No. 23-1870

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff -Appellee,
and

KEVIN B. DUFF,
Appellee,

v.

EQUITYBUILD, INC.,
Defendant,

APPEAL OF: BC57, LLC.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern, Division
Case No. 1:18-cv-05587
The Honorable Manish S. Shah

PETITION FOR REHEARING *EN BANC* OF APPELLANT, BC57, LLC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1870

Short Caption: S.E.C., et al. v. Equitybuild, Inc., et al.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

BC57, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Loeb & Loeb LLP; Bernstein, Shur, Sawyer & Nelson, P.A.; Goldberg Kohn, Ltd.; Dykema Gossett, PLLC;

Maddin, Hauser, Roth & Heller, P.C.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

BC57, LLC is 100% owned by Bloomfield Capital Income Fund II, LLC

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Andrew R. DeVooght Date: 5/20/2024

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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RULE 35(b) STATEMENT

This petition presents a question of exceptional importance. In interpreting Illinois state law to provide that a mortgage lien can continue despite repayment of the underlying debt, the Panel's opinion threatens bedrock principles governing tens of thousands of mortgages issued every year in Illinois. Specifically, in concluding that the Illinois Legislature impliedly abrogated the common law governing the securitization of real estate, the Panel converted a ministerial requirement (with a mere $200 penalty for noncompliance) into a tool security-holders could use to maintain security rights in real estate long after the underlying debt has been fully repaid. The opportunities for errors and malfeasance are manifest, creating needless clouds on title and potentially disrupting the alienability of real property in the state.

The Panel correctly recognized that the Illinois Mortgage Act (the "Act"), 765 ILCS 905/1 *et seq.*, does not explicitly abrogate the common law rule that payment of an underlying debt automatically extinguishes a security obligation. (Panel Opinion ("Panel Op.") at 8.) Nor does any precedent from the Illinois Supreme Court so much as hint at such a conclusion. In upending more than a century of Illinois law, the Panel did not employ the analysis the Illinois Supreme Court requires when assessing whether the Act necessitated an "implied repeal of the common law," which "has never been favored." *Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, 980 N.E.2d 45, 51 (Ill. 2012). Instead, the Panel looked to two Illinois Appellate Court decisions to forecast what the Illinois Supreme Court would hold if faced with this issue of such enormous consequence to the real estate market. (*See*

Panel Op. at 9-10 (citing *Federal Nat'l Mortg. Ass'n v. Kuipers*, 732 N.E. 2d 723, 728 (Ill. App. Ct. 2000) and *North Shore Cmty. Bank & Tr. Co. v. Sheffield Wellington, LLC*, 2014 IL App (1st) 123784, 20 N.E. 3d 104, 117-19 (Ill. App. Ct. 2014)).) With respect, these decisions cannot carry this heavy load. Neither case applied the Illinois Supreme Court's strict analysis for finding the otherwise disfavored implied repeal of the common law. Moreover, both cases are readily distinguishable, and indeed, one of these two courts has since recognized the validity of the common law principle. *See City of Chicago v. Elm State Prop. LLC*, 2016 IL App (1st) 152552, ¶ 21.

Contrary to the Panel's conclusion, a proper application of the Illinois Supreme Court's abrogation analysis demonstrates that the Act simply provides the framework for a mortgagor to obtain a release of record within a reasonable period of time after the mortgage debt has been satisfied, which, once recorded, evidences that previous discharge of the debt. The release of record thus has the effect of removing the mortgage from the public record. As such, the statute's framework is "supplementary, not contradictory" to the common law rule, thus demonstrating the lack of legislative intent to overrule the common law rule. *See Rush*, 980 N.E. 2d at 52.

The Panel's novel application of Illinois mortgage law will create real world consequences for the Illinois real estate market, including would-be homeowners involved in the thousands of transactions that take place in Illinois every month. Accordingly, Appellant BC57, LLC ("BC57") respectfully requests that this Court

grant its petition for rehearing *en banc* and (1) certify to the Illinois Supreme Court, pursuant to Circuit Rule 52(a) and Illinois Supreme Court Rule 20, the question of whether the Act abrogated the Illinois common law rule that payment of a debt automatically extinguishes any lien securing the debt, or, alternatively, (2) review the question and reverse the district court's decision.

