UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES and EXCHANGE COMMISSION,	)	**No. 18 CV 5587**
Plaintiff,	)	
v.	)	**Magistrate Judge Young B. Kim**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	)	
Defendants.	)	**July 9, 2019**

ORDER

Before the court is a consolidated motion to amend the court's May 2, 2019 order, which was filed by the following mortgagees (collectively, "Lenders"): (1) Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; (2) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB30; (3) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2017-SB41; (4) U.S. Bank National Association, as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Corp., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB50; (5) Wilmington Trust, National

Association, as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Trust 2014-LC16, Commercial Mortgage Pass-Through Certificates, Series 2014-LC16; Federal National Mortgage Association ("Fannie Mae"); (6) Federal Home Loan Mortgage Corporation ("Freddie Mac"); (7) UBS AG; (8) BMO Harris Bank N.A.; (9) Midland Loan Services, a Division of PNC Bank, National Association; and (10) BC57, LLC ("BC57"). For the following reasons, the motion is denied:

Background

The court detailed the relevant facts of the case in its May 2, 2019 order. (R. 352, May 2, 2019 Order at 1-2.) On February 15, 2019, the Receiver filed a second motion for court approval of the process for public sale of real property by sealed bid. (R. 228, Receiver's Mot.) Certain lenders objected, arguing in part that the proposed sale process did not provide them the right to credit bid to secure their interests to the extent that the proposed sale of a property was for less than the amount owed. (R. 232, Liberty's Obj. at 3-5; R. 235, U.S. Bank/Freddie Mac's Ltd. Obj. at 5-6; R. 240, BC57's Obj. at 1-2.) In those objections, the lenders did not specify procedures they wanted to be attached to the credit-bidding process. On May 2, 2019, the court ruled on the Receiver's second motion, and granted the lenders the right to credit bid. (R. 352, May 2, 2019 Order at 6-8.)

Thereafter, the lenders filed objections to the court's May 2, 2019 order with the assigned district judge, complaining in part that the court's order did not specify the manner, timing, and methodology for placing credit bids, despite the fact that the lenders had not proposed any such procedures to this court in their oppositions. (See,

e.g., R. 359, Liberty's Obj. at 7-11 (arguing in part that Liberty must be given a "last look" opportunity to bid and that any credit bid "should be part of a public bid process"); see also R. 362, Freddie Mac's Obj.; R. 363, Certain Lenders' Obj.; R. 404, Certain Lenders' Mot.; R. 418, Lenders' Mot.) On June 9, 2019, the court ordered the parties and certain institutional lenders to establish credit-bidding procedures by June 17, 2019. (R. 406, June 9, 2019 Order.) Liberty EBCP, LLC ("Liberty") and the Receiver were able to reach an agreement on such procedures, although Liberty reserved the right to seek additional amendments and/or modifications to such procedures if the resolution it reached with the Receiver were not deemed resolved as to all lenders. (R. 415, Liberty's Notification of Negotiations Regarding Bid Procedures.) Liberty attached as Exhibit A to its notification a redlined version of credit-bid procedures upon which Liberty and the Receiver had agreed. (Id., Ex. A.)

The Lenders were not able to reach an agreement with the Receiver on credit-bidding procedures. (R. 418, Lenders' Mot. at 2.) As a result, the court ordered the Lenders to file a separate redlined version, using as a template the terms and conditions previously agreed upon by Liberty and the Receiver, to clarify what additional procedures they were seeking to address their concerns. (R. 423, June 20, 2019 Order.) On June 28, 2019, the Lenders filed their redlined submission. (R. 430-1, Lenders' Redlined Comments.) The court heard oral arguments on the current motion on July 2, 2019.

Analysis

The Lenders seek a number of changes to the credit-bidding procedures agreed upon by Liberty and the Receiver, but their request essentially amounts to a request barring the Receiver from proceeding with the sale of all mortgage-encumbered properties—a request they should have raised much earlier. As such, the Lenders' motion is improperly styled as a "motion to amend" the court's May 2, 2019 order. (R. 418, Lenders' Mot.) The title of the motion suggests—incorrectly—that the issues raised in the Lenders' current motion were presented to the court before it issued its May 2, 2019 order or are now timely raised with this court. They were not, and they are not. On May 2, 2019, the court ruled on the Receiver's second motion for court approval of the process for public sale of real property by sealed bid. (R. 352, May 2, 2019 Order.) Certain lenders had objected to the second motion, arguing that the Receiver's process denied them the right to credit bid. (R. 232, Liberty's Obj. at 305; R. 235, U.S. Bank/Freddie Mac's Ltd. Obj. at 5-6; R. 240, BC57's Obj. at 1-2.) The Lenders never argued that in order to credit bid, they would first require the court to enter final judgment amounts and lien priority determinations. The Lenders now argue that without final judgment amounts and priority determinations a right to credit bid is merely "illusory." But if the right to credit bid is illusory, that situation is attributable solely to the Lenders.

