

No. 24-2254

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: SHATAR CAPITAL PARTNERS.

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 PANEL REHEARING AND REHEARING EN BANC OF
APPELLANT, SHATAR CAPITAL PARTNERS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-2254Short Caption: SEC, et al v. Kevin Duff, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

- (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):
Shatar Capital Partners on behalf of 111 Crest Dr. LLC, Abraham Aaron Ebriani, Hamid Esmail and Farsaa Inc., and
and any subsequent assignees including Pakravan Living Trust
- (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; Dykema Gossett, PLLC; Fox Rothschild LLC; Cherny Law Offices, P.C.
- (3) If the party, amicus or intervenor is a corporation:
- i) Identify all its parent corporations, if any; and
None.
- 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:
N/A
- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

Attorney's Signature: /s/ Andrew R. DeVooght Date: 7/31/2024Attorney's Printed Name: Andrew R. DeVooghtPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes

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No

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A
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N/A

Attorney's Signature: /s/ Alexandra J. Schaller Date: 7/31/2024Attorney's Printed Name: Alexandra J. SchallerPlease indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes

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RULE 40(b) STATEMENT

This petition presents a question of exceptional importance. In concluding the Individual Investors possessed unrecorded, equitable mortgages that have priority over Shatar's earlier-recorded mortgage for property located at 5450 S. Indiana, the Panel erroneously expanded the scope of what qualifies as an "equitable mortgage" under well-established Illinois case law. In doing so, the Panel neither acknowledged the limited circumstances under which Illinois law authorizes equitable mortgages, nor did it reconcile the fact that those circumstances are not met here. Indeed, those circumstances cannot be met on the record here, where the Individual Investors' funds were not used to buy the property, while Shatar's were. As a result, the Panel's decision expanding Illinois' doctrine of equitable mortgages was error.

The Panel's expansive ruling also threatens to upend foundational principles of property ownership in Illinois by subverting the purpose of the statutory framework for recording title-related instruments in Illinois. The Panel's ruling creates a new basis for dilatory mortgagees to assert priority ahead of subsequent mortgagees who timely record. Far from promoting the timely recording of mortgages, the Panel's conclusion undermines the purpose of Illinois' recording regime.

Accordingly, Appellant Shatar Capital Partners ("Shatar") respectfully requests that this Court grant its petition for panel rehearing or rehearing *en banc* and reverse the district court's decision.

BACKGROUND

This matter concerns a mortgage lien priority dispute between competing claimants—Appellant Shatar and a collection of certain individual and entity investors (the “Individual Investors”). Each claims priority to funds liquidated by the Receiver’s sale of two properties in Chicago—5450 S. Indiana and 7749 S. Yates—based on mortgages issued to Shatar and the Individual Investors.

The Individual Investors invested with Equitybuild in early 2017. At the time of their investment, the Individual Investors received promissory notes, Collateral Agency and Servicing Agreements appointing Equitybuild Finance (EBF) as the collateral agent, trustee, and loan servicer, and unexecuted mortgages—unsigned by any affiliate of Equitybuild. (R.1602 at 66-114.) Equitybuild signed the Individual Investors’ mortgage for 7749 S. Yates on March 14, 2017, and signed the Individual Investors’ mortgage for 5450 S. Indiana on March 31, 2017. The Individual Investors did not record their mortgages in either property until June 23, 2017. (R.1562-4; R.1562-5.) The Individual Investors’ funds were not used to purchase 5450 S. Indiana. (*See* R.1587-8.)

Shatar also invested with Equitybuild in early 2017. On March 30, 2017, Equitybuild executed Shatar’s mortgages on both 7749 S. Yates and 5450 S. Indiana, and both were recorded on April 4, 2017. As to 5450 S. Indiana, a purchase money mortgage, Shatar’s funds were used to purchase the property and, in fact, Shatar sent its funding through escrow directly to the third-party seller, unaffiliated with Equitybuild, to close the loan. (*See* R.1587-8.)

