

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

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	Civil Action No. 18-cv-5587
)	
v.)	Hon. Manish S Shah
)	
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,)	Mag. Judge Young B. Kim
)	
Defendants.)	
)	
)	

**CLAIMANT AMARK INVESTMENT TRUST’S
MOTION FOR STAY PENDING APPEAL**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Claimant AMark Investment Trust (“AMark”) respectfully files this Motion for Stay Pending Appeal requesting that the Court stay the distribution or disbursement of the proceeds from the sale of Property No. 116 (1102 Bingham Street, Houston, Texas 77007) pending appeal of the Court’s July 10, 2024 Order Approving Distribution of Proceeds From the Sale of Group 4 Properties [Doc No. 1695] (the "Distribution Order"), thereby bringing up for review the Court’s May 31, 2024 Order [Doc No. 1671] determining the priority of claimants to liquidated funds from the sale of the Group 4 properties. In support thereof, AMark states as follows:

I. BACKGROUND

1. After Defendants allegedly engaged in a securities fraud scheme, the Court appointed the Receiver to advise the Court on distributing assets. The properties at issue were organized into groups for purposes of claims resolution. AMark’s claim concerns a priority dispute

concerning the proceeds of Property No. 116 located at 1102 Bingham Street, Houston, Texas 77007 (the “Bingham Property”) from the Group 4 properties. Specifically, AMark claims that it holds a first priority perfected security interest in the Bingham Property pursuant to a Deed of Trust (the “Bingham Deed of Trust”). The Bingham Deed of Trust includes a cross-collateralization provision whereby any proceeds recovered from the sale of the Bingham Property shall be used to satisfy not only AMark’s investment under the Bingham Property, but also AMark’s investment in the 5201-5207 W. Washington Blvd., Chicago, Illinois 60644 properties (the “Chicago Property”). Notably, the Chicago Property was sold prior to establishment of the Receivership and has been deemed a non-receivership property, meaning AMark has not been able to recover its losses incurred as a result of the fraudulent sale.

2. The Receiver’s Submission on Group 4 Claims [Doc No. 1627] asserted that AMark should only recover the \$125,000.00 it invested as principal directly into the Bingham Property. AMark filed its Response to Receiver’s Submission on Group 4 Claims on April 10, 2024 [Doc. No. 1642] and its Amended Response to Receiver’s Submission on Group 4 Claims on April 18, 2024 [Doc. No. 1651], (collectively, “AMark’s Response”). AMark’s Response objected to the Receiver’s proposed treatment of AMark’s claim on the basis that AMark, as a first priority secured creditor perfected by the Bingham Deed of Trust on the over-secured Bingham Property, including a cross-collateralization clause, should be paid the amounts owed on the Bingham Property (\$125,000.00), the Chicago Property (\$131,000.00), and its pre-receivership attorney’s fees (\$128,427.27). *Id.* The full amount sought by AMark from the Bingham Property is \$384,427.27. *Id.* The amount available for distribution from the Bingham Property proceeds is \$569,373.44, making said AMark’s lien over-secured. *See* Doc. No. 1695-1, p. 17.

3. On May 31, 2024, the District Court accepted the Receiver's recommendation as to Group 4 and overruled AMark's objections to the Receiver's Submission on Group 4 Claims, which was notated on the District Court's docket entry after ordering the same in open court during a status conference hearing on May 31, 2024 [Doc. No. 1671]. Thereafter, on July 10, 2024, the District Court entered the Distribution Order [Doc No. 1695], ordering that "[t]he objections of claimant AMark Investment Trust (116-710) to the Receiver's recommended distribution are overruled and the Court finds that this claimant should be treated similarly to other EquityBuild investor-lenders." Doc No. 1695, p. 4.

