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

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, AND SHAUN D. COHEN, Defendants.	)	Civil Action No. 18-cv-5587 Hon. Manish S. Shah

GROUP 2 RESPONSIVE POSITION STATEMENT
OF CERTAIN INDIVIDUAL INVESTORS

In their initial Position Statement, the Certain Individual Investors provided both legal and factual explanations for why their claims and those of the other individual investors in Group 2[1] should be preferred over the claims submitted by the three Institutional Lenders: (1) DLP for the MLK Property; (2) Shatar for the Indiana and Yates Properties; and (3) Thorofare for the Juneway Property. Since then, the SEC and the Receiver have submitted Position Statements of their own agreeing with aspects of the Certain Investors' Initial Statement and provided additional legal and factual support for those positions. (Doc. 1556, Doc. 1571.) Meanwhile, DLP, Shatar, and Thorofare provided sparse position statements of their own that, especially for the first two, do little to explain why their claims should now be preferred over those of the Individual Investors.

[1] As with their initial Position Statement (Doc. 1564 (the "Certain Investors' Initial Statement"), the Certain Individual Investors propose that all of the lenders identified in the Exhibits A to the EquityBuild Mortgages be in the same lien position and that the funds available for the properties in Group 2 should be distributed among them *pro rata*. Throughout their Position Statement and this Responsive Statement, those lenders are referred to collectively as the "Individual Investors." Other defined terms are as defined in the Certain Investors' Initial Statement.

Based on those filings, it remains clear that (1) the Individual Investors made loans relying on promises from the EquityBuild Defendants that they would be secured by first-position mortgage liens on the property or properties in which they invested, (2) the EquityBuild Defendants made their business model, including those promises of first-position mortgage liens, clear to anyone that bothered to look, (3) the Individual Investors were never paid in full nor properly released their mortgages, and (4) each of DLP, Shatar, and Thorofare made their loans after at least some of the Individual Investors made theirs, meaning basic due diligence would have alerted them to pre-existing loans on the properties. When considered in combination with the overwhelming evidence of the Institutional Lenders' reliance on title insurers to protect their interests, these Position Statements demonstrate that the liens granted to the Individual Investors should remain in first lien position.[2]

ARGUMENT

I. DLP'S RELIANCE ON A FRAUDULENT RELEASE MEANS THE INDIVIDUAL INVESTORS CONTINUE TO HAVE A HIGHER LIEN POSITION.

As noted in the Certain Investors' Initial Statement, DLP bases its claim to superior lien position on a fraudulent lien release it received from the EquityBuild Defendants in connection with the loan it made that it believed would refinance the Individual Investors' existing loan. (Doc. 1564, pp. 4-6; Doc. 1559.) As set forth in the Certain Investors' Initial Statement and the statements

[2] Alternatively, as noted in the Certain Investors' Initial Statement, because their liens were not paid in full, the Certain Individual Investors and the other Individual Investors have equitable liens that should take priority over the subsequent mortgages. (Doc. 1564, pp. 18-20.) To date, none of the other parties' Position Statements filed with the Court have responded to this alternate argument. To the extent that any responsive statements do address this alternat argument, the Certain Individual Investors request an opportunity to reply.

Similarly, Shatar filed a motion seeking additional pages for its Responsive Position Statement. That request was not opposed and has now been granted by the Court. To the extent that Shatar uses that response to belatedly provide evidence or raise new arguments in support its claims, the Certain Individual Investors also request an opportunity to respond to them.

filed by the SEC and the Receiver, which the Certain Individual Investors adopt and incorporate, DLP's reliance on that release fails to support its position. DLP's arguments actually demonstrate that its reliance on the fraudulent release only confirms that it is the Individual Investors' lien, not DLP's, that should have priority. Thus, DLP's claim remains as flawed and unpersuasive as the claims the Court addressed in resolving the claims in Group 1.[3] (*See, e.g.*, Doc. 1386, pp. 13-14.) Those similarities compel the conclusion that the Individual Investors' mortgages should be given first priority.

DLP argues that because Illinois is a race-notice jurisdiction, the recording of the fraudulent release has legal significance, noting the legal truism that a recorded valid release of a mortgage releases the lien on the property associated with that mortgage. (Doc. 1559, p. 3.) That truism, though, does nothing to establish that the release at issue here is valid or effective. Illinois courts are clear that the filing of ineffective or irrelevant documents will not disrupt an otherwise valid mortgage lien. *See, e.g.*, *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶¶ 75-78, *as supplemented* (Dec. 16, 2013) (explaining multiple courts rejection of recorded "land patents" as a means of obtaining clean title). Indeed, there is not that much difference between a self-serving "land patent" filed by a borrower and a self-serving false release signed by an officer of a borrower.

