

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

*In the matter of Sections 97 and 100 of the Courts of Justice Act, R.S.O. 1990 c. C.43,  
as amended*

B E T W E E N:

**FIRM CAPITAL MORTGAGE FUND INC.**

Applicant

- and -

**FORTRESS BROOKDALE INC., FORTRESS AVENUE ROAD (2015) INC.  
and FERNBROOK HOMES (BROOKDALE) LIMITED**

Respondents

In attendance:

D.J. Miller & Leanne Williams (TGF)  
B. Greenberg (Atlas Dewatering)  
S. Lima (Alma Systems)  
Thomas McRae (Gilbert Steel Limited)  
John Margie (Innocon and as agent for Michael Handler for The Fence People)  
Michael Scaglione (D. Zentil Mechanical)  
Michael DeLellis, Jeremy Dacks, Roger Gilberg (FAAN Mortgage Administration Inc. as Trustee of BDML)  
George Corsianos (Second mortgagees Quincy Investments Ltd. et al)  
Alex Flesias (Concrane and agent for Stephenson Rentals)  
Paul Guaragena, Miller Thomson (Fernbrook (Brookdale)  
Robert Harason (Dircam Electric Ltd.)  
James M. Butson (Jaekel Capital)  
Brendan Clancy (Computershare Trust Company of Canada)  
Sam Babis, Courtney Raphael (Summit Forming)  
Joseph Maggisano (Global Precast Inc., Lien Claimant)

**ENDORSEMENT**

The parties in attendance at the hearing of the application on December 19, 2018 previously attended before me on October 18, 2018. At the October attendance Firm Capital obtained a Vesting Order, on an unopposed basis, with respect to the defined Purchased Assets. At that time, the interested parties agreed that they would re-attend in December to argue the three issues set out in my October 18, 2018 endorsement.

The primary issue is whether Firm Capital should remain a party to the various construction lien actions. Firm Capital is generally supported by the second and third mortgagees Quincy and

Jaekel, as well as FAAN who acts as the Court-appointed Trustee of BDMC which held the fourth and fifth mortgages. Computershare indicates that it generally supports FAAN's position with the exception of minor scheduling issues.

All of the lien claimants oppose Firm Capital's attempt to have the construction lien actions dismissed against it.

For the reasons that follow I am not prepared to dismiss the construction lien actions against Firm Capital. I am prepared, however, to stay the actions against Firm Capital, subject to terms that will be discussed and, if necessary, subject to further submissions and review.

Briefly, by way of background, Firm Capital, takes the position that it should not remain as a defendant in any of the construction lien actions for two primary reasons:

- There are more than sufficient funds deposited with the Accountant to require such a dismissal as per the provisions of the *Construction Lien Act* (Ontario) (the "Act"); and
- There is no scenario whereby Firm Capital could not receive all of the amounts it is owed.

Firm Capital therefore submits that there is no practical purpose in keeping it in any of the construction lien actions and it only serves to force Firm Capital to incur unnecessary fees which then will deplete the ultimate recovery to other stakeholders.

The lien claimants concede that there is no conceivable outcome whereby Firm Capital could not receive all of the payments owing to it. They submit, however, that I lack jurisdiction to dismiss their actions and further that if I did so, they could not pursue their claims that Firm Capital was a statutory owner, which are legitimate in law.

Insofar as jurisdiction is concerned it is my view that this Court does have the jurisdiction to stay or dismiss the construction lien actions, if it sees fit to do so. This jurisdiction arises from an interactive reading of Rule 14 of the *Rules of Civil Procedure*, section 100 of the *Courts of Justice Act* and sections 44/47 of the Act.

A review of those provisions demonstrates that this Court has the authority and flexibility to dismiss, or stay, a construction lien action in the within circumstances on an Application.

Both sides in this dispute quoted from caselaw that they submitted supported their positions. They concede, however, that none of the cases are directly on point. The caselaw, however, is not of much assistance given the unique circumstances of this case.

Even though I am sensitive to the position of Firm Capital, the other mortgagees and Computershare, I am not of the view that the lien claimants' claims ought to be dismissed in this Application.

They do have priority disputes pursuant to s. 78. These may, or may not prove to be tenuous, but they exist and deserve to be heard. I accept that a dismissal of the construction lien actions against Firm Capital would hamper the lien claimants' ability to pursue the disputes and that it would be inappropriate to dismiss the claims outright prior to a determination.

In my view staying the actions, subject to terms, achieves the appropriate balance in the circumstances of this matter.

With proper management and reasonable co-operation between the parties the actions can proceed in a timely, cost effective and proportional fashion. This will allow the lien claimants to pursue their priority disputes with an aim to keeping the costs and ongoing mortgage interest to a minimum.

1. The construction lien actions are stayed as against Firm Capital subject to further order of this Court.
2. I will case manage the actions.
3. The staying of the actions will, necessarily, be subject to terms so that the lien claimants can obtain the necessary evidence to pursue their priority claims. These will include orders concerning production and discovery.
4. The provisions of [*sic*] Firm Capital's mortgage provide that its fees be paid. Pending any further order, its solicitors, who held \$750,000.00 in trust, ought to be paid its ongoing fees, as well as disbursements.
5. I am also prepared to hear submissions with respect to having Quincy and Jaekel's mortgages paid out and limiting their involvement in the actions.
6. On consent of FAAN, no one objecting, the stay of proceedings order in Justice Hainey's Order is lifted. FAAN will participate in the litigation.
7. Given the fact the Vesting Order has been stayed, the sale completed, the liens vacated and the remaining money has been paid into Court, I see no need to segregate the funds at this time. I am prepared to hear further submissions on this issue in the event I have overlooked any issue in this regard.
8. The parties will book a two hour case management appointment with me through the Commercial List office to review next steps.
9. Ultimately, all final decisions on costs of the construction lien actions are reserved to a further order of the Court.
10. With respect to the costs of the Application, the result was mixed. If however any party seeks its costs the issue can first be canvassed [*sic*] at the case management meeting as can any other issues raised by these orders.

January 4, 2019.

McEwen, J.