4. AMark is appealing the District Court's Disbursement Order, which brings up for review the Court's priority determination as to the disbursement of proceeds from the Bingham Property. For the reasons set forth herein, AMark now moves for a stay of the District Court's Disbursement Order as to the Bingham Property proceeds only to maintain the status quo of the funds liquidated by the Receiver's sale of the Bingham Property until its appeal is resolved.

II. GROUNDS FOR RELIEF

5. Courts have inherent power to stay proceedings to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. *Id.* To determine whether to grant a stay, the Court considers “the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other.” *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). A “sliding scale” approach applies such that “the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its

favor, and vice versa.” *Id.* For the reasons set out below, each of these factors favors issuance of a stay pending the resolution of AMark 's appeal.

I. There is a significant probability of success on the merits of AMark's appeal.

6. There is a significant probability of success on the merits of AMark's appeal. The Court erred in concluding that AMark’s claim was limited to recovery of its principal investment in the Bingham Property. The issues AMark plans to raise on appeal are legal issues, subject to de novo review.¹

7. The Court's decision turned in large part on its finding that AMark’s security interest in the Bingham Property pursuant to the Bingham Deed of Trust was limited to its principal investment in the Bingham Property. Thus, the Court disregarded AMark’s rights as a secured creditor and disregarded its contractual rights. The Court even noted on the record that AMark “is a little differently situated” and that “AMark may have both state law, contractual rights, and if this were governed by the Bankruptcy Code, things might be different.” Doc No. 1691, 15:16–17 and 15:20–22. However, the Court ultimately concluded that AMark would be limited to recover its principal investment in the Bingham Property in order to “recover assets for the benefit of everyone and distribute assets for the benefit of everyone.” Doc No. 1691, 16:2–3.

8. AMark’s first priority secured lien interest through the Bingham Deed of Trust allows it to recover losses stemming from the Bingham Property and Chicago Property. The Court disagreed and determined that “5201 Washington is not a receivership property, and I conclude that leveraging that deed of trust against Bingham for the loan on Washington is interjecting a level of complexity in the big-picture receivership management that would be to the detriment of the estate and inconsistent with the horizontal equity that we're trying to achieve in treating secured

¹ AMark will raise at least the issues detailed in its Motion for Stay on appeal, but anticipates it will refine and further develop these issues and other arguments in its comprehensive briefing before the Seventh Circuit.

interests as limited to the principal investment in the property within the receivership.” Doc No. 1691, 16:4–11. Therefore, the Court disregarded AMark’s rights as a secured creditor and its contractual rights.

9. By virtue of the Receiver’s decision not to employ a pro-rata distribution plan in this case, the Receiver acknowledges that there are significant differences in priority among the Ponzi scheme victims based on a creditor’s status as being secured or unsecured. It is inconsistent with applicable law to recognize differences in security and priority among lenders, but then deny AMark the privilege provided by that very security by arbitrarily reducing its claim in favor of junior creditors.

10. Although a district court has broad powers and wide discretion in determining the appropriate relief in an equity receivership, such power does not allow the court “to disregard the law in its entirety.” *Bank Midwest v. R.F. Fisher Elec. Co., LLC*, 514 F. Supp. 3d 1310, 1319–20 (D. Kan. 2021); *SEC v. Mgmt. Sols., Inc.*, No. 11-CV-01165-BSJ, 2013 WL 594738, at *2–3 (D. Utah Feb. 15, 2013); *see also Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401, 407 (7th Cir. 2011) (“creditors are usually paid ahead of shareholders in insolvency proceedings, whether the proceedings take the form of bankruptcy or of receiverships”) (internal citations omitted)). It is well established that a federal court appointed receiver takes property subject to all liens, priorities or privileges existing or accruing under the laws of the State. *Bank Midwest*, 514 F. Supp. 3d at 1319–20 (D. Kan. 2021). Another well-established principle of receiverships is that “a receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment.” *Id.* (quoting *Cates v. Musgrove Petroleum Corp., Inc.*, 190 Kan. 609, 376 P.2d 819, 821 (1962)). “To the extent that one debt is secured and another is not there is

