

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

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

M.Y. RESIDENTIAL INC.

Respondent

**AFFIDAVIT OF CHARLES WEBSTER
(Sworn August 30, 2017)**

**I, CHARLES WEBSTER, of the City of Kingston, in the Province of Ontario, MAKE
OATH AND SAY:**

1. I am the Contract Administrator of Jensen Building Ltd. (JBL), a construction lien claimant in this matter, and in this capacity I have personal knowledge of the matters hereinafter deposed to, except where stated to be based upon information and belief, in which case I verily believe the information and belief to be true.

THE PARTIES

2. JBL is a corporation incorporated pursuant to the laws of the Province of Ontario with a head office located in Kingston, ON. JBL is engaged in the business of providing *inter alia* general contracting services for industrial, commercial and institutional building projects in south eastern Ontario.

3. The Respondent, M.Y. Residential Inc. (hereinafter referred to as “M.Y. Residential”), is a corporation originally incorporated pursuant to the laws of the Province of Ontario with a registered office located at 384 Bank Street, Ottawa, ON. M.Y. Residential is the amalgamated corporation resulting from the amalgamation of M.Y. Residential Inc. and Golden Dragon Ho 7 Inc. (“Golden Dragon”) which amalgamation became effective on or about May 31, 2017.
4. M.Y. Residential, is the current owner of the following real property (“the Property”) described as follows:
 - a. 637 JOHNSON ST, KINGSTON, ON
LT 49-51 PL B25 KINGSTON CITY; PT LT 48 PL
B25 KINGSTON CITY AS IN FR304050;
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0211 LT
 - b. 647 JOHNSON ST, KINGSTON, ON
LT 46-47 PL B25 KINGSTON CITY; PT LT 48 PL
B25 KINGSTON CITY AS IN FR231746; (PCL 2);
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0158 LT
 - c. 653 JOHNSON ST, KINGSTON, ON
LT 45 PL B25 KINGSTON CITY; PT LT 44 PL
B25 KINGSTON CITY AS IN FR307318;
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0159 LT
 - d. 655 JOHNSON ST, KINGSTON, ON
LT 43 PL B25 KINGSTON CITY; PT LT 44 PL
B25 KINGSTON CITY PT 1, 2 13R3088;
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0160 LT

5. The Applicant, KingSett Mortgage Corporation ("KingSett"), is a corporation incorporated pursuant to the laws of Canada. KingSett is currently the sole registered mortgagee on the Property holding a building mortgage to enable the construction of a multi-unit residential development on the Property.

OVERVIEW

6. JBL was retained by Golden Dragon (the predecessor of M.Y. Residential) to perform construction services and works for a project known as the Johnson Street Townhomes – Chi Suites (the "Project"), located at the Property pursuant to a CCDC 5B Construction Management Contract.
7. JBL commenced its work as general contractor on the Property on or about July 1, 2014.
8. On or about June 1, 2015, Golden Dragon engaged Armstrong Modulevsky Schutte Quantity Surveyors Inc. (hereinafter referred to as "AMS") to act as its project monitor for the construction of the Project. Thereafter, JBL submitted all progress billings to AMS, Golden Dragon/M.Y. Residential. Since April 2016, JBL has also submitted progress billings to Kingsett.
9. JBL and AMS provided Golden Dragon/M.Y. Residential and KingSett with invoices or progress billings for construction by various contractors and management fees for services rendered all in accordance with the Construction Management Contract in the total amount of \$8,556,310.54, including HST up to July 17, 2017. The original agreement between JBL and the Defendant, Golden Dragon (now M.Y. Residential) provided for interest on unpaid amounts on any balance of 2.0% per annum above prime rate for the first 60 days from default and 4.0% per annum above prime rate thereafter, compounded monthly.
10. JBL completed the Project in accordance with the Construction Management Contract and the invoices rendered in a competent, good workmanlike and professional manner, as certified by AMS.