In the months before executing and recording its mortgages, Shatar was in communication with Equitybuild representatives about the loan. When Shatar was first introduced to Equitybuild in November 2016, Equitybuild shared information about Equitybuild’s investment business generally, including that “[a]s with all other EBF notes, this private mortgage note”—for a property not at issue in this receivership—“is fully secured . . . with a first lien position, on the property.” (R.1537 at 177.) This introductory communication between Shatar and Equitybuild did not concern either 7749 S. Yates or 5450 S. Indiana.

The next month, in December 2016, Shatar asked for additional detail about Equitybuild and the potential investment properties, asking about the “properties we [are] looking at, and the amount of the loans,” and confirmation that Equitybuild’s “refinancing of already closed deals are allowed and kosher” given Equitybuild’s “business structure” and “assuming your previous deals have been closed with crowdfunding investors.” (*Id.* at 179.) One of Equitybuild’s principals, Shaun Cohen, responded confirming that for “all refinances we send out rollover documents to our lenders asking them if they would like their funds back or if they would like to rollover their funds into a new deal,” and offered sample documents to that effect. (*Id.* at 181.) Cohen’s associate at Equitybuild, Tyler DeRoo, circulated those documents which included a template note, mortgage, and servicing agreements—all unexecuted. (*Id.* at 180.) Again, Equitybuild mentioned neither 7749 S. Yates nor 5450 S. Indiana in these communications with Shatar.

The next communication of record between Equitybuild and Shatar occurred in March 2017, when DeRoo emailed Shatar detailing anticipated closing dates and purchase prices for 7749 S. Yates and 5450 S. Indiana. (R.1537 at 248.) On March 14, 2017, during discussions concerning paperwork for the Yates and Indiana loans, Equitybuild's outside counsel, Rock Fusco & Connelly, LLC, indicated the 7749 S. Yates property purchase transaction had already closed. (*Id.* at 250-55.)

By the end of March 2017, Shatar and Equitybuild were finalizing the closing documents for the loan on two properties. (R.1602-1 at 168-69.) On March 30, 2017, Equitybuild executed mortgages on both 7749 S. Yates and 5450 S. Indiana in favor of Shatar's beneficiaries for \$3.6 million. (R.1562-2; R.1562-3.) The loan closing documents confirm that Equitybuild was granting first lien positions on both properties to Shatar. (R.1587-7 at 3; R.1562-2 at ¶ 19.8; R.1562-3 at ¶ 19.8.)

A little over one year later, in 2018, the U.S. Securities and Exchange Commission filed a complaint alleging the owners of Equitybuild had engaged in a scheme to defraud investors in connection with real estate investments in Chicago. (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, including the two "Group 2" properties at issue in this appeal. (R.941.)

After reviewing the claimants' respective position papers and the Receiver's submission, the district court held the Individual Investors' mortgages had priority

over Shatar's mortgages, notwithstanding that Shatar recorded its mortgages almost three months before the Individual Investors' mortgages were recorded. (A32; A36.) To reach that conclusion, the court held Shatar was on inquiry notice of the Individual Investors' mortgages with respect to both properties. (A32; A34-36.) As to 5450 S. Indiana, the court further held that the Individual Investors had equitable mortgages in that property such that Shatar's mortgage "takes a second-place position," despite the fact that "there was no signed mortgage in favor of the Individual Investors at the time that Shatar made its loan to Equitybuild." (A33; A36.)

The Panel affirmed the district court's ruling. As to 5450 S. Indiana, the Panel affirmed the district court's conclusion that the Individual Investors had equitable mortgages in 5450 S. Indiana, created by the writings Equitybuild provided to the Individual Investors before the Individual Investors invested with Equitybuild and prior to Equitybuild purchasing the property. Specifically, the Panel agreed that "signed collateral agency and serving agreement[s], unsigned mortgage[s], and promissory note[s]" provided by Equitybuild "evinced an equitable mortgage on the Indiana property in the individual investors' favor." (Panel Op. at 21.) "Taken together," the Panel concluded, "these documents show that the individual investors' loaned funds were intended to be secured by the Indiana property." (*Id.* at 22.) The Panel further held that the "district court did not err in finding that Shatar was on inquiry notice of the individual investors' interests in the Yates and Indiana properties." (*Id.* at 23.)

