IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. EQUITYBUILD, INC., et al., Defendants.	Case No. 1:18-cv-5587 Hon. Manish S. Shah Magistrate Judge Young B. Kim

RESPONSIVE POSITION STATEMENT OF
CLAIMANT SABAL CAPITAL OPERATIONS, LLC (PROPERTY 70)

Both the SEC and the Individual Investors contend the Individual Investors should take priority over Sabal Capital Operations, LLC, as successor in interest to Sabal TL1, LLC ("Sabal")[1] because the Individual Investors "never released their mortgages and no purported release was ever recorded." (Dkt. 1795 at 1; *see also* Dkt. 1796 at 2.) Sabal does not dispute that releases were never provided or recorded. Nevertheless, Sabal is still entitled to priority over the prior Individual Investors. As explained below, Sabal, having performed all of its payment obligations under Illinois law, is entitled to a valid release and priority over the Individual Investors. To conclude otherwise runs contrary to the Illinois Mortgage Act and well-established principles of Illinois common law, including foundational principles of agency law and the Illinois Fiduciary Obligations Act. As a result, Sabal's mortgage lien should take priority over prior Individual

[1] Sabal TL1, LLC is the current holder of record of Claim 70-2084 (the "Claim"). The Claim is being assigned to Sabal Capital Operations, LLC ("Sabal Capital") and Sabal Capital will file a notice of assignment with this Court when all assignment documents have been fully executed

Investors who authorized Equitybuild Finance, LLC ("EBF") to act on their behalf. The SEC and Individual Investors' arguments to the contrary lack merit.

ARGUMENT

I. The Seventh Circuit's Group 1 Decision Does Not Foreclose Sabal's Argument.

The SEC and the Individual Investors both suggest the Seventh Circuit's Group 1 decision, *SEC v. Equitybuild, Inc.*, 101 F.4th 526 (7th Cir. 2024), forecloses Sabal's priority argument because the Individual Investors' mortgage was not released. (Dkt. 1795 at 1; Dkt. 1796 at 2.) To be sure, the Seventh Circuit rejected Group 1 claimant BC57, LLC's argument that the Illinois common law rule—that payment of a debt underlying a mortgage automatically extinguishes the security interest belonging to the holder of that debt—survived the passage of the Illinois Mortgage Act ("IMA"). *SEC v. Equitybuild, Inc.*, 101 F.4th at 532. Specifically, the Court held "there must be payment *and* delivery of the release to extinguish a mortgage lien." *Id.* (emphasis in original).

Sabal, however, advances a different argument. Consistent with the Seventh Circuit's ruling, having paid the debts underlying the prior liens, Sabal is ***entitled to releases*** of the Individual Investors' mortgages.[2] Sabal is therefore entitled to priority over the Individual Investors who empowered their agent, EBF, to issue payoff statements and receive payments on their behalf because EBF did, in fact, receive payment on behalf of the Individual Investors.

II. Sabal is Entitled to a Valid Release Under the IMA.

The IMA governs the release of mortgages in Illinois and, as relevant here, requires a release for the benefit of Sabal. The IMA states "every mortgagee of real property, his or her assignee of record, or other legal representative, having received full satisfaction and payment of

[2] As stated in Sabal's opening Position Statement, Sabal accepts any relief the Court deems appropriate to effectively release the lien of the prior mortgages as to the sales proceeds. (*See* Dkt. 1798 at 3, n.3.)

all such sum or sums of money as are really due to him or her . . . shall make, execute and deliver to the mortgagor . . . an instrument in writing releasing such mortgage . . . or shall deliver that release to the recorder or registrar for recording or registering." 765 ILCS 905/2. The IMA further requires that a court order the issuance and delivery of a release when a prior mortgagee fails to deliver a release within 30 days after the payment of the debt secured by such prior mortgage. *See* 765 ILCS 905/4 ("Upon a finding for the party aggrieved, the court **shall** order the mortgagee . . . to make, execute, and deliver the release as provided in Section 2 of [the IMA].") (emphasis added). Finally, the IMA further confirms that "introduction of a loan payment book or receipt which indicates that the obligation has been paid shall be sufficient evidence to raise a presumption that the obligation has been paid." *Id.*

The IMA does not require anything more from the "party aggrieved." Notably, the IMA does ***not*** require a mortgagor to request a release to be entitled to one under the IMA. Specifically, for payoffs made after September 1973,[3] like Sabal Capital II, LLC's ("Original Lender") to EBF, the IMA's requirements that a release be issued are automatic, and not triggered by a request.[4] *See id.*; *see also* § 905/4 (confirming mortgagee's obligation to execute and deliver a valid release in

[3] By contrast, for payoffs made before September 1973, the IMA states a mortgagee shall execute and deliver a release "***at the request*** of the mortgagor." 765 ILCS 905/2 (emphasis added). Of note, to the extent *Rockford* can be interpreted as requiring a request for release, that case involved a payoff made ***before 1973***. *See Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190, 193 (3d Dist. 1970).

