

**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 am.

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**

Borrowers

**FACTUM OF THE APPLICANT,
FIRM CAPITAL MORTGAGE FUND INC.**

Dated: October 17, 2018

Thornton Grout Finnigan LLP
Barristers and Solicitors
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto, Ontario
M5K 1K7

D.J. Miller (LSO# 34393P)
Tel: 416-304-0559
Fax: 416-304-1313

Leanne M. Williams (LSO# 41877E)
Tel: 416-304-0060
Fax: 416-304-1313

Lawyers for the Applicant

PART I – OVERVIEW

1. This factum is filed in support of an application (the “**Application**”) by Firm Capital Mortgage Fund Inc. (the “**Lender**”) for an Order, *inter alia*, vesting the right, title and interest in and to the assets described in the Sale Agreement in the Purchaser (as such terms are defined herein) pursuant to Sections 97 and 100 of the *Courts of Justice Act*¹ (the “**CJA**”) (the “**Vesting Order**”).

PART II – THE FACTS

2. A brief summary of the facts is provided below. The facts underlying this Application and its background are set out in more detail in the affidavit of Forrest Todd sworn September 20, 2018 (the “**Todd Affidavit**”)² and the Report of the Receiver dated October 2, 2018. Capitalized terms not defined herein shall have the meanings ascribed to them in the Todd Affidavit.

The Mortgage

3. Fortress Brookdale Inc. is the registered owner (as bare trustee for the beneficiaries) of certain real property municipally known as 1678-1704 Avenue Road, 375-377 Fairlawn Avenue and 412-416 Brookdale Avenue, Toronto (the “**Property**”).³ Fortress Avenue Road (2005) Inc. and Fernbrook Homes (Brookdale) Inc. are the beneficial owners of the Property.⁴

¹ R.S.O. 1990, c. C.43, as amended.

² Affidavit of Forrest Todd sworn September 20, 2018, Application Record of the Applicant, Tab 2 [“**Todd Affidavit**”].

³ Todd Affidavit at para. 5.

⁴ Todd Affidavit at para. 6.

4. Pursuant to a Mortgage Loan Commitment dated April 18, 2017 (as amended, the “**Loan Commitment**”), issued by Firm Capital Corporation (“**FCC**”) and subsequently assigned by FCC to the Lender, the Lender made a mortgage loan available to the Borrowers in the principal amount of \$18,500,000 plus interest and costs (the “**Mortgage Loan**”).⁵

5. Pursuant to the Loan Commitment and as security for its obligations to the Lender, FBI granted a Charge/Mortgage of Land (the “**First Mortgage**”) to the Lender in the amount of the Mortgage Loan which was registered against title to the Property on June 7, 2017.⁶ All other charges against title to the Property have either been contractually postponed in favour of the Lender or were registered subsequent to the First Mortgage and registered after the last advance of the Lender.⁷ The Borrowers also granted general security agreements to the Lender which were perfected pursuant to the *Personal Property Security Act (Ontario)*.⁸

6. As at September 14, 2018 the Borrowers were indebted to the Lender under the Loan Commitment in the amount of CAD\$20,138,450.97 (which includes principal, accrued interest and fees), together with accruing interest thereon and all costs and fees, including professional fees and disbursements of counsel to the Lender and those fees and disbursements of the Receiver appointed by the Lender, until the indebtedness is paid in full.⁹ The First Mortgage provides for the payment of all costs, charges and expenses of the Receiver from the proceeds of any sale of

⁵ Todd Affidavit at para. 7.

⁶ Todd Affidavit at para. 8.

⁷ Todd Affidavit at para. 9.

⁸ R.S.O. 1990, c. P.10; Todd Affidavit at paras. 13, 14.

⁹ Todd Affidavit at para. 10.

the Property.¹⁰ The First Mortgage further provides for the payment of all legal fees payable on a solicitor and his client basis, costs and out-of-pocket expenses incurred by the Lender and for such costs to be added to the mortgage indebtedness secured thereunder should the Borrower fail to pay such costs.¹¹

The Project and Outstanding Construction Liens

7. The Borrowers commenced construction on a seven-story mixed-use building known as “Brookdale on Avenue Road” (the “**Project**”) at the Property site. By the end of January, 2018, however, construction had ceased.¹²

8. The Mortgage Loan matured on December 1, 2017 and was automatically contractually renewed for an additional month. As a result, the indebtedness under the Mortgage Loan became due and owing on January 1, 2018. By letter dated January 24, 2018, the Lender demanded repayment from the Borrowers of all amounts then outstanding and delivered a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act* (Canada).¹³

9. Commencing on February 2, 2018, certain trades began to register Claims for Lien and Certificates of Pending Litigation against title to the Property (the “**Outstanding Construction**

¹⁰ Todd Affidavit, Exhibit E, pages 9-10 of 21.