Even if the Lenders had argued that their right to credit bid required final determinations as to judgment amounts and lien priority, this court would have overruled their objections. The court has already denied the Lenders' request to stop

the claims process and decide the Lenders' priority.[1] (See R. 444, April 23, 2019 Tr. at 7-14 (finding that "it makes sense . . . to deal with . . . claims in an orderly fashion" through "an orderly claims process," and rejecting lenders' request for an immediate, first-lien priority determination).) Thus, the law of the case would have precluded this court from issuing a decision that conflicted with this prior ruling. Even though the Lenders now try to distinguish the prior ruling by applying it only to the claims process and not to credit-bidding procedures, this court deems such a distinction to be one without a difference given the nature of the relief they seek.

In any event, the court will address the Lenders' proposed modifications. First, as discussed above, the Lenders assert that they must be informed of the amounts due to them, as well as the priority of their liens versus other investors' liens, before they can credit bid. (R. 418, Lenders' Mot. at 3-4.) While the Lenders no doubt know the amounts of the liens they hold, they complain that the Receiver has indicated he will challenge the amounts due and charge them "default interest, attorneys' fees, and other fees and costs." (Id. at 4.) The Lenders assert that uncertainty as to their judgment amounts prevents them from knowing the maximum amount to credit bid and may result in them having to pay cash at closing if the bid exceeds the judgment amount. (Id. at 3-4.) The Lenders also contend that without knowing lien priority,

[1] Similarly, while the Lenders ask that the Receiver be required to abandon certain failing properties by removing the court's stay and allowing them to go into foreclosure, the court has already considered and declined to adopt such a request. (R. 444, April 23, 2019 Tr. at 15-19, 31-35 (arguing on behalf of certain lenders, without adoption by the court, that properties that "have no value or are not performing . . . should be abandoned" by the Receiver).) The Lenders cannot make an end-run around that decision by rearguing the issue before this court.

they cannot effectively conduct the credit-bid process and may have to pay cash to a senior lienholder, if they are determined to have junior rights. (Id. at 6-7.) Such a result runs contrary to Illinois law, according to the Lenders. (Id. at 3.) The Lenders therefore propose that the following language be added to the credit-bid procedures: "In order for a lender to exercise its right to submit a credit bid, the amount due each lender must be determined prior to any property being offered for sale pursuant to these terms and conditions." (R. 430-1, Lenders' Redlined Comments.) The Lenders do not appear, however, to propose that any language requiring a lien priority determination be added to the credit-bid procedures. (Id.)

The court declines to adopt the Lenders' proposed "modification." Although the Lenders have argued that Illinois law mandates the right to credit bid along with the procedures they propose, (see R. 418, Lenders' Mot. at 4), during the July 2, 2019 hearing, counsel confirmed that no Illinois law requires such procedures in a Receivership case like the one here. When initially requesting the right to credit bid, the Lenders also referred to bankruptcy law and Northern District of Illinois local rules, (R. 232, Liberty's Obj. at 3-5; R. 235, U.S. Bank/Freddie Mac's Ltd. Obj. at 5-6; R. 240, BC57's Obj. at 1-2), but that authority does not support the changes the Lenders seek here. Under 11 U.S.C. § 363(k) of the Bankruptcy Code, "[a]t a sale . . . of property that is subject to a lien that secures an allowed claim," the lien holder may submit a bid, "*unless the court for cause orders otherwise*." *Id.* (emphasis added). Thus, a right to credit bid is not absolute. *See In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55 (D. Del. 2014) (finding that the law is "clear" that a court may "for cause"

refuse the right to credit bid); *In re Phila. Newspapers, LLC*, 599 F.3d 298, 315-16 (3d Cir. 2010) (listing cases in which the right to credit bid was denied). Local Rule 66.1 in turn states that "[t]he administration of estates by receivers . . . shall be similar to that in bankruptcy cases except that the court in its discretion shall . . . direct the manner in which the estate shall be administered." Accordingly, the court has "substantial discretion" in directing the administration of these proceedings, as the court has noted. (See R. 444, April 23, 2019 Tr. at 14.)

