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JUDICIAL CENTRE  
OF CALGARY

COURT FILE NUMBER	1801-04745
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	<b>HILLSBORO VENTURES INC.</b>
DEFENDANT	<b>CEANA DEVELOPMENT SUNRIDGE INC.</b>
PLAINTIFFS BY COUNTERCLAIM	<b>CEANA DEVELOPMENT SUNRIDGE INC., BAHADUR (BOB) GAIDHAR and YASMIN GAIDHAR</b>
DEFENDANTS BY COUNTERCLAIM	<b>HILLSBORO VENTURES INC., NEOTRIC ENTERPRISES INC., KEITH FERREL and BORDEN LADNER GERVAIS LLP</b>
DOCUMENT	<b><u>STATEMENT OF DEFENCE TO COUNTERCLAIM</u></b>
PARTIES FILING THIS DOCUMENT:	Hillsboro Ventures Inc., Neotric Enterprises Inc., and Keith Ferrel, Defendants by Counterclaim
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court 15 <sup>th</sup> Floor, 850 - 2 <sup>nd</sup> Street S.W. Calgary, Alberta T2P 0R8  Attention: Derek Pontin Ph. (403) 268-6301 Fx. (403) 268-3100 File No.: 559316-3

**Statement of facts relied on:**

1. The Defendants by Counterclaim, Hillsboro Ventures Inc. ("**Hillsboro**"), Neotric Enterprises Inc. ("**Neotric**"), and Keith Ferrel ("**Ferrel**", collectively with Hillsboro and Neotric, the "**Hillsboro Counterclaim Defendants**") adopt and rely upon the facts stated in the Amended Statement of Claim filed by Hillsboro in this action.
2. The Hillsboro Counterclaim Defendants admit that Neotric is a body corporate registered in Alberta and that Ferrel is a resident of Alberta, but deny the remaining facts and allegations pleaded in the counterclaim ("**Counterclaim**") filed in the within action by Ceana Development Sunridge Inc. ("**Ceana**"), Bahadur (Bob) Gaidhar ("**Bob**"), and Yasmin Gaidhar ("**Yasmin**", together with Bob the "**Gaidhars**", the Gaidhars and Ceana are the "**Plaintiffs by Counterclaim**"), except as specifically admitted herein.
3. Hillsboro and Ceana are party to certain loan agreements, including:
  - (a) a Formal Loan Commitment dated January 2, 2017, originally between Ceana and Liberty Investments Ltd., and subsequently transferred by Liberty to Hillsboro (the "**\$3 Million Loan Agreement**");

- (b) an Additional Loan Commitment dated July 5, 2017 between Ceana and Hillsboro (the "**\$2 Million Loan Agreement**"); and
  - (c) an Additional Loan Commitment dated October 9, 2017 between Hillsboro and Ceana (the "**\$1.5 Million Loan Agreement**", collectively with the \$3 Million Loan Agreement and \$2 Million Loan Agreement, the "**Loan Agreements**" and each a "**Loan Agreement**").
- 4. The Loan Agreements provided for the advance of funds for use in connection with Ceana's development of certain property it owns in North East Calgary (the "**Development**").
- 5. In conjunction with each Loan Agreement, Ceana provided certain security to Hillsboro, including but not limited to mortgages over the Development.
- 6. Furthermore, Bob provided guarantees of the amounts owing pursuant to each Loan Agreement and Yasmin provided a guarantee of the amounts owing pursuant to the \$1.5 Million Loan Agreement.
- 7. Each of the Loan Agreements stipulated, among other terms:
  - (a) that interest would be payable on amounts borrowed;
  - (b) that a lender fee would be deducted from amounts advanced;
  - (c) that a prepaid interest reserve would be deducted from amounts advanced; and
  - (d) that funds would be advanced in tranches, and each advance would only be made if certain conditions precedent were met prior to each advance.
- 8. Additionally:
  - (a) the \$2 Million Loan Agreement specifically contemplated, and Ceana and Bob specifically agreed to, the postponement of the \$3 Million Loan Agreement and related security in favour of the \$2 Million Loan Agreement and related security; and
  - (b) the \$1.5 Million Loan Agreement specifically contemplated, and Ceana, Bob, and Yasmin, specifically agreed to, the postponement of the \$3 Million Loan Agreement and related security and \$2 Million Loan Agreement and related security in favour of the \$1.5 Million Loan Agreement and related security.
- 9. Ceana fell into default of its obligations to Hillsboro under the Loan Agreements, and on or about May 16, 2018, Hillsboro entered into a forbearance agreement (the "**Forbearance Agreement**") with the Plaintiffs by Counterclaim and a related corporation, Ceana Development Westwinds Inc.
- 10. The Plaintiffs by Counterclaim defaulted on their obligations under of the Forbearance Agreement, and it became necessary for Hillsboro to take steps to enforce its security.
- 11. Ultimately, on the application of Hillsboro, a receiver and manager was appointed over the assets, properties, and undertakings of Ceana.

