

COURT OF APPEAL FOR ONTARIO

CITATION: DBDC Spadina Ltd. v. Walton, 2015 ONCA 625

DATE: 20150917

DOCKET: C60187

Gillese, Lauwers and Benotto JJ.A.

BETWEEN

DBDC Spadina Ltd. and those corporations listed on Schedule A hereto

Applicants

and

Norma Walton, Ronauld Walton, The Rose & Thistle Group Ltd. and Eglinton
Castle Inc.

Respondents (Respondents)

and

Those corporations listed on Schedule B hereto, to be bound by the result

Florence Leaseholds Limited, Beatrice Leaseholds Limited and Ada Leaseholds
Limited

(Appellants)

Robert B. Cohen, for the appellants Florence Leaseholds Limited, Beatrice
Leaseholds Limited and Ada Leaseholds Limited

Mark Dunn, for the respondent Schonfeld Inc., Manager

Heard: September 10, 2015

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of
Justice, dated February 9, 2015.

ENDORSEMENT

[1] This appeal is part of a complex, multi-party insolvency proceeding.

[2] By order dated November 5, 2013, Schonfeld Inc. (the “Manager”) was appointed receiver-manager of a commercial property located on Dupont Street in Toronto, along with a number of other properties and the companies that owned them.

[3] The appellants, Florence Leaseholds Limited, Beatrice Leaseholds Limited and Ada Leaseholds Limited, hold a first mortgage on the Dupont property (the “Mortgage”).

[4] The November 2013 order granted the Manager a charge for its fees, disbursements and counsel, which ranked as the first charge on the properties in priority to any other charges. It also granted a Manager’s borrowing charge that ranked subordinate to the Manager’s charge but in priority to all other charges on the properties (together, the “Charges”). Thus, the Charges ranked ahead of the Mortgage.

[5] The Manager promptly served the November 2013 order on the various individuals and entities with a security interest in the properties, together with a letter that referred to the paragraphs in that order granting the Charges. This letter noted that the Charges ranked ahead of pre-existing security interests in the properties.

[6] On receipt of this communication, some mortgagees took the position that they wanted to have control of the properties under their mortgages. Consent orders were made discharging the Manager for those properties.

[7] Millwood Management Limited, who administers the Mortgage on behalf of the appellants, did not object to the November 2013 order. Accordingly, the Manager remained in place in respect of the Dupont property. The Manager then proceeded to invest significant time and money in managing, preserving and marketing the Dupont property.

[8] Months later, the appellants moved to, among other things, have the November 2013 order amended to provide that the Charges rank behind the Mortgage.

[9] The motion judge dismissed the appellants' motion. He found that the appellants had not moved "forthwith" to vary the November 2013 order, as required by rule 37.14(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In any event, the motion judge found that even if the appellants had complied with the *Rules*, the motion should be dismissed. He found that the appellants had acquiesced in the Manager's appointment and taken the benefit of its work, knowing that they could have had the Dupont property carved out of the November 2013 order, as other mortgagees had done.

[10] We see no basis on which to interfere with the decision below. Indeed, we fully agree with it.

[11] Shortly after the November 2013 order was made, the appellants were served with it and the cover letter drawing attention to the "super-priority" given to the Charges. The appellants then waited for a period of many months before

bringing their motion. During that period, the appellants knew that the Manager was spending time and money on the Dupont property. The appellants' materials show that they wanted the Dupont property to be under the Manager's administration. In these circumstances, the trial judge made no error in finding that the appellants did not move "forthwith" to vary the November 2013 order.

[12] As the motion judge found, the appellants acquiesced in the Manager's appointment, knowing that the Charges ranked ahead of their mortgage. They took the benefit of the Manager's work on behalf of the Dupont property. It would be inequitable and unfair to grant the appellants the relief they sought. The fact that the appellants asked that the stay of proceedings be lifted in February 2014 and threatened to bring a motion to vary the November 2013 order in April 2014 does not change this result.

[13] Accordingly, the appeal is dismissed with costs to the Manager fixed at \$20,000, inclusive of all taxes and disbursements.

W. Greene J.
Pham M.
M.L. Benotto J.A.

Schedule "A" Companies

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investment Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Tisdale Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Inc.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Industrial Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

Schedule “B” Companies

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Inc.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Tisdale Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Dewhurst Developments Ltd.
29. Eddystone Place Inc.
30. Richmond Row Holdings Ltd.
31. El-Ad Limited
32. 165 Bathurst Inc.