

**COURT OF APPEAL FOR ONTARIO**

**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**

**B E T W E E N:**

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

Applicants

-and-

**CHRISTINE DROTOS**

Respondent

**FACTUM OF THE APPELLANT/RESPONDENT ON THE MOTION  
PILLAR CAPITAL CORPORATION (CAYMAN)**

December 12, 2018

**WAGNER SIDLOFSKY LLP**  
181 University Avenue  
Suite 1800  
Toronto, Ontario M5H 3M7

Gregory M. Sidlofsky (LSUC No.43579C)

Tel: (416) 601-9279

Fax: (416) 364-6579

Lawyers for the Appellant, respondent on  
the motion, Pillar Capital Corporation  
(Cayman)

**TO: BLANEY MCMURTRY LLP**  
2 Queen Street East, Suite 1500  
Toronto, Ontario M5C 3G5

Eric Golden  
[egolden@blaney.com](mailto:egolden@blaney.com)

Tel: (416) 593-1221  
Fax: (416) 593-5437

Lawyers for the Receiver

**AND TO: CHAITONS LLP**  
5000 Yonge Street, 10<sup>th</sup> Floor  
North York, Ontario M2N 7E9

Maya Poliak  
[Maya@chaitons.com](mailto:Maya@chaitons.com)

Tel: (416) 222-8888  
Fax: (416) 222-8402

Lawyers for the Receiver,  
Money Gate

**AND TO: DICKINSON WRIGHT**  
Commerce Court West  
199 Bay Street, Suite 2200  
Toronto, Ontario M5L 1G4

David Preger LSO No. 36870L  
[dpreger@dicksonwright.com](mailto:dpreger@dicksonwright.com)

Tel: (416) 646-4606  
Fax: (844) 670-6009

Lawyers for the Applicants

**AND TO: DJD LAW PROFESSIONAL CORPORATION**  
1186 Eglinton Avenue West  
Toronto, Ontario M6C 2E3

Eli Karp LSO No.54317P  
ek@djdllaw.com

Tel: (416) 769-4107  
Fax: (416) 352-7638

Lawyers for the Plaintiff,  
Curah Capital Corporation

## PART I – OVERVIEW

1. The receiver of the bankrupt estate of Christine Drotos brings this motion for directions to determine whether the appeal of Pillar Capital Corporation (Cayman) (“Pillar Capital”) from the order of Justice Dunphy dated November 26, 2018 (the “Order”), requires leave of the court. Pillar Capital states that it is an appeal as of right pursuant to s. 193(c) of the *Bankruptcy and Insolvency Act* (the “Act”).

2. Justice Dunphy determined that an assignment of the first mortgage registered on title to 4 Birchmount Avenue in Toronto (the “Property”) in favour of Pillar Capital was a nullity and that nothing was owing on the mortgage. As such, the proceeds of sale of the Property that would have otherwise been paid to Pillar Capital as first mortgagee were instead ordered to be paid to the applicants, who hold a second mortgage on the property.

3. Pillar Capital appeals on the basis that the motions judge erred in law in determining that the assignment of the first mortgage was a nullity, disregarding uncontroverted evidence and relying on speculation to determine that the first mortgage had actually been discharged, considering inadmissible evidence and wrongfully shifting the burden of proof to Pillar Capital to prove that its registered assignment, signed by the original first mortgagee and paid for with full consideration, constituted a valid assignment.

4. Pillar Capital satisfies the test for an automatic right of appeal pursuant to s. 193(c) of the Act because the Order:

a) is not procedural;

- b) calls into play the value (and validity) of property (the first mortgage);
- c) results in a complete loss of the value of the first mortgage to Pillar Capital;  
and
- d) directly involves property exceeding \$10,000 in value. The mortgage was for \$1,425,000 with over \$2,000,000 currently owing on it, inclusive of unpaid interest and expenses.

5. As such, Pillar Capital asks that the receiver's motion be dismissed with costs.

## PART II – FACTS

### A. THE PARTIES AND THE PROPERTY

6. Pillar Capital was incorporated on October 14, 2014, pursuant to the laws of the Cayman Islands.<sup>1</sup> The sole director and officer of Pillar Capital is Laila Alizadeh (“Alizadeh”). Her husband, Ara Missaghi, is a mortgage consultant and fund manager for Pillar Capital and its related companies.<sup>2</sup>

7. The applicants in the proceeding below are a group of investors who collectively hold the second mortgage on the Property. They are hereinafter referred to as the “Second Mortgagee”.<sup>3</sup>

