



COURT FILE NUMBER 2201 13540
 COURT Court of King's Bench of Alberta
 JUDICIAL CENTRE Calgary

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 Dec 2 2022

PLAINTIFFS **BANCORP FINANCIAL SERVICES INC., BANCORP BALANCED MORTGAGE FUND II LTD., and BANCORP GROWTH MORTGAGE FUND II LTD.**

DEFENDANTS **ALVARO DEVELOPERS INC., ALVARO LIMITED PARTNERSHIP, CRUZ CUSTOM HOMES LTD., 1770374 ALBERTA INC., SUNSET HOMES LTD., DANIEL RODOLFO ASTETE-CRUZ, and PEDRO ARNOLDO OCANA MULLER**

DOCUMENT **STATEMENT OF CLAIM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **Fasken Martineau DuMoulin LLP**
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NOTICE TO DEFENDANTS

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Statement of facts relied on:

1. Bancorp Financial Services Inc. (the “**BFS**”) is a corporation incorporated under the laws of British Columbia, extra-provincially registered in Alberta, and doing business in the City of Calgary, and elsewhere, in the Province of Alberta.
2. Bancorp Balanced Mortgage Fund II Ltd. (“**BBMF**”) is a corporation incorporated under the laws of British Columbia, extra-provincially registered in Alberta, and doing business in the City of Calgary, and elsewhere, in the Province of Alberta.
3. Bancorp Balanced Mortgage Fund II Ltd. (“**BGMF**” and, together with BFS and BBMF, the “**Lender**”) is a corporation incorporated under the laws of British Columbia, extra-provincially registered in Alberta, and doing business in the City of Calgary, and elsewhere, in the Province of Alberta.
4. Alvaro Developers Inc. (the “**Trustee**”) is a corporation incorporated under the laws of Alberta and doing business in the City of Calgary, and elsewhere, in the Province of Alberta.
5. Alvaro Limited Partnership (the “**Beneficial Owner**” and, together with the Trustee, the “**Borrower**”) is a limited partnership formed under the laws of Alberta, and the Trustee is its general partner.
6. Cruz Custom Homes Ltd. (“**Cruz**”) is a corporation incorporated under the laws of Alberta and doing business in the City of Calgary, and elsewhere, in the Province of Alberta.
7. 1770374 Alberta Inc. (“**177**”) is a corporation incorporated under the laws of Alberta and doing business in the City of Calgary, and elsewhere, in the Province of Alberta.
8. Sunset Homes Ltd. (“**Sunset**”) is a corporation incorporated under the laws of Alberta and doing business in the City of Calgary, and elsewhere, in the Province of Alberta.
9. Daniel Rodolfo Astete-Cruz (“**Astete-Cruz**”) is an individual residing in the city of Calgary and is the director of the Trustee and Cruz.

10. Pedro Arnold Ocana Muller (“**Muller**”) is an individual residing in the city of Calgary and is the director of 177 and Sunset.

The Loans, Guarantees, and Security

11. In early September 2019, the Lender and the Borrower entered into discussions regarding the Lender’s providing to the Borrower first mortgage construction financing to build a residential development, which was to comprise 10 townhomes and two condominium units (the “**Development**”), on two parcels of land located at 428 and 430 3rd Avenue, Northeast, in Calgary, Alberta, and legally described as (together, the “**Lands**”):

Title Number: 181 195 112

Plan 1332N, Block 2, Lot 1, Excepting thereout that portion of Lot 1 lying east of a line drawn 37.5 feet east from the west boundary and all of Lots 2 to 4 inclusive, excepting thereout all mines and minerals from Lot 2 and the [sic] that portion of Lot 3 which lies to the east of the westerly 7 feet throughout of the said Lot 3;

Title Number: 201 009 726

Plan 1332N, Block 2, all that portion of Lot 1 which lies to the east of a line drawn parallel with and 37.5 feet perpendicularly distant easterly from the west boundary of said lot.

