

**Insights**

**U.S. COVID-19: NEW YORK STATE'S TEMPORARY COMMERCIAL FORECLOSURE BAN IS INAPPLICABLE TO PROPOSED SALES OF COLLATERALIZED ASSETS GOVERNED BY THE UCC.**

May 21, 2020

Through a series of executive orders (202.8 and 202.28) issued by Governor Cuomo, the State of New York has banned the enforcement of commercial foreclosures through and including June 6, 2020. Neither executive order, however, addresses non-judicial mezzanine loan foreclosures, which are governed by the UCC.

On May 18, 2020, New York Supreme Court Justice Frank Nervo issued a decision confirming that the temporary prohibition on judicial foreclosures does not apply to the sale of pledged interests governed by the UCC and without determining whether the sale was “commercially reasonable,” he allowed the notice sale to proceed.

In *1248 ASSOC. MEZZ II LLC v. 12E48 MEZZ II LLC*, Index No. 651812/2020, the plaintiff, the sole owner of 1248 Mezz LLC, which is the parent entity that owns the mixed-use hotel currently being developed at 12 East 48th Street in Manhattan, moved to enjoin the defendant creditor from conducting a sale of plaintiff’s membership interest in 1248 Mezz LLC, which served as collateral for certain amounts advanced to plaintiff by the defendant.

In his decision and order, Justice Nervo denied the plaintiff’s motion, explaining that the disposition of collateral pursuant to Article 9 of the UCC is not a judicially ordered foreclosure and therefore not subject to New York State’s temporary prohibition of commercial foreclosures.

The decision is silent on whether a UCC sale conducted during the COVID-19 pandemic is commercially unreasonable. Instead, Justice Nervo concluded that, even if the sale is commercially unreasonable, the plaintiff had not shown likelihood of success on the merits because the loss is merely a commercial investment that is quantifiable, and plaintiff’s economic damages claim was speculative. Justice Nervo cautioned, however, that to the extent that there are any such damages, they may be properly remedied after the UCC sale.

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