11. To date, JBL is owed \$838,024.00 and has sought to recover same by way of construction lien actions. Attached as **Exhibit "A"** to my Affidavit is a copy of the Statement of Claim wherein JBL is seeking damages in the amount of \$838,024.00 as against M.Y. Residential, KingSett and the officers and directors of said corporations on the basis of *inter alia* their failures to comply with the their statutory holdback and trust obligations under the *Construction Lien Act*.

JBL'S BREACH OF TRUST CLAIM AS AGAINST KSV

12. Relevant to this Application wherein KingSett is seeking to appoint KSV Kofman Inc. ("KSV"), is the fact that JBL has commenced an action against KSV for breach of its trust obligations under the *Construction Lien Action*. A copy of the Statement of Claim in this action is attached herein as **Exhibit "B"** to my Affidavit.
13. The claim as against KSV in Court File No. CV-17-0294-00 is founded on KSV's refusal and/or failure to comply with its trust obligations under the *Construction Lien Act* the particulars of which include but are not limited to:
 - a. In September 2016, the City of Kingston issued a Certificate of Occupancy for a portion of the Property. Substantial performance of the Project has been achieved and notice thereof published in the Daily Commercial News on February 21, 2017. As of May 1, 2017, the City of Kingston issued a Certificate of Occupancy for all of the Property and soon after the Property was fully rented. On July 20, 2017 AMS certified that the construction and development of the Project on the Property was complete. Nevertheless, contrary to the *Construction Lien Act*, the holdback funds were not released to JBL nor were rent monies collected from the Project held in trust and paid out to JBL.

- b. On June 14, 2017, JBL preserved a Claim for Lien by registration of the Claim for Lien and registration of an Affidavit of Verification for Lien with the Land Registrar for the County of Frontenac receipted as FC241574.
- c. On June 26, 2017, KingSett appointed KSV as a private receiver for the purpose of receiving and retaining the rents relating to the Property on M.Y. Residential's behalf, which constituted trust funds to be held and paid to JBL (the "Trust Funds") pursuant to the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "*Construction Lien Act*").
- d. Contrary to their obligations under the *Construction Lien Act*, KSV have refused and/or failed to hold and pay the Trust Funds to JBL.

NEED FOR INDEPENDENT/THIRD PARTY RECEIVER

- 14. I verily believe that rents came into the hands of KSV after the certification of substantial completion and were converted by KSV for a use inconsistent with their trust obligations under the *Construction Lien Act*.
- 15. The rent monies collected by KSV were impressed with a trust by reason of non-payment to JBL when money was due and owing to it.
- 16. The only beneficiary of the trust is JBL. JBL has not received any rent monies collected by KSV. I verily believe that KSV paid the trust money owing to JBL to KingSett and thus breached the trust.
- 17. JBL has a legitimate claim it wishes to pursue as against KSV. The claim of JBL as against KSV is not frivolous or vexatious. From my review of the Draft Appointment Order attached at TAB 3 of the Application Record, I understand that the provisions of same would preclude JBL from pursuing its legitimate claim as against KSV. In addition, I verily believe that the actions of KSV while it was appointed as a private receiver and the claim of JBL arising from same will

preclude KSV from complying with its duties as a court appointed receiver in this action.

18. I verily believe that if a receiver is to be appointed in this matter by the Court it must be an independent third party so as to protect the rights of JBL and its subcontractors for the Project.

NEED FOR ORDER EXCLUDING HOLDBACK/TRUST FUNDS FROM PROPERTY OF DEBTOR

19. The holdback/trust funds due and owing to JBL are not property of the Debtor. From my experience in the construction industry, I understand and verily believe that holdback/trust funds cannot be used for purposes other than the payment of the contract or the trust would be breached.
20. From my review of the Draft Appointment Order attached at TAB 3 of the Application Record, I understand no provision has been made to exclude the holdback/trust funds from the property of the debtor to the prejudice of JBL and subcontractors retained by JBL.

