

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

)	
U.S. SECURITIES AND EXCHANGE)	
COMMISSION,)	
)	
Plaintiff,)	Civil Action No. 18-CV-5587
)	
v.)	Judge John Z. Lee
)	
EQUITYBUILD, INC., et al.,)	Magistrate Judge Young B. Kim
)	
Defendants.)	
)	

**RECEIVER’S RESPONSE AND OPPOSITION
TO INSTITUTIONAL LENDERS’ OBJECTIONS (DOCKET NOS. 359, 362, 398 & 455)**

PRELIMINARY STATEMENT

The objections of the various institutional lenders should be overruled for several reasons. First, as to Liberty’s objections (Docket Nos. 359 & 398) there are none. Liberty and the Receiver have settled and resolved the objections. (*See* Docket No. 463) Therefore, there is nothing further to address in that regard.

Second, as to the objections of certain other lenders (Docket Nos. 362 & 455), the Orders of Magistrate Judge Young B. Kim are entitled to significant deference, which is more than justified here. The arguments raised in the objections (which largely overlap) have been previously raised and rejected before both this Court and Judge Kim. There is no basis in fact or law supporting the objections. Nothing in Judge Kim’s Orders is remotely close to being clearly erroneous or an abuse of the sizable discretion that the Court exercises. The objections should finally be overruled and concluded.

Furthermore, the context in which these matters continue to arise remains exigent. As the Receiver has repeatedly stressed and the Court and the institutional lenders have recognized, a number of the properties within the Receivership Estate are not generating enough cash to support their costs. It is clear from a preliminary review of the nearly 2,000 claims submissions that the Receiver has received that there is a complex thicket of claims and corresponding disputes that enshroud the properties and priority to their sales proceeds. Yet, as long as the properties are within the Estate, the Receiver must take steps to preserve them and manage them. Those efforts include addressing life and safety issues for the various properties which have hundreds of tenants and are in residential neighborhoods. The Receiver has recommended, “in the manner the Receiver deems most beneficial to the Receivership Estate” (*see* Docket No. 16, Order Appointing Receiver, ¶ 38; *see also id.* ¶ 39), selling many of those properties without delay, and segregating the sales proceeds from those sales, both to stem the costs of continuing to carry those properties and to protect the funds from those sales so that once priority has been determined the funds corresponding to those sales can be properly distributed. Judge Kim has approved the Receiver’s efforts in this regard, recognizing that the Order Appointing Receiver “permits the Receiver to ‘take all necessary and reasonable actions’ to sell or lease the Properties.” (*See* Docket No. 382, May 22, 2019 Order, at 3; *see also* May 2, 2019 Order, Docket No. 352, at 2 & *passim*)

I. Liberty’s Objections Have Been Settled And Resolved.

As noted above, and as set forth in two separate submissions by Liberty (as well as discussed before Judge Kim at a hearing on the matter on July 2, 2019), there are no objections to resolve vis-à-vis Liberty. (*See* Docket Nos. 415 & 463) In fact, discussions between the Receiver and Liberty prior to the July 2nd hearing led to agreement on the sales procedures that the Receiver is currently using to sell properties. There is nothing more to address, or to be heard, from Liberty.

II. The Other Institutional Lenders' Objections Are Baseless.

Judge Kim's May 2, 2019, May 22, 2019, and July 9, 2019 rulings should be sustained for several reasons. Judge Kim correctly set forth the Seventh Circuit's standard for evaluating such orders, noting that the Court's discretion to set the terms and conditions of judicial sales of real property "will not be disturbed on appeal except for abuse." (Docket No. 352, May 2, 2019 Order, at 4, *citing United States v. Peters*, 777 F.2d 1294, 1298 n.6 (7th Cir. 1985)).

A. The Orders Should Be Affirmed Because The Receiver Has Properly Exercised His Discretion In Setting Procedures For Credit Bidding, As Evidenced By Agreement On Such Procedures With Liberty.

As Judge Kim recognized, the Receiver has broad discretion to exercise his business judgment to take steps and implement procedures to realize the maximum amount possible from the sale of the real property assets at issue here. The Receiver and the retained professionals that are part of his team have and continue to make every effort to do so, including by incorporating credit bidding into the sale process. Here, Judge Kim recognized that this has been accomplished in very reasonable fashion as evidenced by nothing less than an agreement that was reached on such issues between the Receiver and a vociferous objector (Liberty). As with many other matters of procedure, the Receiver should be allowed to use his judgment and discretion to implement sales procedures, and Judge Kim acted properly in utilizing his discretion relative to the agreed upon credit bid terms.

