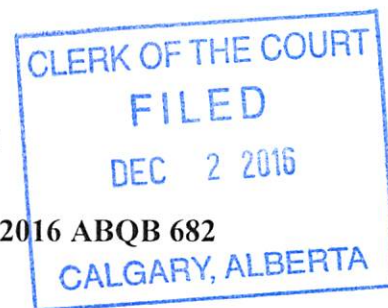


Court of Queen's Bench of Alberta



Citation: Easyloan Corporation v Base Mortgage & Investment Ltd, 2016 ABQB 682

Date:
Docket: 1501 11817
Registry: Calgary

Between:

Easyloan Corporation and Mike Terrigno

Plaintiffs

- and -

Base Mortgage & Investments Ltd. and Base Finance Ltd., Arnold Breitkruetz, Susan Breitkruetz, Susan Way and GP Energy Inc.

Defendants

**Memorandum of Decision
of the
Honourable Madam Justice B.E. Romaine**

I. Introduction

[1] Base Mortgage & Industries Ltd, Base Finance Ltd, Arnold Breitkruetz, Susan Breitkruetz and GP Energy Inc, (the "Base applicants") applied for a variety of relief in this receivership. Susan Way, another defendant, was not represented in the application.

[2] The Base applicants apply:

- (a) for an order removing from the November 6, 2015 Amended Amended Order of Receivership (the "Order") the reference that extended the receivership over real property that is registered in the names of Mr. Breitkruetz, Ms. Breitkruetz, and 334103 Alberta Ltd, and that directed the Registrar of Land Titles to register the

Order against title to property notwithstanding the requirements of subsection 191(1) of the *Land Titles Act*;

- (b) for an order removing certificates of *lis pendens* against certain property;
- (c) for an order striking paragraph 14 of a Statement of Claim filed in relation to this matter on October 16, 2015, naming the Base applicants as defendants;
- (d) returning records seized by the Receiver; and
- (e) extending the time to file an affidavit of records.

[3] I denied the entirety of the application and these are my reasons.

[4] The Receiver applied for an order approving its actions taken to date, compelling production of information and permitting the Receiver to market and sell certain real properties. The Order provides the Receiver with authority to market and sell properties, subject to Court approval when individual transaction exceed \$100,000 and aggregate transactions exceed \$500,000. As the proposed transactions will exceed both the individual and aggregate limits, the Receiver sought approval to market the properties in advance.

II. Facts

[5] Arnold Breitkruetz is the sole shareholder and director of Base Mortgage, a mortgage brokerage company incorporated in 1978, and Base Finance, a private investment company incorporated in 1984 (collectively, "Base"). Base Mortgage acts as the administrator of Base Finance, and is paid an administration fee. Over the approximately 35 years of the operations of Base, Mr. Breitkruetz solicited in excess of \$120 million from approximately 240 investors and deposited these funds in Base Finance.

[6] As noted by Yamauchi, J in *EasyLoan Corporation v Base Mortgage & Investments Ltd*, 2016 ABQB 77:

Mr. Breitkruetz would inform investors that Base Finance was in the mortgage broker business, that it would obtain funds from investors that it would pool and loan to borrowers. Mr. Breitkruetz told investors that the borrowers would provide Base Finance with mortgages on real estate as security for the loans. The investors would be the beneficial holders of those mortgages, although Base Finance would be the nominal mortgagee, an intermediary in transactions involving the trustees and the borrowers.

[7] In most cases, Base Finance would provide the investors with a document entitled "Irrevocable Assignment of Mortgage Interest" that would name the investor, show the amount the investor provided to Base Finance and outline some of the terms of a mortgage that would secure the loan. As noted by Justice Yamauchi, this document did not name either the mortgagor or the lands on which the mortgage would be placed. None of the applicant investors involved in the matter before Justice Yamauchi had ever seen the mortgages that from the Assignment allegedly were security for their investments.

[8] Affidavits filed in the receivership proceeding in the matter before Justice Yamauchi and affidavits filed with the Alberta Securities Commission by investors disclose that they believed that they were investing their money with the Base corporations in order to participate in the assignment of first mortgages held on Alberta properties at attractive interest rates.

[9] Mr. Breitkruetz denies that he represented that the mortgages would be held on Alberta properties, alleging that he only said that investors would have an investment in a first mortgage held by Base Finance.

[10] The events that led to the receivership commenced on or around September 28, 2015, when the Alberta Securities Commission was advised by the Royal Bank of Canada that it had concerns about the validity of the Base businesses as a result of an investigation into a large NSF cheque issued to Base Finance.