ARGUMENT

I. The Panel's Conclusion that the Individual Investors Had Equitable Mortgages in 5450 S. Indiana was Error.

The Panel erred in concluding that the Individual Investors had equitable mortgages in 5450 S. Indiana, such that their unrecorded interests are entitled to priority over Shatar's first-recorded mortgage. The Individual Investors' purported equitable mortgages meet none of the conditions Illinois courts require before finding an equitable mortgage encumbers a property. Instead, the Panel found equitable mortgages under circumstances no Illinois court has previously recognized, thereby expanding the doctrine in a manner that is inconsistent with established Illinois law. Further, this expansion not only contradicts Illinois law, it also risks disruption to the Illinois real estate market by effectively adding a new category of enforceable equitable mortgages.

A. The Panel's Decision Expands the Doctrine of Equitable Mortgages Beyond Existing Illinois Precedent.

The Panel's decision finding the Individual Investors had equitable mortgages in 5450 S. Indiana that predated Shatar's purchase money mortgage (both in terms of existence and recordation) erroneously creates a new category of equitable mortgages not recognized under Illinois law.

In Illinois, an equitable mortgage "arises in a situation where money is loaned or credit given in reliance upon the security of property of the debtor, but pledged by him in such manner as not to be enforceable as a mortgage at law."

Wilkinson v. Johnson, 29 Ill. 2d 392, 398 (1963). Illinois case law confirms equitable mortgages have only been found to exist in two scenarios. The first, and most

typical, scenario is one in which the borrower already has an interest in the property to give the equitable mortgage. *See, e.g., First Illinois National Bank v. Hans*, 143 Ill. App. 3d 1033 (2d Dist. 1986) (finding plaintiff possessed equitable mortgages in two parcels of land where defendants obtained two loans from plaintiff, assigning their existing equitable title to the two parcels to plaintiff as security for the two loans).

The second, and more unusual, scenario is one where, although the borrower does not yet have an interest in the property, the lender's funds are in fact used to purchase the specific property being pledged as security for the loan. *See, e.g., Boucek v. Pondelicek*, 259 Ill. App. 59 (1st Dist. 1930) (finding an equitable mortgage after plaintiff loaned defendant's husband \$2,000 to purchase real estate, defendant's husband promised to execute a note for \$2,000 and a mortgage on the property to secure the same, and defendant's husband used the \$2,000 to purchase the land, of which defendant and her husband took title as joint tenants); *Silas v. Robinson*, 131 Ill. App. 3d 1058, 1063 (1st Dist. 1985) (affirming finding of equitable mortgage where the money plaintiff loaned defendant was used to "purchase the property" at issue); *Grigaitis v. Gaidauskis*, 214 Ill. App. 111 (1st Dist. 1919) (finding an equitable mortgage where plaintiff loaned defendants \$1,500 to purchase real estate, defendants promised to either repay the loan or execute and deliver a mortgage on the property to secure the loan, and defendants used the \$1,500 to purchase the property). Importantly, Appellees never cited or referred to a

single case finding an equitable mortgage outside of these two circumstances at any point in their briefing or at argument.

The Individual Investors' "equitable mortgages" on 5450 S. Indiana do not fall into either of the two categories endorsed by Illinois courts. It is undisputed that Equitybuild did not have any interest in 5450 S. Indiana when it provided investment documents to the Individual Investors. Equitybuild similarly did not have any interest in 5450 S. Indiana when the Individual Investors provided their respective investments to Equitybuild. Rather, Equitybuild used Shatar's funds to purchase 5450 S. Indiana. The Panel opinion does not reference this fact, although it is undisputed in the record that Shatar delivered its funds through escrow directly to the third party seller (unrelated to Equitybuild or any other party interest) to close its loan for the purchase of 5450 S. Indiana (*See* R.1587-8.) As a result, without Shatar's funding to purchase 5450 S. Indiana, there would not have been a property to which the competing Individual Investors' mortgages could attach, nor would there be proceeds from the sale of that property to distribute to the Individual Investors.