**Any matters that defeat the claim of the plaintiffs:**

***The Gaidhar's Counterclaim against the Hillsboro Defendants by Counterclaim is a Nullity***

12. The Gaidhars are not named defendants in the Statement of Claim filed in the within action. As such, the Gaidhars have no ability to file a counterclaim in the within action.
13. The filing of the Counterclaim in these circumstances is a nullity, and the Gaidhars should be removed from the Counterclaim.

***The Forbearance Agreement Prohibits the Counterclaim***

14. It is an express term of the Forbearance Agreement that:
  - (a) Ceana will "not file a Statement of Defence in the Action"; and
  - (b) neither Ceana, Bob, nor Yasmin will "oppose or in any way attempt to delay or hinder" the within action.
15. The filing of a Counterclaim constitutes opposition to the within Action and is an attempt to delay and hinder the within Action. Accordingly, Ceana, Bob, and Yasmin are contractually prevented from advancing the Counterclaim by the terms of the Forbearance Agreement.
16. Additionally and alternatively, on the basis of the representations and promises in the Forbearance Agreement, and the reliance placed on such representations and promises by the Hillsboro Counterclaim Defendants, the Plaintiffs by Counterclaim are estopped from advancing the Counterclaim against the Hillsboro Counterclaim Defendants.

***The Pleadings Against Ferrel***

17. The Plaintiffs by Counterclaim have not plead any grounds that would entitle them to seek relief as against Ferrel in his capacity as a director of Hillsboro or Neotric, or would justify a finding of liability through piercing the corporate veil.
18. The sole allegation against Ferrel appears to relate to liability for actions purportedly taken by his alleged agent, Borden Ladner Gervais LLP ("**BLG**").
19. BLG is not agent for Ferrel, and Ferrel can under no circumstances have liability for any alleged misconduct of BLG.

***Breach of Collateral Agreement***

20. In response to paragraphs 6, 7, 8, and 11 of the Counterclaim, the pleadings of the Plaintiffs by Counterclaim are embarrassing for a lack of particulars regarding the alleged collateral agreement (the "**Collateral Agreement**").
21. Furthermore, the Hillsboro Counterclaim Defendants deny a Collateral Agreement exists, as pleaded or at all.
22. Alternatively, if a Collateral Agreement does exist, which is denied, the Hillsboro Counterclaim Defendants deny any breach of the Collateral Agreement.

23. In the further alternative, if a Collateral Agreement does exist and was breached by the Hillsboro, which is denied, such breach did not result in any loss to the Plaintiffs by Counterclaim.

***Mortgagee in Possession***

24. In response to paragraph 9 of the Counterclaim, Hillsboro denies that it was a mortgagee in possession.
25. Alternatively, if Hillsboro was a mortgagee in possession, which is denied, it did not authorize the general contractors and other trades to continue to work, or otherwise act improperly as a mortgagee in possession.
26. It was a specific term of the Loan Agreements, agreed to by the Plaintiffs by Counterclaim, that Ceana would authorize all stakeholders, including contractors and trades, to provide information to Hillsboro upon Hillsboro's request.
27. Any communication between Hillsboro and any contractors or subcontractors was expressly authorized by the Plaintiffs by Counterclaim.

