

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**B&M HANDELMAN INVESTMENTS LIMITED, FLORDALE HOLDINGS LIMITED M.
HIMEL HOLDINGS INC., 1530468 ONTARIO LTD., MAXOREN INVESTMENTS, AND
SHEILACO INVESTMENTS INC.**

Applicants
(Respondents in Appeal)

- and -

CHRISTINE DROTOS

Respondent

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101 OF
THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED

NOTICE OF MOTION

(Receiver's Motion for Directions Before a Single Judge
of the Court of Appeal returnable December 14, 2018)

Rosen Goldberg Inc., in its capacity as receiver (the “**Receiver**”) over lands and premises registered in the name of the Respondent (the “**Debtor**”), will make a motion to a single Judge of the Court of Appeal, on an urgent basis, on Friday, the 14th day of December, 2018 at 10:00 a.m., or as soon after that time as the motion can be heard, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. an Order abridging the time for service of the Receiver's Motion Record, validating service of the Motion Record, and dispensing with further service thereof;
2. advice and directions regarding the Notice of Appeal of Pillar Capital Corporation (Cayman) ("**Pillar Cayman**") dated November 28, 2018 (the "**Notice of Appeal**") of the decision of The Honourable Mr. Justice Dunphy of the Ontario Superior Court of Justice (Commercial List) dated November 26, 2018 (the "**Priority Order**"), determining that:
 - (i) the first mortgage in the principal amount of \$1,425,000.00 over the property municipally known as 4 Birchmount Road, Toronto (the "**Birchmount Property**") given by the Debtor to Home Trust Company (the "**Home Trust Mortgage**") on or about September 27, 2006, was paid in full on August 15, 2014, and that as a result, the transfer of the Home Trust Mortgage to "Pillar Capital Corporation" registered on title to the Birchmount Property on May 5, 2015 (the "**Purported Assignment**") was a nullity and did not have priority over the Applicants' mortgage;
 - (ii) Pillar Capital Corporation (including Pillar Cayman) is not entitled to the statutory lien prescribed by s. 346(3) of the *City of Toronto Act*, 2006, S.O. 2006, c. 11, in respect of a municipal tax lien over the Birchmount Property registered on title on December 23, 2014 (the "**Tax Lien**") and paid on or about November 30, 2015 by "Pillar Capital Corporation c/o Meridian Law, Professional Corporation" by way of a payment for \$307,981.81 (the "**Tax Lien Payment**"); and
 - (iii) the Receiver was to pay the Applicants the remaining amount due under their mortgage over the Birchmount Property;

3. an Order declaring that Pillar Cayman cannot appeal the Priority Order as of right, and that it requires leave of the Court to do so;
4. an Order declaring that the Priority Order is not stayed by the Notice of Appeal, or in the alternative if it is stayed, lifting the stay;
5. an Order approving the distribution of funds to the Applicants pursuant to the Priority Order;
6. the Receiver's costs of this motion on a substantial indemnity scale; and
7. such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS FOR THIS MOTION ARE:

Ownership of Pillar Capital Corporation

1. there are two identically named Pillar Capital Corporations. One Pillar Capital Corporation is incorporated in Ontario, and one the other is incorporated in the Cayman Islands (Pillar Cayman). The issue of who owns Pillar Capital Corporation (and as a result is entitled to any proceeds of the Home Trust Mortgage and the Tax Lien Payment payable to Pillar Capital Corporation), is the subject of a motion that was to be heard two days following the Priority Motion (as defined below) which is the subject of this Motion for Directions, but that ownership issue is now in abeyance pending the determination of this motion. Pillar Cayman is moving to appeal the Priority Order.