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<sup>1</sup> Incorporation certificate of Pillar Capital, **Compendium Tab 2**, Motion Record of Pillar Capital, Tab 1(B), p. 16

<sup>2</sup> Affidavit of Ara Missaghi, **Compendium Tab 3**, Motion Record of Pillar Capital, Tab 1, p. 1, para. 1; Transcript of the cross-examination of Ara Missaghi, **Compendium Tab 4**, p. 10, q. 28

<sup>3</sup> Affidavit of Stephen Handelman, **Compendium Tab 5**, Motion Record of the Applicants, Tab 2, p. 6-7, para. 1 and 3

8. The Property itself is a multi-million dollar luxury home located in the sought-after Scarborough Bluffs neighbourhood. The bankrupt, Christine Drotos, owned the Property until it was sold by Rosen Goldberg Inc., in its capacity as Ms. Drotos' receiver.<sup>4</sup>

## **B. ASSIGNMENT OF THE FIRST MORTGAGE**

9. On August 14, 2014, Pillar Capital acquired the first mortgage on the Property (the "First Mortgage") by way of assignment from Home Trust Company ("Home Trust"). The consideration paid for the assignment was \$1,372,368.70, representing 100 cents on the dollar for the debt then outstanding.<sup>5</sup>

10. The assignment was not formally registered until May 5, 2015 because Ms. Drotos was subject to bankruptcy proceedings that involved litigation concerning the Property and because a certificate of pending litigation was registered on title to the Property. Sheriff & Sole, the bankruptcy trustee, also took the position that their consent was required before the assignment of the First Mortgage could be registered.<sup>6</sup>

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<sup>4</sup> Order of Justice McEwen dated April 13, 2018, **Compendium Tab 6**, Motion Record of the Applicants, Tab 2(A), p. 23; Approval and Vesting Order of Justice Dunphy dated June 1, 2018, **Compendium Tab 7**, Motion Record of the Applicants, Tab 2(C), p. 43; Affidavit of Stephen Handelman, **Compendium Tab 5**, Motion Record of the Applicants, Tab 2, p. 7, para 7

<sup>5</sup> Transfer of charge from Home Trust Mortgage to Pillar Capital Cayman, **Compendium Tab 8**, Motion Record of Pillar Capital, Tab 1(E), p. 31-32; Home Trust mortgage assignment statement dated July 25, 2014, **Compendium Tab 9**, Motion Record of Pillar Capital, Tab 1(F), p. 34; Affidavit of Ara Missaghi, **Compendium Tab 3**, Motion Record of Pillar Cayman, Tab 1, p. 5, paras. 15-16

<sup>6</sup> Transfer of charge from Home Trust Mortgage to Pillar Capital, **Compendium Tab 8**, Motion Record of Pillar Capital, Tab 1(E), p. 31-32; Correspondence between counsel to Pillar Capital and Sheriff & Sole as Bankruptcy Trustee, **Compendium Tab 10**, Motion Record of Pillar Capital, Tab 1(G), p. 36-41; Transcript of the cross-examination of Ara Missaghi, **Compendium Tab 4**, p. 103-104, q. 349

11. Following a decision of Master Jean in the bankruptcy proceeding, and after the bankruptcy trustee acquired a legal opinion confirming the validity of the Home Trust First Mortgage, the bankruptcy trustee consented to the registration of the assignment of the Home Trust mortgage to Pillar Capital. The transfer of charge was issued on May 5, 2015 as is evidenced by its registration on title.<sup>7</sup>

**C. SUBSEQUENT MORTGAGES and SALE OF THE PROPERTY**

12. As stated above, the applicants in the proceeding hold the Second Mortgage. The applicants were made aware of the transfer of the First Mortgage to Pillar Capital.<sup>8</sup>

13. A third mortgage is registered on title to the Property in favour of World Finance Corporation (a related company of Pillar Capital) and Money Gate Mortgage Investments.<sup>9</sup>

14. The amount available for distribution resulting from the sale of the Property was initially \$2,974,661. On August 31, 2018, Conway J. approved an interim distribution of \$350,000 to the Second Mortgagee, bringing the total distributable funds to \$2,624,661.

