

Mezzanine Loan Defaults, UCC Foreclosures and Recent New York Court Decisions

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The recent trajectory of a case involving a property at 12 East 48th Street in Manhattan before Judge Frank P. Nervo of the New York State Supreme Court (New York County) offers important guidance with regard to the projected wave of upcoming borrower defaults and foreclosure sales under the Uniform Commercial Code (UCC). More recently, on June 23, Judge Andrea Masley of the New York State Supreme Court ruled on a similar case that may provide further direction on future UCC sales in New York courts, particularly as the pandemic and related loan defaults continue to develop.

Judge Masley's decision temporarily halted a mezzanine foreclosure related to the Mark Hotel, a luxury hotel on the upper east side of Manhattan. The mezzanine lender in this case, OREI VI Investments LLC, declared a default under the mezzanine loan due to cross-default provisions in the mezzanine loan documents, namely, that the senior borrower had failed to make payments on the senior loan in April and May of 2020. Based upon that default, the mezzanine lender issued a notice of a sale to be held just 36 days later. In her decision temporarily staying the sale, Judge Masley cited several arguments of the borrower, D2 Mark LLC, against the commercial reasonableness of the sale, including the fact that the hotel had been forced to close during the pandemic, and the short period of time between the issuance of the sale notice until the specified sale date. One such argument cited by the court was the fact that the then-current phased reopening in New York made the hotel unavailable to be examined by potential qualified bidders until just prior to the sale, and would likely require individuals to take public transportation and risk potential exposure to COVID-19. While the court did not ultimately find that holding any UCC sale in the current environment was unreasonable, the decision specified that the nature in which the proposed sale was to be conducted initially was unreasonable. The order contained requirements for the mezzanine lender to conduct a future sale of the collateral, including, without limitation, revising the sale notice, providing an advance copy to the mezzanine borrower, and enjoining any sale of the collateral until at least July 23, 2020.

Further distinguishing the Mark Hotel case from the 12 East 48th Street case was the timing of the default – while the mezzanine borrower in the case at hand defaulted during (and due to) COVID-19-related business closures, the default notice in 12 East 48th Street occurred in January, prior to the pandemic. In the case of the Mark Hotel, the mezzanine borrower and mezzanine lender were also in negotiations to address the defaults, as were the senior borrower and senior lender, prior to the mezzanine lender declaring a default. The court was sympathetic to the mezzanine borrower's contention that the mezzanine lender was not conducting the sale fairly, a factor which the court largely declined to entertain in the 12 East 48th Street case.

Both cases have the potential to create important precedent for future UCC foreclosures in New York as they proceed. We will continue to monitor both cases for further developments as events unfold.

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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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