

1 of 2 DOCUMENTS

*Case Name:*

**McFlow Capital Corp. v. Simcoe Condominium Corp. No. 27**

**RE: McFlow Capital Corp., Applicant, and  
Simcoe Condominium Corporation No. 27 and Kenneth James,  
Respondents**

[2009] O.J. No. 2345

Court File No. CV-09-376660

Ontario Superior Court of Justice

**M.D. Forestell J.**

Heard: May 15 and 22, 2009; further written submissions,  
June  
3, 2009.

Judgment: June 4, 2009.

(3 paras.)

**Counsel:**

**Kenneth Prehogan** and **Hilary Book** for the Applicant.

**Ranjan Das**, for the Respondents.

**Raymond Stancer**, for Christopher Tomkinson and Gary Pace.

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**ADDENDUM TO ENDORSEMENT**

**1 M.D. FORESTELL J.:**-- On May 27, 2009 I made an order appointing an administrator of Simcoe Condominium Corporation No. 27. The order included a requirement that cross-examinations be completed by May 29, 2009 and requiring service of facta.

**2** On consent of counsel dated June 3, 2009 these terms (subparagraphs 9 and 10 of paragraph 43) were deleted from my order.

**3** If the parties require any further clarification or direction, this can be done through the Commercial List Office or by arranging a further appearance.

M.D. FORESTELL J.

cp/e/qlrpv/qlpxm

2 of 2 DOCUMENTS

*Case Name:*

**McFlow Capital Corp. v. Simcoe Condominium Corp. No. 27**

**RE: McFlow Capital Corp., Applicant, and  
Simcoe Condominium Corporation No. 27 and  
Kenneth James, Respondents**

[2009] O.J. No. 2325

Court File No. CV-09-376660

Ontario Superior Court of Justice

**M.D. Forestell J.**

Heard: May 15 and 22, 2009.

Judgment: May 27, 2009.

(44 paras.)

**Counsel:**

**Kenneth Prehogan and Hilary Book** for the Applicant.

**Ranjan Das**, for the Respondents.

**Raymond Stancer**, for Christopher Tomkinson and Gary Pace.

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**ENDORSEMENT**

M.D. FORESTELL J.:--

**Overview**

**1** This application concerns a 44-unit condominium at 12 Lankin Boulevard in Orillia. The condominium corporation is Simcoe Condominium Corporation No. 27 (the "Corporation"). From 1995 until January 2001 all 44 units were owned by Lucy Cianculi, either directly or through corporations. In 2001, because of a default on a mortgage, Ms. Cianculi lost 14 of the 44 units. The current owner of the 14 units is a corporation registered as 1652030 Ontario Ltd. ("165"). 165 has defaulted on its mortgage and the first mortgagee is the Applicant, McFlow Capital Corporation ("McFlow"). Ms. Cianculi, the original owner of the remaining units, died recently. The identity of the current owners and mortgagees of the remaining 30 units is unclear. Kenneth James is a lawyer who has represented the Corporation since 1995.

**2** From 2001 until present, the relationship between the owner of the 14 units and the Corporation has been contentious and litigious. The ownership of the 14 units has changed over the years but the disputes have continued. The battle between the two factions has raged while the physical state of the condominium has steadily deteriorated.

3 In 2009 the Corporation registered liens against the 14 condominium units. The issue in this application is the validity of liens registered by the Corporation against the 14 units. Pending the determination of that issue, McFlow seeks an order appointing an administrator and an order giving McFlow, rather than the Corporation, control over the sale of the units.

### **The History of the Dispute**

4 I will not set out in detail the history of the dispute between McFlow (and its predecessors) and the Corporation. However, some history is necessary to provide a context to the issues.

5 During the early 1990's all 44 units of the condominium were owned by three individuals either directly or through corporate vehicles. One of the three individuals, Lucy Cianculli, through a corporation, owned 50% of the units. Around 1995, Ms. Cianculli purchased the other 50% of the units. She financed the purchase of eight of the units through private investors, many or all of whom appear to have been clients of Mr. James (paragraph 5, James Affidavit #1). Ms. Cianculli financed the purchase of 14 of the units through Beneficial Realty Limited ("Beneficial"), an institutional lender. Mr. James did not act for Ms. Cianculli on the Beneficial transaction but appears to have represented her on the other transactions.

