

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

MAY 31 2018



S-186288

NO. _____
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

REALCOR MORTGAGE CORP.

PETITIONER

AND:

MORNINGSTAR GOLF CLUB LTD.
CANADIAN WESTERN BANK
NATIONAL LEASING GROUP INC.
ROYNAT INC.
ICE CUBE LEASING INC.

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

Morningstar Golf Club Ltd.

c/o Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3V5

Canadian Western Bank

c/o McLennan Ross LLP
600 McLennan Ross Building,
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

c/o Miller Thomsen LLP

2700 Commerce Place
10155 - 102 Street
Edmonton, Alberta T5J 4G8

National Leasing Group

1525 Buffalo Place
Winnipeg, MB R3T 1L9

Roynat Inc.

Suite 1500, 4710 Kingsway Street
Burnaby, BC V5H 4M2

Ice Cube Leasing

P.O. Box 1311
Aldergrove, BC V4W 2V1

This proceeding is brought for the relief set out in Part 1 below, by the persons named as petitioner in the style of proceedings above.

If you intend to respond to this proceeding, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner,

- (c) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (d) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (e) if you were served with the petition anywhere else, within 49 days after that service, or
- (f) if the time for response to petition has been set by order of the court, within that time.

The address of the registry is:	800 Smithe Street Vancouver, BC V6Z 2E1
The ADDRESS FOR SERVICE of the petitioner is:	Karen Fellowes DLA PIPER (CANADA) LLP Barristers & Solicitors 2800 Park Place 666 Burrard Street Vancouver, BC V6C 2Z7
Fax number address for service (if any):	604.687.1612
E-mail address for service (if any):	karen.fellowes@dlapiper.com

The name and office address of petitioner's lawyer is:	Karen Fellowes DLA PIPER (CANADA) LLP Barristers & Solicitors 2800 Park Place 666 Burrard Street Vancouver, BC V6C 2Z7
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CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. A declaration that the Mortgage (as hereinafter defined) is a mortgage and charge on the fee simple interest held by the Respondent Morningstar Golf Club Ltd. ("**Morningstar**") in the Lands (as hereinafter defined) (as hereinafter defined), ranking in priority to the interests of Morningstar and its respective heirs, executors, administrators, successors and assigns and all persons claiming by, through or under it.
2. A declaration that the Mortgage charged against the Lands is in default and all monies secured thereby are due and owing.
3. A declaration that, under and by virtue of the GSA (as hereinafter defined), the Petitioner is entitled to a charge on all of the right, title and interest of Morningstar in and to the Personal Property (as hereinafter defined).
4. A declaration that the GSA charged against the Personal Property is in default and that all monies secured thereby are due and owing.
5. A declaration that the amount of money due and owing to the Petitioner pursuant to the provisions of the Security (as hereinafter defined) at May 29, 2018 is \$1,648,593.99 with a per diem rate of interest at \$243.56 thereafter, as provided for in the Security and the costs of the Petitioner in these proceedings.
6. An Order that the last date for redemption of the Security will be set at the expiry of one day from the date of pronouncement of any Order made herein, or such other period as this Honourable Court will set.
7. A declaration that the balance to be paid to the Petitioner to redeem the Security will be the balance found to be due and owing as at the date of any Order pronounced herein plus the interest accruing to the date of redemption plus the assessed party and party costs of the Petitioner with interest at the rates set out below to accrue until the Lands and Personal Property are redeemed, whether or not they are redeemed prior to or after the last date set for redemption in the said Order. The interest accruing will be the greater of prescribed post-judgment interest and one per cent (1%) per annum, calculated semi-annually, not in advance.