BACKGROUND

This matter concerns a mortgage lien priority dispute between two claimants— Appellant BC57 and a collection of more than 160 individual and entity investors (the "Investor-Lenders"). (R.1152, 1201.) Each claims priority to funds liquidated by a receiver's sale of five properties by virtue of their respective mortgage liens. (*Id.*)

In 2015 and 2016, the Investor-Lenders made loans to Equitybuild, Inc. ("Equitybuild"), which Equitybuild used to purchase five investment properties in Chicago. In exchange, Equitybuild granted five mortgages to the Investor-Lenders to secure their investment. (R. 1147-1-1147-5, the "Investor-Lenders' Mortgages.") For each loan, the Investor-Lenders entered into contracts with a related entity, Equitybuild Finance, LLC ("EBF"), appointing EBF as the collateral agent, trustee, and loan servicer. (See, e.g., Collateral Agency and Servicing Agreement ("CAS"), R.1147-7.) The Investor-Lenders authorized EBF, *inter alia*, to issue monthly statements, issue payoff demands, and demand, receive and collect loan payments. (*Id.* at § 9(a).) The Investor-Lenders also provided EBF with written authority "to receive the payoff in its name and issue and execute a release of said mortgage, upon payment in full of any outstanding balance." (See, e.g., Authorization

Document, R.1160 at 78.)

In 2017, BC57 made a secured loan to a special purpose limited liability company sponsored by Equitybuild, to allow Equitybuild to refinance the existing debt on the five properties. (R.109.) BC57 conditioned its loan on, among other things, (1) a first mortgage lien position on each of the properties and (2) receipt of releases of record, evidencing release of the Investor-Lenders' security interests in the five properties. (*Id.* at 115.)

Consistent with those conditions, at closing, BC57's settlement agent received payoff statements from EBF stating the amounts due on the Investor-Lender loan and releases of record for each property signed by EBF. (R.1160 at 225-228, R.1147-16-20.) Thereafter, BC57's agent wired $4,944,850 to EBF (the total amount required by the payoff statements), the loan closed (R.1160 at 238-257) and BC57's mortgage and releases of record were recorded against each of the five properties. (R. 1147-22, 1147-16-20.)

In 2018, the U.S. Securities and Exchange Commission filed a complaint alleging the owners of Equitybuild and EBF, had engaged in a scheme to defraud investors in connection with real estate investments in Chicago, including the five properties at issue in this appeal. (R.1.) Thereafter, the district court appointed a receiver "to secure the real estate and other assets obtained with investor proceeds, and to ultimately recompense the defrauded investors," (R.3) and established a claims resolution process organizing properties into groups. (R.941.)

After both BC57 and the Investor-Lenders claimed priority in the five

properties constituting "Group 1," the district court held in favor of the Investor-Lender Mortgages. (A01-A30.) To reach that conclusion, the court held that the releases of record provided to BC57 were facially defective and that EBF lacked authority to execute them. (*Id.*) The court further found that BC57's payments were insufficient to extinguish the Investor-Lender's mortgage liens as a matter of law, and irrespective of the releases, because the Act "replaced" the common law rule that a lien of a mortgage is extinguished upon payment of the debt secured by the mortgage. (*Id.* at 28-29.) The court explained that "[t]he Act says a payment (together with a request for a mortgage release) triggers an *obligation* to release the mortgage-it doesn't trigger the release itself." (A29 (original emphasis).)

The Panel affirmed the district court's ruling, holding that the Act impliedly "abrogated the common law rule," such that "there must be payment and delivery of the release to extinguish a mortgage lien." (Panel Op. at 10.) The Panel further held that "[t]he conclusion that the releases were facially invalid is not against the manifest weight of the evidence." (*Id.* at 12.)

ARGUMENT

I. The Panel Erred in Concluding the Illinois Mortgage Act Abrogated The Common Law Principal that Repayment of Debt Extinguishes A Security Interest.

The Panel acknowledged that "[u]nder Illinois common law, the payment of a debt underlying a mortgage automatically extinguishes the security interest belonging to the holder of that debt." (Panel Op. at 7) (citing *Bradley v. Lightcap*, 66 N.E. 546, 548 (Ill. 1903) ("[T]he title conveyed to the mortgagee is a mere incident of the mortgage debt, … and when the debt is paid, discharged, released, or barred by

limitation, the mortgagee's title is extinguished by operation of law."). Pursuant to this well-established rule, Appellant BC57's payment of the debt underlying the Investor-Lender Mortgages in accordance with payoff statements issued by EBF extinguished those prior mortgage liens, leaving BC57 with the only enforceable mortgage against the five properties. This is how the real estate market in Illinois has worked for more than a century. (Amicus Br. of Ill. Land Title Ass'n, ECF No. 20 ("ILTA Br."), at 4-5.) The Panel upended this fundamental principle of Illinois law by concluding the Act impliedly abrogated the common law rule, replacing it with a new rule that a mortgage lien remains effective absent delivery and recording of a signed release of record. (*See* Panel Op. at 10.) This conclusion was error.