B. The Priority Issues Have Been Rejected By This Court.

The lenders' objections in large measure are nothing but an argument that priority determination must be done first not only before any credit bid is made, but before any sale of properties can be made moving forward. During argument before Judge Kim, the intent of the motion was laid bare: the lenders sought to stall all sales until a priority hearing has occurred.

Judge Kim correctly saw this for what it is: another effort by the lenders to reargue issues about timing and procedure that had been rejected before. Judge Kim properly addressed the argument, and any objection on that issue should be overruled.

First, the issue has already been determined and is law of the case. To that point, the issue of priority was argued before this Court in conjunction with the Receiver's motion for approval of interim financing and expedited consideration of the Magistrate Judge's April 8th Report and Recommendation (which related to approval of the first sale of properties). (Docket No. 322) A combined objection of certain lenders is Docket No. 342 (including reference on page 11 to request for "prompt determination of the nature and amount of secured interests"). The transcript from that hearing reflects discussion and the Court's considering of the lenders' arguments that the priority of liens ought to occur before other matters proceeded. (*See* 4/23/19 Hearing Tr. at 7-14, 32-36, 49) Over those and various other objections, this Court granted the Receiver's motion on April 23, 2019. (Docket No. 344; *see also* 4/23/19 Hearing Tr. at 14)

This is important because that hearing and the Court's rejection of the objections that were raised both in writing and orally are consistent with the Court's subsequent determination to grant the Receiver's motion to establish the claims process. In granting the motion to establish the claims process, Judge Kim rejected the lenders' same request for an immediate priority hearing (*See* Docket No. 349). Notably, that ruling was *not* appealed to the District Court and became law of case.

Similarly, Judge Kim issued another ruling on February 13, 2019 (Docket No. 223) regarding segregation of rents, which addressed issues of priority (and which was also *not* appealed or challenged by the lenders). In that Order, Judge Kim stated:

The court agrees with the Receiver that it is premature to determine whether the Creditors have preexisting secured interests in the Rents

under Illinois law. The court has not yet approved a claims process. And the SEC and Receiver have alleged that Defendants manipulated secured interests as part of their Ponzi scheme. (R. 114, SEC’s Resp. at 1; R. 115, Receiver’s Resp. at 7.) Given that defrauded investors and creditors may assert interests in the same Rents and subject properties, the claims process should be implemented to ensure that investors and lenders receive due process.

(Docket No. 223 at 8-9) (emphasis added)

Judge Kim further stated that **“the court agrees with the Receiver that priority determinations should not be rendered until a claims process has been approved and implemented.”** (Docket No. 223 at 9, n.3) (emphasis added)

C. The Lenders’ Objections Should Be Subject To Estoppel Or Deemed Waived.

Judge Kim found that 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.” (Docket No. 447, July 9, 2019 Order, at 4). Having never raised the issue of priority as a requirement of the credit bid process as part of their objections to the first sales process motion (Docket Nos. 143 & 148), nor in their objections to the second sales process motion (Docket Nos. 232, 235 & 240), the lenders are properly estopped from making any such argument now, and/or have otherwise waived that objection for purposes of this motion.

D. Judge Kim Properly Used His Discretion In Establishing A Letter Of Credit Requirement.

The lenders object to the letter of credit requirement that Judge Kim included as a protective measure in his Order, claiming that it can be set only “for cause.” That is inaccurate on several levels. In fact, the Court has the discretion to impose the letter of credit, as he had the discretion to even allow credit bids. That is exactly the holding, for example, in *In Re River Road Hotel Partners, LLC*, 2010 WL 6634603 (Bankr. N.D. Ill. Oct. 5, 2010) which provides the following:

