

**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

**FACTUM OF THE RESPONDENT INNOCON, A PARTNERSHIP OF LAFARGE CANADA INC.,
LEHIGH HANSON MATERIALS LIMITED AND INNOCON INC.**

(MOTION RETURNABLE OCTOBER 18, 2018)

I. Introduction

1. This is an application by Firm Capital Mortgage Fund Inc. ("Firm Capital") to obtain, in part, an Order to vacate the registration of construction liens upon posting security under section 44 of the *Construction Lien Act* (now the *Construction Act*, although the project is governed by the *Construction Lien Act*) in order to permit a sale of the property pursuant to a vesting Order.

2. Firm Capital appointed a private receiver pursuant to its mortgage document. Therefore, the Order sought by Firm Capital is not sought in a *Bankruptcy and Insolvency Act* proceeding nor in a *Companies Creditor's Arrangement Act* proceeding. As a result, there are no issues of paramountcy regarding which legislation applies.

3. The property is located in Toronto, Ontario and therefore Ontario law applies. There is only one way to vacate the registration of a construction lien in Ontario and that is by complying with s. 44 of the *Construction Lien Act*.

4. Therefore, in accordance with s. 44 of the *Construction Lien Act*, security equal to the full amount claimed as owing in the claim for lien plus security for costs equal to 25% of the value of each lien up to a maximum of \$50,000 must be paid into Court in order to vacate the registration of each lien along with the corresponding certificate of action.

5. The Order sought on this motion goes beyond vesting the purchased assets by seeking to dismiss the lien actions against Firm Capital despite the fact that the lien actions claim priority over the mortgage of Firm Capital. Firm Capital provides no legal basis for the Court's jurisdiction to dismiss the lien actions against Firm Capital without first having the priority issue determined. In fact, and in particular, Firm Capital does not bring a motion under sections 47 (a motion for summary judgment) or 78 of the *Construction Lien Act*. Firm Capital fails to provide a proper factual record to support this relief it seeks. Firm Capital does not even file pleadings in the actions which it seeks to dismiss, pleadings which plainly disclose that the lien claimants are claiming priority over Firm Capital's mortgage.

6. Granting the Vesting Order in the form sought by Firm Capital gives Firm Capital an unjustifiable advantage over the lien claimants and prejudices the lien claimants' rights against Firm Capital, and against the other mortgagees. There is no basis on which to provide such an advantage to Firm Capital and the other mortgagees to the prejudice of the lien claimants.

7. The commercially reasonable outcome of this application is as follows:

- (a) The sale of the purchased assets should close, and Firm Capital should be paid out on its mortgage, as it has, without prejudice to the rights of any of the lien claimants to argue any issue regarding priority over the Firm Capital mortgage for the deficiency in the owner's holdback;
- (b) With respect to the balance of the proceeds of sale:

- (i) An amount equal to the full value of each lien, plus 25% for costs up to a maximum of \$50,000 should be posted as security with the Accountant of the Ontario Superior Court in respect of each lien action in accordance with section 44 of the *Construction Lien Act*;
 - (ii) Upon posting security with the Accountant of the Ontario Superior Court of Justice in b(i), the registration of the claims for lien and certificates of action be vacated; and,
 - (iii) The balance of the proceeds of sale after payment in (a) and b(i) above should be paid into court without prejudice to the rights of the other mortgagees asserting their claims to these proceeds of sale;
- (c) In accordance with s. 58 of the *Construction Lien Act*, all lien actions should be referred to Master Short, or a Construction Lien Master at Toronto, for determination of all issues, including the priority of the liens over all mortgages, including that of Firm Capital; and,
- (d) Any payment to any mortgagee is without prejudice to any rights of any of the lien claimant and that the Vesting Order is without prejudice to any findings that Master Short or a Construction Lien Master may make.

II. The Facts

8. The respondent Fortress Brookdale Inc. ("Fortress") is the registered owner of lands at Avenue Road, Toronto on which the 7-storey condominium project known as Brookdale on Avenue was being constructed (the "Project"). The property was bought by Fortress Brookdale Inc. on February 10, 2015 from Mady Avenue Road Ltd. for a nominal consideration of \$2.00.

