Appeal No. 21-2664

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee

and

KEVIN B. DUFF, RECEIVER,
Court-Appointed Receiver-Appellee

v.

VENTUS HOLDINGS, LLC, and VENTUS MERRILL, LLC
Appellants

Appeal from the United States District Court
for the Northern District of Illinois
Hon. John Z. Lee
1:18-cv-5587

MOTION TO DISMISS APPEAL

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INTRODUCTION

Receiver-Appellee Kevin B. Duff, by and through his attorneys, hereby moves to dismiss this appeal for lack of jurisdiction. This is the second interlocutory appeal filed by Ventus Holdings, LLC and Ventus Merrill, LLC (collectively, "Ventus") arising out of their respective defaults in connection with the prospective purchase of three real estate properties (7600-10 S. Kingston, 7656 S. Kingston, and 6949-59 S. Merrill) (the "Properties"). The first appeal was dismissed by this Court for lack of jurisdiction, and this appeal should be dismissed for the same reason.

Ventus entered into, then backed out of, contracts to purchase the Properties, citing lack of financing and lack of equity. As the District Court stated, "Ventus essentially concedes that it breached its contracts with the Receiver for the purchase of [the Properties]." (*See* Exhibit 1, Order at 3) After Ventus admitted that it could not close, the Receiver executed contracts to sell the Properties to other purchasers. When the Receiver moved for approval of the new contracts, Ventus objected based on the suggestion that it was approved for replacement financing and would close at the original prices, which exceeded the prices the Receiver was able to achieve with the new purchasers. The District Court overruled the objection and confirmed the sales to the new purchasers. (Dkt. No. 825) Ventus appealed, but that appeal was dismissed by this Court for lack of jurisdiction. (Attached as Exhibit 2)

After the sales of the Properties closed, Ventus sought the return of its $431,520 in earnest money. The District Court rejected Ventus' request for an order that would allow it to secure the return of those funds, which were deposited into

(and which remain in) escrow with the title company. (Dkt. No. 1025, Exhibit 1 hereto)[1]

On September 10, 2021, Ventus filed a notice of appeal from the District Court's decision. (*See* Dkt. No. 1043) Ventus asserts that jurisdiction for this interlocutory appeal exists under 28 U.S.C. § 1292(a)(2) "because it concerns the wind up of the Receivership Estate." (App. Dkt. No. 3 at 3)

Section 1292(a)(2), however, does not support jurisdiction over this appeal. Controlling authority from the Seventh Circuit which this Court cited in its decision to dismiss Ventus' prior appeal, as well as the language of the statute, establish that an interlocutory order associated with an effort to obtain the return of earnest money related to the purchase and sale of receivership property is not appealable under Section 1292(a)(2). Accordingly, the Receiver moves to dismiss this appeal.

BACKGROUND AND PROCEDURAL HISTORY

Father and son, Jerome Cohen and Shaun Cohen, were the owners and operators of EquityBuild, Inc., EquityBuild Finance, LLC, and numerous affiliated entities which purchased, rehabilitated, and resold real estate properties principally located on the south side of Chicago. (Dkt. No. 1 at 1) The Cohens touted their self-described "proprietary method" for identifying undervalued property, then solicited loans and investments in connection with the acquisition and rehabilitation of

[1] These earnest money deposits, when released to the Receiver, will be retained in separate accounts that have been established for each of the Properties sold by the Receiver to be held for eventual distribution to the fraud victims and creditors at the conclusion of the claims process being administered in the District Court. (Dkt. No. 882 at 13)

selected properties with promises of superior risk-adjusted returns. (*Id.* at 1-2) Their business, however, was a massive fraud. (*Id.*) In actuality, the Cohens were operating a Ponzi scheme by, *inter alia,* over-inflating the values of properties to make them attractive to lenders and investors, creating multiple secured interests in the same properties, and taking various other actions to ensure they received fresh monies to pay their obligations to prior investors. (*Id.*)

The United States Securities and Exchange Commission (the "SEC") filed suit on August 15, 2018 to halt the Cohens' scheme and their continuing violations of federal securities law. (*Id.* at 3) A consent judgment was entered a short time thereafter. (Dkt. No. 40) The SEC sought, and the District Court appointed, a receiver to take charge of EquityBuild's assets and operations. (Dkt. No. 16)

The receivership is complex and substantial, subsumes nearly 120 parcels of real estate containing more than 1,600 units, and requires the analysis of over 2,000 claims submitted by approximately 900 claimants, the vast majority of whom are defrauded investors. (*See, e.g.,* Dkt. No. 638 at 8, 18-20; Dkt. No. 720 at 1; Dkt. No. 107 at 10) Maintenance, preservation, and orderly disposition of the properties has been a primary and substantial focus of the Receiver. (*See, e.g.,* Status Reports, Dkt. Nos. 107, 258, 348, 467, 567, 624, 698, 757, 839, 930, 985, 1017) The Receiver has followed a deliberate and orderly plan to market and sell the properties, consistently with District Court approval. (Dkt. No. 166; *see also* Dkt. No. 790 at 11 (and record citations therein)) With nearly all the properties now sold, the District Court has

approved and the Receiver has implemented a claims review process and the Receiver is currently reviewing disputed claims as a predicate to a final distribution plan.