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<sup>7</sup> Transfer of charge from Home Trust Mortgage to Pillar Capital Cayman, **Compendium Tab 8**, Motion Record of Pillar Capital, Tab 1(E), p. 31-32; Legal Opinion Obtained by Bankruptcy Trustee, **Compendium Tab 11**, Motion Record of Pillar Capital, Tab 1(I), p. 48-49; Affidavit of Ara Missaghi, **Compendium Tab 3**, Motion Record of Pillar Capital, Tab 1, p. 6, para. 19

<sup>8</sup> Affidavit of Stephen Handelman, **Compendium Tab 5**, Motion Record of the Applicants, Tab 2, p. 11, para. 24

<sup>9</sup> Statements and breakdowns under First Mortgage and Third Mortgage, **Compendium Tab 12**, Motion Record of the Applicants, Tab 2(T), p. 132-140; Mortgage Statement of WFC dated June 14, 2018, **Compendium Tab 13**, Motion Record of Pillar Capital, Tab 1(D), p. 24-29

**D. THE MOTION JUDGE'S DECISION**

15. The assignment of the First Mortgage went undisputed for years. However, upon the commencement of these proceedings, the Second Mortgagee took the position that the assignment to Pillar Capital was invalid.

16. The motions judge determined that the payment of funds to the original first mortgagee, Home Trust, of \$1,372,368.70 was to discharge the First Mortgage, not to take an assignment of it. He relied on a reference to "discharge" in the letter enclosing the payment of funds to Home Trust from Pillar Capital's lawyer, Ms. Verma.<sup>10</sup>

17. The motions judge held that other references in the documents and correspondence to an assignment of the mortgage, or the registered transfer of charge, were not sufficient for him to conclude that the payment of the mortgage debt was for anything other than a discharge of the First Mortgage. His Honour disregarded the actual assignment document signed by Home Trust on the basis that Home Trust likely signed the document to get out of dealing with the matter and avoid litigation.<sup>11</sup>

18. The motions judge did not address why Pillar Capital would pay out the First Mortgage if not to take an assignment of it stating that it was not for him or the applicants to answer that question – it was for the "person claiming the assignment to answer". The

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<sup>10</sup> Reasons for decision dated November 27, 2018, para. 41 and 48

<sup>11</sup> Reasons for decision dated November 27, 2018, para. 50 and 63



motions judge then speculated that perhaps it was the third mortgagee's desire to add the payment to the third mortgage at a higher interest rate.<sup>12</sup>

19. In reaching his decision, the motions judge expressly stated that he was "mindful" of allegations of misconduct against Missaghi who gave evidence on behalf of Pillar Capital (allegations that Pillar Capital argued ought to have been inadmissible) and made negative findings about Missaghi's evidence without justification.<sup>13</sup>

20. Ultimately, the motions judge determined that the First Mortgage had been fully paid, that the transfer of charge was a nullity and that the proceeds of sale of the Property would go toward paying the applicants' second mortgage.<sup>14</sup>

#### **E. THE APPEAL**

21. Pillar Capital served a notice of appeal and an amended notice of appeal from the Order and asserts that it has an automatic right to appeal. In the alternative, Pillar Capital states in the notice that it is appropriate that leave to appeal be granted. Some of the grounds for appeal are set out below.

22. Pillar Capital states that the record overwhelmingly supports the conclusion that the First Mortgage was never discharged and that it was validly assigned to Pillar Capital. Specifically:

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<sup>12</sup> Reasons for decision dated November 27, 2018, para. 64-66

<sup>13</sup> Reasons for decision dated November 27, 2018, para. 30-33

<sup>14</sup> Reasons for decision dated November 27, 2018, para. 68 and 87

- a) the Mortgage Statement of Home Trust to Pillar Capital is titled “Mortgage Assignment Statement”;<sup>15</sup>
- b) numerous emails and letters from Pillar Capital’s real estate lawyer and from Missaghi refer to the transaction as a “transfer of charge” and a “mortgage assignment”;<sup>16</sup>
- c) the registration of the instrument itself is a “transfer of charge” instrument from Home trust to Pillar Capital. As such, as a matter of law and fact, the First Mortgage was transferred by way of assignment and not discharged;<sup>17</sup>
- d) no discharge statement was ever registered on title; and
- e) Pillar Capital was purchasing the First Mortgage in order to take the benefit of the assignment of the First Mortgage.

23. The motions judge relied on the one and only reference to a “discharge” of the First Mortgage that was made in a letter from Pillar Capital’s lawyer. Such reliance is unreasonable as the reference is clearly an error as it is contrary to the voluminous evidence to the contrary including the Home Trust Payout documents, the Home Trust Mortgage Statement, correspondence between the lawyer for Pillar Capital and the lawyer for Home Trust, the registered legal document and the evidence of Missaghi.<sup>18</sup>

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<sup>15</sup> Home Trust Mortgage Assignment Statement dated July 25, 2014, **Compendium Tab 9**, Motion Record of Pillar Capital, Tab 1(F), p. 34

<sup>16</sup> Various correspondence, **Compendium Tab 14**, Motion Record of Pillar Capital, Tab 1(L), p. 59-65; Tab 1(N), p. 79