***Bald Allegations of Misrepresentation***

28. In response to paragraph 10 of the Counterclaim, the Hillsboro Counterclaim Defendants deny that any misrepresentation was made by Hillsboro.
29. Alternatively, if a misrepresentation was made by Hillsboro, which is denied, then such misrepresentation did not result in the registration of a lien.
30. Alternatively, if a misrepresentation was made by Hillsboro, which is denied, then such misrepresentation did not result in any damage or loss to the Plaintiffs by Counterclaim.
31. Further in the alternative, Ceana's liability under the *Builders' Lien Act* is limited to the amount of the major lien fund, and the amount of the major lien fund is determined by analyzing contracts to which Ceana is a party.
32. A misrepresentation by Hillsboro could not, in any circumstances, have the effect of authorizing work pursuant to a contract between Ceana and a contractor, and accordingly an allegation of misrepresentation by Hillsboro cannot found any liability for harm allegedly caused by the filing of a lien.

***Alleged Misrepresentations to the Plaintiffs by Counterclaim***

33. In response to paragraph 13 of the Counterclaim, the Hillsboro Counterclaim Defendants deny that any misrepresentation was made by Hillsboro or Neotric.
34. Furthermore, the Hillsboro Counterclaim Defendants deny that the placing of funds into a trust account amounts to a representation of any kind.
35. Alternatively, if a misrepresentation was made, which is denied, such a misrepresentation was innocent, and, as no duty of care was owed to the Plaintiffs by Counterclaim by Hillsboro or Neotric, cannot give rise to a cause of action by any of the Plaintiffs by Counterclaim.

36. Alternatively, if a misrepresentation was made by Hillsboro, which is denied, then such misrepresentation did not result in any damage or loss to the Plaintiffs by Counterclaim.

***Alleged Misrepresentations to Third Parties***

37. In response to paragraph 14 of the Counterclaim, the Hillsboro Counterclaim Defendants deny that BLG was an agent for Neotric or Ferrel.
38. Furthermore, the Hillsboro Counterclaim Defendants deny that any misrepresentation was made by BLG.
39. Alternatively, if a misrepresentation was made by BLG, which is denied, such misrepresentation was innocent, and, as no duty of care was owed by BLG to the general contractor to whom the alleged misrepresentation was made, cannot give rise to a cause of action by the general contractor.
40. The fact that the said funds were held in trust necessarily implies that the funds would be subject to the terms and conditions of the trust. The funds could not be released from trust, absent the necessary terms being met, and the Plaintiffs, and any other third parties, knew or ought of have known of that restriction upon the availability of any funds.
41. Additionally and alternatively, if a misrepresentation was made by BLG to a general contractor or otherwise and such representation was actionable, which is denied, this would not give rise to a cause of action in favour of the Plaintiffs by Counterclaim as against the Hillsboro Counterclaim Defendants.
42. As set out above in paragraphs 31 and 32, any representation by BLG could not result in increased liability of Ceana under the *Builders' Lien Act*.

***Release and Accounting of Funds***

43. In response to paragraph 15 of the Counterclaim, the Hillsboro Counterclaim Defendants deny that Neotric or Ferrel had any duty to release funds under any circumstances.
44. Hillsboro at all times abided by the provisions of the Loan Agreements. To the extent funds were not released, if at all, this was because the conditions precedent to the release of funds had not been met. At no time was Hillsboro under any obligation to release the funds and failed to do so.
45. Hillsboro has, on multiple occasions at the request of the Plaintiffs by Counterclaim, accounted for the monies advanced pursuant to the Loan Agreements.

***Inducement of General Contractor and Subcontractor***

46. In response to paragraph 16 of the Counterclaim, the Hillsboro Counterclaim Defendants deny that the actions of Hillsboro provided an inducement to the general contractor or subcontractors or resulted in any of the damages alleged, or at all.