Consistent with the foregoing duties and responsibilities, the Receiver marketed the three properties at issue in this appeal in accordance with the procedures approved by the District Court (*e.g.,* Dkt. Nos. 352, 382, 540, 618). In October 2019, the Receiver accepted contracts (without financing contingencies) to sell Ventus the property located at 7600-10 South Kingston for $1,870,000 and to sell Ventus the property located at 7656 South Kingston for $510,000. (Dkt. No. 618 at 66, 69) In December 2019, the Receiver accepted a contract to sell Ventus the property located at 6949-59 South Merrill for $1,935,200. (*Id.* at 76)

After the District Court confirmed these sales (Dkt Nos. 633 and 680), Ventus defaulted and the purchase contracts were terminated. (*See* Dkt. No. 739, Exhibits A & B) By letter dated April 20, 2020, Ventus informed counsel for the Receiver that it was unable to secure acquisition financing, that it could no longer raise the required equity, and that it could not proceed with the acquisitions of the Properties. (*Id.,* Exhibit A) Ventus then requested the return of its earnest money deposits (equaling ten percent of each purchase price), but the Receiver refused, which the purchase contracts entitled him to do.

With Ventus' unequivocal pronouncement that it could not proceed (*see id.*, Exhibit B), the Receiver secured new purchase contracts for the Properties from other buyers who had previously submitted bids. On June 11, 2020, the Receiver moved to confirm the sales of the Properties to the new purchasers. (Dkt. No. 712) As set forth

in the motion, the Receiver accepted an offer to purchase 7600-10 South Kingston for $1,530,000, accepted an offer to purchase 7656 South Kingston for $320,000, and accepted an offer to purchase 6949-59 South Merrill for $1,520,000. (*See* Dkt. No. 712 at 5-11)

On June 22, 2020, however, Ventus moved to intervene and then opposed the Receiver's motion to confirm the sales to the new purchasers. (Dkt. No. 721)

On October 26, 2020, the District Court overruled Ventus' objection and granted the Receiver's motion to approve the sale of the Properties. (Exhibit 2) Ventus appealed from that decision, but the appeal was dismissed for lack of subject matter jurisdiction. (*Id*.)

Then, in the District Court, Ventus moved for an order that would direct the title company to return its earnest money on the basis that its breach was excused by the doctrines of impossibility and commercial frustration. (Dkt. No. 861) The Receiver opposed the motion. (Dkt. No. 882) The District Court ruled in the Receiver's favor and denied Ventus' motion. (Exhibit 1) Another notice of appeal by Ventus followed. The Receiver now moves to dismiss the appeal for lack of subject matter jurisdiction.

ARGUMENT

The Appellant asserts 28 U.S.C. § 1292(a)(2) as the basis of this Court's jurisdiction over the interlocutory order of the District Court. Section 1292(a)(2) supplies jurisdiction for appeals from "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes

thereof, such as directing sales or other disposals of property…." 28 U.S.C. § 1292(a)(2). Ventus asserts, without citation, that jurisdiction exists because the decision denying its motion for an order enabling the return of its earnest money represents a winding up of the receivership estate.

To the contrary, the order appealed from does not fall within the narrow scope of jurisdiction set forth in Section 1292(a)(2), as it arises from and is intertwined with the sale and proceeds of Receivership Estate assets. It is not an order appointing a receiver, an order refusing to take steps to wind up the receivership estate, or an order refusing to direct the sales of properties. This Court recognized the limited scope of Section 1292(a)(2) when it dismissed Ventus' prior interlocutory appeal to which the order now under appeal relates. (*See* Exhibit 2 hereto) In so holding, this Court expressly recognized and applied the applicable and governing authority from this Circuit on this issue (*id.*), a decision consistent with other circuits.

In *U.S. v. Antiques Ltd. P'ship,* 760 F.3d 668 (7th Cir. 2014), the actions of a receiver and related court orders led to the filing of numerous appeals, including an appeal from an order of the district court approving of certain property sales. The Seventh Circuit held that an "appeal … challenging the district court's approval of property sales by the receiver … is not within our jurisdiction," despite the fact that "an interlocutory order appointing a receiver is appealable, as is an interlocutory order 'refusing to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property.'" *Antiques,* 760 F.3d at 671 (citing 28 U.S.C. § 1292(a)(2)). The Court explained:

> Parties in other cases have argued that this additional statutory language authorizes appeals from orders en route to winding up the receivership, which could include the sale order in the collection phase of this case. But that would both strain the statutory language and make anything the receiver did appealable immediately, which could flood the courts of appeals with interlocutory appeals. We therefore agree with the courts that have held that appellate jurisdiction over interlocutory orders involving receivers is limited to the three types of order specified in section 1292(a)(2): orders appointing a receiver, orders refusing to wind up a receivership, and orders refusing to take steps to accomplish the purposes for winding up a receivership.

