

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

IN THE MATTER OF SECTION 25 OF THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, CHAPTER 30, AS AMENDED

AND IN THE MATTER OF RE/MAX EXECUTIVE REALTY INC. (1996)
and DAVID SETO



APPLICATION UNDER section 25 of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30 as amended, and Rule 14.05(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a for an initial hearing on Monday, February 1, 2010, at 9:30 a.m., at 330 University Avenue, Toronto, Ontario, M5G 1R7 or as soon thereafter as it may be heard.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date January 29, 2010

Issued by 
Local registrar

Address of 330 University Avenue
court office 7th Floor
Toronto, ON M5G 1R7

APPLICATION

1. The applicant, the director under the *Real Estate and Business Brokers Act, 2002* (Ontario) (the “**Director**”), makes application for:

- (a) An order for directions or an order relating to the disposition of assets, trust funds and land that are affected by:
 - (i) two Freeze Orders (as hereinafter defined) that were issued by the Director, pursuant to section 25(1) of *Real Estate and Business Brokers Act, 2002* (Ontario) (“**REBBA**”), on February 2 and 23, 2009, in relation to assets and/or trust funds of Re/Max Executive Realty Inc. (1996) (“**Executive**”) and David Seto (“**Seto**”); and
 - (ii) a Notice (as hereinafter defined) that was registered by the Director in the land registry office at 50 Bloomington Road, 3rd Floor in Aurora, Ontario on February 25, 2009 pursuant to 25(7) of REBBA;
- (b) An order for directions with respect to notice and/or service of this application on persons who may be affected by this application;
- (c) Costs of this application on a substantial indemnity basis; and
- (d) Such further and other relief as this Honourable Court deems just.

2. The grounds for the application are:

A. The Parties

- (a) The *Safety and Consumer Statutes Administration Act, 1996* (Ontario), and its associated regulations, designates the Real Estate Council of Ontario (“**RECO**”) as the sole administrative authority of REBBA. As

such, RECO is responsible for administering REBBA and its associated regulations on behalf of the Government of Ontario. RECO is a self-managed, not-for-profit, federal corporation.

- (b) The Director is appointed by the board of RECO pursuant to section 2(1) of REBBA.
- (c) REBBA regulates the sale of real estate in Ontario. Among other things, REBBA regulates the conduct of real estate brokers, brokerages and salespersons.
- (d) Executive became registered under REBBA to trade in real estate as a brokerage in Ontario on or about July 17, 1996.
- (e) Seto became registered under REBBA to trade in real estate as a sales person in Ontario on or about July 28, 1986. On or about June 27, 1992, Seto became registered under REBBA as a broker. On or about July 17, 1996, Seto became employed by Executive. Thereafter, Seto was Executive's broker of record, its sole director, its sole officer, and its sole shareholder.
- (f) In February 2009, Executive employed approximately 125 to 130 people, including registrants and unregistered support staff. Executive had multiple locations. Its main office was located at 8 Weldrick Road West in Richmond Hill, Ontario.

B. REBBA

B.1 Registration and maintenance of trust accounts

- (g) Section 4 of REBBA requires persons to register under REBBA in order to trade in real estate, including as a brokerage, broker or salesperson (subject to certain exemptions, which are not applicable to this proceeding).

- (h) Entitlement to registration is subject to a number of requirements and conditions, including compliance with REBBA.
- (i) Section 12 of REBBA requires every brokerage to designate a broker as its broker of record. The broker of record must ensure that the brokerage complies with REBBA.
- (j) Section 27 of REBBA requires every brokerage to maintain an account that is designated as a trust account. Every brokerage is required to:
 - (i) deposit into the account all money that comes into the brokerage's hands in trust for other persons in connection with the brokerage's business;
 - (ii) at all times keep the money separate and apart from money belonging to the brokerage; and
 - (iii) disburse the money only in accordance with the terms of the trust.
- (k) Section 40 of REBBA provides that a person is guilty of an offence who contravenes or fails to comply with any section of REBBA or its associated regulations.

B.2 Freeze orders and notices in land registry offices

- (l) Section 25 of REBBA authorizes the Director to issue a "freeze order" in certain circumstances, including if:
 - (i) he believes that it is advisable for the protection of the clients or customers of a registrant or former registrant; and
 - (ii) proceedings in relation to a contravention under REBBA are about to be instituted against the registrant or former registrant in

connection with or arising out of the business in respect of which the registrant or former registrant is or was registered.

- (m) In particular, under section 25(1) of REBBA, the Director may in writing order any person having on deposit or controlling any assets or trust funds of a registrant or former registrant to hold those funds or assets.
- (n) If the Director makes a freeze order under section 25(1) of REBBA, then section 25(7) of REBBA authorizes the Director to register in the appropriate land registry office a notice that:
 - (i) a freeze order has been issued; and
 - (ii) the freeze order may affect land belonging to the person referred to in the notice.
- (o) A notice issued under section 25(7) of REBBA has the same effect as the registration of a certificate of pending litigation, except that the Director may in writing revoke or modify the notice.

C. Consumer Deposit Insurance and Commission Protection Insurance

- (p) All registered salespersons, brokers and sole proprietors are required to participate in RECO's insurance program. RECO's insurance program includes Consumer Deposit Insurance, Commission Protection Insurance, and Errors and Omissions Insurance.
- (q) Consumer Deposit Insurance protects consumers against the loss of deposits caused by real estate broker fraud, misappropriation of funds or insolvency.
- (r) Commission Protection Insurance protects registrants from the loss of commission caused by real estate broker fraud, misappropriation of funds or insolvency.

