

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:23-24903-CIV-JB

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, et al.,

Defendants.

**NON-PARTY 3610 STEWART ACQUISITION, LLC’S (1) RESPONSE IN OPPOSITION
TO THAT PORTION OF MARTIN I. HALPERN’S MOTION TO INTERVENE
RELATED TO THE STEWART GROVE PROPERTY; AND,
(2) REQUEST TO TAKE JUDICIAL NOTICE**

Non-Party, 3610 Stewart Acquisition, LLC (“Acquisition”), hereby (1) files its response in opposition to that portion of Non-Party Martin I. Halpern’s (“Halpern”) Motion to Intervene (the “Motion” or “Motion to Intervene”) [DE 130] related to the Stewart Grove Property, and (2) requests this Court to take judicial notice of certain filings in the subject state foreclosure litigation.

I. PRELIMINARY STATEMENT.

Acquisition files this opposition to Halpern’s Motion to Intervene solely as it relates to the Stewart Grove Property. In the Motion, Halpern claims to possess an “interest” in the Property for which he seeks stay relief to initiate foreclosure proceedings in state court. Succinctly stated, Halpern’s interest is illusory, as his mortgage is a second position mortgage, *junior* to Acquisition’s *first* position mortgage of \$11,279,062.65. A junior mortgagee can *never* foreclose out a senior mortgage and, thus, on its face, the Motion makes no sense. Instead, Halpern brings his Motion as to the Stewart Grove Property for ulterior purposes.

The *true* reason for the Motion is an attempted “money grab” against the Receiver, in retaliation for the Receiver’s refusal to place Halpern on the closing statement for the proposed sale identified in Receiver’s Expedited Motion to Approve Sale Free and Clear, etc. (“Motion to Approve Sale”) [DE 128]. Halpern, in essence, is attempting to leverage the Receiver into foregoing legal claims the Receiver may have to any surplus proceeds by seeking to block the sale indirectly through the threat of initiation of frivolous foreclosure litigation against the asset. By threatening foreclosure and delaying the contract, Halpern puts the Receiver in an untenable position of forcing her to cave on her refusal to place Halpern on the closing statement. The resulting consequence is to jeopardize payment to all of the other lienholders by forcing the deal to fall through. The Court should not reward this litigation tactic.

As explained in the ensuing sections, Halpern must be denied intervention. Any foreclosure would be futile. Moreover, it would lead to the absurd result of Acquisition or the Receiver removing Acquisition’s state foreclosure lawsuit to this Court under ancillary jurisdiction simply to conduct a foreclosure sale that likely would result in Acquisition being the successful credit bidder. The Receiver, creditors, and this Court for that matter would fare much better by closing on the subject contract proposed by the Receiver which would generate a significant lien claimant fund.

Halpern’s Motion also fails to establish each of the necessary elements for intervention. Most notably, Halpern’s motion is untimely, and Halpern has no real interest in the subject property. His interest is in the sale proceeds, as his mortgage is junior to Acquisitions and, thus, will be extinguished.

Acquisition also requests this Court take judicial notice of the filings in the subject state foreclosure litigation.

II. RELEVANT BACKGROUND.

A. **The Stewart Grove Property and Foreclosure Proceedings.**

On May 2, 2024, Receiver, Bernice C. Lee (“Receiver”), filed her Expedited Motion to Approve Sale Free and Clear, etc. (“Motion to Approve Sale”). The property at issue in this motion is a luxury property located at 3610 and 3620 Stewart Avenue, Miami, Florida (the “Stewart Grove Property” or “Property”).

Non-Party Acquisition is the prime lender on the Stewart Grove Property, possessing a first position mortgage in the principal amount of \$11,279,062.65 (the “Acquisition Mortgage”). The Acquisition Mortgage is accruing interest in the amount of \$7,722.29 per diem. Prior to the commencement of these proceedings, Acquisition, as Plaintiff, initiated foreclosure proceedings in the Eleventh Judicial Circuit for Miam-Dade County under the case styled: *3610 Stewart Acquisition, LLC v. Stewart Grove 1, LLC, et al.*, Case No. 2023-020591-CA-01 (“State Foreclosure Litigation”). Movant Halpern possesses a second position mortgage (the “Halpern Mortgage”) which is *junior* to Acquisition’s first position mortgage.