[4] While Sabal does not suggest or concede that it was required to request a release at any point, once this Receivership began, a mere 20 days after the 30 day IMA mandatory release period expired, Sabal was restrained from requesting the release to which it is entitled under the IMA given that the claimants are "restrained and enjoined from directly or indirectly taking any action or causing any action to be taken . . .which would [i]nterfere with the Receiver's efforts" including "interfering with or creating or enforcing a lien upon any Receivership Assets." (Dkt. 16 at 15; *see also Rockford*, 128 Ill. App. 2d at 195 (finding "no merit" to estoppel argument based on a six month delay between payment and request for a release).)

compliance with § 905/2 must be completed "within 30 days *after the payment of the debt. . .*") (emphasis added)).

Here, Sabal has satisfied each element under the IMA entitling it to a valid release. First, the Original Lender issued the payoff to EBF,[5] the Individual Investors' "legal representative" within the meaning of the IMA, authorized to receive such payoff. (*See* Sabal Ex. E (CASA § 2(a)); *see also* Sabal Exhibit C (Avers Payoff & Wire Confirmation); Receiver's Ex. 26.) In fact, the Illinois First District Court of Appeals recognized in *5201 Wash. Investors LLC v. Equitybuild Inc.*, 2024 IL App (1st) 213403-U, that EBF qualifies as a legal representative within the meaning of the IMA, in circumstances arising out of the same Equitybuild scheme, involving the same EBF entity, and the same authorization agreements (CASAs). *See id*. at ¶ 38. Specifically, in *5201 Wash. Investors*, the Court of Appeals concluded EBF necessarily qualified as a "legal representative" within the meaning of the IMA where the record established EBF was publicly identified as the prior investors' agent via the same "care of" language seen on the Individual Investors' mortgages here. (*Id*. at ¶ 38; *see also* Receiver's Ex. 26.)

5201 Wash. Investors is controlling guidance for the Court. As the Seventh Circuit acknowledged, "[w]ithout guidance from the state's highest court, 'decisions of the Illinois Appellate Courts control, unless there are persuasive indications that the Illinois Supreme Court would decide the issue differently.'" *SEC v. Equitybuild, Inc.*, 101 F.4th at 531 (quoting *Nationwide Agribusiness v. Dugan*, 810 F.3d 446, 450 (7th Cir. 2015)). In *5201 Wash. Investors*, the First District's reasoning was sound and, given the nearly identical facts here, applies with equal force:

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[5] The Receiver concedes EBF received the Original Lender's payment: "…a payoff of the prior mortgage was provided to [EBF]." (Dkt. 1772 at 9.)

> Reference to the dictionary reveals that a legal representative is "an agent having legal status." Merriam- Webster.com Legal Dictionary, Merriam-Webster, https://www.merriam-webster.com/legal/legal%20representative. Accessed 2 Aug. 2024. Similarly, Black's Law Dictionary defines "agent" as "someone who is authorized to act for or in place of another; a representative." Black's Law Dictionary (11th ed. 2019). Courts have also recognized that an agent is necessarily a legal representative. *See*, *e.g.*, *Grane v. Grane*, 143 Ill. App. 3d 979, 985 (1986) (describing defendant as "agent/legal representative").

2024 IL App (1st) 213403-U, ¶ 38.

Moreover, even if EBF were not a "legal representative" under the IMA, payment to EBF is equivalent to payment to the Individual Investors themselves, satisfying the IMA payment criteria, as discussed in greater detail below. *See Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190, 193 (3d Dist. 1970) ("Under the general rules of agency, if [the agent] had either actual or apparent authority to receive the payment, then payment to him had the same legal effect as payment to [the] principal."); *see also Hoiden v. Kohout*, 12 Ill. App. 2d 161, 164 (1st Dist. 1956) ("Payment to a duly authorized agent is payment to the principal. In such a case any argument with respect to defendants' exercise of care or failure to inquire is irrelevant.").

