

CITATION: Constantine Enterprises Inc v. Mizrahi, 2026 ONSC 3506
COURT FILE NO.: CV-25-747164-00CL
DATE: 20260615

SUPERIOR COURT OF JUSTICE – ONTARIO [Commercial List]

RE: CONSTANTINE INTERPRISES INC.

Applicant

AND

SAM MIZRAHI, SAM M (180 SAW) LP INC. and SAM M (180 SAW) INC.

Respondents

BEFORE: Justice Dunphy

COUNSEL: *Eliot Kolers & Nicholas Avis*, for the Applicant

David Trafford & Adam S. Beyhum, for the Respondents

HEARD: June 11, 2026

ENDORSEMENT

- [1] This application under Rule 14.05(3)(h) by Constantine Enterprises Inc. (“Constantine”) seeks final declarations of the remaining indebtedness of the respondents following demands by Constantine upon eight debt obligations issued by the respondents and following the liquidation by a court-appointed receiver of all of the securities granted by the respondents to secure payment of those obligations. The securities granted concerned interests in two real estate projects in which the parties had collectively invested but which, unfortunately, proved unprofitable for them.
- [2] There is no dispute that Mr. Mizrahi controlled and/or was the beneficial owner of each of the respondents but of course each is a separate and distinct legal entity. Both parties were anxious to provide their own narrative about who bears the responsibility for the failure of the two real estate projects to produce the hoped-for profits. That is not a task that I am required to undertake to resolve this application beyond noting that whatever may have been the individual contributions of the parties in terms of bad business decisions when viewed in hindsight, macro-economic forces obviously played a very significant role and they have plenty of good company in the real estate development industry as our court’s docket amply demonstrates.

[3] For purposes of this application, the relevant dealings between the parties may broadly be said to concern eight debt obligations in respect of three separate loans regarding two real estate projects summarized as follows:

- (a) Constantine's investment in relation to a development project at 128 Hazelton Avenue in Toronto consisting of a grid promissory note dated November 10, 2020 (the "Retail Note") given by Mizrahi 128 Hazelton Retail Inc. (or "Retail") and guaranteed by Mr. Mizrahi personally (the "Retail Guarantee") in the principal amount of \$2,174,130 as of November 19, 2020;
- (b) Constantine's investment in a development project at 180 Steeles Ave. West in Vaughan which included:
 - i. The receipt of a promissory note given by Mizrahi 180 SAW LP (or "Mizrahi Partner") dated December 3, 2021 in the original principal amount of \$4,866,735 (the "180 SAW Note")¹ which obligation was in turn guaranteed by Mr. Mizrahi personally (the "Mizrahi SAW Guarantee") and by the respondent Sam M (180 SAW) Inc. (or "Mizrahi Shareholder") referred to as the "Mizrahi Shareholder SAW Note Guarantee"); and
 - ii. The receipt of a promissory note dated December 3, 2021² from Mr. Mizrahi personally in the original principal amount of \$9,209,071.57 (the "180 Saw Loan") which note was guaranteed by both Mizrahi Partner ("the Mizrahi Partner Guarantee") and Mizrahi Shareholder (the "Mizrahi Shareholder Saw Loan Guarantee").

[4] In this proceeding, Constantine is thus seeking judgment for the amounts due under the following notes or guarantees held by it. Each of these eight instruments were the product of commercial negotiations between sophisticated parties assisted by lawyers throughout. Some of the clauses relevant for the purposes of this application are summarized beside the name of each such instrument listed below:

- (a) The Retail Note by Retail: grid note repayable 90 days following named conditions precedent unless accelerated at the option of the lender following payment default, representations of maker as to validity and enforceability in accordance with its terms, no set-off, maker's agreement to pay costs including legal fees in connection with enforcement.
- (b) The Retail Guarantee by Mr. Mizrahi personally: unconditional continuing guarantee to make any payment the Borrower fails to make, indemnity for all costs arising from Borrower's failure, no set-off, unconditional absolute obligation notwithstanding

¹ The 180 Saw Note is also a Grid Note and stood at a balance of \$6,430,536.11 as of September 6, 2022.

