



## ONPOINT / **Mezzanine Foreclosure in the Time of Coronavirus: The Final Chapter**

May 18, 2020

A decision today by the New York Supreme Court has paved the way for mezzanine lenders to proceed with UCC foreclosure sales in New York City during the pandemic. This afternoon, Justice Frank Nervo issued an order denying a borrower's emergency request to halt a UCC sale and holding, among other things, that the existing executive orders limiting commercial real estate foreclosures in New York do not apply to non-judicial mezzanine foreclosures under the Uniform Commercial Code.

As we have described in two previous OnPoints - *Mezzanine Foreclosures in the Time of Coronavirus: Chapter 2* and *Mezzanine Foreclosures in the Time of Coronavirus*, a mezzanine UCC foreclosure sale that had been scheduled for May 1 was temporarily stayed by the New York Supreme Court based on the borrower's allegations that the terms of the UCC sale process were not commercially reasonable in light of the COVID-19 pandemic and that the New York Governor's moratorium on foreclosures of commercial properties precludes a mezzanine foreclosure. In response, the lender argued that its sales process was commercially reasonable and that the executive orders relating to foreclosure did not apply because a mezzanine "foreclosure" is actually a non-judicial sale of personalty under the Uniform Commercial Code, as opposed to a judicial foreclosure of a mortgage secured by real property. Under New York law, real estate mortgage foreclosures are judicial and subject to court order. UCC sales are not a judicial process.

After a review of the multiple affidavits and pleadings filed in the case, the Court issued a ruling without conducting a hearing, noting that because the borrower "had not demonstrated in its papers the elements required for the issuance of a preliminary injunction", a hearing was not required.

Justice Nervo concurred with the lender's position that a mezzanine collateral foreclosure is distinct from a mortgage foreclosure. The Court noted that although the terms of Executive Order No. 202.8 do not explicitly limit its application to mortgages, it "addresses enforcement of a judicially ordered foreclosure", and that the mezzanine foreclosure at issue was a "sale of ... pledged [LLC] interests ...result[ing] from the parties' agreement, as guided by the UCC".

The Court also held that the borrower had not met the standard of showing a "likelihood of success on the merits", which is necessary for the issuance of an injunction, citing to caselaw which included the Atlas / Macquarie case - where Dechert successfully represented the foreclosing mezzanine lender - (see **March 30, 2020 Atlas v. Macquarie Decision**).

Justice Nervo's ruling contains three key components, it (i) vacates the temporary injunction that had been issued on April 30th, (ii) vacates the handwritten notation included in the prior order of April 23rd (stating that the Governor's executive orders encompassed the requested preliminary injunction against the UCC foreclosure) and (iii) confirms the Court's prior determination that the borrower's case does not constitute an "essential action" under the New York Judiciary's Administrative Order 278-20. This decision will be welcome news for other mezzanine lenders considering their enforcement options (this past week's Commercial Mortgage Alert contained two notices of upcoming UCC sales - one relating to a portion of 229 West 43rd Street (set for June 30th), and the other involving a multi-family rental portfolio in Ashland, Missouri (scheduled for May 29th)).

The decision did not provide any specific guidance on whether the standards for "commercial reasonableness" had been met, so decisions regarding how to structure a UCC foreclosure sale during the time of coronavirus should continue to be carefully considered by mezzanine lenders (and their lawyers). However, the Court's confirmation of its initial ruling that the case did not constitute an "essential action" should be weighed by mezzanine borrowers (and their lawyers) considering challenging a mezzanine foreclosure.

**[Read the decision >>](#)**