

To Our Clients and Friends

Memorandum

October 29, 2020

New York Supreme Court Allows Previously Enjoined UCC Foreclosure Sale to Proceed

In our prior client alert entitled, *New York Supreme Court Issues Preliminary Injunction Halting Another UCC Foreclosure* (Aug. 6, 2020), we discussed the New York County Supreme Court's decision in *Shelbourne BRF LLC v. SR 677 BWAY LLC*, Index No. 652971/2020 (N.Y. Cnty. Sup. Ct.) (Schecter, J.), where the court issued a preliminary injunction preventing a foreclosure sale under the Uniform Commercial Code ("UCC") from occurring prior to October 15, 2020. After the expiration of the preliminary injunction, on October 16, the mezzanine lender notified the mezzanine borrowers that a UCC foreclosure sale would occur on October 30. The mezzanine borrowers once again tried to enjoin the UCC foreclosure sale. However, the court rejected the borrowers' application for a temporary restraining order and preliminary injunction and permitted the UCC foreclosure sale to proceed on October 30, 2020.

The court's prior order in August relied on an administrative order issued by Chief Administrative Judge Marks that enjoined real property auctions in foreclosure actions in New York from occurring prior to October 15, 2020. The moratorium on real property auctions was not extended by Chief Judge Marks. Rather, Chief Judge Marks issued a new administrative order on October 22, 2020, effective October 23, 2020, providing that real property auctions were permitted to resume in the normal course in New York State and that "[a]ll residential, commercial, and in rem foreclosure matters may proceed in the normal course, subject to..." certain qualifications.¹ The court noted that Chief Judge Marks's prior order was no longer in effect, and that mezzanine foreclosure sales were now proceeding.

The court also found that it "would be unreasonable to further enjoin the sale in the manner that the parties expressly agreed to in their contract." In opposition to the temporary restraining order, the mezzanine lender alleged that the terms of sale were substantially similar to the terms that were approved by the court in *D2 Mark LLC v. OREI VI Invs., LLC*, Index No. 652259/2020, 2020 N.Y. Misc. LEXIS 2978 (Sup. Ct. N.Y. Cnty. June 23, 2020). The mezzanine lender also provided the court with details as to the expenditures incurred to preserve its rights to foreclose on a borrower that still had an interest in the underlying real property. In this regard, the mezzanine lender indicated that it paid

¹ Chief Judge Marks's October 22 administrative order expressly provides that it is subject to "current or future federal and state emergency relief provisions governing time limits for the commencement and prosecution of matters, limitation of foreclosure-related remedies, and similar issues," including any limitations imposed by Governor Cuomo's executive orders relating to the commencement and enforcement of commercial foreclosures prior to January 1, 2021.

approximately \$1.4 million to cure defaults under the senior mortgage loan during a five-month period, and that a further injunction would cost approximately \$232,000 per month to maintain the right to conduct a meaningful UCC foreclosure sale. The mezzanine lender noted that the borrowers had failed to make any payments of interest or principal under the mezzanine loan since April 2020. In light of these facts, the court found that the balance of the equities did not favor plaintiffs. Rather, the court stated that “[f]orcing defendant to continue funding the costs that plaintiff failed to pay would be commercially unreasonable given the state of the property and the debt to the senior lender.”

This decision follows on the heels of the *Atlas Brookview Mezzanine LLC et al. v. DB Brookview LLC*, Index No. 653986/2020, where the New York County Supreme Court denied as moot a request for a preliminary injunction preventing a foreclosure sale from occurring on October 15, 2020. There, the court (Schechter, J.) had previously issued a temporary restraining order enjoining a foreclosure sale under UCC scheduled for August 25, 2020 until October 15, 2020. At oral argument, the court (Borrok, J.) indicated that he would not have signed the temporary restraining order. Doc. No. 72 at 36. The court also referenced prior decisions from the Supreme Court holding that a mezzanine borrower cannot demonstrate irreparable harm in this context because the loss it would suffer is compensable by monetary damages. *Id.* at 25.

These two developments from the New York County Supreme Court reflect a potential turning point in how New York courts evaluate requests for emergency injunctive relief in connection with UCC foreclosures, and a potential return to the approach that courts had prior to the COVID-19 pandemic.

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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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