² The 180 SAW Loan on this date was an amended and restated promissory note from an original \$7.5 million note in April 2019 interest upon which was capitalized in the amended and restated 180 Saw Loan. Nothing in this application turns upon that fact.

alleged set-off or counterclaim or failure to marshal or any other circumstance that might constitute an equitable defence or discharge, waiver of limitation periods as a “business agreement”, requirement to “exhaust its recourse against the Borrower” and to “realize on any security, collateral or other guarantees” prior to making demand, entire agreement clause, acknowledgement of independent legal advice, agreement to pay costs of enforcement including legal fees.

- (c) The 180 Saw Note by Mizrahi Partner: grid note, August 31, 2022 maturity date, representation of enforceability, no set-off, obligation to pay enforcement costs including legal fees.
- (d) The Mizrahi SAW Guarantee: unconditional continuing guarantee to make any payment debtor fails to make, indemnity for all costs arising from Borrower’s failure, no set-off, unconditional absolute obligation, waiver of limitation periods as a “business agreement”, requirement to “pursue the Debtor and any other guarantor” and to “realize on any security, collateral or other guarantees” prior to making demand, entire agreement clause, payment of costs of enforcement including legal fees, acknowledgement of independent legal advice.
- (e) The Mizrahi Shareholder SAW Note Guarantee: no set-off, unconditional guarantee, waiver of limitation periods as “business agreement”, no requirement to exhaust recourse, entire agreement, extends to payment of all enforcement costs including legal fees.
- (f) The 180 SAW Loan by Mr. Mizrahi: August 31, 2022 maturity date, representation of validity and enforceability of terms, no set-off, obligation to pay enforcement costs including legal fees.
- (g) The Mizrahi Partner Guarantee by Mizrahi Partner: no set-off, unconditional guarantee, waiver of limitation periods as “business agreement”, no requirement to exhaust recourse, entire agreement, extends to payment of all enforcement costs including legal fees.
- (h) The Mizrahi Shareholder SAW Loan Guarantee: no set-off, unconditional guarantee, waiver of limitation periods as “business agreement”, no requirement to exhaust recourse, entire agreement, extends to payment of all enforcement costs including legal fees.

- [5] There can be no question that each of the three promissory notes are valid promissory notes creating or evidencing valid obligations and that the amounts owing under each are liquidated sums. Each of the five guarantees are themselves guarantees of any amounts owing under the referenced promissory notes and thus the amounts owing under each are also liquidated sums. There is no serious dispute that each of the referenced promissory notes and guarantees were executed and delivered as and when indicated between sophisticated parties represented by counsel throughout. None of the respondents have filed any evidence to dispute that the borrowers in each transaction borrowed the money indicated, that CEI advanced the funds borrowed, that the guarantors delivered guarantees of the amounts borrowed as referenced in each guarantee and that the loans evidenced thereby have not been repaid in full. With the exception of a narrow dispute regarding the allocation of

funds received in payment from the court-appointed receiver and the defences raised, no evidence has been filed to dispute the *calculation* of the remaining amount due under the obligations represented by each of these instruments as claimed by the applicant. Stated simply – other than the allocation issue, the dispute is about whether there is a defence to the obligations and not a dispute about the calculation of the amounts as such.

- [6] The Mizrahi interests in the two real estate projects have now all been liquidated by receivers appointed by the Court on the application of Constantine on applications resisted by Mr. Mizrahi. The resulting funds have been distributed to the creditors in accordance with their priorities and Constantine, having now realized on all such security held for the various debts³, has not been paid in full and no evidence has been led to contradict Constantine's evidence of the *calculation* of that shortfall.
- [7] For the reasons that follow, I am granting the relief sought in this application. The parties have been embroiled in litigation for the past several years and all of the defences raised by the respondents have, in one form or another, been raised and dismissed, sometimes more than once. Claims that the instruments were other than what they were clearly stated on their face to be or that they should be subordinated to various alleged fiduciary duties arising from the dealings between the parties have been examined by this Court and dismissed – twice. The second dismissal was expressly without leave to amend. Objections to the appointment of a receiver to realize upon the security advanced on similar grounds were also dismissed, receivers were appointed, the assets sold and the secured creditors – including Constantine - received the proceeds which the Court found them to be entitled to. Attempts to oppose this proceeding as an application or to convert it into an action were dismissed. Costs orders remain unpaid. Still the battle continues, if on ground that has already been well tilled.
- [8] The applicant's claim is simplicity incarnate. It extended loans in return for a variety of specifically bargained-for instruments with definite legal properties including the three promissory notes and five guarantees given to it by Mr. Mizrahi or entities he controls. It has demanded payment in accordance with the clear words of clear contracts all of which have no set-off provisions and have either express representations as to the enforceability of the agreement in accordance with its written terms, entire agreement clauses or both. The agreements were part of sophisticated commercial arrangements negotiated among sophisticated commercial parties with the benefit of legal advice. The applicant is still owed approximately \$36 million after all of the security it held for these debts has been liquidated.
- [9] This application required the respondents to place facts before the court raising a genuine issue to be tried as to the liability of the respondents on each of the instruments relied upon by the applicant. I am entitled to assume that the respondents have put their best foot forward