[11] An affidavit filed by an investigator for the Alberta Securities Commission states that, prior to the Bank contacting the ASC, Mr. Breitkruetz had communicated to the Bank that Base Finance operated as a mortgage broker and had approximately 100 mortgages that were secured on title and that all mortgage funds were obtained from investors.

[12] In conducting its own review, the Bank was of the view that none of the transactions made out of the Base Finance account appeared to be for the purpose of lending for mortgages. The investigator determined activities in the account were suspicious and representative of a Ponzi-type scheme. The only Bank account that held funds was that of Base Finance and many of the deposits and payments from the account were made from and to individual investors with memo notations of principal and interest.

[13] On September 25, 2016, the Bank froze the Base Finance account, which had a balance of approximately \$1.08 million. On September 29, 2015 the Executive Director of the Alberta Securities Commission issued an order pursuant to section 47 of the *Securities Act*, RSA 2000, c S-4, freezing the Base Financial account.

[14] On October 15, 2015, this Court granted an order appointing a Receiver of all the current and future assets, undertakings and properties of every nature and kind of Base Finance and Base Mortgage and certain properties registered in the names of Mr. Breitkruetz, his spouse Ms. Breitkruetz and 334103 Alberta Ltd. The receivership order was amended twice. As part of the order, Mr. Breitkruetz, Ms. Breitkruetz, the Base corporations' sole employee Ms. Way, an individual named Brian Fox, and 334103 Alberta Ltd. (now GP Energy Inc) were also listed as respondents and subject to certain terms of the order.

[15] The Receiver's first report filed on November 5, 2016, states that, "the Receiver has not discovered any underlying Alberta based mortgages that the Debtors have invested in for the benefit of their investors."

[16] Mr. Breitkruetz appears to support his position on the basis that Base Finance is entitled to an underlying mortgage on the basis of a Deed of Trust with a face value of \$30 million. It appears from the Receiver's investigation to date that Mr. Breitkruetz maintains that Base Finance holds first charge mortgage security on leasehold interests in oil and gas properties in Texas held by Saddle Lake LLC, a company whose sole director and shareholder appears to be Mr. Fox.

[17] A Deed of Trust payable to Base Finance exists, and appears to be secured against leases outlined in the Deed of Trust documents. The Receiver has not had the funds to investigate the legitimacy or value of the Deed of Trust.

[18] Mr. Breitkruetz advised the Receiver that Base Finance has been investing in Mr. Fox and his related companies, including, most recently, Saddle Lake Energy LLC, since before 2000. At one time, Mr. Breitkruetz indicated to the Receiver that he did not know how much has

been invested in Mr. Fox and his related companies, but that it is in the range of \$30 million to upwards of \$80 million. More recently, Mr. Breitkruetz indicated on questioning that Mr. Fox borrowed approximately \$120 million from Base Finance over 35 years for the purpose of obtaining and developing oil and gas properties.

[19] The Receiver reports that Mr. Breitkruetz told the Receiver that the bulk of the investor funds from Base Finance, in the approximate amount of \$80 million, was lost when Powder River Petroleum International Inc filed for bankruptcy protection under Chapter 7 of the US *Bankruptcy Code*. Powder River was a public company of which Mr. Fox was the sole director, and president.

[20] The Receiver reports that no significant income has been earned by the Base companies since the liquidation of Powder River.

[21] Mr. Breitkruetz takes the odd and incredible position that investors did not suffer loss from the Powder River insolvency. He says that “we” (unspecified as to whether this was Base or Mr. Fox or Saddle Lake) were able to re-acquire the leases, which he maintains still have a value in excess of \$100 million according to a 2013 appraisal. The appraisal is problematic in that it does not identify the oil and gas properties that were being appraised.

[22] The Receiver states that, in an effort to recover from the approximate \$80 million in losses from Powder River, Mr. Breitkruetz continued to solicit investment from his Base Finance investor group in order to maintain the interest payment and principal redemption requirements of his investor group. Mr. Breitkruetz conceded on questioning that he “probably continued soliciting funds”.

[23] Mr. Breitkruetz also advises that he continued to forward investors funds to Mr. Fox and his related companies in an effort to recover the leases lost in the Powder River liquidation, as evidenced by the purchase of the Saddle Lake leases and the Deed of Trust.

[24] Mr. Breitkruetz advised that investor funds in the approximate amount of \$200,000 were used to pay for legal fees related to SEC allegations against Mr. Fox relating to Powder River. Mr. Fox did not quantify the amounts paid to his legal counsel but agrees that Base Finance helped fund his legal costs.