¹¹ Todd Affidavit, Exhibit E, page 11 of 21.

¹² Todd Affidavit at paras. 21, 22.

¹³ R.S.C. 1985, c. B-3; Todd Affidavit at paras. 38, 39.

Liens”). The aggregate amount of the Outstanding Construction Liens registered against title to the Property as at September 20, 2018 was \$10,183,524.65.¹⁴

10. Each of the claimants having Outstanding Construction Liens (the “**Construction Lien Claimants**”) filed a Certificate of Action against title to the Property and, with one exception, issued a Statement of Claim (collectively, the “**Lien Actions**”) against numerous defendants, including the Lender. One Construction Lien Claimant also included RSM Canada Limited as a defendant in the action it commenced in respect of its construction lien.¹⁵

Marketing and Sale of the Property

11. On April 20, 2018 the Lender issued a Notice of Sale under Charge/Mortgage of Land under the *Mortgages Act* (Ontario) (the “**Notice of Sale**”).¹⁶ Pursuant to the terms of its security, on June 11, 2018 the Lender privately appointed RSM Canada Limited as its receiver (the “**Receiver**”), with the written consent of the Borrowers, for the purpose of realizing on the collateral of the Borrowers, including but not limited to marketing the Property for sale.¹⁷

12. The Receiver conducted a thorough and robust sale process in respect of the Property which resulted in the execution of an agreement of purchase and sale dated August 23, 2018 (the “**Sale Agreement**”) with Empire (Water Wave) Inc. or its assignee (the “**Purchaser**”).¹⁸

¹⁴ Todd Affidavit at paras. 34, 35.

¹⁵ Todd Affidavit at paras. 36, 37.

¹⁶ R.S.O. 1990, c. M.40 [*Mortgages Act*].

¹⁷ Report of the Receiver dated October 2, 2018; Todd Affidavit at paras. 42, 43.

¹⁸ Todd Affidavit at para. 46.

13. Pursuant to the terms of the Sale Agreement, the assets that are the subject thereof (the “**Purchased Assets**”) are required to be conveyed pursuant to a Vesting Order issued by the Ontario Superior Court of Justice (Commercial List) on the following terms:

- (a) Vesting title in and to the Property free of all encumbrances (except certain Permitted Encumbrances as set out in the Sale Agreement), including but not limited to:
 - (i) the Outstanding Construction Liens; and
 - (ii) any and all (i) agreements of purchase and sale for the purchase of condominium residential units, parking and locker units, (ii) rental agreements, if any, for rental units, and (iii) agreements of purchase and sale or agreements to lease for non-residential components of the Project being constructed or to be constructed on the Lands forming part of the Purchased Assets (collectively, the “**Offers**”);
- (b) Declaring that the net proceeds of the sale, after the payment in full of the indebtedness owing to the Lender, of the Purchased Assets (the “**Net Proceeds**”) are to be paid into Court; and
- (c) Declaring that the Net Proceeds paid into Court stand in place and instead of the Purchased Assets and that all claims and encumbrances attach to the Net Proceeds on closing with the same (but no greater) priority as they had with respect to the Purchased Assets immediately prior to the sale of the Purchased Assets.¹⁹

¹⁹ Todd Affidavit at para. 47.

14. The proceeds of the sale of the Purchased Assets are more than sufficient to:
- (a) Pay amounts having legal priority to the First Mortgage, including real property taxes and utilities, that will be required to be paid on closing;
 - (b) Pay all amounts owing to the Lender under the First Mortgage, including all costs, interest and fees associated therewith, and those of the Receiver and its counsel; and
 - (c) Permit the Net Proceeds in an amount that is expected to be more than 200% of the aggregate amount of the Outstanding Construction Liens, but will in no event be less than 125%, to be paid into Court.²⁰

PART III – THE ISSUES

15. The issues on this application are:
- (1) Should a vesting order be granted pursuant to sections 97 and 100 of the *Courts of Justice Act*?
 - (2) Where more than 125% of the aggregate amount of all Outstanding Construction Liens is paid into Court to stand in place and instead of the Purchased Assets, should the Court grant the requested vesting order and require that the actions relating thereto against the Lender and the Receiver be dismissed?
 - (3) Is a sealing order appropriate in respect of the sealing of the Confidential Appendices to the Receiver's Report?

²⁰ Todd Affidavit at para. 48.

