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 FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	**Magistrate Judge Young B. Kim**
Defendants.	

RECEIVER'S OPPOSITION TO VENTUS' MOTION TO STAY

The Receiver opposes Ventus' Motion to Stay (Dkt. No. 848). Ventus had contracts to purchase three receivership properties, but terminated all three of them because it professed an inability to secure the capital necessary to consummate the transactions. The Receiver did not terminate these contracts. Ventus did. In so doing, Ventus relinquished any interest in the three assets. Nonetheless, it has now appealed this Court's order confirming the sales of these properties to new purchasers as an obvious means of exerting leverage against the Receiver in its effort to recover earnest monies paid associated with those three properties. These properties urgently need to be sold, however, and the prospective new buyers should not be forced to endure yet additional delays, having deposited their own earnest monies and diligently lined up all the pieces necessary to effectuate the acquisitions. Indeed, the buyers have expressed frustration by the cancellation of scheduled closings as a result of Ventus' efforts to undermine the sales, and rightfully so, as the disruptions require constant rewriting of acquisition and financing documentation, rent rolls, and settlement statements, as well as the last-minute rearranging of busy schedules of the principals,

lawyers and paralegals for two different buyers and their respective lenders. The delays also cost the Receiver goodwill with the title company which blocks out substantial time for escrow agents and then loses it, resulting in inefficient allocations of resources.

The Motion to Stay should be denied because Ventus enjoys no right to appeal this Court's orders (Dkt. Nos. 825 and 841) under 28 U.S.C. § 1292(a)(2), which, as the Seventh Circuit has made clear, is not a vehicle to appeal in these circumstances. Indeed, Ventus makes no effort to provide a jurisdictional rationale to support its appeal, a tacit admission that jurisdiction does not exist. Further, Ventus has no standing to appeal, not only because it terminated its contracts, but because it is not a claimant and will not be affected by any reduction in sales proceeds available for distribution to investors. Moreover, Ventus is not likely to succeed on the merits, and will not be irreparably harmed by the confirmation of the sale of properties in which it voluntarily relinquished its interest. This Motion, like that made by certain institutional lenders, should therefore be denied. *See generally SEC v. Wealth Management, LLC*, 628 F.3d 323 (7th Cir. 2010) (noting prior denials of motions to stay by both district and appellate court).

Finally, as a procedural matter, Ventus never noticed its Motion to stay for hearing and did not appear at the November 5, 2020 hearing at which the Court allowed certain institutional lenders an opportunity to file a reply to their own motion to stay after inquiring into the status of the sale of the properties implicated by that motion (Dkt. No. 832). As a result of these failures, there was no discussion before the Court of Ventus' Motion to Stay or the three properties implicated by Ventus' Motion. Indeed, had Ventus noticed its Motion for hearing, appeared, and inquired about the status of the sales, it would have been reminded that, unlike the circumstances associated with the appealing institutional lenders, the Court has already issued all necessary orders to proceed to closing (Dkt. Nos. 825 (10/26/2020) & 841 (10/30/2020)) and would have been notified that the

Receiver had set Thursday, November 12, 2020, as the dates of the closings of the three properties at issue in Ventus' Motion. Such timing is consistent with the Receiver's practice of closing properties as soon as possible after receipt of appropriate orders in the interest in capping all expenses and casualty risks associated with holding properties, and in recognition of the fact that the purchasers have been waiting for months to close and are courting risks with their lenders by not closing in timely fashion.

In light of the Court's November 9, 2020 Order (Dkt. No. 860), the Receiver has arranged to reset these closings to November 17, 2020, and is planning on proceeding with the closings at that time in order to avoid further threats that the purchaser(s) will terminate their contracts and seek damages unless closing occurs.

I. Ventus Has No Right To Appeal Under Section 1292(a).

The Seventh Circuit (along with other circuits) has made clear that the order approving the sale of a property by the Receiver is not appealable under Section 1292(a)(2). *See, e.g., U.S. v. Antiques Ltd. P'ship*, 760 F.3d 668, 671-72 (7th Cir. 2014). The Receiver will not repeat those arguments verbatim, but incorporates those points from his opposition to the motion to stay filed by the institutional lenders as though set forth herein. (Dkt. No. 854 at 4-5)

II. Ventus Lacks Standing To Appeal.

Ventus admits that it terminated the contracts to purchase the properties at issue in its Motion. (Dkt. No. 739, Exhibit A) Thus, Ventus has no contracts to enforce and no contractual remedies to seek; nor is it seeking to do so. Moreover, it is not a claimant and is not eligible for a distribution from the assets of the Estate. As such, Ventus lacks standing on both fronts. Ventus will not suffer any damages from a sale of these properties (after it terminated the contracts). And, Ventus is currently pursuing the return of its earnest money, which is a matter that remains

pending; as such, Ventus has not sustained damage associated with that issue from which it could pursue further relief.

