

COURT FILE NUMBER 1401-12431

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT ACCESS MORTGAGE CORPORATION (2004) LIMITED

RESPONDENT ARRES CAPITAL INC.

Clerk's Stamp



DOCUMENT

NOTICE OF APPLICATION

ADDRESS FOR
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CONTACT
INFORMATION
OF PARTY FILING
THIS DOCUMENT

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Attention: Jeffrey Oliver

NOTICE TO RESPONDENT:

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Date: June 21, 2017

Time: 2:00 p.m.

Where: Calgary Courts Centre

Before Whom: The Honourable Justice K.D. Yamauchi

Go to the end of this document to see what you can do and when you must do it.

Remedy claimed or sought:

1. Access Mortgage Corporation (2004) Limited ("**Access**"), a corporation incorporated pursuant to the laws of the Province of Alberta, hereby applies to the Court to settle a form of order appointing a receiver over Arres Capital Inc. ("**Arres**"), a corporation incorporated under the laws of the Province of Alberta, further to the February 13, 2015 reasons for decision of Justice Strekaf (the "**Oral Receivership Order**"); and
2. If the Court grants a formal order with respect to the Oral Receivership Order, Access seeks to stay that order pending the outcome of its concurrent application for a bankruptcy order in respect of Arres.

Grounds for making this application:

3. On or about August 1, 2004, Access and Arres entered into an agreement (the "**Management Agreement**") whereby Arres would provide Access with brokerage and management services in respect of mortgage loans by Access to third parties (the "**Access Mortgage Loans**"). The Management Agreement provided that Arres would manage and administer the Access Mortgage Loans for and on behalf of Access.
4. Pursuant to the Management Agreement, in exchange for Arres' management services, Arres would be paid a management fee ("**Management Fee**") equal to one third of the net income earned by Access in each fiscal year as calculated pursuant to a formula set out in the Management Agreement ("**Net Income**").
5. The Management Fee was advanced in monthly instalments, in such amounts as approved by Access' Board of Directors. At the end of each fiscal year, the actual Management Fee owing to or from Arres for the preceding fiscal year would be reconciled with the aggregate amount of advances actually paid to Arres by Access.
6. From April of 2008 to March of 2009 ("**2009 Fiscal Year**"), Access had advanced and Arres had received instalments totalling \$1,028,879.99.
7. A reconciliation of the Management Fee for the 2009 Fiscal Year revealed that Access had not earned any Net Income. Accordingly, pursuant to the Management Agreement, Arres was not entitled to a Management Fee for the 2009 Fiscal Year.
8. Although Access made a demand for repayment of the Management Fee for the 2009 Fiscal Year, Arres failed to repay that amount.

9. On March 11, 2011, Access filed a statement of claim in Court of Queen's Bench of Alberta Court File Number 1101-03481 against Arres seeking \$1,028,879.99 in damages for Access's overpayment of brokerage and management service fees to Arres (the "**Debt Action**").
10. On May 24, 2013, Access was granted summary judgment against Arres in the sum of \$1,028,879.99, less any amounts that had been paid by Arres to Access ("**Summary Judgment Order**").
11. Arres has reduced \$1,028,879.99 it owes to Access by only \$62,000 and has therefore failed to satisfy the Summary Judgment Order.
12. As a result of Access' unsuccessful efforts to enforce the Summary Judgment Order against Arres, on November 18, 2014, Access brought an application for the appointment of a receiver over Arres' exigible property pursuant to the *Civil Enforcement Act*, R.S.A. 2000, c. C-15, as amended ("**Receivership Application**").
13. On February 13, 2015, the Honourable Madam Justice Strekaf delivered the reasons of the Court on the Receivership Application.
14. Justice Strekaf directed that a receiver be appointed over Arres' exigible property reasoning that "Arres' behaviour has ... raised some potential concerns about the feasibility and prospect of Access being able to realize on its judgment in the absence of a receiver being appointed."
15. Although Justice Strekaf directed the appointment of a receiver over Arres' exigible property, she directed that Access' counsel draft a form of order that would address the identification of Arres' exigible property and payment of the receiver's costs, and confer with counsel for Arres regarding the form of order. If the parties could not agree on the terms of the order, Justice Strekaf advised the parties they could reattend before Her Honour to address those matters.
16. On or about April 22, 2015, counsel for Access and Arres reattended before Justice Strekaf regarding the form of order. Justice Strekaf provided further directions to the parties with respect to the Oral Receivership Order.
17. In the period following Justice Strekaf's decision and subsequent directions to the parties, counsel for Access and Arres attempted to agree on a form of receivership order.
18. Following both the Oral Receivership Order and Justice Strekaf's subsequent directions, the parties exchanged numerous draft forms of order. However, and despite Access' best efforts, the parties were unable to agree on a form of order.

19. Alvarez & Marsal Canada Inc., of the city of Calgary in the Province of Alberta is a corporation qualified to act as receiver of the exigible property of Arres, has agreed to act as receiver of Arres and is acceptable to Access

Material or evidence to be relied on:

20. The materials upon which Access intends to rely include the following:
- a. Affidavit of David Murphy sworn on June 12, 2017; and
 - b. Such further and other material as counsel may advise and this Honourable Court may permit;

Applicable rules:

21. Access will rely upon and refer to the Alberta *Rules of Court* during the making of this application, including without limitation Rule 3.14.

Applicable Acts and regulations:

22. Access will rely upon and refer to:
- a. *Civil Enforcement Act*, R.S.A. 2000, c. C-15, as amended;
 - b. *Judicature Act*, R.S.A. 2000, c. J-2, as amended

Any irregularity complained of or objection relied on:

23. None.

How the application is proposed to be heard or considered:

24. In person.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.