A. In Finding Implied Abrogation of the Common Law, The Panel Failed To Properly Conduct the Illinois Supreme Court's Abrogation Analysis

The Panel's conclusion that the Act abrogated the longstanding common law rule that payment of a debt extinguishes the mortgage securing that debt is based on a flawed application of the Illinois Supreme Court's abrogation analysis.

The Illinois Supreme Court has established "well-settled principles that govern legislative abrogation of a common law rule." *See Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, 980 N.E.2d 45, 50 (Ill. 2012). The first step of the analysis asks "whether the statute contains a 'plainly and clearly stated' expression of abrogation." (Panel Op. at 7 (citing *Rush*, 980 N.E. 2d at 50).)

The Panel correctly observed that "[w]hile the Act obligates a mortgagee to issue a release of the mortgage upon full satisfaction of the debt underlying the lien,

it does not expressly abrogate the common law rule that payment automatically extinguishes the lien. It does not even mention the common law rule, let alone provide a 'plain and clear statement' rejecting automatic extinguishment of a security interest upon payment of a debt underlying a mortgage." (Panel Op. at 8.)

The Panel then moved to the second component of *Rush*, noting that "[t]he Act nevertheless abrogates the common law rule if there is an 'irreconcilable repugnancy' between the statute and the common law right such that both cannot be carried into effect," (*Id.* at 8 (citing *Rush*, 980 N.E.2d at 51 (quoting *People ex rel. Nelson v. West Englewood Tr. & Sav. Bank*, 353 Ill. 451, 460 (1933))). As the Illinois Supreme Court emphasized, this repugnancy standard is required because "[t]he implied repeal of the common law is not and has never been favored," *Rush*, 980 N.E. 2d at 51 (citing, in part, *People v. Spann*, 20 Ill. 2d 338, 341 (1960)). Accordingly, "a statute that does not expressly abrogate the common law will be deemed to have done so only if that is what is 'necessarily implied from what is expressed.'" *Id.* (quoting *Acme Fireworks Corp. v. Bibb*, 6 Ill.2d 112, 119, (1955)). Finally, and critically, "[w]here the common law rule in question provides greater protection than the statute at issue, but the rule is not inconsistent with the general purpose of the statute, 'it is better to say that the law was intended to supplement or add to the security furnished by the rule of the common law rather than to say that it is repugnant to that rule.'" *Id.* (quoting *West Englewood*, 353 Ill. at 461).

Despite acknowledging Illinois law's exacting standard regarding implied abrogation, the Panel did not conduct the required analysis to determine whether

the Act did, in fact, create "an irreconcilable repugnancy" with the common law. A close review of the Act and the common law demonstrates that they are "supplementary, not contradictory," and that there is no "irreconcilable repugnancy" between them. *See id.* at 51-52. Therefore, Illinois courts properly applying the *Rush* standard would not recognize implied abrogation of the common law.

1. The Common Law Established Criteria for Extinguishing The Lien, While The Act Provides A Mechanism For Recording Evidence Of That Extinguishment

As discussed above, Illinois common law created the standard by which courts could determine whether a mortgage lien had been extinguished: by operation of law, the repayment of the debt extinguished the lien. *See Bradley*, 66 N.E. at 548. By contrast, the Act addresses whether the public record accurately reflects the status of the mortgage lien.

The Act states: "Mortgages of real property and deeds of trust in the nature of a mortgage shall be released ***of record*** only in the manner provided herein." 765 ILCS 905/2 (emphasis added). Prior to enactment of the Act in 1961, a release would be "recorded" by writing it into the margin of the record. *See id.* (acknowledging pre-Act recording method entered "on the margin of record"). Post-Act, rather than writing a release into the margins, a release must be a separate "instrument in writing," which itself must be recorded. *Id.*

In requiring a mortgagee to execute a release of record upon payment, the Act "protects the free alienability of land," guarding against forever clouding title. *In re Gluth Bros. Constr. Inc.*, 451 B.R. 447, 451 (Bankr. N.D. Ill. 2011). The Act is thus designed not to change the security relationship between the parties; instead, it is

designed to ensure that the public record accurately reflects the reality that the security relationship between the parties has ended.

