

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.

Case No. 1:18-cv-5587

Hon. John Z. Lee

**JOINDER AND RESPONSE OF WILMINGTON TRUST TO RECEIVER'S MOTION FOR  
ENTRY OF AN ORDER: (1) ESTABLISHING CLAIMS BAR DATE; (2) FINDING THAT THE  
RECEIVER GAVE FAIR, ADEQUATE, AND SUFFICIENT NOTICE TO ALL INTERESTED  
PARTIES; AND (3) APPROVING PROOF OF CLAIM FORM  
AND SUMMARY PROCEDURES**

Wilmington Trust, National Association, as Trustee for the benefit of the registered holders of UBS Commercial Mortgage Trust 2017-C1, Commercial Mortgage Pass-Through Certificates, Series 2017-C1 ("Wilmington") hereby joins in the response to the Receiver's Motion for Entry of an Order: (1) Establishing Claims Bar Date; (2) Finding that the Receiver Gave Fair, Adequate, and Sufficient Notice to All Interested Parties; and (3) Approving Proof of Claim Form and Summary Procedures ("Claims Motion"), filed by Liberty EBCP, LLC and in further response states as follows:

**SUMMARY**

Wilmington hereby joins in, adopts and incorporates by reference the response of Liberty EPCP, LLC ("Liberty") [Docket No. 280] (the "Liberty Response"), as applicable for the reasons states therein. In addition, Wilmington opposes the Receiver's proposed Claims Motion for the additional following reasons.

Like Liberty, Wilmington has not received any principal or interest payments on its loan since July 2018, while it appears that the rents collected from the properties securing Wilmington's loans may have been diverted for payment of expenses for properties other than those securing Wilmington's loan, in violation of Magistrate Kim's order[Docket N. 225] (the "Memorandum Opinion"). The lengthy claims process proposed by the Receiver only heightens the loss currently being suffered by Wilmington and if the Claims Motion as proposed by the Receiver is allowed, Wilmington and other conventional lenders will suffer significant losses, which probably could have been avoided.

I. The Claims Bar Date is Too Long.

As set forth in Liberty's Response, the time period proposed by the Receiver in the Claims Motion for the claim Bar Date, is too long. The Receiver has been in place since this Court's August 17, 2018 Order [Docket No. 16]. It has taken the Receiver almost seven (7) months to circulate a proposed claims process, which proposes a claims Bar Date 120 days after the court approves the Claims Motion and a claims approval period that could exceed one year. As the Receiver acknowledges in his motion, the Receiver has identified at least 700 investors and nearly 100 other claimants, including conventional lenders and creditors as potential claimants, yet the Receiver requests thirty (30) days to send notice to this potential claimants through a third party vendor Axios Fiduciary Services ("Axios"). This time period, along with the Bar Date, is excessive.

By this time, all potential claimants have (or should have) notice of this proceeding. Therefore, the Receiver, using the Resources of Axios, should be able to provide notice of the Bar Date to all potential claimants within seven days of the order approving the Claims Motion.

Further, the Bar Date should be set sixty (60) days after the Court approves the Claims Motion, not one hundred twenty days (120) as proposed by the Receiver. The reason for this is simple. While the Receiver drags out the claims period, the Receiver continues with unfettered control to manage the real property and use the rents collected not to pay principal and interest owed secured creditors, or real estate taxes, but rather to fund other estate expenses.

In addition, during the last few months the Receiver entered into contracts for the sale of six properties (five of which were unsecured), which have yet to close and has pending a motion to sell and liquidate twelve more properties. These new properties secure loans to conventional lenders without guarantees that those loans will be paid off from the proceeds of sale, even if they were sufficient to pay out the loans in full. Rather, the Receiver has indicated that he intends to withhold payment of the net proceeds (until the conclusion of the Claims Motion and the Court's final determination on priority of liens, which could last another year). During this period, the secured creditors will not be paid any sale proceeds at time of sale, or monthly principal and interest on its debt, which continues to accrue default interest and attorneys' fees that are required to be paid under the loan documents. Further, during this period, the Receiver will continue to incur his own attorney's fees and costs (much of it possibly contesting the priority claims of the various claimants). Under the Claims Motion, only after all properties have been liquidated and the priority of the claimants have been determined, will the Receiver make *prorata* distributions of the funds still remaining in the estate to pay the allowed claimants. This could result in a secured creditor like Wilmington not being paid in full at the time of the sale of the property, but, as acknowledged by the Receiver in the Claims Motion, an amount less than 100% owed based on the expected limited funds to be

received from the sale of the assets.