6 Between 1995 and 2000, Beneficial changed names from Beneficial to Associates to Citifinancial Mortgage Corp. ("Citifinancial"). Citifinancial took possession of the units from Ms. Cianculli in January 2001 following a default on the mortgages. Citifinancial held the units until September 30, 2003 when they were sold under power of sale to a corporation registered as 1450996 Ontario Inc. ("145").

7 During the two and one-half years that Citifinancial had possession of the 14 units, there was a contentious and litigious relationship between the Corporation and Citifinancial. Mr. James, in his affidavit, alleges that Citifinancial refused, unreasonably, to pay common expenses for the units. Citifinancial took the position, in litigation commenced at that time, that there was no management company at the time of its possession of the units and that Ms. Cianculli was converting the rent from the units to her own use when those rents ought to have been paid to Citifinancial. In an affidavit filed in the litigation, the solicitor for Citifinancial pointed out that Mr. James represented Ms. Cianculli's company as well as a company called Kingston Holdings which held the second mortgages on the 14 units.

8 In 2003 Citifinancial sold the 14 units to 145. The disputes over common expenses and the management of the Corporation continued following the sale to 145. The Corporation continued to be involved in litigation with Citifinancial.

9 In March 2005, 145 sold the properties to the current owner, 165. McFlow loaned money to 165 to finance the purchase and secured the loan by various mortgages including a first mortgage on the 14 units.

10 The disputes continued following the sale. 165 repeatedly requested access to the financial statements of the Corporation. 165 also questioned the state of repair of the building. 165 paid most of its common expenses until June of 2008. Following a meeting in June 2008 when a special assessment was discussed, 165 stopped paying its monthly common expenses. A special assessment of \$40,000 per unit was imposed in January 2009. This was also not paid by 165.

11 On February 17, 2009 Mr. James, on behalf of the Corporation, issued Notices to Encumbrancer advising that a lien had been registered against each of the 14 units owned by 165. The amount claimed on each lien is stated to be \$45,181.28. This amount is said to be comprised of 15 months' arrears of monthly common expenses and a \$30,000 special assessment levied on January 31, 2009.

12 On February 27, 2009 Mr. James, on behalf of the Corporation, issued Notices of Attornment of Rent to the tenants of the 14 units directing that rents be paid to James & Associates in trust.

13 In early March 2009, McFlow served notice that, the mortgage being in default, it was commencing power of sale proceedings with respect to the units.

14 On March 16, 2009 the Corporation issued Notices of Sale in respect of each of the units.

### **The Application and Motion**

15 McFlow disputes the validity of the liens and has brought an application for relief against oppression by the Corporation and Kenneth James. In that application McFlow seeks the appointment of an administrator.

**16** McFlow has also brought a motion for an order for the interim preservation of property or for an interlocutory injunction preventing the Respondents from selling the disputed condominium units pending the determination of the Application.

**17** The motion for interim relief was originally scheduled to be heard on May 15, 2009. It was agreed by the parties that the matter should be adjourned and should be transferred to the commercial list. However, the terms of the adjournment were disputed and full argument was heard on the issue of the terms of the adjournment. The hearing on the terms was commenced but could not be completed on May 15, 2009. It continued to completion on May 22, 2009.

**18** The terms that McFlow seeks pending the hearing of the application are:

1. The appointment of an Administrator pursuant to s. 131 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act");
2. The freezing of funds held in an account described by Kenneth James in his affidavit;
3. An order allowing the Applicant to exercise its power of sale over the units; and
4. An order prohibiting the Respondents from interfering with the exercise of the power of sale by the Respondents and prohibiting the Respondents from selling the units.

*The Appointment of an Administrator Procedural Issues*

**19** While the appointment of an administrator is sought in the application, the Notice of Motion in this matter did not specify that the appointment of an administrator would be sought as an interim order. This request was made in oral argument on the 15th of May, 2009. The Respondents object to the appointment of an administrator and argue that the Applicant has not given sufficient notice of this head of relief.

