

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.

Civil Action No.: 18-CV-5587

Hon. John Z. Lee

Magistrate Judge Young B. Kim

**VENTUS HOLDINGS, LLC'S REPLY TO RECEIVER'S EIGHTH MOTION TO
CONFIRM SALE OF CERTAIN REAL ESTATE AND THE OBJECTIONS BY
PIONEER ACQUISITIONS LLC AND SOUTHSIDE PROPERTY GROUP, LLC**

Intervenor, Ventus Holdings, LLC ("Ventus"), through its attorney, Michael B. Elman & Associates, Ltd., for its Reply to Receiver's Eighth Motion to Confirm Sale of Certain Real Estate and Objections by Pioneer Acquisitions LLC and Southside Property Group LLC, states as follows:

1. The real estate that is the subject of this motion consists of three (3) parcels, (i) 6949-59 South Merrill, (ii) 7600-10 South Kingston and (iii) 7656-58 South Kingston, all in Chicago, Illinois (collectively the "Properties").
2. Ventus' cumulative offers to purchase the Properties is \$965,200.00 more than the offers the Receiver seeks to confirm. It is inexplicable why the Receiver believes it is so urgent to close these sales immediately and forego an additional \$965,200.00 to the receivership estate. Ventus can close within 30 days of an order allowing re-instatement

of their contracts. The prospective purchasers are seeking to purchase the Properties at substantially less than fair market value by taking advantage of the Covid-19 pandemic.

3. The Court stated in its Order entered on May 2, 2019, “the Receiver must act with due regard to the realization of the true and proper value of the real property.”

4. Ventus agrees with the following facts contained in the Receiver’s motion:

A. The Receiver accepted Ventus’ bids on each of the Properties;

B. On or about April 15, 2020, Ventus was informed by its lender that due to the Covid-19 pandemic financing was no longer available. (Exhibit 6 to the Receiver’s motion);

C. On or about April 20, 2020, Ventus informed the Receiver that it was unable to proceed with the transactions (Exhibit 7 to the Receiver’s motion); and

D. On May 8, 2020 the Receiver accepted alternative bids for each of the Properties.

5. The Receiver’s motion failed to state that Ventus tendered ten percent of each of its bids as an earnest money deposit. Accordingly, \$431,520.00 of Ventus’ money is being held in an escrow account.

6. The motion also did not address the Receiver’s intention regarding these earnest money deposits.

7. In its reply, the Receiver now admits that Ventus’ earnest money is held in an escrow account. Furthermore, the Receiver now states that it should retain the earnest money and asks the Court to enter an order setting a briefing schedule regarding the earnest money issue.

8. In the motion and reply the Receiver also admits:

A. **6949-59 Merrill:** Ventus' bid was \$1,935,200.00 and the Receiver is asking the Court to approve a new bid of \$1,520,000.00. A loss of \$415,200.00;

B. **7600-10 Kingston:** Ventus' bid was \$1,870,000 and the Receiver is asking the Court to approve a new bid of \$1,530,000.00. A loss of \$340,000.00; and

C. **7656-58 Kingston:** Ventus' bid was \$510,000.00 and the Receiver is asking the Court to approve a new bid of \$300,000.00. A loss of \$210,000.00.

Accordingly, if the Court confirms the pending bids, the receivership estate will receive the astonishing amount of \$965,200.00 less than it will receive from Ventus.

9. The lenders for the Properties also object to the pending sales and support a sale to Ventus.

10. Again, it is inexplicable why the Receiver is in such a rush to sell the Properties. The Receiver is currently listing a property comparable to the 7656 S. Kingston property for a purchase price of \$50,000.00 per apartment unit. The price the Receiver is willing to sell the 7656 S. Kingston property is only \$18,750.00 per unit, which is substantially below fair market value. Ventus is offering to pay \$31,875.00 per unit for the 7656 S. Kingston property.

11. Although the Receiver states that “[h]e remains under intense pressure to sell the properties” the Receiver does not state facts in support of this conclusion. There is no need for an immediate sale to the prospective purchasers. In fact, the Receiver admits that it “is selling dozens of properties in consecutive tranches”. Therefore, the sales at issue here are not the final steps to closing the receivership estate and a short delay required to close the Ventus sales would benefit the receivership estate and the lenders.

