

CITATION: McDowell v. Fortress Real Capital Inc., 2024 ONSC 4780
COURT FILE NO.: CV-17-570361-00CP
DATE: 20240829

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ARLENE MCDOWELL and THE ESTATE OF BRYAN MADRYGA, BY HIS LITIGATION ADMINISTRATOR REBECCA SHAW, Plaintiffs

– and –

FORTRESS REAL CAPITAL INC., FORTRESS REAL DEVELOPMENTS INC., JAWAD RATHORE, VINCENZO PETROZZA, LAMB CALGARY INC., ORCHARD CALGARY INC., BUILDING & DEVELOPMENT MORTGAGES CANADA INC., ESTATE OF ILDINA GALATI by its Trustee in Bankruptcy CROWE SOBERMAN INC., FFM CAPITAL INC., ROSALIA SPADAFORA, FMP MORTGAGE INVESTMENTS INC., MICHAEL DARAMOLA, TONINO AMENDOLA, GRAHAM MCWATERS, DEREK SORRENTI, GRANT MORGAN and SORRENTI LAW PROFESSIONAL CORPORATION, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Mitchell Wine and Karine Bedard*, for the Plaintiff / Defendant by Counterclaim

Ruby Egit, Christopher Rhone, and Halla Ahmed, for the Defendants, FMP Mortgage Investments Inc., Michael Daramola, Tonino Amendola, and Graham McWaters

HEARD: Motion in writing

SETTLEMENT NOTICE APPROVAL

[1] The Plaintiffs move for the following relief:

1. Approving the Condensed Form and Short Form Notices of Hearing for Certification and Settlement Approval (the “Notices”);
2. Approving the Notice Protocol for the dissemination of the Notices;

3. Directing FAAN Mortgage Administrators Inc. (“FAAN”), the Notice Administrator, to disseminate the Condensed Form Notice in accordance with the Notice Protocol;
4. Declaring that, in fulfilling the role of Notice Administrator, FAAN is not acting in its capacity as court-appointed Trustee of Building & Development Mortgages Canada Inc., but as the court-appointed Notice Administrator in these actions, and that in fulfilling the Notice Administration function, it is not acting in a conflict with its Trustee functions;
5. Granting FAAN leave to use the list of participants/investors in the syndicated mortgage loan registered against title to the Orchard real estate development that is the subject of this action, including names, contact information, and email addresses that are in its possession for the purposes of effecting the noticing;
6. Confirming that this Order satisfies the requirements of s. 7(3)(c) of the Personal Information Protection and Electronic Documents Act, SC 2000, c 5, and granting FAAN protection from any action for privacy breach in relation to its use of the investor lists to effect the noticing;
7. Declaring that no person may bring any action or take any proceeding against FAAN or any of its past and current officers, directors, employees, parents, subsidiaries, agents, partners, associates, representatives, predecessors, successors, beneficiaries or assigns for any matter in any way relating to the implementation of this Order;
8. Directing that Class Counsel shall pay FAAN for its services as Notice Administrator, and may claim the costs as a disbursement if the Settlement Agreement is approved; and
9. Setting the date for the motion for certification and settlement approval in respect of the Settling Defendants to be heard on January 9, 2025.

[2] This class action was commenced in 2017. Since then, the claim has been amended several times.

[3] The Plaintiffs have now entered into settlement agreements with Defendants FMP Mortgage Investments Inc. (“FMP”), Michael Daramola, Tonino Amendola and Graham McWaters (the “Settling Defendants”). They intend to seek an order certifying this action for settlement purposes as against the Settling Defendants, and approving the Settlement Agreement.

[4] A settlement approval hearing has been scheduled for January 9, 2025.

[5] FAAN has consented to act as the Notice Administrator for this settlement. As set out in the affidavit of class counsel Margaret Waddell, FAAN has a list of all investors in the Orchard development project, along with the investors' contact information. It has previously fulfilled the role as the court-appointed Trustee in respect of the mortgage administration of this development project.

[6] The proposed Notice Protocol calls for FAAN to provide direct notice of the hearing for certification and settlement approval to the putative class members by sending the Condensed Form Notice by email, or where no email is available, then by mail to all the investors in the Orchard development. It appears that this is the best and most efficient means of providing notice to the putative class of the motion for certification and settlement approval with the Settling Defendants.

[7] Class counsel will also post the Short Form Notices on their website and request that a copy be posted on a social media site for investors in syndicated mortgage loans.

[8] This plan to disseminate the Notices impresses me as an effective one that is also proportionate given the quantum of the settlement, the stage of the proceedings. As indicated, it will involve direct notice to all or virtually all putative class members. I am advised that a substantially similar Order was previously issued by Justice Perell against some defendants in this action who have already settled.

[9] The proposed Notice and means of dissemination appear acceptable to me, as do the other terms of the proposed order. There will be an order to go as submitted by class counsel.

Date: August 29, 2024

Morgan J.