

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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U.S. SECURITIES AND EXCHANGE	)	)	
COMMISSION,	)	)	
	)	)	
Plaintiff,	)	Civil Action No. 18-CV-5587	
	)	)	
v.	)	Judge John Z. Lee	
	)	)	
EQUITYBUILD, INC., <i>et al.</i> ,	)	Magistrate Judge Young B. Kim	
	)	)	
Defendants.	)	)	
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**SEC'S RESPONSE TO THE  
INSTITUTIONAL LENDERS' MOTION FOR RECONSIDERATION**

The Court's decision to utilize summary procedures for the priority-resolution process falls squarely within the Court's wide discretion to administer an equitable receivership. Nevertheless, the institutional lenders continue their overly litigious conduct by seeking the extraordinary remedy of reconsideration. But the lenders ignore that such motions are disfavored and reserved for the rare instances necessary to present new evidence or correct manifest errors of law. Rather than meeting these stringent standards, the lenders' motion simply rehashes arguments the Court has already considered and rejected. Indeed, the lenders' (incorrect) argument that the Receiver must bring standalone fraudulent transfer actions merely repeats their original arguments opposing the Receiver's priority-determination proposals.

Because courts routinely allow the use of summary procedures in equitable receiverships, because the protocols adopted by the Court provide ample due process, and because the concerns raised in the lenders' motion are speculative at best, the Court should deny the lenders' motion and allow the priority-resolution process to commence.

### **A. Relevant Procedural History**

On February 28, 2020, the Receiver moved to approve a process to resolve the competing positions of the investors and institutional lenders, who both claim to be the senior secured lenders on various properties in the Receiver's real estate portfolio. (ECF No. 638). In his motion, the Receiver proposed that all issues related to the determination of priority – including whether the institutional lenders' mortgages constituted voidable fraudulent transfers – be resolved in a unified process utilizing summary procedures. (*Id.*, pp. 8-17, 21). The Receiver's proposed procedures include: (a) a pre-discovery framing report by the Receiver describing the issues related to priority, which would presumably include the Receiver's preliminary views vis-à-vis fraudulent transfers; (b) discovery; (c) the parties filing position papers, and responses, with the Court; and (d) evidentiary hearings, if necessary, to resolve disputed facts. (*Id.*).

In their response to the Receiver's motion, the lenders argued the Receiver cannot utilize summary procedures to assert fraudulent transfers. (ECF No. 708, pp. 3, 6-10). Specifically, the lenders argued that any fraudulent transfer claims should be brought via standalone complaints that meet the requirements of the Federal Rules of Civil Procedure, in particular Rules 8 and 9(b). (*Id.*; *see also* ECF No. 744-1).

At the September 23, 2020 hearing, the Court adopted, with minor modifications, the Receiver's proposal for resolving priority disputes. In regard to potential fraudulent transfer claims, the Court held that within 14 days after the close of discovery, the Receiver must alert an institutional lender if he intends to assert such a claim. (Sept. 23, 2020 Hr'g Tr. at 25:11-26:11). The lender would then be entitled to seek leave to conduct "additional discovery" relating to the proposed fraudulent transfer claim. (*Id.*).

The lenders responded to the Court's protocols by again arguing that the Receiver's fraudulent transfer claims should comply with the Federal Rules of Civil Procedure, namely that the Receiver should "provide a formal pleading setting forth the details with particularity." (Sept. 23, 2020 Hr'g Tr. at 26:23-27:9). The Court then held, in the event the Receiver seeks to assert a fraudulent transfer claim, that the Receiver must disclose "the factual basis for that claim," but that the Receiver need not file a formal complaint. (*Id.* at 27:17-21, 27:25-28:5, 32:11-15). Responding to further concerns by the lenders, the Court provided the following assurance: "if the receiver asserts [a fraudulent transfer] theory, then to the extent the lenders need discovery -- that is, of facts relevant to that theory -- that they'll be given a reasonable amount of time to do so." (*Id.* at 29:19-22). The Court concluded by stressing that it would be flexible, and left open the possibility of amending its protocols as the priority-determination process plays out. (*Id.* at 31:2-20).

**B. The Lenders' Motion for Reconsideration Rehashes Their Earlier Arguments**

The lenders' motion for reconsideration merely repeats their prior objections that any fraudulent transfer claims must comply with the Federal Rules of Civil Procedure. (ECF No. 814). The lenders primarily argue that the Receiver must assert such claims via Rule 8 complaints that plead fraud with specificity pursuant to Rule 9(b). As discussed above, this is an argument the lenders earlier advanced at least three times: (a) in opposition to the Receiver's motion (ECF No. 708, pp. 3, 6-10); (b) when proposing protocols to govern the priority-determination process (ECF No. 744-1, p. 3); and (c) at the September 23, 2020 hearing.

In their current motion, the only "new" wrinkle to the lenders' argument is a recitation of case law standing for the noncontroversial proposition that when a plaintiff files a formal complaint alleging fraudulent transfer, the complaint should be plead fraud with particularity.

(ECF No. 814, pp. 4-7). However, the lenders fail to address how the Court's requirement, that the Receiver must disclose "the factual basis" for any fraudulent transfer claims, fails to satisfy the standards of Rule 9.

Tellingly, the lenders do not cite a single case holding that a receiver's summary procedures were inappropriate. Nor do they cite a case holding that a receiver is required to assert fraudulent transfer claims via a formal complaint, as opposed to using summary procedures.