- (s) The limits of each of the Consumer Deposit Insurance program and the Commission Protection Insurance program are \$100,000 per claim to a maximum of \$500,000 per occurrence.

D. Proceedings involving Executive and Seto

D.1 Executive's and Seto's mishandling of trust funds

- (t) On or about January 14, 2009, RECO received an anonymous e-mail message that alleged Seto had improperly removed funds from Executive's trust account. As a result of this anonymous e-mail message, RECO arranged for an inspection of Executive.
- (u) According to RECO's records, Executive kept its trust account at the Toronto Dominion Bank located at 55 King Street West in Toronto (the "**TD Bank**"). Executive also maintained a general account and a commission trust account at the TD Bank.
- (v) On February 2, 2009, Seto met with representatives from RECO. At the meeting, Seto admitted to RECO that, contrary to subsection 27(1)(b) of REBBA, Executive failed to place funds that were paid to it in trust into its trust account. Instead, the funds were placed into Executive's general account or were otherwise dealt with improperly. Seto further revealed that there were shortages in Executive's trust account and commission trust account, and that its general account was overdrawn.
- (w) RECO also discovered that Seto was the Director and President of L.N.D.M Investments Inc. ("**LNDM**"), and that Seto is a 50% owner of LNDM. LNDM owns the property known municipally as 8 Weldrick Road West in Richmond Hill, Ontario (the "**Property**"). The Property was Executive's main office and Executive paid its rent to LNDM.

D.2 The Freeze Orders and Notice

- (x) Following the meeting between Seto and RECO, the Director believed it advisable to make two freeze orders pursuant to section 25(1) of REBBA for the protection of clients or customers of Executive and Seto, and that proceedings in relation to a contravention under REBBA should be instituted against Executive and Seto.
- (y) On February 2, 2009, the Director ordered the TD Bank to hold all assets and/or trust funds which were being kept and maintained by Executive and Seto in any account, which includes Executive's trust account, commission trust account and general account.
- (z) On February 23, 2009, the Director ordered any person, including without limitation, LNDM, having on deposit or controlling any assets or trust funds of Executive or Seto to hold those funds or assets.
- (aa) The freeze orders issued by the Director on February 2 and 23, 2009, as described above, are collectively referred to the "**Freeze Orders**".
- (bb) On February 25, 2009, the Director registered in the land registry office at 50 Bloomington Road, 3rd Floor in Aurora, Ontario a notice (the "**Notice**") advising that he had issued the Freeze Orders and that such orders may affect the Property.

D.3 Suspension and revocation of registrations

- (cc) On February 6, 2009, the Registrar under REBBA ordered the suspension of Seto's registration as a broker and of Executive's registration as a brokerage.
- (dd) On March 11, 2009, the registrations of both Seto and Executive were revoked.

D.4 Charges and guilty plea

- (ee) On March 18, 2009, Executive was charged with eight counts of failing to deposit trust monies into a real estate trust account and ten counts of failing to deposit funds into a real estate trust account to eliminate a trust shortfall. On the same day, Seto was charged with 18 counts of failing to ensure that the brokerage complied with REBBA.
- (ff) On November 19, 2009, Executive pled guilty to eight counts of failing to deposit trust money into a real estate trust account, and depositing the money directly into a general account, contrary to sections 27(1)(a) and 27(1)(b) of REBBA. That same day, Seto pled guilty to eight counts of failing to ensure that Executive complied with REBBA, contrary to subsection 12(2) of REBBA.
- (gg) Sentencing for both Executive and Seto is scheduled to take place on February 8, 2010 in the City of Toronto Provincial Offences Court.

E. Potential Claimants

- (hh) Numerous parties have asserted, or may assert, claims to the assets affected by the Freezing Orders (the "**Frozen Assets**"), including:
 - (i) the TD Bank;
 - (ii) a Lloyd's Syndicate, composed of Liberty Syndicate, Brit Syndicate Ltd. and Amlin Syndicate, in its role as the insurer of the Consumer Deposit Protection program and Commission Protection Insurance program;
 - (iii) clients and customers of Executive and Seto;
 - (iv) brokers and salespersons employed by Executive with respect to commissions that may be owed to them;

- (v) brokers and salespersons employed by cooperating brokerages with respect to commissions that may be owed to them;
- (vi) LNDM and any other owners of the Property;
- (vii) former employees of Executive;
- (viii) Canada Revenue Agency and other taxation authorities;
- (ix) other creditors of Executive and Seto; and
- (x) Executive and Seto.

F. Request for directions from the Court

- (ii) Under section 25(4) of REBBA, the Director may consent to the release of any particular asset or trust fund from a freeze order issued under section 25(1) or may wholly revoke the freeze order.
- (jj) However, REBBA does not authorize the Director to order the distribution of assets that have been affected by a freeze order, or to determine rights and priorities amongst competing claimants for such assets.
- (kk) If the Director has made a freeze order under section 25(1) of REBBA, or has registered a notice in a land registry office under section 25(7), then section 25(11) authorizes the Director to apply to the Superior Court of Justice for directions or an order relating to the disposition of assets, trust funds or land affected by the order or notice.
- (ll) Section 25(12) of REBBA provides that the Director may make such an application without notice to any other person.
- (mm) Sections 25(11) and 25(12) of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, as amended, and its associated regulations.

- (nn) Sections 3, 4 and 7 of the *Safety and Consumer Statutes Administration Act, 1996*, S.O. 1996, c. 19, as amended, and its associated regulations.
 - (oo) Rule 14.05(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
 - (pp) Such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- (a) Affidavit of Thomas Wright; and
 - (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

January 29, 2010

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Court File No: 10-8560-00CL

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Proceeding commenced at Toronto

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