

CITATION: VOLKAN BASEGMEZ ET AL V. ALI AKMAN ET AL., 2018 ONSC 3069
COURT FILE NO: CV-17-11697-00CL
DATE OF HANDWRITTEN ENDORSEMENT: 20180509
DATE OF RELEASE: 20180515

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: VOLKAN BASEGMEZ, CEM BLEDA BASEGMEZ, ANIL RUKAN
BASEGMEZ,
BA&B CAPITAL INC., SERDAR KOCTURK
and KAAAN HOLDINGS INC.
Applicants

AND:

ALI AKMAN, SAMM CAPITAL HOLDINGS INC.
and TARN FINANCIAL CORPORATION
Respondents

BEFORE: McEwen J.

COUNSEL: Kyla Mahar and Stephanie De Caria, for KPMG Inc., in its capacity as
Liquidator for Tarn Financial Corporation and in its capacity as Receiver for
Tarn Construction Corp.

Patrick Shea, for the Applicants

Michael Valente, for Meridian Credit Union

Evita Ferreira for the Guarantee Company of North America

Jonathan Kulathungam, for Ali Akman

Brad Vermeerseh for Kingsett Capital Inc.

HEARD: May 1, 2018

ENDORSEMENT

Introduction

1. KPMG brings this motion seeking three orders. Given that there is some time sensitivity surrounding this matter, I am releasing these reasons by way of a handwritten endorsement.
2. For the reasons below, I am granting the three orders sought.

3. From the outset I should note that, subject to my comments below, the Respondents do not oppose the orders sought nor does the Applicant or any other of the interested corporate parties that attended.
4. Not surprisingly, a number of people who signed Agreements of Purchase and Sale (APSs) with Tarn Construction also attended. They are understandably upset and some made submissions to the Court. Most would like to see the project proceed, others seek a speedy return of their deposits¹.
5. As I indicated at the hearing, I have great sympathy for these purchasers, but as I will indicate below, it is my respectful view that the APSs ought to be terminated.
6. First, I will deal with the Disputed Deposits Resolution Procedure Order. The recommended procedure is reasonable.
7. Tarn and the Guarantee Company, support the order sought. The purchasers' rights are protected. Any difficulties with the May 15, 2018 bar date can be dealt with by me, if necessary. It is also important to note that the terminations are not occurring at this time. A further motion to terminate and return deposits will follow.
8. The second order involves the Approval and Vesting Order. I have previously approved the sale process. The process undertaken has been robust and competitive. It has been run in two phases.
9. I have also reviewed the Confidential Appendices which contain the most competitive bids. The accepted bid contains the highest price and is unconditional. Financing is confirmed. Employees are retained and there are a number of other sensible commercial provisions.
10. The order also provides for the contemplation of a back-up bid on an expedited basis, if necessary.
11. The order, at para 7, also addresses the termination of the excluded assets including the APSs. It is in the keeping with prior orders of the Court including in *Urbancorp*, wherein Justice Newbould (at para 6) approved an Approval and Vesting Order free of APSs in similar circumstance where APSs did not attach to the real property.
12. The remainder of the order deals with non-contentious issues and closely follows the model order.
13. Overall, the process and the offer received comply with the factors to be considered as set out in *Royal Bank of Canada v. Soundair Corp.* I agree that the sale represents the highest and best outcome.
14. In this regard, I also agree that the Confidential Appendices should be sealed as per the *Sierra Club* decision. The sensitive commercial information ought not to be disclosed as to avoid prejudice in the event the sale does not close.

¹ Twelve people attended. Five spoke to the court.

15. Last, the third order involves the entitlement of KPMG to terminate the agreements of purchase and sale – APSs. The terms of the APSs, as approved by Tarion, allow for early termination if certain conditions are met.
16. In considering this issue it is important to remember that Tarn Construction, the vendor, does not own the land and the APSs do not attach to the land. Tarn Construction's parent, Tarn Financial, is subject to these proceedings and the Winding Up Order. Tarn Financial, pursuant to this sales process is selling all its assets – including the property where the condominium development was to be built.
17. In considering whether this order, as drafted, should be granted it should first be noted that the early termination conditions include receipt by Tarn Construction of financing for the project on terms satisfactory to it, by October 9, 2018.
18. The question that arises is whether Tarn Construction will fulfill the condition regarding financing, by October 9, 2018 and if not, what are the ramifications.
19. Based on the record and submissions of counsel for KPMG, I am also satisfied that Tarn Construction has no chance of obtaining financing by October 9, 2018. As noted, Tarn Construction has no assets, does not own the land which is being sold, the APSs do not attach to the land, and its parent company is being liquidated and wound up.
20. Accordingly, where it has been established that it is “certain, inevitable, predestined and beyond doubt” that the condition precedent could not be met, Tarn Construction via KPMG can terminate the APSs without liability or damages other than the return of the deposits (and interest, if any): see *Pabla v. Tara Development (1999) Ltd.*, 2004 BCSC 1036.
21. The Purchasers should not have to wait until after October 9, 2018 in these circumstances.
22. Given this finding, it is also my view that s. 25(c) of the APS applies which limits the purchasers recovery as per the terms of that section. The purchasers therefore cannot pursue Tarn Construction for other costs or claims as per s. 25(c). The draft order in paras 3 and 4 recites those restrictions on liability.
23. A few of the condominiums purchasers sought costs. Based on the wording of s. 25(c) costs are not recoverable.
24. I should also note that Mr. Akman, although he did not oppose the orders sought, requested some terms as set out in para 2 of the affidavit of Kathy Ples. 2(a) was abandoned at the hearing.
25. I am not prepared to grant the terms requested in paras 2(b) - 2(e). First, Mr. Akman brings no motion and provides no caselaw to support its arguments.
26. Second, the relief he seeks in paras 2(c) and (d) is premature as the matter will be returning to me at a later stage where these issues, which will be much better known, can be dealt with.

27. Further, there is no basis that I can see at this time to expand the language as Mr. Akman proposes, as per para 2(b). Once again, it is premature and he can bring a motion on a proper record if he wishes, which will be served on all interested persons.
28. Last, there is no juristic reason I can think of to add para 2(e) at this time.
29. It is also necessary to note that one bid – Mr. Akman’s - did contemplate allowing for development of the condominiums.
30. The problems with this bid is that it is much lower than the highest bid; it was conditional on financing; the liquidator sought permission to speak to the proposed financier and this was denied; plus there was no evidence of construction financing in place; and, there was no evidence of financing to close the transaction.
31. There was therefore no reasonable hope that the APSs could ultimately be saved.
32. The final issue involved the purchasers right to rescind. Although, once again, there was no motion before the Court, this issue also arose.
33. In my view, there is no need at this time to amend the order to deal with the right of rescission. The orders made are without prejudice to any purchaser’s right to seek rescission if they so wish. The lifting of the stay would have to be addressed. I can deal with this issue if it arises.
34. The three orders shall therefore go as per the drafts filed. Counsel can provide me with copies for signature.

McEwen, T.