Second, the Original Lender issued a payoff at closing in amounts consistent with the payoff statement indicating the amount due under the prior investor mortgage. (*See* Sabal Ex. C.)

Third, there is no dispute that "a payoff of the prior mortgage was provided to EquityBuild Finance" (Dkt. 1772 at 9), and Sabal has submitted evidence demonstrating that the amounts actually due under the Individual Investors' prior mortgage were paid. (*Id.*)

Accordingly, because Sabal satisfied each of its obligations pursuant to the IMA[6] by making its payment to the Individual Investors' legal representative, EBF, for the balance of the existing debt encumbering 638 Avers, the IMA entitles Sabal to a valid release.

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[6] Again, as described, the IMA's requirements that a release be issued are automatic, and not triggered by a request. *See* 765 ILCS 905/2, 905/4.

The Seventh Circuit's Group 1 decision supports this conclusion. As noted, the Seventh Circuit held that the IMA abrogated the common law principle that payment of the debt underlying a prior mortgage extinguishes that mortgage. *SEC v. Equitybuild, Inc.*, 101 F.4th at 532. Instead, "the [IMA] obligates a mortgagee to issue a release of the mortgage upon full satisfaction of the debt underlying the lien." *Id*. at 531. That obligation finds support in the IMA's purpose: the IMA was designed "to allow the mortgagor to obtain a release when the terms of the mortgage have been fully satisfied" and to "protect[] the free alienability of land." *In re Gluth Bros. Constr. Inc.*, 451 B.R. 447, 451 (Bankr. N.D. Ill. 2021). Having met the requirements under the IMA—by issuing payment of the amounts due under the prior liens to the Individual Investors' agent authorized (actually and apparently) to receive those payments—Sabal is entitled to valid releases under the IMA. *See Franz v. Calaco Dev. Corp.*, 352 Ill. App. 3d 1129, 1150-1152 (2d Dist. 2004) (recognizing "the [IMA] unambiguously requires a mortgagee to release his mortgage upon receiving full payment under the mortgage" and ordering plaintiff to "execute and deliver a release of the mortgage as required by section 2 of the [IMA]."); *In re Estate of Schroeder*, 2022 IL App (5th) 210163-U (ordering bank to execute and deliver a release pursuant to section 2 of the IMA). To conclude otherwise would read a loophole into the IMA, wherein a mortgagor could comply with all of its obligations under the IMA, by submitting payment to a legal representative in satisfaction of the prior lien debt, but receive none of the IMA's protections. Indeed, reading the IMA this way undercuts the very rights the IMA is designed to protect.

Illinois case law supports this conclusion, too. Once payment is made to a legal representative, the burden does not shift back to the payor to confirm that the legal representative remits those funds to its principal. *Rockford Life Ins. Co. v. Rios*, 128 Ill. App. 2d 190 (3d Dist. 1970) is particularly instructive in this regard. As the Seventh Circuit explained, "[i]n *Rockford*,

the Illinois Appellate Court **ordered the release of a mortgage** after it determined that the note securing the mortgage **had been properly paid** to the mortgagee's authorized **agent**." *SEC v. Equitybuild, Inc*., 101 F.4th at 532 (emphasis added). Having paid the authorized agent in *Rockford*, "the payor [was] not bound to inquire into the application of such payment. The default of such agent is the responsibility of the principal." *Rockford Life Ins Co.*, 128 Ill. App. 2d at 195. The court reasoned "[it] is the principal who in the first instance selects the agent, grants him the authority and enables him to come into possession of the funds which are diverted. It is this conduct which makes the loss possible and the principal **may not shift the burden to the party dealing with his agent.**"[7] *Id*. (emphasis added).