B. **Halpern’s Request for Acquisition to Pursue Sale with Putative Buyer, Receiver’s Post Appointment Efforts with Lender, and Proposed Sale to the Putative Buyer.**

1. **Relevant Pre-Receivership Efforts to Liquidate Property.**

Prior to the Receiver’s appointment, Retired Judge Alan Fine (“Ret. Judge Fine”) was appointed the liquidating manager over the Location Ventures entities that are now the “Receivership Companies.” This includes Stewart Grove 1, LLC, the titular owner of the Stewart Grove Property.

Relevant here, when the Stewart Grove Property loan with Acquisition went into default status, Ret. Judge Fine sought a cooperative liquidation strategy for the Property. To that end, he

attempted to sell the Property, however, the Property was unmarketable because of its uncompleted state, as well as the secured debt on the Property exceeded its value. The putative Buyer identified in Receiver's Motion to Approve Sale sought to place an offer in the weeks prior to the initiation of the instant proceedings and appointment of the Receiver. The purchase price of the offer was identical to that set forth in the Motion to Approve Sale.

Further relevant and important here, Halpern's counsel requested Acquisition pursue this offer. Specifically-

From: [Rob Hyman](#)
To: [Jason Alderman](#); "Mark Raymond"
Cc: [Troy Tolentino](#)
Subject: RE: Can you guys zoom real quick to discuss Stewart
Date: Tuesday, December 19, 2023 5:28:47 PM

CAUTION: THIS EMAIL ORIGINATED FROM OUTSIDE THE LAW FIRM.

Jason,

Give me a call so that I can present the issues to my client. We can then discuss once I have their input.

Rob N. Hyman, Esq.
ROB HYMAN, P.A.
110 SE 6th Street, Suite 1700
Fort Lauderdale, FL 33301
Phone: 954.780.8250
Email: rhyman@rhymanlaw.com

-and-

From: [Rob Hyman](#)
To: [Jason Alderman](#); "[Alexander Almazan](#)"
Cc: "[Alan Fine](#)"; "[Robert Gutohn](#)"; brian@goodkindandflorio.com; [Troy Tolentino](#); [Amy Donner](#)
Subject: RE: 3620 Stewart Avenue
Date: Wednesday, December 27, 2023 2:00:20 PM
Attachments: [image003.png](#)
[image004.png](#)
[image005.png](#)
[image007.png](#)
[image008.png](#)
[image009.png](#)
[image010.png](#)

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Please give me an update on this.

Has an agreement been reached.

Rob N. Hyman, Esq.
ROB HYMAN, P.A.
110 SE 6th Street, Suite 1700
Fort Lauderdale, FL 33301
Phone: 954.780.8250
Email: rhyman@rhymanlaw.com

2. Receiver's Efforts to Stabilize and Liquidate the Property.

Upon her appointment, the Receiver was tasked with managing an asset then valued at \$22,000,000 that, in essence, was an uncompleted luxury house construction project, without a certificate of occupancy. The asset requires significant expenses in order to prevent waste. This includes power, taxes, insurance, landscaping, and maintenance. Relevant here, Acquisition, as the first position lender, collaborated with the Receiver in advancing these expenses. It did so at a voluntarily reduced interest rate. Both Receiver and Acquisition, including their respective lawyers, expended considerable time and expense in ensuring the asset did not fall into waste.

III. ARGUMENT IN OPPOSITION TO MOTION TO INTERVENE.

A. Providing Halpern Intervention Relief is an Exercise in Futility.

Any attempted foreclosure by Halpern of its second position mortgage on the Property is *futile*. This is because the Halpern Mortgage is a junior mortgage, and a junior mortgage can *never* foreclose out a senior mortgage such as the first position Acquisition Mortgage. *See Cone Bros. Const. Co. v. Moore*, 193 So. 288 (Fla. 1940); *Bank of Am., N.A. v. Kipps Colony II Condo.*

Ass'n, Inc., 201 So. 3d 670 (Fla. 2d DCA 2016); and, *U.S. Bank Nat. Ass'n v. Bevans*, 138 So. 3d 1185 (Fla. 3d DCA 2014). Given Halpern's inability to foreclose Acquisition's first position mortgage as a junior mortgagee, his *sole* remedy is to make a claim to any foreclosure surplus proceeds. *See* Fla. Stat. §§ 45.031 & 45.032.