manifestly an inequality of rights between the secured and unsecured creditors, **which cannot be affected by the principal of equality of distribution.**” *Id.* (citing *Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 412, 58 S.Ct. 612, 82 L.Ed. 926 (1938)) (emphasis added). Thus, although the court “has broad powers to craft an equitable remedy in the distribution of receivership assets ... it cannot ignore state and federal laws.” *Id.* (citing *SEC v. Mgmt. Sols., Inc.*, No. 11-CV-01165-BSJ, 2013 WL 594738, at *3). In particular, the court “must respect contract rights, the status of secured creditors, and secured creditors’ rights to their interests in collateral.” *Id.*

11. Here, the Court ordered that AMark should be limited to recover the principal balance from the Bingham Property investment in the amount of \$125,000.00 and that AMark should not recover the remaining balance from the Chicago Property investment from the Bingham Property Proceeds. The Bingham Deed of Trust includes an enforceable cross-collateralization clause such that the Bingham Property shall be used to secure not only the Bingham Property investment, but also:

shall secure, in addition to the [Bingham Promissory] Note, all funds hereafter advanced by Beneficiary to or for the benefit of Grantor, as contemplated by any covenant or provision herein contained or for any other purpose, and all other indebtedness, of whatever kind or character, owing or which may hereafter become owing by Grantor to Beneficiary, whether such indebtedness is evidenced by note, open account, overdraft, endorsement, surety agreement, guaranty or otherwise, it being contemplated that Grantor may hereafter become indebted to Beneficiary in further sum or sums.

See Doc. No. 1651, Ex. C.

12. Texas law applies to the Bingham Deed of Trust pursuant to the choice of law provision in section thirty-one of the Bingham Deed of Trust. *See* Doc. No. 1651, Ex. C. Under Texas law, cross-collateralization clauses are fully enforceable. *See Robinson v. Nat'l Bank of Commerce of Dallas*, 515 S.W.2d 166, 168 (Tex. App.—Fort Worth 1974, no writ) (holding that

express provisions in a deed of trust securing future advances have been consistently upheld by Texas Courts); TEX. BUS. & COM. CODE § 9.204(c). Therefore, AMark retains a first priority secured lien interest through the Bingham Deed of Trust that allows it to recover losses stemming from the Bingham Property and Chicago Property. However, the Court determined that AMark's secured interest in the Bingham Property, and its proceeds, under the Bingham Deed of Trust did not extend to the Chicago investment, which directly impairs AMark's contractual rights and effectively punishes a secured creditor. In determining that AMark could not recover its Chicago Property investment from the Bingham Property, the Court in turn nullified a secured mortgagee's contractual rights which violates the fundamental principal that a "court in equity may not do that which the law forbids." *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 842 (5th Cir. 2019).

13. The claim that leveraging AMark's cross-collateralization clause is "interjecting a level of complexity in the big-picture receivership management that would be to the detriment of the estate" [Doc No. 1691, 16:5-8] is unfitting because the same situation has not presented itself across any of the claims administered to date, despite the Receivership nearing an end to its secured claims process, and despite the fact that EquityBuild's Illinois mortgage security instrument, used in every receivership property other than the Bingham Property, did not contain a cross-collateralization provision. Based on information and belief, this situation only arises with the over-secured Bingham Property, and the estate does not have the right to claim AMark's secured collateral for the benefit of its unsecured lenders.

14. Further, under the "netting rule," which the Court employed for Group 4 distributions, amounts transferred by the Ponzi scheme perpetrator to the investor are netted against the initial amounts invested by that individual. *See Donell v. Kowell*, 533 F.3d 762, 771

(9th Cir. 2008). In receivership proceedings, the net investment amount is often used to determine the allowed amount of investors' claims because it reflects the true economic loss suffered by the investors. AMark has suffered a true economic loss from its investments in the Bingham Property and Chicago Property, including additional loss as a result of the sale of the Chicago Property. As such, recovery of the “net investment” for the Bingham Property and the Chicago Property under the Bingham Deed of Trust does not result in AMark realizing a profit at the expense of other investors and lenders.