**20** The parties to this litigation agree that in order to determine the validity of the disputed liens, cross-examination is required. However, McFlow argues, the facts in support of the appointment of an administrator are not in dispute. McFlow relied wholly on the affidavits of Mr. James in support of its argument that the immediate appointment of an administrator was required. McFlow takes the position that it was only when the affidavit of Mr. James was filed that grounds for an immediate appointment of an administrator arose. McFlow immediately notified the Respondents of its intention to make the request for the appointment of an administrator.

**21** In light of the position of the Corporation that it did not have an opportunity to respond, I have considered only the affidavits of Mr. James in determining this issue. I note, however, that the Corporation did have a full week to serve and file further material on this issue in light of the delay in hearing the motion. I am not of the view that there was any prejudice to the Corporation in the manner in which the issue arose and was argued.

*The Law*

**22** Some of the factors to be considered in deciding whether the appointment of an administrator is in the best interests of the Corporation are as follows:

1. whether a demonstrated substantial inability to manage the Corporation has been established;
2. whether substantial misconduct or mismanagement or both in relation to the affairs of the Corporation has been demonstrated;
3. whether there is a struggle within the corporation among competing groups such as to impede or prevent proper governance of the Corporation; and
4. whether only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the Corporation.<sup>1</sup>

**23** It is also important to remember that the democratic government of the community should not be overridden by the court except where absolutely necessary.<sup>2</sup>

*Whether a demonstrated substantial inability to manage the Corporation has been established*

**24** Mr. James, in his affidavit, states that by February 2008 the unit mortgagees had determined and Ms. Cianculli had acknowledged that the financial situation of the Corporation and the state of disrepair of the property had produced a situation where the value of mortgage indebtedness on the remaining units exceeded any realistic net proceeds of disposition. Mr. James states that in or around 2001 he advised the unit owners and mortgagees (other than the owners and mortgagees of the 14 units) that until the respective rights and obligations of Citifinancial and the Corporation were

mortgagees of the 14 units) that until the respective rights and obligations of Citifinancial and the Corporation were resolved and the affairs and records of the Corporation were regularized and made to conform with the 'new' legislation that they would be unable to deal in any effective way with their units and the unit mortgagees would be unable to successfully enforce their rights on default. As a result, he states that no changes in beneficial interest of the unit owners or unit mortgagees have been recorded on title since December 2000, it being Mr. James' opinion and advice that the remaining units would all have to be disposed of by power of sale.

**25** I conclude from the two affidavits of Mr. James filed in this proceeding, that the property is in a state of disrepair requiring immediate attention; that the value of the property has declined to the point that the mortgage indebtedness exceeds the value of the units and that the ownership of the units has not been properly recorded since 2000. Mr. James states that the records of the Corporation have not been made to comply with the 'new' 1998 legislation. This evidence establishes that there has been a substantial inability to manage the Corporation over the past ten years.

*Whether substantial misconduct or mismanagement or both in relation to the affairs of the Corporation has been demonstrated Financial Statements*

**26** The Act requires that an auditor be appointed by the owners and that financial statements be prepared and audited. It appears from the affidavit of Mr. James that the Corporation had no financial statements from 1998 to 2002, inclusive. From 2003 to 2007 inclusive, the financial statements are not audited. There is no indication on the face of the financial statements of the author of the statements.

**27** As an exhibit to his affidavit, Mr. James attached a series of correspondence between himself, litigation counsel and Gary Pace, representing the board of directors of 165. Immediately following its purchase of the 14 units, 165 requested the last four budgets and annual audited financial statements as well as the minutes of the last four annual and general meetings and the minutes of the last four board of directors meetings. Mr. James, in response, denied 165 access to any information. He took the position that until the arrears of 165's predecessor were paid, 165 had no right to any of the requested material. In October 2005 Mr. Pace reminded Mr. James of previous letters requesting copies of minutes, audited financial statements, the budget and the date of the next general meeting for the Corporation. Mr. Pace also continued to press for repairs to the condominium. Mr. James responded in December 2005. By this time Mr. James had received legal advice that he could not deny the request of Mr. Pace. He responded as follows:

I took great pains to advise you through your solicitor and before you purchased your units, of the lengthy, expensive and complicated litigation the condominium has been involved in since the year 2001. The cost of this litigation has been borne totally by the owners and mortgagees of the units which you do not own because your predecessor owners refused to do so. The attrition of the litigation has caused property values to go down during a period when property values generally have escalated ...