760 F.3d at 671-72.

This Court applied the *Antiques* decision to dismiss Ventus' prior appeal, and *Antiques* is equally applicable here. Relabeling the District Court's order as one involving the winding up of the receivership is contradicted by the order itself, which finds that escrow money deposits from the defaulted purchase and sale agreements constitute assets of the estate to be held by the Receiver. To suggest that the order refuses to wind up a receivership "strain[s] the statutory language and [would] make anything the receiver did appealable immediately." *Antiques*, 760 F.3d at 672. Should the Court find jurisdiction in a situation like this one, the Court will open itself to a flood of appeals from claimants or other objectors who could argue that the District Court is refusing to grant them immediate relief. There are nearly 900 claimants in this action, and those claimants are participating in a claims process involving various tranches, and broadening the scope of Section 1292(a)(2) could unleash a continuing series of interlocutory appeals.

This Court's narrow and careful interpretation of Section 1292(a)(2) reflects the conclusion that Congress did not want to burden the U.S. Courts of Appeal with ongoing supervision of every action a district court or receiver might take. Indeed, other circuits have interpreted the statute in similar fashion and found that it does not apply to steps taken to accomplish the purpose of a receivership. *See, e.g., SEC v. Am. Principals Holdings, Inc.,* 817 F.2d 1349, 1350 (9th Cir. 1987) (interlocutory order requiring that funds be turned over to a receiver is not appealable under Section 1292(a)(2)).

Indeed, *Antiques* recognized that other circuits reject the expansive jurisdiction advanced here. 760 F.3d at 672; *see also, e.g., State Street Bank & Trust Co. v. Brockrim, Inc.,* 87 F.3d 1487, 1490-91 (1st Cir. 1996); *Commodity Futures Trading Comm'n v. Walsh,* 618 F.3d 218, 225 n.3 (2d Cir. 2010); *SEC v. Black,* 163 F.3d 188, 194-95 (3d Cir. 1998); *Netsphere, Inc. v. Baron*, 799 F.3d 327 (5th Cir. 2015); *Plata v. Schwarzenegger,* 603 F.3d 1088, 1099 (9th Cir. 2010).

For example, the First Circuit recognized that a district court's approval of the sale of certain properties did not fall within Section 1292(a)(2). *State Street Bank & Trust Co.* at 1490-91. Like this Court, it noted that an order approving a sale "in no way represents a refusal to wind up the receivership or to take steps to accomplish the purposes thereof." *Id.*

Similarly, in *Plata,* the district court appointed a receiver over the California Department of Corrections and Rehabilitation in connection with an action to improve prisoner health care. The Receiver created a construction plan for additional

hospital beds (a plan that would cost 8 billion dollars over time). The state of California filed a motion terminate the plan, which the district court denied. An appeal was pursued under Section 1292(a)(2), but the Ninth Circuit found it lacking in jurisdiction, stating that "the district court's refusal to block the Receiver's construction plan (or to deny the Receiver the power to plan, as the State now presents it) is not a refusal to terminate the receivership, nor is it a refusal to take a step to accomplish the winding up of the receivership." *Plata*, 603 F.3d at 1099 (citing *Am. Principals Holdings, Inc.*, at 1350-51 (interpreting § 1292(a)(2)'s "take steps to accomplish the purposes thereof" to apply only to orders refusing to take steps to wind up a receivership)).

The Appellant cannot avoid this Court's decision in *Antiques*, the prior appellate ruling in this action, and the great weight of persuasive authority in other circuits by endeavoring to relabel the interlocutory order entered here as tantamount to an order winding up, or refusing to wind up, a receivership.

CONCLUSION

For the reasons set forth herein, this appeal lacks jurisdiction. Accordingly, the Receiver respectfully requests that this motion to dismiss be granted and that he be awarded costs and such other relief as the Court deems just and equitable.

Dated: October 13, 2021

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael Rachlis

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
v.	)	**No. 18 C 5587**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	)	**Judge John Z. Lee**
Defendants.	)	

ORDER

Before the Court is the motion by intervenors Ventus Holdings, LLC, and Ventus Merrill, LLC (collectively, "Ventus"), seeking the return of earnest money deposits relating to Ventus's contracts with the Receiver to purchase three parcels of commercial real estate: 6949–59 South Merrill Avenue, 7600–10 South Kingston Avenue, and 7656–58 South Kingston Avenue. For the following reasons, Ventus's motion [861] is denied.

I. Background

The order appointing the Receiver in this case authorized the Receiver to take "all necessary and reasonable actions" to sell or lease "all real property in the Receivership Estate, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the Receivership Estate, and with due regard to the realization of the true and proper value of such real property." Order Appointing Receiver ¶ 38, ECF No. 16. Pursuant to that authority, in October and

December 2019, the Receiver accepted contracts to sell the properties at issue to Ventus for a total of $4,315,200, and the Court confirmed those sales in February and April 2020. *See* Receiver's Fifth Mot. Confirm Sales, ECF No. 618; 2/21/20 Order, ECF No. 633; 4/1/20 Order, ECF No. 680. Ventus tendered ten percent of the purchase amount—$431,520.00—as an earnest money deposit. Ventus's Mot. Return Earnest Money at 1. On April 20, 2020, however, Ventus informed the Receiver that it had lost its acquisition financing, that it could no longer raise the required equity from its investors, and that it "no longer intend[ed] to proceed with the acquisition of these properties." Receiver's Resp. Opp'n Ventus's Mot. Return Earnest Money ("Receiver's Opp'n"), Ex. K, 4/20/20 Letter from Ventus to Receiver ("4/20/20 Letter"), ECF No. 882 at 130. Ventus added that it was "quite unfortunate that we could not complete these transactions." *Id*.

