

**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

FACTUM OF MIZRAHI INC.

August 7, 2024

MORSE SHANNON LLP
133 Richmond Street West
Suite 501
Toronto ON M5H 2L3

Jerome R. Morse (21434U)
jmorse@morseshannon.com

David M. Trafford (68926E)
dtrafford@morseshannon.com

Tel: 416-863-1230
Fax: 416-863-1241

Lawyers for the Respondents

FACTUM OF MIZRAHI INC.

1. The Moving Party, Mizrahi Inc (“MI”), seeks the following construction related documents from the court-appointed receiver, Alvarez & Marsal (the “Receiver”):
 - a. The daily logs from the general contractor, Skygrid;
 - b. Updated budgets and cost to complete analyses in the Receiver’s possession;
 - c. The quantity survey reports for the Project since the disclaimer of MI’s general contracting contract;
 - d. Updated construction schedules in the possession of the Receiver and/or Skygrid.

Collectively these documents are referred to as the “Construction Documents”.

2. MI seeks production of the Construction Documents from the Receiver because they are relevant to MI’s payment motion.
3. MI is prepared to execute a reasonable and mutually agreeable Non-Disclosure Agreement (“NDA”) and to accept receipt of this documentation on a strictly confidential basis. In its Supplemental Third Report, the Receiver claims that it was prepared to negotiate an NDA with MI for the disclosure of the Construction Documents. The Receiver states, among other things:

The information sought is confidential, and Mr. Mizrahi has not executed a non-disclosure agreement (“NDA”). Mr. Mizrahi and the Receiver are negotiating the terms of an NDA, and the Receiver does not intend to provide any confidential information to Mr. Mizrahi unless and until an appropriate NDA is executed.

4. This Receiver knows this to be incorrect. MI has advised the Receiver it was prepared to agree to confidentiality terms and an NDA, but no NDA was proposed by the Receiver with respect to the Construction Documents. Counsel for MI asked the Receiver to answer questions arising out of its Supplemental Third Report, including questions about the Receiver's claim it was prepared to discuss confidentiality terms for the production of the Construction Documents. The Receiver's response was limited to a timeline for the negotiation of an NDA as part of the SISP, which is unrelated to this motion and the Construction Documents. The Construction Documents are not contained in the SISP data room.

The Construction Documents are Relevant to the Payment Motion

5. The Construction Documents are relevant to the Receiver's opposition to MI's motion for payment to enforce paragraph 17 of the Receivership Order (the "Payment Motion"). The Receiver has provided MI with a preliminary issue list which identifies certain issues the Receiver is investigating as part of its set-off defence in the Payment Motion. One of the issues the Receiver claims it is investigating is whether MI was overcompensated as general contractor to the Project, despite the record being clear that all of MI's costs and fees were reviewed and approved by the quantity surveyor, Altus, the Senior Secured Lender, its Administrative Agent, and, for a period of time, Ms. Jenny Coco's designee who administered the approvals and payments for the Project.
6. The Receiver raised this potential issue months ago in its Supplemental Report to the First Report, dated March 6, 2024, yet has still not yet committed to pursuing this claim as a set-off defence, notwithstanding it initially agreed to a timetable to

file responding materials to advance such a claim by May 30 and all the documents relevant to that claim have been in the possession of the Receiver for months and do not depend on the banking records or project emails MI recently produced.

7. In particular, the Receiver has indicated it *may* argue that MI's claim for payment in the Payment Motion would constitute an above-market payment for a general contractor that is not supported by the underlying contract between the Project and MI. MI should be granted the requested order for production of the Construction Documents so that the Payment Motion can proceed as scheduled. There is no reason not to provide the Construction Documents confidentially, as MI will rely on these documents in response to the threatened set-off defence. Producing that documentation now will save considerable time. Alternatively, if not produced, the Receiver should be precluded from pursuing the threatened set-off defence.
8. To be clear, MI contests that this proposed argument is in any way relevant to the court's determination of MI's claim for payment on the Payment Motion and the interpretation of paragraph 17 of the Receivership Order. The Receiver has confirmed its position that Skygrid is being compensated in accordance with market rates. If the court did entertain this set-off argument by the Receiver, then the Construction Documents are incontestably relevant to the issue of market rates for the construction of the Project.
9. As part of its justification for the disclaimer of MI's general contracting services to the Project, the Receiver advised the court that the replacement of MI with the current general contractor, Skygrid, would save the Project approximately \$1 million per month. It made this claim despite the fact that interest on the Senior Secured Lender's mortgage being incurred at nearly \$1 million a day. The value of

the work provided by MI to the Project is, in part, informed by the costs the Project is currently incurring with Skygrid and the efficiency and the progress made by Skygrid in constructing the building. If Skygrid has not achieved the rate of construction of MI since MI was replaced on March 12, 2024, or was paid at a cost greater or equal to what MI was paid, that would conclusively establish there is no merit to the contention MI charged in excess of a market price for what is essentially the same work.

10. The fact is that if the Receiver is going to ask the court to undertake an analysis of the value of the services MI provided to the Project as a general contractor, then the cost and rate of construction by the replacement general contractor is relevant information that is solely within the Receiver's possession and should be produced to MI to ensure that all relevant information is available to the court as part of a fair procedure to determine MI's rights in the Payment Motion.
11. The production of the Construction Documents is not onerous. When MI was general contractor to the Project, it provided key stakeholders with daily logs every work day. They are electronically prepared documents. All the Receiver must do to comply with this request is produce the past daily logs and add counsel for MI to the distribution list. It requires the Receiver to do no more than address an email to MI's counsel with the daily reports attached and push send. MI will also accept the production of daily logs on a weekly basis to reduce the modest effort required.
12. Similarly, the production of updated schedules and budgets for costs to complete the Project is not onerous. The Receiver has this information. It refused to include this updated information in the data room for participants in the SISP process. The status of construction, the costs of construction since the disclaimer of the MI

general contracting services and the speed of construction are all relevant to the issues raised by the Receiver on the Payment Motion.

13. The Receiver claims that substantially similar information is available to Mr. Mizrahi through the data room as a participant in the SISP process. This is incorrect. The Receiver has not provided any detailed information on the construction progress since the disclaimer of the MI contract. The daily logs are readily available, easily distributed, and concrete evidence of the rate and status of construction. While the Receiver takes the position that the daily logs do not provide relevant information, MI, which has significantly more experience in the development and construction of condominiums than the Receiver, disagrees. MI will rely on the daily logs as part of the Payment Motion to argue that the Project's rate of construction has significantly decreased, as construction of the building by Skygrid has slowed considerably resulting in unnecessary delays and subsequent interest costs.

14. The Receiver has found it relevant to report to the court on the progress of construction, yet refuses to supply the daily logs, which are the single most important document to verify the reported progress. Similarly in its communications to date with MI no reason not to produce the construction documents has been offered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED August 7, 2024



Jerome R. Morse



David M. Trafford

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

-and-

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

Applicant

Respondents

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

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

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF
MIZRAHI INC.**

MORSE SHANNON LLP

133 Richmond Street West Suite
501
Toronto ON M5H 2L3

Jerome R. Morse (21434U)
jmorse@morseshannon.com

David M. Trafford (68926E)
dtrafford@morseshannon.com
Tel: 416.863.1230
Fax: 416.863.1241

Lawyers for the Respondents