<sup>17</sup> Transfer of charge from Home Trust Mortgage to Pillar Capital Cayman, **Compendium Tab 8**, Motion Record of Pillar Capital, Tab 1(E), p. 31-32

<sup>18</sup> Transcript of the cross-examination of Ara Missaghi, **Compendium Tab 4**, p. 71, q. 241; Home Trust Mortgage Assignment Statement dated July 25, 2014, **Compendium Tab 9**, Motion

24. Pillar Capital states that it would be untenable for Pillar Capital to pay almost \$1.4 million to discharge the First Mortgage without receiving the benefit of an assignment of the mortgage leaving only the Second Mortgagee to benefit.

25. Further, the motions judge pointed to the delay in registering the assignment of the First Mortgage as supporting the conclusion that the mortgage was actually discharged, but the delay was entirely explained in the evidence. It was caused by Ms. Drotos' bankruptcy, the insistence from her trustee that they had to consent to the assignment, and the certificate of pending litigation that was registered on title. All of these hurdles were overcome and the assignment was registered, but this evidence was unreasonably disregarded by the motions judge.<sup>19</sup>

26. The motions judge also disregarded the fact that no discharge of the First Mortgage was ever prepared or registered and that counsel for the trustee at the time obtained an opinion that the First Mortgage was valid.<sup>20</sup>

27. With respect to the *Mortgage Act*, contrary to the motions judge's reasons, s. 2 of the *Mortgages Act* does not apply in the circumstances of this case. Section 2 only

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Record of Pillar Capital, Tab 1(F), p. 34; Various correspondence, **Compendium Tab 14**, Motion Record of Pillar Capital, Tab 1(L), p. 59-65 and Tab 1(N), p. 79

<sup>19</sup> Decision of Master Jean in the Bankruptcy Proceedings of Christine Drotos concerning the outstanding litigation over the Property, **Compendium Tab 15**, Motion Record of Pillar Capital, Tab 1(H), p. 43 at p. 45; Correspondence between counsel to Pillar Capital and Sheriff & Sole as Bankruptcy Trustee, **Compendium Tab 10**, Motion Record of Pillar Capital, Tab 1(G), p. 36-41; Legal Opinion of Brian Taran Obtained by Bankruptcy Trustee, **Compendium Tab 11**, Motion Record of Pillar Capital, Tab 1(I), p. 48-49

<sup>20</sup> Legal opinion of Brian Taran, **Compendium Tab 11**, Motion Record of Pillar Capital, Tab 1(I), p. 48-49

applies where a mortgagor (or someone holding the equity of redemption) is seeking to redeem the mortgage. Neither Ms. Drotos nor any subsequent encumbrancer was seeking to redeem the mortgage. As such there was no requirement to obtain consent and s. 2 could not be relied on to invalidate the assignment of the mortgage.

28. The motions judge also failed to address Pillar Capital's arguments that s. 2 of the *Mortgages Act* was nonetheless satisfied given the consent of the third mortgagee and the conduct of the Second Mortgagee, who had been accepting payments on the second mortgage.

29. Pillar Capital relied on the assignment of the First Mortgage in proceeding to pay significant expenses relating to the Property following its purchase of the First Mortgage, including paying a \$307,981 tax lien registered on the Property which was added to the First Mortgage. Pillar Capital relied on the validity of the assignment of the First Mortgage to make this and other payments, which was disregarded by the motions judge.<sup>21</sup>

### **PART III – LAW AND ARGUMENT**

#### **A. PILLAR CAPITAL HAS AN AUTOMATIC RIGHT OF APPEAL**

30. Pillar Capital submits that section 193(c) of the Act applies to its appeal.

Section 193(c) states:

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<sup>21</sup> Affidavit of Ara Missaghi, **Compendium Tab 3**, Motion Record of Pillar Capital, Tab 1, p. 7, para. 24

**193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

...

(c) if the property involved in the appeal exceeds in value ten thousand dollars;<sup>22</sup>

31. Section 193(c) is to be narrowly construed and must *directly* involve property exceeding \$10,000 in value.<sup>23</sup>

32. The courts have held that s. 193(c) does not apply to:

- a) orders that are procedural in nature,
- b) orders that do not bring into play the value of the debtor's property, or
- c) orders that do not result in a loss.<sup>24</sup>

33. The Order of Justice Dunphy is not procedural in nature. It is a final order that conclusively determines the invalidity of Pillar Capital's First Mortgage on the Property.