[25] At the time of the receivership, the Texas properties were non-producing. Mr. Breitkruetz stated on questioning that Mr. Fox was attempting to obtain financing in the amount of \$50 million from unidentified Chinese investors to develop the properties but that this fell through for vague and confusing reasons.

[26] The Receiver has determined that Mr. Breitkruetz and his companies have engaged in very little mortgage brokering since 2009, and none in the past two years, because Mr. Breitkruetz says he plans to retire.

[27] Mr. Breitkruetz admits that funds borrowed from investors were advanced to Mr. Fox so that he could then make payments to other investors and sometimes make payments to Base investors, which payments were represented to be “interest payments”. In fact, no investments were made and no interest was earned, but the payments gave the illusion that the Base corporations were continuing to earn significant returns on investments. Investors were not advised of the loss in the Powder River insolvency or the investment in Mr. Fox’s oil and gas activities.

[28] Mr. Fox has stated in an affidavit filed in related proceedings that he believes that Mr. Breitkruetz, the Base corporations and 334103 Alberta Ltd are parties to a Ponzi scheme that involves almost 300 investors, and that in excess of \$122 million of funds that were advanced are now lost. He also says:

I'm also informed and believe that although the investors believed they were investing in Alberta mortgages and, in fact, there was only one Alberta mortgage that existed, and that mortgage was filed on the lands once they were fraudulently transferred and converted to 334103 Alberta Ltd and Arnold Mr. Breitkruetz, Base Mortgage & Investment Ltd and Base Finance Ltd.

[29] Mr. Breitkruetz denies this.

III. Analysis

A. The Base Applicants' Application

[30] With respect to the application to remove certain properties from the Order, the Base applicants rely on the fact that amendments to the original receivership order were made in an application on November 6, 2015 without notice of the application to their counsel.

[31] First, and most importantly, the provisions incorporating the properties in question were not added in the November amendments but have been in the order since it was first made on October 15, 2015. That original order was never appealed, nor did the Base applicants take advantage of the come-back provision in the order. The Base applicants do not dispute the evidence that was before Justice Yamauchi on October 15, 2015 that led to the original order but rely on two irregularities:

- (a) They allege that the affiant for the plaintiff, Mike Terrigno, misrepresented to the Court that Base Finance had no valid security on the leases of its borrower, Saddle Lake Energy LLC. As noted previously, the Base applicants allege that Base Finance holds security in the amount of \$30 million based on the Deed of Trust. As described in the Receiver's reports, there are a number of irregularities and unanswered questions with respect to the Deed of Trust and the leases alleged to be held by Saddle Lake. At best, it appears that the Deed of Trust, if valid, would secure only \$30 million of an alleged \$80 million invested by Base Finance in Saddle Lake. The Receiver has not been able to determine the authenticity and validity of the Deed of Trust, given the financial statues of the receivership. Thus, if there was a misrepresentation in the affidavit, which is not clear at this point, it was made at the commencement of an investigation into the complex and poorly documented affairs of Base. I am not persuaded that this misrepresentation, if it was one, would have made a difference to Justice Yamauchi, in granting the initial order, given the weight of other evidence that was before him.
- (b) They allege that counsel for the Plaintiffs and the Receiver failed to give notice of the November 6, 2015 application to counsel for the Base applicants. The Base applicants were previously represented by different counsel who had not yet filed a Notice of Ceasing to Act on November 6, 2015. Current counsel had contacted counsel for the plaintiffs with respect to the Statement of Claim, asking him not to take further steps to note Base in default. This new counsel had not yet identified

which of the Base defendants he was acting for. The fact that some Base applicants were retaining counsel was disclosed to Justice Yamauchi during the hearing. It is noteworthy that the amendments made to the Order were clarification amendments. The amendment to section 3(O) did not add to the Receiver's existing powers, but merely added the specific wording required by officials at the Land Titles office. The amendment to section 5 is not at issue. The amendment to section 6 merely clarifies existing powers. Therefore, while it would have been advisable and appropriate for counsel to the Receiver to have given notice to new counsel for Base, despite his failure to specify for whom he was acting, the type of amendment requested did not result in any greater prejudice to the Base applicants than the original order.

[32] I declined to amend the Amended Amended Order by reason of these alleged irregularities.

