

ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

BETWEEN:

DBDC SPADINA LTD. AND THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO,

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. AND  
EGLINTON CASTLE INC.

Respondents

-and-

THOSE CORPORATIONS LISTED IN SCHEDULE "B" HERETO, TO BE  
BOUND BY THE RESULT

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AFFIDAVIT OF HEWARD JORY KESTEN  
(WOODGREEN MANAGEMENT INC.)

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I, **HEWARD JORY KESTEN**, of the City of Vaughan, in the Province of Ontario, MAKE OATH  
AND SAY AS FOLLOWS:

1. I am President of Woodgreen Management Inc. (hereinafter "Woodgreen") and as such I had responsibility for the sale of 887 Queen Street East, Toronto, Ontario ("Property") to Red Door Lands Ltd. ("Red Door") and the related Vendor Take Back mortgage

transaction and as such I have personal knowledge of the matters set out herein my Affidavit.

## BACKGROUND FACTS

2. Woodgreen Management Inc. was incorporated to be the registered owner of certain properties previously owned by my mother and father, one of which was the Property known municipally as 887 Queen Street East, Toronto Ontario which had been owned by my parents since the 1940's. My late father operated a pharmacy from the Property until he passed away in 1998. Woodgreen subsequently rented the pharmacy premises to Agmosal Drugs Ltd, who remains a Tenant at the Property.
3. In early 2012, Woodgreen was approached by Colliers, a Real Estate company, on behalf of their client, to enquire if Woodgreen was interested in selling the Property. After negotiations, which included discussions between myself on behalf of Woodgreen and Norma Walton, on behalf of Red Door, an agreement was reached whereby Red Door Lands Ltd. purchased the Property for \$2,400,000.00 from Woodgreen with a Vendor Take Back first mortgage ("VTB") of \$1,200,000.00. The payment terms for the VTB were a) interest only payments were due each month calculated at 6% per annum; and b) three principal payments in the amount of \$400,000.00 each were to be due after one year, two years and three years respectively.
4. The sale closed on July 6, 2012.
5. On closing, a first Charge securing the principal sum of \$1,200,000.00 in favour of Woodgreen was registered as Instrument No. AT3067749 in the Land Registry Office for the Land Titles Division of Toronto (No.80) in respect to the Property. Attached

hereto and marked as **Exhibit "A"** to this my Affidavit is a copy of the registered Mortgage.

6. At the time of closing the sale of the Property, all property taxes were current and up to date.
7. In July 2012, Woodgreen's lawyer were contacted by the lawyers for Red Door asking if there were any terms in the Woodgreen Mortgage that would prohibit or restrict the registering of a second mortgage. I am advised by Jeremy Mandell of the law firm of Garfinkle Biderman LLP and verily believe that Jeremy Mandell answered the enquiry by advising no such restriction existed in the Woodgreen mortgage.
8. To my knowledge, prior to November 2013, that was the only communication regarding the second mortgage received by Woodgreen or its lawyers. Prior to November 2013, neither Woodgreen nor its lawyers received notice that a second mortgage had been registered neither against the Property nor of its terms, nor were we provided with a copy of the Riocan loan terms or the Riocan mortgage. In July 2013, I did not know the Riocan mortgage loan provided for a \$400,000.00 advance to Woodgreen in July 2013.
9. Prior to the due date (July 2013) for the first \$400,000.00 principal payment, Woodgreen invited Red Door to defer the due date for the first principal payment for another year. Although the first \$400,000.00 principal payment was due on Friday, July 6, 2013, it was not received on that date. Red Door's representative, Norma Walton telephoned me and indicated she would be agreeable to defer the principal payment for one year and to continue making the interest only payments during that period. The deferral was accepted by Woodgreen and Red Door in an exchange of emails on July 9 2013. Attached hereto and marked as **Exhibit "B"** to this my Affidavit are true copies of emails between Norma Walton and myself on July 9, 2013.