Appointment of the Receiver

2. further to an application by the Applicants herein, and by Order of the Honourable Mr. Justice McEwen dated April 13, 2018 (the “**Appointment Order**”), Rosen Goldberg Inc. was appointed Receiver over lands and premises registered in the name of the Debtor, including the Birchmount Property;
3. the Applicants herein hold the mortgage that was registered in second place over the Birchmount Property, and as of August 31, 2018, the amount owing under their second mortgage was \$860,753.39, excluding legal fees;
4. the Birchmount Property is a 1.9 acre lot overlooking Lake Ontario in the Scarborough Bluffs neighbourhood of Toronto, on which is located a partially constructed shell of a 12,900 square foot home with a roof that has a hole in it, and which had become a home for wild animals;
5. among other things, pursuant to the Appointment Order, the Receiver was granted the power to market the Birchmount Property, sell it with Court approval, and report to and meet with affected persons in the discretion of the Receiver;

The Birchmount Property Mortgages

6. Pillar Cayman was incorporated on October 20, 2014 (six days after the other Pillar Capital Corporation was incorporated in Ontario);
7. Home Trust registered a first mortgage over the Birchmount Property on September 27, 2006 (the Home Trust Mortgage). It was paid out in full on August 15, 2014, following requests for a discharge by a lawyer named Anita Verma. However, the Home Trust Mortgage was then assigned to “Pillar Capital Corporation” on May 5, 2015;

8. as set out below, the Birchmount Property was sold for \$3.45 million, and following Court approval the sale closed on June 15, 2018. There were four mortgages registered against the Birchmount Property prior to closing. A summary of charges registered on title prior to the closing of the sale of the Birchmount Property, including the approximate amounts owing under each charge, is set out below:

Rank on title, face amount and monthly payment	Date Registered	Date Assigned/ Party assigned to	Current Secured Creditor	Amount Claimed
First \$1,425,000 7.5% \$10,426.66	Sep. 27, 2006	Home Trust to Pillar Cayman (May 5, 2015)	Pillar Capital Corporation	\$2,360,003.15 plus legal costs (as of June 14, 2018) Per diem \$484.93
Second \$900,000 12% \$9,000.00 “Applicants’ Mortgage”	May 27, 2008		B & M Handelman Investments et al. (the Applicants herein)	\$1,162,755.39, excluding legal costs (as of June 19, 2018). \$860,753.39 excluding legal costs (as of August 31, 2018) Per diem \$235.82
Third \$35,000 18.99 % \$558.91 “WFC Mortgage”	Oct 7, 2008	DMS Inc. to 2176506 Ontario Inc. (Dec. 12, 2008), to World Finance (April 27, 2012), to Money Gate to a 30.1 % interest (Dec 1, 2017)	World Finance Corporation/ Money Gate Mortgage Investments	\$6,700,916.93 (as of May 14, 2018)
Fourth \$400,000 (interest rate cannot be determined) “Barlow Mortgage”	Aug. 14, 2009		Lorraine Barlow/Gilbert Barlow	Not reported.

Approval and Vesting Order

9. the Receiver carried out a sales process for the Birchmount Property, and the proposed sale for \$3.45 million was approved by Justice Dunphy pursuant to an order dated June 1, 2018 (the “**Sale Approval and Vesting Order**”);
10. prior to the return of the motion for the Sale Approval and Vesting Order on June 1, 2018, Pillar Cayman and a related company World Finance Corporation, which currently holds a 69.9% interest in the mortgage registered in third position over the Birchmount Property, objected to the motion for the Sale Approval and Vesting Order (collectively, the “**Objecting Creditors**”);
11. until shortly after the Notice of Appeal was served, the Objecting Creditors were both represented by the law firm Brauti Thorning Zibarras LLP (“**BTZ**”) in this receivership proceeding (Pillar Cayman is now represented by different counsel);
12. the holder of the remaining 30.1% interest in the third mortgage (Money Gate Investment Corporation) supported the transaction;
13. Dunphy J. examined the proposed transaction and the steps undertaken by the Receiver in light of the principles set out by this Court in *Royal Bank of Canada v Soundair Corp.*, (1991), 4 O.R. (3d) 1 (“**Soundair**”). Dunphy J. found that the *Soundair* factors weighed in favour of Court approval of the Accepted Offer;