15. Additionally, the Court declined to award AMark its pre-receivership attorney’s fees. First, pursuant to 11 U.S.C. § 506(b), “[t]o the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.” There is no dispute that the Bingham Property is over-secured. *See* Doc. No. 1695-1, p. 17. Therefore, AMark is entitled to recovery of its pre-receivership attorney’s fees under 11 U.S.C. § 506(b), under the terms of both the Houston Promissory Note and the Chicago Promissory Note, and under Texas law. *See* Doc. No. 1651, Ex. B and Ex. D; *See* TEX. CIV. PRAC. & REM. CODE § 38.001 *et. seq.*; TEX. BUS. & COM. CODE § 24.001 *et. seq.*

16. Second, AMark is not similarly situated to other claimants, which has been acknowledged by the Receiver and the Court. The Receiver argued that the Court should apply equitable considerations and cited to *SEC v. Capital Cove Bancorp LLC*, No. SACV 15-980-JLS (JCx), 2015 WL 9701154 (C.D. Cal. October 13, 2015), on numerous occasions to support its argument to disallow AMark’s claim for pre-receivership fees. However, the Court in *Capital Cove* stayed only the accrual of **post-receivership** interest for **unsecured** and **under-secured** creditor

claims and on only default rate interest as to any and all fully secured or over-secured creditor claims. *Id.* This does not apply to AMark's request to recover **pre-receivership** attorney's fees. First, AMark is not seeking recovery of any post-receivership fees or interest, but rather those incurred prior to the receivership inception date. Second, AMark's first priority, secured interest is not similarly situated, or of equal priority, to unsecured lenders under the Receivership. Third, the Bingham Property is over-secured and will still have a surplus even after paying AMark's true economic loss of principal and pre-receivership fees totaling \$384,427.27. Lastly, AMark does not seek to penalize the Estate, but rather seeks only to recover actual losses incurred through its EquityBuild investments without interest or any other return. Therefore, given that the Bingham Property was over-secured, AMark should be entitled to recover of its pre-receivership attorney's fees as required by law.

17. For all of the above reasons, AMark believes that there is a significant probability of success on the merits of AMark's appeal.

II. AMark will face irreparable harm absent a stay.

18. Even if the Court were to disagree as to AMark's likelihood of success on appeal, the risk of harm to AMark weighs heavily in its favor and therefore necessitates a stay. Without a stay, the Receiver will transfer the remaining \$394,373.44 from the Bingham proceeds to the Receiver's account for use in the administration of the Receivership Estate. *See* Doc. No. 1695, p. 6; Doc No. 1695-1, p. 17. If AMark is successful on appeal, and the Court of Appeals determines that AMark is entitled to recovery of its full claim, obtaining the distributed funds may be difficult if the Receiver disburses them to other claimants during AMark's appeal for use in the administration of the Receivership Estate. During AMark's appeal, the Bingham Property proceeds could be transferred to other claimants which could be spent or transferred beyond the geographical

and/or jurisdictional reaches of the Court during that period of time, effectively putting the funds beyond the reach of both the parties and the Court.

19. In addition to the difficulties the parties would face should unwinding the distribution become necessary following resolution of AMark's appeal absent a stay, AMark also risks further challenge under the doctrine of equitable mootness. *See S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 332 (7th Cir. 2010) ("The [equitable mootness] doctrine applies in the context of securities-fraud receiverships") (citations omitted)). The inevitable result is that denial of a stay would potentially moot AMark's appeal and deny AMark recovery of its full claim. Accordingly, the threat of equitable mootness is another harm AMark faces in the absence of a stay.