12. Ventus is a substantial operation that does business with the Receiver. Attached to this reply as Exhibit A is the Affidavit of Zachary D. Elman, who is a member-manager of Ventus (Aff. par.1). Ventus has been in existence since January 23, 2013 (Aff. par. 2). It owns and operates approximately 425 apartment units located in approximately 30 buildings throughout the west and south sides of Chicago (Aff. pars. 3- 4).

13. The reason that Ventus' lender declined to issue the loan was due solely to the unforeseen Covid-19 pandemic (Aff. pars. 5 and 6).

14. Prior to the purchase of the Properties, no lender had ever denied a loan to Ventus (Aff. par. 6).

15. Ventus is in the process of securing alternative financing and has received a term sheet from a new lender (Aff. par. 7). The only contingencies are (i) the re-certification of an existing appraisal and (ii) receipt of the financial disclosures for the Properties during the last few months of this year (Aff. par. 8 and 9). There is no need for a new appraisal (Aff. par. 10). Ventus has been communicating with the seller's broker who has been sending the most recent financial disclosures to Ventus as they are prepared. (Aff. pars. 8 and 9). Ventus is ready, willing and able to purchase the Properties based upon the term sheet, which has not been attached to this reply because it contains proprietary information but would, upon request, provide the term sheet to the parties hereto.

16. The receivership estate is not losing money on the Properties. Based upon the financial records received by Ventus:

A. 6949 S.Merrill: Year-to-date through May net operating income is

\$71,967.65;

- B. 7600 S. Kingston: Year-to-date through February net operating income is \$5,854.65; and
- C. 7656 S. Kingston: Year-to-date through February net operating loss is \$58,143.95. However, this property incurred a one-time capital expenditure of \$16,965.98 in January and repair costs over the last 12 months from March, 2019 to February 2020 of \$23,807.50, the last 6 months only being \$6,625.50.

(Aff. par. 13).

17. Ventus had also previously entered into a fourth contract with the Receiver for a property located at 7110 South Cornell. This contract was also terminated. However, Ventus secured alternative financing based upon substantially the same terms as those stated in the pending term sheet. The Receiver agreed to reinstate this contract and is proceeding to closing.

18. By this objection, Ventus seeks two alternatives:

A. Deny the pending motion, order the Receiver to re-instate the Ventus contracts and confirm the Ventus sales. This alternative would provide the greatest return to the receivership estate and avoid the time and expense of litigating the earnest money deposit issues; or

B. If this motion is granted and the pending bids are confirmed, grant leave to Ventus to file a motion for return of its earnest money deposits.

19. Illinois Code of Civil Procedure, 735 ILCS Section 5/15-1508(b), relating to foreclosure sales, is instructive. As here, a foreclosure sale requires confirmation by the court. Section 1508(b) states:

Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was otherwise not done, the court shall enter an order confirming the sale.

20. Balancing the equities among the receivership estate and victims, the lenders, the prospective purchasers and Ventus, the Court should deny confirmation and permit Ventus to purchase the properties.

21. Confirming the bids herein, which would cause the receivership estate to lose \$965,200.00, would not be the realization of the true and proper value of the Properties, as stated in the Order entered on May 2, 2019, especially considering that Ventus is in the process of securing the financing necessary to now acquire the Properties.

22. In **Corporate Assets, Inc. v. Paloian**, 368 F.3d 761 (7th Cir., 2004), a bankruptcy proceeding, the plaintiff submitted the winning bid for the purchase of real estate. After the auction was closed a new bid was submitted. The court then ordered the plaintiff to conduct a new auction. The defendant submitted a new bid in an amount that was \$352,500.00 higher than its earlier bid. The court confirmed the higher bid. The plaintiff appealed, arguing that the court erred in ordering a second auction.

23. The Appellate Court affirmed the confirmation of sale. In so doing, it analyzed two competing principles. The governing principle at a confirmation proceeding is to secure the highest price for the estate. But, there is also an interest in the finality and integrity of the process. Significantly, the court held that the trial court has more

discretion to reject a bid prior to, rather than after confirmation because consideration of a late bid would not unduly frustrate the reasonable expectations of the participants or compromise the integrity of the process.

24. Under Illinois foreclosure law the court has broad discretion to approve or disapprove a confirmation of sale. **Mortgage Electronic Registration Systems, Inc. v. Thompson**, 368 Ill.App.3d 1035, 859 N.E.2d 621 (1st Dist. 2006).

