

# To Our Clients and Friends

# Memorandum

May 18, 2020

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## *Client Alert Update: New York State Court Gives UCC Foreclosures the Go Ahead*

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In an [earlier alert](#), we reported on a decision of interest by a New York state court that temporarily enjoined a UCC foreclosure auction, apparently in reliance on the State of New York's temporary moratorium on commercial foreclosure actions.<sup>1</sup> The Court has now provided much-needed guidance to mezzanine lenders by ruling that the moratorium does not prohibit UCC foreclosure auctions.

As we reported earlier, a New York County Supreme Court judge in *1248 Associates Mezz II LLC v. 12E48 Mezz II LLC* (Index No. 651812/2020) (the "Action") was faced with the question of whether New York's temporary moratorium on commercial foreclosure actions barred a UCC foreclosure auction. The mezzanine borrower sought to prevent its mezzanine lender from conducting a UCC foreclosure auction during the pendency of various closure orders in the State of New York. There was no dispute that the borrower was in default of its obligations under the loan. The borrower alleged that the auction would violate the recent executive order signed by New York Governor Andrew Cuomo (N.Y. Exec. Order No. 202.8 (Mar. 20, 2020)) (the "Executive Order"), which stayed all residential and commercial evictions and foreclosures for 90 days by providing that there shall be "no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days."

In a preliminary ruling that temporarily halted the auction from going ahead as scheduled, the judge issued a temporary restraining order that barred the auction, pending a hearing on the plaintiff's application for a preliminary injunction. This earlier ruling left open whether UCC foreclosures are covered by the Executive Order, although the Court did not explicitly rule on the issue at that time.

Today, the Court resolved the question conclusively, leaving no doubt that UCC foreclosures may proceed during the pendency of the Executive Order. The Court adopted the lender's arguments that the Executive Order did not apply to the foreclosure sought by the lender because the proposed sale was of membership interests governed by the UCC—not a mortgage upon real property—and that a foreclosure is a judicial proceeding, whereas the proposed sale addresses a disposition of collateral pursuant to the UCC, which is a non-judicial proceeding. The borrower challenged the sale on the basis that timing the sale during the current economic shutdown and restrictions on travel meant that there was no meaningful

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<sup>1</sup> Fried Frank Client Memorandum, [Preliminary Injunction Application to Enjoin COVID-19 Related UCC Foreclosure Given Green Light](#) (May 5, 2020)

public access to the auction, but the Court dismissed this claim as speculative. Relying on a long series of New York cases, the Court held that the borrower's loss of its interest in the pledged collateral was not unique and could be adequately remedied by damages after the sale.

Please contact us if you are interested in this decision, or if you require any advice relating to any of the matters covered in this alert.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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