

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF BANKRUPTCY
AND INSOLVENCY ACT, R.S.C. 1985, C B-3, AS AMENDED AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, C 43, AS AMENDED

BETWEEN:

THE FOREST ROAD COMPANY, LLC

Applicant

- and -

SKYLINE 2 PRODUCTIONS INC.

Respondent

FACTUM OF THE APPLICANT
(returnable August 17, 2021)

PART I - INTRODUCTION

1. Forrest Road Company, LLC ("**FRC**") brings this application for the appointment of MNP Ltd. ("**MNP**") as interim receiver (the "**Interim Receiver**") pursuant to section 47 of the *Bankruptcy and Insolvency Act* ("**BIA**") and section 101 of the *Courts of Justice Act* ("**CJA**") in order to preserve and protect the assets of Skyline 2 Productions Inc. ("**Skyline 2**" or the "**Debtor**").
2. As set out in the Affidavit of Idan Shani, sworn (the "**Shani Affidavit**"), filed in support of FRC's application, the Applicant's primary security is in respect to tax credit proceeds (the "**Tax Credit Proceeds**") related to a film production. Despite FRC's various efforts to get information on the status of the Tax Credit Proceeds from Skyline 2, its accountants and the Canada Revenue Agency

(“**CRA**”), it has been unable to obtain any information on the status of the Tax Credit Proceeds whatsoever. Skyline 2 has also failed to execute the required consent forms authorizing FRC to communicate with CRA or its accountants despite FRC’s multiple requests (and the urging of Justice Koehnen).

Reference: Endorsement of Justice Koehnen dated July 20, 2021

3. As Skyline 2 has been completely uncooperative, FRC seeks the appointment of an Interim Receiver in order to, among other things, protect and preserve its security position.

PART II - THE FACTS

4. FRC is a specialty finance company located in New York City that, among other things, makes loans to film production companies that are secured by tax credits.

Reference: Shani Affidavit at para.4, Application Record, Tab 2

5. Skyline 2 is an Ontario corporation that carries on business as a film production company. It is the producer of a series entitled “Ed Quinn Vs.” (the “**Production**”).

Reference: Shani Affidavit at para.5, Application Record, Tab 2

Loan and Security

6. On September 25, 2019, FRC, as lender, and Skyline 2, as borrower, entered into a Term Sheet and Term Sheet Addendum (collectively, the “**Term Sheet**”). Under the Term Sheet, FRC agreed to provide funding to Skyline 2 of up to forty percent (40%) of the expected refund amount of certain film production tax

credits earned under the British Columbia Production Services Tax Credit and Canadian Federal Production Services Tax Credit (collectively, the “**Tax Credits**”) in respect to the Production, not exceeding one million U.S. dollars (USD\$1,000,000), subject to adjustments (the “**Loan**”).

Reference: Shani Affidavit at para.7, Application Record, Tabs 2 and 2B

7. The maturity date under the Term Sheet (“**Maturity Date**”) is the earlier of one year from the date of the initial advance, three business days after Tax Credit Proceeds are received or upon an event of default.

Reference: Shani Affidavit at para. 8, Application Record, Tab 2

8. FRC’s initial advance under the Term Sheet to Skyline 2 by FRC was made on November 12, 2019.

Reference: Shani Affidavit at para.8, Application Record, Tab 2

9. In connection with the Term Sheet, Skyline 2 executed a promissory note in favour of FRC on October 25, 2019 (the “**Promissory Note**”) by which it acknowledged that it is indebted to and promised to pay FRC the principal amount of \$1,000,000 USD plus interest on demand.

Reference: Shani Affidavit at para.9, Application Record, Tabs 2 and 2C.

10. It also executed a General Security Agreement in favour of FRC on October 25, 2019 (the “**GSA**”). Skyline 2 granted a security interest in favour of the Applicant over all of its property, assets and undertaking, including the Tax Credits (the

“**Property**”). The GSA provides that FRC may appoint a receiver upon default by a debtor in any of its obligations under the Loan documents.