***Builders' Lien Act Breaches***

47. In response to paragraphs 17 to 24 of the Counterclaim, the Hillsboro Counterclaim Defendants deny that any of Hillsboro's actions have resulted in Ceana breaching the *Builders' Lien Act*.

48. As set out above, Ceana's liability under the *Builders' Lien Act* is limited by the quantum of the major lien fund, which is determined by amounts owing by Ceana under contracts to which it is a party.
49. Hillsboro cannot and did not by its actions modify the terms of a contract to which it is not a party, nor can it nor did it cause Ceana to make payment on a contract to which it is not a party.
50. Any breach of the *Builders' Lien Act* by Ceana is the sole result of the actions or inactions of Ceana, for which Hillsboro cannot be held liable.

#### ***Subordination of Mortgages***

51. In response to paragraph 26 of the Counterclaim, Hillsboro has fully advanced amounts related to the \$3 Million Loan Agreement and \$2 Million Loan Agreement, which are secured by a \$3,000,000.00 mortgage and \$2,000,000 mortgage.
52. In response to paragraphs 27 to 30 of the Counterclaim, the subordination of mortgages is an express term of the operative agreements and was done with the knowledge and consent of the Plaintiffs by Counterclaim.
53. In any event, each of the mortgages is valid and enforceable, and Hillsboro is wholly within its rights to subordinate its security as it sees fit, with or without the consent of the Plaintiffs by Counterclaim.
54. In the alternative, and additionally, a subordination of mortgages did not, and cannot, result in damages to the Plaintiffs by Counterclaim as alleged, or at all.

#### ***Compliance with Mortgage Terms***

55. In response to paragraphs 31 and 32 of the Counterclaim, any additional pledge of security by the Plaintiffs by Counterclaim was not made as a result of any breaches of mortgage agreements by Hillsboro, which are not particularized and in any case are denied.
56. Hillsboro has at all times complied with the provisions and conditions of the Loan Agreements and its other agreements with the Plaintiffs by Counterclaim.

#### ***Forbearance Agreement***

57. In response to paragraphs 34-36 of the Counterclaim, the Plaintiffs by Counterclaim are in default of the Forbearance Agreement, and Hillsboro continues to be owed the amounts claimed by Hillsboro in its Statement of Claim.

#### ***Damages***

58. The Hillsboro Counterclaim Defendants deny that the Plaintiffs by Counterclaim suffered any losses or damages as a result of their actions.
59. If the Plaintiffs by Counterclaim have suffered any losses or damages as a result of the Hillsboro Counterclaim Defendants' actions, which is denied, then the Plaintiffs by Counterclaim have failed to take steps to mitigate such damages, and are disentitled to damages in whole, or alternatively in part.

**Set-off**

60. If the Plaintiffs by Counterclaim are entitled to damages against any of the Hillsboro Counterclaim Defendants, which is denied, the Plaintiffs by Counterclaim are not entitled to set off such amounts under the principles of law, equity, contract, or otherwise.
61. Moreover, in the case of Ceana, the Plaintiffs by Counterclaim have, through the Forbearance Agreement, expressly agreed that Ceana is obligated to make payment to Hillsboro without any deduction or withholding of any nature, including without limitation "any set-off, compensation, counterclaim, recoupment, defence or other right which [Ceana] may have against Hillsboro or anyone else for any reason whatsoever".

**Remedy sought:**

62. The Hillsboro Counterclaim Defendants respectfully seek:
  - (a) a declaration that the Counterclaim commenced by the Gaidhars is a nullity and an order removing the Gaidhars as Plaintiffs by Counterclaim;
  - (b) an order for security for payment of a costs award against the Plaintiffs by Counterclaim;
  - (c) dismissal of the Counterclaim in its entirety;
  - (d) costs of this action on a solicitor and its own client, full indemnity basis, or on such other basis as this Honourable Court deems just; and
  - (e) such further and other relief as this Honourable Court deems just.