

Form 11
[Rule 3.31]



Clerk's Stamp

COURT FILE NUMBER 2003 06728

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF (DEFENDANTS BY COUNTERCLAIM) ROMSPEN MORTGAGE LIMITED PARTNERSHIP and ROMSPEN INVESTMENTS CORPORATION

DEFENDANTS (PLAINTIFFS BY COUNTERCLAIM) 3443 ZEN GARDEN LIMITED PARTNERSHIP, LOT 11 GP LTD, LOT 11 LIMITED PARTNERSHIP, ECO-INDUSTRIAL BUSINESS PARK INC, ABSOLUTE ENERGY RESOURCES INC, ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC and DANIEL ALEXANDER WHITE

PLAINTIFF(S) BY COUNTERCLAIM 3443 ZEN GARDEN LIMITED PARTNERSHIP, LOT 11 GP LTD, LOT 11 LIMITED PARTNERSHIP, ECO-INDUSTRIAL BUSINESS PARK INC, ABSOLUTE ENERGY RESOURCES INC, ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC and DANIEL ALEXANDER WHITE

DEFENDANTS BY COUNTERCLAIM ROMSPEN MORTGAGE LIMITED PARTNERSHIP, ROMSPEN INVESTMENTS CORPORATION, RICHARD WELDON and WESLEY ROITMAN

DOCUMENT COUNTERCLAIM

PARTY FILING THIS DOCUMENT: 3443 ZEN GARDEN LIMITED PARTNERSHIP, LOT 11 GP LTD, LOT 11 LIMITED PARTNERSHIP, ECO-INDUSTRIAL BUSINESS PARK INC, ABSOLUTE ENERGY RESOURCES INC, ABSOLUTE ENVIRONMENTAL WASTE MANAGEMENT INC and DANIEL ALEXANDER WHITE

**ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT**

Attention: Jonathan Hillson

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Note: State below only facts and not evidence (Rule 13.6)

**Statement of facts relied on and any matters that defeat the claim of
the Plaintiff:**

NOTICE TO DEFENDANT BY COUNTERCLAIM.

You are being sued. You are a defendant by Counterclaim.

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. The Plaintiff (Defendant by Counterclaim), Romspen Mortgage Limited Partnership ("Romspen LP"), is an Ontario partnership that operates in Edmonton, Alberta and elsewhere in Alberta.
2. The Plaintiff (Defendant by Counterclaim), Romspen Investment Corporation ("Romspen Investment"), is an Ontario corporation that operates in Edmonton, Alberta and elsewhere in Alberta.
3. The Defendants by Counterclaim, Richard Weldon ("Mr Weldon") and Wesley Roitman ("Mr Roitman"), reside in Toronto, Ontario or elsewhere in Ontario.
4. At all material times:
 - (a) Mr Weldon was the managing partner of Romspen LP;
 - (b) Mr Roitman was the general managing partner of Romspen LP;

- (c) Mr Weldon and Mr Roitman were the controlling minds of Romspen Investment.
5. The Defendant (Plaintiff by Counterclaim), 3443 Zen Garden Limited Partnership ("Zen Garden LP"), is a Texas limited partnership. 3443 Zen Garden GP LLC ("Zen Garden GP") is the general partner of Zen Garden LP.
6. The Defendants (Plaintiffs by Counterclaim), Lot 11 GP Ltd ("Lot 11 GP"), Eco-Industrial Business Park Inc ("Eco"), Absolute Energy Resources Inc ("Absolute Energy") and Absolute Environmental Waste Management Inc ("Absolute Environmental"), are Alberta corporations that operate in Edmonton, Alberta and elsewhere in Alberta.
7. The Defendant (Plaintiff by Counterclaim), Lot 11 Limited Partnership ("Lot 11 LP"), is an Alberta Limited Partnership that operates in Edmonton, Alberta, and elsewhere in Alberta.
8. The Defendant (Plaintiff by Counterclaim), Dan White, is an individual who resides in Edmonton, Alberta.
9. Romspen LP and Romspen Investment, or either of them, are mezzanine lenders that provide loans with interest in excess of normal market rates and, thereafter, syndicate those high interest loans to private investors.
10. At all material times, the State of Texas had a loan program that was available for commercial, industrial and multi family residential properties pursuant to the *Property Assessed Clean Energy Act* ("the PACE Program").
11. Under the terms of the Pace Program:
- (a) low-cost, long term PACE Loans would be provided to property owners to assist in funding the construction of buildings that employed "green" technologies such as renewable energy resources and environmentally sustainable designs;
 - (b) if secured, PACE Loans were to be repaid by an assessment added to the property taxes on a property; and

- (c) PACE Loans were to have priority over existing encumbrances and mortgages in respect of repayment.

