

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

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION will come on for hearing before a Judge on **Thursday, October 18, 2018 at 9:00 a.m.** or as soon after that time as the application can be heard at 330 University Avenue, in the City of Toronto, in the Province of Ontario, M5G 1R7.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does



not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, AN ORDER MAY BE MADE IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contracting a Local Legal Aid office.

DATE: September 12th, 2018

Issued by:


N. Brown

Address of Court office:
330 University Avenue
Toronto, Ontario M5G 1R7

TO: THIS HONOURABLE COURT

AND TO: THE SERVICE LIST HEREIN

SERVICE LIST
(as at September 12, 2018)

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(as at May 15, 2018)

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APPLICATION

THE APPLICANT, Firm Capital Mortgage Fund Inc. (the “**Applicant**”), makes an application for an Order:

1. if necessary, abridging the time for service of this Notice of Application and the materials filed in support of the application and dispensing with further service thereof;
2. vesting title in and to the Purchased Assets, as such term is defined in an Agreement of Purchase and Sale (the “**APS**”) dated August 23, 2018 between RSM Canada Limited in its capacity as receiver, as vendor (the “**Receiver**”) and Empire (Water Wave) Inc., as purchaser (such purchaser or its permitted assignee, the “**Purchaser**”) in favour of the Purchaser or as it may direct, free and clear of the interests of any other party or interest, subject only to the Permitted Encumbrances (as defined in the APS) (the “**Vesting Order**”), all in accordance with the APS;
3. directing and declaring that upon Closing of the APS pursuant to the Vesting Order (all capitalized terms being as defined in the APS):
 - (i) save and except only as it relates to the Permitted Encumbrances, the Purchaser shall take title to the Purchased Assets free and clear of and from any and all lien (including all Outstanding Construction Liens), claim, charge, demand, security interest, pledge, hypothecation, mortgage, trust or deemed trust (in each case, whether contractual, statutory or otherwise) execution, levy or other financial, or monetary claim and encumbrance of any nature and kind whatsoever whether or not they have attached or been perfected, registered or filed and whether secured,

unsecured or otherwise and without limiting the generality of the foregoing, any Offers or other rights or claims of the purchasers or tenants under any Offers;

- (ii) all net proceeds of sale (after payment by the Receiver of all amounts owing to the Applicant including but not limited to principal, interest, fees, costs and expenses, including those of the Receiver, together with any amounts having legal priority to the Applicant's Mortgage) (the "**Net Proceeds**") shall be paid into Court; and
 - (iii) the Net Proceeds paid into Court shall stand in place and instead of the Purchased Assets and all claims and encumbrances shall attach to the net proceeds of sale from the Purchased Assets on Closing with the same priority as they had with respect to the Purchased Assets immediately prior to the sale of the Purchased Assets;
4. dismissing the Construction Lien Actions against the Applicant and the Receiver (if named as a defendant in any such actions) upon payment of the Net Proceeds into Court;
 5. sealing the Confidential Report of the Receiver to be filed, until further Order of this Court; and
 6. granting such other relief as counsel may request and this Honourable Court may deem appropriate.

THE GROUNDS FOR THE APPLICATION ARE:

7. Fortress Brookdale Inc. (“**FBI**”) was incorporated pursuant to the laws of Ontario and maintains its registered head office at 2220 Highway 7 West, Unit #5, Concord, Ontario;
8. FBI is the legal owner of certain real property municipally known as 1678-1704 Avenue Road, 375-377 Fairlawn Avenue and 412-416 Brookdale Avenue, Toronto (the “**Property**”), more specifically described as:
 - (a) PIN10189-0865 (LT) – Legal Description: LOTS 33 & 34 PLAN 2371, PART LOT 42A & LOT 43A PLAN 2247 PT 1 66R29204; TOGETHER WITH AN EASEMENT OVER PT 3 66R29204 AS IN AT4379990; SUBJECT TO AN EASEMENT AS IN AT4660181; SUBJECT TO AN EASEMENT AS IN AT4753130; CITY OF TORONTO; and
 - (b) PIN10189-0866 (LT) – Legal Description: LOT 32 PLAN 2371 YORK PT 2 66R29204; SUBJECT TO AN EASEMENT AS IN AT4660181; SUBJECT TO AN EASEMENT AS IN AT4753130; CITY OF TORONTO,upon which construction for a condominium development was commenced (the “**Project**”).
9. Fortress Avenue Road (2015) Inc. (“**FAR**”) was incorporated pursuant to the laws of the Province of Ontario and maintains its registered head office at 25 Brodie Drive, Unit #1, Richmond Hill. Fernbrook Homes (Brookdale) Limited (“**Fernbrook**”) was incorporated pursuant to the laws of Ontario and maintains its registered head office at 2220 Highway 7 West, Unit #5, Concord, Ontario. FBI is the legal owner of the Property and FAR and Fernbrook are beneficial owners of the Property. FBI, FAR and Fernbrook are collectively referred to as the “**Borrower**”);