From there, the Receiver solicited and accepted the next best bids, ultimately signing contracts to sell the three properties for a total of $945,200 less than what Ventus had agreed to pay for them. Reply Supp. Eighth Mot. Confirm Sales at 3, 6, ECF No. 739. On June 11, 2020, the Receiver moved to confirm the sales. Ventus subsequently objected, seeking to reinstate its old contracts in light of new financing it was pursuing (but had not obtained). Ventus Obj. at 3, ECF No. 721-1. Ventus did not indicate that it could honor the earlier sale terms until two months after it backed out of the earlier deal, and over six weeks after the Receiver had found new purchasers for the properties. Ventus's Mot. Return Earnest Money at 2.

The Court overruled Ventus's objection and approved the sale of 6949–59 South Merrill Avenue, 7600–10 South Kingston Avenue, and 7656–58 South Kingston Avenue to the new purchasers. 10/26/20 Order at 1–4, ECF No. 825. But the Court also permitted Ventus to file the instant motion seeking a return of its earnest money deposits. *Id.* at 4. That motion is now ripe for decision.

II. Analysis

Illinois law governs the relevant purchase and sale agreements. Receiver's Opp'n, Ex. G, 7600 S. Kingston Purchase & Sale Agreement ¶ 25, ECF No. 822 at 68; *id.*, Ex. H, 7656 S. Kingston Purchase & Sale Agreement ¶ 25, ECF No. 882 at 86; *id.*, Ex. J, 6949 S. Merrill Purchase & Sale Agreement ¶ 25, ECF No. 882 at 120. Ventus essentially concedes that it breached its contracts with the Receiver for the purchase of 6949–59 South Merrill Avenue, 7600–10 South Kingston Avenue, and 7656–58 South Kingston Avenue. But, it argues, it is entitled to a return of its earnest money deposits because it only breached its contracts as a result of losing financing due to the COVID-19 pandemic. As such, Ventus claims, its breach is excused under the doctrines of impossibility and commercial frustration.[1] Alternatively, Ventus argues that the liquidated damages provisions of the sales contracts are unenforceable. The Court will address each argument in turn.

[1] Ventus focuses most of its arguments on the doctrine of commercial frustration, and briefly mentions "force majeure." But "[f]orce majeure clauses in contracts supersede the common law doctrine of impossibility." *In re Hitz Rest. Grp.*, 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020). Because the contracts at issue do not contain force majeure clauses, the Court will analyze Ventus's "force majeure" argument under the doctrine of impossibility.

A. Impossibility

The doctrine of impossibility excuses performance where (1) "performance is rendered objectively impossible due to destruction of the subject matter of the contract or by operation of law," and (2) the events or circumstances that rendered performance impossible "were not reasonably foreseeable at the time of contracting." *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 933 N.E.2d 860, 865 (Ill. 2010). "This doctrine has been narrowly applied due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances." *Id.* (cleaned up). "Where a contingency that causes the impossibility might have been anticipated or guarded against in the contract, it must be provided for by the terms of the contract or else impossibility does not excuse performance." *Id.* (citing *Leonard v. Autocar Sales & Serv. Co.*, 64 N.E.2d 477, 479 (Ill. 1945)). The party asserting the doctrine bears the burden of demonstrating each element. *Id.*

The Illinois Supreme Court's decision in *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, is instructive. *Id.* In that case, the court considered whether the impossibility doctrine excused the contracted-for purchase of commercial real estate on the grounds that the 2008 financial crisis had "prevented [the buyer] from obtaining the commercially-practical financing contemplated when the contract was originally made." *Id.* The Illinois Supreme Court rejected the buyer's framing, stating that "[e]ven if the global credit crisis

made it difficult, to nearly impossible, to procure the sought-after commercial financing, this is not the relevant issue. The primary issue is whether it was foreseeable that a commercial lender might not provide [the buyer] with the financing [it] sought." *Id.*

The Supreme Court went on to observe that the "potential inability to obtain commercial financing is generally considered a foreseeable risk that can be readily guarded against by inclusion in the contract of financing contingency provisions." And so the buyer's performance was not excused. *Id.* at 866. Indeed, Illinois courts have long held that "[c]hanging and shifting markets and prices from multitudinous causes is endemic to the economy in which we live." *N. Ill. Gas Co. v. Energy Co-op, Inc.,* 461 N.E.2d 1049, 1059 (Ill. App. Ct. 1984).

