COURT FILE NO. CV-24-00724076-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

B E T W E E N:

FOREMOST MORTGAGE HOLDING CORPORATION

APPLICANT

-AND-

BARAKAA DEVELOPER INC., LERRATO INC. AND 2145499 ONTARIO INC.

RESPONDENTS

BOOK OF AUTHORITIES OF THE NON-PARTY STAKEHOLDERS (PURCHASERS OF 377 PORTE ROAD)

October 3, 2025

ROHOMAN & MOHAMMED LLP
Barristers and Solicitors
885 Progress Avenue
Unit LPH5
Toronto, Ontario
M1H 3G3
ALLAN RASHEED MOHAMMED
LSUC #59008K
Ph. (416) 878-6168
Fax. (647) 288-2100
allan@rohomanmohammed.com
Lawyers for the Non-Party Stakeholders
(Purchasers of 377 Porte Road)

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Tab 1

CITATION: Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 ONSC 4816
COURT FILE NO.: CV-11-9456-00CL
DATE: 20120830

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: **FIRM CAPITAL MORTGAGE FUND INC., Applicant**

AND:

2012241 ONTARIO LIMITED, Respondent

BEFORE: **MORAWETZ J.**

COUNSEL: **J. D. Marshall, for Deloitte & Touche Inc., Receiver**

J. Finnigan and A. McEwan, for Firm Capital Mortgage Fund Inc.

R. D. Howell and D. Schatzkev for G. Gill et al. ("Unitholders")

S. Dewart, for LawPro

HEARD: **JULY 23 AND 26, 2012**

ENDORSEMENT

[1] The Receiver brings this motion for an order (i) approving the Receiver's proposed marketing and sales process in respect of the Respondent's commercial property in Brampton, Ontario (the "Property"); and (ii) authorizing the Receiver to terminate and obtain an order vesting out certain unit purchase agreements and leases with respect to certain units in the Property, such vesting order to be issued in the event that the Receiver receives an acceptable offer to purchase the Property which requires vacant possession.

[2] The Receiver takes the position that the only practical approach to maximizing recovery for the stakeholders is to market and sell the Property as a whole (in accordance with the process outlined in the First Report) to the widest of possible market which would include (i) potential purchasers prepared to complete the project as a registered condominium and sell the units, as well as (ii) potential purchasers who may wish to purchase the Property and lease out the units without registering the project as a condominium. In order to reach both potential markets it is the Receiver's opinion that it is necessary for it to be able to deliver the Property free and clear of the purchase agreements and leases. The Receiver therefore seeks approval of the proposed

marketing proposal with the express condition that it can offer the Property free and clear of the purchase agreements and leases. In effect, the Receiver is seeking an order that those agreements and leases can be "vested out" upon the approval of any agreement to sell the Property, recommended by the Receiver at the completion of the marketing process, if vacant possession is required by the terms of any recommended purchase agreement.

[3] Further, the Receiver recognizes that there is a possibility that a potential purchaser may wish to complete the project as a condominium and may therefore wish to adopt one or more of the agreements or leases or renegotiate such agreements or leases. The Receiver therefore seeks an order that it be authorized, but not bound, to terminate the agreements and leases to allow for the possibility that termination may not be necessary.

[4] On the other hand, a group of purchasers (the "Unitholders") have entered into agreements with 2012241 Ontario Limited ("the Debtor") and have made significant investments in the project, in some cases having paid the entire purchase price for their units or having invested many thousands of dollars for the leasehold improvements for businesses which are currently operating out of the premises. Some of the Unitholders made payments of the entire purchase price at the time of occupancy closings. Others made partial payments and began to make occupancy payments for taxes, maintenance and insurance and have made those payments to the Debtor and later the Receiver.

[5] At the time of occupancy, the Debtor advised that registration and the final closing would take place in approximately three months. However, registration did not take place as anticipated and in 2011, TD Bank, the first mortgagee, appointed a receiver of the Property. TD subsequently assigned its position to Firm Capital Mortgage Fund Inc ("Firm Capital").

[6] Subsequent to the registration of the TD/Firm Capital mortgage, the debtor entered into a number of "pre-sale" agreements, referenced above, pursuant to which several persons agreed to purchase units in the proposed condominium, to close when the Property was registered as such.