25. Also under Illinois foreclosure law, until confirmation, the sale is merely an irrevocable offer which is not deemed accepted until confirmed by the court. **In Re Laporta**, 578 B.R. 792 (2017).

26. In **JP Morgan Chase Bank v. Fankhauser**, 383 Ill.App.3d 254, 890 N.E.2d 592 (2nd Dist. 2008), the appellate court reversed a confirmation of sale finding that the sale price was unconscionable. The fair market value of the real estate was \$385,000.00 (or \$325,000.00) and the sale price was \$32,212.40.

27. Similarly, in **Commercial Credit Loans, Inc. v. Espinoza**, 293 Ill.App.3d 915, 689 N.E.2d 282 (1st Dist. 1997), the appellate court affirmed an order denying a motion to confirm sale because the sale's price was only one-sixth of the property's fair market value.

28. The facts at issue here clearly give the Court a basis for denying the Receiver's motion. If the motion were to be granted the receivership estate would lose \$965,200.00.

29. Moreover, the Receiver did not act in good faith. The Receiver accepted the new bids only 18 days after the Ventus deals were terminated. The Receiver never re-opened the bidding in an attempt to realize the fair market value of the Properties.

Alternatively, the Receiver could have waited a few months until the effects of the pandemic subsided. Lastly, the Receiver could have worked with Ventus to allow Ventus to obtain alternative financing, which Ventus is doing, thereby receiving fair market value for the Properties.

30. Pouring salt in the wound, the Receiver is also asking the Court to order payment of Ventus' earnest money deposits to the receivership estate, in the amount of \$431,520.00.

31. If the Court decides to confirm the pending contracts, it should order the return of the earnest money to Ventus.

32. The sole reason Ventus was unable to secure financing was due to the Covid-19 pandemic (Aff. par. 5). Prior to the transactions at issue here, Ventus had never been declined financing (Aff. par.6). See Exhibit 6 to the Receiver's motion, which is the letter Ventus received from its lender. It states:

Please be assured this is not due to our assessment of you as borrowers, but is a direct response to the Covid-19 pandemic. Having reviewed your financial statements and portfolio performance as well as the financials, appraisals and rent collections of the subject properties, we were very confident these would be approved by our loan committee.

33. The doctrine of commercial frustration is applicable to the facts and circumstances in this proceeding. The doctrine has two conditions, that (i) the frustrating event was not reasonably foreseeable; and (ii) the value of performance has been totally or nearly totally destroyed by the event. **United States of America v. Southwestern Electric Cooperative, Inc.**, 869 F.2d 310 (7th Cir. 1989).

34. In **Scottsdale Ltd. Partnership v. Plitt Theatres, Inc.**, 1999 WL 281085 (N.D.Ill. 1999) the defendant asserted the defense of commercial frustration due to a change in zoning. The plaintiff filed a motion to strike the defense. The court denied the motion holding that there were disputed issues of fact.

35. Similarly, in **Convenient Food Mart, Inc. v. C.F. Marts of California, Inc.**, 1990 WL 512228 (N.D. Ill. 1990), the parties lost the trademark to the business and accordingly, the defendant asserted the defense of commercial frustration. The plaintiff filed a motion for summary judgment which was denied by the court.

36. Although admittedly this doctrine is applied sparingly, the Covid-19 pandemic is the type of event that is so extraordinary that the doctrine should apply. There can be no doubt the pandemic was unforeseeable and temporarily seized-up the loan market.

37. Moreover, the law abhors a forfeiture. **Looney v. Farmers Home Administration**, 790 F.2d 310 (7th Cir. 1986). A forfeiture will not be enforced if an injustice will result therefrom. **Johnson v. PS Illinois Trust**, 2005 WL 2035589 (N.D. Dist. 2005)

38. Requiring Ventus to forfeit \$431,520.00 under all of the facts and circumstances here would clearly be unjust.

39. Not only does the law abhor a forfeiture and such a provision will not be enforced, but a penalty clause will not be enforced either. **Raffel v. Medallion Kitchens of Minnesota**, 139 F.3d 1142 (7th Cir. 1998). The court in **Raffel** also stated that forfeitures and penalties are disfavored under Illinois law and will be resolved in favor of classification as a penalty.