Without this filing in the public record, the chain of title would still include notice of a mortgage that had been, in fact, extinguished by repayment of the debt. The only mechanism for removing this cloud on title would be to obtain an order of removal by a court of equity. *See Allensworth v. First Galesburg Nat'l Bank & Trust Co.*, 7 Ill. App. 2d 1, 4 (2d Dist. 1955) ("Any instrument or proceedings in writing which appears of record and casts doubt upon the validity of the record title constitutes a cloud on the title. . . . equity has jurisdiction to quiet the title [and] remove said clouds. . ."). To avoid this issue and promote alienability of real estate, a recorded release clarifies the chain of title, evidencing what has already occurred—that the prior mortgage debt has been discharged and the lien securing that debt has been extinguished. *See Gluth Bros.,* 451 B.R. at 451; (*see also* ILTA Br. at 8-9.)

The common law thus addressed extinguishment of the secured debt, while the Act addressed the public record of that extinguishment. The two systems are therefore "supplementary, not contradictory" and Illinois courts would not find implied abrogation. *See Rush,* 980 N.E.2d at 52.

Under the common law, the debtor who satisfies the debt would have full peace knowing that the lien securing the debt had been extinguished by operation of law. Once the repayment funds were accepted by the lienholder, the debtor's property would be freed from its encumbrance without need for further cooperation

from the lienholder. This was an important protection for the debtor because once payment had been made, the lienholder would have little incentive to take any additional steps to assist the borrower. (*See* ILTA Br. at 6-7.)

Under the Panel's interpretation of the Act, repayment of the debt is no longer enough; the fully-satisfied lienholder now keeps a security in the property until a record of release is filed. (*See* Panel Op. at 10.) Yet the highly permissive terms of the Act belie such a sweeping transfer of power from the borrower under the common law to the lienholder under the Act. Specifically, the Act allows a mortgagee thirty days from when the debt is paid to record the release document, and it imposes a mere $200 penalty, as well as the cost of attorney's fees, for failure to record the release or meet that timeframe. 765 ILCS 905/4.

The Illinois legislature could not have intended, without so much as a comment in the Act or its legislative history, to repeal the longstanding common law rule that protects a lender who has paid the debt underlying a mortgage, and usher in a new rule, pursuant to which that same lender is completely vulnerable as a matter of law and at the whim of the mortgagee for such an extended period of time.

By any measure, the common law rule unquestionably provides the borrower "greater protection than the statute at issue." *See Rush*, 980 N.E. 2d at 51. In such a situation, the Illinois Supreme Court has made clear that "'it is better to say that the law was intended to supplement or add to the security furnished by the rule of the common law rather than to say that it is repugnant to that rule.'" *Id.*

Each of these points demonstrates there is no "irreconcilable repugnancy"

between the Illinois common law and the Act. *See id.* Unfortunately, the Panel did not engage in any such analysis of the interplay between the Act and the common law as the Illinois Supreme Court requires. As a result, it reached a conclusion regarding abrogation inconsistent with the result that would obtain by an Illinois court applying longstanding Illinois precedent.

B. The Panel Erred in Relying on Inapplicable and Distinguishable Decisions from Illinois Appellate Courts to Conclude the Common Law was Abrogated by the Act.

Instead of conducting the abrogation analysis required by longstanding Illinois Supreme Court precedent, the Panel instead read two Illinois Appellate Court decisions, *Federal Nat'l Mortg. Ass'n v. Kuipers*, 732 N.E. 2d 723, 728 (Ill. App. Ct. 2000) and *North Shore Comty. Bank & Tr. Co. v. Sheffield Wellington, LLC*, 20 N.E. 3d 104, 117-19 (Ill. App. Ct. 2014), "to mean that the Act abrogated the common law rule: there must be payment and delivery of the release to extinguish a mortgage lien." (Panel Op. at 10.) Respectfully, the Panel erred in relying on these decisions, and there are "persuasive indications that the Illinois Supreme Court would decide the issue differently." (*See id.* at 8-9 (citing *Nationwide Agribusiness Ins. Co. v. Dugan*, 810 F.3d 446, 450 (7th Cir. 2015).)

As an initial matter, neither *Kuipers* nor *North Shore* even mentions the common law rule of extinguishment upon payoff, much less its relationship with the Act, or that the Act implicitly replaced or repealed the common law. Moreover, neither court engaged in *any* aspect of the statutory analysis the Illinois Supreme Court requires to effectuate implicit repeal of the common law. Thus, interpreting *Kuipers* or *North Shore* as repealing the common law conflicts with Illinois law as

set forth by the Illinois Supreme Court. *See Rush*, 980 N.E. 2d at 51.