9. On February 13, 2018, Innocon preserved a lien on title to the Project.

10. On March 5, 2018, Innocon requested information from the lenders under section 39 of the *Construction Lien Act*. The *Construction Lien Act* requires that a response be provided

to the section 39 demand for information within 21 days, and therefore, a response was required by March 26, 2018. Quincy provided a response. The Quincy response to the section 39 demand indicates that its loan was to be used to refinance the project and soft costs to be incurred. On its face, the Quincy mortgage is a mortgage taken for financing the improvement.

11. BDMC1, BDMC2 and Jaekel did not provide responses to the section 39 demands for information.

12. Firm Capital admits that a portion of its mortgage was taken for the purpose of financing of the improvement.

13. On March 5, 2018, Innocon caused its statement of claim to enforce its lien to be issued. The Innocon lien statement of claim, at paragraph 29, claims priority over each of the mortgages and claims that the mortgagees are statutory "owners" under the *Construction Lien Act*.

14. On April 19, 2018, Fortress Brookdale Inc. was noted in default of the delivery of a statement of defence in the Innocon lien action.

15. Each of the lenders Firm Capital, Quincy and Jaekel have delivered statements of defence in the Innocon lien action.

16. By Order of Justice Hailey dated April 20, 2018, FAAN Mortgage Administrators Inc. was appointed trustee over the assets of BDMC.

17. Including the Innocon lien, there are 15 liens registered on title to the Project totalling \$10,183,523 by 13 lien claimants that have commenced 11 lien actions to enforce their liens.

III. Issues on Application

18. The issues on the Firm Capital application are:

- (a) What is the correct procedure to be used in Ontario with respect to vacating the claims for lien and certificates of action registered on title to a property where the lender is selling under a power of sale?
- (b) Should the lien actions be dismissed against Firm Capital?
- (c) Should the lien actions be referred to Master Short or a Construction Lien Master at Toronto under section 58 of the *Construction Lien Act* for determination of all issues in the lien actions?
- (d) Should any stay and suspension with respect to the BDMC1 and BDMC2 mortgages be lifted to permit the determination of all issues in the lien actions?

IV. The Law

19. Section 14(1) of the *Construction Lien Act* creates a lien in respect of the interest of the statutory owner in favour of those that supply services or materials to an improvement. Section 14(1) provides as follows:

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.

20. Section 15 of the *Construction Lien Act* provides that lien arises and takes effect when services or materials to the improvement are first supplied.

21. Therefore, a lien arises the moment any supply of services or materials is made to the improvement and is known as a subsisting lien. In this case, the Cost to Complete Summary shows that services and materials were supplied to the improvement prior to April 1, 2017.

Lien actions should not be dismissed against Firm Capital

22. There are 11 lien actions commenced with respect to the Project. Firm Capital seeks to dismiss all the lien actions against it without referring to or relying on any authority under any statute or rule to do so. In fact, it is respectfully submitted that this court has no legal

authority to dismiss these lien actions – each of which is a separate legal proceeding subject to the procedures in the *Construction Lien Act*. Moreover, or in any event, there is no sufficient factual record on which this court could dismiss these lien actions.

23. Innocon’s statement of claim, at paragraphs 19 and 29, pleads that all the mortgagees are a statutory “owner” within the meaning of the *Construction Lien Act* and claims priority over all the mortgagees, including the mortgage of Firm Capital. Dismissing the Innocon lien action, or any of the lien actions, against Firm Capital at this time would prejudice the rights of the lien claimants to pursue their priority claims against Firm Capital.

24. The meaning of “owner” under the *Construction Lien Act* is not the same as the ordinary or dictionary meaning of the word. Any determination of whether or not a legal person is an “owner” must be made in the highly specific context of the payment scheme created by the *Construction Lien Act*, as applied to the factual realities of the relationship between the parties. The form that relationship takes is immaterial, only its substance matters.

Reference: *Filippi v 315 Pembroke St East*, 2017 ONSC 3851, at paras. 13 and 14, Innocon’s Book of Authorities, Tab 1

25. In the *Roni Excavating* case, Justice Ricchetti canvassed the law regarding statutory “owners” and commented that:

- (a) Whether a party is a statutory owner is dependent on the circumstances of each case (para. 53);
- (b) Direct dealing was not a necessary requirement in finding that a request was made by a statutory owner (para. 56);
- (c) Whether a party is a statutory owner could be implied or inferred from all the surrounding circumstances even if there is no direct dealing between the statutory “owner” and the lien claimants (para. 58); and,

- (d) Where there is an agreement between the parties, it is the substance of the transaction and not the form of the agreement between the parties that must be considered (para. 59).

