

PRECEDENT

- Notice of Application for Declaration

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

123456 ONTARIO INC., JOHN SMITH
and JANE DOE

Applicants

and

7891011 ONTARIO LTD.

Respondent

**APPLICATION UNDER RULE 14 OF THE *RULES OF CIVIL PROCEDURE*
and THE *MORTGAGES ACT*, R.S.O. 1990, c. M.40**

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on June 12, 2000 at 10:00 a.m. at 393 University Avenue, 10th Floor, Toronto, Ontario, M5G 2M2.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38C prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES

ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date

Issued by _____
Local registrar

Address of court office:
393 University Avenue
10th Floor
Toronto, Ontario
M5G 2M2

TO: 7891011 ONTARIO LTD.

APPLICATION

1. The Applicants make application for:

- a) An order declaring that the Notice of Power of Sale dated May 31, 2000 delivered by the Respondent with respect to a mortgage dated April 1, 1990 (the "First Mortgage") respecting the Property is null and void and of no effect, and that it is not in compliance with the *Mortgages Act*, R.S.O. 1990, c.M.40;
- b) an Order declaring that each or any of John Smith and Jane Doe, have no financial obligations to the Respondent with regard to the Property;
- c) costs of this application, together with attendant transaction levies and applicable Goods and Services Tax; and;
- d) such further and other relief as to this Honourable Court may seem just.

2. The grounds for the application are:

- a) On April 1, 1990, 123456 Ontario Inc. ("123456") granted the First Mortgage to 7891011 Ontario Ltd.;
- b) Each of John Smith and Jane Doe agreed to be guarantors;

- c) On April 1, 1994, all of the Applicants entered into a new agreement with the Respondent to replace the First Mortgage (the “Second Mortgage”). Under the Second Mortgage, John Smith and Jane Doe ceased to be guarantors;

With respect to paragraph 1(a):

- d) Section 31 of the *Mortgages Act* requires that the Notice of Power of Sale specify the mortgage which gives the mortgagee the right to exercise the self help remedy of a power of sale. The mortgage referred to in the Notice of Power of Sale is not the mortgage under which the Respondent can exercise any rights, as it has been materially changed by the Second Mortgage;
- e) The Notice of Power of Sale fails to disclose that the mortgage referred to in the Notice of Power of Sale was materially changed by the Second Mortgage;
- f) The Applicants are prejudiced as a result of the deficient form and content of the Notice of Power of Sale;
- g) Section 31 of the *Mortgages Act*, R.S.O. 1990, c.M.40;
- h) Rule 14 of the *Rules of Civil Procedure*; and,

- i) Such further and other grounds as counsel may advise and this Honourable Court permit.

3. The following documentary evidence will be used at the hearing of the application:

- a) The Affidavit of John Smith and Exhibits thereto; and,
- b) Such further and other evidence as counsel may advise and this Honourable Court permit.