While Wilmington continues not to receive principal and interest payments owed it from the rents from the properties securing its loan, the Receiver is incurring significant fees for him and his law firm, which will be paid from the assets, including rents from Wilmington's properties. As an example, the Receiver notes in this Second Report that the Receiver has incurred fees and costs to him and his law firm of over \$904,000.00 for the period August 17, 2018 through December 31, 2018. Based on those numbers, from January 2019 through the conclusion of the claim process proposed by the Receiver, he and his law firm could incur another \$3,000,000.00 in fees, which will be paid first from either the assets of the estate (i.e. rents collected) or from the sale of the properties, thereby adversely impacting Wilmington's rights in its collateral. This is inequitable and a lengthy claims Bar Date only increases the cost to all parties.

Accordingly, any interested party should have the materials necessary at their disposal to submit a claim within at most, 60 days.

## **II. The Receiver Fails to Provide for a Time Frame for Processing Claims**

Rather than set a hard date on when the Receiver will review and analyze all claims, the Receiver instead states that he intends to set a status date thirty day after the Bar Date for the Receiver to make his initial report on the "general response to the claim process". At that status date, the Receiver intends to propose a timetable and schedule to review and analyze the claims and distribution plan, including when the Receiver will report to the court regarding the number, amount, categories of all claimants, his proposed distribution plan and schedule for objections to the distribution plan and resolution of same. The vagueness of this timeline is ridiculous. This could add another six to nine months on top

of the 120 day claim period, during which time the Receiver continues to liquidate assets of the conventional lenders (without any payment to the conventional lenders, including Wilmington).

Further, during this time, the cost that the Receiver is incurring against the estate continues to accrue at the rate of approximately \$900,000.00 every four months (or about \$2,700,000.00 per year), but which cost will probably increase based on the Receiver and his attorneys requirement to review the claims material they receive and process. All of these costs and expenses come out of the limited assets in the Receivership estate, as acknowledged by the Receiver in his Claims Motion. This timeline is therefore not reasonable and needs to be clarified and shortened.

III. The Receiver has failed to set forth a Discovery Schedule.

As has been highlighted in Liberty's Response and other pleadings, the court directed the Receiver to include a procedure for discovery in his Claims Motion. Rather than provide for a discovery process, the Receiver merely states that the Receiver "... intends on proposing a discovery schedule to the court to account for any reasonable discovery that the parties to the litigation, the Receiver and the claimants deem necessary and appropriate." Rather than set a timeline as to when this discovery process would begin, the Receiver merely states that the discovery would be completed in advance of his submission of a proposed distribution plan (which is planned to occur over one year after the Court approves the Claims Motion, at the earliest). This proposal flies in the face of the Court's prior direction to the Receiver and is inequitable.

As Wilmington and other conventional lenders have asserted on a number of occasions, discovery is imperative for the parties to establish their priority rights in the

properties securing the conventional lenders loans. Therefore, prior to the Receiver being allowed to liquidate any further real property which secures a conventional lenders loan or to allow the Receiver to “begin the process of analyzing claims”, this Court needs to promptly hold a hearing on priority of the various claimants lien rights against the real property, to determine whether the conventional lenders or the investment lenders have priority against the real property the Receiver wants to liquidate.

This hearing should be held thirty to sixty days after the shortened 60 day Bar Date. Prior to that hearing, the parties should have concluded discovery, therefore, discovery should be allowed immediately and be ongoing as the Receiver obtains claims information from any investor lenders or conventional lenders, as it relates to their specific properties. This discovery can begin immediately, since as highlighted in Liberty’s Response, the Receiver admits in his Second Status Report that he has obtained and recovered substantial amounts of information to date, regarding the mortgagees’ loans, the investors, the activities of the Cohen’s and the properties. In addition, in the Claims Motion, the Receiver acknowledges that the Receiver and his retained professionals have been reviewing records from the Receivership Defendants, it is assumed for months.

Therefore, the Receiver has significant information in his possession which should be made available to all parties during the claim procedure to assist these parties in establishing their claim or to be used for purposes of establishing priority. As highlighted in Liberty’s Response, disclosure of this information is akin to the mandatory disclosure requirements in federal cases for purposes of expediting a resolution of the litigation FED. R. CIV. P 26(a)(1). There is no reason for these documents and information to be withheld from the institutional lenders, when disclosure of such information can only aid in

streamlining the claims process to establish priority of certain loans against properties within the Receivership Estate.

IV. The Claims Motion should be Amended to Provide for Hearing on Priority Before the Receiver makes a Determination on the Claims.

Wilmington joins in on Liberty's Response that any approval of the Claims Motion should not preclude any conventional mortgagee from asserting whatever rights they have in the properties securing their loan until the claims process runs its course and a discovery pretrial hearing is held.

Once the Bar Date has passed and discovery is completed, the claim process should provide for a hearing to determine priority of the claimants against the properties securing their respective loans. Those hearings should occur promptly, but no later than sixty days after the Bar Date (rather than the twelve to fifteen month period suggested by the Receiver in the Claims Motion).