12. By Commitment Letter dated September 23, 2019, and as amended and restated from time to time, (the “**Loan Agreement**”), the Lender agreed to loan the Borrower the principal sum of \$5,350,000 (the “**Loan**”) to construct the Development. Pursuant to the Loan Agreement, the Loan is repayable upon demand.
13. Pursuant to the Loan Agreement, all obligations of the Borrower to the Lender, payment of the amount owing under the Loan including interest and all other costs, charges, and expenses associated with the recovery of the foregoing amounts, including legal costs on a solicitor and own client, full indemnity basis (the “**Indebtedness**”) are secured by, among other things (collectively, and together with the Loan Agreement, the “**Security**”):

- (a) a Collateral Mortgage and Assignment of Rents and Leases granted by the Trustee in the principal amount of \$5,350,000, which was registered against title to the Lands on November 26, 2019 under registration numbers 201 011 929 and 201 011 930 (together, the “**First Mortgage**”);
 - (b) a General Security Agreement dated November 6, 2019, granted by the Borrower in favour of the Lender, pursuant to which the Borrower granted a security interest in all present and after acquired property of the Borrower located at, related to or derived from the Lands (collectively, the “**Property**”) (the “**GSA**”); and
 - (c) a Guarantee and Postponement of Claims dated November 6, 2019, for an unlimited amount granted by each of the Guarantors, jointly and severally, in favour of the Lender (the “**Guarantee**”), pursuant to which the Guarantors agreed to repay the indebtedness of the Borrower to the Lender for an unlimited amount, plus all other amounts, including interest and costs, due under the Guarantee (the “**Guarantee Liability**”).
14. The terms of the First Mortgage and the GSA provide, among other things, that:
- (a) the Lender may appoint a receiver over the Lands, any income generated thereby, and any personal property of the Borrower relating thereto;
 - (b) waiver, or permitting of an extension of time for the performance of, any of the provisions of the Security shall not be construed as a waiver of any subsequent or other default; and
 - (c) the Borrower shall pay the costs of and relating to the enforcement of the Security on a solicitor-and-own-client full indemnity basis.
15. The Guarantee among other things, provides that:
- (a) The Guarantors unconditionally guarantee payment of the Borrower’s obligations to the Lender, to the extent the Borrower’s obligations and liabilities are arising out of or in any way connected to the Loan or the Loan Documents;

- (b) The Guarantors unconditionally indemnify the Lender against costs, loss, damage, expense or liability suffered by the Lender as a result of the Borrower's failure to pay its obligations when due;
 - (c) The Guarantee is in addition to and not in any way prejudiced by or merged with any other guarantee, indemnity or security at any time held by the Lender;
 - (d) All indebtedness and liabilities of the Borrower to the Guarantors or any of them is assigned to the Lender and postponed to the liabilities to the Guarantors, and all monies received by the Guarantors is received in trust for the Lender and is forthwith required to be paid to the Lender; and
 - (e) The Guarantors waive any right they may have of requiring the Lender to proceed against or enforce any other rights or security or claim for payment from any person before claiming from the Guarantors under the Guarantee.
16. Prior to the Lender extending the Loan to the Borrower, the Borrower had entered into a vendor take back mortgage ("VTB") in the amount of \$1,140,000 in order to purchase the property. The VTB was subordinated and postponed to the Lender's First Mortgage through a Subordination and Standstill Agreement entered into between the VTB holder, the Lender, and the Borrower, on or about December 4, 2019 (the "**Subordination Agreement**").