40.a clause is a liquidated damages provision and not a penalty if (1) the actual damages from a breach are difficult to measure at the time the contract was made; and (2) the specified amount of damages is reasonable in light of the anticipated or actual loss

caused by the breach.

ScavengerSale Investors L.P. v. Bryant, 2001 WL 709441 (Ill. N.D. Dist.)

41. The Receiver has not established that it incurred “liquidated damages” of \$431,520.00. The Receiver could have waited a few more months so that lenders could sort through the pandemic. Inexplicably, the Receiver has elected not to do so. The receivership estate will receive an additional \$965,200.00 if the Properties are sold to Ventus. Clearly and in light of the facts and circumstances here, forfeiture of this amount of money is an unenforceable penalty.

42. In its reply the Receiver states that refusal to approve the sales would defeat the expectations of the prospective buyers and disrupt the finality of the sales process. In support of this argument the receiver relies on three cases, two of which are from other circuits, and the third, from the 7th Circuit, is **Corporate Assets, Inc. v. Paloian**, 368 F.3d 761 (7th Cir. 2004) which actually supports Ventus’ objection (see paragraph 22 above). **Corporate Assets** denied confirmation, stating that a court has more discretion to reject a sale prior to, rather than after confirmation.

43. The Receiver also asserts that “Every day that passes after these contracts were signed, the prospective purchasers’ expectations and gravity of finality steadily increases”. However, the object of the receivership is to represent the victims of the wrongdoing and “act with due regard to the realization of the true and proper value of the real estate”. Ventus is offering to pay \$965,200.00 more than the respective purchasers and, not surprisingly, the lenders favor Ventus’ offers.

44. Lastly, the Receiver states that if the pending sales are denied future investors will have the incentive to offer lower bids. Not only is this statement pure speculation,

but on the contrary, it sends a message to the investor community that the Court will accept the highest and best bid.

45. Both prospective purchasers also support the motion to confirm, primarily stating that they had no notice that Ventus would be allowed to intervene in order to seek reinstatement of its contracts. However, the contracts signed by the prospective purchasers contain a provision that requires court approval. Therefore, they were on notice that if the Court denies approval, “the Agreement[s] shall become null and void....”. In short, their offers were contingent not final.

46. Pioneer Acquisitions relies on Steinbrecher v. Stienbrecher, 197 Ill.2d 514, 759 N.E.2d 509 (Ill. 2001) to support its lack of notice argument. Steinbrecher is easily distinguishable from the contracts at issue here. In Steinbrecher, one sibling brought suit against his other siblings to partition a parcel of real estate. It did not involve a contract much less a contract that required court approval.

47. The Illinois Mortgage Foreclosure Law is analogous to the facts before this Court. Section 15-1508(b) allows a court to deny confirmation if the sale is unjust.

48. The bids received from the prospective purchasers represent a small snap-shot of the market at a very specific place in time – at the beginning of the Covid-19 pandemic. This is not the true fair market value of the Properties. The offers made by Ventus represent the true fair market values of the Properties.

49. The totality of the circumstances, especially the extraordinary and unforeseen Covid-19 pandemic, as well as the Receiver’s obligation to the victims and lenders, justify Ventus’ objection to the Receiver’s Eight Motion to Confirm Sale.

WHEREFORE, Intervenor, Ventus Holdings, LLC respectfully requests that the Court enter an order denying the Receiver's Eighth Motion to Confirm Sale of Certain Real Estate and either:

- A. Direct the Receiver to re-instate the Ventus contracts thereby allowing Ventus to purchase the Properties; or alternatively
- B. Grant leave to Ventus to file a motion for return of its earnest money deposits.

Respectfully Submitted,

s/Michael B. Elman
Attorney for Ventus Holdings, LLC

Michael B. Elman & Associates, Ltd.
10 South LaSalle Street, Suite 1420
Chicago, Illinois 60603
(312)541-0903
melman@mbelmanlaw.com

CERTIFICATE OF SERVICE

I hereby certify on July 17, 2020, the undersigned electronically filed this Objection of Intervenor Ventus Holdings, LLC to Receiver's Eighth Motion to Confirm Sale of Certain Real Estate with the Clerk of the United States District Court for the Northern District of Illinois, via the CM/ECF system and copies thereof were served to counsel of record via the CM/ECF system.