Once the issue of priority has been established as it relates to the specific property securing their loan, then the party holding the priority lien against that property should have the right to pursue the remedies available to it under their specific loan documents, including seeking an order removing the properties from the estate if it provides no equity for the estate. To do otherwise, does not benefit any of the claimants, but only the Receiver and his attorneys.

In addition, during this period the Receiver should not be allowed to liquidate any real estate which secures a conventional loan, unless at the time of closing, that conventional lender is paid in full all amounts due in connection with that loan. Otherwise, if the Receiver is allowed to proceed as he is currently doing, he will liquidate the

properties (which impairs the rights of the conventional lenders under their loan documents) and the proceeds from that sale will not be segregated by the Receiver and used to pay the balances owed the conventional lenders, but rather will be used by the Receiver to pay receivership expenses over the next 12-15 months. Meanwhile, the loans due the conventional lenders will continue to go unpaid since August 2018 or earlier.

As such, this court should require that the Claim Motion be amended to provide for a hearing on priority 30-60 days after the Bar Date so that the claimants can determine whose lien has priority against specific properties.

The claims procedure submitted by the Receiver is unjust and unwarranted in law. The order of events suggested by the Receiver is nonsensical and severely harms the rights of the various secured creditors.

#### **IV Conclusion**

Almost eight months have passed since the Receiver took control of these properties and no principal and interest payments have been received by Wilmington (or to Wilmington's knowledge, other conventional lenders) and, based on statement by the Receiver, no payments can be expected. ) During this time, the Receiver is using rental income to cover administrative costs, in violation of loan documents.

Rather than pursue a process which would allow the secured parties to determine priority of lien rights against the real properties, which process would possibly result in a secured claimant being able to pursue recovery of the amount it is owed through the property granted as security for its loan, the Receiver has elected to pursue a cumbersome, costly and timely claims process that benefits no one, except the Receiver and his law firm. The Receiver's actions are draining any equity that the real property in the Receivership

estate may currently have. Further, recently the first installment of 2018 real estate taxes came due and the Receiver was unable to pay all property taxes in full for the properties within the Receivership Estate. Within the time contemplated by the proposed claims process, the second installment will come due, as well as the first installment of 2019 property taxes. The secured creditors have no assurance that property taxes will be paid timely – to their detriment.

Further, the Receiver refuses to make payments to the secured creditors on the basis that priority must first be determined. Yet, the proposed claims process anticipates that “investigating and calculating the claims of investors and creditors will take at least a year from the proposed bar date.” [Docket No. 241, p. 4.] In addition, at the conclusion of this period, all the Receiver proposes to do is use the limited funds he anticipates will be available, to pay claimants, a portion of their claims on a pro-rata basis, notwithstanding the fact that if priority is established, the secured creditors could pursue their individual remedies against the properties to maximize recovery without being burdened by Receivership expenses.

#### **REQUESTED RELIEF**

Wilmington therefore requests that any order approving the Claims Motion:

- a. Approve a claims process that requires the submission of claims within a two month (60 day) and not a four month (120 day) period;
- b. Approve a claims process which allows for immediate discovery and requires the Receiver to make available to the claimants, information in the Receiver’s possession which relates to the properties and or loans securing the conventional or investment lenders loans, EquityBuild and/or the Cohen’s

- c. Approve a claims process which provides for a hearing on priority to occur no later than sixty (6) days after the Bar Date;
- d. Not constitute a waiver or be deemed to preclude Wilmington, in any way, from seeking an adjudication of any of its claims, including renewal of claims asserted in matters denied without prejudice by this Court previously (including under the Memorandum Opinion) or any new matters, including, but not limited to, a right to enforce the terms of the Memorandum Opinion, a new or renewed right to seek adequate protection, relief from the automatic stay or other relief.

Dated: March 13, 2019

Respectfully submitted,

/s/ James M. Crowley

Plunkett Cooney, PC  
221 N. LaSalle Street, Suite 1550  
Chicago, IL 60601  
(312) 607-6607  
[jcrowley@plunkettcooney.com](mailto:jcrowley@plunkettcooney.com)

Counsel for Wilmington Trust, National Association, as Trustee for the benefit of the registered holders of UBS Commercial Mortgage Trust 2017-C1, Commercial Mortgage Pass-Through Certificates, Series 2017-C1

James M. Crowley, Esq. (ARDC #6182597)  
Jennifer E. Walker, Esq. (ARDC #6299794)  
Plunkett Cooney, P.C.  
221 N. LaSalle Street, Suite 1550  
Chicago, Illinois 60601  
(312) 970-3410  
[jcrowley@plunkettcooney.com](mailto:jcrowley@plunkettcooney.com)  
[jwalker@plunkettcooney.com](mailto:jwalker@plunkettcooney.com)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on March 13, 2019 by filing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

/s/ Jennifer E. Walker