In a similar vein, performance is not considered impossible "as long as it lies within the power of the promisor to remove the obstacle to performance." *YPI*, 933 N.E.2d at 866 (cleaned up). In *YPI*, the court found that the buyer failed to demonstrate that "it would have been impossible for [the buyer] to convert its nonliquid assets to liquid assets in order to pay the contract purchase price." *Id.*

Similarly, here, Ventus essentially complains that it lost its financing due to a market downturn. That is not a sufficiently unforeseeable event to excuse its performance under the impossibility doctrine. Like the buyer in *YPI*, Ventus could have provided for the risk that it would lose its financing in the purchase and sale agreements. Furthermore, Ventus admittedly obtained new financing for these contracts two months after breaching them, *see* Ventus's Mot. Return Earnest

Money at 2, which indicates that purchasing the real estate in April 2020 was not "objectively impossible," *see YPI*, 933 N.E.2d at 865. And Ventus has not presented any evidence that it was objectively impossible for it to marshal its existing assets to pay the contract purchase price, either. Finally, its April 2020 letter stated in unequivocal terms that Ventus did not intend to take either course of action to muster the funds it needed to purchase the three properties. Its intentions were clear, concluding that it was "quite unfortunate that we could not complete these transactions." *See* 4/20/20 Letter.

Thus, the Court finds that Ventus has failed to meet its burden with respect to either prong of the impossibility doctrine.

B. Commercial Frustration

The doctrine of commercial frustration "is an extension of the defense of impossibility." *Blue Cross Blue Shield of Tenn. v. BCS Ins. Co.*, 517 F. Supp. 2d 1050, 1059 (N.D. Ill. 2007) (citing *Greenlee Foundries, Inc. v. Kussel,* 301 N.E.2d 106, 109 (Ill. App. Ct. 1973)). Commercial frustration excuses performance of a contract if the one asserting it "show[s] that (1) the frustrating event was not reasonably foreseeable and (2) the value of counterperformance has been totally or nearly totally destroyed by the frustrating event." *United States v. Sw. Elec. Co-Op., Inc.*, 869 F.2d 310, 315 (7th Cir. 1989) (citing *N. Ill. Gas Co.*, 461 N.E.2d at 1059). This doctrine is "not to be applied liberally." *N. Ill. Gas Co.*, 461 N.E.2d at 1059.

Even assuming that the "frustrating event" was the COVID-19 pandemic (and not a mere loss of financing due to a market downturn, as discussed above), Ventus has failed to carry its burden to demonstrate that the value of the contract was totally or nearly totally destroyed by the pandemic's onset.[2] As Ventus itself points out, it sought to reinstate these very contracts in June of 2020—while the pandemic was still raging. *See* Ventus's Mot. Return Earnest Money at 2. This demonstrates that purchasing the buildings was still valuable to Ventus.

The cases Ventus cites do not support a different conclusion. In *Smith v. Roberts*, the Roberts brothers operated a store in their main building, and they signed a lease for the adjacent premises. 370 N.E.2d 271, 272–73 (Ill. App. Ct. 1977). They intended to add a door between the two buildings to establish another department of their store. *Id.* Unfortunately, a fire completely ruined the Roberts's main building. *Id.* The Illinois Court of Appeals held that the value of the lessor's counterperformance (*i.e.*, the value of the leased premises to the Roberts brothers) was "totally or nearly totally destroyed" because "[a]lthough it would be physically possible to operate the leased premises as a separate entity, . . . operations would have to be changed drastically in order to make the premises self-sufficient," and "the leased premises were never intended to be autonomous." *Id.* at 273–74. Thus, the appellate court found that the existence of the main premises was an implied condition of the contract between the parties,

[2] As such, the Court need not address Ventus's argument that the question of foreseeability cannot be decided as a matter of law.

and the contract had been commercially frustrated by its destruction. By contrast, here, the value of owning commercial real estate was not "totally destroyed" by the COVID-19 pandemic; in fact, Ventus wanted to purchase them only months later.

This case is also unlike *Scottsdale Ltd. Partnership v. Plitt Theatres, Inc.*, where, after Plitt Theatres signed its lease, the commercial area was re-zoned to prohibit the movie theater it intended to open. No. 97 C 8484, 1999 WL 281085, at *3–4 (N.D. Ill. Mar. 31, 1999). There, the court held, that because the zoning change prohibited the lessee from conducting its business *at all*, the lessee had satisfied its burden to establish commercial frustration. *Id.* at *4. The court expressly contrasted the movie theater operator's situation from one in which the business at issue was simply less profitable as the result of a zoning change. *Id.* Here, while it may have been less profitable for Ventus to purchase the commercial real estate from the Receiver in April 2020, neither the pandemic, nor Ventus's temporary loss of financing, prohibited Ventus from purchasing the properties or running the buildings *at all*.

Curiously, Ventus also claims that the doctrine of commercial frustration can temporarily suspend performance even when it does not permanently excuse performance. Ventus quotes the Second Restatement of Contracts, which states:

> Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

Ventus's Mot. Return Earnest Money at 4 (quoting Restatement (Second) of Contracts § 269 (1981)). But that doctrine is no help to Ventus, because the Second Restatement makes clear that it is the *non-breaching party* that is entitled to demand performance "after the cessation of the impracticability or frustration." *Id.* A breaching party, like Ventus, is not entitled to demand that the non-breaching party perform under the contract, because the non-breaching party's duty to perform is discharged by the counterparty's material breach. *See id.* cmt. a. In other words, the Receiver could have required Ventus to *purchase* the properties once Ventus could again obtain alternative financing, but Ventus cannot require the Receiver to *sell* the properties, because the Receiver's obligation to sell ended when Ventus breached the contracts.