12. In 2014:

- (a) MOS8 Partners Ltd (“MOS8”) was a Texas partnership that was investigating the purchase of lands in Austin, Texas that were municipally described as 3443 Ed Bluestein in Austin, Texas (“the Austin Lands”);
- (b) MOS8 GP, LLC (“MOSG GP”) was the general partner of MOS8;
- (c) MOS8 and MOS8 GP were formed for the express purpose of purchasing the Austin Lands;
- (d) Romspen LP and Romspen Investments owned or directly or indirectly controlled MOS8 and MOS8 GP as Mr Weldon was – at a minimum - the co-manager of MOS8 and MOS8 GP;
- (e) Romspen LP and Romspen Investment, or any of them, had extended loans and credit facilities to Mr White that had not been fully advanced; and
- (f) Romspen LP and Romspen Investment, or any of them, agreed to investigate and source out investment opportunities for Mr White that would enable Mr White to make use of the unadvanced portion of the loans and credit facilities that had previously been extended to Mr White by Romspen LP and Romspen Investment, or any of them.

13. Thereafter, Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, made representations to Mr White (“the Representations”).

14. The Representations included:

- (a) written representations of October 27, 2014 that:
 - (i) the Austin Lands were perfect for Mr White;
 - (ii) it was advisable that Mr White use his loan with Romspen LP and Romspen Investment, or either of them, to invest in the Austin lands;
 - (iii) the Austin Lands could be acquired for \$5,000,000 to \$7,000,000;

- (b) other verbal or written representations that – if Mr White invested in the Austin Lands – such an investment would be a “valet” investment such that Romspen LP, Romspen Investment and Mr Weldon, or any one or combination of them, would manage the development, leasing and sale of the Austin Lands and Mr White would earn a significant profit in a short period of time; and
 - (c) such further and other representations that shall be proven at Trial.
- 15. Mr White reasonably relied upon the Representations and invested money in MOS8 as a result of the Representations.
- 16. Mr White would not have invested money in MOS8 if the Representations had not been made.
- 17. Unbeknownst to Mr White, however, the Representations were untrue and incorrect. Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, knew that the Representations were untrue and incorrect or, alternatively, made them negligently.
- 18. On August 31, 2015, Rompsen Investment and MOS8 entered into a;
 - (a) Co-development Agreement whereby Romspen Investment agreed to co-develop the Austin Lands with MOS8;
 - (b) Co-Management Agreement whereby Romspen Investment agreed to co-manage the Austin Lands with MOS8;
 - (c) Co-Leasing Agreement whereby Romspen Investment agreed to co-lease out the Austin Lands with MOS8; and
 - (d) Co-Financing and Co-Sales Agreement whereby Romspen Investment agreed to co-finance and co-sell the Austin Lands with MOS8.
- 19. On September 19, 2015, MOS8 Partners Ltd (“MOS8”), purchased the Austin Lands for \$13,000,000 USD:
- 20. Although MOS8 may have held legal title to the Austin Lands:
 - (a) Romspen LP and Romspen Investments owned or directly or indirectly controlled MOS8 and MOS8 GP as Mr Weldon was – at a minimum - the co-manager of MOS8 and MOS8 GP; and

- (b) the Austin Lands had been purchased using money that had been invested by Mr White or, alternatively, raised on the strength of assets owned by Mr White.

21. Romspen LP and Romspen Investment, or either of them, lent money and provided credit facilities to MOS8 to fund the development of the Austin Lands (“the Romspen / MOS8 Loan”).

22. Thereafter, Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, installed Christopher Milam as a manager of MOS8 and granted an ownership share in MOS8 to Mr Milam.