8. An Order that in default of the Respondents paying into Court to the credit of this cause at the Supreme Court Registry, Vancouver Law Courts, or to Counsel for the Petitioner, the amount of money required to redeem the Lands and Personal Property prior to the expiry of the said period of redemption, then the Petitioner will be at liberty to apply for an Order that the Respondents, and their respective heirs, executors, administrators, successors and assigns, and all persons claiming by, through or under them, or any of them will be foreclosed of all right, title and interest in and to the Lands and Personal Property.
9. An Order for the sale of the Lands and Personal Property, subject to the approval of the Court, with the Petitioner herein having conduct of such sale.
10. An Order for the appointment of a Receiver.
11. Judgment against Morningstar pursuant to its covenant for payment in the Security and the Loan (as defined herein), for the amount of money found to be due and owing as at the date of the granting of any Order pronounced herein, plus assessed costs as aforesaid, with interest accruing thereafter on those amounts pursuant to sections 6 through 9 of the *Court Order Interest Act* (as amended).
12. An Order for costs of the Petitioner:
 - (a) if the proceeding is uncontested at the hearing of the petition, costs to be assessed at Scale A under Appendix B of the *Supreme Court Civil Rules*, with the question of the scale of costs on any subsequent applications to be determined at the hearing of any such subsequent applications, or
 - (b) if the proceeding is contested at the hearing of the petition, cost on a solicitor and own client basis as provided in the Security, or at such scale as the court may allow, with the question of the scale of costs on any subsequent applications to be determined at the hearing of any such subsequent applications.
13. An Order for all necessary accounts, directions and enquiries and, without limiting the generality of the foregoing, an Order that the Petitioner be at liberty to apply for an Order that there be a further accounting, whether by a summary accounting before the Court or by a reference to the District Registrar, of any amounts due to the Petitioner for interest, arrears of interest, interest on payments in arrears, taxes, arrears of taxes, insurance premiums, legal costs, charges, expenses or otherwise which are not included within the amounts found to be due and owing as at the date of the Order whether such amounts accrued owing before or after the date of pronouncement of the said Order and that such amounts be proved by the affidavit of an officer of the Petitioner.
14. A Certificate of Pending Litigation.

Part 2: FACTUAL BASIS

1. The Petitioner Realcor is a corporation duly incorporated under the laws of British Columbia with its registered and records office at 2800 - 666 Burrard, Vancouver, British Columbia.
2. Morningstar is a corporation duly incorporated under the laws of British Columbia with its registered and records office at 20th Floor 250 Howe Street, Vancouver, British Columbia.
3. Morningstar owns and operates a golf course located outside Parksville, British Columbia on lands registered in the Victoria Land Title Office and legally described as follows: Parcel Identifier 014-884-275 Lot A District Lots 29, 81, 83 and 126 Nanoose District Plan 49145 Except Parts in Plans VIP51714, VIP52613, VIP76030 and VIP76051 (the "Lands").
4. Realcor loaned monies to Morningstar initially in the amount of \$3,300,000.00, as evidenced by a first Mortgage registered against the Lands under No. CA1545577 and a General Security Agreement ("GSA") dated April 30, 2010.
5. At the expiry of the original term of the Loan, Morningstar was unable to pay the outstanding principal balance of \$2,956,394.11 (the "Balance") and on or about May 1, 2015 Realcor and Morningstar entered into an Extension and Modification of Mortgage Agreement, Promissory Note in the amount of the Balance, and Modification of Mortgage registered under No. CA4484571, which, together with the GSA, stand as security (collectively the "Security") for the repayment of the Balance and interest and other charges thereon.
6. The director and principals of Morningstar are Paul McCracken and his wife Shayne McCracken. Paul McCracken is a businessman previously controlled several companies, including Canada North Group Inc., which have become insolvent and filed for creditor protection under the *Companies Creditors Arrangement Act*. The McCrackens have each also filed a Proposal under Division I of the *Bankruptcy and Insolvency Act*, and have resigned as directors of Morningstar.
7. Realcor has been advised by counsel for Paul McCracken that there are no additional resources to fund accounts payable, and that as a result, the golf course operations will be forced to cease operations and close. As a result of the resignations of Paul McCracken and Shayne McCracken, there is no person who is in control and management of Morningstar
8. It is just and convenient that a Receiver be appointed to preserve the value of Realcor's secured collateral, and continue the golf course operations in order to maintain the going concern value of Morningstar.