Reference: *Roni Excavating v. Sedona Development*, 2015 ONSC 389, at paras. 3, 53, 56, 58 and 59, Innocon's Book of Authorities, Tab 2

26. The lien claimants should be entitled to pursue their claims, as pleaded on a proper and complete record, after productions and examinations. The terms of an agreement of purchase and sale, and the terms of a vesting Order, cannot be used to usurp the jurisdiction of the court and to prejudice the rights of the lien claimants.

Priority of lien over mortgages

27. With certain specified exceptions, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. Section 78(1) provides as follows:

Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements arising from the owner's interest in the premises.

28. In the *Boehmers* case, the court considered the priority of the liens over the advances made under a mortgage. The Court stated as follows:

Section 78(1) is the overarching principle of the new regime of the Act for the determination of priorities. It is, if you will, the central interpretive principle for the adjudication of conflicts of the type before the court in this case. Surely it necessarily implies that, in cases of conflict, as here, the burden must be on the mortgagee to persuade the court that it somehow falls clearly within a specified exception to the generalized priority of the liens.

Reference: *Boehmers v. 794561 Ontario Inc.*, 1993 CarswellOnt 821 (Gen. Div). at para. 54; affirmed 1995 CarswellOnt 244 (C.A.), Innocon's Book of Authorities, Tab 3

29. As a result, the liens *prima facie* have priority over the mortgages registered on title, including that of Firm Capital, and the burden of proof is on the mortgagees on a proper record to bring themselves within an exception in section 78.

30. There is no doubt that the Firm Capital mortgage expressed an intention to secure financing of the improvement. As a result, the lien claimants are at a minimum entitled to priority over the Firm Capital mortgage, and therefore priority over all other mortgagees, to the extent of any deficiency in the holdback required to be retained by the “owner” based on the value of services and materials supplied by each lien claimant.

Reference: *Lindsay Brothers Construction Ltd. v. Halton Hills Development Corporation*, 1992 CanLII 7511, pages 15, 16 and 17, Innocon’s Book of Authorities, Tab 4

31. If the lien actions against Firm Capital are dismissed, this would prejudice the rights of the lien claimants to argue for the priority that they are entitled to over the Firm Capital mortgage.

Proper procedure under section 44 of the *Construction Lien Act*

32. The *Construction Lien Act* provides a specific procedure to vacate the registration of a claim for lien and certificate of action under section 44. Section 44(1) of the *Construction Lien Act* provides as follows:

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 \$50,000 or 25 per cent of the amount described in clause (c), as security for costs.

33. Section 44 provides a complete code for the payment of monies, or the posting of security in order to vacate the registration of liens and certificates of action.

Reference: *Tom Jones Corp. v. OSBBC Ltd.*, 1997 CarswellOnt 1752, at para. 23, Innocon's Book of Authorities, Tab 5

34. The Vesting Order sought by Firm Capital fails to follow that established procedure. To grant Firm Capital an exemption from any section of the *Construction Lien Act* would short circuit the process established by the *Construction Lien Act* and defeat the intentions of the legislation. The established procedure must be followed, regardless of whether Firm Capital, Fortress, or another party is posting security into court to vacate a lien.

Reference: *Con-Drain Co. (1983) Ltd. v. J.D.S. Investments Ltd.*, 1995 CarswellOnt 4019, Innocon's Book of Authorities, Tab 6

35. Where security is posted to vacate the registration of a claim for lien and certificate of action, the posting of security does not displace the priority of the mortgagee where the mortgagee clears title under section 44 of the *Construction Lien Act*. All issues, including priority, remain to be determined in the lien action and the rights of all parties are preserved.

Reference: *Con-Drain Co. (1983) Ltd. v. J.D.S. Investments Ltd.*, 1995 CarswellOnt 4019, Innocon's Book of Authorities, Tab 6

Reference: *Gilvesy Construction v. 810941 Ontario Ltd.*, 1994 CarswellOnt 950, para. 8, Innocon's Book of Authorities, Tab 7

36. Firm Capital relies on section 44 of the *Construction Lien Act* but does not in fact use the usual procedure to vacate the registration of a claim for lien and certificate of action upon the posting of security. Attached, at Schedule C of this Factum is a copy of an issued Order of Master Short, dated July 25, 2018, in a lien action, to post cash security and to vacate the registration of a claim for lien and certificate of action upon the posting of the cash security. The Applicant has failed to present any good reason to vary from this form of Order under section 44 of the *Construction Lien Act*.

