

Appeal No. 20-3114

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant

v.

EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and
SHAUN D. COHEN

Defendants

v.

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

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION and CITIBANK, N.A., AS
TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS FARGO COMMERCIAL
MORTGAGE SECURITIES, INC., MULTIFAMILY MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2018-SB48

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS IN CASE NO. 18-cv-5587, JUDGE JOHN Z. LEE

SEVENTH CIRCUIT RULE 3(c) DOCKETING STATEMENT OF APPELLANTS

Appellants Federal National Mortgage Association (“Fannie Mae”) and Citibank, N.A., as Trustee for the registered Holders of Wells Fargo Commercial Mortgage Securities, Inc., Multifamily Mortgage Pass-Through Certificates, Series 2018-SB48 (“Citibank as Trustee”), by their undersigned counsel, respectfully submits this Docketing Statement pursuant to Circuit Rule 3(c)(1) of the United States Court of Appeals for the Seventh Circuit.

I. DISTRICT COURT JURISDICTION.

The United States District Court for the Northern District of Illinois (“District Court”) has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 77t(b), 15 U.S.C. § 78u(d), and 15 U.S.C. § 78u(e).

II. APPELLATE COURT JURISDICTION.

28 U.S.C. §1292(a)(2) confers jurisdiction over this appeal on the United States Court of Appeals for the Seventh Circuit. *S.E.C. v. Janvey*, 404 F. App’x 912, 915 (5th Cir. 2010) (appellate court has jurisdiction under 28 U.S.C. §1292(a)(2) to hear appeals of interlocutory orders confirming SEC receiver sales); *United States v. “A” Mfg. Co.*, 541 F.2d 504, 506 (5th Cir. 1976) (Under 28 U.S.C. §1292(a)(2), “[i]t logically follows that if an order directing a sale is appealable then an order confirming a sale after the fact is likewise appealable.”); *but see United States v. Antiques Ltd. Partnership*, 760 F.3d 668 (7th Cir. 2014). Section 1292(a)(2) states “the courts of appeals shall have jurisdiction of appeals from: (2) Interlocutory 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.”

On August 15, 2018, the U.S. Securities and Exchange Commission (the “SEC”) filed a complaint against EquityBuild, Inc., Equitybuild Finance, LLC, Jerome Cohen, and Shaun Cohen (collectively, “Receivership Defendants”) based on allegations the Receivership Defendants engaged in a Ponzi scheme involving commercial real estate property. On August 17, 2018, the Court appointed Kevin B. Duff as the equity receiver (“Receiver”) over the estates of the Receivership Defendants (“Receivership Estate”). The Receivership Estate is comprised almost exclusively of commercial real estate. Nearly every piece of real estate is encumbered by a lien in favor of an institutional lender or investors that invested in the Defendants’ Ponzi scheme, or both.

Appellants are two of the so-called “institutional lenders” and each hold perfected mortgage security interests in two properties that are part of the Receivership Estate.¹

The Receiver has been liquidating nearly every asset of the Receivership Estate by selling the real estate. The Receiver filed his Ninth Motion to Confirm the Sale of Certain Real Estate and for the Avoidance of Certain Mortgages, Claims, Liens, and Encumbrances [Dkt 749] (“Ninth Sale Motion”), which sought to sell, among other estate assets, the two properties encumbered by the Appellants’ security interests. The Appellants filed their objections to the Ninth Sale Motion [Dkt. 769] (“Objection”).² On October 26, 2020, the District Court entered its order [Dkt 825] (“Order”) overruling the Appellant’s Objection without hearing and granting the Ninth Sale Motion allowing the Receiver to sell the two properties free and clear of the Appellants’ security interests. Appellants immediately filed their notice of appeal the following day on October 27, 2020.³

Appellate jurisdiction is proper pursuant to 28 U.S.C. §1292(a)(2). The most significant assets in the estate are real estate and the sale and manner of disposition of those assets are essential and necessary to accomplish the wind up of this estate. This case is unlike a case in which an ongoing entity such as a manufacturing company has multiple operations and happens to have a

¹ The Appellants, along with other “institutional lenders” filed a Motion to Intervene [Dkt 751]. The Receiver and SEC agreed that they would not contest or object to the Appellants’ ability to appeal. (Transcript of August 13, 2020 Hearing at 5:15-25; 6:1-13; 6:21-25; 7:1-9; 8:14-21. Based on this representation, the District Court denied the Motion to Intervene on August 13, 2020 [Dkt 762]. *Id.* See SEC v. EquityBuild, Inc., No. 18-cv-05587). See also *S.E.C. v. Enter. Tr. Co.*, 559 F.3d 649, 652 (7th Cir. 2009) (holding parties affected by a receiver’s plan of distribution may appeal adverse distribution decisions without intervening.). *But see S.E.C. v. First Choice Mngmt. Serv. Inc.*, 767 F.3d 709 (7th Cir. 2014).