LATE SERVICE OF APPLICATION RECORD

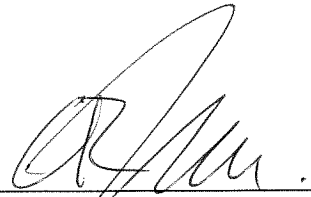
21. I received the Notice of Application of KingSett via email on August 25, 2017 at approximately 4:30pm for this Application returnable August 31, 2017 at 10:00am.
22. JBL has been unable, given the time constraints, to fully respond to the Application. In the event the Court sees fit to consider the appointment of KSV, I verily believe an adjournment is necessary to allow JBL to fully assess and respond what I believe is a conflict of interest.

23. I make this Affidavit in response to the Application of KingSett and for no other or improper purpose.

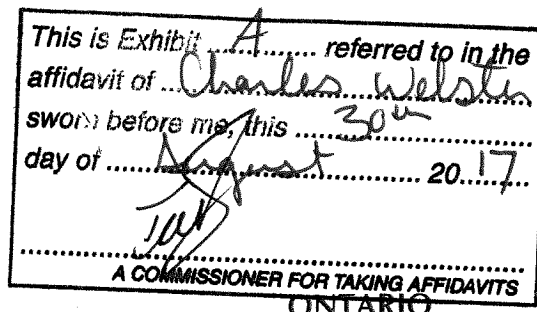
SWORN BEFORE me at the City
of Belleville, in the County of
Hastings this 30th day of
August, 2017


A COMMISSIONER, ETC.

)
)
)
)



CHARLES WEBSTER



Court File No. CV-17-029420

SUPERIOR COURT OF JUSTICE

BETWEEN:

JENSEN BUILDING LTD.

Plaintiff

- and -

M.Y. RESIDENTIAL INC. formerly known as GOLDEN DRAGON HO 7 INC., ANTHONY DEVONISH, CHI HO, KINGSETT MORTGAGE CORPORATION, DAVID VERNON, ANNA M. KENNEDY, JOSEPH R. MAZZOCCO and ROBBIE M. KUMER

Defendants

**STATEMENT OF CLAIM
PURSUANT TO THE CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30**

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,
LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID
OFFICE.

Date: *Aug 29/17*

Issued by: *[Signature]*
15 Bridge St W.
Belleville, ON

TO: **M.Y. RESIDENTIAL INC.**
384 Bank Street
Ottawa, ON
K2P 1Y4

AND TO: **ANTHONY DEVONISH**
2727 Grand Vista Circle
Ottawa, Ontario
K2J 0W5

AND TO: **CHI HO**
384 Bank Street, Suite 300A
Ottawa, ON

AND TO: **KINGSETT MORTGAGE CORPORATION**
66 Wellington Street West
Suite 4400
Toronto-Dominion Centre, TD Tower
Toronto, ON M5K 1H6

AND TO: **DAVID VERNON**
66 Wellington Street West
Suite 4400
Toronto-Dominion Centre, TD Bank Tower
Toronto, ON M5K 1H6

AND TO: **ANNA M. KENNEDY**
66 Wellington Street West
Suite 4400
Toronto-Dominion Centre, TD Bank Tower
Toronto, ON M5K 1H6

AND TO: JOSEPH R. MAZZOCCO
66 Wellington Street West
Suite 4400
Toronto-Dominion Centre, TD Bank Tower
Toronto, ON M5K 1H6

AND TO: ROBBIE M. KUMER
66 Wellington Street West
Suite 4400
Toronto-Dominion Centre, TD Bank Tower
Toronto, ON M5K 1H6

C L A I M

1. The Plaintiff claims:

- a. a declaration that the plaintiff is entitled to a lien against all of the estate, title and interest in any one or more of the defendants in the lands and premises against which a Claim for Lien is registered being:

LT 49-51 PL B25 KINGSTON CITY; PT LT 48 PL B25
KINGSTON CITY AS IN FR304050; KINGSTON; THE
COUNTY OF FRONTENAC 637 JOHNSON ST
KINGSTON
PIN 36027-0211 LT

LT 46-47 PL B25 KINGSTON CITY; PT LT 48 PL
B25 KINGSTON CITY AS IN FR231746; (PCL 2);
KINGSTON; THE COUNTY OF FRONTENAC
647 JOHNSON ST
KINGSTON
PIN 36027-0158 LT

LT 45 PL B25 KINGSTON CITY; PT LT 44 PL B25
KINGSTON CITY AS IN FR307318; KINGSTON;
THE COUNTY OF FRONTENAC
653 JOHNSON ST
KINGSTON
PIN 36027-0159 LT

LT 43 PL B25 KINGSTON CITY; PT LT 44 PL B25
KINGSTON CITY PT 1, 2 13R3088; KINGSTON;
THE COUNTY OF FRONTENAC
655 JOHNSON ST
KINGSTON
PIN 36027-0160 LT

- b. a declaration that the plaintiff's Claim for Lien attaches to any security posted in respect of same;
- c. payment in the sum of \$838,024.00 from the defendants, or any one of them pursuant to the provisions of the *Construction Lien Act*, R.S.O. 1990, c. C3 (the "*Construction Lien Act*");
- d. prejudgment interest at the agreed contractual rate of 2.0% per annum above the prime rate for the first 60 days after default and 4.0% per annum above the prime rate after the first 60 days, compounded monthly;
- e. in the alternative, prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*Courts of Justice Act*");
- f. post-judgment interest at the agreed contractual rate of 2.0% per annum above the prime rate for the first 60 days after default and 4.0% per annum above the prime rate after the first 60 days, compounded monthly;
- g. in the alternative, post-judgment interest in accordance with section 129 of the *Courts of Justice Act*;
- h. in default of the payment of \$838,024.00 plus interest and costs by the defendants or any of them, that the estate and interest of any of the defendants in the said lands described herein be sold and the proceeds applied in and towards payment of the plaintiff's claim, interest and costs;
- i. in the alternative, payment of the plaintiff's claim from the proceeds of any security posted to vacate the Claim for Lien;
- j. a declaration of full priority over any mortgage registered against the Property;

- k. in the alternative, a declaration of full priority over the above referenced mortgage(s) to the extent that any portion of the said mortgage(s) advanced, exceeded or exceeds the actual value of the lands and premises which are the subject matter of this action, at the time the lien first arose;
 - l. in the alternative, a declaration of full priority over the above referenced mortgage(s) to the extent of any unadvanced portions thereof;
 - m. in the further alternative, a declaration of full priority over the above referenced mortgage to the extent that there are deficiencies in the holdbacks required to be retained pursuant to the provisions of the *Construction Lien Act*;
 - n. in addition or in the alternative, damages in the amount of \$838,024.00 on the basis of breach of trust;
 - o. in addition or in the alternative, damages in the amount of \$838,024.00 for breach of contract;
 - p. in addition or in the alternative, damages in the amount of \$838,024.00 on the basis of unjust enrichment;
 - f. the costs of this action on a substantial indemnity basis; and
 - g. such further and other relief as counsel may advise and this Honourable Court consider.
2. The Plaintiff, Jensen Building Ltd. (hereinafter referred to as "JBL"), is a corporation incorporated pursuant to the laws of the Province of Ontario with a head office at Kingston, ON.