Thus, the doctrine of commercial frustration does not excuse Ventus's breach of the sales contracts.

C. Liquidated Damages

Finally, Ventus claims that the "buyer default" provision of each contract is an unenforceable penalty clause, and not, as the Receiver contends, a valid liquidated damages provision.

Each of the contracts at issue states:

> The Buyer and Seller agree that it would be difficult to ascertain the actual damages to be suffered by the Seller in the event of a default by the Buyer and that the amount of the Earnest Money deposited by the Buyer hereunder constitutes the parties' reasonable estimate of the Seller's damages in the event of the Buyer's default, and that upon any such default not caused by the Seller, the Seller shall be entitled to retain the Earnest Money

> as liquidated damages, which shall constitute the Seller's sole and exclusive remedy in law or at equity in connection with said default.

7600 S. Kingston Purchase & Sale Agreement ¶ 17; 7656 S. Kingston Purchase & Sale Agreement ¶ 17; 6949 S. Merrill Purchase & Sale Agreement ¶ 17. Here, the earnest money Ventus deposited under each contract constituted 10% of the purchase price.

"There is no dispute that a penalty clause (as opposed to a reasonable liquidated damages clause) is unenforceable in Illinois, and that Illinois courts narrowly construe contracts to avoid forfeiture if possible." *Homeowners Choice, Inc. v. Aon Benfield, Inc.*, 895 F. Supp. 2d 889, 895 (N.D. Ill. 2012), *aff'd* 550 F. App'x 311 (7th Cir. Dec. 19, 2013); *see also Jameson Realty Grp. v. Kostiner*, 813 N.E.2d 1124, 1130 (Ill. App. Ct. 2004) ("It is a general rule of contract law that, for reasons of public policy, a liquidated damages clause which operates as a penalty for nonperformance or as a threat to secure performance will not be enforced."). But, under Illinois law,

> [c]ourts will generally enforce a liquidated damages provision in a real estate contract where it can be shown (1) that the parties intended to establish an agreed upon amount of damages in the event of a breach; (2) that the amount provided as liquidated damages was reasonable at the time of contracting and bears some relation to the actual damages which might be sustained; and (3) that the actual damages would be difficult to prove and uncertain in amount.

Berggren v. Hill, 928 N.E.2d 1225, 1229–30 (Ill. App. Ct. 2010) (quoting *Morris v. Flores*, 528 N.E.2d 1013, 1014 (Ill. App. Ct. 1988)). "Whether a provision for

damages is a penalty clause or a liquidated damages clause is a question of law." *Morris*, 528 N.E.2d at 1015.

The Court finds that the "buyer default" provisions of the contracts in question are valid, enforceable liquidated damages clauses. Illinois courts have expressly approved liquidated damages clauses that provide for a real estate seller to retain the buyer's earnest money deposits in the event that the buyer defaults on the sales contract. *Id.* at 1014–15. And where the earnest money represented between 10–20% of the purchase price, courts have found that measure of liquidated damages to be reasonable and related to the actual damages that might have been sustained. *See Berggren*, 928 N.E.2d at 1230–31 (discussing *Siegel v. Levy Org. Dev. Co.*, 538 N.E.2d 715, 717 (Ill. App. Ct. 1989) (20%); *Curtin v. Ogborn*, 394 N.E.2d 593, 598–99 (Ill. App. Ct. 1979) (10%)).

As such, the Court holds that the "buyer default" provision recited above is valid and binding on Ventus.

III. Conclusion

For the foregoing reasons, Ventus's motion for the return of its earnest money deposits is denied. The Court finds that the doctrines of impossibility and commercial frustration do not excuse Ventus's breach of the purchase and sale agreements relating to 6949–59 South Merrill Avenue, 7600–10 South Kingston Avenue, and 7656–58 South Kingston Avenue. And the "buyer default" provision in each contract is a valid and enforceable liquidated damages clause. Thus, pursuant to the "buyer default" provisions, the Receiver is entitled to retain Ventus's earnest money deposits.

IT IS SO ORDERED.

ENTERED: 8/13/21

John Z. Lee
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	
v.	)	**Case No. 18 C 5587**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, And SHAUN D. COHEN,	)	**Judge John Z. Lee**
Defendants.	)	

ORDER

Before the Court are the Receiver's eighth and ninth motions to confirm the sale of certain real estate and for the avoidance of certain mortgages, liens, claims, and encumbrances [712] [749]; and the Receiver's second motion for restoration of funds expended for the benefit of other properties [749]. For the following reasons, these motions are granted.

