



No. H-140638  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STARK BC VENTURE, LLC

PETITIONER

AND:

MOUNT BALDY REAL ESTATE, ULC, WINTER RECREATION ULC,  
MOUNT BALDY SKI CORPORATION, ROBERT BOYLE, BRETT SWEEZY,  
BRENT ALAN BAKER ALSO KNOWN AS BRENT BAKER, LAURA  
LESLIE BREUNINGER BAKER, VANTAGEONE CREDIT UNION, B.C.  
OPPORTUNITY FUND LLC, ATTORNEY GENERAL OF CANADA, AS  
REPRESENTATIVE OF THE CROWN IN RIGHT OF CANADA, THE  
OWNERS, STRATA CORPORATION KAS1840

RESPONDENTS

**NOTICE OF APPLICATION**

Name of applicant: G. Powroznik Group Inc. (the "Receiver")

To: The Petitioner and Their Solicitor  
And To: The Respondents and their Solicitors  
And To: Baldy Operating Corp. and Baldy Capital Corp.

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia on Monday November 30, 2015 at 9:45 a.m. for the orders set out in Part 1 below.

**Part 1: ORDERS SOUGHT**

1. An order that the Receiver be authorized and directed to proceed with a Conditional Letter of Intent between the Receiver and a Prospective Purchaser (the "Purchaser"), as supplemental or amended.
2. An order specifically approving a break fee substantially in the form set out in the Letter of Intent, and as may be amended in a manner that counsel to the Receiver may approve and authorizing the Receiver to take such steps as are, in the opinion of the Receiver, necessary or incidental to the performance of its obligations pursuant to the Break Fee.

3. An order that the Receiver be authorized to permit the Purchaser to enter into possession of the assets and to operate the Resort during the 2015/16 season on its own account using the assets which are the subject of this proceeding, in consideration of, but before the completion of the purchase and sale; on the terms of an Operating Agreement in form and content acceptable to the Receiver and its counsel which shall provide that notwithstanding that the operation shall be at the risk of and for the benefit of the Purchaser, the Purchaser shall acquire no interest in the assets until the completion of the asset purchase.
4. An order that the borrowings of the Receiver approved by the court by the order entered December 19, 2014 be increased by \$300,000.00 to \$800,000.00 in total.
5. An order that the Receiver may serve a copy of this Order on any person and such person will provide information, documentation and records including computer records to the Receiver regarding the operation of the Resort during the 2014/15 season.

## **Part 2: FACTUAL BASIS**

1. The assets of Mount Baldy primarily exist at the Mount Baldy Ski Resort (the “**Resort**”) which is located in the southern Okanagan region of British Columbia. The Ski Resort had not opened during the 2013/14 ski season due to the financial difficulties faced by Mount Baldy. This foreclosure proceeded.
2. In July 2014, G-Force Real Estate Inc. was appointed as the Court-appointed Marketing Agent (“**Marketing Agent**”) for the assets of Mount Baldy under an Order Nisi and Order for Conduct of Sale to the Petitioner, Stark BC Venture, LLC (“**Stark**”) for reasons set out in the report to the court of the G-Force Real Estate Inc dated July 10, 2014.
3. From and after the appointment of the Marketing Agent, it undertook a marketing campaign as set out in the November 4<sup>th</sup> Report. The Marketing Agent posted a brochure on its website and the Resort was widely advertised domestically and internationally.
4. Because the Resort had not been operated for the 2014/15 season and was not operational, it could not be opened for the 2015/16 season without material expenditure. Because a foreclosure does not provide a process by which the assets would be repaired and readied for the 2014/15 ski season, a receivership was contemplated.