Other Stakeholders

17. As at November 8, 2022, there were numerous registrations and encumbrances registered against title to the Lands. In particular, there are 6 builders' liens registered against the Lands, 3 agreements charging the Lands, and 2 writs. Additionally, there are several registrations pending at the land titles office respecting the Lands. The charges are summarized as:

Type of Encumbrance	Encumbrancer	Value	Date of Registration
Agreement Charging Land	Pedro Ocana Muller	Not specified	January 21, 2021

Builder's Lien	Foothills Fire Protections Ltd.	\$63,381.00	March 5, 2021
Agreement Charging Land	BESTPRO Construction Ltd.	Not specified	March 24, 2021
Builder's Lien	Q Construction Management Ltd.	\$130,543.00	March 24, 2021
Builder's Lien	Creative Solutions Contracting Services Ltd. c/o Beaumont Church LLP	\$39,084.00	March 26, 2021
Builder's Lien	Q Construction Management Ltd.	\$101,200.00	May 1, 2021
Builder's Lien	BESTPRO Construction Ltd.	\$39,102.00	May 3, 2021
Agreement Charging Land	King Construction Ltd.	Not specified	August 27, 2021
Writ	Lafarge Cananda Inc.	\$155,461 + costs if any	October 5, 2021
Writ	Masuch Law LLP	\$23,859.00 + costs if any	November 10, 2021
Builder's Lien	Lux Windows and Glass Ltd.	\$62,489.00	May 17, 2022

Default under the Security and Forbearance Agreement

18. On January 31, 2021, the Loan matured without extension.
19. By August 11, 2021, the Borrower breached the terms of the Loan Agreement and the Security by, among other things, failing to make payments when due (the “**First Default**”).
20. On August 11, 2021, the Lender made demand on the Borrower and Guarantors for payment of the Indebtedness and provided notice of its intention under section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 to enforce the Security.
21. Between about August 11 2021, and August 19, 2022, the Lender and the Borrower engaged in discussions regarding the First Default and repayment of the Loan, but no formal agreement crystallized.

22. On August 19, 2022, the Lender made further demand on the Borrower and Guarantors for payment of the Indebtedness and provided notice of its intention under section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 to enforce the Security.
23. On September 26, 2022, the Lender, Borrower, and Guarantors entered into a forbearance agreement (the “**Forbearance Agreement**”), pursuant to which the parties agreed, among other things, that:
- (a) the Borrower had defaulted under the terms of the Security, and the Borrower and Guarantors had requested the Lender forbear for a period of time from realizing on its security;
 - (b) as at August 19, 2022, the Indebtedness totalled \$4,717,516.00, and the Borrower and the Guarantors were liable therefor;
 - (c) the Security is valid and enforceable and would remain so following execution of the Forbearance Agreement;
 - (d) the Borrower would make payments on account of the Indebtedness in accordance with the schedule set forth therein (the “**Payment Schedule**”), which, among other things, provided that:
 - (i) on October 8, 2022 the Borrower would pay the deposit payable pursuant to the Accepted Offer (as defined below) to the Lender; and
 - (ii) the Indebtedness would be paid in full by November 30, 2022 (the “**Deadline**”);
 - (e) by the Deadline, the Borrower would complete the sale of the Lands pursuant to the Commercial Purchase Contract among the Trustee and 1188716 B.C. Ltd., or its assignee (the “**Potential Purchaser**”) dated August 24, 2022 (the “**Accepted Offer**”); and
 - (f) upon the occurrence of an Event of Default (as defined therein) and including failure by the Borrower to make payment in accordance with the Payment Schedule,

the Lender may, without further notice to the Borrower or Guarantors, pursue its remedies under the Security, including the appointment of a receiver.

24. The Borrower did not make any payments pursuant to the Payment Schedule as set forth in the Forbearance Agreement.

Status of the Development

25. The Development, once completed, is to comprise a parkade and 12 residential units, 7 of which are situated on the first parcel of the Lands and 5 of which are situated on the second parcel of the Lands.
26. Construction of the Development has halted and the site is vacant. Currently, the Development is completed to the point that each of the 7 units are at lock-up. This means that they have walls, windows and doors such that each unit can be independently secured. The other 5 units only have their foundation poured. The parkade in relation to the Development is also completed.
27. In or about September 2022, the Lender learned that the Borrower was in arrears on its insurance payments and that the insurance policy respecting the Development was at risk of lapsing. As a result, on October 1, 2022, the Lender put in place a commercial general liability insurance policy respecting the Development, which policy will expire on December 1, 2022.
28. The Borrower has failed to maintain its property tax payments respecting the development, and there are presently property tax arrears due and owing by the Borrower to the City of Calgary.
29. The fencing surrounding the Development has been compromised, in part due to the Borrower's failure to pay the fencing contractor. As a result, the Development is accessible from the street and individuals have been seeking shelter in the parkade and completed units of the Development.

