

**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.
(returnable June 6, 2024)**

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

TO: **THE SERVICE LIST**

1. Gamma Windows and Walls International Inc. opposes the Holdback Release Order the Receiver asks for on this motion, as it applies to Gamma. Under the order sought, the Receiver would have the discretion to withhold the release of holdback Gamma is owed unless Gamma gives up its right to approximately \$619,133.59 in progress payments earned up to March 13, 2024 and a further \$276,240 (plus HST) it has earned further to the terms of the Settlement Agreement, and agrees to grant a broad indemnity to the Receiver. This is unfair.
2. Gamma asks to be exempted from the Holdback Release Order, and for a 9:30 appointment to schedule a further motion where it will ask for: (1) declarations as to the propriety of the Receiver's decision to refuse payment on Gamma's invoices that are outstanding; (2) direction that the Receiver satisfy Gamma's unpaid invoices; or (3) in the alternative to (2), an order for a reference proceeding before a Construction Lien Associate Judge to expeditiously resolve the alleged bases for the Receiver's refusal to pay Gamma.
3. Gamma is a Canadian contractor specializing in curtain wall, recladding and window wall supply and installation involving projects across the country. In 2019, it entered contracts with Mizrahi Inc. for nearly \$100 million to supply and install the exterior building envelope system for The One. To resolve several disputes and incentivize Gamma to continue its work, Gamma and Mizrahi entered a comprehensive settlement agreement in June 2023 that, among other things, descope much of Gamma's work for The One, and permitted Gamma to descope

yet more work at its option if certain work of other contractors necessary for Gamma to complete its work was not in place by September 30, 2023.

4. After the Receiver's appointment on October 18, 2023, Gamma continued its work in accordance with paragraph 17 of the Appointment Order and representations of the Receiver. In particular, paragraph 17 of the Appointment Order required, in relevant part, as follows:

THIS COURT ORDERS that all Persons having [agreements with Mizrahi Inc.], including without limitation, [sub-contracts...] are hereby restrained until further Order of this Court from discontinuing...the supply of such goods or services...***provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver or [Mizrahi Inc.], as determined by the Receiver, in accordance with the normal payment practices of [Mizrahi Inc.],*** such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court. [emphasis added]

5. For its part, the Receiver represented in a letter of October 20, 2023 that “all contractors and trades are required to continue providing goods and services, ***and will continue to be paid in the ordinary course.***” The Receiver made the same representation in its letter of February 26, 2024.
6. For Gamma, the “ordinary course” is governed by its Subcontract and the June 2023 Settlement Agreement with Mizrahi, followed by Gamma and Mizrahi for months before the Receiver's appointment, and until very recently. Under Article 6 of the Subcontract and Part 5 of the Subcontract Conditions, as modified by sections 3(h), 15(b), 16 and 18(b) of the Settlement Agreement, Gamma makes application for payment monthly in respect of progress against line items in a

statement of values attached as Annex A to the Settlement Agreement, and for the release of amounts that would be the subject of a holdback but for the express terms of the Settlement Agreement.

7. The Holdback Release Order would modify those terms of payment for work completed and invoiced before the Receiver disclaimed the agreement with Mizrahi Inc., effective March 13, 2024, and at a time when the Receiver represented that Gamma would be paid in the ordinary course. In particular, paragraph 3 of the draft Holdback Release Order gives the Receiver the discretion to refuse the release of holdback unless a Holdback Release Agreement is signed.
8. The Holdback Release Agreement contemplates in recital B that the relevant subcontract provides for the retention of statutory holdback in accordance with the statute. That doesn't apply to Gamma per its Subcontract as amended by the Settlement Agreement. Recital B also contemplates an agreement that the release of holdback settles all outstanding claims that Gamma has prior to March 13, 2024 as set out in paragraphs 5 and 6 of the Holdback Release Agreement. Gamma, however, is owed \$619,133.59 for work completed and billed prior to March 13, 2024 that is separate from its holdback entitlements and a further \$276,240 (plus HST) to which it is entitled further to the Settlement Agreement for materials it has already delivered to the site. As such, paragraph 3 of the draft Holdback Release Order and its requirement for the execution of a Holdback Release Agreement, would permit the Receiver to withhold the release of Gamma's holdback unless Gamma released its right to payment of \$931,284 unrelated to any holdback. That is unreasonable and unfair.

9. Moreover, paragraph 4 of the Holdback Release Agreement would require Gamma to indemnify the Receiver for any claims against it that might result from the Receiver's release of holdback owed to Gamma. There's no reasonable basis for requiring Gamma to provide such an indemnity. Gamma has no contractual relationship with the Receiver, and the work Gamma completed to earn the holdback was not carried out under the condition that payment for the work would only flow in exchange for a broad indemnity.

10. It is also the case that the proposed Holdback Release Agreement contemplates only two situations:
 - a) Contractors that completed their work prior to the Effective Date and thus, are only owed holdback; and
 - b) Contractors that had not completed their work prior to the Effective Date and are going to enter in a further contract with Skygrid.

11. Neither of these situations apply to Gamma. As of the Effective Date, Gamma was very close to being finished its revised scope of work under the Settlement Agreement, but not quite complete. Part of the reason for that is that certain predecessor work by others necessary for Gamma's work to be carried out was not done by the September 30, 2023 deadline set out in the Settlement Agreement, nor is such predecessor work complete as of this date. Gamma is entitled to descope that installation work at the values set out in the Settlement Agreement. Further, Gamma has no interest in entering a new contract with Skygrid. Gamma is content for Skygrid or the Receiver to adopt the Subcontract and Settlement Agreement

Gamma had with Mizrahi Inc., or have those agreements terminate in accordance with their terms.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 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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