AND THE 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.	No.: 18-cv-5587 Honorable Manish S. Shah Magistrate Judge Young B. Kim

AMENDED FEDERAL HOUSING FINANCE AGENCY, FANNIE MAE, AND FREDDIE MAC'S JOINT OBJECTION TO MR. DUFF'S THIRD MOTION FOR REIMBURSEMENT AND RESTORATION OF FUNDS EXPENDED FOR THE BENEFIT OF RECEIVERSHIP PROPERTIES AND TO APPROVE CERTAIN ADDITIONAL PAYMENTS FROM RECEIVERSHIP PROPERTY SALES PROCEEDS

The Federal Housing Finance Agency ("FHFA" or "Conservator"), as Conservator for the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, "the Enterprises"), and the Enterprises respectfully and jointly object to Kevin B. Duff's, in his capacity as receiver of Equitybuild Inc., et al. ("Mr. Duff"), Third Motion for Reimbursement and Restoration of Funds Expended for the Benefit of Receivership Properties and to Approve Certain Additional Payments from Receivership Property Sales Proceeds, Dkt. 1393 ("Motion") as it pertains to 1131-41 East 79th Place or 7024-32 South Paxton Avenue (together, the "Enterprise Properties").

Mr. Duff's Motion, if granted, would violate federal law by dissipating the Enterprises' collateral and thereby restrain and affect FHFA's statutory powers to collect on obligations secured by the properties as well as to preserve and conserve the Enterprises' assets. Mr. Duff incurred expenses that exceeded the rental income each property generated; he seeks reimbursement for the excess. As a result, the amounts he seeks would come directly out of the funds—sale proceeds—embodying the Enterprises' collateral. Specifically, Mr. Duff seeks to be reimbursed for insurance

premiums and property expenses in the amounts of $19,528.49 for 7024-32 South Paxton Avenue and $29,736.32 for 1131-41 East 79th Place. *See* Dkt. 1393, Ex. 1, Rows 67 & 72.

The federal statute authorizing, empowering, and protecting FHFA conservatorships does not allow Mr. Duff to arrogate to himself the power to decide whether to, and if so how to, spend money in which the Conservator has an interest, as Mr. Duff purported to do here. Nor does it allow the Court to impose Mr. Duff's decisions upon the Conservator. So whether some amount of insurance and upkeep expense was inevitable—as it may well have been—is beside the point. Mr. Duff should have notified FHFA of the need to procure services; the two could then have worked together to determine whether it would be necessary to expend collateral funds, and if so, how to do so most efficiently. But instead, Mr. Duff acted unilaterally, in disregard of FHFA's powers and protections under the Housing and Economic Recovery Act of 2008 ("HERA").

HERA constrains the Court from granting Mr. Duff's Motion, and FHFA and the Enterprises therefore object.

I. Mr. Duff Did Not Consult FHFA before Incurring the Property-Related Expenses and Reimbursing Those Expenses from Enterprise Property Proceeds Necessarily Dissipates FHFA's Collateral.

FHFA and the Enterprises' objections to the Motion stem from a common theme in Mr. Duff's receivership: Mr. Duff made unilateral operational and financial decisions regarding the Enterprise Properties without consulting FHFA on how best to manage the Enterprise Properties, despite his knowledge of the Conservator's interest and its statutory powers and protections. It is a matter of public record that Fannie Mae and Freddie Mac are under FHFA's conservatorship since 2008. Mr. Duff has had every reason to be on notice that FHFA as Conservator—not unlike Mr. Duff as a receiver—has unique and important powers and protections given to it by Congress

specifically to protect conservatorship property of Fannie Mae and Freddie Mac.[1] Like "[a]ll citizens," Mr. Duff is "presumptively charged with knowledge of the law," *see Atkins v. Parker*, 472 U.S. 115, 130 (1985), and FHFA's conservatorship of Fannie Mae and Freddie Mac is hardly obscure or arcane. But not once did Mr. Duff contact FHFA to discuss his actions or to work out a mutually agreeable arrangement for anything related to the Enterprise Properties.

In this instance, Mr. Duff seeks reimbursement from Enterprise Property proceeds for property expenses paid over and above expenses that were reimbursed through restored rents and other cash flow items. In other words, Mr. Duff's Motion seeks to foist costs onto the Enterprise Properties, thereby depleting FHFA's collateral in contravention of federal law that mandates that property subject to FHFA's conservatorship cannot be taken without explicit Conservator consent., without giving FHFA an opportunity to assess whether the properties are receiving value commensurate to the costs. FHFA did not even have the opportunity to evaluate the insurance market for specific policies related to the Enterprise Properties or otherwise assist Mr. Duff in evaluating the insurance policies under which Mr. Duff paid the premiums. Similarly, while the Motion provides no detail about which "property management costs" were expended upon the Enterprise Properties, the market for the "property management costs" outlined by Mr. Duff is competitive and FHFA, again had no opportunity to assess for itself the need for specific projects or to review bids, if any were sought. *See* Motion at 3. Mr. Duff now asks this Court to reimburse him for decisions he made unilaterally and clearly without Conservator consent. As a result, FHFA and the Enterprises are forced to object to the Motion.

[1] FHFA, History of Fannie Mae and Freddie Mac in Conservatorships, https://www.fhfa.gov/Conservatorship/Pages/History-of-Fannie-Mae--Freddie-Conservatorships.aspx (last updated October 17, 2022).