... During the period prior to your ownership a special assessment was levied to pay for the cost of the ongoing litigation, statutory compliance and the preparation of documents and reports you have been demanding. Your predecessor refused to pay this levy or the regular monthly ongoing common expenses. The only way the condominium can operate is through the receipt of the common expense payments and while it has been receiving the monthly remittances since you took possession, they do little more than cover the condominium's ongoing day to day operating expenses. To provide you with the material you request before the condominium recovers the pre-existing arrears would require the imposition of yet another special assessment. I am sure that you would not take kindly to receiving a request to contribute between \$150,000.00 and \$250,000.00 as your share of the funds required to pay the condominium's outstanding debt and fund the accounting, legal and capital improvement costs of complying with your demands. That being the case you can well imagine the reaction of the other unit owners who (having already paid their proportionate share of the earlier special assessment) would now be required to pay, in aggregate, approximately twice the sum which would be attributable to your units.

**28** Mr. James did not tell Mr. Pace that there were no financial statements for 2001 and 2002 and no audited statements for 2003 and 2004. He did not provide the statements that apparently existed for 2003 and 2004.

**29** In the litigation between the Corporation and Citifinancial, Citifinancial applied for the appointment of an inspector. In an affidavit filed in 2002 in support of the application, Mr. Carli, a solicitor for Citifinancial, deposed that Mr.

James "confirmed with Mr. Sherkin that, effectively, no one managed the condominium for two (2) years; that there are no financial statements and that he does not know if any records exist." When this 2002 affidavit was filed in the present application, Mr. James responded in a supplementary affidavit as follows:

... Carli is purporting to interpret and bolster the content of telephone conversations allegedly to have taken place between Citifinancial's litigation counsel, Mr. Kevin Sherkin (Sherkin) and myself. I categorically deny the the third hand interpretation attested to by Carli and again insist that Sherkin, like any competent counsel, would immediately seek to document "convenient" alleged admissions on my part. Significantly, there was never a letter produced "confirming" the alleged admissions which would put me to the task of denial. The one conversation I did have with Sherkin related solely to the existence and preparation of financial statements by an accountant I had hired at the expense of the condominium corporation. An examination of Exhibit '15' of my earlier affidavit will reflect the lack of detail of the financial statements from 1998 to 2002 as opposed to the years 2003 to 2007, the former being the work product of the accountant who I advised Sherkin was engaged to prepare the financial statements which the condominium corporation had been unable to commission due to the non-receipt of approximately one third of its projected annual revenue since Citifinancial took possession of the Mcflow units.

**30** The financial statements produced by Mr. James in this proceeding and referred to above are for 2003, 2004, 2005, 2006 and 2007. There is no indication anywhere in the material as to who prepared the statements. They do not appear to be audited. There are no financial statements before 2003. There is a document entitled "Summary" which sets out a loss figure for each of the years 1998, 1999, 2000, 2001 and 2002.

*Receipt of the Corporation's Money*

**31** Subsection 115(1) of the *Condominium Act* provides that:

A person who receives money on behalf of or for the benefit of the corporation, including money received from owners as contributions to the common expenses or the reserve fund, shall hold the money, together with the interest and other proceeds earned from investing it, in trust for the performance by the corporation of its duties and obligations.

**32** Subsection 115(9) provides that:

A person who receives money under subsection (1) shall keep records relating to the receipt and disposition of all money under this section and shall upon reasonable notice and at all reasonable times, make the records available for examination by the corporation, an owner or a mortgagee."

