

**CITATION:** McDowell v. Fortress Real Capital Inc., 2025 ONSC 635  
**COURT FILE NO.:** CV-17-570361-00CP  
**DATE:** 20250130

**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, Margaret Waddell and Karine Bedard*, for the Plaintiffs

*Stephen Libin*, for the Defendants, FMP Mortgage Investments Inc., Michael Daramola, Toninio Amendola, and Graham McWaters

*Sierra Farr*, for claims administrator Faan Mortgage Administrators

**HEARD:** January 27, 2025

**SETTLEMENT APPROVAL, CERTIFICATION, AND FEE APPROVAL**

[1] The Plaintiffs bring a motion for approval under ss. 2 and 5 of the *Class Proceedings Act, 1992*, SO 1992, c. 6 (“CPA”) of a proposed settlement with FMP Mortgage Investments Inc. (“FMP”), Michael Daramola, Tonino Amendola and Graham McWaters (the “FMP Defendants”)

(collectively, the “Settling Defendants”), and, for the purposes of the proposed settlement, certification of the action as against the Settling Defendants.

[2] The claim relates to a syndicated mortgage loan promoted by Fortress Real Developments Inc. and Fortress Real Capital Inc. (together, “Fortress”) and which was registered on the Orchard Calgary Inc. (“Orchard”) real estate project. They allege that they and the class members were misled about the value of the property on which the syndicated mortgage would be registered, the risks involved in participation in the syndicate mortgage, how the mortgage proceeds would be used by the developers and the mortgage trustees/administrators, and that the mortgage would qualify to be held in registered accounts when it did not so qualify.

[3] When the Orchard project’s syndicated mortgage loan went into default, the class members lost most of their investments. The claim seeks to recover the investors’ losses from the Defendants.

[4] On August 14, 2024, the Plaintiffs entered into a Settlement Agreement with the FMP Defendants. The Settlement Agreement provides that the FMP Defendants will pay to the class members the total sum of \$3,000,000 inclusive of legal fees, disbursements, HST, interest, and notice, administrative, and all other expenses, as approved by the Court, to settle the Action as against the FMP Defendants.

[5] This settlement fund represents 75% of the maximum aggregate insurance originally available under FMP’s insurance policy, and is \$1 million more than the total primary coverage under at policy, which is an eroding mortgage brokers professional liability policy. FMP is bankrupt, and the settlement calls for the FMP Defendants to pay substantially all of the remaining available insurance to settle the Plaintiffs’ and class members’ claims.

[6] The Settlement Agreement settles all claims as between the class and the Settling Defendants. It further provides for the Settling Defendants’ consent to certification to effect the settlement on a class-wide basis. It was negotiated by experienced counsel operating at arm’s length from the representative Plaintiffs and class members.

[7] Given all of the circumstances, the Settlement Agreement is fair and reasonable and in the best interests of the class.

[8] Turning to the certification criteria under section 5(1) of the *CPA*, the Fresh as Amended Statement of Claim discloses causes of action in breach of contract, breach of fiduciary duty, negligence, negligent misrepresentation, fraudulent misrepresentation, and conspiracy. These are well recognized causes of action and are supported by the material facts as pleaded.

[9] The class has been defined as:

All persons in Canada who invested in a syndicated mortgage in respect of the Orchard Project, registered against title to lands located at 602, 606, 610, 620, 624,

626 and 628 12th Avenue S.E., in Calgary, Alberta as Registration Number 141 112 373.

[10] Counsel submit, and I agree, that certification of a national class is preferable, providing access to justice and promoting judicial economy and is in the best interest of the class. Furthermore, the Class is objectively defined and readily ascertainable. It is an acceptable class definition for certification purposes.