23. The selection and installation of Christopher Milam as a manager of MOS8 was an act of negligence or recklessness by Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, as Mr Weldon was incapable of or unable to competently perform his duties as the manager of MOS8.

24. Moreover, Mr Milam:

- (a) failed to act honestly and in good faith with a view to the best interests of MOS8 and Mr White when exercising his powers and discharging his duty as an officer or corporate director;
- (b) failed to exercise the required care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances when exercising his powers and discharging his duty as an officer or corporate director by, among other things, attempting to convert the Austin Lands into a Data Centre when such a decision was not a commercially reasonable and not financially viable given the lack of demand for such a project;
- (c) failed to comply with the articles, bylaws and any unanimous shareholder agreements of MOS8;
- (d) failed to disclose any and all information that Mr Milam had in relation to any matter relating to the financial interests of MOS8;
- (e) failed to competently plan the development of the Austin Lands;
- (f) failed to competently manage the development of the Austin Lands;
- (g) misused the funds and assets of MOS8;

- (h) allowed the assets of MOS8 on the Austin Lands to be removed by third parties without authorization or, alternatively, unlawfully removed the assets of MOS8 from the Austin Lands;
- (i) such further and other acts as shall be proven at trial.

25. The above negligence, lack of good faith, breaches of duty, breaches of fiduciary duty and other conduct was:

- (a) known or ought to have been known by Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them;
- (b) allowed to continue by Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, to the detriment of Mr White and for the benefit of themselves.

26. As a result of these actions by Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, MOS8 was unable to successfully develop the Austin Lands and defaulted on the Romspen / MOS8 Loan. At the point of default, MOS8 owed at least \$35,000,000 on the Romspen / MOS8 Loan.

27. Consequently, Mr White demanded that his investment in MOS8 be returned to him and, ultimately, MOS8 sold the Austin Lands to Zen Garden LP on November 14, 2016.

28. Romspen LP and Romspen Investment, or any of them, lent money and provided credit facilities to Zen Garden LP to assist in the purchase of the Austin Lands ("the First Romspen / Zen Garden Loan").

29. In connection with the First Romspen / Zen Garden Loan, however, Romspen LP and Romspen Investment, or any of them, required Zen Garden LP to assume the debts of MOS8 via a purchase money mortgage so as to make it appear that that the Romspen / MOS8 Loan was in good standing and had been satisfied.

30. After November 14, 2016, Zen Garden LP began to develop the Austin Lands with the goal of creating a 110 acre mixed-use campus that would consist of offices, hotels and retail space that would qualify for the PACE Program and a PACE Loan by

employing "green" technology, renewable energy resources and environmentally sustainable designs.

31. In 2017, Mr White and the Plaintiffs by Counterclaim were introduced to Adam Zarafshani. Mr Zarafshani described himself as a real estate developer and was the president of Panache Development and Construction Inc ("Panache"). Panache was alleged to be a Texas construction firm.

32. In early 2018, Romspen LP and Romspen Investment, or any of them, offered to lend additional money and to extend additional credit facilities to Zen Garden LP in the form of a \$125,000,000 construction loan ("the Second Romspen / Zen Garden Loan").

33. In connection with the Second Romspen / Zen Garden Loan, Romspen LP and Romspen Investment, or any of them:

- (a) sent a commitment letter on February 1, 2018 and offered to lend additional money and to extend additional credit facilities to Zen Garden LP;
- (b) agreed to not unreasonably withhold consent to Zen Garden LP securing a PACE Loan;
- (c) agreed that a PACE Loan would be a Permitted Encumbrance against the title to the Austin Lands;
- (d) demanded that Mortgages and General Assignments of Leases and Rent be registered against Lot 12 (which was described as "the remainder of SW ¼ 17-53-23-4") and two parcels of land described by Romspen LP and Romspen Investments as Lot 4 and Lot 11;
- (e) required Lot 11 LP, Lot 11 GP, Eco, Absolute Energy, Absolute Environmental and Mr White to sign Guarantees ("the Guarantees"); and
- (f) Zen Garden LP and Mr White agreed to the February 1, 2018 Commitment Letter.