In its effort to make the fraudulent release effective, DLP notes that the release was prepared by a law firm engaged by the EquityBuild Defendants and identifies the prior mortgage. (Doc. 1559, p. 3.) While true, this does not, without more, establish that the release somehow validly releases that prior mortgage. DLP later notes that it obtained a legal opinion from that same

[3] While DLP does correctly note that the release at issue here does not ***also*** contain further evidence of EquityBuild's fraud (or, as DLP terms it, a scrivener's error) by having the release coming from the borrower, not the lender, this does not, on its own, make the release on which DLP relies valid.

law firm, though acknowledging that it was the ***borrower's*** law firm. (Doc. 1559, p. 6.) Absent from DLP's arguments, however, is any explanation for why it was reasonable for it to rely on an opinion from the borrower's attorneys (as opposed to the lender's) as to whether the borrower might still owe money to the lender.

DLP next asserts that EquityBuild Finance had actual and apparent authority since it was "named as the agent of the individual lenders in the same instrument being released" and therefore the release of that instrument by EquityBuild Finance is valid. (Doc. 1559, p. 3 (citing Ex. A, the mortgage).) Attempting to carry its burden to establish EquityBuild Finance's authority, *see, e.g.*, Doc. 1386, p. 14 (citing *Curto v. Illinois Manors, Inc.*, 405 Ill. App. 3d 888, 892 (3d Dist. 2010); *Schoenberger v. Chicago Transit Auth.*, 84 Ill. App. 3d 1132, 1136 (1st Dist. 1980)), DLP relies solely on the mortgage and the release. These documents, however, disprove DLP's conclusion.

First, nowhere in the mortgage is EquityBuild Finance identified as the "agent" for the Individual Investors. Rather, the mortgage simply identifies that the Lender as "The Persons Listed on Exhibit A to the Mortgage C/O Equity Build Finance, LLC whose address is 5068 West Plano Pkwy. #300 Plano, TX 75093." (Doc. 1559-1, Page 4 of 12.) This hardly establishes agency. Rather, that language merely says that the Lender (in this case, the people identified in Exhibit A) can be contacted care of EquityBuild Finance at its address. Yet, DLP argues that the inclusion of EquityBuild Finance as the "C/O" address makes it the Lender's agent. DLP cites no authority for its conclusion. Nor does DLP identify any other language in the Mortgage to confirm its erroneous conclusion. To the contrary, other language in the mortgage explains why it is important for an address to contact the Lender be provided. In Paragraph 6, the Mortgage provides that "Any notice to the Lender shall be given by first class mail to Lender's address stated herein or any other address Lender designates by notice to Borrower." (Doc. 1559-1, Page 6 of 12.) By noting that the

Lender can be contacted care of EquityBuild Finance and including its address, the Mortgage provides the information referenced in Paragraph 6.

Further undercutting DLP's conclusory argument, while the mortgage itself nowhere refers to EquityBuild Finance as the agent of the Lender, it does explicitly refer to others as the agent for some of the Individual Investors. In Exhibit A, iPlanGroup is identified as the agent for seven of the listed lenders who made their investment through an IRA. In other words, while the mortgage does not identify EquityBuild Finance as the agent of the Lender, in seven instances it explicitly identifies an agent of an Individual Investor.[4]

Thus, the mortgage and release upon which DLP relies do nothing to create the impression (let alone a reasonable one) that EquityBuild Finance has the authority to release the mortgage on their behalf. *See, e.g.*, Doc. 1559, p. 4 (citing *Weil, Frieburg & Thomas, P.C. v. Sara Lee Corp.*, 218 Ill. App. 383, 390 (1st Dist. 1991). This, in turn, means that DLP actually cannot establish either of the first two elements of apparent authority:

- *First*, the "c/o" language by itself does not establish an agency relationship. Instead, it simply provides a single address at which the multiple Individual Investors can be provided with notice as required under the other terms of the mortgage. In this, the "c/o" language no more creates an agency relationship between the Individual Investors and EquityBuild Finance than use of a post office box would.