Critically, the Panel did not acknowledge the limited circumstances in which Illinois courts recognize equitable mortgages. Moreover, the Panel did not address the fact that none of these limited circumstances were present in this case.¹ In so doing, the Panel created a new category of equitable mortgages under Illinois law,

¹ Nor did the Panel address the dearth of Illinois authority for awarding priority to an equitable mortgage priority over an actual, recorded purchase money mortgage facilitated through escrow.

permitting equitable mortgages where the borrower has no interest in the property to give and the lender's funds are not actually used to purchase the property that is being pledged as security for the loan. This departure from established Illinois law is unwarranted and unsupported by the record.

B. The Panel's Decision Undermines Illinois' Statutory Recording Requirements.

Not only is the Panel's expansion without support in Illinois precedent, it further undermines the existing statutory framework for recording in Illinois.

By statute, Illinois requires deeds, mortgages and other instruments relating to or affecting title to real estate to be filed in the county in which such real estate is situated. 765 ILCS 5/28. The purpose of the recording requirement is to maintain sufficient records to allow third parties the opportunity to ascertain the status of title to the property. *Lubershane v. Glencoe*, 63 Ill. App. 3d 874, 879 (1st Dist. 1978). Unless a creditor or subsequent purchaser has notice through other means, any unrecorded deeds, mortgages or other written instruments which are not recorded are void as to such creditor or subsequent purchaser until they are filed of record. 765 ILCS 5/30.

The Panel's expansion of the doctrine of equitable mortgages to include, for the first time and without support from Illinois authority, equitable mortgages where the borrower does not have an interest in the property and the lender's funds were not used to buy the property, subverts the purpose of Illinois' statutory recording framework. Instead of promoting timely recording of instruments affecting title, the Panel's decision disincentivizes recording by creating a

mechanism to win priority even where a mortgagee fails to timely record its mortgage, or fails to record at all. By way of example, consistent with the Panel's opinion, a purported mortgagee who never recorded his mortgage could rely on unexecuted loan paperwork predating a duly-recorded purchase money mortgage to credibly assert a priority claim against the pledged property. Accordingly, as the Illinois Land Title Association previously observed in its Amicus Curiae filing in *Equitybuild I*² in the context of unrecorded releases, allowing equitable mortgages in this context will "call into question the validity and finality of titles" in Illinois.

CONCLUSION

Consistent with the foregoing, Shatar Capital Partners respectfully requests this Court grant the petition for rehearing or rehearing *en banc* and reverse the district court's decision.

Dated: December 18, 2025

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² In *Equitybuild I*, the Illinois Land Title Association submitted its Amicus Curiae brief out of concern that "[t]he district court's holding in the Order"—that the Illinois Mortgage Act abrogated the common law relating to the extinguishment of a mortgage lien—"will have implications beyond the scope of the instant case and will impact the everyday transactions of real estate purchasers, mortgage lenders, and title insurers." (23-1870, Doc. 20.) Following *Equitybuild I*, the Illinois legislature amended the Illinois Mortgage Act to confirm "the Act does not abrogate the Illinois common law that the payment in full of a debt secured by a mortgage extinguishes the lien." (765 ILCS 905/17(1)).

*Attorneys for Appellant Shatar
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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(B), that this brief contains 2,488 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 in 12-point Century.

Dated: December 18, 2025

/s/ Andrew R. DeVooght

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CERTIFICATE OF SERVICE

I certify that, on December 18, 2025, I filed the foregoing via the Court's ECF system, which will send notice to all users registered with that system.

Dated: December 18, 2025

/s/ Andrew R. DeVooght

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