

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

UNITED STATES SECURITIES AND)	
EXCHANGE COMMISSION,)	
)	
Plaintiff,)	Civil Action NO.: 18-cv-5587
)	
v.)	Hon. John Z. Lee
)	
EQUITYBUILD, INC., EQUITYBUILD)	Magistrate Judge Young B. Kim
FINANCE, LLC, JEROME E. COHEN, and)	
SHAUN D. COHEN)	
)	
Defendants.)	

**SOUTHSIDE PROPERTY GROUP, LLC’S
MEMORANDUM IN SUPPORT OF THE RECEIVER’S EIGHTH MOTION TO
CONFIRM THE SALE OF CERTAIN REAL ESTATE**

Southside Property Group, LLC (“Southside”), for its Memorandum in Support of the Receiver’s Eighth Motion to Confirm the Sale of Certain Real Estate (Doc. 712) (“Motion to Confirm”) as to 7600-10 South Kingston, Chicago, IL (“7600-10 South Kingston”) and 7656-58 South Kingston, Chicago, IL (“7656-58 South Kingston”), states as follows:

INTRODUCTION

Kevin B. Duff was appointed Receiver in this case by Order entered on August 17, 2018. (Doc. 16). Through the Motion to Confirm he seeks confirmation of the sale of the residential apartment buildings known as 7600-10 South Kingston and 7656-58 South Kingston (collectively, the “Kingston Properties”) to Southside. The sales process has been on-going for nearly a year, and the Court had previously approved another bidder, Ventus Holdings, LLC (“Ventus”), to purchase these properties (Doc. 680).

The sales process leading to the Motion to Confirm and the Receiver’s proposed sales of the Kingston Properties to Southside are proper. As explained below, the objections challenging

the Motion to Confirm are based on straw man arguments and inapposite case authority that actually supports the Motion to Confirm. Ventus did not succeed in its first attempt to buy the Kingston Properties, and now it wants another chance, even though there is no evidence that the investors of Ventus would provide adequate financing or that any other sufficient financing is readily available.

The objections of Ventus and Liberty EBCP, LLC (“Liberty”) (Doc. 721-1 and 728) rely on unsupported assertion and speculation. The Receiver exercised good faith and his best judgment “with due regard to the realization of the true and proper value of such real property.” (Order Appointing Receiver, ¶38; Doc. 16). The Receiver complied with all statutory and other requirements.

There is an obvious and appropriate need for finality in a sales process here; and the Receiver, and those dealing with him, should be able to rely on the court approved process. A third Motion to Confirm would be excessive and is inappropriate. Confirming the sales to Southside is appropriate given Southside’s reasonable bids on both subject properties as well as the several bids on both properties that are lower than Southside’s (and the potential availability of the earnest funds from Ventus to minimize the difference between the Southside bids and the multiple failed bids of Ventus).

Moreover, the equities support granting the Motion to Confirm. The Receiver rightfully terminated his agreements with Ventus after Ventus breached them and could not cure them, and there is no reason to accord Ventus a favored status over entities like Southside who have played by the rules. Likewise, Southside has been transparent in its dealings with the Receiver regarding available financing. The Court should accord deference to the business judgment of the Receiver, take into account the age of the case, and consider the currently increasing expense of the real

estate. These principles far outweigh the arguments advanced by Ventus and Liberty against confirmation. The Court should grant the Motion to Confirm.

