

To Our Clients and Friends

Memorandum

May 5, 2020

Preliminary Injunction Application to Enjoin COVID-19 Related UCC Foreclosure Given Green Light

In a significant decision, which appears to be the first time that any New York State court has been faced with a request to enjoin a UCC foreclosure auction in connection with New York's temporary moratorium on commercial foreclosure actions, a New York County Supreme Court judge in *1248 Associates Mezz II LLC v. 12E48 Mezz II LLC* (Index No. 651812/2020) (the "Action") issued a temporary restraining order to prevent a UCC foreclosure from proceeding, pending a preliminary injunction hearing.

The Action was commenced by a mezzanine borrower that sought to prevent its mezzanine lender from conducting a UCC foreclosure auction during the pendency of various closure orders in New York State. The lender had alleged that the borrower had failed to meet its obligation to substantially complete a construction project for a Manhattan hotel by an agreed-upon date (prior to the onset of the pandemic), and sought to conduct a UCC foreclosure on the basis of this default. The auction was scheduled to occur on May 1, 2020 at the office of Paul Hastings LLP in the MetLife Building—a building which is effectively shuttered at the present time—although bidders were allowed to attend the auction virtually and telephonically via a Cisco WebEx conference.

The borrower commenced the Action seeking injunctive relief to prevent the auction from being held during the pandemic. The borrower alleged that the auction was a sham designed to ensure that the lender was able to acquire the collateral at a fire sale price, and that the lender had rigged the sale process so that they would be the only bidder on the collateral by ensuring that there was no meaningful public access to the auction. The borrower also alleged that the auction would violate the recent executive order signed by New York Governor Andrew Cuomo (Executive Order Number 202.8) (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 its initial response to the complaint, the New York Supreme Court (Hon Frank P. Nervo) denied the borrower's application on the basis that the "preliminary injunction relief requested is encompassed by the [Executive Order]." Subsequently, the lender took the position that UCC foreclosures were not subject to the Executive Order, and notified the borrower that they intended to proceed with the UCC foreclosure auction at the scheduled time. In response, the borrower refiled the Action in an attempt to clarify whether the UCC foreclosure auction was prohibited by the Executive Order. In reviewing the second filing, the New York Supreme Court issued a temporary restraining order preventing the auction from proceeding at the scheduled time, pending a hearing on the borrower's application for a preliminary injunction.

The second decision indicated ambiguity as to whether UCC foreclosures are subject to the Executive Order, which imposes a temporary moratorium on commercial property foreclosures, although the Court did not explicitly rule on the issue. A transcript of the hearing is not yet available, but we will be monitoring developments in this case, as it may provide much-needed guidance for pending litigants who have been sidelined by the Executive Order. We will issue an update as soon as a transcript is available.

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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