³ In making this remark, I do not discount the arguments regarding exhaustion of recourse which I shall discuss below.

in responding to this application. Having carefully reviewed all of the evidence laid before me by the respondents and the legal defences raised, I find no genuine issues requiring trial.

- [10] The respondents did not raise any limitations defence in their responding evidence to this application and first raised the defence in their factum filed a week prior to this hearing. The applicant has had only a limited ability to gather evidence to respond to that late claim. However, I found that the record before me⁴ makes it quite clear that the defence raised however late is nevertheless entirely without merit. Enforcement proceedings in respect of the two corporate promissory notes and the three corporate guarantees were taken well within two years of maturity or acceleration and payments to the applicant in respect of these obligations from the receiver of the maker of the notes were by court order binding upon the corporate makers of those notes. Mr. Mizrahi explicitly acknowledged and admitted his personal promissory note (the 180 SAW Loan) in a statement of claim made (and since dismissed) in this court in 2024 and in several items of correspondence by email. Further, each of the three corporate guarantees contain express “business agreement” waivers of applicable limitation periods.
- [11] The applicant’s claims are all liquidated claims and fall squarely within the four corners of the documents the claims are founded upon and to which the respondents expressly agreed. Each of the other defences raised are no more than claims for unliquidated and amorphous damages attributed to various events subsequent to those instruments which are alleged to have discharged them by set off or some other mechanism which claims are advanced in express contradiction of the clear terms of the underlying documents. They have also been raised and dismissed by this court on multiple occasions. It is time for the respondents to recognize that these investments have failed and accept the bargained-for consequences. Judgment must issue as asked. My detailed reasons regarding each of the defences raised by the respondents follow.

Overview of litigation between the parties

- [12] There was an event of default under the Retail Note on February 28, 2022 following the failure of Retail to make a required interest payment although no formal notice of election to accelerate or demand was made at that time (on the record before me at least). The 180 SAW Loan and the 180 SAW Note both matured on August 31, 2022 and were not repaid at maturity as required. They too were in default as a result of those non-payments. Through its lawyers, Constantine issued formal demands for payment and notices of intent to enforce security in respect of all three debt instruments to the relevant principal debtors (Retail, Mr. Mizrahi or Mizrahi Partner as the case may be) and to the corporate guarantors of each of these (Mizrahi Partner and Mizrahi Shareholder as applicable) on September 22, 2022⁵. Since the two personal guarantees given by Mr. Mizrahi contained a condition precedent to

⁴ The evidence in this proceeding made reference to a 2024 statement of claim of the respondents against Constantine which was referred to and retrieved from the court file during oral argument.

⁵ Notice via email having been delivered on September 13, 2022 – nothing turns on the earlier date.

