

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

)	
UNITED STATES SECURITIES)	
AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	Civil Action No. 18-cv-5587
)	
)	Hon. Manish S. Shah
v.)	
)	Mag. Judge Young B. Kim
EQUITYBUILD, INC., et al.,)	
)	
Defendants.)	

RESPONSIVE STATEMENT OF CLAIMANT BMO BANK N.A.
PROPERTY 2 (4533-47 S CALUMET AVENUE)

Claimant BMO Bank N.A. f/k/a BMO Harris Bank N.A. (“BMO”), pursuant to Docket Entry 941, submits this Responsive Statement (“Response”) demonstrating that BMO holds a first position, perfected security interest in Property 2.¹

ARGUMENT

I. BMO holds a first position, perfected security interest in Property 2.

Investor Lenders² and the SEC assert in their respective Position Statements that Investor Lenders are entitled to first-position priority over the Property 2 proceeds because the Investor Lender Mortgage was never released. Dkt. 1795 at p. 1; Dkt. 1796 at p. 2. However, consistent with *SEC v. EquityBuild, Inc.*, 101 F.4th 526 (7th Cir. 2024), BMO holds a first-priority interest

¹ Capitalized terms in this Response are defined consistently with the definitions in BMO’s Position Statement (Dkt. 1794).

² In this Response, the term “Investor Lenders” refers specifically to those who signed the position statement filed by certain Investor Lenders through their counsel Max A. Stein (Dkt. 1796). Not all Investor Lenders joined this position statement.

in Property 2 because EBF, Investor Lenders' agent, executed a valid release. Therefore, BMO takes a priority position over Investor Lenders who authorized EBF to act on their behalf.

A. EBF executed a valid release of the Investor Lender Mortgage.

Investor Lenders and the SEC cite to the court's decision in *SEC v. EquityBuild, Inc.*, 101 F.4th 526 (7th Cir. 2024) to advance the position that Investor Lenders have priority because the Investor Lender Mortgage was never released. Dkt. 1795 at p. 1; Dkt. 1796 at p. 2. This argument is flawed as EBF executed a valid release of the Investor Lender Mortgage. (See BMO Exhibit 4.) In *SEC v. EquityBuild, Inc.*, the Seventh Circuit held that Group 1 Claimant BC57's release was facially invalid due to discrepancies regarding issuer's identity. *SEC*, 101 F.4th at 533. BC57's releases listed EB as the party issuing the release, even though EB was the borrower, not the lender or the lender's agent. *Id.* The signature line, in contrast, listed EBF as the party issuing the release. *Id.* Because of the discrepancy between who was listed as the party issuing the release and the party listed at the signature line, the court held that the releases were invalid. *Id.* That is not the case here.

Unlike the release in *SEC v. EquityBuild, Inc.*, BMO's release is not facially invalid. (See BMO Exhibit 4.) The Investor Lender Release lists "The Persons Listed on Exhibit A to the Mortgage C/O Equitybuild Finance, LLC" as the party issuing the release and was signed by Shawn Cohen listed as "Equitybuild Finance, LLC, as agent for the Persons Listed on Exhibit A to the Mortgage." (*Id.*) The signature line and listed releasing party on the Investor Lender Release clearly and consistently identifies the issuer's identity as EBF, Investor Lenders' agent. (*Id.*) As such, *SEC v. EquityBuild, Inc.* does not apply. Therefore, BMO holds a first-priority interest in Property 2 because the Investor Lender Mortgage was properly released.

B. Investor Lenders authorized EBF to release the Investor Lender Mortgage.

As set forth in BMO's Position Statement (Dkt. 1794), EBF had proper authority, as Investor Lenders' agent, to release the Investor Lender Mortgage. The CASA and Authorization Document established that EBF was the Investor Lender's Agent. The CASA expressly appointed EBF as the Investor Lenders' agent, authorizing EBF to issue payoff statements and receive payoffs. The Authorization Document expressly authorized EBF to release their mortgages. These documents establish that EBF had the proper authority to release the Investor Lender Mortgage. Even if EBF's action of releasing the Investor Lender Mortgage went beyond the authority granted by Investor Lenders, Investor Lenders are still bound by EBF's actions. *See Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1210 (7th Cir. 1993) (“[the agent] might be a collection agent and resort to methods that his principal would not have authorized and may even have forbidden; nevertheless the principal is bound.”).

Neither the Investor Lenders or SEC deny that the CASA and Authorization Document granted EBF the proper authority to release the Investor Lender Mortgage. Investor Lenders and the SEC both are unable to show that EBF did not have proper authority to release the Investor Lender Mortgage. They are unable to do so because the CASA and Authorization Document granted EBF the proper authority to execute a valid release of the Investor Lender Mortgage. Therefore, EBF had proper authority to release the Investor Lender Mortgage.

C. BMO agrees with the Receiver's recommendation that Investor Lender Dee Ann Nason has no secured claim in Property 2.

Investor Lender Dee Ann Nason (“Nason”) is not entitled to a distribution from the proceeds of Property 2 because she no longer has a secured interest. In her Position Statement, Nason claims that she has an interest in Property 2. Dkt. 1802 at p. 4. She also states that her interest in Property 2 was never the subject of a rollover transaction. *Id.* This claim is inaccurate because as

the Receiver noted, Nason agreed to rollover her loan to CCF1 in April of 2018. Dkt. 1772, Ex. 1. Accordingly, Nason no longer has a secured claim in Property 2. *Id.* Therefore, consistent with the Receiver's recommendation, Nason is not entitled to a distribution from the proceeds of Property 2.