PART IV – THE LAW

Issue (1): The Court’s Jurisdiction

16. The Lender has brought an application under Rule 14.05 of the *Rules of Civil Procedure* for an Order, *inter alia*, vesting the right, title and interest in and to the assets described in the Sale Agreement in the Purchaser.

17. The Court’s power to grant a vesting order is found in Section 100 of the *CJA* which states that a “court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.”

18. Vesting orders made under Section 100 of the *CJA* are discretionary and have their origins in the court’s equitable jurisdiction.²¹ The Court’s discretion under the provision is broad, and the determination of whether such an order will or will not be granted is dependent on the circumstances of the particular case.²² Section 100 of the *CJA* provides a mechanism to grant ownership of the property to which they would otherwise be entitled.²³

19. The Court’s authority to vest title in the Purchaser is derived from the *Mortgages Act*. The Lender issued the Notice of Sale on April 20, 2018 and the requisite thirty-five day waiting period has lapsed. Accordingly, pursuant to section 28 of the *Mortgages Act*, “[the] person exercising the power of sale has power to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein of the mortgagor and of which the mortgagor had power to dispose.”

²¹ *Lynch v. Segal*, 2006 CarswellOnt 7929 at para. 27.

²² *Ibid* at para. 32.

²³ *Trick v. Trick*, 2006 CarswellOnt 4139 at para. 19.

The Lender's power to vest the Property in the Purchaser satisfies the requirement under section 100 of the *CJA* that the Court has the authority to convey title to the Property.

20. The Purchaser requires a vesting order to complete the transaction contemplated in the Sale Agreement (the "**Transaction**"). Accordingly, the Lender respectfully submits that the Court has the jurisdiction to issue the vesting order required to complete the Transaction.

Issue (2): Vacating the Outstanding Construction Liens

21. Pursuant to sections 14(1) and 15 of the *Construction Act* (Ontario) (the "**Act**"): ²⁴

14(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

15 A person's lien arises and takes effect when the person first supplies services or materials to the improvement.

22. In addition to the construction lien, section 22(1) of the *Act* imposes a statutory holdback on each payer upon a contract or subcontract:

22(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act.

23. Sections 23(1), (2) and (3) of the *Act* set out the personal liability of an owner for the holdbacks:

23(1) Subject to subsections (2), (3) and (4), an owner is personally liable for holdbacks that the owner is required to retain under this Part to those lien claimants who have valid liens against the owner's interest in the premises.

²⁴ R.S.O. 1990, c. C.30.

23(2) Where the defaulting payer is the contractor, the owner's personal liability to a lien claimant or to a class of lien claimants as defined by section 79 does not exceed the holdbacks the owner is required to retain.

23(3) Where the defaulting payer is a subcontractor, the owner's personal liability to a lien claimant or to a class of lien claimants as defined by section 79 does not exceed the lesser of,

- (a) the holdbacks the owner is required to retain; and
- (b) the holdbacks required to be retained by the contractor or a subcontractor from the lien claimant's defaulting payer.

24. "Owner" is defined in section 1 of the *Act* as "any person, including the Crown, having an interest in a premises at whose request and, (a) upon whose credit, or (b) on whose behalf, or (c) with whose privity or consent, or (d) for whose direct benefit, an improvement is made to the premises but does not include a home buyer". "Payer" is defined as "the owner, contractor or subcontractor who is liable to pay for the services or materials supplied to an improvement under a contract or subcontract."

25. The Lender refutes that it is an "Owner" under the *Act*. However, in the present circumstances, even if the Lender were found to be an Owner under the *Act*, the Lender would be relieved of any potential liability that it may have under the *Act* following the payment of the Net Proceeds into Court. Sections 44(1) and (2) of the *Act* state:

44(1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

- (a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or
- (b) where the lien does not attach to the premises, the claim for lien, where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,
- (c) the full amount claimed as owing in the claim for lien; and

- (d) the lesser of \$250,000 or 25 per cent of the amount described in clause (c), as security for costs.

44(2) Upon the motion of any person, the court may make an order vacating the registration of a claim for lien, and any certificate of action in respect of that lien, upon the payment into court or the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien.

26. Liens can be vacated as of right under section 44 of the *Act* upon the payment into court or posting of security in the requisite amount, in which case the lien itself would continue as a charge on those monies rather than a charge against the property.²⁵

27. After the payment of all amounts owing to the Lender (which includes principal, accrued interest and fees, including professional fees and disbursements of counsel to the Lender and those fees and disbursements of the Receiver), the remaining proceeds of sale will be sufficient to permit the Receiver to pay at least 200% of the total amounts claimed under the Outstanding Construction Liens into Court to stand in place and instead of the Purchased Assets. This payment by the Receiver satisfies the requirements of section 44 of the *Act* which entitles the Lender to have the Outstanding Construction Liens vacated.