II. 12 U.S.C. § 4617(f) Prohibits Reimbursement Because it Restrains or Affects the Conservator's Exclusive Power to Preserve and Conserve Enterprise Assets.

Mr. Duff's Motion would necessarily dissipate the collateral securing each Enterprise's loan, thereby depriving the Conservator of a property interest—he expressly asks to be paid out of funds in which FHFA and the Enterprises have a security interest. But HERA provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or receiver." 12 U.S.C. § 4617(f). Here, permitting Mr. Duff to collect reimbursement from Enterprise Property proceeds would restrain FHFA's powers to "collect all obligations and money due" the Enterprises, and to "preserve and conserve [their] asserts and property." 12 U.S.C. § 4617(b)(2)(B).

FHFA does not dispute that some amount of insurance and property expense may have been reasonable to preserve and conserve the Enterprise Properties. And FHFA may well have agreed that some portion of the corresponding costs could be paid out of the collateral funds. But because Mr. Duff acted unilaterally, FHFA was deprived of any opportunity to assess the need for the specific services Mr. Duff procured, as well as the opportunity to deploy FHFA's and the Enterprises' knowledge of the relevant markets to pursue better deals on whatever services were necessary. Because Mr. Duff locked FHFA out of the decision-making process, Mr. Duff here has usurped the Conservator's statutory power and function to preserve and conserve the collateral. And HERA does not permit the Court to order the reimbursement Mr. Duff seeks for costs he chose to incur unilaterally as they relate to conservatorship-protected property.

III. 12 U.S.C. § 4617(j)(3) Prohibits Reimbursement Because it Would Extinguish Agency Conservatorship Property Interests.

Another HERA provision—12 U.S.C. § 4617(j)(3)—also bars allocation of Mr. Duff's costs at issue to the Enterprise Properties. Section 4617(j)(3) provides: "No property of [an FHFA conservatorship] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the

consent of [Conservator], nor shall any involuntary lien attach to the property of the [conservatorship]. 12 U.S.C. §4617(j)(3). The property protected by § 4617(j)(3) includes "lien interests in property." *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1153 (D. Nev. 2015) (collecting cases).

Section 4617(j)(3) has been extensively litigated in federal courts, which have uniformly agreed that the protection "applies to any property for which the Agency serves as conservator." *Berezovsky v. Moniz*, 869 F.3d 923, 928 (9th Cir. 2017). No affirmative decision by FHFA is required; the default rule under the statute is that FHFA does not consent. *Fed. Home Loan Mortg. Corp. v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1149 (9th Cir. 2018). Thus, "the statutory language cloaks [conservatorship] property with Congressional protection unless or until the Agency affirmatively relinquishes it." *Berezovsky*, 860 F.3d at 929 (stating that Section 4617(j)(3) "does not require the Agency to actively resist foreclosure").

Section 4617(j)(3) bars the cost-allocation requested here, because the allocation would make the Enterprises' liens "subject to" a judicially imposed process that would deplete the collateral—the functional equivalent of attachment, garnishment, foreclosure, or sale, all of which the statute prohibits. In applying the analogous FDIC provision, courts have focused on the effect of the action, not the label. *Trembling Prairie Land Co. v. Verspoor*, 145 F.3d 686, 691 (5th Cir. 1998). What matters is whether "the end result is functionally the same as that of the actions that are specifically listed in the statute: the [conservator or receiver would] lose[] the Property." *Id.* at 691. That is because these property-protection provisions "represent[] the express will of Congress that the [conservator or receiver] must consent to any deprivation of property …." *Id.* .

The allocation here would unquestionably deprive the Conservator and the Enterprises of property—their lien interest in the funds being allocated and disbursed. *See Skylights*, 112 F. Supp.

3d at 1153 (stating that § 4617(j)(3) "bars the extinguishment of liens held by FHFA in the conservatorship without its consent."). Accordingly, § 4617(j)(3) forbids it. *See S/N-1 REO Liab. Co. v. City of Fall River*, 81 F. Supp. 2d 142, 150 (D. Mass. 1999) (explaining that, following *Trembling Prairie*, the FDIC analog to Section 4617(j)(3), 12 U.S.C. § 1825(b)(2), prohibits "deprivation," *i.e.*, "reduction in the value of the receivership's assets" (quoting *Irving Indep. Sch. Dist. v. Packard Props.*, 970 F.2d 58, 62 (5th Cir. 1992))).

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FHFA and the Enterprises respectfully request that the Court deny Mr. Duff's Motion insofar as it seeks to dissipate the Enterprises' collateral or reimburse any costs incurred from the Enterprise Properties or to otherwise diminish the proceeds from the sale of the Enterprise Properties. FHFA and the Enterprises further respectfully request that any requests for disbursement of funds from the segregated accounts relating to the monies collected in the forced sale of the Enterprise Properties be held in abeyance.

Dated: March 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2023, I caused the foregoing **Amended Federal Housing Finance Agency, Fannie Mae, and Freddie Mac's Joint Objection to Mr. Duff's Third Motion for Reimbursement and Restoration of Funds Expended for the Benefit of Receivership Properties and to Approve Certain Additional Payments from Receivership Property Sales Proceeds** to be electronically filed with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification of such filing to all parties of record.

/s/ Daniel E. Raymond