Reference and s. 58 and Lifting of the Stay

37. The proper procedure for determining the issues in the lien actions commenced in Toronto is to refer the lien actions for determination of all issues by way of a judgment of reference made pursuant s. 58 of the *Construction Lien Act*. Section 58, in part, provides as follows:

Reference to master, etc.

58 (1) On motion made after the delivery of all statements of defence, or the statement of defence to all crossclaims, counterclaims or third party claims, if any, or after the time for their delivery has expired, a judge may refer the whole action or any part of it for trial,

- (a) to a master assigned to the area in which the premises or part of the premises are situate;
- (a.1) to a case management master; or
- (b) to a person agreed on by the parties

Notice

(1.1) Notice of a motion for a reference under clause (1) (b) shall be given to every person who is or would be entitled to a notice of settlement meeting under subsection 60 (2).

Requirement for consent

(1.2) A reference under clause (1) (b) shall not be made unless the persons entitled to notice under subsection (1.1) consent to the reference.

Deemed consent

(1.3) A person given notice under subsection (1.1) who does not oppose the motion or does not appear at the hearing of the motion shall be deemed to consent to the reference under clause (1) (b).

Master not to hear motion

(2) A master or a case management master shall not hear or dispose of a motion made under subsection (1).

Reference directed

(3) At the trial, a judge may direct a reference to a master assigned to the area in which the premises or part of the premises are situate, to a case management master or to a person agreed on by the parties.

Powers of master on reference

(4) A master or case management master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.

Reference: *Construction Lien Act*, R.S.O. 1990, c. C. 30.

Reference: *Pineau v. Kretschmar Inc.*, 2004 CarswellOnt 548 (Ont. Master), paras. 3-14, Innocon's Book of Authorities, Tab 8

38. Given the totality of the circumstances, it is proper to permit the lifting of any stay and suspension in respect of the BDMC1 and BDMC2 mortgages in respect of the Brookdale on Avenue project in order to facilitate the determination of the issues in the lien actions.

39. There is no prejudice to BDMC as the lifting of the stay and suspension is limited to the mortgages in respect of the Brookdale on Avenue project. In contrast, lien claimants are likely to be materially prejudiced if the stay is not lifted.

Reference: *G.E. Canada Equipment Financing G. O. v. Northern Sawmills Inc.*, 2012 CarswellOnt 15077 (S.C.J.), at para. 34, Innocon's Book of Authorities, Tab 9

V. Order Sought

40. Innocon respectfully requests an Order that:

- (a) that registration of the claims for lien and the certificates of action be vacated from title upon the payment into court pursuant to section 44(1) of an amount equal to the amount owing in each lien, plus the lesser of 25% of the value of each lien or \$50,000 for security for costs;
- (b) Any payment to Firm Capital of an amount to satisfy its mortgage from the proceeds of sale is without prejudice to the rights of the lien claimants to the

issues in the lien actions including the right to argue priority over the mortgages or that the mortgagees are a statutory "owner";

- (c) With respect to the balance of the proceeds of sale, after payment is made into Court as set out above in accordance with s. 44 of the *Construction Lien Act*, the balance of the proceeds of sale be paid into court without prejudice to the rights of the lenders asserting their claims to these proceeds of sale;
- (d) Pursuant to s. 58 of the *Construction Lien Act*, all the lien actions be referred to Master Short, or a Construction Lien Master at Toronto, for determination on all issues; and,
- (e) That the stay and suspension in respect of the mortgages of BDMC1 and BDMC2 in respect of the Brookdale on Avenue project be lifted to permit a judgment of reference to be obtained by Innocon and for the determination of all issues in the lien actions pursuant to the Judgment of Reference;
- (f) The Vesting Order is without prejudice to any findings that Master Short or a Construction Lien Master may make.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


per _____
John Margie, of Glaholt LLP

Schedule "A"

1. *Filippi v. 315 Pembroke St. East*, 2017 ONSC 3851
2. *Roni Excavating v. Sedona Development*, 2015 ONSC 389
3. *Boehmers v. 794561 Ontario Inc.*, 1993 CarswellOnt 821 (Gen. Div)
4. *Lindsay Brothers Construction Ltd. v. Halton Hills Development Corporation*, 1992 CanLII 7511
5. *Tom Jones Corp. v. OSBBC Ltd.*, 1997 CarswellOnt 1752
6. *Con-Drain Co. (1983) Ltd. v. J.D.S. Investments Ltd.*, 1995 CarswellOnt 4019
7. *Gilvesy Construction v. 810941 Ontario Ltd.*, 1994 CarswellOnt 950
8. *Pineau v. Kretschmar Inc.*, 2004 CarswellOnt 548 (Ont. Master)
9. *G.E. Canada Equipment Financing G. O. v. Northern Sawmills Inc.*, 2012 CarswellOnt 15077 (S.C.J.)