BACKGROUND FACTS

1. 7600-10 South Kingston Property

The Receiver asked \$1,700,000 for 7600-10 South Kingston and received five bids. Intervenor Ventus made a bid of \$1,870,000. (Motion to Confirm, ¶26 Doc. 712). After this Court confirmed the sale to Ventus (Doc. 690), Ventus failed to proceed due to a lack of financing and a problem with its investors. *See* Exhibit 1, and Motion to Confirm, Exhibit 7 (Doc. 712). In addition to Ventus, four other bidders also bid on 7600-10 South Kingston. Southside bid \$1,530,000 and three others bid between \$850,000 and \$910,000. (Motion to Confirm, ¶30 Doc. 712) No credit bid was made. *Id.* Thus, after the Receiver sent a default letter to Ventus and terminated his agreement with Ventus for the property, Southside as the second highest bidder, signed a Purchase & Sale Agreement, and paid monies into escrow. (Motion to Confirm, Exhibit 14, Doc. 712; and Nugent Declaration in Support of Southside Property Group's Memorandum in Support of the Receiver's Eighth Motion to Confirm the Sale of Certain Real Estate attached as Exhibit 2, ¶¶ 7, 8). Southside is ready, willing and able to close. Nugent Declaration, Exhibit 2, ¶8.

2. 7656-58 South Kingston

The Receiver asked \$500,000 for 7656-58 South Kingston and received five bids. (Motion to Confirm, ¶36, Doc. 712) Intervenor Ventus made a bid of \$510,000. *Id.* After this Court confirmed the sale to Ventus (Doc. 680), Ventus failed to proceed due to a lack of financing and a problem with its investors. *See* Exhibit 1, and Motion to Confirm, Exhibit 7 (Doc. 712).

Even though an order confirming the sale to Ventus had already been entered by this Court confirming (Doc. 680), Ventus now requests that its earnest money be returned without presenting any legal basis for the return of its earnest money.

In addition to Ventus, four other bidders also bid on 7656-58 South Kingston. Motion to Confirm, ¶36 (Doc. 712). The next highest bidder offered \$300,000, but that bidder was unable to follow through, and the Receiver (through his real estate professionals) obtained a bid from Southside for \$320,000. Motion to Confirm, ¶¶ 40 and 41 (Doc. 712). No credit bid had been made. Motion to Confirm, ¶ 37 (Doc. 712). Thus, Southside, signed a Purchase & Sale Agreement, and paid monies into escrow. (Motion to Confirm, Exhibit 23, Doc. 712; Nugent Declaration, attached as Exhibit 2, ¶¶ 9, 10).

ARGUMENT

The Facts and Good Faith Compliance by the Receiver Support Approval of the Motion to Confirm

The facts, good faith compliance of the Receiver with his responsibilities, and case law, all support approval of the Motion to Confirm.

I. Ventus Relies on Empty Arguments To Oppose Confirmation.

A. The Receiver Acted in Good Faith.

Ventus' argument that the "Receiver did not act in good faith" (Ventus' Objection to Motion to Intervene, ¶ 18; Doc. 721-1) is absurd on its face, and is no more than a baseless assertion. Nothing supporting or suggesting bad faith is presented or described. Simply put, it is ridiculous for Ventus to contend that the Receiver acted in bad faith because he did not wait for some indefinite period to see what would happen after Ventus breached its agreements, or that the Receiver should have "worked with" Ventus after Ventus breached its contract. Not surprisingly, Ventus presents no germane case authority for its arguments.

B. Ventus Still Does Not Present Evidence of Current Financing.

The Receiver properly terminated his agreements with Ventus because Ventus admitted it could not proceed with the purchases due to lack of financing. Ventus now wants another chance, even though the Receiver rightfully has moved forward with selling the properties.

Ventus opposes the Motion to Confirm, seeking to be allowed to salvage its deal. Remarkably, even after failing to obtain financing for its first try, Ventus still has not identified any specific viable financing for its second try, in what perhaps may be its last gasp to save its earnest money. Ventus has not submitted any financing documentation of any type, not even a basic redacted term sheet. Ventus has not named or provided any contact data for its financing entity. Ventus has not even submitted any affidavit or declaration from its principals, under penalty of perjury, that financing exists. Ventus could have presented any of these items to support its bald faced claim that its alleged undisclosed financing source is in fact ready. Ventus did not do so. Ventus apparently is not ready to now close a deal. But Southside is. *See* Declaration of Nugent, ¶¶ 8 and 10.

