

**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 Construction Lien Claimant, Jeff McKeever shall make a cross-motion via zoom to the Commercial Court at Toronto at the same time as the Receiver RSM's motion for court approval of the sale of the Defendant's lands described in Schedule "A" to this Notice of motion at 2:00 pm on May 10, 2021 as soon after that time as the motion may be heard or as this Honourable Court may direct.

The Motion is for:

1. An Order requiring RSM to pay \$216,862.04 into Court to the Credit of the Lien Claimant Jeff McKeever's action, Barrie Court File No. CV-20-00000767-0000 or in the alternative an Order that the transfer of the land is subject to Jeff McKeever's construction lien.
2. An Order Granting the moving party construction lien claimant Jeff McKeever leave to continue his construction lien action Barrie Court File No. CV-20-00000767-0000 against the Defendant Fernwood Developments (Ontario) Corporation.

3. The Costs of this Motion to be fixed and payable forthwith.

The Grounds for the Motion Are:

4. The moving party is a self-employed plumber who worked as a subcontractor to Fernwood and who is owed \$173,489.63 plus interest by the Defendant.
5. The moving party lien claimant is a secured creditor of the Fernwood who is also the owner and claims priority over the mortgage of Marshal Zehr (MZ).
6. The moving party has been informed that RSM, the receiver of the owner has concluded that the maximum value of his lien is approximately \$21,000.00 and that he is not entitled to priority over the MZ mortgage.
7. The owner failed to maintain construction lien holdbacks and it appears that the holdbacks should have been at least \$1,100,000.00.
8. This lien claimant is entitled to priority over the mortgage to the extent of the holdbacks that the owner failed to retain. The lien claimant therefore claims priority over MZ's mortgage up to at least \$1,100,000.00.
9. The Receiver RSM has failed to investigate the priority issue and has demonstrated bias in favour of MZ. There is no reasonable prospect that the Receiver will carry out its responsibility to determine this issue in a manner that is even-handed and fair to this construction lien claimant.
10. The RSM has also claimed that the onus is on the lien claimant to prove it is entitled to priority over the mortgage. This lien claimant claims that this position of RSM is clearly wrong at law and that the onus is on the mortgagee to prove it is entitled to priority over the lien claimant.

11. RSM has further claimed that this lien claimant failed to add MZ as a party to its action. The lien claimant therefore wants to move to amend its statement of claim in its Barrie lien action and if necessary, to ask LAWPRO to become involved in this case to repair any error of this lien claimants former counsel if necessary. However, this lien claimant is also entitled to shelter under Duncan Drywall's prior registration of its certificate of action in Barrie Court File No. CV-20-00000641-0000.
12. More than 14 months have passed since the Receiver was appointed and little progress has been made in resolving issues related to the lien claim of the moving party.
13. RSM has further claimed that this lien claimant's construction lien may have been registered out of time after his lien had expired without any reasonable basis for drawing this conclusion and without any reasonable enquiries being made of this lien claimant about the circumstances related to his lien and the last day he worked on site.
14. MZ's original mortgage was for \$15,000,000.00 even though the property value was \$4,000,000.00 at time of registration of the original mortgage on December 19, 2013.
15. The MZ mortgage was refinanced on September 20, 2016 after the first liens arose on this project and the owner's obligation to maintain a trust fund started.
16. Section 78 of the Construction Act.

The Following Documentary Evidence Will Be Used in the Motion:

- a. The Affidavit of Jeff McKeever sworn on May 5, 2021.
- b. The Affidavit of Dawn Viveiros sworn on May 6, 2021.
- c. The Affidavit of Robert Duncan sworn on May 4, 2021.
- d. The Motion Record of RSM for its motion to approve the sale of the land subject to the lien to MZ, returnable on May 10, 2021.

Date: May 7, 2021

PAUL J. DAFFERN LAW FIRM

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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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