

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

U.S. SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

Case No. 18-cv-5587

Hon. Manish S. Shah

Magistrate Judge Young B. Kim

**MOTION OF MIDLAND LOAN SERVICES FOR LEAVE OF COURT TO
TAKE DISCOVERY RELEVANT TO THE RECEIVER’S AVOIDANCE CLAIM**

Creditor Midland Loan Services, a Division of PNC Bank, National Association (“Midland”), moves this Court, pursuant to the Court’s Order Regarding Summary Proceedings for Group 6 [Docket No. 1637] (the “Group 6 Schedule”), for leave to take discovery relevant to the Receiver’s newly disclosed avoidance claim [Docket No. 1740] (the “Receiver Disclosure”), and further states as follows:

INTRODUCTION

1. Midland is the loan servicer¹ for certain secured loans as evidenced by two mortgage instruments recorded against seven (7) of the fifteen (15) properties being adjudicated in Group 6 of the claims administration process.

¹ The mortgages at issue initially were granted in favor of Colony American Finance Lender LLC (“Colony”) and Corevest American Finance Lender LLC (“Corevest”) and were later assigned to two claim-holding trust entities: (i) Wilmington Trust, N.A., as Trustee for the Benefit of Corevest American Finance 2017-1 Trust Mortgage Pass-Through Certificates (for Property 50); and (ii) Wilmington Trust, N.A., as Trustee for the Registered Holders of Corevest American Finance 2017-2 Trust, Mortgage Pass-Through Certificates, Series 2017-2 (for Properties 51, 53, 54, 55, 56 and 57) (collectively, the “Trusts”).

2. On August 27, 2024 the Receiver submitted his Initial Submission on Group 6 Claims [Docket No. 1740] (the “Group 6 Submission”).

3. The Receiver recommends, among other things, that “the Court find that the investor-lenders’ first-in-time mortgages have priority over the later-recorded Midland mortgages.” Docket No. 1740 at p. 6. If the Court adopts the Receiver’s recommendation in this regard, the investor-lenders would be paid first from the funds contained within the property accounts.

4. Moreover, if the recommendation is adopted, then in the normal course Midland as junior lienholder would be entitled to any surplus funds after the investor-lenders have been paid. The Receiver argues, however, that the Midland liens should be “voided under the Illinois Uniform Fraudulent Transfer Act, 740 ILCS 160 and the claims submitted by Midland in this receivership be treated as unsecured” (the “Avoidance Claim”).² Docket No. 1740 at p. 20.

5. Accordingly, if Midland’s liens are avoided the surplus funds will not be delivered to Midland and instead will be pooled with funds earmarked for all unsecured creditors on a *pro rata* basis.

REQUESTED RELIEF

6. Midland requires, and the Receiver opposes, additional discovery in order to adequately defend the Receiver’s avoidance claim because the Receiver must prove that

² We note that the Receiver has not made any such allegation with respect to the thirty-six properties on which he has paid Midland. The Receiver provides no explanation for his change of position.

there has been a transfer as contemplated by the Illinois Uniform Fraudulent Transfer Act (IUFTA).³

ARGUMENT

I. The IUFTA May Not Govern the Transfers at Issue.

7. The IUFTA applies to transfers of a debtor's assets. An asset is defined as property of a debtor except "to the extent it is encumbered by a valid lien." 740 ILCS 160/2(b)(1). Accordingly, "[i]f an asset is fully encumbered, the transfer may not be attacked." *Puciennik v. Vandenberg*, 121 N.E.2d 462, 466 (Ill. App. 2018).

8. Based on the Receiver's filings to date, it appears that the Receiver concedes that at least three of the seven properties encumbered by Midland liens – Property 50 (7760 S. Coles Avenue, Property 53 (6807 S. Indiana Avenue), and Property 56 (8209 S. Ellis Avenue) – were fully encumbered by liens at the time that initial mortgagees Colony and Corevest received their liens. On the properties where there is a surplus available to Midland, the prior liens were resolved by payment or rollover after Colony and Corevest received their liens. *See* Exhibit 2 to the Receiver's Group 6 Submission (ECF No. 1740-1 at 5-6).

9. It is the Receiver's burden to prove that a transfer occurred, and in order to do so he must prove that the value of the real property exceeded the existing lien(s) at the time that Colony and Corevest received their liens. Even if he is able to do so, the claimed transfer is limited to the amount by which the value of the property exceeded the lien(s).

³ Midland does not need further discovery to support its other defenses. For example, there appears to be no evidence that the Trusts as subsequent transferees had notice – inquiry or otherwise – of EquityBuild's purported fraud.

Pluciennik, 121 N.E.2d at 468 (remanding “to determine the fair market value of the real estate and an appropriate calculation of the value of the transfer in excess of the mortgages that encumbered the properties.”)

II. Discovery is Needed in Order to Defend the Avoidance Claim.

10. The Receiver’s submission does not address this issue. He provided no information regarding the fair market value of the properties or the debts secured by the preexisting liens at the time of the purported transfers. Thus, Midland requires discovery into (i) the fair market value of the properties at the time that the liens in favor of Colony and Corevest attached; and (ii) the amounts that EquityBuild owed to the investor-lenders at the time that the liens in favor of Colony and Corevest attached. In addition, Midland intends to provide expert testimony as to the fair market value of the properties at the time that Colony’s and Corevest’s liens attached.

CONCLUSION

11. Pursuant to the Group 6 Schedule, Midland should be allowed leave of court to take additional discovery relevant to the Receiver’s avoidance claim.

WHEREFORE, Midland respectfully requests that the Court grant leave for forty-five (45) days to conduct additional discovery relative to the Receiver’s avoidance claim, that the deadline for Midland’s position statement be extended in order to allow for such discovery, and for any further relief as may be equitable and just.

September 10, 2024

Respectfully Submitted,

/s/ Thomas B. Fullerton

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on September 10, 2024 by filing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

/s/ Thomas B. Fullerton