**33** Mr. James, in his affidavit, states that the Corporation has received all monthly common expense payments for the other units. He further states that the other mortgagees have provided \$450,000.00 pursuant to a 2004 special assessment, \$1,200,000.00 for the 2009 special assessment (in advance of the special assessment notice) and an additional \$350,000.00 for a deposit for roof repairs. He attaches what he refers to as a 'certificate of deposit' with TD Canada Trust in the amount of \$2,000,000.00. The date of issue on the document is October 27, 2008 and the maturity date is October 27, 2009.

**34** It is unclear when the monies were received. It appears that they were received by Mr. James. It is not explained why the deposit for the roof repair would be in a GIC rather than being paid out for the repair which, according to e-mail communications between the City of Orillia and the Corporation's Property Manager, are now complete.

**35** The special assessment of \$15,000.00 per unit which would have produced the \$450,000.00 referred to by Mr. James was levied in 2004. However, this amount does not appear in the financial statements of 2004, 2005, 2006 or 2007. There is no explanation of why the amount would appear suddenly in 2008 as part of the \$2,000,000.00 deposit.

**36** Mr. James, in his affidavit, states that the Corporation has been forced to borrow money from the mortgagees of the other units in order to meet its obligations and make repairs. He does not explain why the \$2,000,000.00 has not been used to finance the repairs. There is no indication of any indebtedness for such loans in the financial statements.

**37** There is no indication of who has control over the account containing the \$2,000,000.00.

*Conclusions on the mismanagement of the Affairs of the Corporation*

**38** In light of the serious deficiencies in the records of the Corporation in addition to the other aspects of mismanagement noted in paragraphs 24 and 25, I am satisfied that substantial misconduct or mismanagement or both in relation to the affairs of the Corporation has been demonstrated.

***Whether there is a struggle within the Corporation among competing groups such as to impede or prevent proper governance of the Corporation***

**39** In concluding that there is a significant struggle between competing factions I rely on the last three paragraphs of Mr. James' May 13, 2009 affidavit which states as follows:

At the end of the day, this development will never be regularized and its benefits maximized until all forty-four (44) unit owners work together. This has not been the case since 2001 as Citifinancial, 145 and 165 have systematically pillaged this Condominium Corporation for their own ends.

After the events of the last five (5) years and in particular the current proceedings, it is obvious that Tomkinson and Pace must be eliminated as owners. Even McFlow concedes this to be the case by its issuance of its Notice of Sale. While McFlow would be a candidate to join with the other thirty (30) unit owners (having the only real interest in the McFlow units) to work to resolve the issues, McFlow's belated action after five and one half (5 1/2) years of indifference is hardly conducive to engendering the trust of those remaining unit owners.

Better to let the chips fall where they may through a sale by the Condominium Corporation. While it is arguable that the remaining thirty (30) units owners are the most interested and likely to be the highest bidders, it is equally true that the prospect of ending the eight (8) years of purgatory they have endured might also cause them to be the highest bidders ...

The excerpted passage is representative of the tenor of much of the affidavit material filed by Mr. James. It is clear that there has been an ongoing and bitter battle between the owners/mortgagees of the 30 units for whom Mr. James speaks and the 14 units for which McFlow is the mortgagee.

***Whether only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the Corporation***

**40** Mr. James speaks for the Corporation in these proceedings. He has been representing the Corporation for the past fifteen years and appears to have had the responsibility of managing the condominium's affairs. Mr. James has not been able to manage the affairs of the Corporation. He has expressed the opinion that the affairs cannot be regularized unless the owners of the 14 units are "eliminated". He has, in the past, represented unit owners and mortgagees of the remaining units. Mr. James is not able to manage the affairs of the Corporation and there is no other identifiable person or body capable of governing the Corporation. There is no doubt that the affairs of the Corporation must be put in order and that this must occur as soon as possible. There is no alternative to the appointment of an administrator to accomplish that task. I am conscious of the admonition that the democratic government of the community should not be overriden unless absolutely necessary. In this case, there is no evidence of any democratic process. Even had there been some sign of democracy, the state of mismanagement and dysfunction is such that I would nevertheless have concluded that the immediate appointment of an administrator was necessary.