10. pursuant to a Mortgage Loan Commitment dated April 18, 2017 (as amended, the “**Loan Commitment**”), the Applicant made a mortgage loan available to the Borrower;
11. as security for their obligations to the Applicant, the Borrowers each granted security to the Applicant, including but not limited to, the personal property as enumerated in General Security Agreements each dated May 12, 2017 (collectively, the “**GSAs**”);
12. the Applicant registered its security interest against each of the Borrowers pursuant to the *Personal Property Security Act* (Ontario) on May 17, 2017 against all classes of collateral, except “consumer goods” and “motor vehicle”;
13. FBI also granted the Applicant, among other security, a Charge/Mortgage of Land which was registered as a first mortgage against title to the Property on June 7, 2017 (the “**Mortgage**”). It is a term of the Mortgage, and of the GSA’s in favour of the Applicant, that the Applicant may appoint a receiver upon default by the Borrower;
14. litigation relating to the Property was commenced in October, 2017 by Computershare Trust Company of Canada in its capacity as Trustee under a Trust Indenture dated November 26, 2013 in a proceeding bearing court file number CV-17-585584-CL (the “**Computershare Litigation**”) against, *inter alia*, all mortgagees of the Property. The Computershare Litigation was dismissed as against the Applicant herein Firm Capital Mortgage Fund Inc. by way of a consent Order dated March 9, 2018, on a “with prejudice and without costs” basis;
15. on February 7, 2018, the Superintendent of Financial Services (“**FSCO**”) appointed FAAN Mortgage Administrators Inc. (“**FAAN**”) as Administrator over Building &

- Development Mortgages Canada Inc. (“**BDMC**”), the mortgage administrator for a subsequent mortgagee having a charge against the Property;
16. construction liens totalling more than \$10 million have been registered against title to the Property and various actions have been commenced by lien claimants;
 17. construction on the Project ceased at the end of January, 2018;
 18. the Applicant’s first priority Mortgage matured, and was not repaid;
 19. by letter dated January 24, 2018, the Applicant demanded repayment from the Borrower and delivered a Notice of Intention to Enforce Security (the “**BIA Notice**”) pursuant to Section 244 of the BIA;
 20. the Applicant previously commenced an application bearing court file no. CV-18-593097-00CL for the appointment of a receiver by the Court (the “**Prior Receivership Application**”), in connection with a potential re-financing of the Project by the Applicant to permit continuation of the Project, which re-financing did not proceed as all conditions were not met;
 21. the Prior Receivership Application was adjourned on three occasions on consent, and was ultimately held in abeyance by the Applicant by way of Endorsement of Justice McEwen dated April 20, 2018;
 22. the Applicant thereafter chose to proceed in the enforcement of its rights and remedies pursuant to the Mortgage;

23. the Applicant caused to be issued a Notice of Sale under Mortgage in respect of the Property on April 20, 2018;
24. all relevant notice periods have expired;
25. no party entitled to redeem the Mortgage has done so;
26. the Borrower remains in default of its obligations under the Loan Commitment;
27. the Applicant is contractually entitled to appoint a Receiver upon default occurring under the Mortgage and did so by appointment letter dated June 11, 2018;
28. RSM Canada Limited, in its capacity as Receiver appointed by the Applicant, undertook an extensive marketing and sales process in respect of the Property, resulting in an offer being accepted in the form of the APS;
29. The Purchased Assets comprise the realty and any fixtures or improvements located thereon, but do not include any personal property assets;
30. it is a requirement of the APS that a Vesting Order be obtained for Closing in the form of the draft Order sought herein;
31. the Net Proceeds of sale (after payment of amounts owing to the Applicant and any amounts having legal priority to the Applicant's interest in the Property) are more than sufficient to satisfy all legal and statutory requirements in respect of Outstanding Construction Liens (as defined in the APS), and will be paid into Court for the benefit of those parties entitled to assert a claim to same, as their respective interests may appear;

32. Rules 14.05(3)(e) and (g) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Sections 97, 100 and 142 of the *Courts of Justice Act* (Ontario), Section 44 of the *Construction Lien Act* (now the *Construction Act*), and Sections 24 and 32 of the *Mortgages Act*; and
33. such other grounds as counsel may advise and this Honourable Court may deem just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this application:

1. the Affidavit of Jonathan Mair, with Exhibits annexed thereto, to be sworn and filed;
2. the Report of the Receiver, to be filed;
3. the Confidential Report of the Receiver, to be filed; and
4. such further and other evidence as counsel may advise and this Honourable Court may permit.

September 12th, 2018

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IN THE MATTER OF Sections 97 and 100 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended

FIRM CAPITAL MORTGAGE FUND INC.

- and -

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

Applicant

Respondents

Court File No.: **CV-18-604993-001**

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

Proceedings commenced at Toronto, Ontario

NOTICE OF APPLICATION

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