3. M.Y. Residential Inc. (hereinafter referred to as "M.Y. Residential") is a corporation incorporated pursuant to the laws of the Province of Ontario with a registered office located at 384 Bank Street, Ottawa, ON. M.Y. Residential is the amalgamated corporation resulting from the amalgamation of M.Y. Residential Inc. and Golden Dragon Ho 7 Inc. ("Golden Dragon") which amalgamation became effective on or about May 31, 2017.
4. The Defendant, M.Y. Residential, is the current owner of the following real property ("the Property") described as follows:
 - a. 637 JOHNSON ST, KINGSTON, ON
LT 49-51 PL B25 KINGSTON CITY; PT LT 48 PL
B25 KINGSTON CITY AS IN FR304050;
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PIN 36027-0159 LT

- d. 655 JOHNSON ST, KINGSTON, ON
LT 43 PL B25 KINGSTON CITY; PT LT 44 PL
B25 KINGSTON CITY PT 1, 2 13R3088;
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0160 LT
5. The Defendant, Anthony Devonish, is the President of M.Y. Residential. He is the sole officer, director and controlling mind of M.Y. Residential.
6. The Defendant, Chi Ho, was the sole officer, director and controlling mind of Golden Dragon, the predecessor of the Defendant, M.Y. Residential. Prior to the amalgamation of Golden Dragon and M.Y. Residential, Golden Dragon was the registered owner of the aforementioned Property.
7. The Defendants, Anthony Devonish and/or Chi Ho, at all material times had effective control of the relevant activities of Golden Dragon Ho 7 Inc. (now known as M.Y. Residential) and/or M.Y. Residential.
8. The Defendant, KingSett Mortgage Corporation ("KingSett"), is a corporation incorporated pursuant to the laws of Canada with a registered office located at 66 Wellington Street West, Suite 4400, Toronto, ON. KingSett is engaged in the business of *inter alia* providing construction financing.
9. The Defendants, David Vernon, Anna M. Kennedy, Joseph R. Mazzocco, and Robbie M. Kumer, are the officers, directors and controlling minds of the Defendant KingSett. At all material times, these Defendants had effective control of the relevant activities of KingSett.

10. JBL commenced its work on the Property on or about July 1, 2014.
11. On January 19, 2015, Golden Dragon (now M.Y. Residential) hired JBL as the construction manager to perform various services and works for a project known as Johnson Street Townhomes – Chi Suites (the “Project”), located at the Property pursuant to the CCDC 5B Construction Management Contract (the “Construction Management Contract”) between JBL and Golden Dragon Ho 7 Inc..
12. The Defendant, KingSett, is the primary lender to M.Y. Residential, providing M.Y. Residential with a building mortgage, which was secured by a Charge in the sum of \$2,500,000.00 registered against the Property on May 22, 2015 as Instrument No. FC199530 and a Notice of Assignment of Rents (General) registered against the Property on May 22, 2015 as Instrument No. FC199531 (hereinafter the “Loan”).
13. On or around June 1, 2015, the owner engaged Armstrong Modulevsky Schutte Quantity Surveyors Inc. (hereinafter called “AMS”) to act as its project monitor for the construction of the Property. Thereafter, JBL submitted all progress billings to AMS and the corporate Defendants.
14. The Defendant, KingSett, increased the principal sum of the Loan to \$9,659,206.00 and increased the secured amount of the above-noted Charge to \$12,000,000.00 by way of a Notice registered against the Property on April 19, 2016 as Instrument No. FC217795.
15. JBL and AMS provided the corporate Defendants with invoices or progress billings for construction by various contractors and management fees for services rendered all in accordance with the Construction Management Contract in the total amount of \$8,346,229.00 up to June 13, 2017. The original agreement between JBL and the Defendant, Golden Dragon (now M.Y. Residential) provided for interest on unpaid amounts on any balance of 2.0% per annum above prime rate for the first 60 days from default and 4.0% per annum above prime rate thereafter, compounded monthly.