5. Significant repairs and improvements were necessary and Secured Creditors were not prepared to fund the costs of Receivership and the costs to commence operations. Also, as the Resort was not operational, no acceptable offer was received by the Marketing Agent.
6. In October of 2014, Baldy Operating Corp., and its affiliate Baldy Capital Corp. (collectively "**Baldy Co**") offered to pay the receivership expenses and to operate the Resort until they could effect a purchase of the assets from a receiver. The parties contemplated an Asset Purchase Agreement (the "**Proposed Baldy APA**") to be entered into by November 14, 2014 which would have court approval by January 31, 2015. Initially, after Baldy Co made that arrangement in principle, it could not raise the necessary interim funding.
7. By December of 2014, Baldy Co and the receiver had arranged funding and on December 18, and 19 2014, the two companies entered into an (i) Amended Memorandum of Understanding between Stark and Baldy Capital Corp. to purchase the assets on a deferred payment basis and an (ii) Operating Agreement between the Receiver and Baldy Operating under which they could go into early occupation of the Resort.
8. As the Proposed Baldy APA terms were not settled, Baldy Operating Corp. was allowed to go into early possession and to operate the Resort on its account for a short time until the asset purchase could be final. It was a fundamental term of the Operating Agreement and Amended Memorandum of Understanding that Baldy Operating Corp. would pay all operational costs and all Receiver's costs and that Baldy Capital Corp. would then negotiate the Proposed Baldy APA with the Receiver by January 30, 2015. It was a default if they failed to enter into the Proposed Baldy APA within that time period. Accordingly, the Petitioner was at that time of the view that it had agreed to a potential sale of the assets and would eventually receive its compensation.
9. Because operating funding was assured, G. Powroznik Group Inc. was then appointed receiver and manager over the assets and properties of the Respondents Mount Baldy Real Estate ULC and Mount Baldy Ski Corporation by order on December 19, 2014. The reasons for the appointment are set out in the Marketing Agent's Report to the court dated November 3, 2014 at paragraph 15, and the reasons for the delay are set out in the report of December 18, 2014. Immediately, Baldy Operating went into possession and commenced operations which continued for the season pursuant to an Operating Agreement ("**Operating Agreement**") dated December 19, 2014 executed with the Receiver.

10. The receivership was funded by Receiver's Certificates. There is now \$400,000 in Receiver's Certificates outstanding excluding accrued interest. These were in part for funding Baldy Operating Corp. under the terms of the Operating Agreement with the Receiver and in part for the fees and costs incurred during and leading up to the receivership.
11. No asset purchase agreement was prepared by Baldy Capital Corp. on January 30, 2015 or by April of 2015.
12. By April 29, 2015, Baldy Co (i) did not to enter into the Proposed Baldy APA; (ii) refused to pay receivership expenses; (iii) failed to make certain required payments in January of 2015; and (iv) accumulated \$65,000 in debt which it left unpaid and for which it invoiced the Receiver. The Receiver elected to terminate the Operating Agreement based on specified defaults. On May 7 2014, Stark terminated the Amended Memorandum of Understanding.
13. The Receiver then began activities to identify additional prospects to acquire Mount Baldy's assets. The Receiver updated the materials that had been used earlier by the Marketing Agent as reported in the Marketing Agent's reports. The Receiver contacted fourteen new prospects after the initial failure of the Baldy transaction.
14. After the termination of the agreements with Baldy Co, negotiations continued through the spring and summer of 2015 toward a new form of agreement with Baldy Co. In September 2015 a meeting was arranged for October 1, 2015 between representatives of the Receiver, Baldy Co, and Stark in attempt to enter into a new Asset Purchase Agreement with Baldy Capital Corp. On October 1, 2015, the parties met and a framework was set out for the terms of the new Asset Purchase Agreement. The negotiation was based on the premise that no Asset Purchase Agreement would be signed unless Baldy Capital Corp. provided evidence of its ability to finance the transaction.
15. On October 30, 2015, Baldy Capital Corp. sought fundamental changes to the proposed terms. Then on November 4, 2015, Baldy Capital Corp provided a "Drop Dead Offer" which contained a term among others indicating that "there will no confirmation of availability of funds to close from the Purchaser until closing". Negotiations then ended.
16. During the period ending October 1, 2015, the Receiver's costs increased in part due to the normal administration costs associated with holding the assets longer than anticipated and from attempts by the Receiver and its counsel to conclude an Asset Purchase Agreement with Baldy Operating Corp.

17. After it was clear that Baldy Capital Corp. could not effect a purchase, the Receiver then undertook negotiations with a Prime Prospect which with an Experienced Operator to attempt to conclude an interim followed by a final solution. An initial Letter Of Intent (the “LOI”) was received by the Receiver from the Prime Prospect on November 17, 2015 for the assets of Mount Baldy. Key terms of the LOI provide for:
- a. The Purchaser to provide sufficient cash on closing of an Asset Purchase Agreement (“APA”) to retire all of the Receiver’s costs, borrowings and other receivership costs;
  - b. Stark to finance the prospective purchaser (“**Prospective Purchaser**”) for a substantial take back mortgage;
  - c. finalization of a formal Asset Purchase Agreement (“APA”) by December 16, 2015;
  - d. the Prospective Purchaser to remove its conditions within thirty days of executing the APA, which includes obtaining approvals from third parties of transfer of existing contractual rights with Mount Baldy under the APA;
  - e. the Receiver to obtain court approval within fifty days of removal of the conditions in the APA by the Prospective Purchaser;
  - f. a condition that the parties enter into an Operating Agreement with the Prospective Purchaser under which it will operate the Resort for the 2015/16 ski season for the account of the Prospective Purchaser; and
  - g. A break fee (“**Break Fee**”) of \$200,000 will be paid out of the sale proceeds if the Court approves a sale to a third party.
18. The Prospective Purchaser is expecting to invest a minimum of \$200,000-\$300,000 for working capital and expenditures for operating the 2015/16 ski season as part of its arrangements to acquire Mount Baldy’s assets. The Break Fee is intended to compensate the Prospective Purchaser if the Court approves a sale to a third party.