Here, like *Rockford*, the Individual Investors expressly authorized EBF to act as their agent—at a minimum, to "issue payoff demands" and "demand, receive and collect all Loan payments." (Sabal Ex. E, § 9(a).) The Authorization Document also confirmed EBF's authority to receive payoffs as the Individual Investors' agent and trustee. (Sabal Ex. F.) Because the Individual Investors—not Sabal, a third party with no agency relationship with EBF or Equitybuild—empowered EBF to act as the collateral agent and servicer of their loan, they must bear the responsibility for their agent's wrongful conduct, and the Court must order a release of the mortgage, giving Sabal priority. *See Rockford Life Ins. Co.*, 128 Ill. App. 2d at 193, 195 (affirming trial court holding including that "defendants were entitled to a release of the mortgage"

[7] In its Group 1 ruling, the Court distinguished *Rockford* on the basis that the "contract between Rockford and Roe did not 'include any limitations or exceptions on the authority of the agent' to collect payments," while the "contract here explicitly barred Equitybuild Finance from unilaterally releasing the mortgages." (Dkt. 1386 at 21-22.) As relevant here, however, the contract between EBF and the Institutional Lenders (the CASAs) contains ***no limitation*** on EBF's authority to issue payoff statements or receive loan payments. Instead, the CASAs authorized EBF, among other things, to "issue payoff demands" and "demand, receive and collect all Loan payments." (Sabal Ex. E at § 9(a).)

where the "note secured by the mortgage had been paid in full" by payment to the agent); *see also M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233, ¶ 52 ("Where one of two innocent persons must suffer by reason of the fraud or wrong conduct of another, the burden must fall upon him who put it in the power of the wrongdoer to commit the fraud or do the wrong.").

Finally, the Illinois Fiduciary Obligations Act,[8] 760 ILCS 65 *et seq*. ("IFOA"), similarly protects Sabal in these circumstances, consistent with both the IMA, *Rockford*, and principles of agency. The IFOA is intended to protect payors such as Sabal. *See* 760 ILCS 65/1(1). The purpose of the IFOA is "to facilitate the fiduciary's performance of his responsibilities by limiting the liability of those who deal with him." *Praither v. Northbrook Bank & Tr. Co*., 2021 IL App (1st) 201192, ¶ 27 (citations omitted). The IFOA thus serves to "facilitate banking and financial transactions and place[s] on the principal the burden of employing honest fiduciaries." *Cty. of Macon v. Edgcomb*, 274 Ill. App. 3d 432, 435, (4th Dist. 1995).

The IFOA broadly defines "fiduciary" to include an agent, which EBF undoubtedly was on behalf of the Investor-Lenders. *See* 760 ILCS 65/1(1) (including "agent" as a "fiduciary" within the meaning of IFOA). The IFOA further defines "fiduciary" to include a trustee, which EBF was by virtue of the Authorization Document. (*See* Sabal Ex. F.) While Sabal acknowledges the CASA indicates "neither the Collateral Agent nor the Servicer shall have . . . a fiduciary relationship with any Lender," (*see* Sabal Ex. E, § 2(a)), Illinois courts disfavor advance waivers of fiduciary duties. *See Labovitz v. Dolan*, 189 Ill. App. 3d 403 (1st Dist. 1989) ("Defendants cite no authority, and we find none, for the proposition that there can be an *a priori* waiver of fiduciary

[8] Respectfully, the Court's ruling in Group 1 that the IFOA does not apply because the CASAs "expressly disclaimed" a fiduciary relationship between EBF and the Individual Investors (Dkt. 1386 at 20) is not binding on Sabal (*see* Dkt. 941 at 7) and, in any event, should be reconsidered by the Court.

duties in a partnership – be it general or limited."). Further, fiduciary relationships are born out of the parties conduct, not labels. *See, e.g.*, *McNerney v. Allamuradov*, 2017 IL App (1st) 153515, ¶ 69.

Here, it is undisputed that EBF was the Individual Investors' agent (and trustee) (*see* Sabal Exs. E, F), which expressly brings their relationship into the zone of protection provided by the IFOA. EBF and the Individual Investors did not have the privilege or right of agreeing between themselves to deprive Sabal and others of the protections the legislature provided through the IFOA by attempting to voluntarily disclaim EBF was a "fiduciary," particularly where the IFOA's provisions expressly define and establish EBF as a "fiduciary" within the meaning of the act.[9]

Accordingly, having satisfied its obligations under the IMA and Illinois common law, Sabal is entitled to a valid release and therefore priority over the Individual Investors who empowered their agent to receive Sabal's payoff funds. The Court should, therefore, direct the Individual Investors to issue a release to Sabal of their mortgage on 638 Avers.