16. JBL completed the work in accordance with the Construction Management Contract and the invoices rendered in a competent, good workmanlike and professional manner, all as certified by AMS.
17. JBL preserved a Claim for Lien by registration of the Claim for Lien and registration of an Affidavit of Verification for Lien with the Land Registrar for the County of Frontenac on June 14, 2017 receipted as FC241574 and seeks to enforce the Lien by commencement and registration of this action.
18. There was no agreement between JBL and the Defendants that JBL would not be entitled to a lien on the Property.
19. In September 2016, the City of Kingston issued a Certificate of Occupancy for the Project. Shortly after, AMS certified that the construction and development of the Property had been completed. Substantial performance of the Project has been certified and notice thereof published in the Daily Commercial News on February 21, 2017. Within forty-five days from the publishing of the certificate of substantial performance, the Defendants did not pay the holdback funds to the Plaintiff. As of May 1, 2017 the City of Kingston issued a Certificate of Occupancy for all of the Property and soon after the Property was fully rented.
20. On June 28, 2017, the Defendant, KingSett, appointed a private receiver, being KSV Advisory Inc., for M.Y. Residential for the purpose of receiving and retaining the rents relating to the Property on M.Y. Residential's behalf, which funds are being held in trust for the benefit of the Plaintiff. Prior to KSV's appointment, the rents were collected by M.Y. Residential and/or its agents.
21. The defendant, KingSett, on any progress advances paid to Golden Dragon and/or M.Y. Residential, withheld the holdback funds required under the Construction Lien act. KingSett remains in possession of the holdback funds which are due to the plaintiff.

22. The rents collected by the Defendants and the hold back funds noted in paragraph 21 herein constitute trust funds to be held and paid to JBL pursuant to the *Construction Lien Act*. To date, the Defendants have refused or neglected to pay the funds due and owing to JBL contrary to their obligations under the *Construction Lien Act*.
23. The Defendants assented to or acquiesced in the aforesaid conduct when they knew or reasonably ought to have known such conduct amounted to a breach of trust by M.Y. Residential/Golden Dragon contrary to their obligations under the *Construction Lien Act*.
24. On July 20, 2017, AMS provided the Plaintiff and the Defendants with the Progress Report No. 12, which acknowledged the amounts due to JBL and recommended that the Defendant, KingSett, pay to JBL the amount claimed herein from the next progress advance. To date, the Defendant, Kingsett, has failed to pay to JBL those amounts due.
25. JBL supplied services and materials resulting in the improvement of the Property and JBL has a lien upon the interest of the owner of the Property so improved for the unpaid price of those services or materials pursuant to the *Construction Lien Act*.
26. JBL brings this claim pursuant to the provisions of the *Construction Lien Act* as the Plaintiff provided improvements to the Property.
27. JBL claims priority over any mortgages of the Defendant, KingSett.
28. JBL states that the aforementioned mortgages were given and taken by the Defendant KingSett with the intention to secure financing of the improvements and JBL therefore claims that its lien has full priority over the said mortgages.
29. The Defendants have neglected or refused to pay the outstanding account(s) of JBL in the amount of \$838,024.00 and are in breach of the Construction Management Contract.

30. The Defendants have failed to retain and pay to the Plaintiff, the holdback funds required by the Owner pursuant to the *Construction Lien Act*.
31. The Defendants received construction financing to pay progress bills of JBL, rent monies etc. and have appropriated and/or converted said funds for their own use or a use inconsistent with their trust obligations under the *Construction Lien Act* and therefore are liable to JBL for the amount claimed.
32. JBL has been deprived of \$838,024.00 for the supply of services, labour and materials. The Defendants have been unjustly enriched to the detriment of JBL. The Defendants are therefore liable to JBL for the amount claimed.
33. The Plaintiff relies upon the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the *Construction Lien Act*, R.S.O. 1990, c. C.30 and amendments and regulations thereto.
34. The Plaintiff asks for a trial of this action at Belleville.