STATEMENT

I. The Receiver's Eighth Motion to Confirm the Sale of Certain Real Estate [712]

The Receiver moves to confirm the sale of three apartment buildings in Chicago, located at 6949-59 South Merrill Avenue; 7600-10 South Kingston Avenue; and 7656-58 South Kingston Avenue. Eighth Mot. Confirm Sales at 3, ECF No. 712. Ventus Holdings, LLC ("Ventus") objects on the basis that it is willing to pay higher prices for the apartment buildings than those agreed to by

the Receiver and the proposed buyers. *See* Ventus's Obj., ECF No. 721; Ventus's Reply, ECF No. 746; Ventus's Supplemental Reply, ECF No. 763; *see also* Liberty EBCP, LLC's Obj., ECF No. 728 (objecting on the same basis); Thorofare Asset Based Lending REIT Fund IV, LLC's Obj., ECF No. 730 (objecting on the same basis).

In October and December 2019, the Receiver accepted contracts to sell the buildings at issue to Ventus for a total of $4,315,200, and the Court confirmed those sales in February and April 2020. *See* Feb. 21, 2020 Order, ECF No. 633; Apr. 1, 2020 Order, ECF No. 680. Ventus tendered ten percent of that amount—$431,520.00—as an earnest money deposit. Ventus's Obj. at 3. On April 20, 2020, however, Ventus informed the Receiver that it was unable to secure acquisition financing, that it could no longer raise the required equity from its investors, and that it "[could not] proceed with the acquisition of [the] properties." Apr. 20, 2020 Letter from Ventus to Receiver, ECF No. 739 at 13. Ventus added that it was "quite unfortunate that we could not complete these transactions." *Id.*

From there, the Receiver solicited and accepted the next best bids, ultimately signing contracts to sell the three properties for a total of $945,200 less than Ventus had agreed to pay for them. Reply Supp. Eighth Mot. Confirm Sales at 3, 6, ECF No. 739. On June 11, 2020, the Receiver moved to confirm the sales. Ventus subsequently objected, seeking to reinstate its old contracts in light of new financing it was pursuing. Ventus Obj. at 3 ("Ventus is in the process of securing alternative financing and has received, and approved, term sheets from a new

lender."). Ventus did not indicate that it could honor the earlier sale terms until two months after it backed out of the earlier deal, and over six weeks after the Receiver had found new purchasers for the buildings.

As the Receiver notes, Courts have consistently warned against setting aside transactions and disrupting the reasonable expectation of bidders, given the impairment of public confidence in the sales process that ensues from a lack of finality. *See, e.g.*, *In re Gil-Bern Indus., Inc.*, 526 F.2d 627, 628–29 (1st Cir. 1975) (reversing the decision to set aside a sale merely because a higher offer was received after the bidding deadline because, in the long run, this practice would be "penny wise and pound foolish" as creditors would suffer if "unpredictability discouraged bidders altogether" or at least "encourage[d] low formal bids."); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 565 (8th Cir. 1997).

After Ventus stated unequivocally in April that it was backing out of the sale for the three apartment buildings, the Receiver acted reasonably in soliciting and accepting new, competitive bids. Given the need to maintain public confidence in the sales process relating to the Receivership Estate—to say nothing of continuing uncertainty that Ventus could go through with a sale this time around, *see* Pioneer Acquisitions' Mem. Supp. Eighth Mot. Confirm Sales at 2, ECF No. 748—the objections to the Receiver's eighth motion to confirm sales are overruled.[1] The motion is granted.

[1] Southside Property Group, LLC and Pioneer Acquisitions, LLC filed a joint motion requesting that the Court either strike Ventus's supplemental reply in opposition to the eighth motion to confirm sales, ECF No. 763, or else entertain Southside and Pioneer's arguments in response to that supplemental reply. Southside and Pioneer's Joint Motion

With that said, Ventus is granted leave to file a motion for return of its earnest money deposit within two weeks from the date of this order. *See* Ventus Obj. at 6. Responses to the motion will be due two weeks after that.

II. The Receiver's Ninth Motion to Confirm the Sale of Certain Real Estate [749]

Objections were filed against two of the fourteen properties contained in the Receiver's ninth motion for confirmation of sales.[2] *See* Obj. Ninth Mot. Confirm Sales at 6, ECF No. 769 (objecting to the sales of 1131-41 E. 79th Place and 6250 S. Mozart Avenue in Chicago). Here too, the Court finds the Lenders' objections unpersuasive and, therefore, grants the motion.

Most of the arguments by the two objecting Lenders, Citibank and Fannie Mae, were previously rejected by the Court. For instance, in the face of nearly identical challenges, the Court already approved the Receiver's credit bidding procedures, Oct. 4, 2019 Order at 4–6, ECF No. 540; approved the sales of properties for prices amounting to less than the mortgages securing them, Mar. 31, 2020 Order at 7, ECF No. 676; approved the sales of properties free and clear of any liens or encumbrances provided that those liens attach to the ultimate sales proceeds of the properties, Dec. 12, 2019 Minute Entry, ECF No. 601; and

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at 3, ECF No. 772. The joint motion is granted to the extent that the Court considered the substantive arguments contained therein before ruling on the Receiver's eighth motion to confirm sales.

[2] On September 14, 2020, the Court entered an order granting the motion as to the the twelve properties to which no objection was filed. Order Partially Granting Receiver's Ninth Mot. Confirm Sales, ECF No. 789.

permitted the Receiver's property managers to bid for properties, Oct. 4, 2019 Order at 4–5.