Reference: Shani Affidavit at para.10, Application Record, Tabs 2 and 2D;

11. FRC registered its security interest against the Debtor pursuant to the *Personal Property Security Act* (Ontario) and the *Personal Property Security Act* (British Columbia) on October 18, 2019. FRC is the first secured creditor against Skyline 2.

Reference: Shani Affidavit at para.12, Application Record, Tabs 2, 2E and 2F

Assignment of the Tax Credits

12. FRC agreed to advance the Loan on the basis that Skyline 2 was entitled to and would receive Tax Credits from the British Columbia Production Services Tax Credit and Canadian Federal Production Services Tax Credit.

Reference: Shani Affidavit at para.14, Application Record, Tab 2

13. In support of the Loan, Skyline 2 also executed:
 - (a) an Assignment dated October 25, 2019 (the “**Assignment**”) by which it irrevocably assigned the Tax Credits and the Tax Credit Proceeds as security to FRC. Under the terms of the Assignment, Skyline 2 covenanted to provide any documentation as required by FRC to facilitate the assignment of the Tax Credit Proceeds and authorize communication with CRA and to hold the Tax Credit Proceeds in trust for FRC.

Reference: Shani Affidavit at para.15, Application Record, Tabs 2 and 2G

- (b) a direction ("**Direction**") authorizing CRA and various tax authorities (collectively, the "**Tax Authorities**") to pay the Tax Credit Proceeds to FRC; and
- (c) a Power of Attorney and consent ("**Consent**") authorizing FRC to communicate with CRA to obtain information regarding the Tax Credits and the Tax Credit Proceeds.

Reference: Shani Affidavit at para.16, Application Record, Tabs 2 and 2H to 2J

Efforts to Obtain Information on the Tax Credits

- 14. In December 2019 and January 2020, FRC inquired of Skyline 2 and its tax accountants, Baker Tilly Canada ("**Baker Tilly**"), on the timing of the filing of the Debtor's tax returns in order to ascertain the timing for the Tax Credits.

Reference: Shani Affidavit at paras.17 and 18, Application Record, Tab 2

- 15. In January 2020, Baker Tilly confirmed that Skyline 2's tax returns were filed and, in April 2020, advised that the tax returns had been assessed and that cheques in respect to the Tax Credit Proceeds had been issued. However, the cheques had to be reissued as they were sent to the wrong address. Due to the impact of the COVID-19 pandemic, no timeline could be given as to the timing of the processing of the tax credits.

Reference: Shani Affidavit at paras.18 to 20, Application Record, Tab 2

16. FRC made persistent efforts to get information about the Tax Credits from Skyline 2, Baker Tilly and CRA. However, FRC was unable to get any further information from Skyline 2 or Baker Tilly.

Reference: Shani Affidavit at para. 22, Application Record, Tab 2

17. Further, FRC was unable to get any information on Skyline 2's tax account from CRA despite the fact that Skyline 2 had executed the Consent authorizing CRA to provide information to FRC.

Reference: Shani Affidavit at para.23, Application Record, Tab 2

18. From October 2020 onward, FRC requested that Skyline 2 execute a new CRA consent form and authorize Baker Tilly to provide information to FRC on the status of the Tax Credits. Skyline 2 was completely non-responsive.

Reference: Shani Affidavit at paras.24 to 28 and 35, Application Record, Tab 2

19. Aside from learning in late October 2020 that CRA was moving forward with an audit, FRC has been unable to get Skyline 2's cooperation or any clear information on the status of the Tax Credits.

Reference: Shani Affidavit at para.28, Application Record, Tab 2

The Default and Demands for Payment

20. The Loan matured on November 12, 2020. As the Loan remained unpaid and in light of the events of default under the Loan, FRC demanded payment from Skyline 2 by letter dated November 18, 2020 (the “**Demand Letter**”).

Reference: Shani Affidavit at para.30, Application Record, Tab 2 and 2L.

21. FRC issued a further demand for payment to Skyline 2 on June 21, 2021 and delivered a Notice of Intention to Enforce Security pursuant to section 244 of the BIA. Skyline 2 has failed to respond to either of these letters.