- making a demand for payment under them, demand under those guarantees was not then made. Formal demand on the two personal guarantees was made on April 25, 2025.
- [13] With the exception of payments eventually made in respect of these obligations out of the receiverships that followed, no payments were made by any of the debtors or guarantors in response to any of these demands.
- [14] Separate receivership proceedings were commenced by Constantine in this Court on February 22, 2024 in respect of both projects. Cavanaugh J. granted the applications and appointed a receiver over the interests of the interest of Retail in the 128 Hazelton project and over the interests of Mizrahi Partner and Mizrahi Shareholder in the 180 Steeles Ave. West project by two separate orders both dated June 4, 2024.
- [15] Both receivership applications were opposed by Mr. Mizrahi and by the related debtors controlled by him. Among other steps taken to resist the receiverships was a statement of claim by Mr. Mizrahi, Retail, Mizrahi Partner and Mizrahi Shareholder against Constantine and its principals dated April 5, 2024 (amended on April 8, 2024). The relief claimed in that civil claim included general damages, punitive damages and declarations that none of the defendants were indebted to any of the defendants in respect of either of the two projects or at all.
- [16] The allegations in the claim included allegations which are specifically raised by the respondents as defences here including failure to allow a sale of a unit in Retail “putting Sam at risk for the indebtedness he guaranteed”, refusing to approve transactions that “would have retired all debt Sam owed CEI on the 180 SAW project” and generally conspiring (between Constantine and its principals) to harm the respondents economic interests, and by “breach of fiduciary duty, and breach of the duty of good faith” entitling the plaintiffs to the declaratory relief sought.
- [17] The statement of claim described the financing of each of the two projects. In the case of the 180 SAW project, paragraphs 37 and 38 of the statement of claim specifically admitted the existence of the 180 SAW Loan owed by Mr. Mizrahi and the 180 SAW Note owed by Mizrahi Shareholder and guaranteed by Mr. Mizrahi. The claim alleged the right to be discharged from that obligation (and the related guarantees) as a result of the refusal of the defendants “to sell the SAW project to harm Sam’s interest” which the particulars in the claim attributed to the failures of the defendants to support a Korean investment in 180 SAW that he reported upon in early June 2023.
- [18] On July 31, 2025, Cavanaugh J. struck the statement of claim in its entirety as disclosing no reasonable cause of action but granted leave to amend. A Fresh as Amended Statement of Claim soon followed on October 14, 2025 which restated most of the factual allegations as in the original claim but cast the entirety of the Constantine-Mizrahi relationship as a common law partnership to claim much the same relief. This claim too was struck by Black J. on March 13, 2026 but without leave to amend.
- [19] In parallel with the last stages of the Mizrahi statement of claim, the present Notice of Application was issued on May 6, 2025. The respondents sought to convert the application to an action without success as well. That motion was dismissed also dismissed by Black J. on March 13, 2026.

Outline of issues raised

[20] The following defences were raised by the respondents in response to this application:

- (a) Limitations Act defences – the respondents allege that some of the claims advanced by Constantine in this proceeding were raised more than two years after the claims arose and are barred by the *Limitations Act, 2002*, S.O. c. 24, Sched. B (the “*Limitations Act*”). This defence does not apply to claims under the two guarantees given by Mr. Mizrahi personally since demands for payment of these two obligations were made within two years of the commencement of this proceeding. This defence is premised on the undisputed fact that *this* proceeding was commenced on May 6, 2025 more than two years following maturity or acceleration and demands for payment under the other instruments mentioned above all of which had occurred by no later than September 22, 2022.
- (b) Allocation: Mr. Mizrahi alleges that payments made to the applicant in the receivership of Retail must be allocated in a manner which would reduce his liability under the Retail Guarantee. That issue is pending before this Court in another proceeding.
- (c) Alleged obstruction of sale to repay Retail Note: Constantine is alleged to have breached duties owed to Mr. Mizrahi in failing to agree to cooperate in closing an allegedly “ready willing and able to close” sale of “Sam’s Unit” in the Retail project that would have repaid the Retail Note to Constantine.
- (d) Alleged bad faith or breach of fiduciary duty: project: Mr. Mizrahi alleges a broader breach of alleged fiduciary duties in relation to the management of the 180 SAW project that he claims prevented repayment of the 180 Saw Loan arising from the failure to agree to a proposed sale to Korean investors he was negotiating in June 2023 and in early 2024.
- (e) Alleged failure to exhaust recourse: Mr. Mizrahi alleges that the demands upon his two personal guarantees were premature as Constantine has not yet fulfilled the condition precedent of exhausting recourse prior to making demand.

Discussion and Analysis

(a) Limitations Act

[21] The respondents raised a limitations defence for the first time in their factum filed a week prior to the hearing. They did not advert to this defence in the responding affidavit filed which should have been their “best foot forward”, in connection with the motion to convert this application to a statement of claim or in any of the scheduling case conferences that preceded this hearing. Fairness to the applicant who had less than a week to respond to the allegation would require me to adjourn this aspect of the application to permit the applicant such a proper opportunity to place evidence and argument before me. I should have done so here but for the fact that I have found the claimed defence to be entirely without merit on the record before me – supplemented at the hearing by reference to a statement of claim between

the same parties and in this court which was referred to but not attached to affidavits filed here. As so supplemented, I found an adjournment was not required as I had the necessary record before me to dismiss the defence raised.

