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Sept 1 2020
Justice Romaine

COURT FILE NUMBER 1401-12431

COURT COURT OF QUEEN'S BENCH
OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFF **ACCESS MORTGAGE INVESTMENT CORPORATION
(2004) LIMITED**

DEFENDANT **ARRES CAPITAL INC.**

DOCUMENT **APPLICATION OF KENZIE FINANCIAL INVESTMENTS
LTD., SHELLY BECK, THERESE F. DALEY, LINDA
JAEGER, ANDREW LITTLE, LAURIE LITTLE, AGNES M.
OBERG, STEVEN OGG, LESTER S. IKUTA
PROFESSIONAL CORPORATION, LESTER IKUTA,
MICKEY IKUTA, BRIAN SEKIYA, HOLLY SEKIYA,
SANDRA SOMMER, MARION SOMMER, ALLAN
SOMMER, STEVEN REILLY, SWARTS BROS LIMITED
AND CLARA MAE WOROSCHUK**

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File: 15,054 LVH

NOTICE TO RESPONDENTS:

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

You have the right to state your side of this matter before the Master/Judge.

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

Date: Tuesday, September 1, 2020
Time: 10:00 am
Where: Calgary Courts Centre, 601 - 5 Street S.W., Calgary,
Alberta, T2P 5P7

Before Whom: The Honourable Justice Romaine

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

Remedy claimed or sought:

1. A procedural order regarding funds in the amount of \$235,000.00 initially paid into court to the credit of the Applicants as Plaintiffs in the matter of *Kenzie Financial Investments Ltd. v. Arres Capital Inc.*, Court File Number 1201-16440 in this Court (the “Kenzie Action”), pursuant to the Order of The Honourable Mr. Justice Wilkins pronounced February 11, 2014 (the “Wilkins Order” attached as Schedule “A”), which funds were then paid over to the Receiver and Trustee of Arres Capital Inc. pursuant to the Order of The Honourable Madam Justice B.E.C. Romaine pronounced June 4, 2018 in this and other litigation (attached as Schedule “B”), and which funds the Applicants now seek to be paid to them.
2. Such other relief as this Court may determine appropriate, including solicitor-client, full indemnity costs or party-party costs for this application payable forthwith in any event of the cause; and
3. Such further and other relief as this Honourable Court deems just.

Grounds for making this application:

4. Arres Capital Inc. (“Arres”) was a licensed “mortgage broker” under the *Real Estate Act* (Alberta) and bare trustee of the Applicants, in connection with a syndicated loan and mortgage administered by Arres on behalf of the Applicants as investors pursuant to a standard-form “Loan Administration Agreement” signed by each investor.
5. Arres deducted and retained certain amounts from trust monies otherwise received on behalf of, and payable to, the Applicants. The Applicant claimed these deductions by Arres were wrongful and in breach of trust and fiduciary duties, such that the deductions should be repaid back to them.
6. Partial summary judgment in the Kenzie Action was granted in favour of the Applicants by Amended Order granted on July 17, 2013 disallowing certain deductions made by Arres from the Applicants’ trust funds, and directing Arres to repay these deductions.
7. Under a Consent Order granted February 11, 2014, Arres paid \$235,000 (the “Secured Funds”) into court to the credit of the Kenzie Action to effect a stay of enforcement of the Applicants’ judgment under the Amended Order, which funds were to be held pending the final determination of an appeal of that judgment taken out by Arres. The Secured Funds were thereafter to be released in accordance with the final judicial determination of the appeal.
8. By Order of The Honourable Madam Justice C.L. Kenny pronounced on April 16, 2014, Arres’ appeal was dismissed with costs awarded to the Applicants.

However, this Order did not direct the release of the Secured Funds to the Applicants at that time.

9. No further appeal was taken out by Arres contesting the Applicants' judgment against it, and the time for any further appeal has long passed.
10. As of July 23, 2015, post-judgment interest on the Applicants' judgment against Arres totalled \$2,791.90 and costs that had been determined in the amount of \$5,196.63. Further post-judgment interest continues to accrue from that date.
11. An application by the Applicants to have the Secured Funds paid out to them to satisfy their judgment was heard on July 23, 2014. Terrapin Mortgage Investment Corp. ("Terrapin") applied for intervenor status in the Kenzie Action and in the matters of *Arres Capital Inc. v. Graybriar Land Company Ltd. and Graybriar Greens Inc.*, court file numbers 0903-17684 and 0903-17685 (the "Graybriar Foreclosure Actions"), opposed the Applicants' application and applied to have the Secured Funds paid out to Terrapin or otherwise held in Court until the Graybriar Foreclosure Actions were resolved with the determination of issues regarding the entitlement to 4 Graybriar condominium units and the registration of Terrapin's mortgage against those units
12. The result of the Applicants' and Terrapin's applications regarding the Secured Funds was that the Court decided to leave the Secured Funds in court in the Kenzie Action pending a determination of Graybriar Foreclosure Actions.
13. While the Graybriar Foreclosure Actions were unfolding on a number of fronts, by Order of The Honourable Madam Justice Eidsvik pronounced July 26, 2017, Arres was adjudged bankrupt with Alvarez & Marshal Canada Inc. appointed as trustee and receiver of the estate of Arres.
14. By Order of The Honourable Madam Justice B.E.C. Romaine pronounced June 4, 2018 the Secured Funds were paid to the trustee for Arres. Madam Justice Romaine ordered that the Secured Funds be held by the Trustee and made the following direction in connection with granting her Order:

And I am going to allow the order, but on the understanding that the funds are to be used to determine the priority of claims against the Graybriar funds and the Kenzie funds only, and not with respect to the other projects that might be in the receivership. If the receiver determines that it wishes to proceed with those other projects, it must give notice to the parties here today so that there can be some determination of whether that is appropriate.

15. The trustee for Arres agreed to segregate the Kenzie Action funds from the general revenues of Arres realized during the course of the bankruptcy and receivership of Arres, and to only utilize those funds to deal with any competing claims of creditors (presumably Terrapin) against those funds but not otherwise for the general expenses of the bankruptcy and receivership of Arres.

16. The trustee for Arres has now taken the position the Secured Funds are general assets for the benefit of all creditors of Arres and for the general expenses of Arres' bankruptcy and receivership, rather than funds earmarked for the Applicants in satisfaction of their judgment against Arres, contrary to the direction of Madam Justice Romaine accepted by the trustee.
17. Terrapin is no longer making any claim against the Secured Fund, leaving only the Applicants with a claim against those funds.
18. The Applicants' claim for the Secured Funds trump a trustee's priority to funds paid into court if the funds are sufficiently "earmarked" for the benefit of the Applicants and the Applicants have done all that they reasonable could to access those funds, which was complicated by the involvement of Terrapin as an intervenor and the factual and legal implications arising from the Graybriar Foreclosure Actions.

Material or evidence to be relied on:

19. Affidavit of Gaye Saruwatari, filed.

Applicable rules:

20. Rules 5.3, 5.9, 6.2 of the Alberta *Rules of Court*.

Applicable Acts and regulations:

21. None applicable.

Any irregularity complained of or objection relied on:

22. None applicable.

How the application is proposed to be heard or considered:

23. Oral submissions before the presiding Master in Chambers.

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 at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.