

December 31, 2018

DELIVERED VIA EMAIL

To Attached Service List

Counsel,

Re: Firepower Debt GP Inc., As Agent v. TheRedPin, Inc. et al.
Our File No. 51012
Court File No. CV-18-59964400CL
Court of Appeal File No. C66336

Further to my correspondence of December 27, 2018, please find enclosed an Amended Notice of Appeal, which is served on you pursuant to the *Rules of Civil Procedure*.

Yours very truly,



Jordan Goldblatt

JG/mpe

cc. Clients
Alex Fidler-Wener, Adair Goldblatt Bieber LLP
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(Current as of September 13, 2018)

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COURT OF APPEAL FOR ONTARIO

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent)

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

AMENDED NOTICE OF APPEAL

The Appellants, the former real estate agents of the respondent The RedPin.com Realty Inc. (the “TRP Agents”) and Certain Underwriters of Lloyds of London, appeal to the Court of Appeal from the Order of the Honourable Justice M. Penny (the “Motion Judge”) dated November 30, 2018, made at Toronto.

THE APPELLANTS ASK that the Order be set aside and that an Order be granted as follows:

- a. declaring that commissions earned and payable to the TRP Agents are impressed with a trust in their favour, and do not form part of the assets of the TRP Realty that are subject to any security interest;

a.1 an Order, as may be necessary, extending the time for bringing this appeal;

a.2 an Order as may be required, granting the appellants leave to appeal to this Honourable Court;

- b. awarding the appellants their costs of the appeal; and
- c. such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

The Parties

- a. on June 14, 2018, by Order of the Honourable Justice Hainey, MNP Ltd. (the “Receiver”) was appointed as receiver over the assets, undertakings and properties of TheRedPin Inc. and The RedPin.com Realty Inc. (“TRP Realty”);
- b. TRP Realty was a real estate brokerage until the appointment of the Receiver;
- c. the appellants, the TRP Agents, are the former real estate agents of TRP Realty who contracted with TRP Realty to provide it with real estate services;
- d. the appellant, Certain Underwrites of Lloyds of London, insures portions of the TRP Agents’ commissions;
- e. the respondents, Firepower Debt GP Inc. and Trilogy Growth Fund LP, are the secured creditors of TRP Realty (the “Secured Creditors”);

The Issue

- f. the *Real Estate and Business Brokers Act, 2002* (“REBBA”) requires that real estate agents conduct their business through licensed real estate brokerages. Accordingly, while it is the real estate agents who perform the listing and selling activities that generate real estate transactions, those transactions are carried out through the brokerage, in this case, TRP Realty;
- g. commissions owed to real estate agents are therefore first paid to the agent’s brokerage, who then is obliged to pay the commission to the agent;
- h. at the time of the receivership order, the TRP Agents were owed approximately \$3.7 million in commissions;
- i. a dispute emerged between the TRP Agents and the Secured Creditors regarding whether the commissions were impressed with a trust in favour of the TRP Agents, or, were part of the general property of TRP Realty subject to the Secured Creditors’ security;
- j. the Receiver brought a motion for direction that was heard by the Motion Judge on October 22, 2018, a decision reserved to November 18, 2018. The Motion Judge determined that the TRP Agents had established that they were the beneficiaries of a trust over the commissions;

The Motion Judge’s Errors

k. the Motion Judge made a number of reviewable errors in finding as he did. In particular, the Motion Judge:

- a. erred in law by conflating the indicia of an express trust with evidence supporting an implied trust. In particular, the Motion Judge held that the absence of a trust clause in the TRP Agents' contracts with TRP Realty significantly undermined the TRP Agents' trust claim. A trust clause in the contracts would have created an express trust, which was not the TRP Agents' submissions;
- b. erred in law and in fact by disregarding evidence from TRP Realty's founder regarding his intention in setting up the brokerage. Specifically, TRP Realty's founder swore that he set up a specific banking structure to segregate agents' commissions from TRP Realty's other assets, precisely because he recognized that the commissions did not belong to TRP Realty;
- c. erred in law and in fact by permitting the Secured Creditors to secure their advances over assets that TRP Realty considered as not belonging to it prior to the receivership;
- d. erred in fact and in law in respect of the import, evidentiary value, and weight to be given to TRP Realty's 2016 audited financial statements. The Motion Judge made the following errors in this regard:
 - i. while finding as a fact that "balances on deposit in TRP Realty's.... commission account are included as cash and cash equivalents in the

audited financial statements”, and, that the restrictions on cash included “only the amounts representing buyer deposits”, he ignored that there were amounts in the commission account that were admittedly impressed with a trust in favour of co-operating brokerages. Accordingly, the audited financial statements necessarily included as revenue moneys that were impressed with a trust;

- ii. failed to consider that even if the 2016 audited financials did pledge the commissions as security, that TRP Realty could not revoke a trust that it had already constituted;
 - iii. failed to consider that the 2016 audited financials could only speak to the state of affairs in 2016, and provided no evidence regarding TRP Realty’s practice and operations at any point prior;
 - iv. erred in regard to the weight he afforded to the financial statements, especially as compared to other documents and processes put in place by TRP Realty’s management;
- e. erred in finding there was an “absence of evidence that the commission account at TD/Comerica/RBC was, in fact a trust account”. The Motion Judge reached this conclusion in spite of finding as a fact that the commission account had the word “trust” as part of its nomenclature, and that this was “most likely” “requested by the client, TRP Realty, since the bank does not normally assign nomenclature of this kind to any account”;

- f. erred in finding that the commission account could be a trust account for certain purposes but not with respect to other purposes; ~~and~~

Other

- 1.1 after service of the Notice of Appeal in this matter, certain respondents took the position that the delivery of the Notice of Appeal was out of time, and that it ought to have been delivered within a ten day appeal period set out under s. 31(1) of the *Bankruptcy and Insolvency General Rules* (the “BIA Rules”);
- 1.2 while the appellants do not admit that the BIA Rules govern the herein appeal, which concerns matters of trust law not matters provided for under the *Bankruptcy and Insolvency Act* (the “BIA”), in the event that the BIA Rules govern this appeal, then s. 31(1) of the BIA Rules permit this Court to extend the time for delivery of a Notice of Appeal.
- 1.3 in the circumstance, if the BIA Rules apply, it is just in all circumstances for the time frame for delivery of the Notice of Appeal to be extended;
- 1.4 further, certain respondents have also asserted that this appeal may not be brought as of right, and that leave is required.
- 1.5 the appellants submit that leave is not required, and that this appeal may be brought as of right under s. 193(a) of the BIA (the point at issue involves future rights, to wit, the determination of commissions to be paid), s. 193(b) of the BIA (the point at issue is likely to affect other cases), or s. 193(c) (the property in the appeal exceeds ten thousand dollars);

1.6 in the alternative, if leave to appeal is required, s. 31(2) of the BIA Rules requires the Notice of Appeal to include the request for leave to appeal;

1.7 if leave is required, then this is an appropriate case where leave to appeal ought to be granted; and

1. such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (a) section 6(1)(b) of the *Courts of Justice Act*;
- (b) the Order appealed from is final; ~~and~~
- (c) leave to appeal is not required;
- (d) in the alternative, Rule 31(1) of the BIA Rules and s. 183(2), 193 of the BIA; and
- (e) in the further alternative, Rule 31(2) of the BIA Rules and s. 193(e) of the BIA.

Date: December ~~27~~31, 2018

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TO: SERVICE LIST

RCP-E 61A (November 1, 2005)

Firepower Debt GP Inc.
Applicant
(Respondent)

-and- The RedPin Inc.
Respondent
(Respondents)

Court File No.

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

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RCP-E 4C (May 1, 2016)