

**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 NOTICE OF RESOLVED MIDLAND OBJECTION
AND REPLY TO INDIANA/YATES MORTGAGEES’
OPPOSITION TO SECOND RESTORATION MOTION**

The Receiver and Midland have agreed that Midland’s limited objection (Dkt. No. 766) to the Receiver’s second restoration motion (Dkt. No. 749) has been resolved. As such, the only objection that remains is associated with the restoration request from two properties, one at 5450-52 S. Indiana and the other at 7749 S. Yates. (Dkt. No. 764); no other amount sought by the Receiver for restoration is subject to objection or dispute. Specifically, the Indiana/Yates Mortgagees opposition to the Receiver’s second restoration motion, raises three points. As discussed below, each is misplaced or without merit.

As is the case with most of the properties in the estate, there are allegedly competing secured claims against both the 5450-52 S. Indiana and 7749-59 S. Yates properties. (*See, e.g.*, Dkt. No. 693, at 8-11) In fact, there are 68 claims against 5450-52 S. Indiana and 70 claims against 7749-59 S. Yates, most of which assert a secured interest in these properties. (*Id.*) Neither the

rights of the Indiana/Yates Mortgagees nor of other allegedly competing secured claimants on these properties have been adjudicated.

The applicable law and legal standard described in the Receiver's motion is not disputed. It is entirely reasonable and legitimate for the Receiver to recover amounts that have been expended for the benefit of the Indiana and Yates properties. The Court's authority and discretion to determine who shall pay for the expenses of the receivership is beyond question. (Dkt. No. 749, at 9-10) *See, e.g., Gaskill v. Gordon*, 27 F.3d 248, 251 (7th Cir. 1994) ("As a general rule, the expenses and fees of a receivership are a charge upon the property administered.") (citing *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 375-76 (1908); *Donovan v. Robbins*, 588 F. Supp. 1268, 1271 (N.D. Ill. 1984)); *Gaskill v. Gordon*, 1993 WL 64642, at *3 (N.D. Ill. 1993) ("The general rule regarding payment of receivership expenses is that: [C]osts and expenses of a receivership, including compensation for the receiver, counsel fees, and obligations incurred by him in the discharge of his duties, constitute a first charge against the property or funds in the receivership....") (citations omitted); *Cagan v. Mutual Ben. Life Ins. Co.*, 28 F.3d 654, 656 (7th Cir. 1994) ("it is common to give priority to the costs of repairs" and would be "startling ... [for a mortgagee to] believe that the receiver must stand in line behind its mortgage"). The Seventh Circuit has made clear that "it is appropriate to charge a secured creditor for maintenance of the collateral...." *Cagan*, 28 F.3d at 656.

Consistent with these authorities, each of the arguments presented by the Indiana/Yates Mortgagees should be overruled.

First, the Indiana/Yates Mortgagees argue that the restoration motion contravenes the Court's order requiring restoration. This is wrong. In support of their position, they argue that if the amounts the Receiver seeks to restore (from funds in the accounts for the Indiana and Yates

properties) were taken from another property's rent or other income it was done without a court order. (Dkt. No. 764, ¶¶ 6, 9) The Indiana/Yates Mortgagees misperceive the basis for the motion. The motion is brought to effectuate compliance with the Court's February 13, 2019 Order (Dkt. No. 223). The funds requested from the properties will first be used to complete rent restoration under the Court's February 13, 2019 Order and then restore funds that came from and will be returned to the Receiver's account. (Dkt. No. 749, at 9 ("through this motion, the Receiver seeks both to complete the rent restoration due under the Court's February 13, 2019 Order and to restore funds to the Receiver's account that have been expended for the benefited properties")). The Receiver is *not* seeking to restore funds taken from another property's account subsequent to the Court's Order, because no such funds were taken, but restore amounts that were used from the Receiver's account that were incurred specifically for the maintenance of these exact properties.

In addition, the Indiana/Yates Mortgagees argue that there has been no order extinguishing or setting any other parties' rights superior to the Indiana/Yates Mortgagees' rights to rents from those properties. The argument misses the point. The fact that the Court has not fully adjudicated the asserted liens in the properties does not limit the Court's authority to determine who shall pay for the expenses of the receivership, particularly where there is a continuing obligation to preserve the property pending the adjudication of claimants' asserted interests. The Receiver segregated the proceeds from the sales of the Indiana and Yates properties following their sale, in accordance with the Court's order and pending further court order. (Dkt. Nos. 633, 715) The Receiver now seek an order to ensure that the costs *incurred for the benefit of these particular properties* are covered by these properties and neither by other properties nor by other claimants' interests in the estate. The Court has the authority to manage the receivership and to ensure that the costs of the

receivership are borne by those properties that have received the benefit of funds from the Receiver's account to preserve and maintain them. (Dkt. No. 749, at 9-10)

The Indiana/Yates Mortgagees further argue that the Receiver has not followed the Court's February 13, 2019 Order to "not commingle the Rents but to use the Rents from each property solely for the benefit of that property..." (Dkt. No. 764, ¶ 11) They say this order has not been followed, but they are mistaken. The Receiver has only used rents from the Indiana and Yates properties for the benefit of those properties. The funds that are the subject of the Receiver's restoration request either came from the rents of other properties prior to the Court's February 13, 2019 order or came from funds in the Receiver's account. (Dkt. No. 749, at 4) Contrary to the Indiana/Yates Mortgagees arguments, the Receiver's request is consistent with (if not mandated by) the Court's February 13, 2019 Order.