14. following the Sale Approval and Vesting Order, the closing of the sale of the Birchmount Property was set for June 11, 2018. However, World Finance Corporation delivered a Notice of Appeal dated June 7, 2018, taking the position that it had an appeal as of right (it also did not seek a stay). Therefore, the Receiver extended the closing to June 14, 2018;
15. the Receiver also brought a motion before a single judge of the Court of Appeal for directions regarding World Finance Corporation's purported appeal of the Sale Approval and Vesting Order;
16. the Receiver's motion was heard by the Honourable Justice Paciocco, who held that World Finance Corporation did not have an appeal as of right of the Sale Approval and Vesting Order pursuant to s. 193(b) of the *Bankruptcy and Insolvency Act* ("**BIA**"). Justice Paciocco further denied leave to appeal pursuant to s.193(e), and approved the sale of the Birchmount Property pursuant to the Sale Approval and Vesting Order. The sale closed on or about June 15, 2018;

The Priority Motion

17. following the closing of the sale of the Birchmount Property, the Receiver held approximately \$3,108,000 in net proceeds of sale, with approximately \$2,955,000 available for distribution. The amount available for distribution was greater than the amount Pillar Cayman alleged it was owed under the Home Trust Mortgage. Accordingly, pursuant to the order of Justice Conway dated August 31, 2018, an interim distribution of \$350,000 was made to the Applicants, with the balance held by the Receiver pending a determination as to the amount owing to "Pillar Capital Corporation", if any;

18. as a result, the Receiver had approximately \$2,600,000.00 in surplus funds to distribute on the Priority Motion (the “**Surplus Funds**”), wherein the Applicants alleged they were owed approximately \$860,753.39 plus interest from September 1, 2018, plus costs;
19. the Applicants brought a motion for, among other things, a determination that no funds were owing under the Home Trust Mortgage on the basis that the payment tendered to Home Trust was with the intention that the first mortgage be discharged;
20. the Priority Motion was heard by Justice Dunphy on November 26, 2018. In his Reasons for Decision dated November 27, 2018 (the “**Priority Motion Reasons for Decision**”) Justice Dunphy held that the indebtedness of the Debtor to Home Trust secured by the First Mortgage over the Birchmount Property was fully paid on August 15, 2014, and that the Purported Assignment of the Home Trust Mortgage on May 5, 2015, was a nullity because there was no outstanding obligation to transfer. Because Pillar Capital Corporation did not have an interest in the Birchmount Property on or about the date it purportedly made the Tax Lien Payment to the City of Toronto (on or about November 30, 2015), Justice Dunphy further held that Pillar Capital Corporation was not entitled to a statutory tax lien over the Birchmount Property. Justice Dunphy further directed the Receiver to pay the Applicants out of the Surplus Funds the remaining amount due on their mortgage;
21. the Priority Motion Reasons for Decision were factually driven, with all evidence therein traceable back to the written record before the Court;

The Attempted Appeal

22. as was the case in the attempted appeal of the Sale Approval and Vesting Order, BTZ did not deliver on behalf of its client a Notice of Motion for an order seeking leave to appeal the Priority Order. Instead, BTZ delivered a Notice of Motion seeking a stay of the Priority Motion pending the hearing of the appeal, and in its Notice of Appeal seeks leave to appeal “in the alternative”;
23. there are two discreet issues at play for Pillar Cayman in respect of the attempted appeal of the Priority Order: the Purported Assignment (of the Home Trust Mortgage), and the Tax Lien issue.