C. Ventus' Case Authorities Support Granting the Motion to Confirm, or Are Clearly Distinguishable from the Present Case.

The five cases cited by Ventus in fact support Southside's Motion to Confirm, or are distinguishable from the current case.

The bankruptcy proceeding, Corporate Assets, Inc.v. Paloian, 368 F3d 761 (7th Cir. 2004), is entirely consistent with and supports Southside's position in the present case. In the Corporate Assets bankruptcy, a deeply flawed auction for property lead to the Bankruptcy Court allowing a second, fair, auction during which the final price for the property in question increased significantly. The Seventh Circuit noted the tension between the two key principles; the court must be mindful of the integrity of the auction process while at the same time securing the highest price

for the assets. Corporate Assets, at p. 765. Unlike Corporate Assets, the auction in our case was not flawed, was fair, and resulted in an initial “winning” bid by Ventus. But the Ventus bid did not secure the highest price for the property then because it had no financing. Southside, however, is ready, willing and able to close, and signed a contract after Ventus unambiguously breached.¹

As to Illinois foreclosure law granting a court broad discretion, that is of course true, though different considerations exist here where the Receiver is an independent disinterested party already acting pursuant to the strictures of a court order. In Mortgage Electronic Systems, Inc. v. Thompson, 368 Ill. App.3d 1035 (1st Dist. 2006), the circuit court denied a motion to confirm a judicial sale where the defendant mortgagors sold the property to a third party after receiving a request for a payoff letter. The law cited by Ventus is correct but is immaterial unless Ventus is suggesting that Southside should receive costs if this Court denies the Motion to Confirm. The intervenor who had made the highest bid at the judicial sale did receive damages. Ventus is presenting its objections without due regard to how the situation has changed because of its breaches and since its breaches, and without taking into account the interests and rights of Southside and others. Nor does Ventus acknowledge the potential severity and impact of its breaches. Ventus does not acknowledge the potential problems which ruling against the Receiver at this late date can create. In the sales process for the properties the Receiver will be selling in the future, a ruling against the Receiver can chill and slow the sales process for this Receivership on

¹ As to the other cases cited by Ventus, Southside, of course, agrees that an unconscionable sales price is a basis for reversing a confirmation of sale. See ¶¶ 15, 16 of Ventus Objection. Southside also agrees that the sale is technically an irrevocable offer until confirmed. See ¶¶ 15, 16 of Ventus Objection. This law is not at issue.

an ongoing basis. Further, Ventus does not acknowledge that it does not provide evidence it can now close.

II. Liberty Relies on Faulty Arguments To Oppose Confirmation.

Liberty filed an Objection to the Motion to Confirm Sale. (Doc. 728). Liberty's arguments are empty because they merely state facts Southside agrees with, or are made out of whole cloth without support, and rely upon inapposite authority.

As to the quotations by Liberty from the Sealed Bid Public Sale of Real Estate Terms and Conditions, nothing in that document dictates "that the Ventus offers should be considered" a second time. In fact, some of the quotations set forth by Liberty totally support the exercise of the Receiver's best judgment. *See e.g.*, "[t]he Seller and the Broker reserve the right, in their sole and absolute discretion, to postpone or cancel the Sealed-Bid Public Sale of Real Estate with or without notice." (Liberty Objection, at pp. 3-4) Yes, the Receiver exercised his best good-faith judgment in his sole and absolute discretion.

The fact that Liberty does not like the Receiver's business judgment is understandable but under the facts and law, zero basis is presented other than the price at which Ventus once before had bid on the real estate. Liberty argues that "the Receiver should be obligated to pursue the higher Ventus bids...." (Liberty Objection, p. 4) Liberty's contention about being "obligated" is patently incorrect under the established law as well as under the Order establishing the Receiver and under the Terms and Conditions.