34. As a result, legal duties, a duty of care and a duty of good faith and fair dealing arose between the Defendants by Counterclaim and the Plaintiffs by Counterclaim, and each of them.

35. Romspen LP and Romspen Investment, or any of them, however, acted in bad faith in connection with the negotiations in connection with the Second Romspen / Zen Garden Loan by, among other things:

- (a) demanding that the ownership structure of Zen Garden LP and Zen Garden GP be altered so as to grant Mr Zarafshani – or companies controlled by Mr Zarafshani - an ownership interest in Zen Garden LP and Zen Garden GP;
- (b) excluding Mr White from the negotiations;
- (c) insisting that negotiations be conducted by Adam Zarafshani behalf of Zen Garden LP;
- (d) imposing unconscionable terms upon the Plaintiffs by Counterclaim including a demand for excessive amounts of collateral to secure the Second Romspen / Zen Garden Loan; and
- (e) such further and other acts as shall be proven at trial.

36. Thereafter:

- (a) Romspen LP and Romspen Investments extended additional credit facilities to Zen Garden LP and began issuing draws pursuant to the Second Romspen / Zen Garden Loan;
- (b) Romspen LP and Romspen Investments provided a form of Loan Agreement to Zen Garden LP but Romspen LP and Romspen Investments never signed or accepted the terms of the Loan Agreement; and
- (c) In October 2018, Zen Garden LP secured a *bona fide* commitment from a Texas lender that was to provide Zen Garden LP a \$25,000,000 PACE Loan in connection with the development of the Austin Lands.

37. Romspen LP and Romspen Investment, or any of them, however, breached the terms of the Second Romspen / Zen Garden Loan by, among other things:

- (a) delaying the funding of draws under the Second Romspen / Zen Garden Loan without justification;
- (b) refusing to disperse the remaining amounts of the Second Romspen / Zen Garden Loan;

- (c) unreasonably refusing to consent to Zen Garden LP receiving a PACE Loan;
- (d) registered encumbrances against properties in excess of those that were agreed to under the terms of the Second Romspen / Zen Garden Loan and the February 1, 2018 commitment letter;
- (e) manufacturing circumstances which were used as a mechanism for repeatedly charging excessive and unjustified fees;
- (f) alleging that Zen Garden LP was in breach of the Second Romspen / Zen Garden Loan without justification; and
- (g) such further and other breaches as shall be proven at Trial.

38. Further, or in the alternative, Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, inserted themselves into the business operations of and interfered with the business operations of Zen Garden LP to the detriment of those business operations by, among other things:

- (a) insisting that Zen Garden LP retain Panache and Zarafshani as the general contractor for the development of the Austin Lands;
- (b) excluding Mr White from negotiations with respect to the construction contract with Panache;
- (c) directly negotiating the construction contract with Panache and by inserting terms that were detrimental to Zen Garden LP into that contract;
- (d) unlawfully paying draws under the Second Romspen / Zen Garden Loan to Panache and Mr Zarashani as opposed to providing those funds to Zen Garden LP;
- (e) demanding that:
 - (i) partnership interests in Zen Garden LP be transferred to Jefferson 1801, LLC – a Texas corporation controlled by Mr Zarafshani;
 - (ii) 50% of the membership interests in Zen Garden GP be assigned to Mr Zarafshani;
- (f) negatively interfering in the business relationship between Zen Garden LP and the subcontractors and sub-subcontractors of Zen Garden LP;
- (g) negatively interfering in the business relationships between Zen Garden LP and its realtors and potential tenants at the Austin Lands;

- (h) negatively interfering in the business relationships between Zen Garden LP and potential purchasers of the Austin Lands; and
- (i) such further and other actions as shall be proven at Trial.

39. As such, Romspen LP and Romspen Investment became joint venturers, co-developers and co-managers of the Austin Development and a Lender in Possession.

40. Further, or in the alternative, Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, owed a fiduciary duty and a duty of fidelity to the Plaintiffs by Counterclaim, and were, among other things:

- (a) required to act honestly and in good faith with a view to the best interests of the Plaintiffs by Counterclaim;
- (b) prohibited from earning unauthorized profits or undisclosed secret profits at the expense of the Plaintiffs by Counterclaim;
- (c) required to disclose any and all information that they had in relation to the financial interests of the Plaintiffs by Counterclaim;
- (d) were required to perform such further and other fiduciary acts and acts of fidelity as shall be proven at Trial.

41. Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, breached the fiduciary and other duties that they owed to the Plaintiffs by Counterclaim, and each of them, by:

- (a) failing to act honestly and in good faith in their dealings with the Plaintiffs by Counterclaim;
- (b) earning unauthorized profits or undisclosed secret profits at the expense of the Plaintiffs by Counterclaim;
- (c) failing to disclose any and all information that they had in relation to the financial interests of the Plaintiffs by Counterclaim;
- (d) failing to perform such further and other fiduciary acts and acts of fidelity as shall be proven at Trial.

42. As a result of this conduct, Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them:

- (a) became liable to the Plaintiffs by Counterclaim, and each of them, for the loss or damage that arose as a result from the above conduct of Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them;
- (b) have been unjustly enriched and the Plaintiffs by Counterclaim have suffered a corresponding deprivation and there is no juristic reason for the unjust enrichment.

43. As a result of the above conduct, Zen Garden LP issued a Notice of Default to Romspen LP and Romspen Investment on October 9, 2019.

44. In response, Romspen LP and Romspen Investment issued a Notice of Default to Zen Garden LP on October 11, 2019.

45. Although the Austin Development ultimately became the subject matter of a Consent Receivership Order in Texas, a Judgment has never been obtained against Zen Garden LP or Mr White in Texas.

46. As such, the question of who breached the Second Romspen / Zen Garden Loan Agreement or, alternatively, whether the conduct of Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, prompted a breach of the Second Romspen / Zen Garden Loan has never been finally determined by a Court of competent jurisdiction.

47. On April 15, 2020, Zen Garden LP was petitioned into bankruptcy in the State of Texas and, as a result, there is now a Texas Stay of Enforcement with respect to disputes involving Zen Garden LP – such as the question of who breached the Second Romspen / Zen Garden Loan Agreement or whether the Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, prompted a breach of the Second Romspen / Zen Garden Loan.

48. The Plaintiffs by Counterclaim have suffered loss or damage as a result of the above breaches of duty, negligence and misrepresentations, or any combination of them, including:

- (a) loss or capital investment;
- (b) loss of profit;
- (c) loss of corporate opportunity;
- (d) a diminution of the value of their assets as a result of the wrongful registration of encumbrances against those assets; and
- (e) such further and other loss or damage and will be proven at trial.

Remedy sought:

49. Wherefore the Plaintiffs by Counterclaim claim against the Defendants by Counterclaim and each of them;

- (a) a Declaration that Romspen LP and Romspen Investment, or any of them, breached the Second Romspen / Zen Garden Loan;
- (b) a Declaration that Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, breached the fiduciary duties and duties of fidelity that were owed to the Plaintiffs by Counterclaim;
- (c) Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, have been unjustly enriched at the expense of the Plaintiffs by Counterclaim;
- (d) an Order directing that Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, be disgorged of any profit that was earned as a result of any breach of fiduciary duty or duty of fidelity;
- (e) an Order allowing for the tracing of the amounts that Romspen LP, Romspen Investment, Mr Weldon and Mr Roitman, or any one or combination of them, have earned as a result of any breach of fiduciary duty, duty of fidelity or unjust enrichment;
- (f) further or in the alternative, damages in an amount not less than \$150,000,000;
- (g) interest pursuant to the *Judgment Interest Act*, RSA 2000, c. J-1;

- (h) costs; and
- (i) such further and other damages as this Honourable Court deems appropriate.

NOTICE TO THE DEFENDANT(S) BY COUNTERCLAIM

You only have a short time to do something to respond to this counterclaim.

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 to counterclaim in the Office of the Clerk of the Court of Queen's Bench at Calgary, Alberta, AND by serving your Statement of Defence or a Demand for Notice to counterclaim on the Plaintiff(s) by counterclaim's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice to counterclaim within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late doing either of these things, a court may give a judgment to the Plaintiff(s) by counterclaim against you after notice of the application has been served on you.