30. On or about November 7, 2022, the Lender retained the services of Regent Protection Services Ltd. (the “**Regent**”) to provide site security for the Development and to prevent further trespasses.

Further Default by the Borrower and Amounts Owing

31. The Borrower breached the terms of the Loan Agreement, Forbearance Agreement, and the Security, as follows:

- (a) The Borrower has failed to repay balances due and owing under the Loan Agreement and Security as they come due;
- (b) The Borrower has failed to make the required payment under the Payment Schedule pursuant to the Forbearance Agreement;
- (c) The Borrower has permitted the Charges to accrue against the Lands;
- (d) The Borrower has permitted substantial property tax arrears to accrue against the Lands;
- (e) The Borrower has failed to pay or promptly pay all insurance premiums on all insurance policies in respect of the Lands and in favour of the Lender; and
- (f) The Borrower has failed to keep the Lands and the Development in good and substantial repair;

(collectively the “**Events of Default**”).

32. Since the Events of Default, the Lender and the Borrower have discussed the mechanics of completing the sale of the Lands to the Potential Purchaser under the Accepted Offer. It has become apparent that the Trustee cannot convey clear title to the Lands to the Potential Purchaser on account of the registration of the Charges.
33. The Borrower and the Guarantor have failed, neglected, or refused to repay the Loan to the Lender. As at November 7, 2022 there remained \$4,585,157.88 due and owing by the Borrower to the Lender pursuant to the Loan Agreement, plus all further accruing interest

payable in accordance with the Loan, plus all costs incurred with respect to the collection thereof, including legal fees on a solicitor and own client, full indemnity basis.

34. The entire sum of the Indebtedness, plus all further accruing interest payable in accordance with the Loan plus all costs incurred with respect to the collection thereof, including legal fees on a solicitor and own client, full indemnity basis is a just debt and properly due and owing by the Borrower and the Guarantors to the Lender.
35. Alvarez & Marsal Canada Inc. has consented to act as receiver and manager over the Borrower's property, including the Lands.

Remedy sought:

36. The Plaintiffs, Bancorp Financial Services Inc., Bancorp Balanced Mortgage Fund II Ltd., and Bancorp Growth Mortgage Fund II Ltd. claim as against each of the Defendants:
 - (a) A declaration that the Defendants are in default of payment of the Indebtedness;
 - (b) A declaration that the Security is valid, binding, and enforceable in accordance with its terms;
 - (c) A declaration that the Guarantee has become enforceable and that such Guarantee constitutes valid and enforceable security in accordance with its terms;
 - (d) a declaration that the Lender's security interests pursuant to the Security rank *vis a vis* the secured Property in priority to all other interests, security or otherwise;
 - (e) an Order for Possession of the Property secured by the Security;
 - (f) a Preservation Order over the secured Property;
 - (g) judgment for all amounts owing under the Loan, plus interest including and up to the date of judgment, or alternatively, pre-judgment and post-judgment interest pursuant to the *Judgment Interest Act*, RSA 2000, c. J-1, as amended, or on such terms this Honourable Court deems just;

- (h) the appointment of a Receiver or Receiver and Manager over the property, assets and undertaking of the Borrower, pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended, and the *Judicature Act*, RSA 2000, c J-2;
- (i) costs on a solicitor and own client full indemnity basis, or on such basis that this Honourable Court deems just; and
- (j) such further and other relief as this Honourable Court deems just.

NOTICE TO THE DEFENDANTS

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's(s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.