Second, the Indiana/Yates Mortgagees argue that the Court has not approved expending funds for the benefit of other properties. This argument also lacks merit. The Court appointed the Receiver to preserve the properties. (Dkt. No. 16, at 1) Since the outset of the receivership the Receiver has reported his efforts to preserve the properties and that many of them (including these particular properties) were underperforming and required funds to meet their operating expenses. For two years, the Receiver has reported repeatedly to the Court and all stakeholders' steps taken to preserve the properties, that many of the properties lacked funds to meet their operating costs, and that he was using funds from the Receivership account for the benefit of the underperforming properties. (*See, e.g.*, Dkt. Nos. 346 (at 10), 348 (at 18-22), 467 (at 2-7), 545 (at 7), 567 (at 2-4), 624 (at 2-4), 683 (at 2), 698 (at 3-4))

In addition, the Indiana/Yates 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 updating the “Cumulative Amount Reimbursable from Property” by each of these two properties (*see, e.g.*, Dkt. No. 749-1, at 39, 49), which expressly informed them that this “line item on the report reflects the cumulative amount that has been expended for the benefit of the property from sources other than its operating income. . . . The Receiver intends to seek Court approval to use proceeds from the sale of these properties (a) for the purpose of rent restoration in accordance with the Court’s Order of February 13, 2019, and (b) to reimburse the Receivership for any remaining reimbursable amount in excess of such rent restoration.” (Dkt. No. 749, Ex. 1, ¶ 11 (bottom of p.8) & Exs. 14 & 19)

Furthermore, the Court approved a previous restoration motion like the instant motion, in which the Receiver sought approval for restoration of funds from sales proceeds from an underperforming property. (Dkt. No. 494) The Indiana/Yates Mortgagees have neither addressed nor distinguished that prior court order.

Third, the Indiana/Yates Mortgagees suggest that the spreadsheets provided are merely summaries with no backup or justification of the necessity of the expenses. But that is wholly inaccurate. The spreadsheets collect and recite expense information previously produced to the Indiana/Yates Mortgagees. (Dkt. No. 749, at 8 & Ex. 2) The Receiver also submitted a declaration in support of the second restoration motion that provides additional evidentiary support, explaining both the basis for the information put forward and the nature of the expenses and monthly reporting provided to lenders like the Indiana/Yates Mortgagees. (Dkt. No. 749, Ex. 1, ¶¶ 10-11; *see also* Dkt. No. 223, at 8) As explained, the monthly reports for each property were prepared by the Receiver’s accounting firm based upon monthly profit and loss reports from the property managers, schedules maintained by the Receiver of expenditures per property, and information provided by the insurance agent used to allocate the percentage of total insurance costs to each

property on a proportionate basis. *Id.* The reports thus reflect both the operating expenses and the accumulated restoration amount due from the property. Those monthly reports and the information described therein were created and have been sent or otherwise made available to the Indiana/Yates Mortgagees in accordance with the Court's February 13, 2019 Order. The Indiana/Yates Mortgagees neither objected to these reports nor their content, nor requested additional information. These reports are consistent with Federal Rule of Evidence 1006 which provides evidentiary support for summaries that explain the content of voluminous expense records.

Conclusion

For these reasons, the Receiver respectfully requests that the Court: (a) overrule the objections of the Indiana/Yates Mortgagees (Dkt. No. 764); (b) grant the Receiver's motion (Dkt. No. 749); (c) approve the Receiver's request to transfer funds from the 24 separate accounts holding the net proceeds from the sales of those benefited properties that are the subject of the Receiver's motion consistent with Exhibit 2 (Dkt. No. 749, Ex. 2) to (i) complete rent restoration consistent with the Court's February 13, 2019 Order, and (ii) restore funds to the Receiver's account for continued administration of the receivership; and (d) for such other relief as the Court determines is just and equitable.

Dated: September 15, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2020, I electronically filed the foregoing **Receiver's Notice of Resolved Midland Objection and Reply to Indiana/Yates Mortgagees' Opposition to Second Restoration Motion** 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 **Notice and Reply**, to be served upon the following individuals or entities by electronic mail:

- Defendant Jerome Cohen (jerrycohen@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 **Notice and Reply** will be posted to the Receivership webpage at: <http://rdaplawnet.com/receivership-for-equitybuild>

/s/ Michael Rachlis

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