² The Objection raised numerous issues with the sale process, including (i) the Receiver’s ability to sell assets encumbered by the Appellants’ liens that will not generate any net proceeds for the estate over and above the amount of the mortgage liens; (ii) violation of the Appellants’ due process rights; (iii) violation of Illinois law related to state law liens and security interests; (iii) the impropriety of the bid process, including the requirement that the Appellants’ post a letter of credit to be eligible to credit bid on their properties; and (iv) the failure to disburse sale proceeds.

³ The Appellants also simultaneously filed their Motion to Stay Sales Pending Appeal to the United States Court of Appeals for the Seventh Circuit [Dkt 832]. That motion is set for hearing on November 5, 2020.

parcel of real estate. The manner of disposition of the real estate is the key and threshold issue for the wind up of this case. By overruling the Appellants' Objection and granting the Ninth Sale Motion, the District Court has refused to take the steps necessary to accomplish the "wind up" of this estate. In other words, the order granting the Ninth Sale Motion and denying the Mortgagees' Objection is a "refusing order[]" to take steps to accomplish the purpose of the wind up of the estate. 28 U.S.C. §1292(a)(2).

The two properties at issue are not general receivership assets that will generate sale proceeds that will be divided up among unsecured creditors. Rather, the proceeds belong either to the institutional lender or investor(s). This is because the properties are encumbered by a lien in favor of an institutional lender or an Equitybuild investor, or both. Each lien must be satisfied before proceeds can be distributed to an unsecured creditor. Therefore, the only task left after a sale is a determination of lien priority and value for each of these individual "estates" (i.e., each of the properties.) The liquidation of assets is a step towards the wind up of the Receivership Estate and the Appellants' requests concerning to this process relate to steps necessary for the wind up of the estate.

The case of *Janvey* highlights the appellate court's jurisdiction under 1292(a)(2). There, an SEC receiver sold partnership interests over the objection of the defendants. The court confirmed the sales and the defendants appealed under 1292(a)(2). The appellate court determined it had proper jurisdiction. *Janvey*, 404 F. App'x at 915-16. The Appellants are attempting the exact same appeal.

United States v. Antiques Ltd. Partnership, 760 F.3d 668 (7th Cir. 2014) is distinguishable. In *Antiques*, a receiver was appointed as part of the post-judgment tax collections proceedings to assist the United States in recovering on tax liens. The court found that three types of orders are

appealable under 1292(a)(2): (i) orders appointing a receiver, (ii) orders refusing to wind up a receivership, and (iii) orders refusing to take steps to accomplish the purposes for winding up a receivership. *Antiques*, 760 F.3d at 672. In *Antiques*, the court held that a post-judgment tax collection receiver's sale of the taxpayers' interest in a partnership was not appealable under 1292(a)(2). *Antiques*, 760 F.3d at 671-72.

The *Antiques* holding is distinguishable from the present case for several reasons. As an initial matter, the order qualifies as an appealable order under the third category. The issues raised in the Objection relate to the steps necessary to accomplish the "wind up." By overruling the Objection, the District Court entered a "refusing order[]" to take steps to accomplish the purpose of the wind up of the estate. 28 U.S.C. §1292(a)(2). Moreover, *Antiques* involved a post-judgment tax collections receiver. Here, we have an SEC receiver, identical to *Janvey*. Additionally, as part of its analysis, the court found that the tax liens attached to the defendants' ownership interest in the partnerships "entitling the receiver to sell those interests in order to realize cash from the liens to satisfy the [defendants'] tax obligations." *Id.* at 672. The Appellants have asserted significant case law that the Receiver lacks a right to sell their collateral on the terms and conditions that have been approved. Finally, the defendants in *Antiques* were serial appeal filers, filing five appeals, and the court found their appeals "frivolous." *Id.* at 673. This is the Appellants first appeal. Thus, the present appeal is analogous to *Janvey* and distinguishable from *Antiques*. Therefore, the Appellants believe appellate jurisdiction is proper pursuant to 28 U.S.C. §1292(a)(2).

This case is not a direct appeal from the decision of a magistrate judge.

III. PRIOR OR RELATED APPELLATE PROCEEDINGS.

There have been no prior or related appellate proceedings in this case.

IV. ADDITIONAL REQUIREMENTS OF CIRCUIT RULE 3(C)(1).

This is a civil case that does not involve any criminal convictions. None of the parties to the litigation appear in an official capacity. This case does not involve a collateral attack on a criminal conviction.

Respectfully submitted this 3rd day of November, 2020.

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*Application filed for admission to United
States Court of Appeals for the Seventh Circuit