

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. Manish S. Shah
	)	
EQUITYBUILD, INC., EQUITYBUILD	)	Magistrate Judge Young B. Kim
FINANCE, LLC, JEROME H. COHEN,	)	
and SHAUN D. COHEN,	)	
	)	
Defendants.	)	
	)	

**RECEIVER’S RESPONSE TO SHATAR CAPITAL’S  
MOTION TO STAY PENDING APPEAL**

Kevin B. Duff, as the receiver (“Receiver”) in this action, respectfully submits this response to Shatar’s Motion to Stay Pending Appeal in regards to distributions associated with the claimants for 5450 South Indiana (sometimes referred to as the “Indiana property”) and 7749 South Yates (sometimes referred to as the “Yates property”). (Dkt. 1710)

**I. The Court Has Discretion Whether or Not to Stay Distribution**

Whether or not to issue a stay pending appeal is a matter reserved for the exercise of the Court’s judicial discretion. *Nken v. Holder*, 556 U.S. 418, 433 (2009).

**II. Expeditious Distribution of Funds to Victims Is Consistent with the Primary Purpose of Equity Receiverships.**

As the Receiver has previously indicated when similar issues have arisen (for example with regard to the appeal from this Court’s decision on Group 1), the Receiver is prepared to implement and distribute funds consistent with the orders entered by the Court as soon as practicable. (*See, e.g.*, Dkt. 1479) This position is offered in recognition that claimants have been waiting now many

years for receipt of distributions. Furthermore, the distribution of such funds enhances the public policy supporting equity receiverships, where the goal is to distribute monies back to claimants efficiently and expeditiously. *See, e.g., SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986) (“primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors”). To be clear, and consistent with the orders approving the sales of the two properties in which Shatar claims an interest, which required the Receiver to hold the net proceeds of those sales pending further Court order (Dkt. 382, 715), the Receiver will only distribute those funds as ordered by the Court.

**III. The Court May Consider the Relative Impact of the Underlying Fraud on Claimants in Determining How and When to Distribute Receivership Funds.**

In determining whether to grant or deny Shatar’s motion to stay distribution, the Court may consider the relative interests and circumstances of the claimants and the extent to which distribution now versus a stay of distribution would impact them. *Cf. Duff v. Central Sleep Diagnostics, LLC*, 801 F.3d 833, 840 (7th Cir. 2015) (referencing the court’s awareness that “some of the claimants are elderly, and many were very badly harmed by [the defendant’s] fraud”).

This Court has heard from claimants at various times during the Receivership, who have made clear the significant and devastating impact of Defendants’ conduct, first by having their funds deposited with the Defendants as part of their scheme, and then suffering the delays of receiving money back through the process designed to unwind the complex fraudulent web established by the Defendants. For example, claimant Susan Kalisiak (a claimant for both 5450 Indiana and 7749 South Yates) came before the Court and counsel present at the April 26, 2023 status hearing and provided a poignant perspective on the impacts the EquityBuild fraud and delays in recovery have had on her life as a single mom of two girls who had been living from the income

received from these investments. (Tr. 4/26/23 Hearing at 8-12) And the Receiver and the receivership team have received myriad communications from other claimants repeating the personal devastation to their lives and households, noting that the damages here involved, *inter alia*, the loss of their life savings and monthly income, sickness, depression, inability to provide for children, inability to pay for healthcare, and sundry other problems. Among the messages sent by such claimants include, but are not limited to the following:

- A claimant wrote with grave concern (several years ago) that “with my husband’s cancer, our finances have been even more important to make sure we can get through this challenging time”
- Another claimant wrote (also several years ago) that “[m]ost of my life savings (\$180k) are locked up with Equity Build, and I’ve had to go from being retired to working full-time again.”

The Receiver understands that many of the approximately 139 investors in the Indiana and Yates properties are in their 70s or older.

The Receiver notes that the Court has recognized that a material factor contributing to the length of the case has been the manner in which the institutional lenders have chosen to litigate this matter. (*See, e.g.*, Dkt. 1030 at 8 (“the Receiver and his legal professionals have devoted significant resources responding to various motions, objections and inquires made by lenders,” and “certain delays in this case can be attributed to the Receiver’s need to respond to various motions and objections made by the [institutional] lenders.”)) And now, were a stay granted during the pendency of Shatar’s appeal, that would, of course, add further delay; while there is no precise way to predict the length of time for appeal, it is fair to consider that for Group 1 the time from the notice of appeal to the Court’s approval of the final Group 1 distribution order was nearly thirteen (13) months.

**IV. Shatar Has Not Shown a Likelihood of Success on Appeal.**

The Receiver does not agree with the principal arguments in Shatar’s motion, including but not limited to Shatar’s argument that is likely to succeed in its appeal. (Dkt. 1710 at 4-11) As the Seventh Circuit observed in *SEC v. Enterprise Trust Co.*, 559 F. 3d 646 (7th Cir. 2009)—in which the Court affirmed the District Court’s approval of a receiver’s distribution plan in an investor fraud scenario where, like here, individuals’ property was marshaled by a receiver and claims were resolved in the receivership proceedings—the claimants here, whether the investors, Shatar, or others, are “like creditors of a debtor in bankruptcy, [and] must accept the distribution that the court believes appropriate.” 559 F.3d 649, 652 (7th Cir. 2009).

