDRS*, the Ontario Superior Court of Justice stated that final orders with respect to the appointment of a receiver-manager may be granted under section 243 of the BIA and interlocutory orders for the same may be granted under section 101 of the CJA. An order for the appointment of a receiver-manager is interlocutory in character to the extent that an action is commenced to enforce a debt and the plaintiff is seeking an interim appointment to preserve and protect the assets pending proof of the debt. In this scenario, the receiver-manager preserves and protects the debtor's assets upon proof of the debt and if the plaintiff obtains judgment on its debt, the receiver-manager will, where appropriate, liquidate assets or engage in other processes to realize cash to pay the plaintiff, who is then a judgment creditor. With respect to the appointment of an interlocutory receiver, the court in *CFNDRS* stated that it is not essential that a secured party demonstrate it will suffer irreparable harm if a receiver-manager is not appointed.

Reference: *Royal Bank v CFNDRS Inc.*, 2017 ONSC 7661 [*CFNDRS*] https://canlii.ca/t/hpgpl at paragraphs 4-5 and 8(d)

31. Furthermore, the court in *CFNDRS* added that the issue that usually tips the balance with respect to the appointment of a receiver-manager is whether there is a reason to incur the expense and procedural formality of appointing a third party to exercise neutral, transparent and accountable stewardship of the debtor's assets. The court further stated that "often, simple default on secured debt will be sufficient to attract a receivership where the risk to the business is implicit in the nature of the business…".

Reference: *Ibid* at paragraph 10

32. The General Security Agreements specifically permit the appointment of a receiver and manager in the event of a default under the Promissory Note. The Applicant has legitimate concerns over the Debtors' financial situation in light of their ongoing default under the Promissory Note, their debts to other secured creditors and the Debtors' refusal to produce financial information that would show their consolidated debt service coverage ratios. No viable payment proposal has been made by the Debtors. The nature of Pulse's business, which involves servicing the needs of long-term care homes and retirement residences - particularly during the current COVID-19 pandemic, presents inherent business risks, since there is a possibility that these long-term care homes and retirement residents could terminate their contractual arrangements with Pulse upon the appointment of a private receiver (as opposed to the stay provisions in the Model Order that would require at least the initial continuation of these contractual arrangements pending further Order of this Honourable Court).

33. Although the Applicant is primarily seeking a final order under section 243(1) of the BIA, to the extent that the Applicant's request for the appointment of a receiver and manager must be in the form of an interlocutory order, it is submitted that the Applicant's commencement of the Action constitutes an action to enforce the Debtors' debt in accordance with the Promissory Note and that, according to the ruling in *CFNDRS*, section 101 of the CJA permits a judge to grant an interlocutory order appointing a receiver-manager where a plaintiff has brought an action to enforce a debt and where the judge has determined it is just and appropriate to do so.

34. As a result of the foregoing, the Applicant respectfully submits that it is entitled to the appointment of a receiver and manager.

PART IV – REQUESTED RELIEF

35. The Applicant respectfully requests the following relief:

a. If necessary, an Order abridging time for service and filing of the Notice of Application and the Application Record or, in the alternative, dispensing with same;

b. An Order appointing MNP Ltd. as receiver and manager, without security, of the Debtors' Property; and

c. Such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of June, 2021.

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SCHEDULE "A"

LIST OF AUTHORITIES

Case Name	Brief of Authorities Tab Number	Referred to in Factum Paragraph
Fraser Jewellers (1982) Ltd. v Dominion Electric Protection Co. (1997), 34 O.R. (3d) 1 (C.A.)	1	23
Toronto-Dominion Bank v Pritchard (1997), 154 D.L.R. (4th) 141 (Div. Ct.)	2	25
Bank of Montreal v Carnival National Leasing Ltd., 2011 ONSC 1007 (Comm. List)	3	25
Business Development Bank of Canada v Royal Green Enterprises Ltd., 2012 ONSC 478	4	29
Royal Bank v CFNDRS Inc., 2017 ONSC 7661	5	30-31

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Courts of Justice Act, R.S.O. 1990, c C.43

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Rules of Civil Procedure, RRO 1990, Reg 194

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time. R.R.O. 1990, Reg. 194, r. 2.03.

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. R.R.O. 1990, Reg. 194, r. 3.02 (1).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed. R.R.O. 1990, Reg. 194, r. 3.02 (2).

14.05 (2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes. R.R.O. 1990, Reg. 194, r. 14.05 (2); O. Reg. 292/99, s. 1 (2).

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Proceeding commenced at Toronto

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