Exercising its discretion, the court has already determined that fairness requires the claims process to proceed before priority is determined. (R. 444, April 23, 2019 Tr. at 14; see also R. 223, Feb. 13, 2019 Order at 8-9 & n.3 (finding by this court that "priority determinations should not be rendered until a claims process has been approved and implemented"); R. 349, May 1, 2019 Order (declining to address lenders' request for an expedited priority hearing, which was not properly before this court and did not relate to the motion before this court).) As stated, the court must endeavor to balance all of the parties' interests given that there are a number of investors and creditors who assert competing claims. To that end, the court must consider not only the interest in repaying investors and/or creditors quickly, but also whether the correct parties are being repaid.

What the Lenders seek here is for the court to stop the sale process from moving forward until the Receiver has decided, and the court has approved, final judgments and lien priority. Under the schedule set in this case, the claims bar date was July 1, 2019, and the process for investigating and calculating claims is expected

to take until approximately July 2020. (R. 241, Feb. 22, 2019 Order at 4-5.) The Lenders contend that because the claims bar date has passed, the Receiver should know which liens have priority. But the Receiver asked for at least 30 days after the bar date to provide an *initial* report on the claims process. (Id. at 9.) The Receiver also expressed an intent to take discovery to investigate claims, which may extend the time for calculating claims to July 2020 or beyond. (Id. at 4-5, 9-10.) Thus, the Lenders' priority claims—and, for that matter, final judgment amounts—are not ripe for adjudication at this point.[2]

Second, the Lenders argue that the court's requirement that a letter of credit must be posted under certain circumstances is not necessary and that such a requirement precludes them from exercising their rights to credit bid. They therefore seek to strike the letter-of-credit condition from the credit-bid procedures. (R. 430-1, Lenders' Redlined Comments.) This argument is tantamount to a request to reconsider this court's May 2, 2019 order, and the court denies the same, especially because the Lenders have not cited any authority supporting the request.

Third, the Lenders argue that they should not be responsible for closing costs. (R. 418, Lenders' Mot. at 8-9.) The court does not agree to the Lenders' proposed

[2] The Lenders confirmed during the July 2, 2019 hearing that they are not required to submit credit bids, but merely have the option of doing so. To the extent that the Lenders will benefit from additional information to determine whether they should credit bid, the court urges the Receiver to provide the Lenders information on whether their liens are contested and by whom, and the amounts the other lienholders assert in the properties at issue, as soon as practicable after the Receiver has such information. Also, the Lenders may want to discuss whether the Receiver has any objection to allowing them to condition their credit bid on being made subject to a valid senior mortgage lien.

modifications in this regard. If the costs and fees assessed to the Lenders would extinguish their preexisting security interests, then they may petition the court for relief at the final sale hearing if their credit bid is the highest bid.

Fourth, the Lenders assert that the sale process should require the sale price to exceed the debt of the determined senior secured lender. (Id. at 9-11.) The court has ruled on this issue and declines to change its prior ruling. (R. 352, May 2, 2019 Order at 10.)

Finally, the Lenders contend that a mortgagee should not be required to take title to a property. (R. 418, Lenders' Mot. at 11.) The redlined version of the credit-bid procedures agreed upon by Liberty and the Receiver already addresses this issue. (See R. 415, Ex. A ("A Credit Bid Lender shall not be required to acquire title to the property . . . but, instead . . . shall have the right to assign its right to title . . . to a third party . . . .").) As such, the court directs the Lenders to confer with the Receiver on this point.[3]

Conclusion

For the foregoing reasons, the Lenders' motion is denied.

ENTER:

Young B. Kim
United States Magistrate Judge

[3] Like sands through the hourglass, so are the assets available for compensating the victims of Cohen Defendants' fraud scheme. The Lenders should begin (if they have not already begun) to confer with the Receiver and SEC on ways to compromise on the amounts they are owed and resolve their issues before the assets run out. The court is willing to assist with these discussions upon request.