Reference: Shani Affidavit at para.31, Application Record, Tab 2 and 2M.

The Indebtedness

22. As of June 18, 2021, the outstanding amount due and owing under the Loan to FRC is \$1,396,061 USD, inclusive of accrued interest and costs (the “**Indebtedness**”). Skyline 2 has failed to pay the Indebtedness and any other amounts owing and due under the Term Sheet and the Promissory Note.

Reference: Shani Affidavit at paras.33 and 34, Application Record, Tab 2

23. In light of Skyline 2’s breaches and defaults under the terms of the Loan and the lack of cooperation from its management, FRC has completely lost trust and confidence in the Debtor. It is also very concerned about the status of the Tax Credits Proceeds as they are a significant asset under FRC’s security.

Reference: Shani Affidavit at para.36, Application Record, Tab 2

PART III - ISSUES AND THE LAW

24. The sole issue on this application is whether an interim receiver should be appointed under section 47 of the BIA and section 101 of the CJA.

25. FRC submits that, in light of the evidence put forward by FRC, it is appropriate in the circumstances to appoint an interim receiver to monitor and protect the property and business of Skyline 2.

A. Test for Appointing an Interim Receiver

26. An interim receiver may be appointed pursuant to section 47 of the BIA and section 101 of the CIA.

Reference: BIA, s. 47; CJA, s. 101.

27. Section 47 of the BIA provides that if a 244 Notice has been sent to a debtor, the court may appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates for up to 30 days, or until the earlier of the appointment of a section 243 receiver or a trustee, whichever comes first.

Reference: BIA, s. 47(1).

28. An interim receiver may take possession of all or party of the debtor's property, exercise control over that property and the debtor's business, take conservatory measures and summarily dispose of property that is likely to depreciate rapidly in value.

Reference: BIA, s. 47(2).

29. An interim receiver may only be appointed if it is necessary for (a) the protection of the debtor's estate; or (b) the interests of the creditor who sent the 244 Notice.

Reference: BIA, s. 47(3).

30. Courts require that there be some risk to the assets in order to appoint an interim receiver which is more than merely speculative, but does not require the applicant to go so far as to prove an actual immediate risk to assets where a secured creditor with significant risk has lost confidence in the Debtor.

Reference: [Maximum Financial Services Inc. v. Corporate Cars Ltd. Partnership \(2006\), 29 C.B.R. \(5th\) 110 \(Ont. S.C.J.\) at para. 15](#)

31. In [Royal Bank of Canada v. Canadian Print Music Distributors Inc.](#), Justice Cumming granted an application for a receiver under section 47(1) to protect a bank's security interests. In that case, the bank was concerned about suspicious transactions and cheques that were payable to parties that were related to the debtor. Justice Cummings emphasized that proof of misfeasance was not necessary, and that the bank had successfully established on a balance of probabilities the need for an immediate interim receivership to ensure the conservation of the Respondents' assets and the protection of the bank's interests through its security.

Reference: [Royal Bank of Canada v. Canadian Print Music Distributors Inc., \[2006\] O.J. No. 2492 at paras. 13 to 18](#)

B. It is Just and Appropriate to Appoint a Receiver over the Debtor

32. FRC is a secured creditor of Skyline 2 and is thus entitled to bring an application under section 47 of the BIA.

33. Skyline 2 is in breach of its obligations under the Loan, as set out in paragraphs 21 through 23 above. As a result of these breaches, Skyline 2 has defaulted under the Loan and Security. Pursuant to section 6(1) of the GSA, the occurrence of an Event of Default grants FRC the right to seek the appointment of a receiver.

Reference: Shani Affidavit, paras.21 to 23, Application Record, Tabs 2 and 2D.