- [22] There is no limitations defence raised in relation to Mr. Mizrahi's two personal guarantees. Mr. Mizrahi claims that demand on those is still premature and the applicant demanded upon them less than two years prior to the commencement of this proceeding. As regards the other six instruments upon which this application is based, the following findings dispense with any further requirement to examine the potential viability of this defence.
- [23] First, two receivership applications were begun by Constantine in April 2024 against Mizrahi Retail, (premised upon, among other things the obligation represented by the Retail Note and security held for those obligation), against Mizrahi Partner (premised upon the 180 Saw Note and the Mizrahi Partner Guarantee and the security held for these obligations) and against Mizrahi Shareholder (premised upon the Mizrahi Shareholder SAW Loan Guarantee and the Mizrahi Shareholder SAW Note Guarantee and the security held for these obligations) on February 22, 2024. These proceedings were initiated well within two years of the date of amounts coming due under those five corporate instruments referred to. In addition, the proceeding under the guarantees of Mizrahi Partner and Mizrahi Shareholder of Mr. Mizrahi's personal loan (the 180 SAW Loan) specifically referenced that instrument and the guarantee of it by the two corporations. Receivers were duly appointed over the three corporations and their holdings in the two projects and those receivers sold the assets and made distributions to Constantine to satisfy those obligations in part at least. This proceeding seeks to obtain judgment as against the two corporations for the shortfall remaining owing following those payments commencement of this proceeding against the three corporations. The suggestion that the *Limitations Act* has extinguished these five claims seeking the *shortfall* remaining as a result of the court-ordered payments received from the two prior *timely* proceedings in this same Court is simply absurd. Among other provisions of the *Limitations Act* supporting this obvious conclusion:
- (a) S. 13(4) – Timing of performance of obligations under security agreements in respect of the claimed obligation following the appointment of a receiver;
 - (b) S. 13(11) – The effect of the partial payment of claims from distributions made by court-appointed receiver in respect of the each of the debt obligations in question;
 - (c) S. 5(1)(iv) – This proceeding was neither reasonably necessary nor – in light of the receivership stay of proceedings – possible before such payments which established the amount of the shortfall.
- [24] Second, Mr. Mizrahi specifically acknowledged the 180 SAW Loan in his April 2024 Statement of Claim. This application was commenced within two years of that confirmation. The Statement of Claim pleading discharge of the obligation necessarily confirmed the existence of the 180 SAW Loan, the original principal amount of it and that it was an outstanding obligation of Mr. Mizrahi at minimum until the events which it alleged discharged the obligation within less than two years of this claim. This admission clearly satisfies the requirements for an acknowledgement under s. 13(1) of the *Limitations Act*.

- [25] The applicants have also, on short notice, surfaced two emails during this time frame which also clearly acknowledge the existence of the 180 SAW Loan in the context of negotiated proposals to repay the obligation without in any way disputing its existence or validity. These were not “without prejudice” settlement negotiations of a disputed obligation – these were business efforts to negotiate a transaction that would repay it.
- [26] Third, the four corporate guarantees all contain waivers of limitation periods and acknowledgement of such agreements as business agreements in each case satisfying all of the requirements of s. 22(5) of the *Limitations Act*. The suggestion that this language is insufficiently clear is without merit. The agreements in question provide that where, as here, applicable law prohibits a complete exclusion and waiver of any limitation period “any limitation period is extended to the maximum length permitted by applicable law”. Section 22(5) of the *Limitations Act* permits a limitation period to be extended by agreement providing it does not extend beyond the s. 15 limitation period of 15 years. None of the parties to these agreements are consumers and the agreements are clearly business agreements, a fact specifically acknowledged in each. The waivers in each of the four corporate guarantees in question plainly satisfy the statutory requirements and the applicant is entitled rely upon them.
- [27] I find the defences predicated upon the *Limitations Act* to be without merit.