- *Second*, neither the mortgage nor the release in the public record (Doc. 1559, p. 5) are consistent with DLP's arguments about EquityBuild's authority to act. To the contrary, the mortgage does nothing to establish that authority and the release does nothing to suggest that any such authority is being invoked. These undisputed (and indisputable) facts show that DLP could not have had a good faith belief that EquityBuild Finance was acting as the Individual Investors' agent.

[4] Further dooming DLP's arguments, as noted in the Certain Individual Investors' Statement (Doc. 1564, pp. 5-6), the fraudulent release upon which it relies was not signed by EquityBuild Finance in its supposed capacity as the Individual Investors' agent (or even care of or "C/O" anyone). Instead, Shaun Cohen signed the release on behalf EquityBuild Finance itself.

Because it cannot show that the public documents on which it relies establish either actual or apparent agency, there was nothing reasonable about its reliance on EquityBuild Finance's supposed authority to act for the Individual Investors. And so DLP's arguments fail. While DLP points to a Cook County opinion finding that EquityBuild Finance had apparent authority (Doc. 1559, p. 5), that decision, which, of course, is not binding on this Court and was rendered without the benefit of the claims process created by this Court, was issued in a case in which the party arguing against the Individual Investors' priority was several steps removed from the party that bought the properties in question from EquityBuild. And because that party was buying the properties, not refinancing them, it had no reason to investigate EquityBuild's business model the way that DLP did. Thus, the Cook County opinion does not change anything here.

As noted in the Certain Individual Investors' Statement, DLP has no one to blame but itself for its mistakes. DLP's discovery responses make clear that it chose not to conduct sufficient due diligence to address the basic issues raised by the release on which it now tries to rely. Instead, DLP outsourced this critical matter to others. (Doc. 1564, pp. 7-8.) Having done so, it cannot now avoid the consequences for its choices.[5]

DLP's arguments do not change the fact that the obvious flaws with the fraudulent release on which it now relies make it invalid and ineffective. Accordingly, DLP cannot now rely on that fraudulent release to claim that the Individual Investors' mortgages and liens were actually released. Thus, the Court should order the Receivership assets tied to the MLK Property be

[5] DLP's failure to adequately conduct due diligence also means it cannot rely on the terms of the CASA to resuscitate its claims regarding agency since there is no evidence that DLP ever saw that document. And, as noted previously, even if it had, its terms would have made it clear that, though EquityBuild Finance was an agent for certain things, the scope of its agency did not extend to releasing mortgage. (Doc. 1564, p. 6 n.4.)

distributed to the Individual Investors *pro rata* as suggested by the Receiver in its Statement. (Doc. 1571.)

II. BECAUSE SHATAR KNEW ABOUT THEIR MORTGAGES, THE INDIVIDUAL INVESTORS' LIENS HAVE HIGHER PRIORITY THAN SHATAR'S.

The Certain Investors' Initial Statement details the significant evidence showing how Shatar knew or should have known that there was at least one existing loan on the properties for which it now claims to have higher priority liens, while also detailing the countless shortcomings of Shatar's own due diligence. (Doc. 1564, pp. 11-18.) Additionally, the Receiver raises further issues with Shatar's claim, most notably its agreement to convert its loan to equity, which the Certain Individual Investors incorporate adopt and incorporate. (Doc. 1571, pp. 4-8.)[6] Rather than addressing any of that evidence or the issues it creates, Shatar's Position Statement seemingly hopes Shatar's claim to higher priority will breeze through based solely on the fact that Shatar's mortgages were recorded before the Individual Investors' mortgages. (Doc. 1562.) But, in addition to the overwhelming evidence it does not even attempt to address, Shatar's own arguments doom its claims.

As Shatar notes in its position statement, "'…where any party has actual or constructive notice of a prior lien, it will ordinarily take subject to that lien.'" (Doc. 1562, pp. 3-4 (quoting *Skidmore, Owings & Merrill v. Pathway Financial*,173 Ill. App. 3d 512, 514 (3d Dist. 1998)).) The evidence presented by the Receiver and the Individual Investors demonstrates that Shatar had actual knowledge of EquityBuild's business such that it knew or should have known that

[6] As also explained in the Certain Individual Investors' Statement, Shatar may not be a proper claimant. (Doc. 1564, pp. 9-11.) While Shatar's Statement asserts that it and the claim it made were both submitted "on behalf" of the actual lenders and that it acted as "a broker and loan servicer" on the lenders' behalf (Doc. 1562, pp. 1-2), those assertions do little to establish that Shatar itself is actually a proper claimant.