Liberty relies on only one old, dusty, case from 1939, which has not been cited for decades, and with good reason. Roth v. Hood, 106 F.2d 616 (6th Cir. 1939), involved a comptroller liquidating a piece of real property owned by a defunct bank which was a national association. The Sixth Circuit went to great pains to list the number of statutory controls in the banking laws and

the Comptroller of the Currency over liquidations of these types. Roth, at pp. 617-18. In summary, liquidations of national banks are governed by a different set of parameters, considerations and procedures in which the receiver of a national bank is appointed by the Comptroller of the Currency. In the present case, however, the Receiver is governed at least in part by 28 U.S.C. §§ 2001 and 2004 (Order Appointing Receiver, ¶39; Doc. 16; and Motion to Confirm, ¶ 51, Doc. 712), which under subsection 2001(c) specifically states: “This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.” (emphasis added). Thus, Liberty’s reliance on Roth is misplaced.

In addition, Roth did not address a fact situation where numerous properties will be sold over a relatively short period of time to a relatively small community of investors, and the chilling impact on pricing and sales finality which can occur if the Receiver’s Motion to Confirm is denied.

III. The Receiver Acted Within His Authority, Appropriately and Reasonably.

Ventus breached its agreements by defaulting on its obligations. In response to those many breaches, the Receiver acted within his authority, appropriately, and reasonably to secure the highest price for the properties in question. Ventus and Libery ask the Receiver to accept a phantom or problematic offer with no backing by any identifiable financing. In contrast, Southside has the ability to put hard cash on the table and complete the sales of these properties now. The Receiver knows this, Southside knows this, and Ventus and Liberty should know this. The Motion to Confirm and the extensive supporting documentation filed by the Receiver fully supports the relief he requests, and the Court should grant that relief including, in particular, the sale of the Kingston Properties to Southside.

CONCLUSION

The Receiver presents a sound basis for granting the Eighth Motion to Confirm. The only objections to his motion are based on speculation or lack substance. Southside requests that the Court grant the Motion to Confirm and provide such other and further relief as the Court deems just in the premises.

Respectfully Submitted,

SOUTHSIDE PROPERTY GROUP, LLC

By: /s/ Kenneth D. Peters
Kenneth D. Peters
One of Its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020 that the foregoing Memorandum in Support of the Receiver's Eighth Motion to Confirm the Sale of Certain Real Estate (Doc. 712) was filed with the Clerk of the Court using the Court's CM/ECF system which sent electronic notification to the parties participating in the Court's ECF system on July 17, 2020.

/s/ Rachel McCandless
Rachel McCandless
Paralegal

EXHIBIT 1

MICHAEL B. ELMAN & ASSOCIATES, LTD.

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April 20, 2020

VIA EMAIL

Mr. Andrew Porter
Porter Law Office
853 N. Elston Ave.
Chicago, Illinois 60642

**Re: 7600 S. Kingston
7656 S. Kingston
7110 S. Cornell
6949 S. Merrill**

Dear Andrew:

Due to the unforeseen circumstances caused by the pandemic, the buyer's lender has elected not to provide financing in connection with these transactions. A copy of the lender's correspondence is attached. In addition, because of economic circumstances, my client's investors also no longer intend to proceed with the acquisition of these properties. Accordingly due to these unforeseen circumstances, my client cannot proceed and seeks the seller's approval to release the buyer's earnest money deposit held in a strict joint order escrow account at First American Title Insurance Company in the amount of \$555,520.00.

It is quite unfortunate that we could not complete these transactions and Ventus looks forward to working with the seller again the future when circumstances permit. Kindly discuss this correspondence with your client and the courtesy of a prompt reply is appreciated. Thank you for your anticipated cooperation.