/s/ Michael B. Elman
Attorney for Ventus Holdings, LLC

Michael B. Elman & Associates, Ltd.
10 South LaSalle Street, Suite 1420
Chicago, Illinois 60603
(312)541-0903
melman@mbelmanlaw.com

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
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UNITED STATES SECURITIES AND
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Hon. John Z. Lee

Magistrate Judge Young B. Kim

AFFIDAVIT OF ZACHARY D. ELMAN

I, Zachary D. Elman, being duly sworn upon my oath, depose and state as follow:

1. Affiant is a member-manager of Ventus Holdings, LLC ("Ventus").
2. Ventus came into existence on January 23, 2013 and Affiant has been a member-manager from Ventus' inception.
3. Ventus is in the business of owning and operating multi-unit apartment buildings.
4. Ventus currently owns approximately 425 apartment units among approximately 30 buildings, all of which are located on the west and south sides of Chicago.
5. In connection with the three transactions that are the subject of this motion, Ventus' lender declined to finance the transactions solely due to the Covid-19 pandemic.

6. Prior to these three transactions, no lender had ever denied a loan to Ventus. Attached to the Receiver's motion as Exhibit 6 is the letter Ventus received from its lender stating that:

Please be assured this is not due to our assessment of you as borrowers, but is a direct response to the Covid-19 pandemic. Having reviewed your financial statements and portfolio performance as well as the financials, appraisals and rent collections of the subject properties, we were very confident these would be approved by our loan committee".

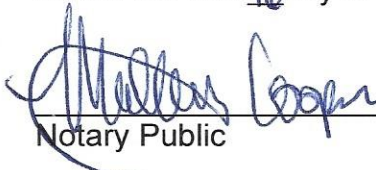
7. Ventus has secured a new loan term sheet, the terms of which are acceptable to Ventus. The only contingencies remaining are a re-certification of an existing appraisal (not a new appraisal) and review of the most recent financials for each of the properties.
8. Based upon the Affiant's experience, the customary procedures for securing a commercial real estate loan are as follows:
- A. Provide the lender with the property's financial information for the past 12 months;
 - B. Provide the lender with the borrower's financial records;
 - C. Order an appraisal of the property; and
 - D. Loan review by the lender's underwriting/credit department for approval.
9. The lender has been provided with all required documentation except the financial information for the Merrill property in June and the Kingston properties from March through June. These documents have been requested through the seller's broker who has been made aware of the urgency to provide them.

10. The lender does not require a new appraisal but a re-certification of the existing appraisal. Therefore, there is no need to hire an appraiser. A re-certification can be received in no longer than 1 week.
11. Affiant has asked the selling broker for the last few months of financial documents and is currently awaiting their receipt.
12. Affiant anticipates that once the final few months of the properties' financial information is provided to the lender, the transactions can be closed within 30 days.
13. Based upon the financial records received by Affiant:
 - A. Merrill property: From June 2019 through May, 2020 net operating income is \$71,967.65;
 - B. 7600 S. Kingston: From March, 2019 through February, 2020 net operating income is \$5,854.82; and
 - C. 7656 S. Kingston: From March, 2019 through February, 2020 net operating income loss is \$58,143.95. However this property incurred a one-time capital expenditure of \$16,975.98 in January and repair costs over the last 12 months, from March, 2019 to February, 2020 of \$23,807.50, the last 6 months only being \$6,625.50.
14. Thus, the receivership estate will not incur a loss of income if the sale of the properties is delayed an additional 30 days.
15. If asked to testify under oath, Affiant would testify to the same facts as those

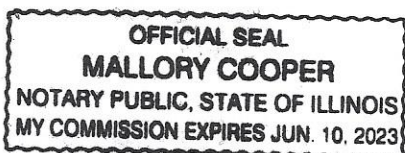
stated herein.

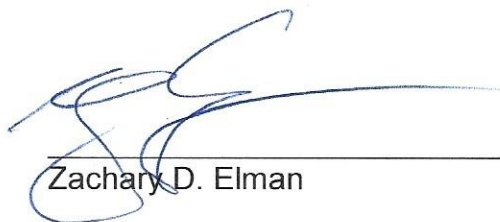
AFFIANT FURTHER SAYETH NOT.

SUBSCRIBED AND SWORN TO
before me this 16 day of July, 2020.



Notary Public





Zachary D. Elman