(b) Obstruction of Retail Sale

- [28] The respondents seek to go beyond the terms of the Retail Note itself to the Term Sheet which gave rise to it to impose a non-existent obligation upon Constantine to have agreed to a sale of a unit in the Retail project that was never in fact ready, willing and able to close.
- [29] The Retail Note evidences the existence of a clear and unequivocal obligation to pay upon the Borrower. Further, the Borrower specifically represented that the Retail Note “constitutes a legal, valid, and binding obligation of the Borrower, enforceable against it in accordance with its terms” and agreed that “the Borrower shall not exercise any right of set-off”. This unequivocal obligation to pay is in no way subordinated to any future steps of any kind required to be taken by the Lender. Indeed, the Lender has no obligations at all under the Retail Note.
- [30] The applicants attempt to tease the “obligation” of Constantine to consent to a sale of what is sometimes referred to as “Sam’s Unit” in the Hazelton Ave development from the language of a Term Sheet dated October 25, 2020, such as it is, which preceded the Retail Note.
- [31] That Term Sheet made mention of a number of Conditions Precedent to which the obligation to advance the contemplated loan was to be subject. From this, Mr. Mizrahi seeks to infer a positive obligation upon Constantine to sell other properties it owned and to consent to the lifting of security interests in relation to ProjectCo to permit the sale of “Sam’s Unit” in a way that would have repaid the Retail Note.
- [32] Nothing about this confusing allegation is consistent with the actual facts.

- [33] First, conditions precedent in the Term Sheet which did not find their way into the actual Retail Note that followed cannot override the clear and unambiguous terms of the Retail Note which neither incorporates nor adopts them in any way.
- [34] Second, there is simply no credible evidence on the record that Retail was *ever* ready, willing and able to close on any purchase of “Sam’s Unit” at any relevant time, with or without the consent of Constantine. Mr. Mizrahi alleged “multiple efforts” from May 2023 to close on the sale of the Unit, attaching in evidence of this allegation a self-serving email from himself alleging a deal with a prior secured creditor to consent to the transaction. No confirmation from that secured creditor, by way of sworn statement or actual written agreement was tendered and that same secured creditor issued a demand and Notice of Intention to Enforce Security under s. 244 of the *Bankruptcy and Insolvency Act* in December 2023 when Mr. Mizrahi was supposedly still in position to move forward. When cross-examined on this point for evidence of the supposedly committed and ready-to-close financing necessary to complete this transaction,. Mr. Mizrahi produced two highly conditional and dated commitment letters one of which dated from 2020 while the other expired in accordance with its terms in 2022.
- [35] Mr. Mizrahi admitted on cross-examination to never having attempted to close a sale of Sam’s Unit, claiming that it wasn’t worth incurring the fees of attempting to close if Constantine would not cooperate. Even entering into Wonderland and assuming the alleged after-life of the Term Sheet, the suggestion that there was ever a moment in time where the Retail Note could have been paid in full but for the consent of Constantine is without a shred of evidence beyond Mr. Mizrahi’s unsubstantiated say-so, and it utterly contrary to common sense. If the financing were available and wanted only Constantine’s consent to an escrow closing to avoid what Mr. Mizrahi described as “paying twice”, that could have been arranged in a heartbeat and the evidence of it would not be hard to find.
- [36] Neither the factual nor the legal premise upon which this alleged defence is premised has any validity. This allegation raises no obstacle to judgment on the Retail Note or Mr. Mizrahi’s guarantee of it.

(c) Allocation Issues re Retail

- [37] The respondents take the position that the Term Sheet survives and creates an obligation upon Constantine to apply to the Retail Note payments received from the receivership in respect of the first secured position on certain assets of Retail acquired by Constantine long after the Retail Note was in default and accelerated. I shall not express any view on the merits of that allegation which I understand is pending before another judge of this court who is hearing matters in relation to that receivership.
- [38] For present purposes it is sufficient to note that if Mr. Mizrahi were successful in advancing this position, the result would be to increase the amount of the distribution applied to the Retail Note but it would not repay the Retail Note in full. It does not impact the fact of Retail Guarantee so much as a potential partial credit. It is not at all events a defence to this application.