II. Investor Lenders are not entitled to a priority equitable lien.

There is no basis to support Investor Lenders' alternative argument that if the Court determines that they do not have a superior interest that they nonetheless are entitled to an equitable lien. *See* Dkt. 1796 at p. 2. Investor Lenders attempt to inappropriately expand the established equitable lien principles of Illinois law.

Investor Lenders are not entitled to an equitable lien on Property 2. The imposition of an equitable lien is a remedy for a debt that cannot be legally enforced but which should be recognized under considerations of right and fairness. *Paliatka v. Bush*, 2018 IL App (1st) 172435, ¶ 28 (1st Dist. 2018). The essential elements of an equitable lien are (1) a debt, duty, or obligation defendant owed to plaintiff and (2) the existence of a *res* that, in some way, is particularly related to the debt or obligation. *Id.* While Illinois recognizes imposition of an equitable lien, "the tendency is to limit rather than extend the doctrine". *Canton v. Chorbajian*, 88 Ill. App. 3d 1015, 1023 (1st Dist. 1980). Most typically, an equitable lien arises where a landowner has a duty, debt, or obligation to a tenant or builder for physical improvements made to the land. *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 36 (2nd Dist. 2016).

Here, principles of equity and fairness do not support awarding Investor Lenders an equitable lien. The award of an equitable lien to Investor Lenders is not fair because it would defeat BMO's right to a priority lien, depriving them of the sale proceeds they conditioned their loan upon. The BMO Mortgage was executed in conjunction with a construction loan agreement. BMO

Exhibit 10. Under the terms of the construction loan agreement, the funds of the loan were to be used solely for the costs of constructing improvements of the property, costs incurred in connection with construction of improvements, and if permitted by the lender, interest due under the note. *Id.* It would be unfair to deprive BMO of the sale proceeds from Property 2 because their loan was used to directly improve the property, which in turn added value to the Receivership estate.

While it is true that Investor Lenders did not receive the payoff proceeds, “[w]here 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.” *M&T Bank v. Mallinckrodt*, 2015 IL App (2d) 141233, ¶ 52, citing *Connor v. Wahl*, 330 Ill. 136, 146, 161 N.E. 306 (1928). Equity requires that the Investor Lenders who put their agent EBF in power must bear the loss caused by their agent’s conduct. Therefore, the principles of equity and fairness do not support awarding Investor Lenders an equitable lien on Property 2.

Further, Investor Lenders admit that an equitable lien cannot take priority over a party who acquires an interest in the property without notice of the equitable interest. Dkt. 1796 at p. 3, citing *Stump v. Swanson Dev. Co., LLC*, 2014 IL App (3d) 110784 (3rd Dist. 2014). They nonetheless argue that they are entitled to a priority equitable lien because BMO should have known, through reasonable inquiry, that Investor Lenders’ loans remained outstanding and therefore had an equitable lien on Property 2. *Id.* This argument, however, is in stark contradiction to principles established in the very case they cite to in their Position Statement. Rather, in *Stump v. Swanson Dev. Co., LLC* the court holds that inquiry notice is not the appropriate standard when making an equitable lien determination. 2014 IL App (3d) 110784, ¶110 (3rd Dist. 2014) (“[T]he concept of inquiry notice is not applicable to equitable vendor’s liens...”). Rather, the key inquiry is whether the party had actual knowledge. *Id.*

BMO did not have actual or inquiry notice of any facts Investor Lenders claim give rise to an equitable lien. While BMO had notice of the Investor Lenders original rights in Property 2 from the Investor Lender Mortgage, the Investor Lender Mortgage release, executed by Investor Lenders' agent, extinguished that interest. BMO was not aware of any limitation of EBF's authority and even if they had inquired, they would have confirmed authority through the CASA and Authorization Document. Further, BMO had no duty to ensure that Investor Lenders received the payoff funds. *See Rockford Life Ins Co.*, 128 Ill. App. 2d at 195. BMO did not know, nor should have known, any facts Investor Lenders claim give rise to an equitable lien. Therefore, even if the Court determines that Investor Lenders have an equitable lien, it cannot take priority over BMO's interest.

CONCLUSION

For the reasons discussed herein and in BMO's Position Statement (Dkt. 1794), BMO's assigned mortgage interest in Property 2 is the first secured interest and therefore entitled to priority as a matter of law. BMO holds a first-priority interest in Property 2 because EBF, Investor Lenders' agent, executed a valid release, extinguishing their secured interest in Property 2. As the secured claimant with priority, BMO is entitled to receive the entirety of its secured claim up to the amount of the net proceeds from the sale of Property 2.

Respectfully Submitted,

**BMO BANK N.A. f/k/a BMO HARRIS
BANK, N.A.**

By: /s/ Bradley S. Anderson
One of its attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2024 I caused BMO Harris Bank N.A.'s Responsive Statement to be electronically filed with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification of such filing to all parties of record, and emailed to the Receiver at equitybuildclaims@rdaplawn.net.

BMO BANK N.A. f/k/a BMO HARRIS
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