Dated: August 29, 2017

BALDWIN LAW Professional Corporation
Barristers and Solicitors
P.O. Box 1537
54 Victoria Avenue
Belleville, ON K8N 5J2
Ph. 613-771-9991; Fax 613-771-9998
S. Daniel Baldwin; LSUC No. 657970
Lawyers for the Plaintiff

Jensen Building Ltd.
Plaintiff

v. M.Y. Residential Inc. and KingSett et al.
Defendant

Court File No. CV-17-0294-d


SUPERIOR COURT OF JUSTICE

(Action commenced in BELLEVILLE)

STATEMENT OF CLAIM

BALDWIN LAW Professional Corporation
Barristers and Solicitors
54 Victoria Avenue, P.O. Box 1537
Belleville, ON K8N 5J2
S. Daniel Baldwin (LSUC No. 657970)
Tel: 613-771-9991; Fax: 613-771-9998
Lawyers for the Plaintiff

This is Exhibit B referred to in the affidavit of Charles Webster sworn before me, this 30th day of August 2017


A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. CV-17-0395-00

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JENSEN BUILDING LTD.

Plaintiff

- and -

KSV KOFMAN INC., MITCH VININSKY, PETER FARKAS, DAVID SIERADZKI and ROBERT KOFMAN

Defendant



STATEMENT OF CLAIM
PURSUANT TO THE CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,
LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID
OFFICE.

Date: *Aug 29/17*

Issued by: *[Signature]*
15 Bridge St W.
Belleville, ON

TO: **KSV KOFMAN INC.**
150 King Street West, Suite 2308
Toronto, ON M5H 1J9

AND TO:

MITCH VININSKY
19 Lynnhaven Road
Toronto, ON M6A 2K7

PETER FARKAS
112 Health Street West
Toronto, ON M4V 1T6

DAVID SIERADZKI
92 Armour Blvd.
Toronto, ON M3H 1L7

ROBERT KOFMAN
17 Plymbridge Crescent
Toronto, ON M2P 1P3

CLAIM

1. The Plaintiff claims:

- a. damages in the amount of \$838,024.00 on the basis of breach of trust;
- b. in addition or in the alternative, damages in the amount \$838,024.00 on the basis of unjust enrichment;
- c. prejudgment interest at the agreed contractual rate of 2.0% per annum above the prime rate for the first 60 days after default and 4.0% per annum above the prime rate after the first 60 days, compounded monthly;
- d. in the alternative, prejudgment interest in accordance with section 128 of the **Courts of Justice Act**;
- e. post-judgment interest at the agreed contractual rate of 2.0% per annum above the prime rate for the first 60 days after default and 4.0% per annum above the prime rate after the first 60 days, compounded monthly;
- f. in the alternative, post-judgment interest in accordance with section 129 of the **Courts of Justice Act**;
- f. the costs of this action on a substantial indemnity basis; and
- g. such further and other relief as counsel may advise and this Honourable Court consider.

2. The Plaintiff, Jensen Building Ltd. (hereinafter called "**JBL**"), is a corporation incorporated pursuant to the laws of the Province of Ontario with a head office at Kingston, ON.
3. The Defendant, KSV Kofman Inc. (hereinafter "**KSV**"), is a corporation incorporated pursuant to the laws of Canada with a registered office address of 150 King Street West, Suite 2308, Toronto, ON.
4. The Defendants, Mitch Vininsky, Peter Farkas, David Sieradzki and Robert Kofman, are the directors and officers of KSV and have effective control of its relevant activities.
5. On or about June 26, 2017, KSV was appointed by an entity known as KingSett Mortgage Corporation to act as a private receiver for the purpose of collecting rent and paying disbursements on behalf of M.Y. Residential Inc., the owner of real property described as follows (the "Property"):
 - a. 637 JOHNSON ST, KINGSTON, ON
LT 49-51 PL B25 KINGSTON CITY; PT LT 48 PL
B25 KINGSTON CITY AS IN FR304050;
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0211 LT
 - b. 647 JOHNSON ST, KINGSTON, ON
LT 46-47 PL B25 KINGSTON CITY; PT LT 48 PL
B25 KINGSTON CITY AS IN FR231746; (PCL 2);
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0158 LT