Schedule "B"

Construction Lien Act, R.S.O. 1990, c. C.30, s.1

"owner" means 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;
("propriétaire")

Construction Lien Act, R.S.O. 1990, c. C.30, s.39

Right to information:

(1) Any person having a lien or who is the beneficiary of a trust under Part II or who is a mortgagee may, at any time, by written request, require information to be provided within a reasonable time, not to exceed twenty-one days, as follows:

from mortgagee or unpaid vendor

(2) Any person having a lien or any beneficiary of a trust under Part II may, at any time, by written request, require a mortgagee or unpaid vendor to provide the person within a reasonable time, not to exceed twenty-one days, with,

(a) sufficient details concerning any mortgage on the premises to enable the person who requests the information to determine whether the mortgage was taken by the mortgagee for the purposes of financing the making of the improvement;

(b) a statement showing the amount advanced under the mortgage, the dates of those advances, and any arrears in payment including any arrears in the payment of interest; or

(c) a statement showing the amount secured under the agreement of purchase and sale and any arrears in payment including any arrears in the payment of interest. R.S.O. 1990, c. C.30, s. 39 (2); 2017, c. 24, s. 70.

State of accounts

(4.1) A state of accounts under subsection (1) shall contain the following information, as of a specified date:

1. The price of the services or materials that have been supplied under the contract or subcontract.
2. The amounts paid under the contract or subcontract.
3. In the case of a state of accounts under paragraph 4 of subsection (1), which of the amounts paid under the contract or subcontract constitute any part of the payment referred to in subsection 19 (1).
4. The amount of the applicable holdbacks.
5. The balance owed under the contract or subcontract.
6. Any amount retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).
7. Any other information that may be prescribed.

Information provided by mortgagee

(4.2) For the purposes of clause (2) (b), if amounts have been advanced under the mortgage for the purposes of financing both the purchase price of the land and the making of the improvement, the statement must show the amount advanced under the mortgage for each of those purposes.

Liability for failure to provide information

(5) Where a person, who is required under subsection (1), (2), (3) or (4) to provide information or access to information, does not provide the information or access to information as required or knowingly or negligently mis-states that information, the person is liable to the person who made the request for any damages suffered as a result.

Order by court to comply with request

(6) Upon motion, the court may at any time, whether or not an action has been commenced, order a person to comply with a request that has been made to the person under this section and, when making the order, the court may make any order as to costs as it considers appropriate in the circumstances, including an order for the payment of costs on a substantial indemnity basis.

Construction Lien Act, R.S.O. 1990, c. C.30, s.14(1)

Creation of lien

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.

Construction Lien Act, R.S.O. 1990, c. C.30, s.44(1)

Vacating lien by payment into court without notice

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 \$50,000 or 25 per cent of the amount described in clause (c), as security for costs.

Construction Lien Act, R.S.O. 1990, c. C.30, s.58

Reference to master, etc.

58 (1) On motion made after the delivery of all statements of defence, or the statement of defence to all crossclaims, counterclaims or third party claims, if any, or after the time for their delivery has expired, a judge may refer the whole action or any part of it for trial,

(a) to a master assigned to the area in which the premises or part of the premises are situate;

(a.1) to a case management master; or

(b) to a person agreed on by the parties

Notice

(1.1) Notice of a motion for a reference under clause (1) (b) shall be given to every person who is or would be entitled to a notice of settlement meeting under subsection 60 (2).

Requirement for consent

(1.2) A reference under clause (1) (b) shall not be made unless the persons entitled to notice under subsection (1.1) consent to the reference.

Deemed consent

(1.3) A person given notice under subsection (1.1) who does not oppose the motion or does not appear at the hearing of the motion shall be deemed to consent to the reference under clause (1) (b).

Master not to hear motion

(2) A master or a case management master shall not hear or dispose of a motion made under subsection (1).