Shatar recognizes that its burden is substantial here to establish a “*significant* probability of success.” (Motion, Dkt. 1710, at 3) *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1987) (movant “need[s] to demonstrate a substantial showing of likelihood of success, not merely the possibility of success, because they must convince the reviewing court that the lower court, after having the benefit of evaluating the relevant evidence, has likely committed reversible error.”) Put differently, Shatar would have to establish a substantial probability that this Court abused its discretion. *Enterprise Trust*, 559 F.3d at 652. Shatar does not meet that threshold.

Here, Shatar’s efforts to meet this substantial burden largely challenges many factual determinations in regards to the transactions, and actions that were taken or were not taken by Shatar in regards to both properties (*See* Motion, Dkt. 1710, at 4-7 (Yates), 7-10 (Indiana).) This Court’s factual determinations are provided significant deference, and Shatar does not and cannot show they are clearly erroneous. *See, e.g., SEC v. Wealth Management*, 628 F.3d 323, 332-33 (affirming distribution plan and stating that the “district court has broad equitable power in this area, so appellate scrutiny is narrow; we review the decision below for abuse of discretion”); *see*

*generally U.S. v. Magana*, 118 F. 3d 1173, 1183 (7th Cir. 1997) (stating that under an abuse of discretion standard, “the proper inquiry is not how the reviewing court would have ruled if it had been considering the case in the first place, but rather whether any reasonable person could agree with the district court.” (citation omitted)). Here, it is beyond cavil that a reasonable person could (and would) agree with the thorough and thoughtful opinion of the District Court on the issues associated with the Indiana and Yates properties. (Dkt. 1679 at 4-8)

And even if Shatar’s challenges were to be viewed as legal challenges (which the Receiver does not concede), Shatar’s arguments largely recycle similar or related arguments to those this Court has previously rejected. (*Compare, e.g.*, Dkt. 1587 at 5-14 *with* Dkt. 1710 at 4-11) For example, Shatar challenges the Court’s determination that there was an equitable mortgage for the Indiana property on the basis that Shatar’s monies were used to acquire the Indiana property, and not those funds associated with the equitable mortgages. (Dkt. 1710 at 8-11; *see also* Dkt. 1587 at 7-8) Not only is there no case law that establishes the new requirement advanced by Shatar, but it further ignores that, in this circumstance, the Yates property (which indisputably used investor monies as part of the acquisition) also acted as security for the Indiana loan. In any event, “[a]lthough proof of an equitable mortgage must be clear, satisfactory and convincing, it is not necessary that there be no conflict in the evidence presented.” *Silas v. Robinson*, 131 Ill App. 3d 1058, 1062 (affirming trial court determination of existence of equitable mortgage). The Court’s determinations are well grounded in the law, as articulated in the Receiver’s submission on the Indiana and Yates claims (Dkt. 1571 at 4-8, and Dkt 1602-1 at 2-6), as well as that of the Individual Investors (Dkt. 1564). There is no “substantial showing” of a likelihood of success, here, which is fatal to Shatar’s motion.

V. **If a Stay Is Considered, the Court Should Require Shatar to Post an Appeal Bond and/or Hold Back Sufficient Funds for Receivership Administration, Including for the Costs of Appeal and Final Distribution.**

“Ordinarily a party is entitled to a stay pending appeal only by posting an appropriate bond.” *In re Carlson*, 224 F.3d 716, 719 (7th Cir. 2000) (affirming district court decision not to waive bond requirement on motion to stay). If the Court determines that a stay is appropriate, then it should also require Shatar to post a bond in an amount determined by the Court to protect the receivership estate and the distributees from the financial impact of its appeal.

In the alternative, and at a minimum, the Receiver requests that the Court hold back 5% of the amounts to be distributed, to be available to cover the fees and costs of the Receiver’s remaining work related to the Shatar properties, including relating to Shatar’s appeal and any subsequent work of the Receiver including but not limited to administration of a final distribution if a holdback is ordered.

Further, any stay order should be limited so that it does not restrict distributions relating to receivership administration including, but not limited to, any approved fees and costs. This is consistent with Shatar’s request for relief, which states that it “respectfully requests that this Court issue a stay, without security, of any distribution or disbursement of the proceeds from the sale of 5450 S. Indiana and 7749 S. Yates to the Investor-Lenders pending appeal.” (Dkt. 1710 at 15) In other words, any stay should *not* apply to other matters pending in the Receivership which might impact the funds held in the separate accounts for the two properties, including but not limited to the Receiver’s fee applications, or to future applications or motions seeking approval, reimbursement, and/or restoration of funds.

Dated: August 1, 2024

Respectfully submitted,

s/ Michael Rachlis

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**CERTIFICATE OF SERVICE**

I hereby certify that I provided service of the foregoing Receiver's Response to Shatar's Motion to Stay Pending Appeal, through the Court's CM/ECF system, to all counsel of record on August 1, 2024.

I further certify that I caused true and correct copy of the foregoing Response to be served upon all 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) and their counsel.

I further certify that the Response will be posted to the Receivership webpage at: <http://rdaplawnet.com/receivership-for-equitybuild>

/s/ Michael Rachlis

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