EquityBuild would seek loans from folks like the Individual Investors. (Doc. 1564, pp. 11-13.) Further, the evidence demonstrates that Shatar had actual knowledge of the Individual Investors' mortgage for the Yates Property. (*Id*., pp. 13-18.) Thus, the authority Shatar itself cites demonstrates that its claims to a higher priority fail.

Notably, Shatar's Position Statement provides no evidence to rebut this conclusion. Shatar, instead, simply ignores its own knowledge and focuses solely on the timing of the recording of the mortgages, noting that its mortgages were filed almost three months prior to the Individual Investors' mortgages. (Doc. 1562, pp. 2-4.) But the evidence of Shatar's own actual knowledge of EquityBuild's business model and the loan made by the Individual Investors for the Yates Property makes that timing wholly irrelevant. And, on that key point, Shatar recognizes it cannot claim not to have known and instead simply states that it had no knowledge "that EquityBuild or its affiliates were engaged in any fraud or wrongdoing of any kind, including in relation to the Indiana and Yate Properties." (*Id.*, p. 3.) This attempted sleight of hand fails, though, because it is not the right inquiry when it comes to mortgage priority; rather knowledge of the loans is.

III. BECAUSE THOROFARE SHOULD HAVE KNOWN ABOUT THE INDIVIDUAL INVESTORS' INVESTMENTS IN THE JUNEWAY PROPERTY, ITS LIEN SHOULD NOT BE GIVEN HIGHER PRIORITY THAN THE INDIVIDUAL INVESTORS' MORTGAGE.

For the Juneway Property, it is undisputed that EquityBuild executed mortgages with the Individual Investors, from whom it began accepting investments in early March 2017, and Thorofare on the same day, April 6, 2017. EquityBuild then filed the Thorofare mortgage a few days later, while it waited a few months to file the Individual Investors' mortgage. Admittedly, it is not clear whether Thorofare had actual knowledge of the Individual Investors' loans and mortgage and, accordingly, the Receiver has supported Thorofare's claim that its mortgage should have priority since it was recorded first. (Doc. 1571, pp. 8-10.)

Given the totality of the circumstances here and like any other Institutional Lender, Thorofare should have been aware that EquityBuild's business model relied on loans like those made by the Institutional Investors and investigated whether EquityBuild had made any promises and received any funds from Individual Investors before closing its loan. Indeed, the Receiver notes as much. (*Id.*, pp. 9-10.) Yet, despite the evidence of its knowledge of that business model, there is no evidence of any such effort by Thorofare. Accordingly, the mortgage securing the investments by Individual Investors that predate Thorofare's loan should be given higher priority or, at worst, the two mortgages bearing the same date should be deemed to be of equal priority.

CONCLUSION

For the reasons set forth in the Certain Individual Investors' Statement and above, the Court should rule that mortgage liens granted to the Individual Investors, including the undersigned Certain Individual Investors, have higher priority than those granted to the Institutional Lenders and distribute the assets recovered by the Receiver to the Individual Investors *pro rata* as recommended by the Receiver. Alternatively, the Court should find that an equitable lien protects the Individual Investors.

Dated: January 10, 2024

WILLIAM H. AKINS;
PAUL S. APPLEFIELD, DDS 401K PLAN,
QUESTTRUST FBO ROBIN APPLEFIELD ROTH IRA, AND
QUESTTRUST FBO PAUL APPLEFIELD ROTH IRA;
THE BE COMPANY LITD. F/K/A
BLUEBRIDGE PARTNERS LTD.;
ARTHUR AND DINAH BERTRAND;
BRIGHT VENTURE, LLC;
KARL R. DEKLOTZ;
PAT DESANTIS;
DISTRIBUTIVE MARKETING INC.;
EASTWEST FUNDING TRUST,
MARGARET PALMS, TRUSTEE
JUILETTE FARR-BARKSDALE;

FRANCISCO FERNANDEZ;
GIRL CAT CAPITAL WEST LLC;
AMIT HAMMER;
ROBERT W. JENNINGS;
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MARK A. MILLER ATF DOMANSKIN REVOCABLE TRUST;
MARK MOUTY;
HARENDRA PAL;
PIONER VALLEY PROPERTIES LLC;
STEVEN ROCHE;
SOURCE ONE FUNDING, LLC;
MADISON TRUST COMPANY FOR BENEFIT OF KATHY TALMAN IRA AND CLEARWOOD FUNDING LLC;
STEVE WEERA TONASUT; AND
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