**The freezing of funds held in an account described by Kenneth James in his affidavit**

**41** McFlow seeks an order freezing the \$2,000,000.00 held in the account described by Mr. James. In light of the order that I am making appointing an administrator, I am not satisfied that an order freezing the funds is necessary or appropriate. If the money belongs to the Corporation it should be available to the administrator.

**An order allowing the Applicant to exercise its power of sale over the units and an order prohibiting the Respondents from interfering with the exercise of the power of sale by the Respondents and prohibiting the Respondents from selling the units.**

**42** McFlow also seeks to control the sale of the units and seeks an interlocutory order giving it control over the sale. McFlow alleges that the Corporation and Mr. James will use the Corporation's right to sell the units as a vehicle to take control over the condominium and to deprive McFlow of the full value of the property. In light of the order that an administrator be appointed, it is not necessary that McFlow control the sale.

## Order

43 I have reviewed the *curriculum vitae* of the proposed administrator and the consent filed. I agree that he is qualified to act as administrator. I therefore order that:

1. Joseph L. Vero (the "Administrator") is hereby appointed as the Administrator of the Simcoe Condominium Corporation No. 27 (the "Corporation") effective immediately, and shall remain as administrator until further order of this Court.
2. The powers of the Corporation's board of directors be and are hereby suspended until further order of this Court.
3. The Administrator shall manage the affairs of the Corporation as if he were the board of directors of the Corporation and, without in any way limiting the generality of the foregoing, the Administrator is hereby expressly empowered and authorized to do any of the following where the Administrator considers it necessary or desirable:
  - (a) obtain insurance for the Corporation in accordance with the Act;
  - (b) determine and collect, as he deems fit, the common expenses payable by each until owner of the Corporation for the proper operation of the Corporation in accordance with the Corporation's declaration;
  - (c) levy and collect such special assessment(s) as the Administrator deems fit against the units of the Corporation for the proper operation of the Corporation in accordance with the Corporation's declaration;
  - (d) enter into or terminate contracts on behalf of the Corporation for the management of the Corporation's property of any kind or nature whatsoever (the "Property");
  - (e) have exclusive control and possession of all of the Corporation's records;
  - (f) retain legal counsel to advise the Administrator in relation to the Corporation's affairs and to assist the Administrator in carrying out the orders of this Court;
  - (g) retain an accountant and auditor to prepare audited financial statements for the Corporation;
  - (h) employ such advisors and experts as the Administrator deems advisable to carry out the required maintenance and repairs to the Property;
  - (i) prepare and sign status certificates on behalf of the Corporation;
  - (j) be the sole signing officer of the Corporation, with the power to delegate such function, on all of the Corporation's bank accounts and all documents executed on behalf of the Corporation; and
  - (k) take any steps reasonably incidental to the exercise of these powers.
4. The (i) Corporation, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order shall forthwith advise the Administrator of the existence of any of the Property in such person's possession or control and shall forthwith deliver all such Property to the Administrator.
5. Any expenditure or liability which shall properly be made or incurred by the Administrator, including the fees of the Administrator and the fees and disbursements of its legal counsel, shall be allowed to it in passing its accounts.
6. The Administrator and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Administrator and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.
7. Prior to the passing of its accounts, the Administrator shall be at liberty from time to time to apply reasonable amounts, out of the Corporation's monies, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Administrator or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.
8. The Administrator may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.



9. Cross-examinations on affidavits served in this matter shall be completed by May 29, 2009.
10. The Applicant's factum shall be served 7 business days before the hearing of the application and the Respondents' factum shall be served 5 business days before the hearing of the Application.

**44** I further order that the balance of this application shall be adjourned to a date to be set by the Commercial list.

M.D. FORESTELL J.

cp/e/qlqs/qlmxb

<sup>1</sup> *Skyline Executive Properties Inc. v. Metropolitan Toronto Condominium Corporation No. 1385* (2002), 17 R.P.R. (4th) 152 (Ont. S.C.) citing *Lum v. Strata Plan VR519* [2001] B.C.J. No.641 (B.C.S.C.)

<sup>2</sup> *Cook v. Strata Plan No. 50*, [1995] B.C.J. No. 2882.

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