[33] With respect to the filing of certificates of *lis pendens*, the Base applicants allege that these were improperly filed as they do not represent an interest in land. The Order authorized the registration of the Order against title, and that is what the Receiver has done by way of certificates of *lis pendens*. These certificates are evidence of the Receiver's claim to an equitable lien on the properties through a tracing claim that will be determined by the Court. The evidence is clear that Mr. Breitkruetz commingled all the funds raised from investors and that the properties were, at least in part, purchased from commingled funds. Thus, the Receiver has established a *prima facie* case supporting the certificates of *lis pendens*.

[34] The certificate of *lis pendens* will not be removed, pending the outcome of these proceedings.

[35] There is no reason to strike paragraph 14 of the Statement of Claim, which alleges that misappropriated funds were invested in certain properties held in the name of the defendants. This is an allegation in a Statement of Claim. There is no evidence that would lead me to conclude that the allegation is frivolous or without merit.

[36] It appears from the evidence that the Base applicants not been denied access to the records in the possession of the Receiver. A protocol has been established that would allow them to obtain copies of material. There is no reason to return records to the defendants, and given the allegations and the evidence gathered by the Receiver so far, the return would risk the alteration or destruction of valuable evidence.

[37] The plaintiffs advise that they are not in a hurry to require the defendants to file an affidavit of records, and would give the defendants appropriate notice if that position changed.

B. The Receivers's Application

1. Approval of the Receiver's Reported Actions

[38] I have reviewed the Receiver's reports and supplemented reports issued to date and see no reason not to approve its reported actions as reasonable and appropriate to date.

[39] Mr. Breitkruetz submits that the Receiver's actions should not be approved because the Receiver has failed to recognize and develop the Texas security. He suggests that the Receiver has "destroyed the security through inactivity", that the Receiver has "let it expire through inactivity".

[40] The Receiver has limited funds to investigate the Base corporations and no funds to pursue the Texas property beyond a review of the limited documentation and discussion with Texas-based counsel. That counsel advises that the cost of determining ownership of land and validity of title would be in excess of \$50,000. The evidence is clear, and Mr. Breitkruetz concedes, that the properties were inactive at the time of the receivership, and that Mr. Fox was seeking capital of about \$50 million to develop the properties. Mr. Breitkruetz' criticism of the Receiver is disingenuous in the circumstances.

[41] Mr. Breitkruetz' allegations of misrepresentation and failure to grant him access to the records have been addressed previously in this decision, and are unfounded.

[42] I approve the Receiver's reported actions to date.

2. Compelling Production of Information

[43] Given that the information is relevant and required by the Receiver in conducting its investigations, I direct specific financial institutions as requested to provide historical to current banking information for all named parties as well as Mr. Fox and Lyle Hogaboam; and direct that Mr. Breitkruetz provide the Receiver with the names and contact information of the tenants at the properties at issue.

3. Approval to Market

[44] The relief sought by the Receiver is corollary to the Order which gave the Receiver its original authority to market and sell assets for the benefit of creditors. Given that it is clear from the Receiver's investigations to date that substantial funds raised from investors have gone to the Base corporations and then into the real properties at issue without adequate documentary support or proof of bona fide consideration, and given that, if any valid security exists, there would be a massive shortfall for investors, it is appropriate and reasonable to authorize the Receiver to list the following properties for sale immediately:

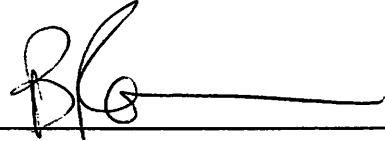
- a) 724-55 Avenue SW, Calgary, AB;
- b) 735-55 Avenue SW, Calgary, AB;
- c) 728-55 Avenue SW, Calgary, AB;
- d) 63 Suncastle Bay SE, Calgary, AB; and
- e) 27 Ceduna Park SW, Calgary, AB.

[45] The Base applicants applied to vary the receivership order to grant them access to what they allege is equity in their personal real estate. Given the clear shortfall in the security available to investors, the lack of co-operation by Mr. Breitkruetz with respect to his sources of income and line of credit, his use of identified accounts, and the lack of any evidence of need, I dismiss this application on the basis of insufficient evidence.

IV. Conclusion

[46] I grant the Receiver's application in its entirety. If the parties are unable to agree on costs, they may make written submissions of no more than five pages within the next 90 days.

Dated at the City of Calgary, Alberta this 2nd day of December, 2016.

A handwritten signature in black ink, appearing to read 'B.E. Romaine', is written above a solid horizontal line.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Richard N. Billington, Q.C.
for the Receiver

Robert C.P. Smyth
for the Base applicants

Christopher M.A. Souster
For the Plaintiffs

Predrag Anic
for Interested Parties