[7] The Unitholders take the position that the Receiver's proposed course of action would favour Firm Capital and would disregard the interests of the Unitholders. The Unitholders take the position that the Receiver should recognize their purchase agreements and proceed to complete the condominium project and bring it to registration at which point the existing purchase agreements could be closed and the balance of the units sold.

[8] The Debtor also entered into a number of leases of units after the registration of the TD/Firm Capital mortgage. Although the records are not clear, the Receiver reports that it appears that the Debtor entered into agreements of purchase and sale with respect to 29 units and leases with respect to 5 units. The balance of 30 units appear to be unsold and not leased.

[9] None of the agreements and leases are registered against the title to the Property.

[10] All of the agreements of purchase and sale contain clauses expressly subordinating the purchasers' interests thereunder to the Firm Capital mortgage security. The provisions read as follows:

> 26. Subordination of Agreement
>
> The Purchaser agrees that this Agreement shall be subordinate to and postponed to any mortgages arranged by the Vendor and any advances thereunder from time to time, and to any easement, service agreement and other similar agreements made by the Vendor concerning the property or lands and also to the registration of all condominium documents. The Purchaser agrees to do all acts necessary and execute and deliver all necessary documents as may be reasonably required by the Vendor from time to time to give effect to this undertaking and in this regard the Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor or any of its authorized signing officers to be and act as his lawful attorney in the Purchaser's name, place and stead for the purpose of signing all documents and doing all things necessary to implement this provision.

[11] Three of the five leases also contain similar subordination clauses. The other two leases contain subordination clauses that only refer to mortgages or charges created after the date of the leases. However, the Receiver has been informed that the tenant of one of the units recently terminated its lease and the other unit is vacant and the former Receiver has advised that it believes the lease was terminated or abandoned.

[12] It appears from the Debtor's records that most of the Unitholders who entered into agreements to purchase units paid deposits to the Debtor which are held in trust pursuant to the provisions of the *Condominium Act*, 1998. The Receiver advises that while those records contain numerous inconsistencies which made it impossible for the Receiver to determine with certainty whose deposit remains in trust, it appears that most of the initial purchase deposits remain in trust.

[13] However, five purchasers apparently paid to the Debtor or its solicitors the balance of the purchase price, notwithstanding that the project had not been registered and further authorized the law firm in question to release the funds from trust and pay them to the holder of the second mortgage registered against title. Those payments total more than $1.2 million.

[14] The Receiver advises that it does not have the financial resources to complete the Property to the point of registration as a condominium or to market the unsold units. The Receiver is of the view that the revenue currently generated by the Property is not sufficient to cover ongoing operational expenses, let alone the costs of completing construction, marketing and other related costs. Further, Firm Capital is not prepared to advance funds for this purpose, nor is Firm Capital prepared to subordinate its mortgage security to any new lender.

[15] In addition, the Receiver has advised that it will not be in a position to close at least five of the pre-sold units due to the fact that the purchasers of those units paid to the Debtor the full balance of purchase price under their agreements and authorized the Debtor to pay those funds to the second mortgagee instead of being held in trust.

[16] From the standpoint of the Unitholders the main issue on this motion is whether the Receiver should be permitted to terminate the agreements of purchase and sale and effectively vest out the interests of the Unitholders.

[17] Counsel to the Unitholders points out that at the time of the commencement of the receivership, all stakeholders had the expectation that the project would proceed to registration and that the existing agreements of purchase and sale and lease agreements would be honoured.

[18] Counsel to the Unitholders argued that in moving to the appointment of the Receiver, TD had indicated that its goal was to expedite registration and that this was a reasonable goal given that the project was virtually complete and that owners and tenants were operating businesses from their units.

[19] Counsel further submits that developers and their successors have a statutory obligation to expedite registration of the condominium so that title to the individual units can be conveyed. Counsel referenced s. 79 of the *Condominium Act, 1998* (the "Act") with respect to the duty to register declaration and description and that the existence of these duties, although not binding on the Receiver, are relevant considerations in determining the actions which the Receiver should be approved to take.

[20] The position put forth by the Unitholders was adopted by counsel to LawPro as insurer for Paltu Kumar Sikder.