28. Sections 44(6), 44(9), and 47(1.1) of the *Act* state further:

44(6) Where an order is made under clause (1)(a) or subsection (2), the lien ceases to attach to the premises and ceases to attach to the holdbacks and other amounts subject to a charge under section 21, and becomes instead a charge upon the amount paid into court or security poster, and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given.

44(9) Where an order is made under subsection (1), (2) or (3), the following rules apply:

²⁵ *Heinrichs v. 374427 Ontario Ltd.*, 2018 ONSC 78 at para. 30.

1. The lien claimant whose lien was the subject of the order may proceed with an action to enforce his claim against the amount paid into court or security posted in accordance with the procedures under Part VIII, but no certificate of action shall be registered against the premises.

47(1.1) The court may, on motion, make any of the following orders, on any proper ground:

1. An order that the registration of a claim for lien, a certificate of action or both be vacated.
2. If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.
3. An order dismissing an action.

29. The effect of a vacating order made under section 44 of the *Act* is to remove the lien as a charge against the property, the holdbacks, and all other amounts subject to a charge under section 21 of the *Act*. The lien is thereby converted to a charge upon the amount paid into Court and the owner or payer is placed in the same position as if the lien had not been perfected.²⁶

30. The Lender and the Outstanding Lien Claimants have no direct contractual relationships. Once the Outstanding Construction Liens have been vacated, the Outstanding Lien Claimants will have no outstanding claims against the Lender and no grounds on which an action could be continued. Instead, their claims will be against the amount paid into Court.

31. If the Lender were required to defend each of the statements of claim filed by the Outstanding Lien Claimants, the Lender would incur unnecessary costs that would, pursuant to the terms of the First Mortgage outlined above, be added to the Lender's security and result in a lower recovery for other creditors.

²⁶ *Tom Jones Corp. v. OSBBC Ltd.*, 1997 CarswellOnt 1752 at para. 28.

Issue (4): The Sealing Order

32. The Lender requests that certain confidential and commercially sensitive information in connection with the Transaction for which approval is sought in this motion, including the amount of the Sale Proceeds and deposit for the Transaction, be sealed. Such confidential information is or will be contained in the Confidential Appendix to the Report of the Receiver to be filed.

33. The test for such an order, as established by the Supreme Court of Canada, is:

“A confidentiality order under R. 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.”²⁷

34. The Lender submits that such an order is necessary in order to prevent a serious risk to their commercial interest and that there would be no unduly salutary effects of granting the same.

PART V – RELIEF REQUESTED

35. The Lender seeks an Order, *inter alia*:

- (1) Vesting the right, title and interest in and to the assets described in the Sale Agreement in the Purchaser pursuant to Sections 97 and 100 of the *Courts of Justice Act*; and
- (2) Sealing the Confidential Appendices.

²⁷ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 53; see also *Re Target Canada Co.*, 2015 ONSC 1487 at paras. 28-30.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2018.


Thornton Grout Finnigan LLP

Barristers and Solicitors
Toronto-Dominion Centre
100 Wellington Street West
Suite 3200, P.O. Box 329
Toronto, Ontario
M5K 1K7

D.J. Miller (LSO# 34393P)

Tel: 416-304-0559

Fax: 416-304-1313

Leanne M. Williams (LSO# 41877E)

Tel: 416-304-0060

Fax: 416-304-1313

Lawyers for the Applicant

**SCHEDULE “A”
LIST OF AUTHORITIES**

Tab	Caselaw
1	<i>Lynch v. Segal</i> , 2006 CarswellOnt 7929
2	<i>Trick v. Trick</i> , 2006 CarswellOnt 4139
3	<i>Heinrichs v. 374427 Ontario Ltd.</i> , 2018 ONSC 78
4	<i>Tom Jones Corp. v. OSBBC Ltd.</i> , 1997 CarswellOnt 1752
5	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> , 2002 SCC 41
6	<i>Re Target Canada Co.</i> , 2015 ONSC 1487

**SCHEDULE “B”
RELEVANT STATUTES**

Courts of Justice Act, R.S.O. 1990, c. C.43 – ss. 97 100

Declaratory orders

97. The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right whether or not any consequential relief is or could be claimed.

Vesting orders

100. A court may by order vest in any person an interest in real or personal property that the court has the authority to order be disposed of, encumbered or conveyed.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Title of Proceeding

14.06(1) Every originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity.