Kuipers does not support abrogation for an additional reason. Importantly, *Kuipers* examined the impact of an unrecorded assignment of a debt, not an unrecorded payoff release. 732 N.E.2d at 729. Specifically, the issue in *Kuipers* was whether assignment of a mortgage must be recorded in order for the assignee to obtain the priority position of the assignor. *Id.* at 725. The court rejected that assertion, holding that "assignment did not result in the creation of either a new lien that required recording or a new priority position. *Id.* at 728-29. "Rather, the original lien and priority position remained, and FNMA received the right to enforce the lien via the assignment." *Id.* at 728. *Kuipers* thus addressed the issue of what happens when an underlying debt is sold, not what happens when the underlying debt is satisfied. Tellingly, none of the parties in this case cited to *Kuipers* because it is inapposite to this appeal.

North Shore is also distinguishable. In *North Shore*, which primarily concerned the Illinois Mechanics Lien Act, the court rejected a party's argument, in the context of a preliminary standing analysis, that the Act, ***in and of itself***, provided support for "its contention that, once a mortgagee receives full payment for the mortgage, the mortgage is deemed released." 20 N.E. 3d at 117-18. While *North Shore* analyzes the Act, the question was whether payment of a debt underlying the mortgage triggered the release of record itself, where that release was not delivered, but was instead held in escrow, leaving the mortgage intact and of record by agreement. *Id.* The court concluded it did not, holding that "even if there was full

payment, the plain language of the Mortgage Act indicates that delivery is necessary before a mortgage is released." *Id.* at 118-19. This is accurate. Payment alone does not release a mortgage of record—a mortgagee must comply with the conditions set out in the Act to release a mortgage of record. Payment alone does, however, extinguish the lien secured by the mortgage, per the common law rule. *See Bradley,* 66 N.E. at 548. Thus, any attempt to rely on *North Shore*, which never even mentions the common law rule, ignores the functional interplay between the Act and the common law.

Importantly, later precedent by the same Illinois Appellate Court that issued *North Shore* further undermines the Panel's interpretation. In *City of Chicago v. Elm State Property LLC*, the same Illinois Appellate Court that issued the *North Shore* decision two years earlier explained that in Illinois, a mortgage "only creates a lien on the property" and "[i]t conveys a security interest that may be extinguished by the mortgagor paying in full any time prior to foreclosure." 2016 IL App (1st) 152552, ¶ 21 (citing Restatement (Third) of Prop. Mortgages § 3.1 (1997)).

If the Illinois Appellate Court believed the Act abrogated the common law rule, its statement in *Elm State Property* would make no sense. Instead, that case recognized the continued validity of the common law, and it made no mention of any purported abrogation by the Act. *See id.*

Accordingly, the Panel's reliance on *Kuipers* and *North Shore* to conclude "the Act abrogated the common law rule: there must be payment *and* delivery of the release to extinguish a mortgage lien," is misplaced. (*See* Panel Op. at 10 (original

emphasis).)

C. The Panel's Erroneous Conclusion that the Common Law was Abrogated by the Act will Disrupt the Illinois Real Estate Market.

The Panel's novel application of Illinois mortgage law will create real world consequences for the Illinois real estate market, including for every day, would-be homeowners involved in the tens of thousands of transactions that take place in Illinois every year. Indeed, *amicus curiae*, the Illinois Land Title Association ("ILTA"), which has a unique perspective given that it has served the Illinois land title community for more than a century, detailed for the Panel the magnitude and scope of disruption this change would cause in the real estate industry—both commercial and residential. (*See generally* ILTA Br.) For example, the Panel's decision will undermine the validity and finality of titles related to thousands of sales that have been made and that continue to occur every day in Illinois where no release of a prior mortgage has ever been recorded. Additionally, the Panel's decision will cause unnecessary delays in scheduling and substantial disruptions to finalizing closings for thousands of would-be homeowners in Illinois. (*Id.* at 8-9, 13-14.) These examples demonstrate that the "irreconcilable repugnancy" here is between the Panel's ruling and an otherwise efficient Illinois real estate market that has functioned pursuant to the common law rule for over a century. *See Rush*, 980 N.E. 2d at 51; (ILTA Br. at 2.)

CONCLUSION

Consistent with the foregoing, BC57 respectfully requests this Court grant the petition for rehearing *en banc* and (1) certify to the Illinois Supreme Court, the

question of whether the Act abrogated the Illinois common law rule that payment of a debt automatically extinguishes any lien securing the debt, or, alternatively, (2) review the question and reverse the district court's decision.

Dated: May 20, 2024

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that this brief contains 3,898 words, excluding Fed. R. App. P. 32(f)'s exclusions. I also certify, pursuant to Fed. R. App. P. 32(a)(5), that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Century.

Dated: May 20, 2024

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CERTIFICATE OF SERVICE

I certify that, on May 20, 2024, I filed the foregoing via the Court's ECF system, which will send notice to all users registered with that system.

Dated: May 20, 2024

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