Very truly yours,

Michael B. Elman

MICHAEL B. ELMAN
MBE:gj

cc: Ventus Holdings, LLC

EXHIBIT 2

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

UNITED STATES SECURITIES AND)		
EXCHANGE COMMISSION,))	
)	
Plaintiff,))	Civil Action NO.: 18-cv-5587
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v.))	Hon. John Z. Lee
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EQUITYBUILD, INC., EQUITYBUILD))	Magistrate Judge Young B. Kim
FINANCE, LLC, JEROME E. COHEN, and))	
SHAUN D. COHEN))	
)	
Defendants.))	

**DECLARATION OF KEVIN NUGENT IN SUPPORT OF SOUTHSIDE
PROPERTY GROUP'S MEMORANDUM IN SUPPORT OF THE RECEIVER'S
EIGHTH MOTION TO CONFIRM THE SALE OF CERTAIN REAL ESTATE**

Pursuant to 28 U.S.C. §1746, I hereby declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I have primary management responsibility for Southside.
2. My title at Southside is Managing Member, and I am authorized to testify as to matters set forth in this Declaration.
3. I have personal knowledge of all the bids and offers of purchase submitted by Southside to the Receiver for purchase of the properties known as 7600-10 South Kingston and 7656-58 South Kingston, both in Chicago, Illinois (collectively, the "Kingston Properties").
4. I managed and supervised the due diligence conducted by Southside on the Kingston Properties. I hired outside professionals as part of the due diligence process, took the lead in making decisions on behalf of Southside as to the Kingston Properties, communicated with the attorney for the Receiver as to the Kingston Properties, communicated with the real estate professionals hired by the Receiver to facilitate the sale of the Kingston Properties, hired attorneys

and other professionals to work with me to make decisions on the Kingston Properties, ordered appraisals, signed the Purchase & Sale Agreement for purchase of 7656-58 South Kingston, signed the Purchase & Sale Agreement for purchase of 7600-10 South Kingston, and paid earnest monies on behalf of Southside into escrow for both Kingston Properties.

5. On or about August 14, 2019, Southside submitted a good faith, arms-length bid to the Receiver for 7600-10 South Kingston. Shortly thereafter, I was told that we were not the highest bid, and I later learned we were the second highest of five formal bids.

6. After the bidding period closed for the Kingston Properties, the Receiver (through real estate professionals apparently representing the Receiver) informed Southside that the 7600-10 South Kingston property had been won by another bidder. Months later, in April of 2020, the Receiver contacted Southside and indicated that the first place bidder had defaulted.

7. With respect to the 7600-10 South Kingston property, the Receiver accepted Southside's bid. Therefore, Southside immediately secured financing for the 7600-10 South Kingston property, and Southside executed a Purchase and Sale Agreement for the 7600-10 South Kingston property. A copy of that Purchase and Sale Agreement is attached to the Receiver's Eighth Motion to Confirm the Sale of Certain Real Estate and for the Avoidance of Certain Mortgages, Liens, Claims, and Encumbrances as Exhibit 14 (Doc. 712).

8. Southside promptly deposited earnest money in the amount of \$153,000.00 with the Receiver, and Southside is ready, willing and able to close on the purchase of the 7600-10 South Kingston property as soon as the Court approves the sale.

9. With respect to the 7656-58 South Kingston property, I was advised that the Court confirmed the sale to a buyer but that buyer had defaulted on its contractual obligations to purchase the property. The Receiver (through real estate professionals apparently representing the Receiver)

then asked for an offer from Southside, and the Receiver accepted Southside's offer for \$320,000.00. (According to the Receiver, the second highest bid had been \$300,000.00 but that bidder could not execute a purchase & sale agreement.) A copy of that Purchase and Sale Agreement is attached to the Eighth Motion to Confirm as Exhibit 23 (Doc. 712).

10. Southside has already deposited earnest money in the amount of \$32,000.00 with the Receiver, and Southside is ready, willing, and able to close on the 7656-58 South Kingston property as soon as the Court approves the sale.

11. If called to testify, I will testify as set forth in this Declaration.

Executed on July 7th, 2020.



Kevin Nugent