34. Further, the Order expressly brings into play the value of the debtor's property. The motions judge determined that the assignment of the First Mortgage in favour of Pillar Capital is a nullity and that nothing is owing on the First Mortgage. The Order therefore directly effects property.<sup>25</sup>

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<sup>22</sup> Section 193(c) of the *Bankruptcy and Insolvency Act*

<sup>23</sup> *Crate Marine Sales Ltd., Re*, 2016 ONCA 140 at para. 6; *Enroute Imports Inc., Re*, 2016 ONCA 247 at para. 5

<sup>24</sup> *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at para. 53; *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 at para. 22

<sup>25</sup> *Crate Marine Sales Ltd., Re*, 2016 ONCA 140 at para. 10

35. Finally, the Order results in a loss to Pillar Capital. Pillar Capital paid over \$1.3 million to take an assignment of the First Mortgage and then paid hundreds of thousands more toward expenses pertaining to the Property. The Order deprives Pillar Capital of the right to recover these amounts and constitutes a total loss to Pillar Capital that far exceeds \$10,000.

36. In paragraph 42 of the applicants' factum, the applicants take the position that the Order does not finally determine Pillar Capital's economic interests in the Drotos estate because they say that Pillar Capital was never a creditor of Drotos. The applicants' argument is untenable as it relies on the impugned finding by Justice Dunphy that the assignment of the First Mortgage was a nullity. This finding is expressly under appeal.

37. Further, the applicants' argument in paragraph 43 of their factum is similarly untenable as it relies on the impugned finding that nothing was owing on the First Mortgage, which is also the subject matter of the appeal.

**B. NO BASIS TO LIFT THE AUTOMATIC STAY**

38. The applicants in their factum request that in the event the court determines that Pillar Capital has an automatic right to appeal, that the court should lift the stay imposed by s. 195 of the Act.

39. When the within motion was scheduled by Justice Huscroft in chambers on December 5, the only issue that was to be put to the court was whether there was an

automatic right to appeal. On that basis, Justice Huscroft granted the parties a very quick return date of December 14.

40. Section 195 of the Act states:

**195** Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

41. Pillar Capital submits that there is no basis to lift the automatic stay and that doing so would be extraordinarily prejudicial to Pillar Capital.

42. The applicants are not a financial institution that can be relied on to repay any amount released to them if ordered to do so. They are a collection of individuals who offer no security in return for a lifting of the stay.

43. Pillar Capital submits that its appeal has merit and that the funds being held belong to it. There is no basis to release the funds that are the subject matter of the dispute prior to a determination of the appeal.

44. The applicants are not suffering any harm or prejudice flowing from the stay.

45. The applicants' factum also purports to raise the issue of whether leave to appeal ought to be addressed on the within motion. This issue is not before the court on the December 14 motion as the date was specifically set only to determine whether Pillar Capital has an automatic right to appeal. If the court determines that leave to appeal is required then Pillar Capital submits that a timetable should be set to address the leave motion and the Order ought to be stayed in the interim.

**PART IV – ORDER SOUGHT**

46. Pillar Capital therefore respectfully requests that the receiver's motion for directions be dismissed with costs.

**CERTIFICATE**

I estimate the time required for oral argument of the responding party on the motion to be 1 hour.

There are no original papers required for this motion.

**ALL OF WHICH IS RESPECTFULLY  
SUBMITTED BY:**

  
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Gregory M. Sidlofsky  
Counsel for the Appellant



**SCHEDULE "A"**

<b>Tab</b>	<b>List of Authorities</b>
1	<i>Crate Marine Sales Ltd., Re</i> , 2016 ONCA 140
2	<i>Enroute Imports Inc., Re</i> , 2016 ONCA 247
3	<i>2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.</i> , 2016 ONCA 225
4	<i>Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.</i> , 2017 ONCA 611

**SCHEDULE "B"****Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3**

**193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

**Stay of proceedings on filing of appeal**

**195** Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

B&M HANDELMAN INVESTMENTS LIMITED et al.  
Applicants (Respondents in Appeal)

- and -

CHRISTINE DROTOS  
Respondent

Court of Appeal File No.: C66196

**COURT OF APPEAL FOR ONTARIO**

Proceedings commenced at Toronto

**FACTUM OF THE APPELLANT/RESPONDENT  
ON THE MOTION**

**PILLAR CAPITAL CORPORATION**

**WAGNER SIDLOFSKY LLP**  
181 University Avenue, Suite 1800  
Toronto, Ontario M5H 3M7

**Gregory M. Sidlofsky LSO No. 43579C**

Tel: (416) 601-9279

Fax: (416) 364-6579

Lawyers for the Appellant  
Pillar Capital Corporation