34. Where the security provides for the private appointment of a receiver upon default, as the GSA executed by Skyline 2 to FRC does, the burden upon the Applicant seeking the appointment of a receiver is relaxed because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

Reference: [BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 1953 \(CanLII\) at para. 43.](#)

35. In addition to FRC's contractual rights, the appointment of MNP as Interim Receiver over the Debtor is just and convenient as a result of the evidence that Skyline 2's management team has completely failed to communicate with FRC, authorize Baker Tilly to provide any information on the Tax Credit Proceeds or execute the CRA consent requested by FRC. It has completely lost confidence in the Debtor's management team. FRC's lack of visibility into Skyline 2's tax

account, coupled with the fact that a cheque was previously issued to the Debtor in respect to the Tax Credit Proceeds is alarming to the Applicant. Its primary concern is that the Tax Credit Proceeds, which represents FRC's primary security, could be dissipated.

36. Considering this pattern of behaviour and non-responsiveness, this is a situation in which a court-appointment is not only necessary to enable the Interim Receiver to carry out its work and duties more efficiently, but it is the only way for FRC to obtain any information in respect to the Tax Credit Proceeds.
37. Interim receivers have also been appointed where, like here, the debtor is in serious breach and default of its loan agreements, has compromised the security of its secured creditors and shown a disregard with respect to its obligations under the loan and security agreements.

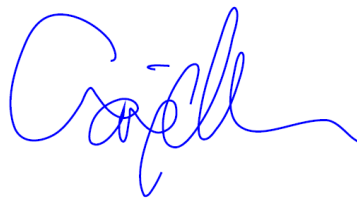
Reference: [Royal Bank v. Applied Energy Systems Inc. \(2009\), 61 CBR \(5th\) 104 \(Ont. S.C.J.\) at para. 24](#)

38. Based on the Debtor's non-responsiveness and FRC's loss of trust and confidence in Skyline 2's management, FRC submits that an Interim Receiver is necessary to protect the Debtor's estate and the interests of FRC and other creditors and should be granted.

PART IV - ORDER REQUESTED

39. On the basis of the submissions herein, FRC respectfully requests an Order substantially in the form of the draft Interim Receivership Order attached at Tab 4 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of August, 2021.



Craig A. Mills
MILLER THOMSON LLP

Lawyer for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. [Maximum Financial Services Inc. v. Corporate Cars Ltd. Partnership \(2006\), 29 C.B.R. \(5th\) 110 \(Ont. S.C.J.\)](#)
2. [Royal Bank of Canada v. Canadian Print Music Distributors Inc., \[2006\] O.J. No. 2492](#)
3. [BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 1953](#)
4. [Royal Bank v. Applied Energy Systems Inc. \(2009\), 61 CBR \(5th\) 104 \(Ont. S.C.J.\)](#)

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Appointment of interim receiver

- **47 (1)** If the court is satisfied that a notice is about to be sent or was sent under [subsection 244\(1\)](#), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor’s property that is subject to the security to which the notice relates until the earliest of
 - **(a)** the taking of possession by a receiver, within the meaning of [subsection 243\(2\)](#), of the debtor’s property over which the interim receiver was appointed,
 - **(b)** the taking of possession by a trustee of the debtor’s property over which the interim receiver was appointed, and
 - **(c)** the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

- **Directions to interim receiver**

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- **(a)** take possession of all or part of the debtor’s property mentioned in the appointment;
- **(b)** exercise such control over that property, and over the debtor’s business, as the court considers advisable;
- **(c)** take conservatory measures; and
- **(d)** summarily dispose of property that is perishable or likely to depreciate rapidly in value.

- **When appointment may be made**

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- **(a)** the debtor’s estate; or

- (b) the interests of the creditor who sent the notice under [subsection 244\(1\)](#).

Courts of Justice Act, RSO 1990, c C.43

INTERLOCUTORY ORDERS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

THE FOREST ROAD COMPANY, LLC
Applicant

and

SKYLINE 2 PRODUCTIONS INC.
Respondent

Court File No.: CV-21-00665781-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL
LIST**

Proceeding commenced at TORONTO

**FACTUM OF THE APPLICANT
(returnable August 17, 2021)**

MILLER THOMSON LLP

Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Craig A. Mills LSO#: 40947B
cmills@millerthomson.com
Tel: 416.595.8596

Elsir Tawfik, LSO#: 79819D

Tel: 416.595.2663
Fax: 416.595.8695
Email: etawfik@millerthomson.com

Lawyers for the Applicant