

**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

**WRITTEN SUBMISSIONS OF THE APPLICANT,
FIRM CAPITAL MORTGAGE FUND INC.**

Dated: December 14, 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

OVERVIEW

1. Pursuant to the Endorsement of Mr. Justice McEwen dated October 18, 2018 (attached as **Exhibit “A”**), counsel on the Service List who attended or were represented at the October 18, 2018 hearing agreed that the issues to be determined at the return of the application are:

- (a) whether or not the Applicant, Firm Capital Mortgage Fund Inc. (the “**Lender**”) should remain a party to the Construction Lien Actions;
- (b) the rights of any lien claimants to challenge the Applicant’s Holdback, including the amount retained by the Lender pursuant to paragraph 9(a) of the Vesting Order; and
- (c) the application of section 44(1) of the *Construction Lien Act* with respect to the segregation of Net Proceeds paid into Court and the appointment of a Construction Lien Master, if such relief is brought.

2. Capitalized terms not defined herein shall have the meanings ascribed thereto in the Order of Mr. Justice McEwen dated October 18, 2018 (the “**Vesting Order**”), a copy of which is attached as **Exhibit “B”**.

3. The Lender has prepared these Written Submissions as a summary of its position in respect of the remaining issues to be argued. The Applicant also continues to rely on its Factum dated October 17, 2018, a copy of which is attached as **Exhibit “C”**.

THE RELEVANT FACTS

4. The Lender had a first mortgage against the Purchased Assets. There were four subsequent mortgages registered on title to the Purchased Assets which were either contractually postponed in favour of the Lender or registered subsequent to the Mortgage and registered after the last

advance of the Lender.¹ It is not disputed by any party that the Lender is entitled to be paid all amounts advanced or incurred prior to any other mortgagees. Pursuant to the terms of its security, including the Mortgage, the Lender privately appointed RSM as its receiver for the purpose of marketing for sale and realizing on the Purchased Assets.² Pursuant to section 243(2) of the *Bankruptcy and Insolvency Act* (Canada)³ (the “**BIA**”), the Receiver is a “receiver” for the purposes of the BIA.

5. Pursuant to Rules 14.05(3)(e) and (g) of the Rules of Civil Procedure and sections 97 and 100 of the *Courts of Justice Act* (Ontario)⁴, the Applicant obtained a Vesting Order and certain ancillary relief. Pursuant to the terms of the Vesting Order, the Receiver completed the sale of the Purchased Assets to the Purchaser on October 23, 2018 and filed the Receiver’s Certificate. The Receiver paid the amounts required to be paid in accordance with the terms of the Sale Agreement and Vesting Order and paid the Net Proceeds to the Accountant. The Completion Certificate was served on the Service List together with a statement of Sources and Uses as at December 5, 2018 setting out the amounts received and paid by the Receiver. The Net Proceeds paid to the Accountant was \$26,945,205. A copy of the statement of Sources and Uses is attached as **Exhibit “D”**.

¹ Affidavit of Forrest Todd sworn September 20, 2018, Application Record of the Applicant, Tab 2 [“**Todd Affidavit**”] at para 9.

² Todd Affidavit at para 43.

³ R.S.C., 1985, c. B-3.

⁴ R.S.O. 1990, c. C.43.

6. Commencing on February 2, 2018, certain trades began to register Claims for Lien and Certificates of Action against title to the Purchased Assets (the “**Outstanding Construction Liens**”). The aggregate amount of the Outstanding Construction Liens registered against title to the Purchased Assets as at September 20, 2018 was \$10,183,524.65⁵.

7. 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 “**Construction 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.⁶ Pursuant to the terms of the Vesting Order, RSM was released from this action.⁷

SUBMISSIONS

8. The Applicant seeks to be dismissed from the Construction Lien Actions on the basis that: (i) there are more than sufficient funds on deposit with the Accountant to require such dismissal in accordance with the provisions of the *Construction Act* (Ontario) (the “*Act*”)⁸; and (ii) no outcome of any litigation in respect of such actions will result in the Applicant not receiving payment of all amounts owing to it, including for additional costs and expenses to be incurred if it has to defend such actions, prior to any subsequent mortgagees. Accordingly, keeping the Lender

⁵ Todd Affidavit at paras 34 and 35.

⁶ Todd Affidavit at paras. 36 and 37.

⁷ Vesting Order, para 9.

⁸ R.S.O. 1990, c. C.30.

in such actions serves no practical purpose and produces no legal result, other than the unnecessary expenditure of fees.

9. Construction 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.⁹

10. The Net Proceeds paid to the Accountant by the Receiver is more than 250% of the total amounts claimed under the Outstanding Construction Liens. Pursuant to the terms of the Vesting Order, the Net Proceeds stand in place and instead of the Purchased Assets and all Claims and Outstanding Construction Liens attach to the Net Proceeds with the same priority as existed immediately prior to the sale of the Purchased Assets.

11. Pursuant to section 44(9) of the *Act*, a Construction Lien Claimant may proceed with an action to enforce its claim against the Net Proceeds. The Court is authorized to dismiss the Construction Lien Actions.¹⁰ Given the amount held by the Accountant, there is absolutely no reason for the Lender to remain a party to the Construction Lien Actions. Requiring the Lender to remain a party and incur costs will result in a corresponding depletion of the Net Proceeds for subsequent mortgagees, who are already in a shortfall position.

12. The Construction Lien Claimants have argued that they require the Lender to remain a party to the Construction Lien Actions because they claim that the Lender may subsequently be found to be an “owner” under the *Act*. The Lender expressly denies that there is any factual or

⁹ *Heinrichs v. 374427 Ontario Ltd.*, 2018 ONSC 78 at para. 30.

¹⁰ The *Act*, section 47(1.1).

legal basis for asserting that it is an “owner” under the *Act* but notes that, even if it was found to be an “owner” and subject to personal liability, it is irrelevant due to the amount of the Net Proceeds currently held by the Accountant. The Construction Lien Claimants are completely protected from any financial implication of same.

13. There are 11 Construction Lien Actions that have been commenced naming the Lender as a defendant. If the Lender is required to defend each of these actions, the Lender would incur significant unnecessary legal costs that would, pursuant to the terms of the Mortgage, be added to the Lender’s security and result in a lower recovery for other creditors including subsequent mortgagees. This outcome makes no sense in the circumstances and is strongly opposed by those creditors who would stand to lose from any further costs incurred by the Lender. The Construction Lien Claimants are more than adequately protected by the Net Proceeds held by the Accountant.

14. Pursuant to paragraph 9(a) of the Vesting Order, the Applicant’s counsel is holding the Applicant’s Holdback in trust. In the event that the Construction Lien Actions are not dismissed against the Lender, this amount will continue to be held and used from time to time to fund all costs that may be incurred by the Lender to defend the 11 claims through to trial.

December 14, 2018



~~Thornton Groat 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

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-18-604993-00CL

**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.