

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**TREZ CAPITAL LIMITED PARTNERSHIP and COMPUTERSHARE TRUST
COMPANY OF CANADA**

**Applicant
(Respondents in Appeal)**

and

WYNFORD PROFESSIONAL CENTRE LTD. and GLOBAL MILLS INC.

Respondents

NOTICE OF APPEAL

THE APPELLANT, Metro Toronto Condominium Corporation No. 1037 (“**MTCC 1037**”), **APPEALS** to the Ontario Court of Appeal from the Judgment of the Honourable Justice Pattillo dated December 10, 2015, made at Toronto, Ontario.

THE APPELLANTS ASK that the initial Judgment be set aside and an Order be granted as follows:

- a) An Order setting aside the Judgment dated December 10, 2015;
- b) An Order that the Appellant has an equitable lien against Wynford Professional Centre Ltd.’s (“**Wynford**”) units in MTCC 1037 (the “**Wynford Units**”) and granting the Appellant priority to be reimbursed before a Respondent in Appeal, Trez Capital Limited Partnership (“**Trez**”), can collect its mortgage proceeds;

- c) In the alternative, an Order reviving the Appellant's right to lien against the Wynford Units pursuant to section 86 of the *Condominium Act, 1998*, S.O. 1998 (the "*Act*") and granting the Appellant priority to be reimbursed before Trez can collect its mortgage proceeds;
- d) An Order that costs be payable to the Appellant on the Motion and the appeal on a partial indemnity basis; and
- e) Such further and other relief as counsel may advise and this Honourable Court permit.

THE GROUNDS OF APPEAL are as follows:

- a) The learned Justice made errors of fact, law, and mixed fact and law in the Judgment;
- b) The learned Justice failed to consider all of the relevant evidence and arguments raised by the Appellant;
- c) The learned Justice erred in failing to find an equitable lien due to Wynford's unjust enrichment and the Appellant's corresponding deprivation;
- d) The learned Justice erred in finding that a purchaser is not required to inquire when a status certificate is incomplete or missing information and can rely on the information contained in a status certificate without any further due diligence;
- e) The learned Justice erred by finding that it was proper due diligence for Trez's counsel not to look behind a status certificate in question with respect to common expense arrears;

- f) The learned Justice erred in ignoring the red flags related to the status certificate in question and in finding that Trez and its counsel carried out satisfactory due diligence despite Trez's failure to meet its own due diligence requirements under the mortgage commitment;
- g) The learned Justice erred in fact and law by not accepting the findings of the Appellant's expert that:
1. It is industry practice for a recipient of a status certificate to make further inquiry where the certificate indicates there may be an issue with the condominium corporation's governance or financial stability;
 2. It is contrary to industry practice to rely on a status certificate that has outdated financial statements or financial information;
 3. The delivery of a status certificate with no information as to the amount in the reserve fund or with financial information that is greater than two years old should constitute a significant red flag for a prospective purchaser or mortgagee;
 4. It falls below the minimum acceptable standards of practice for a lawyer to not inquire further with respect to a status certificate that contains out of date or missing information;
 5. Given the non-arm's length relationships of Norma and the affiliated parties in the transaction, it was incumbent on Trez and its counsel to be alert to potential red flags or issues that could arise in the transaction;

6. The failure to include the “last annual financial statements” in the status certificate in question, as required by the *Act*, should have led Trez or its counsel to make further inquiry; and
 7. Trez and its counsel acted unreasonably by not making further inquiries with respect to obvious defects on the face of the status certificate in question, which constituted red flags when combined with the nature of the relationship between Norma and the affiliated parties involved in the transaction;
- h) There was insufficient evidence before the learned Justice that George Habib and Jonathan Griffiths (collectively, the “**Minority Directors**”), two members of Appellant’s Board of Directors, acceded or acquiesced to the fraudulent or negligent actions of the Board’s remaining directors, Norma Walton (“**Norma**”), Ronauld Walton (“**Ronauld**”), and Dr. Stanley Bernstein (“**Bernstein**”) (collectively, the “**Walton Directors**”);
 - i) There was insufficient evidence before the learned Justice that the Minority Directors failed to meet their duty to exercise diligence in circumstances where the Walton Directors failed to hold or inform them of Board meetings or inform them of any actions taken by the Board;
 - j) The learned Justice’s findings regarding the duty and diligence of the Minority Directors implies that even a director who was appointed without their knowledge, as Bernstein claims he was, is subject to a duty to exercise diligence in circumstances where other directors failed to hold or inform them of Board meetings or inform them of any actions taken by the Board; and

- k) The learned Justice erred in determining that the Appellant was unable to revive its lien rights under the *Act* by referencing case law which did not deal with the issue of fraud, an agreed upon presumption in the within case.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- a) Section 6(1)(b) of the *Courts of Justice Act*;
- b) The Judgment appealed from is final and exceeds \$50,000.00;
- c) Section 193(c) of the *Bankruptcy and Insolvency Act*;
- d) The Judgment appealed from exceeds \$10,000; and
- e) Leave to appeal is not required.

December 21, 2015

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APPELLANTS' CERTIFICATE

The Appellants certify that the following evidence is required for the appeal, in the Appellants' opinion:

1. The Appellant's Motion Record, and all exhibits thereto;
2. The Appellant's Supplementary Motion Record, and all exhibits thereto;
3. The Appellant's Further Supplementary Motion Record, and all exhibits thereto;
4. The Appellant's Second Further Supplementary Motion Record, and all exhibits thereto;
5. The Respondents in Appeal's Responding Motion Record, and all exhibits thereto;
6. The Respondents in Appeal's Amended Supplementary Responding Motion Record, and all exhibits thereto;

7. The Respondents in Appeal's Further Supplementary Responding Motion Record, all exhibits thereto;
8. The Respondents in Appeal's Second Further Supplementary Responding Motion Record, and all exhibits thereto;

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Court of Appeal File No.:
Court File No.: CV-14-10493-00CL

Ontario
SUPERIOR COURT OF JUSTICE
Proceeding Commenced At **TORONTO**

APPELLANTS' CERTIFICATE

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