III. The Individual Investors are not Entitled to Priority by Virtue of "Equitable Liens."

The Individual Investors alternatively assert that "the Court should hold that the Individual Investors have equitable liens on the properties and in the proceeds of sale of such properties superior to the Institutional Lenders' mortgages." (Dkt. 1796 at 2.) There is no evidentiary basis whatsoever to impose an equitable lien here. Sabal does not contest that the Individual Investors had a valid mortgage lien—the Original Lender paid the amounts due under that lien to close its loan. (*See* Sabal Ex. C.) In any event, the imposition of equitable liens would not change the foregoing analysis with respect to the operation of the IMA following Original Lender's payment

[9] The protections set forth within the IFOA also exist in common law. *See M&T Bank*, 2015 IL App (2d) 141233, *supra*.

to the Individual Investors' legal representative, EBF. The Individual Investors, in short, simply ask far too much of equitable lien principles.

Moreover, the suggestion that the prior Individual Investors have priority because Sabal's due diligence efforts were "lax" is totally unfounded. (Dkt. 1796 at 3.) The Individual Investors concede that "[g]enerally, the holder of an equitable lien cannot take priority over the interest of a party who acquires an interest in a property without notice of the equitable interest." *Id*. at 3 (citing *Stump v. Swanson Development Co., LLC*, 2014 IL App (3d) 110784). The Individual Investors assert, however, that the "Institutional Lenders were making loans to a business that trumpeted its crowdsourced funding and used lenders like them to refinance that funding" and thus "should have been on inquiry to investigate whether there were any existing loans on the properties." *Id*.

Sabal, however, did not participate in the origination of the loan. Instead, it received its interests through a series of assignments. (Sabal Ex. D.) As such, Sabal had *no* opportunity to investigate the existence of prior liens on the properties with Equitybuild or its representatives. For precisely this reason, Illinois courts do *not* permit equitable liens against third parties on the basis of inquiry notice. Rather, equitable liens against third parties like Sabal are limited to situations in which the third party had *actual knowledge*:

> [T]he concept of inquiry notice is not applicable to equitable vendor's liens and that the only time—*if at all*—a purchaser of a property interest who is a stranger to the original transaction can be burdened with the original vendee's equitable—essentially moral—obligation for the unpaid purchase price is when the subsequent purchase . . . has *actual* knowledge about the prior purchase that would render his own purchase or mortgage tantamount to complicity in fraud.

Stump, 2014 IL App (3d) 110784 at ¶ 110 (emphasis in original); s*ee also Richter v. Vacation Vill. Venture, LLC*, 2016 IL App (2d) 160050-U, ¶ 67 ("As *Stump* instructs, an equitable lien will not be declared in a vendor's favor over the rights of a third party purchaser, unless the third party had actual knowledge about the prior purchase.") (citation omitted). Accordingly, given that there is

no evidence of Sabal's actual knowledge[10] of Equitybuild's fraud, or EBF's failure to remit payment to its principals, the Individual Investors, the imposition of an equitable lien in this case would run contrary to Illinois law. Moreover, as described, Sabal was under no duty to ensure the payments were passed to the Individual Investors themselves. To the contrary, Illinois law absolves Sabal of any such obligation. *See Rockford Life Ins Co.*, 128 Ill. App. 2d at 195; *M&T Bank*, 2015 IL App (2d) 141233 at ¶ 52; *see also* 760 ILCS 65 *et seq*.

CONCLUSION

For the aforementioned reasons, and for the reasons stated in Sabal's Position Statement (Dkt. 1798), Sabal's assigned mortgage interest in the Group 7 property located at 638 N. Avers (Property 70) is a secured interest entitling Sabal to a valid release and priority to the proceeds of the sale of Property 70 as a matter of law. Under the IMA, Sabal is entitled to a release from the Individual Investors of their prior (and paid off) mortgage, and the Court should direct them to issue such release. As the secured claimant with priority, Sabal is further entitled to receive all amounts from the available funds liquidated by the Receiver's sale of Property 70 to be applied to its secured claim.

Dated: December 16, 2024

Respectfully submitted,

/s/ Andrew R. DeVooght

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[10] To be clear, Sabal does not concede—and indeed vigorously disputes—any suggestion that it "should have been on inquiry to investigate." (Dkt. 1796 at 3.)

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2024, I electronically filed the foregoing **RESPONSIVE POSITION STATEMENT OF CLAIMANT SABAL CAPITAL OPERATIONS, LLC (PROPERTY 70)**, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record, and further caused the foregoing to be served upon all members of Claims Group 7 by email to the distribution list via equitybuildclaims@rdaplaw.net.

/s/ Andrew R. DeVooght
Andrew R. DeVooght