20. As demonstrated above, the risk of irreparable harm to AMark is immediate and material.

III. A stay will not injure any of the parties or claimants in this matter.

21. A stay will not injure any of the parties or claimants in this matter. The disputed funds, which are limited to the proceeds from the sale of the Bingham Property, are already in the Receiver's possession, so there is no risk of injury to any party or claimant's interest in those funds. As long as the funds stay in the Receiver's possession, "[i]n the event of an affirmance by our circuit court, there is no danger, even with a stay, that" the parties or claimants "will not be paid the full amounts of which they have been deprived." *Wells Fargo Bank, N.A. v. ESM Fund I, LP*, No. 10 CIV. 7332 AJN MHD, 2012 WL 3023997, at *5 (S.D.N.Y. Apr. 3, 2012), report and recommendation adopted, No. 10 CIV. 7332 AJN, 2012 WL 3023985 (S.D.N.Y. July 24, 2012); *see also Life Ins. Co. of N. Am. v. Camm*, No. 402-CV-0106-DFH-WGH, 2007 WL 2492384, at *1 (S.D. Ind. Aug. 29, 2007) ("[s]tays pending appeal ... do not appear to be unusual" in cases where "the court has the disputed funds already in its possession so that all parties are protected

from the risk that another party will dissipate them or put them beyond the reach of the court and other parties").

22. Additionally, the funds are in interest-bearing accounts and will continue to accrue interest as long as the funds remain in those accounts. *See* Doc. No. 1695. As such, there is no risk of the funds diminishing in value during the pendency of AMark's appeal. Further, AMark is requesting that the stay be limited to distribution of the Bingham Property proceeds only, rather than the distribution of all Group 4 properties. Accordingly, there is no risk of injury to other parties or claimants.

IV. A stay is in the public interest.

23. The public interest is served in accurately distributing the proceeds of the sale of Group 4 properties. To the extent that an erroneous distribution of the Bingham Property proceeds that is not corrected might tend to undermine confidence in courts, the public interest points in the direction of making sure that the courts decide the case correctly. *Life Ins. Co. of N. Am. v. Camm*, No. 402-CV-0106-DFH-WGH, 2007 WL 2492384, at *2 (S.D. Ind. Aug. 29, 2007). There is also no indication that the public interest will be negatively affected if the stay is granted. Therefore, a stay is in the public interest.

V. A supersedeas bond is not required.

24. To the extent a supersedeas bond may sometimes be required for money judgments, no such bond is necessary here. The Court has the discretion to waive bond requirements and considers five factors to determine whether waiver is appropriate:

- (1) the complexity of the collection process;
- (2) the amount of time required to obtain a judgment after it is affirmed on appeal;
- (3) the degree of confidence that the district court has in the availability of funds to pay the judgment;
- (4) whether the defendant's ability to pay

the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Dillon v. City of Chi., 866 F.2d 902, 904-05 (7th Cir. 1988)).

25. In this case, the third factor is directly on point and determinative. Here, a supersedeas bond is unnecessary because the disputed funds are securely in receivership until distribution so that all parties are protected from risk. *See Palm Properties, LLC v. Metro. Nat. Bank*, No. 4:09CV00038 JLH, 2010 WL 2976157, at *2 (E.D. Ark. July 22, 2010) (“In an interpleader case, such as here, the court has the disputed funds already in its possession so that all parties are protected from risk. Thus, an interpleader case presents the “unusual circumstance” in which a supersedeas bond is unnecessary.”) (citations omitted)). Accordingly, AMark respectfully requests that this Court grant its motion for stay without requiring a bond.

III. CONCLUSION

For all of the above reasons, AMark respectfully requests that this Court issue a stay, without security, of any distribution or disbursement of the proceeds from the sale of the Bingham Property (Property No. 116) pending appeal.

Dated: July 31, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2024, I electronically filed the foregoing Notice of Appeal with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record.

/s/ D. Alexander Darcy
D. Alexander Darcy