10. At the time of the acceptance of the deferral, Ms. Walton advised me that a lawyer's trust cheque had been prepared and made payable to Woodgreen in anticipation of the first principal payment due on July 6, 2013. As this cheque was not then required, I suggested she arrange to have it cancelled. She said she would consult the lawyers and get back to me. After some hours, she advised the cheque had been certified and in order to cancel it, it would be easier to have Woodgreen cash it and immediately return the funds to Red Door. As a pre-condition to assist in accommodating this effort to cancel the cheque, I required a written Acknowledgement from Red Door that Woodgreen's receipt of the cheque was not intended as a payment on the Mortgage.
11. On July 9, 2013, Ms. Walton on behalf of Red Door executed an Acknowledgement to Woodgreen indicating that the \$399,152.50 cheque payable to Woodgreen Management Inc. was prepared in error and not intended to be a payment against the mortgage with respect to the Property. Attached hereto to this my Affidavit and marked as **Exhibit "C"** is a copy of the said Acknowledgment received by Woodgreen prior to receipt of the cheque.
12. There was no intention on the part of Woodgreen or Red Door to make a mortgage advance or fresh advance when accommodating the cheque cancellation process.
13. On July 10, 2013, the cheque was received by my sister Darlene Wolk as I was out of town. Darlene deposited the cheque on July 10 2013, the day after the extension had been accepted and put in place, and the said funds were immediately returned to Red Door as per Norma Walton's request for Woodgreen to accommodate the cheque cancellation process.
14. The cheque was not accompanied with any letter from Riocan or Riocan's lawyers indicating that the funds were a mortgage advance. I know now that the cheque

payable to Woodgreen was drawn on the law firm Fogler Rubinoff's trust account and was actually in the amount of \$399,152.50 (not the amount of the deferred mortgage payment of \$400,000.00). I did not actually see this cheque.

15. As agreed by Woodgreen and Red Door, the funds represented by the \$399,152.50 cheque were not applied to the mortgage and the return of the \$399,152.50 was not intended or treated as a re-advance. There was always a common intention between Red Door and Woodgreen that the Property was security for the \$1,200,000.00.
16. It was not until April 2014 when the Manager's lawyer wrote to Woodgreen's lawyer that I learned that the certified cheque referred to below was in fact an advance under the Riocan second mortgage.
17. I had no knowledge of the terms of the Riocan mortgage and as a first mortgagee I had no reason to enquire into same.
18. Interest payments continued to be made by the Borrower at \$6000 per month as agreed. I had no indication of any difficulties with the Property until receiving a letter from the Manager's solicitors dated November 2013. As I was out of Toronto for the winter, I did not actually receive this letter until April 2014, and then received communications from our lawyers concerning communication they had received from the Manager's solicitors in respect of a possible sale of the Property and discharge of the Mortgage.
19. The Manager has served a motion seeking approval of the sale of 875 Queen Street East, Toronto and 887 Queen Street East, Toronto in a single transaction. This sale in fact relates to two properties known municipally as 875 Queen Street East and 887 Queen Street East, Toronto. Woodgreen has a first mortgage on 887 Queen Street

East and no mortgage on 875 Queen Street East, Toronto. I understand that Riocan has a second mortgage on 887 Queen Street and a first mortgage on 875 Queen Street.

20. The Manager's lawyer has advised that in its opinion as a result of the exchange of cheques between Woodgreen and Red Door \$400,000.00 was paid against the Mortgage and re-advanced and therefore Woodgreen has a secured claim for only 800,000.00 (not \$1,200,000.00) and has an unsecured claim for \$400,000.00 in relation to 887 Queen Street East, Toronto. Woodgreen disagrees with the Manager's position.
21. Until Thursday, June 5, 2014 at 7 pm, the Manager's lawyer had indicated that the sale proceeds were sufficient to pay out Woodgreen in full even if the Manager's position that Woodgreen was unsecured for \$400,000.00 were correct.
22. At 7 pm on Thursday, June 5, 2014, the Manager's lawyer contacted Woodgreen's lawyer and confirmed, some facts that gave Woodgreen concern about the proposed sale.
23. Woodgreen is furthermore concerned that selling these two properties in a single transaction for a combined price may prejudice it by not recognizing a proper allocation of sale proceeds and related charges.
24. It is Woodgreen's position that Woodgreen is fully secured with its first mortgage against 887 Queen Street East, Toronto Ontario in the full amount of \$1.2 million plus interest and costs.
25. I make this Affidavit in support of the cross-motion of Woodgreen for advice and direction of the court as to the priority of Woodgreen's \$1.2 million mortgage vis-a-vis the Riocan second mortgage and seeking an order similar to that obtained on

January 20, 2014 by Riocan and other mortgagees and for no other or improper purpose.

SWORN before me at the City of

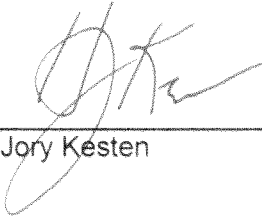
Toronto, in the Province

of Ontario this 9<sup>th</sup>

day of June, 2014



Robin A. D'Amico  
A Commissioner, Etc.

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