Here, Halpern does not contend in his Motion to Intervene that the proposed sale price of \$17,500,000 with the putative Buyer in the Receiver's Motion to Approve Sale is inadequate. Nor does Halpern argue that a foreclosure sale in the State Foreclosure Litigation of Acquisition's first position mortgage would yield a greater lien claimant fund. Thus, Halpern's sought intervention is futile under any conceivable scenario as he, as well as the other junior lien holders, will undoubtedly stand in a better position in these proceedings if the Receiver's sale goes through versus if the State Foreclosure Litigation is concluded. This is because the lien claimant fund created by the Receiver's proposed sale will be greater than any surplus sale proceeds from a foreclosure (if any). A foreclosure would take considerable time to complete versus the closing of the proposed sale. During this time, default interest would continue to accrue thereby requiring a foreclosure sale price to exceed the current \$17,500,000. A feat which is highly unlikely to occur. The Motion to Intervene should be denied.

B. Acquisition of Receiver Can Simply Remove the State Foreclosure Litigation to This Court and Foreclose Out the Halpern Mortgage.

Halpern's attempt to initiate foreclosure proceedings is an absurd ask that will result in an absurd result. This is best illustrated as follows.

Halpern is *already* named in the State Foreclosure Litigation initiated by Acquisition. Indeed, Halpern has requested that the state trial court determine its validity over the remaining junior lienors. If Halpern were provided stay relief upon intervention, he could not initiate foreclosure proceedings separate from the State Foreclosure Litigation. To do so would

constitute an impermissible splitting of causes of action and, as previously stated, there exists no jurisdiction to foreclose Acquisition's admitted, superior mortgage. All that will occur is that Acquisition or the Receiver will remove the foreclosure proceedings to this Court on the grounds of ancillary jurisdiction. *See Nat'l Mar. Services, Inc. v. Straub*, 776 F.3d 783, 786–87 (11th Cir. 2015); *Perlman v. Five Corners Inv'rs I*, 09-81225-CIV-HURLEY, 2010 WL 962953, at *1 (S.D. Fla. Mar. 15, 2010); *Silver v. Hoffman*, 607CV1670ORL31DAB, 2007 WL 4482241, at *2 (M.D. Fla. Dec. 19, 2007). Then, the foreclosure proceedings would proceed to a sale *on Acquisition's first position mortgage in this Court*. This is an absurd waste of time and loss of money given the accrual of default interest and loss of the sale proposed by the Receiver. There is simply no functional difference to Halpern between what the Receiver is proposing in her Motion to Approve Sale and his participation in any foreclosure proceedings (given Acquisition's first position). Accordingly, the Motion should be denied on this additional ground of futility.

C. Halpern Cannot Satisfy a *Single* Element for Intervention as to Stewart Grove.

1. The Intervention Request Is Untimely.

As to the first element of "timeliness," Halpern appeared in this case on January 17, 2024. DE 28. The Receiver filed her Motion to Approve Sale on May 2, 2024. During the intervening period of 3 months and 16 days (107 days), the Receiver and Acquisition expended considerable time, energy and resources stabilizing the asset and pursuing its sale with the Buyer. Halpern had full knowledge of the incurrence of these expenditures and outlays of resources. Moreover, during this interval, the Receiver filed numerous motions seeking to liquidate other Receivership Assets through the identical procedure set forth in Receiver's Motion to Approve Sale. Halpern was on notice that the Receiver would employ the same procedure with the Stewart Grove Property, and do so on the very contract Halpern requested Acquisition and

Receiver pursue. Thus, Halpern could have sought intervention prior to the Receiver and Acquisition's expenditure of time, monies and resources stabilizing the asset and pursuing the putative Buyer. Halpern's seeking of intervention is thus untimely. *See Sec. & Exch. Comm'n v. Marin*, 1:19-MC-20493-UU, 2019 WL 3428551, at *3 (S.D. Fla. May 31, 2019), report and recommendation adopted, 1:19-MC-20493-UU/JJO, 2019 WL 13240985 (S.D. Fla. Sept. 30, 2019) (proposed intervener's delay of two months in seeking intervention deemed untimely); *Burke v. Ocwen Fin. Corp.*, 833 Fed. Appx. 288 (11th Cir. 2020). The Motion to Intervene fails for this reason alone.

