

What's the Standard for “Commercially Reasonable” in a Commercially Unreasonable World (Health Crisis)? Part II

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Yesterday, in a turn of events that struck a hopeful chord for mezzanine lenders, New York County Supreme Court Judge Frank P. Nervo vacated his April 30, 2020 order which temporarily halted the sale of mezzanine loan collateral owned by the borrower, 1248 Associates Mezz II LLC, under the Uniform Commercial Code (“UCC”). Judge Nervo’s previous order had both halted the sale, and ruled that the borrower’s request to have its case considered on the merits was “essential.”

The borrower’s argument had been supported, in part, by New York Governor Andrew Cuomo’s Executive Order No. 202.8, dated March 20, 2020, declaring a moratorium on all residential and commercial foreclosures, by stating, in the pertinent part, that “[t]here 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 yesterday’s decision, Judge Nervo rejected the borrower’s contention that the Executive Order applied in the foreclosure of a junior mezzanine loan, on the basis that the sale is subject to the UCC and is a non-judicial proceeding, unlike a New York state foreclosure proceeding, and the Executive Order itself did not address non-judicial proceedings. Notably, on May 7, 2020, Governor Cuomo issued subsequent Executive Order 202.28, which, in part, extended the existing moratorium on the foreclosure of residential and commercial *mortgages*, a word not contained in the previous Executive Order, providing further clarification on this issue.

As the nature and timing of the default under the subject mezzanine loan was not in dispute between the parties, Judge Nervo further rejected the borrower’s arguments as to the nature and timing of the sale having been designed to take advantage of the current COVID-19 crisis. Judge Nervo held that such arguments were “speculative”, and that the borrower’s request for relief relied upon “anticipated economic damage” which could result from such a sale. As the borrower had failed to demonstrate that the holding of such a UCC sale would cause it irreparable harm. Instead, the holding provided that the appropriate recourse in the event that such a sale ultimately caused the borrower a loss of its investment opportunity would be a cause of action for monetary damages at that time.

The issuance of Executive Order 202.28, coupled with the May 18, 2020 decision create a positive precedent for mezzanine lenders in seeking to enforce their rights through a UCC sale, in New York, even in the current environment created by COVID-19. It is now clear that for the time being, any current foreclosure moratoriums in New York do not apply to mezzanine loan foreclosures.



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As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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