Finally, the Debtors' believe that the Lenders should not be allowed *to* credit bid because the amount and priority of the mechanics' liens against the property have not been resolved. **Section 363, however, allows this court to alleviate this concern by placing conditions upon a secured creditor's right to credit bid without denying the right altogether.** *See In re NJ Affordable Homes Corp.*, 2006 WL 2128624, 16 (Bankr.D.N.J.2006).^[1] For example, courts have required secured creditors to put cash in escrow, pay a portion of the bid in cash, or furnish a letter of credit when the amount and validity of an alleged senior lien is in dispute. *See In re Octagon Roofing*, 124 B.R. 522, 526 (Bankr.N.D.Ill.1991); *In re Die bart Bancroft*, 1993 WL 21423, *5 (E.D.La. Jan.26, 1993). In this instance, a similar condition on credit bidding appears to be warranted to ensure that all mechanics' liens that are senior to the Lenders are protected.

Id. at *2 (emphasis added)

Contrary the to the arguments made by the lenders, there is no right to credit bid under federal or Illinois law. (*See* Docket No. 447, July 9, 2019 Order, at 6; *see also* SEC Response, Docket No. 474, at 5-6) The cases relied upon by the lenders (Docket No. 398 at 3, 6; Docket No. 455 at 4-6) all involve foreclosure or bankruptcy, neither of which is the situation at bar. In sum, Judge Kim has properly exercised his discretion, and the lenders' objection should be overruled.

III. The Claims Process Cannot Run In Tandem With A Priority Hearing.

Taking another swing on the priority argument with a different bat, the lenders argue that everything can run together because the claims bar date was July 1, 2019, arguing in essence that the claims process has already been completed, so what's the problem?

As was evident from the initiation of the claims process, and as articulated in the July 9, 2019 Order, the claims process is still in its early stages. That is demonstrated by the fact that there are approximately 2,000 claims submissions that have been received (through claims portal,

¹ The court in the *NJ Affordable Homes Corp.* stated that “[t]he term ‘cause’ is not defined in § 363 of the Bankruptcy Code, but it is intended to be a flexible concept enabling a court to fashion an appropriate remedy on a case-by-case basis. Further, the language of § 363(k) does not prohibit a bankruptcy court from placing conditions upon a secured creditor's ability to credit bid.” 2006 WL 2128624, at *16.

regular mail, overnight delivery, and email) that need to be reviewed and analyzed. (Docket No. 468, at 4) As the Receiver has reported to the Court on a preliminary basis, the number, nature, and complexity of claims received require deliberate, careful, and thoughtful review and analysis. It is in the interests of all claimants that the Receiver proceed with those efforts as expeditiously as possible. It is antithetical to those efforts to put the interests of one class or category of claimants above others. A properly and fairly implemented claims process will benefit all claimants, including the institutional lenders. It will reduce the costs to all, avoid waste of time and resources, and allow the Receiver and the Court to best exercise their discretion as to the path that will most efficiently, cost effectively, and expeditiously determine claims and priority. It will determine their rights and the rights of all claimants, including as to priority. It will give them finality. The process to review and evaluate the claims of investors and creditors is not complete and will last well into next year. (*See also* Docket No. 241 at 4)

IV. The Credit Bid Procedures Agreed Upon Are Being Utilized.

There is no uncertainty as to the procedures that are currently being used. Consistent with Judge Kim's suggestion that, "the Receiver may wish to consider the Lenders' suggestions before finalizing sale procedures" (Docket No. 382, at 3) – the Receiver reached out to institutional lenders' counsel to solicit their comments before finalizing and implementing the sales procedures that the Receiver is currently using to sell properties, which the Receiver also then presented to Judge Kim for review and approval. As a result of that process, and as numerous filings have reflected, the credit bid process that was agreed upon by the Receiver and Liberty are the procedures that are being used. (Docket No. 415) The lenders are not only aware of this from the filings and hearings, but also from interactions with the Receiver's real estate broker through the on-going sales process. This is a non-issue.

WHEREFORE, the Receiver respectfully requests that all objections to the May 2, 2019, May 22, 2019, and July 9, 2019 Orders be overruled.

Dated: August 14, 2019

Respectfully submitted,

/s/ Michael Rachlis
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CERTIFICATE OF SERVICE

I hereby certify that I provided service of the foregoing document via ECF filing, to all counsel of record on August 14, 2019. I further certify that I caused the foregoing to be served on Defendant Jerome Cohen, via email, at jerryc@reagan.com.

/s/ Michael Rachlis

Michael Rachlis