

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

**KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL
ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE
PLACEMENT REAL ESTATE FUND NO. 434**

Applicant

- and -

**MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT
GROUP (THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP INC.**
Respondents

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF
THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS
AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O.
1990, c. C. 43, AS AMENDED**

**AIDE MEMOIRE OF
GAMMA WINDOWS AND WALLS INTERNATIONAL INC.
(Case Conference on July 15, 2024)**

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Lawyers for the Respondent,
Gamma Windows and
Walls International Inc.

1. Gamma Windows and Walls International Inc. has served the Receiver with a Notice of Motion and supporting affidavit seeking an order that the Receiver satisfy two invoices for about \$700,000 that Gamma rendered to Mizrahi Inc. (“Mizrahi”) when it was The One’s Construction Manager. The invoices were rendered further to Gamma’s contracts with Mizrahi for work carried out and amounts earned further to those contracts before Mizrahi was removed as Construction Manager.
2. Gamma’s motion also asks for an order directing a reference to have the balance of its lien for \$1,839,681.92 determined by one of the Associate Justices experienced in construction and construction lien matters under rule 54.02 of the *Ontario Rules of Civil Procedure*.
3. At this Case Conference, Gamma asks for its motion for these two items to be scheduled.
4. The basis for the motion seeking payment of Gamma’s invoices is that the work invoiced was done further to paragraph 17 of the Receivership Order directing contractors to continue supplying to The One provided that they were paid in the ordinary course. Relying on the Receivership Order and representations of the Receiver and Skygrid that payment in the ordinary course would follow where contractors continued supply, Gamma continued to work and rendered invoices to Mizrahi until March 12, 2024. In the ordinary course, Mizrahi Inc. approved Gamma’s invoices for payment, just as Mizrahi had approved the previous 54 progress draws since the commencement of the project.

5. The Receiver won't pay the invoices because it says it needs for Skygrid to review all of Gamma's work and determine the extent of any deficiencies and get comfortable that Gamma will finish the work the Receiver perceives Gamma is obliged to complete under Gamma's contract with Mizrahi.
6. Unlike other trades on this Project, Gamma will not be entering into a contract with Skygrid with respect to the rest of the Project. That is because Gamma was approaching the end of its work under its contract when Mizrahi was removed. Gamma has no agreement with SkyGrid or the Receiver nor is it contemplated that there will be any such agreement.
7. Gamma's position on its motion is that the Receiver's pre-conditions for payment are outside the "ordinary course" and therefore offside paragraph 17 of the Receivership Order. Gamma continued its work on the understanding it would be paid if its invoices were rendered, scrutinized and approved, in the ordinary course by Mizrahi. Gamma did the work, Mizrahi has approved the invoices, but the Receiver refuses to pay them. If Gamma had known that preconditions for payment were not only Mizrahi's approval in the ordinary course, but also Skygrid's evaluation of Gamma's work under its agreements with Mizrahi with which Skygrid has no involvement, understanding or history, Gamma would not have continued, but would have sought leave to clarify and/or discontinue. That's not because Gamma is concerned with what Skygrid's and the Receiver's review might show, but because Gamma did not contract to be obliged to provide resources necessary to respond to yet two more levels of oversight and the delay in payment those extra layers have obviously caused.

8. Gamma is aware of Mizrahi's motion for payment that also engages paragraph 17 of the Receivership Order and that is contemplated to be heard in September 2024. Gamma understands that the Receiver opposes Mizrahi's motion on the basis that it may have set-offs against Mizrahi's claim, or reasons why Mizrahi's claims are not legitimate. The difference between Mizrahi's motion and Gamma's motion is that The One (in receivership) is the counterparty to Mizrahi's contract. The One (in receivership) is *not* the counterparty to Gamma's contract. If The One, and thus the Receiver, takes issue with Gamma's work that Mizrahi approved for payment, that's an issue between the Receiver and Mizrahi, not an issue between the Receiver and Gamma and cause for the Receiver to withhold payment from Gamma. The Receiver has emphasized repeatedly that it has no contract with Gamma. That observation runs both ways.
9. The success or failure of Gamma's motion for payment on its \$700,000 of invoices will turn on the merits of this distinction. If the court holds that Skygrid's and the Receiver's review of Gamma's work has any bearing on whether Gamma should get its \$700,000 of invoices paid, Gamma's motion for payment fails.
10. The motion isn't just about money. Gamma also needs some direction on whether it can terminate its contract with Mizrahi and demobilize (Gamma has already issued a Notice of Default dated May 15, 2024 in respect of its two unpaid invoices) rather than just maintain a presence at The One project in a state of contractual limbo.

11. With respect to Gamma's lien claim of \$1,839,681.92, (\$1,628,037.10 without HST) that figure can be sorted into three buckets, two of which are already for fixed amounts;
 - (a) The first bucket is \$621,331 (plus HST) consisting of the two approved invoices described above for work done on Mizrahi's watch prior to March 12, 2024;
 - (b) The second bucket in the amount of \$897,018.88 (plus HST) consisting of previously fixed amounts relating to agreed holdback already reported by the Receiver to the Court and amounts provided for in Gamma's contract; and
 - (c) The third bucket of \$109,686.98 (plus HST) is the value of work and materials supplied after the time-period covered by invoices described above, based upon the Statement of Values for which all progress draws are based.
12. Particulars of the foregoing were provided to the Receiver in response to the Receiver's request.
13. The first bucket will fall away if Gamma succeeds on its motion for payment. Gamma requests that the remaining two buckets be referred to the Associate Justices for determination, keeping in mind that 80% of the balance of just over \$1.0 million are for fixed amounts and the other two items are based upon a) an agreed formula and b) the Statement of Values in Gamma's contract with Mizrahi, respectively.

14. Gamma appreciates that the Lien Regularization Order contemplates at paragraph 23 that the Receiver will move for approval of a process to have liens determined. The same paragraph, however, provides that any Person can move for determination of a lien claim as well.

15. Gamma just wants its lien determined in a timely fashion. The Lien Regularization Order was made four months ago yet the Receiver has not moved to have a process to have the liens determined approved. It doesn't appear as though there are a multitude of lien claims against The One such that a specialized process is required. Rather, it would seem to be efficient for all stakeholders to have an Associate Justice experienced in construction and construction lien matters determine Gamma's lien claim, which the Associate Justice would do at no added cost to the estate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of July, 2024.



Glenn Grenier / Jeffrey Levine
McMillan LLP

Lawyers for Gamma Windows and Walls
International Inc.

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Court File No.: CV-23-00707839-00CL

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Proceeding commenced at **TORONTO**

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