### **Part 3: LEGAL BASIS**

1. The court orders have authorized G Force to sell the Resort assets. Paragraph 4 of the Order for Conduct of Sale provides authority for the Petitioner to apply for orders as may be necessary to maximize realization. Paragraph 24 of the Receivership order contains the usual term whereby the receiver may apply to the court for advice and directions.
2. The contemplated transaction is in the form of a non-binding Letter of Intent. Accordingly, the application before the court is not for approval of an offer but it is for directions authorizing the Receiver to proceed with the Letter of Intent. Directions are sought:

- a. first, because the Letter of Intent is not final; and
  - b. second, because it contains a break fee.
3. The LOI nonetheless contemplates a final sale to the Purchaser and in that case it is submitted that the Court must be satisfied that there has been adequate exposure to the market.
  4. During the past year and one half there has been an adequate exposure to the market. The steps taken by the Marketing Agent are set out in the report dated November 4, 2014. The assets were widely advertised such that 125 persons worldwide were contacted; 19 signed non-disclosure agreements.
  5. Only two of the potential prospects were prepared to proceed to make an offer. In the November 4<sup>th</sup> report, there is reference to Baldy Co in paragraph 12. They were not successful in concluding a purchase. Baldy Co did not complete the purchase; did not provide anticipated funding; and left outstanding accounts unsatisfied from the 2014/15 season.
  6. After the failure of the sale to Baldy Co in the spring of 2015, the Receiver followed up on other options and expressions of interest and revised its sale materials. There are clearly very few potential purchasers for this asset. The present Letter of Intent is from the other party referred to in paragraph 11 of the November 4<sup>th</sup> Report.
  7. The LOI must be commercially reasonable. Central to the commercial reasonableness of the LOI is the desirability of selling an operating Resort. The present Letter of Intent allows an operator to open for this season. But, that comes with risk to the operator which will invest up to \$300,000. If there were a higher offer which is approved by the court, the investment would be lost without a break fee. The Receiver has agreed to the Break Fee to compensate the purchaser for any potential loss it suffers if it makes an investment in operations and then the sale is approved to another purchaser.
  8. Madam Justice Fitzpatrick in reasons which have not yet been released, has indicated that court approval for a break fee should be obtained in advance. The break fee in this case is justified by the need by a purchaser to advance operating capital of \$200,000-\$300,000 in order to ready the Resort for the upcoming ski season which is imminent.
  9. The secured creditor who will bear the burden and risk of the Letter of Intent is in favour of the current letter of intent and it is the only creditor who is affected in material way.
  10. It would be beneficial for the community to have the Resort operational.

**Part 4: MATERIAL TO BE RELIED ON**

1. Receiver's Report, made 25/Nov/2015
2. Affidavit #1 of Scott Stark, to be sworn
3. Affidavit #1 of Leah Jonak, sworn 25/Nov/2015
4. Marketing Report, filed 04/Nov/2014
5. Supplemental Report to the Marketing Report, filed 18/Dec/2014
6. Order Nisi, made 14/Jul/2014
7. Order for Conduct of Sale, made 14/Jul/2014
8. Order Appointing Receiver, made 19/Dec/2014
9. Report in Support of Appointment, filed 10/Jul/2014
10. Affidavit #2 of Kim Manderson, made 04/Nov/2014
11. Amending Order, made 08/Jan/2015
12. Requisition for Short notice, filed \_\_\_/Nov/2015


The applicant estimates that the application will take one (1) hour.

*NOT WITHIN*  
[x] This matter is within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (ii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: 25/Nov/2015

  
Signature of  
[x] lawyer for applicant(s)  
Dennis K. Fitzpatrick