2. No Interest in Property.

As to the second element, and as previously discussed, the Halpern Mortgage is a junior mortgage interest in the Property. Given a junior mortgage has no jurisdiction to, and can never, foreclose out a senior mortgage, Halpern possesses no "control" or "affirmative" interest in the Property to liquidate. Stated differently, any attempt by Halpern to assert the Halpern Mortgage against Acquisition will ultimately end in a judgment against Halpern. All Halpern can do is sit and wait for Acquisition to assert its first position, Acquisition Mortgage, which will extinguish the Halpern Mortgage. Upon this occurrence, Halpern's rights are transferred to the surplus sale proceeds for the court to determine priority. This is what precisely the Receiver is proposing in her Motion to Approve Sale. The Motion to Intervene must thus be denied for want of satisfaction of this second element.

3. Halpern's Interest in the Property is Protected.

As to the third and fourth elements for intervention, the only true interest in the Property possessed by Halpern is that the liquidation value of the Property is protected. In other words, the Receiver does not sell the Property for less than its fair market value.

The Receiver has done an excellent job in this regard, bringing to fruition a sale contract for \$17,500,000. This sale price exceeds every other offer received for the Property. Moreover, this offer was received from the very contract Halpern demanded Acquisition to pursue. Halpern does not argue that this amount is insufficient; or, that a foreclosure sale can or would likely result in greater surplus proceeds than the lien claim fund generated by Receiver's proposed sale. Halpern has thus failed to establish his interests are not protected by the Receiver's action or that his interests may be impaired if intervention is not granted.

IV. REQUEST TO TAKE JUDICIAL NOTICE.

Pursuant to Fed. R. Evid. 201(c)(2), Acquisition requests this Court take judicial notice of the State Foreclosure Litigation court records as follows:

<u>DE</u>	<u>Date</u>	<u>Title</u>	<u>Exhibit to Response</u>
DE 2	07/31/23	Complaint	A
DE 42	10/21/23	Halpern Family Trust's Answer and Affirmative Defenses to Plaintiff's Complaint	B
DE 43	10/23/23	Halpern Family Trust's Answer and Affirmative Defenses to A1A Sod, Sand, & Soil Crossclaim	C
DE 50	01/02/24	Plaintiff's Motion for Summary Final Judgment on All Counts of the Complaint and Against All Junior Lienor Defendants	D
DE 56	01/10/24	Amended Complaint	E

Fed. R. Evid. 201(b)(2) provides that the court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *Id.* Courts routinely take judicial notice of the

records on file with the court, as well as the records of other courts both within and outside of the federal system. *See In re Chariots of Palm Beach, Inc.*, 17-19455-MAM, 2019 WL 4744900, at *2 (Bankr. S.D. Fla. Sept. 27, 2019); *In re Loe*, 07-12045-BKC-RBR, 2007 WL 997581, at *1 (Bankr. S.D. Fla. Mar. 29, 2007). All of the records and facts set forth above are appropriate for judicial notice, as they are not subject to reasonable dispute and constitute court records that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Accordingly, judicial notice is appropriate and warranted.

V. CONCLUSION.

Based upon the foregoing, Non-Party Acquisition respectfully requests this Court take judicial notice of State Foreclosure Litigation court records set forth herein, and deny Halpern's Motion to Intervene as it relates to the Stewart Grove Property

Dated: May 16, 2024.

Respectfully submitted,

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Florida Bar No. 172375
Troy A. Tolentino
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record on **May 16, 2024** via CM/ECF system.

By: /s/ Jason R. Alderman
Jason R. Alderman