The Loan and Security

9. As security for the Loan, Morningstar granted to the Petitioner, *inter alia*:

- (a) a mortgage dated April 30, 2010 in the principal sum of \$3,300,000.00 (the “**Principal Sum**”) bearing interest at the rate of 5.65% per annum and registered at the LTO on under number CA1545577 as modified by a Modification Agreement registered in the Victoria Land Title Office on June 24, 2015 under No. CA4484571 (collectively the “Mortgage”) pursuant to which Morningstar granted and mortgaged to the Petitioner the interest held by Morningstar in the Lands;
- (b) a general security agreement dated April 30, 2010 (the “**GSA**”) granted by Morningstar in favour of the Petitioner for which a financing statement was registered in the British Columbia Personal Property Registry (the “**PPR**”) on May 14, 2018 under Base Registration No. 757556K pursuant to which Morningstar mortgaged, charged, transferred and assigned to the Petitioner all present and after-acquired personal property of Morningstar and all proceeds thereof (the “**Personal Property**”),

(the Mortgage and GSA are collectively referred to as the “**Security**”).

- 10. The GSA secures payment and performance of all present and future obligations, indebtedness and liabilities, matured or not, direct or indirect, absolute or contingent, extended or renewed, at any time due or owing to the Petitioner by Morningstar, whether in principal or surety.
- 11. It is a term of the Mortgage that the failure by Morningstar to observe any promise or agreement pursuant to the Mortgage or any other agreement between the Petitioner and Morningstar constitutes an event of default.
- 12. It is a term of the GSA that non-payment when due of any part of the indebtedness owed by Morningstar to the Petitioner or the failure by Morningstar to observe any obligation or term in the GSA or any other agreement between Morningstar and the Petitioner constitutes an event of default.
- 13. Pursuant to the Security, upon the occurrence of an event of default, all of the money owing to the Petitioner, at the sole discretion of the Petitioner, becomes immediately become due and payable and the Petitioner is entitled to, *inter alia*, sue Morningstar for the amount of money due to the Petitioner, take possession of the Lands and Personal Property and appoint a receiver over the Lands and Personal Property.

Default and Demand

- 14. Morningstar has made default under the Loan and Security by failing to pay when due the amounts owing thereunder and pursuant to the terms thereof, the full amount of the balance due and owing of the principal monies, interest, taxes and other amounts due, owing and secured by the Security (the “**Outstanding Balance**”) is due, owing and payable by Morningstar to the Petitioner.

15. As at May 29, 2018, the Outstanding Balance is \$ \$1,648,593.99, which balance does not include any amount as penalty, bonus or indemnity and which balance, as to interest, does not violate section 345 of the *Criminal Code of Canada*.
16. The Mortgage further provides that all taxes, expenses and costs incurred by the Petitioner in relation to the Mortgage would bear interest at the rate provided under the Mortgage until fully paid.
17. The GSA further provides that all costs, charges and expenses reasonably incurred by the Petitioner in enforcing the GSA would be a first charge on the proceeds of realization, collection or disposition of the Personal Property.
18. On August 3, 2017, the Petitioner demanded payment from Morningstar of all monies due and payable pursuant to the Loan and on May 18, 2018 the petitioner served a notice of intention to enforce the Security (the "Notice") pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada), but Morningstar has failed, refused and/or neglected to pay the same or any part thereof.

Part 3: LEGAL BASIS

1. *Law and Equity Act*, R.S.B.C. 1996, c. 253, as amended, and in particular ss. 4, 15, 20, 37, 39 and 64 thereof;
2. *Personal Property Security Act*, R.S.B.C. 1996, c. 359, as amended, and in particular s. 55(6) thereof;
3. *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as amended, and in particular Rules 2-1, 14-1, 16-1, 21-7 and 22-4; and
4. the inherent jurisdiction of this Honourable Court.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Dennis Van Den Hooff, sworn May 31, 2018;
2. the pleadings and other materials filed herein; and
3. such further and other material as counsel may advise and this Honourable Court may allow.

The petitioner estimates that the hearing of the petition will take 10 minutes.

May 31 2018
Dated _____



Signature of lawyer for the petitioner
DLA PIPER (CANADA) LLP (Karen Fellowes)

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this petition

with the following variations and additional terms:

Date: _____

Signature of Judge Master

NO. _____
VANCOUVER REGISTRY

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PETITION TO THE COURT

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Client Matter No. 085532-00002