

**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

**AIDE MEMOIRE OF MIZRAHI INC
(Returnable March 7, 2024)**

1. On October 18, 2023, Justice Osborne granted an Order (the “**Appointment Order**”) appointing a receiver, Alvarez & Marsal Canada Inc (“**A&M**” or the “**Receiver**”) over the owners of an 85-storey condominium, hotel and retail tower located at the southwest corner of Yonge Street and Bloor Street West in Toronto, Ontario (the “**Project**”).
2. Since 2014, Mizrahi Inc (“**MI**”) has acted as the general contractor and developer of the Project.
3. MI brings a motion seeking, *inter alia*:
 - a. payment of its outstanding invoices for work provided to the Project as required by paragraph 17 of the Appointment Order;
 - b. an order setting aside the December 2023 payment letters; and

- c. certain ancillary relief, as set out in the Notice of Motion served by MI and in a Supplemental Motion Record (the “**Supplemental Motion**”) of MI to be served.
4. As of March 7, 2024, MI is owed in excess of \$5 million for outstanding invoices for work provided to the Project for work that was performed and costs incurred since the date of the Appointment Order. The Supplemental Motion will provide particulars as to the further amounts owed to MI up to the effective date of the disclaimer, March 12, 2024, that was issued by the Receiver to MI on February 26, 2024.
5. The Appointment Order obliged MI to continue to provide the Project with its services and for A&M to pay MI for such services in accordance with normal payment practices of the Project for such services. Notwithstanding that MI has complied with its obligation, A&M has consistently refused to pay MI’s invoices for construction services and labour provided to the Project, in accordance with the normal payment practices of the Project, at the historical rates in the four years prior to the Appointment Order.
6. On February 26, 2024, A&M disclaimed (the “**Disclaimer**”) MI’s contract with the Project. As a result, MI’s obligation to provide construction services and labour to the Project ends on March 12, 2024, at which point MI’s claim to payment of outstanding invoices for construction services and labour will have crystallized. These claims will be set out in the Supplemental Motion Record.
7. MI’s motion should be heard urgently and expeditiously. The combined effect of months of short payment to MI and the Disclaimer creates a significant hardship and prejudice for MI, who has not been paid in full for its services at the rates paid by the Project for the four years prior to the Appointment Order.

8. The MI motion is largely limited to the interpretation of paragraph 17 of the Appointment Order and a factual matrix that is largely uncontested and supported by the statements in the Receiver's First Report dated February 26, 2024 (the "**First Report**").
9. MI does not take a position on the draft Lien Regularization Order sought by the Receiver, which is included in the Motion Record of the Receiver dated February 26, 2024 (the "**Receiver's Motion Record**").
10. MI does not take a position with the draft Construction Continuance Order that is included in the Receiver's Motion Record, save and except for paragraphs 11, 14 and 15 (the "**Disputed Relief**") of the Construction Continuance Order. The Disputed Relief goes to the root of the dispute between the Receiver and MI and should be addressed by the Court when it hears MI's motion. It is premature for the Court to grant the Disputed Relief on March 7, 2024.
11. A&M has been aware of MI's claim for the outstanding amounts owing to MI for months.
12. A&M now advises in the Receiver's Motion Record that it intends to seek a set-off claim for unspecified claims it alleges against MI. However, the credibility of such a claim is undermined by the explicit requirement in paragraph 17 of the Appointment Order, which mandates that MI be paid in accordance with the Project's normal payment practices. This claim is currently considered a stranded post-filing claim. The integrity of the payment process is crucial for third parties dealing with a Court-appointed receiver, as it ensures confidence in the receiver's ability to fulfill obligations for goods and services provided post-filing. The role of the receiver was clearly defined in a recent Ontario Court of Appeal decision, where it was stated that the receiver does not represent the creditors of the debtor, but instead, "stands in the shoes of the debtor and not the creditors."^[1]

^[1] Royal Bank of Canada v. Cutler Forest Products Inc., 2024 ONCA 118 at para 32.

13. A&M may bring its motion, returnable at the same time as MI's motion but if it chooses to have its motion returnable 4 to 6 months later doing so should not prejudice MI's right to be paid for the services it was ordered to supply the project. The Receiver's effort to frustrate and delay the MI motion to the prejudice of MI, concerning A&M's breach of the Appointment Order, ought not to be rewarded.
14. If MI's motion is not heard expeditiously, MI will suffer hardship in the circumstances of not being paid amounts that it is entitled to, as required by paragraph 17 of the Appointment Order. MI will be prejudiced by A&M's intended sales process, in which the existing lender has confirmed it will participate. MI is concerned that the deliberate delay by the Receiver will set the stage for a transaction that will be brought to the Court that will seek either an Approval and Vesting Order, or a Reverse Approval and Vesting Order that defeats the MI stranded claims.
15. MI proposes the following timetable:

Responding Motion Record of the Receiver and a Cross Motion, if any be served by March 28, 2024;

Responding materials by MI (to any Cross Motion) as well as Reply by April 5, 2024;

Supplementary record asap

Supplementary Responding Motion Record within 5 days

Reply to Supplementary Responding Motion Record withing 2 days

Cross-examinations, if any, completed by April 26, 2024;

Exchange Facta by May 3, 2024; and

Hearing the week of May 6, 2024.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of March, 2024.

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-and-

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Applicant

Respondents

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

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PROCEEDING COMMENCED AT TORONTO

MOTION RECORD

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