Purported Assignment of the Home Trust Mortgage

24. the attempted appeal does not involve a dispute which is likely to affect another case raising the same or similar issues in the within proceeding, and therefore the Priority Order does not fall within the ambit of s.193(b) of the *BIA*;
25. the attempted appeal does not involve a loss of more than \$10,000.00, or any loss at all, as both Pillar Capital Corporations were not incorporated until several months after the Home Trust Mortgage was paid out on August 15, 2014. There is no evidence that the payout of the Home Trust Mortgaged was by Pillar Cayman, and in fact there is no evidence at all as to who funded the payout; the only certainty is it could not have been by Pillar Cayman (or the other Pillar Capital Corporation) because they approximately two months away from coming into existence (October 14 and October 20, 2014). There is also no evidence that the lawyer who sought the Home Trust Mortgage discharge was acting for either Pillar Capital Corporation (or who she was in fact acting for). Therefore, the Priority Order does not fall within the ambit of s.193(c) of the *BIA*. If anyone incurred a loss, it was not either Pillar Capital Corporation;

26. the attempted appeal does not involve an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, is not *prima facie* meritorious, and the Priority Order will not unduly hinder the progress of the bankruptcy/insolvency proceedings. Therefore, the Priority Order does not fall within the ambit of s.193(e) of the *BIA*;
27. accordingly, there is no automatic stay of the Priority Order and leave to appeal should also not be granted;

The Tax Lien Issue

28. the Priority Order simply held that Pillar Capital Corporation was “not entitled to the statutory lien prescribed by s. 346(s) of the *City of Toronto Act*”. Justice Dunphy did not make any other findings in respect of the Tax Lien Payment, such as what priority it is entitled to (and over who), or whether it is entitled to any form of priority at all;
29. as a result, there is no finality to the Priority Order as it relates to the Tax Lien Payment as Pillar Capital Corporation still needs to determine what it has in respect of the Tax Lien Payment, and any appeal is premature. The Receiver’s position is that any appeal rights in respect of the Tax Lien Payment only arise when a determination is made by the Court at first instance about what Pillar Capital Corporation does have as a result of the Tax Lien Payment;
30. furthermore, since the Applicants are only owed in respect of their mortgage \$860,753.39, plus interest from September 11, 2018, and legal fees, a stay of Justice Dunphy’s Order is not required as the Receiver will still be holding more than enough Surplus Funds to pay the Tax Lien Payment if it is found to be in priority to the Applicants’ mortgage;

31. in addition, neither the Receiver nor the Applicants will have any interest in any further priority disputes in respect of the remaining Surplus Funds if the Applicants' mortgage is paid out as the Receiver would pay the remaining Surplus Funds into Court and seek its discharge. Any parties with a claim to the Surplus Funds can then make their claims without the Receiver's involvement;
32. counsel for the Receiver certifies his estimate that 15 minutes will be required for his oral argument, not including reply;
33. sections 193 and 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3;
34. Rules 2.03, 3.02, 25.11 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;
and
35. such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED ON THE HEARING OF THE MOTION:

1. Affidavit of Stephen Handelman sworn July 30, 2018;
2. Affidavit of Ara Missaghi sworn September 5, 2018;
3. Transcript of the Cross-Examination of Stephen Handelman dated September 20, 2018
4. Transcript of the Cross-Examination of Ara Missaghi dated September 20, 2018;
5. Answers to Undertakings Brief Regarding the Cross-Examination of Stephen Handelman dated October 1, 2018;
6. Refusals and Undertakings Brief Regarding the Cross-Examination of Ara Missaghi

7. dated November 20, 2018;
8. The Second Report of the Receiver;
9. The Third Report of the Receiver;
10. The Fourth Report of the Receiver; and
11. such further and other grounds as counsel may advise and this Honourable Court may permit.

December 6, 2018

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Applicants

and **CHRISTINE DROTOS**

Respondent

Court File No. CV-18-594590-00CL

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

Proceeding commenced at Toronto

**NOTICE OF MOTION
(Receiver's Motion for Directions)**

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