[21] In my view, this secondary argument can be disposed of on the basis that neither Firm Capital nor the Receiver is a "declarant" or "owner" of the Property. In my view the activities of Firm Capital and the Receiver are not governed by the provisions of ss. 78 and 79 of the Act. Neither Firm Capital nor the Receiver have statutory obligations to the Unitholders.

[22] With respect to the main issue, counsel to the Receiver submits that as a matter of law the first mortgage takes legal priority over the interests, if any, of the purchasers and the lessees. (See: Subsection 93 (3) of the *Land Titles Act*.)

[23] In this case, the first mortgage was registered on October 20, 2008. The mortgage is in default. The unit purchase agreements and leases are all dated after that date and are not registered.

[24] Counsel to the Receiver also points out that with respect to the leases, ss. 44 (1)(4) of the *Land Titles Act* provides that any lease "for a period yet to run that does not exceeds three years" is deemed not to be an encumbrance. All of the leases in question are unregistered and run for periods exceeding three months. Accordingly, counsel submits that they are subordinate to the registered first mortgage.

[25] In addition, the purchase agreements and leases contain expressed clauses subordinating the interests thereunder to the first mortgagee. The Court of Appeal has held that the existence of such express subordination provisions negate any argument that the mortgagee is bound by actual notice of a prior interest. (See: *Counsel Holdings Canada Limited v. Chanel Club Ltd.* (1997), 33 O.R. (3rd) 235 (C.A.).)

[26] Further, counsel submits that in any event, it is doubtful that the purchase agreements create an interest in land, referencing paragraph 19 of the Purchase Agreements which provide in part as follows:

> 19. Agreement not to be Registered
>
> The purchaser acknowledges this Agreement confers a personal right only and not any interest in the Unit or property…

[27] I agree that the position of Firm Capital takes legal priority over the interests of the purchasers and lessees.

[28] Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an unregistered condominium project) should not be ordered where it would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence". (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262.) I accept this submission.

[29] In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

[30] Having reviewed the evidence and hearing submissions, I am satisfied that the recommendation of the Receiver that it be authorized to market the property in accordance with the process recommended in the First Report is reasonable in the circumstances.

[31] With respect to the second issue, namely, whether the Receiver should be authorized to terminate purchase agreements and leases and be entitled to a vesting order that terminates the interest of parties to purchase agreements and leases, it is necessary for the Receiver to take into account equitable considerations of all stakeholders.

[32] The remaining question is whether there are any "equities" in favour of the purchasers and lessees that would justify overriding first mortgagee's legal priority rights.

[33] Counsel to Firm Capital submits that the equitable considerations with respect to the Unitholders are limited. The interests of the Unitholders fall into four categories:

i. Those who paid deposits that are still held in trust;

ii. Those who purport to have purchased units and paid deposits but which are apparently not held in trust;

iii. Those who paid the balance due on closing under their agreement and authorized release of those funds to the second mortgagee;

iv. Those who claim to have incurred expenses in renovating or improving their units.

[34] With respect to the first category, it seems to me that these purchasers would be entitled to the return of their deposits held in trust if the Sale Agreements are terminated and they will not incur any significant financial losses.

[35] The second category of purchasers, whose deposits are not held in trust for whatever reason, may have some remedy against the Debtor, or perhaps its advisers.

[36] The third category of purchasers paid the balance of their purchase price and expressly authorized the release of those funds from trust to be paid to the second mortgagee, notwithstanding the subordination clauses of their Sale Agreements and the fact that they would not be receiving title to their unit at that time. It seems to me that these purchasers ran the risk of losing those payments, but they may have recourse against other parties.

[37] The fourth category of purchasers claim that they have spent significant sums of money on renovations and improvements to their proposed units, and on equipment. As counsel for Firm Capital points out these purchasers spent this money at their own risk and are subject to the subordination clause in their Sale Agreement.

[38] In considering the equities of the situation, it seems to me that a review of the above categories establishes that the equities do not favour the Unitholders. These Unitholders either have a remedy to receive back their original deposits or, alternatively, they are responsible for any losses over and above that amount. In the result, I have not been persuaded that the positions of the Unitholders/opposing purchasers, as supported by LawPro have merit.

