

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

MARSHALLZEHR GROUP INC.

APPLICANT

-and-

FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION

RESPONDENT

NOTICE OF MOTION

The Lien Claimant 1267989 Ontario Inc o/a Duncan Drywall shall make a Cross Motion via Zoom to the Commercial Court at Toronto, at 2:00 pm on May 10, 2021, at the same time as a motion being brought by the Receiver of the Defendant owner for approval of the sale of the land described in Schedule "A" to this Notice of Motion, or as soon after that time as the motion may be heard or as this Honourable Court may direct.

The Motion is for an Order:

1. Directing that the sum of \$251,700.49 to be paid into court to the credit of Barrie Court file No: CV-20-00000641-0000 as security for Duncan Drywall's Construction Lien claim or in the alternative that any sale of the land shall be subject to the Construction Lien of Duncan Drywall.
2. An Order granting 1267989 Ontario Inc o/a Duncan Drywall leave to continue its construction lien action, Barrie Court File No. CV-20-00000641-0000 against the

Defendant's Fernwood Developments (Ontario) Corporation and MarshallZehr Group Inc.

3. Costs of this motion in an amount to be fixed and to be paid forthwith.

The Grounds for the Motion Are:

4. The Plaintiff is a Construction Lien Claimant and was at all material times a drywall subcontractor who worked as a subcontractor to Fernwood on a project in Barrie on land described as School House Barrie.
5. Duncan Drywall's action, Barrie Court File No. CV-20-00000641-0000 was stayed by an Order made by Justice Hainey in this proceeding on February 12, 2020, (paragraph 10).
6. The Receiver-Manager RSM has had over 14 months to investigate the issues related to this lien claim and whether the Duncan Drywall's lien has priority over the mortgage of MZ but little progress has been made in resolving these issues.
7. The Receiver-Manager has apparently concluded that MZ's mortgage may have priority over the Duncan Drywall's construction lien. Duncan Drywall claims there is no reasonable basis for this conclusion. The owner and general contractor, Fernwood, failed to maintain either an owner's construction lien trust fund and/or a general contractors construction lien trust fund.
8. Duncan Drywall claims that the owner's construction lien trust fund should have been at least \$1,100,000.00 and this lien claimant has priority over the MZ mortgage for at least \$1,100,000.00. The original MZ mortgage was registered on December 19 2013. This mortgage was for \$15,000,000.00 even though the land was worth a maximum of \$4,000,000.00 at the time. The mortgage was refinanced on September

20, 2016 after the first construction lien had arose and the owner's obligation to maintain a trust fund had started.

9. Further MZ allegedly directed and compelled Fernwood to pay out at least \$1,000,000.00 or more of the mortgage advance to pay real estate commissions and/or rental income premiums instead of using these monies to maintain the construction lien.
10. Duncan Drywall therefore claims that MZ committed acts of an owner and Duncan Drywall as a construction lien claimant is entitled to priority over the MZ mortgage.
11. RSM has also alleged that Duncan Drywall's lien may be invalid and may have been registered out of time despite the fact that Fernwood has admitted its debt to Duncan Drywall in writing and there are no facts that support RSM's position that Duncan Drywall's Construction Lien was registered out of time.
12. Duncan Drywall therefore claims that RSM has failed to deal with it an even-handed manner and that RSM has demonstrated bias in favour of MZ and that there is no reasonable prospect that these issues will be resolved by RSM in an even-handed unbiased manner.
13. Section 78 Construction Lien Act.

The Following Documentary Evidence Will Be Used in the Motion:

- a. The Motion Record of the Receiver for the Court approval of the sale of the School House Development Land.
- b. The Affidavit of Robert Duncan sworn on May 4, 2021.

- c. The Affidavit of Jeff McKeever sworn on May 5, 2021.
- d. The Affidavit of Dawn Viveiros sworn on May 6, 2021.
- e. Such further materials as counsel may advise and this Court deems just.

Date: May 6, 2021

PAUL J. DAFFERN LAW FIRM

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Lawyer 1267989 ONTARIO INC.
o/a Duncan Drywall

SCHEDULE "A"

PROPERTY DESCRIPTION

PART OF BLOCK 6, PLAN 51M983, PART 3 PLAN 51R40027; SUBJECT TO AN EASEMENT OVER PART 3 PLAN 51R40027 AS IN SC1189600; TOGETHER WITH AN EASEMENT OVER COMMON ELEMENTS SIMCOE STANDARD CONDOMINIUM PLAN NUMBER 420 AS IN SC1354411; SUBJECT TO AN EASEMENT OVER PART 3 PLAN 51R40027 IN FAVOUR OF SIMCOE STANDARD CONDOMINIUM PLAN NO. 420 AS IN SC1354411; SUBJECT TO AN EASEMENT OVER PART 3 PLAN 51R40027 IN FAVOUR OF SIMCOE STANDARD COMDOMINIUM PLAN NO. 420 AS IN SC1496430; TOGETHER WITH AN EASEMENT OVER COMMON ELEMENTS SIMCOE STANDARD CONDOMINIUM PLAN NUMBER 420 AS IN SC1496430; CITY OF BARRIE

MARSHALLZEHR GROUP INC. -and-

FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION

APPLICANT

RESPONDENT

Court File No. CV-20-00635523-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT

TORONTO

NOTICE OF MOTION

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and Jeff McKeever Plumbing and Contracting