Reference directed

(3) At the trial, a judge may direct a reference to a master assigned to the area in which the premises or part of the premises are situate, to a case management master or to a person agreed on by the parties.

Powers of master on reference

(4) A master or case management master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.

Powers of person agreed on by parties

(4.1) Subsection (4) also applies to a person who is agreed on by the parties and to whom a reference has been directed.

Application to set aside order of reference

(5) Where under subsection (1) the action has been referred to a master, to a case management master or to a person agreed on by the parties for trial, any person who subsequently becomes a party to the action may, within seven days after becoming a party to the action, make a motion to a judge of the court that directed the reference to set aside the judgment directing the reference.

Effect on subsequent party to action

(6) Where no motion is made under subsection (5), or where the motion is refused, the person who subsequently became a party to the action is bound by the judgment directing the reference as if the person had been a party to the action at the time the reference was directed.

Construction Lien Act, R.S.O. 1990, c. C.30, s.47

General power to discharge lien

(1) Upon motion, the court may,

(a) order the discharge of a lien;

(b) order that the registration of,

(i) a claim for lien, or

(ii) a certificate of action,

or both, be vacated;

(c) declare, where written notice of a lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given; or

(d) dismiss an action,

upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances.

Construction Lien Act, R.S.O. 1990, c. C.30, s.78(1)

Priority over mortgages, etc.

Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Schedule "C"

Court File No. CV-18-598321

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF the *Construction Lien Act*,
R.S.O. 1990, c. C.30, as amended**

MASTER SHORT

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)
)

WEDNESDAY, THE 25TH DAY

OF JULY, 2018

BETWEEN:



FOURTH PIG WORKER CO-OPERATIVE INC.

Plaintiff

-and-

**KEVIN SCRAGG, CAROLINE JALLAND, BRENDA GRAHAM, and
THE TORONTO-DOMINION BANK**

Defendants

ORDER

THIS MOTION made by the Defendants, Kevin Scragg and Caroline Jalland, without notice, pursuant to Section 44(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended, and for an Order vacating the registration of the claim for lien and certificate of action of the plaintiff, Fourth Pig Worker Co-operative Inc. ("Fourth Pig"), was heard this day at the Court House, 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, filed, the Affidavit of Darina Mishiyev, sworn July 24, 2018, and Exhibits attached thereto, filed, upon hearing submissions of counsel for Kevin Scragg and Caroline Jalland, and upon it appearing that Kevin Scragg and Caroline Jalland have posted security in the amount of the claim for lien of Fourth Pig of \$144,192.88 together with the amount of \$36,048.22 as security for costs for a total of \$180,241.10 in the form of a Certified Cheque dated July 23, 2018 filed with the Accountant of the Ontario Superior Court of Justice as Accountant's Account number

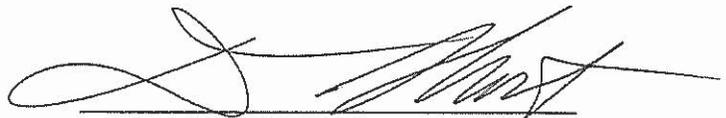
✓ 550874, ✓ 

1. **THIS COURT ORDERS** that the registration of the claim for lien of Fourth Pig in the amount of \$144,192.88 registered on April 5, 2018 as Instrument No. AT4836009 in the Land Registry Office for Land Titles Division No. 80 (Toronto), against the lands and premises referred to in Schedule "A" annexed hereto be vacated.
2. **THIS COURT ORDERS** that the registration of the certificate of action of Fourth Pig, registered on May 23, 2018 as Instrument No. AT4870105 against the lands and premises set out in Schedule "A" attached hereto be vacated.
3. **THIS COURT ORDERS** that a copy of this Order shall be sent to counsel for Fourth Pig, forthwith after entry.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 25 2018

PER / PAR: 



MASTER D. E. SHORT

SCHEDULE "A"

Legal description:

PIN 21062 - 0618 LT

PT LT 26-27 PL 298E TORONTO AS IN CA707626, S/T & T/W IN CA707626; CITY OF TORONTO

9 DINGWALL AVE
TORONTO

FOURTH PIG WORKER CO-OPERATIVE INC.
Plaintiff

- and -

KEVIN SCRAGG et al.
Defendants

ONTARIO SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Lien Act*,
R.S.O. 1990, c. C.30, as amended

Proceeding commenced at Toronto

ORDER

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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.
Applicant

-and-

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

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

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

Proceeding commenced at Toronto

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