[11] The following common issues have been proposed:

- (a) Did FMP breach its contracts with the Class members? If so, how?
- (b) Did FMP owe a fiduciary duty to the Class members, and if so, in what respect? If yes, did FMP breach its fiduciary duty owed to the Class members, and if so, how?
- (c) Did the Settling Parties owe a duty of care to the Class members with respect to the claims asserted against them in negligence or negligent misrepresentation?
- (d) If the Settling Parties owed a duty of care to the Class members with respect to the claims in negligence or negligent misrepresentation, what was the applicable standard of care for the Settling Parties?
- (e) If the Settling Parties owed a duty of care to the Class members with respect to the claim in negligence or negligent misrepresentation, did the Settling Parties breach the applicable standard of care? If so, how?
- (f) Did FMP make fraudulent misrepresentations to the Class members, and, if so, is FMP liable to the Class with respect thereto?
- (g) Did FMP conspire with any one or more of Fortress Real Capital Inc., Fortress Real Developments Inc., Jawad Rathore, Vincenzo Petrozza, Building & Development Mortgages Canada Inc., or others, with the intent to cause harm to the Class members? If so, did the conspiracy cause harm to the Class members?
- (h) Can the Class members' damages be assessed, in whole or in part, in the aggregate, and if so, what is the quantum of their aggregate damages?

[12] Each of those proposed issues can be answered in common for all of the class members. Moreover, there is some basis in fact supporting the existence of each of those issues. I see no reason not to certify all of the proposed issues as common issues for this class action.

[13] Given the size of each claim and the commonality of the issues among class members, a class action is the preferable procedure for resolving the claims. Under the circumstances, a class

proceeding best reflects the desired goals of access to justice, judicial economy, and behaviour modification.

[14] The representative Plaintiffs appear to have fulfilled their role of instructing and guiding counsel through the action and settlement process. There is no suggestion that any of them have a conflict with the class. They are appropriate representative Plaintiffs for certification purposes.

[15] Class counsel also seek on behalf of the Plaintiffs a number of ancillary orders. These include appointing Arlene McDowell and Rebecca Shaw, Estate Administrator of the Estate of Bryan Madryga, as the representative Plaintiffs; appointing MSTW Professional Corporation and Sotos LLP as class counsel; declaring that the relief sought by the class as against the Settling Defendants is declaratory, general damages, punitive damages, interest, and costs; and appointing FAAN Mortgage Administrators Inc. (“FAAN”) as Claims Administrator.

[16] In addition, the Plaintiffs seek an order that no person may bring any action or take any proceeding against the parties, FAAN, counsel for the Settling Defendants or class counsel or any of their respective 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 the settlement approval order or the Settlement Agreement, except with leave of the Court.

[17] All of these are reasonable requests and are designed to protect the settlement and benefit the class. They also appoint reputable and credible professionals as counsel and as administrators for the settlement.

[18] The Plaintiffs are to give notice of the certification of this action and approval of the FMP Settlement Agreement to the class in accordance with the Notice Protocol attached as Schedule B to the Settlement Agreement.

[19] Class counsel also seek approval of their fees. The several firms representing the Plaintiffs and class seek a total of \$750,000 in fees plus HST of \$97,500, for a total of \$847,500. They also seek an order authorizing payment to class counsel of incurred disbursements in the amount of \$10,821.63 plus \$1,000 as an estimate of disbursements still to be incurred, all to be paid from the settlement fund.

[20] In addition, class counsel seek an order that \$169,500 be held in trust from the settlement fund by class counsel to pay for future disbursements and to pay for any adverse costs awards in respect of the ongoing action, and that these funds may be disbursed by class counsel, as incurred, without further order of the court. In the event that any funds remain in trust at the completion of the action, they are to be allocated against future approved class counsel fees or otherwise distributed in accordance with the court’s direction at the time.

[21] Each of these requests is reasonable under the circumstances. The counsel fee is 25% of the settlement fund, which is well within the range that this court has on numerous occasions determined to be a reasonable counsel fee. The disbursements are also relatively modest.

[22] Although it is a bit unusual, under the circumstances and given the financial realities facing the parties, the request to hold funds in trust for future fees or expenses is a prudent one.

**Disposition**

[23] The proposed settlement is a fair and reasonable one. It is in the best interests of the class and is hereby approved. Likewise, the counsel fees and all ancillary orders sought by the Plaintiffs are fair and reasonable and are hereby approved.

[24] There will be an order to go as submitted by Plaintiffs' counsel.

**Date:** January 30, 2025

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**Morgan J.**