[39] The Receiver's motion is granted and an order shall issue approving its proposed process of marketing and sale, with related relief, as set forth substantially in the form of a draft order attached as Schedule "A" to the notice of motion with revisions to reflect the Receiver's intent as expressed in paragraphs 20 and 21 of the factum submitted by counsel to the Receiver.

MORAWETZ J.

Released: August 30, 2012

Tab 2

Counsel Holdings Canada Limited v. The Chanel Club Limited et al.

[Indexed as: Counsel Holdings Canada Ltd. v. Chanel Club Ltd.]

43 O.R. (3d) 319
[1999] O.J. No. 681
Docket No. C27207

Ontario Court of Appeal
Labrosse, Charron and Feldman JJ.A.
March 5, 1999

Mortgages -- Priorities -- Purchaser's lien -- Purchaser of condominium unit agreeing that claims under agreement of purchase subordinate to any mortgages granted by vendor -- Agreements of sale not registered -- Mortgage registered after agreements -- Mortgagee having actual notice of agreements -- Although priority of mortgage may be affected by actual notice of prior equitable lien, priority not affected where lien by its terms is expressed to be subordinate or subject to mortgage.

Real property -- Agreements of purchase and sale -- Agreement obliging vendor to hold deposit in trust -- Vendor entitled to use deposit funds after deposit receipt delivered to purchaser under Ontario New Home Warranty Program -- Condominium Act, R.S.O. 1990, c. C.26 -- Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

Real property -- Registration -- Priorities -- Purchaser's lien -- Actual notice -- Purchaser of condominium unit agreeing that claims under agreement of purchase subordinate to any mortgages granted by vendor -- Agreements of sale not registered -- Mortgage registered after agreements -- Mortgagee

having actual notice of agreements -- Although priority of mortgage may be affected by actual notice of prior equitable lien, priority not affected where lien by its terms is expressed to be subordinate or subject to mortgage.

NOTE: An appeal from the above-cited judgment of the Ontario Court (General Division) (Adams J.), reported at 33 O.R. (3d) 285, to the Court of Appeal for Ontario was dismissed on March 5, 1999. The court's endorsement was as follows:

BY THE COURT: -- This appeal involves a question of priority to the proceeds from the sale of property, The contest is between Counsel Holdings' first mortgage (registered) and ONHWP's subrogated rights of purchasers (unregistered) to recover their deposits paid under purchase agreements of condominium units of which Counsel Holdings had notice.

It is undisputed that Counsel Holdings has first priority under its mortgage except to the extent that it had actual notice of a prior interest. ONHWP relies on the purchase agreements to impute notice to Counsel Holdings. Paragraph 26 of the purchase agreements expressly subordinated the rights of purchasers to Counsel Holdings' mortgage. ONHWP argues, however, that Counsel Holdings cannot claim the benefit of the subordination clause because it is not a party to the purchase agreements.

In our view, the issue is not one of privity of contract but of notice. The trial judge correctly held that notice of an interest that is expressly stated to be subordinate to the mortgage is not actual notice of a "prior" interest and, therefore, cannot defeat Counsel Holdings' registered interest. Counsel relied on the case of Euroclean Canada Inc. v. Forest Glade Investments Ltd. (1985), 49 O.R. (2d) 769, 16 D.L.R. (4th) 289 (C.A.). However, that case is not of assistance to the appellant as it does not deal with the issue of notice.

Alternatively, ONHWP argues that, as a matter of construction, the subordination clause does not apply to the purchasers' equitable liens because the liens do not arise from

the contract but by operation of law. The trial judge was correct in rejecting this argument. The purchasers' claim to their deposits clearly arose under the purchase agreements and any rights flowing therefrom are subject to the terms of those agreements, including the subrogation clause.

The ground of appeal with respect to the deposits being subject to a trust claim, an argument that the trial judge held to be without merit, has been abandoned.

In the result, we agree with the trial judge's conclusions on the two issues raised on appeal. The appeal is dismissed with costs.

Harry C.G. Underwood, for appellant, Ontario New Home Warranty Program ("ONHWP").
Benjamin Zarnett and Graham D. Smith, for respondent.