The Court also has ruled that an orderly claims process is the most efficient and equitable method to resolve competing claims of investors and institutional lenders, *id.* at 5; Mar. 31, 2020 Order at 6; and that a claims process is appropriate even for properties where a Lender has a recorded mortgage but the investors do not. *Id.* at 6 n.2 ("Though there are no competing mortgages for four of the properties at issue . . . the Court is persuaded that, with respect to these properties, 'other issues remain to be resolved during the initiated claims resolution process, including without limitation the alleged balance due in connection with the corresponding loan, the propriety of all of the component amounts of the claims asserted, and the entitlement of the Receiver to an administrative lien on a portion of the proceeds, if warranted.'" (citation omitted)). The objectors have raised nothing that would change this conclusion.

While Citibank and Fannie Mae additionally object that the Receiver's sales have not "generated the true and proper value of the properties," Obj. Ninth Mot. Confirm Sales at 25–28, they offer no evidence that the bid process the Receiver employed resulted in properties being sold for less than their true value. *Cf.* Mar. 31, 2020 Order at 7 ("The Court is not persuaded that [the sales] amount is 'grossly inadequate,' . . . nor is it persuaded by UBS's vague contention that a better marketing and sales process would have fetched a higher price."). Indeed, the proposed sales prices for 1131-41 E. 79th Place and 6250 S. Mozart Avenue

represent 92% and 109% of their list prices, respectively. Receiver's Reply Supp. Ninth Mot. Confirm Sales at 12, ECF No. 790.

Finally, Citibank and Fannie Mae offer no legal authority to support their novel argument that the sale of the two properties here would invoke the Fifth Amendment's Takings Clause. Obj. Ninth Mot. Confirm Sales at 20–22. Their failure to provide apposite legal support is unsurprising, as courts have recognized that "adjudication of disputed and competing claims cannot be a taking." *In re Lazy Days' RV Ctr., Inc.*, 724 F.3d 418, 425 (3d Cir. 2013).

For the foregoing reasons, the entirety of the Receiver's ninth motion to confirm sales is granted.

III. The Receiver's Second Motion for Restoration of Funds Expended for the Benefit of Other Properties [749]

Finally, objections were filed against two of the twenty-four properties contained in the Receiver's second motion for restoration of funds.[3] *See* Obj. Second Mot. Restoration at 1, ECF No. 764 (objecting to using proceeds from the sales of 5450-52 S. Indiana Avenue and 7749-59 S. Yates (the "Indiana/Yates properties") to restore funds those properties received from other properties or the Receiver's account). The arguments made by the objecting Mortgagees are overruled.

[3] On September 21, 2020, the Court entered an order granting the motion as to the twenty-two properties to which no objection was filed. Order Partially Granting Receiver's Second Mot. Restoration, ECF No. 796.

First, the Receiver's request is not inconsistent with Magistrate Judge Kim's February 13, 2019 order, which stated, *inter alia*, that the Receiver should use the rent from each property solely for the benefit of that particular property. *See* Obj. Second Mot. Restoration at 1; Feb. 13, 2019 Mem. Op. and Order at 9, ECF No. 223. It is undisputed that the Receiver has only used rents from the Indiana and Yates properties for the benefit of those properties, and the funds that are the subject of the Receiver's restoration motion either came from the rents of other properties prior to the February 13, 2019 order, or else came from the Receiver's account. Receiver's Reply Supp. Second Mot. Restoration at 4, ECF No. 791.

Second, the Mortgagees argue that the Receiver failed to request Court approval to expend funds for the benefit of the Indiana and Yates properties. *See* Obj. Second Mot. Restoration Funds at 1, 2. But the Court appointed the Receiver to preserve the properties in the Receivership Estate, and the Receiver subsequently reported over the course of two years that he was using funds from the Receivership account for the benefit of underperforming properties. *See, e.g.*, Receiver's Oct. 31, 2019 Status Report at 2–4, ECF No. 567. The Mortgagees never objected to the Receiver using funds from the Receiver's account to preserve, maintain, and improve the Indiana/Yates properties, despite receiving monthly reports detailing these activities and stating that the Receiver intended to restore the funds. *See* Exs. to Second Mot. Restoration at 39, 49, ECF No. 749–1. Moreover, the Court, including when approving a previous restoration motion, has

not required the Receiver to seek approval before expending funds on a given property. *See* Aug. 27, 2019 Order, ECF No. 494.

Finally, the Mortgagees argue that the Receiver's spreadsheets regarding the costs incurred for the Indiana/Yates properties are "merely summaries with no backup or justification of necessity of an expenditure." Obj. Second Mot. Restoration Funds at 1–2. It is undisputed, however, that those spreadsheets collect and recite expense information that was previously produced to the Mortgagees. *See* Receiver's Reply Supp. Second Mot. Restoration at 5–6; Exs. to Second Mot. Restoration at 14–15. The Mortgagees have not objected to the monthly reports for the Indiana/Yates properties, which reflect operating expenses and the accumulated restoration amount due. *Id.*

For these reasons, the Receiver's second motion for restoration of funds is granted in its entirety.

IT IS SO ORDERED.

ENTERED: 10/26/20

John Z. Lee
United States District Judge