

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

Magistrate Judge Young B. Kim

REPLY IN SUPPORT OF MORTGAGEES' MOTION FOR RECONSIDERATION

The Mortgagees (as defined in their Motion docket no. 814) respectfully file this reply in support of their Motion for Reconsideration (“Motion”) and state as follows:

INTRODUCTION

The Motion is not an attempt to relitigate or re-argue issues previously raised. Rather, the Motion is intended to correct an error of misapprehension. The Mortgagees believe the specific issue of fraudulent transfer claims and the requisite pleading standards for those claims was overlooked such that there was a failure to consider an aspect of the law that if left unaddressed would result in manifest injustice.

The Receiver ignores this distinction and ignores the Court’s actual ruling on the issues raised in the Motion—namely that the Disclosure will not comply with Rule 9. Consistent with nearly every response brief filed in this case, the Receiver reverts back to the same argument “let the process play out and we’ll deal with any issues at a later date.” This argument ignores established law and has failed the Receiver to date as seen with the insolvency of the estate, which

the Mortgagees predicted at the beginning of the case. The Mortgagees file this short reply to clarify the issues raised in the Motion.

ARGUMENTS

I. Fraudulent Transfer Claims in Summary Proceedings Must Comply with Illinois law.

Any claim by the Receiver for fraudulent transfer must still comply with the Illinois Uniform Fraudulent Transfer Act (“IUFTA”), even if alleged in summary proceedings. The Receiver takes the position that he does not need to comply with IUFTA because this Court will utilize summary proceedings. (Resp., pp. 3-5.) This is wrong. In *Fed. Trade Comm’n v. Life Mgmt. Servs. of Orange Cty., LLC*, a receiver was appointed at the request of the Federal Trade Commission. *Life Mgmt. Servs. of Orange Cty., LLC*, No. 6-cv-982-Orl-41TBS, 2019 WL 1093023, at *1 (M.D. Fla. Jan. 24, 2019). The receiver moved for summary judgment and for approval of summary procedures related to claims of disgorgement against two defendants. *Id.* The receiver alleged claims for fraudulent transfers. The district court determined the receiver must satisfy the requirements of Florida’s fraudulent transfer statute for his claims of fraudulent transfer against the defendants. *Id.* at *3.

The exact same principles apply to the current case. The Receiver’s fraudulent transfer claims must comply with IUFTA, even if alleged in summary proceedings. This makes logical sense because fraud claims are treated differently under the law. “Heightened pleading in the fraud context is required in part because of the potential stigmatic injury that comes with alleging fraud and the concomitant desire to ensure that such fraught allegations are not lightly leveled.” *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 442 (7th Cir. 2011). A party cannot skirt its heightened pleading standard for fraud claims by utilizing summary proceedings. The Receiver ignores this distinction and wants to treat fraudulent transfers claims

like any other claims. Illinois law rejects this position and requires a heightened pleading standard.

II. Fraudulent Transfer Claims in Summary Proceedings Must Also Comply with FRCP.

Likewise, it follows that the heightened pleading standard of Rule 9 applies to fraudulent transfer claims, even if alleged in summary proceedings. *See Life Mgmt. Servs. of Orange Cty., LLC*, No. 6-cv-982-Orl-41TBS, 2019 WL 1093023, at *3. It is illogical on the one hand to say the claims must comply with IUFTA and then on the other hand state those claims do not need to comply with Rule 9. *See B.E.L.T., Inc. v. Wachovia Corp.*, 403 F.3d 474, 477-78 (7th Cir. 2005) (stating claims of fraud “must be pleaded with particularity under Fed. R. Civ. P. 9(b).”) Rule 9 sets the standard for fraud claims alleged in federal court. The Receiver must bring any fraudulent transfer claim under the IUFTA. Therefore, the claims must satisfy both Rule 9 and the IUFTA.

The Receiver mistakenly states “Nothing advanced by the Court or Receiver suggests that the Receiver would not meet these statutory requirements if a claim is brought under IUFTA.” The Court ruled that the Disclosure does not have to comply with Rule 9 and that the Receiver is not required to file a complaint that complies with Rule 9. (Transcript of September 23, 2020 hearing, 32:11-15.) These rulings do more than suggest the Receiver will not meet the statutory requirements—they excuse the Receiver from complying in the first instance. Thus, the Mortgagees respectfully request the Court reconsider its ruling.

III. The IUFTA and the FRCP Must Be Satisfied Before The Claims Process Begins.

The Disclosure itself and the process for responding to the Disclosure must comply with both the IUFTA and the FRCP. The Receiver points to the proposed claims process and the Mortgagees’ opportunity to be heard and to conduct discovery as somehow absolving the need to comply with the IUFTA and the FRCP. (Resp., pp. 3-5.) This is wrong. You cannot cure due process, procedural, and statutory violations by providing an opportunity to conduct discovery.

As pointed on it the Motion, this places the cart before the proverbial horse. The Disclosure itself must comply with both the IUFTA and the FRCP. This sets the table for the remainder of the process, including dispositive motions, discovery, and hearings.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Motion, the Mortgagees respectfully request that this Court reconsider its Order and ruling on the Disclosure.

Dated: November 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jill L. Nicholson, hereby certify that on October 12, 2020, I caused to be electronically filed the ***Reply in Support of Mortgagees' Motion for Reconsideration*** which is being served electronically via the Court's ECF system on all counsel of record.

/s/ Jill L. Nicholson

Jill L. Nicholson