- c. 653 JOHNSON ST, KINGSTON, ON
LT 45 PL B25 KINGSTON CITY; PT LT 44 PL
B25 KINGSTON CITY AS IN FR307318;
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0159 LT
 - d. 655 JOHNSON ST, KINGSTON, ON
LT 43 PL B25 KINGSTON CITY; PT LT 44 PL
B25 KINGSTON CITY PT 1, 2 13R3088;
KINGSTON; THE COUNTY OF FRONTENAC
PIN 36027-0160 LT
- 6. JBL was retained by an entity known as Golden Dragon Ho 7 Inc. (the predecessor of M.Y. Residential Inc.) to perform construction services and works for a project known as Johnson Street Townhomes - Chi Suites (the "Project"), located at the Property pursuant to a CCDC 5B Construction Management Contract.
 - 7. JBL commenced its work on the Property on or about July 1, 2014.
 - 8. JBL completed the Project in accordance with the Construction Management Contract and the invoices rendered in a competent, good workmanlike and professional manner and as certified by the quantity surveyor retained by the owner.
 - 9. In September 2016, the City of Kingston issued a Certificate of Occupancy for a portion of the Property. Shortly after, the quantity surveyor certified that the construction and development of the Property was complete. Substantial performance of the Project has been certified and notice thereof published in the Daily Commercial News on February 21, 2017. As of May 1, 2017, the City of Kingston issued a Certificate of Occupancy for all of the Property and soon after the Property was fully rented.

10. On June 14, 2017, JBL preserved a Claim for Lien by registration of the Claim for Lien and registration of an Affidavit of Verification for Lien with the Land Registrar for the County of Frontenac receipted as FC241574.
11. On June 26, 2017, KingSett appointed KSV as a private receiver for the purpose of receiving and retaining the rents relating to the Property on M.Y. Residential's behalf, which constituted trust funds to be held and paid to JBL (the "Trust Funds") pursuant to the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "*Construction Lien Act*").
12. Contrary to their obligations under the *Construction Lien Act*, the Defendants have refused and/or failed to hold and pay the Trust Funds to JBL.
13. The Defendants, Mitch Vininsky, Peter Farkas, David Sieradzki and Robert Kofman, assented to or acquiesced in the aforesaid conduct when they knew or reasonably ought to have known such conduct amounted to a breach of trust by KSV contrary to their obligations under the *Construction Lien Act*.
14. The Defendants have appropriated and/or converted the Trust Funds for their own use or a use inconsistent with their trust obligations under the *Construction Lien Act* and therefore are liable to JBL for the amount claimed.
15. In the alternative, the Defendants have been unjustly enriched to the detriment of JBL by their conduct and therefore are liable to JBL for the amount claimed.
16. The Plaintiff relies upon the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the *Construction Lien Act*, R.S.O. 1990, c. C.30 and amendments and regulations thereto.

17. The Plaintiff asks for a trial of this action at Belleville.

Date of Issue: August 29, 2017

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S. Daniel Baldwin; LSUC No. 65797O
Lawyers for the Plaintiff

Jensen Building Ltd.
Plaintiff

v. KSV Kofman Inc. et al
Defendant

Court File No. CV77-029508

SUPERIOR COURT OF JUSTICE

(Action commenced in BELLEVILLE)

STATEMENT OF CLAIM

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Lawyers for the Plaintiff

KINGSETT
Applicant

v. M.Y. Residential Inc.
Respondent

Court File No. CV-17-581591-00CL

SUPERIOR COURT OF JUSTICE

(Application commenced in TORONTO)

**AFFIDAVIT OF CHARLES WEBSTER
SWORN AUGUST 30, 2017**

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