

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION,

Plaintiff,

v.

EQUITYBUILD, INC., EQUITYBUILD  
FINANCE, LLC, JEROME H. COHEN, and  
SHAUN D. COHEN

Defendants.

Case No. 1:18-cv-5587

Hon. John Z. Lee

Magistrate Judge Young B. Kim

**MOTION FOR ORAL ARGUMENT ON RECEIVER'S CLAIMS PROCESS MOTION**

The Mortgagees<sup>1</sup> move for oral argument on the Receiver's Motion for approval of process for resolution of disputed claims (Dkt. #638).

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<sup>1</sup> The Mortgagees are Freddie Mac; Citibank N.A., as Trustee for the Registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48; 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; 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; 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; 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; Wilmington Trust, National Association, as Trustee for the benefit of the registered holders of UBS Commercial Mortgage Trust 2017-C1, Commercial Mortgage Pass-Through Certificates, Series 2017-C1; Federal National Mortgage Association ("Fannie Mae"); BMO Harris Bank N.A.; Midland Loan Services, a Division of PNC Bank, National Association; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Colony American Finance 2015-1; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Registered Holders of Corevest American Finance 2017-2 Trust, Mortgage Pass-Through Certificates, Series 2017-2; Midland Loan Services, a Division of PNC Bank, N.A. as servicer for Wilmington Trust, N.A., as Trustee for the Benefit of Corevest American Finance 2017-1 Trust Mortgage Pass-Through Certificates; BC57, LLC; UBS AG; Thorofare Asset Based Lending REIT Fund IV, LLC; and Liberty EBCP, LLC.; Direct Lending Partner LLC (successor to Arena DLP Lender LLC and DLP Lending Fund LLC)

The Receiver's Motion seeks to establish a process for adjudicating the validity of hundreds of millions of dollars of competing lien claims filed primarily by the Mortgagees and over 900 Investor Lenders. The Motion has been briefed by the Receiver, the Mortgagees, and the SEC.

Prior to the filing of the Motion, the Court conducted three informal "off the record" in-chamber status hearings with the Receiver, the SEC, attorneys for some of the Mortgagees and attorneys for some of the investor creditors. The purpose of these conversations was to explore the potential parameters for the resolution of disputed claims. Although the SEC suggests otherwise in its brief, because all claimants of EquityBuild asserting secured interests in the properties were not included in these discussions and did not have a meaningful opportunity to participate in the discussion, the Court was clear that the Court was not going to make any rulings with respect to what was discussed during these in-chamber meetings concerning the dispute resolution process.

The adjudication of the validity and priority of millions of dollars in competing lien claims is a judicial process, not based on the Receiver's business judgment or the propriety of a plan for distribution of estate funds. Secured claims must be paid before assets are distributed to unsecured creditors. Neither the payment nor priority of secured claims is a matter of discretion or business judgment. They are legal requirements.

Rather than questions of distribution, the Receiver's Motion and the sometimes inconsistent Replies raise issues concerning the administration of justice, such as:

- Are the parties entitled to notice of their opponents' positions or must they attempt to discern them from proofs of claim – a bare accounting of the transfer of funds between EquityBuild and its opponents?
- May the Receiver state a fraudulent transfer claim for the first time after the close of discovery and without complying with the pleading requirements normally required

in the Seventh Circuit? And, if so, how will the Receiver's framing report provide the claimants with adequate notice of his fraudulent transfer claims?

- How can the Receiver assert in its Reply that after his "initial disclosure, all claimants should have all, or nearly all, relevant information in their possession" (Dkt.720, p. 2) when the Receiver admits in its Motion that "Given the disorganized and decentralized manner in which these records were kept by EquityBuild, the Receiver is not presently able to perform cost-effective and time-efficient searches through these records", so that apparently all the Receiver initially will be providing access to are the "claims forms and documentation that was submitted to the Receiver [by the claimants] with respect to the properties subject to the summary proceeding being litigated. (Dkt. #638, fn. 1 and par. 36).
- Will the Receiver provide access to EquityBuild's records –a critical source of evidence necessary to resolve the claims disputes? And, if so, how and when?
- What are reasonable limits on discovery, particularly if the parties must take discovery regarding a fraudulent transfer claim that may or may not be asserted by the Receiver? Is 60 days sufficient in light of the complexity of the disputes and the global COVID-19 pandemic? Are ten requests for production, ten interrogatories and three depositions per claimant reasonable?
- Can the Receiver possibly be a neutral while at the same time asserting claims, such as fraudulent transfer, that are exclusively his and on which he bears the burden of proof?
- Would the Receiver's actions in making recommendations as to the priority of disputed secured claims between Mortgagees and Investor Lenders violate the provisions of Paragraph 45 of the Order appointing him Receiver which provides in part "The Receiver has a continuing duty to ensure that there are no conflicts of interest between the Receiver, his Retained Personnel (as that term is defined below), and the Receivership Estate." [Doc. No. 16]

Both the Receiver's and the SEC's replies spend a great deal of time and effort discussing the Receiver's discretion and accusing the Mortgagees of bad faith, but little to no time addressing these important issues. Accordingly, oral argument would be helpful.

Oral argument is particularly appropriate here based on the SEC's assertion that the Mortgagees know all about the potential fraudulent transfer claims against them when the Receiver himself reveals that he does not even know what those claims will be. In particular, the SEC asserts that "the lenders currently are well aware that potential fraudulent transfers are an

issue in these proceedings. And the lenders will obtain even greater insight via the Receiver's pre-discovery framing reports." (Dkt. #718, p. 7). Yet, the Receiver admits that despite the length of these proceedings and its threats of fraudulent transfer actions, it has not "taken or evaluated discovery and determined what issues to raise in relation to" its "nascent and potential claims." (Dkt. #720, p. 5).

If the Receiver cannot even plead a cause of action for fraudulent transfer without first conducting discovery, how can the claimants of EquityBuild (Mortgagees, Investor Lenders or investors) possibly know what discovery they should take concerning his "nascent and potential claims" or be afforded due process if discovery is closed before those claims are first asserted. Moreover, what efficiencies are obtained by requiring the claimants to engage in discovery on an expedited basis concerning the Receiver's theoretical claims, especially if additional discovery will be necessary when and if the Receiver pleads its actual fraudulent transfer claims.

Although the Mortgagees do not contest the Receiver's right to pursue such claims, he must do as part of the dispute resolution process and in a manner that affords all claimants due process. Otherwise, claimants might find themselves needlessly litigating the priority of their liens before addressing their validity in accordance with the Federal Rules, thus wasting the Court's time and the claimants' funds, and jeopardizing the claimants' legal rights.

In light of the issues raised above, the hundreds of millions of dollars at issue in this proceeding, and the concerns raised by the divergent positions of the SEC and the Receiver in their briefs, oral argument will provide the most fair and equitable means to resolve the Receiver's Motion.

Wherefore, the Mortgagees request that this Court permit oral argument on the Receiver's Motion.

Dated: June 24, 2020

Respectively Submitted:

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