(2) In an action, the title of the proceeding shall name the party commencing the action as the plaintiff and the opposite party as the defendant.

(3) In an application, the title of the proceeding shall name the party commencing the application as the applicant and the opposite party, if any, as the respondent and the notice of application shall state the statutory provision or rule, if any, under which the application is made.

Mortgages Act, R.S.O. 1990, c. M.40 – s. 28

Conveyance to the purchaser

28. The person exercising the power of sale has power to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein of the mortgagor and of which the mortgagor had the power to dispose.

Construction Act, R.S.O. 1990, c. C.30

Definitions

1(1) In this Act,

[...]

“**owner**” means the owner, contractor or subcontractor who is liable to pay for the services or materials supplied to an improvement under a contract or subcontract;

“**payer**” means the owner, contractor or subcontractor who is liable to pay for the services or materials supplied to an improvement under a contract or subcontract;

Creation of lien

14(1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

When lien arises

15. A person’s lien arises and takes effect when the person first supplies services or materials to the improvement.

Lien a charge

21. The lien of a person is a charge upon the holdbacks required to be retained by Part IV, and subject to subsection 17(3), any additional amount owed in relation to the improvement by a payer to the contractor or to any subcontractor whose contract or subcontract was in whole or in part performed by the supply of services or materials giving rise to the lien.

Basic holdback

22(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act.

Vacating lien by payment into court; without notice

44(1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

- (a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or
- (b) where the lien does not attach to the premises, the claim for lien, where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,
- (c) the full amount claimed as owing in the claim for lien; and
- (d) the lesser of \$250,000 or 25 per cent of the amount described in clause (c), as security for costs.

On payment in of reasonable amount

44(2) Upon the motion of any person, the court may make an order vacating the registration of a claim for lien, and any certificate of action in respect of that lien, upon the payment into court or

the posting of security of an amount that the court determines to be reasonable in the circumstances to satisfy the lien.

[...]

Lien a charge upon amount paid into court

44(6) Where an order is made under clause (1)(a) or subsection (2), the lien ceases to attach to the premises and ceases to attach to the holdbacks and other amounts subject to a charge under section 21, and becomes instead a charge upon the amount paid into court or security posted, and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given.

Idem

44(7) Where an order is made under clause (1)(b) or subsection (3), the lien ceases to attach to the holdbacks and other amounts subject to a charge under section 21 and becomes instead a charge upon the amount paid into court or security posted and the owner or payer shall, in respect of the operation of sections 21, 23 and 24, be in the same position as if the lien had not been preserved or written notice of the lien had not been given

[...]

Rules

44(9) Where an order is made under subsection (1), (2) or (3), the following rules apply:

1. The lien claimant whose lien was the subject of the order may proceed with an action to enforce his claim against the amount paid into court or security posted in accordance with the procedures under Part VIII, but no certificate of action shall be registered against the premises.
2. The amount paid into court or security posted is subject to the claims of all persons having a lien to the same extent as if the amount paid into court or security posted was realized by the sale of the premises in an action to enforce the lien and shall be distributed among all lien claimants in accordance with the priorities provided for in section 80.
3. Where any amount is realized in a lien action by the sale of the premises or otherwise, it shall be pooled into a common fund with the amount paid into court or security posted under this section, and shall be distributed among all lien claimants in accordance with the priorities provided for in section 80.
4. A lien claimant whose lien is sheltered, in accordance with subsection 36(4), under the lien that was the subject of the order may proceed with an action to enforce the sheltered lien as if the order had not been made.

General powers of the court

47(1) The court may, on motion, order the discharge of a lien,

- (a) on the basis that the claim for the lien is frivolous, vexatious or an abuse of process; or
- (b) on any other proper ground.

Power to vacate, etc.

47(1.1) The court may, on motion, make any of the following orders, on any proper ground:

1. An order that the registration of a claim for lien, a certificate of action or both be vacated.
2. If written notice of a lien has been given, a declaration that the lien has expired or that the written notice of the lien shall no longer bind the person to whom it was given.
3. An order dismissing the action.

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Applicant

Respondents

Court File No. CV-18-604993-00CL

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

Proceedings commenced at Toronto, Ontario

**FACTUM OF THE APPLICANT,
FIRM CAPITAL MORTGAGE FUND INC.**

THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
Toronto, Ontario M5K 1K7
Fax: (416) 304-1313

D.J. Miller (LSUC# 34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Leanne M. Williams (LSUC# 41877E)
Tel: (416) 304-0060
Email: lwilliams@tgf.ca

Lawyers for the Applicant, Firm Capital Mortgage Fund Inc.