(d) Bad Faith/Breach of Fiduciary Duty

- [39] Mr. Mizrahi made extensive allegations of bad faith or breach of fiduciary duty as against Constantine and its principals in the civil suit he filed in response to Constantine's receivership applications in 2024. His affidavit in response to this application (and in support of his own motion to convert this application to an action) largely reiterated the same allegations. The civil claim was dismissed a first time and an attempted reformulation of it by way of amendment was dismissed again with prejudice. Those same allegations when packaged as a reason to convert this application to an action were dismissed a third time.
- [40] On this application, the respondents' focus was somewhat narrower, alleging "unreasonable decisions" taken in relation to an attempt to sell the 180 SAW project to a Korean group. In this regard, they point to a non-binding letter of intent that – had it been completed – would have avoided the receivership that followed and repaid all loans, etc. What followed were negotiations between the stakeholders in 180 SAW including Constantine and Mizrahi as to how to structure such a transaction. Mr. Mizrahi's affidavit refers to a meeting between the potential investor and the principals of Constantine that he was not present for and speculates that the subsequent failure of the proposed investment to be completed must be laid at the feet of Constantine as a breach of fiduciary duty or a duty of good faith by reason of what was said or done at that meeting. The mere fact of a failed business negotiation does not establish bad faith or breach of fiduciary duty still less does the allegation establish a basis to alter the obligations under prior promissory notes and guarantees which are clear and unambiguous and expressly disclaim any right to set-off. The respondents sought to convert this application to an action on the basis of this same vague and unsubstantiated set of allegations. It was not successful then and nothing has changed.
- [41] These vague allegations afford no defence to the applicant's claim before me.

(e) Failure to Exhaust Recourse

- [42] Both of the personal guarantees given by Mr. Mizrahi of the obligations of two of the corporations controlled by him (Mizrahi Retail and the Retail Note; Mizrahi Partner and the Mizrahi SAW Note) contain provisions which, in slightly different language, defer the right to make demand until recourse against others has been exhausted. There is no merit to the suggestion that the applicant has failed to exhaust its recourse in the manner prescribed by the two guarantees.
- [43] The respondents acknowledge that the applicant did in fact enforce its security by seeking a receiver, the receiver has sold the assets, realized the proceeds of sale and distributed them. The respondents take issue with the manner in which Constantine has allocated the proceeds in the case of the Retail Note– that has nothing whatever to do with *realizing* upon the security it holds. There is nothing further Constantine can do to exhaust its recourse against the Borrower. The resolution of the allocation dispute is unrelated to recourse against the Borrower or realization upon security. The respondents acknowledge that the proceeds about which it disputes the allocation are less than the amount owing under the Retail Note at all events.

[44] In the case of the receivership of the SAW project and borrowers, there is not even the issue of allocation remaining. The receiver has completed the sale of all assets and has been discharged.

[45] This objection of prematurity has no merit.

Disposition

[46] For the foregoing reasons, I grant the application and order as follows:

- i. judgment requiring payment by Mr. Mizrahi, as guarantor, to CEI in the amount of \$2,718,507 (as of April 30, 2025) in connection with the Retail Note;
- ii. judgment requiring payment by Mr. Mizrahi, as debtor, and Mizrahi Partner and Mizrahi Shareholder, as guarantors, to CEI, jointly and severally, in the amount of \$21,465,963 (as of April 30, 2025) in connection with the 180 SAW Loan;
- iii. judgment requiring payment by Mizrahi Partner, as debtor, and Mr. Mizrahi and Mizrahi Shareholder, as guarantors, to CEI, jointly and severally, in the amount of \$11,824,659 (as of April 30, 2025) in connection with the 180 SAW Note; and
- iv. in respect of each of the three preceding judgments, the applicant is entitled to its actual legal and other costs of enforcement including costs of this application as provided for in each of the relevant instruments to be set as directed below.

[47] I am directing the parties to finalize the form of a judgment as of today's date that will include interest brought forward from April 30, 2025 until today and the precise means of calculating interest on each amount thereafter. In the event of disagreement (which I do not expect to see), an affidavit as to the calculation and the inputs made in doing so will be provided to me by the applicant and the respondents will have one week and five pages to explain any disagreements on such calculations.

[48] I am also directing the parties to discuss the amount of contractual enforcement costs required to be added to the judgment granted. In the event of disagreement, the applicant shall provide its outline of the claimed costs and an affidavit in support of such amounts – I do not require further evidence regarding the *right* to claim such costs. The only evidence sought is as to the amount. A page limit of five pages to each side will apply exclusive of outlines of costs.

[49] Orders accordingly which I expect to be settled swiftly as to form and content.

Justice Dunphy

Date: June 15, 2026