III. There Is No Irreparable Harm To Ventus, But Great Harm And Risk To The Stakeholders And The Public.

As noted above, not only has Ventus not suffered any harm, it is impossible to characterize any alleged harm as "irreparable." Simply put, Ventus cannot be irreparably harmed by being deprived of the opportunity to acquire properties that it expressly disclaimed any interest in acquiring.

Instead, the actual and real harm here is being visited upon the Estate and the receivership claimants, who stand to be damaged if the purchasers walk away or sue for damages (as recently threatened), or the properties suffer a casualty event during a potentially lengthy appeal process, while additional costs mount from continuing operation of the properties. (*See* Dkt. No. 854 at 3, 12-13 (describing the costs and risks from delaying property sales, which are expressly incorporated here by reference)) Stakeholders will continue to deal with greater delay, costs, and expenses, which are now being stacked on earlier delays which have compounded impacts on all claimants, the Receivership Estate, and the Court.

IV. There Is No Likelihood Of Success On The Merits.

Ventus' Motion does not come close to meeting the burden of a strong showing of likelihood of success on the merits. Ventus possesses no appealable order. It completely lacks standing. Ventus can press its case for the return of the earnest money as it now is seeking to do, but that is yet to be adjudicated. Separately, having terminated its contracts to buy the properties, Ventus divested itself of any interest in those assets.

Ventus' reliance upon *Corporate Assets, Inc. v. Paloian*, 368 F.3d 761 (7th Cir. 2004) is misplaced. *Paloian* arose in a bankruptcy setting, and involved a bankruptcy court's decision,

prior to approving a sale, to proceed to a second auction. The Seventh Circuit acknowledged the difficult task faced by a bankruptcy court in balancing the goal of estate maximization against the court's interest in preserving the integrity and finality of the sale process and concluded that lower courts must be accorded maximum discretion in striking the appropriate balance between these two competing goals. *Id.* at 770. The appellate court found that under the circumstances present, the bankruptcy court did not abuse its discretion in permitting the second auction after the estate received a significantly higher upset bid. *Id.* at 772. But nothing in the *Paloian* decision suggests that it would have been an abuse of discretion to *confirm* the sale to the original high bidder, and therefore nothing to suggest that Ventus has established a likelihood of success on the merits.

In addition, *JP Morgan Chase Bank v. Fankhauser*, 383 Ill.App.3d 254 (2d Dist. 2008), is also inapposite, as it involved a state court action construing a section of the foreclosure statute directing that a court shall confirm a foreclosure sale unless, *inter alia*, the terms of the sale were unconscionable. 735 ILCS 5/15-1508(b). The court remanded for an evidentiary hearing on a lienholder's assertion that a bid less than 10% of the property value was unconscionable. *Id.* at 265. The reviewing court was careful to explain that mere inadequacy of price is not a sufficient reason to disturb a judicial sale, except when "the amount bid is so grossly inadequate that it shocks the conscience of a court of equity." *Id.* at 264. Here, in contrast, the next-highest bids accepted by the Receiver were approximately 80% of the price at which Ventus was otherwise prepared to purchase the properties.

V. There Is No Valid Basis To Stay, But, If A Stay Is Issued, Then A Bond Is Essential To Protect The Interests Of The Receivership Estate and Its Stakeholders.

There is no ground to support a stay and even less ground to excuse a bond. Here, a bond would be essential given the substantial additional financial risks to the Estate and its stakeholders.

Indeed, in these circumstances, where it is evident that the request is designed to use the system to increase costs and create delay in order to obtain leverage with respect to the escrowed funds, a bond requirement becomes even more important. In short, the movant truly must be required to put its money where its mouth is. Here, where there is a clear amount at issue – each property has an established and approved purchase price – the bond should be for at least 110% of the purchase prices of the properties in light of, for example but without limitation, the increased costs to the Receivership both in carrying costs and in having to litigate these matters, the ongoing casualty risk, and the risk of losing the current sales in light of the delays.

Wherefore, and given that the Receiver anticipates proceeding on November 17, 2020 with the scheduled closings of the three properties at issue (rescheduled from November 12, 2020), the Receiver respectfully requests that Ventus' Motion to Stay be denied.

Dated: November 11, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2020, I electronically filed the foregoing **Receiver's Opposition to Ventus' Motion to Stay** with the Clerk of the United States District Court for the Northern District of Illinois, using the CM/ECF system. A copy of the foregoing was served upon counsel of record via the CM/ECF system.

I further certify that I caused a true and correct copy of the foregoing **Opposition**, to be served upon the following individuals or entities by electronic mail:

- Defendant Jerome Cohen (jerryc@reagan.com);
- All known EquityBuild investors; and
- All known individuals or entities that submitted a proof of claim in this action (sent to the e-mail address each claimant provided on the claim form).

I further certify that the **Opposition** will be posted to the Receivership webpage at: http://rdaplaw.net/receivership-for-equitybuild

/s/ Michael Rachlis

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