### **C. Motions for Reconsideration Carry a Heavy Burden and are Rarely Granted**

Motions for reconsideration "serve a very limited purpose: correcting manifest errors of law or fact and presenting newly discovered evidence." *Essex Ins. Co. v. Structural Shop, Ltd.*, 2018 U.S. Dist. LEXIS 186620, \*4 (N.D. Ill. Oct. 31, 2018) (Lee, J.) (citing *Caisse Nationale de Credit Agricole v. CBI Indus.*, 90 F.3d 1264, 1270 (7th Cir. 1996)). As such, motions for reconsideration are "disfavored." *Id.* (citations omitted); *see also SMK Assocs., LLC v. Sutherland Global Servs.*, 2017 U.S. Dist. LEXIS 76915, \*5 (N.D. Ill. May 19, 2017) (Lee, J.) (denying motion for reconsideration).

These standards impose "a heavy burden for the moving party" and make "a motion for reconsideration an inappropriate medium to 'rehash' past arguments...or revisit improvident strategic decisions made earlier." *Essex*, 2018 U.S. Dist. LEXIS 186620, \*4 (citations omitted); *see also SMK Assocs.*, 2017 U.S. Dist. LEXIS 76915, \*4. "Accordingly, motions for reconsideration will be granted only where 'the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.'" *Essex* at \*4 (quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990)). "Given these exacting

standards, issues appropriate for reconsideration ‘rarely arise and the motion to reconsider should be equally rare.’” *Essex* at \*4 (quoting *Bank of Waunakee* at 1191); *see also SMK Assocs.* at \*4.

#### **D. The Court Should Deny the Lenders’ Motion**

The lenders’ motion fails to satisfy the exacting standards required to grant a motion for reconsideration. First, there is no genuine dispute that the Court can employ summary procedures to resolve claims in SEC receiverships. For instance, in both their opposition to the Receiver’s claims process motion (ECF No. 708, p. 6) and in their current motion for reconsideration (ECF No. 814, p. 6 n.5), the lenders cite *SEC v. Elliott*, 953 F.2d 1560 (11th Cir. 1992). But *Elliott* holds that a court satisfies due process in a receivership context if “its summary procedures permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts.” *Elliott* at 1567. Even the lenders concede that the Court may appropriately utilize summary procedures in this receivership. (ECF No. 708, p. 7 (“If the Court decides to use a summary proceeding and forgo use of the Federal Rules, it must design its own rules to govern the proceedings. Any such rules must comport with [due process].”)).

Beyond *Elliott*, courts routinely allow for receivers to employ summary procedures such as the ones this Court has approved. *See, e.g., SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986) (“We have repeatedly held, however, that the use of summary proceedings to determine appropriate relief in equity receiverships, as opposed to plenary proceedings under the Federal Rules, is within the jurisdictional authority of a district court ... Such procedures ‘avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership.’”) (citations omitted); *SEC v. Varacchi*, 2020 U.S. Dist. LEXIS 48034, \*10-11 (D. Conn. Mar. 20, 2020) (approving receiver’s motion for summary procedures); *United States v. Fairway Capital Corp.*, 433 F. Supp. 2d 226, 241 (D.R.I.

2006) (“Receivership courts can employ summary procedures in allowing, disallowing and subordinating claims of creditors.”); *SEC v. Bjork*, 2012 U.S. Dist. LEXIS 56088, \*5 (S.D. Tex. Apr. 19, 2012) (“the Court agrees with the Receiver that summary proceedings are proper to determine third parties’ rights to assets that appear to belong to the Receivership Entities.”); *SEC v. Basic Energy and Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir. 2001) (“abbreviated procedures (including the use of a single receivership proceeding to resolve all claims) advance the government’s interest in judicial efficiency by reducing the time needed to resolve disputes, decreasing the costs of litigation, and preventing the dissipation of the receiver’s assets”).

Here, the Court’s summary procedures provide due process for the lenders and squarely fall within the Court’s equitable discretion. To that end, the Court allows the lenders to take discovery, including on the issue of fraudulent transfers. To the extent the Receiver intends to assert fraudulent transfer claims, the Court requires the Receiver to disclose “the factual basis” for any such claims. (Sept. 23, 2020 Hr’g Tr. at 27:17-21, 27:25-28:5, 32:11-15). Then, if the lenders believe more information is necessary, they can seek leave for additional discovery. (ECF No. 801). Per the Receiver’s proposal, the lenders will then be able to make written submissions to the Court, respond to any submissions by the Receiver, and request an evidentiary hearing, if necessary. (ECF No. 638, pp. 8-18).

These are precisely the sort of summary procedures which courts routinely find to provide due process. There has been no manifest error of law, misunderstanding, or misapprehension by the Court. Accordingly, the lenders’ motion for reconsideration fails.

Finally, an additional reason for denying the lenders’ motion is that the prejudice of which the lenders complain is entirely speculative. The Receiver has given no indication that he actually intends to assert a fraudulent transfer claim. Similarly, the lenders have not even begun

discovery or confronted an allegedly deficient fraudulent transfer disclosure. Moreover, the specific lenders who filed the motion have not been proposed to be included in the first tranche of priority disputes. As such, the lenders' motion is premature. Once the priority dispute resolution process has commenced, the lenders are free to petition the Court if they believe the Court's procedures have actually deprived them of due process or caused them a legally cognizable injury.

**E. Conclusion**

The Court's summary procedures for resolving potential fraudulent transfer claims provide ample due process and are well within the Court's equitable discretion and authority. Such summary procedures are routinely utilized in equitable receiverships. Accordingly, there has been no error of law, and no grounds to impose the extraordinary remedy of reconsideration. For these and the foregoing reasons, the Court should deny the lenders' motion and allow the priority determination process to proceed.

Dated: October 26, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I provided service of the foregoing Response, via ECF filing, to all counsel of record and Defendant Shaun Cohen, on October 26, 2020. I further certify that I caused the foregoing Response to be served on Defendant Jerome Cohen, via email at [jerryc@reagan.com](mailto:jerryc@reagan.com).

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