

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK P. NERVO PART IAS MOTION 4

Justice

1258 ASSOC MEZZ II LLC,
Plaintiff,
- v -
12E48 MEZZ II LLC
Defendant.

INDEX NO. 651812/2020
MOTION DATE 05/18/2020
MOTION SEQ. NO. 001
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1 through 54 were read on these motions to/for Injunction / Bond.

The motion is decided in accordance with the annexed decision and order of even date.

Any requested relief not addressed therein has nonetheless been considered and is hereby denied.

/S HON. FRANK P. NERVO, J.S.C.

5/18/2020 DATE
FRANK P. NERVO, J.S.C.
CHECK ONE: CASE DISPOSED [X] NON-FINAL DISPOSITION
GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
APPLICATION: SETTLE ORDER [] SUBMIT ORDER []
CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN [] FIDUCIARY APPOINTMENT [] REFERENCE []

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART IV

-----X
1248 ASSOC. MEZZ II LLC ,
Plaintiff,

DECISION AND ORDER

-against-

Index Number
651812/2020

12E48 MEZZ II LLC
Defendant.

-----X
FRANK P. NERVO, J.S.C.

On this motion the Court considered the Plaintiff-Movant’s affirmation in support of Bradley S. Pensyl, Esq., Defendant’s affirmation in opposition of Jodi Kleinick, Esq. and affidavit of James Gabriel, and the affirmation in reply of Abraham J. Hidary, Esq., and all exhibits annexed thereto (NYSCEF Doc. Nos. 1 through 54).

THE PARTIES

Succinctly, plaintiff is a single-purpose entity whose only asset consists of the membership interest in 1248 Associates Mezz LLC, and whose only liability is a loan obligation owing to Defendant.

Defendant is the creditor of plaintiff and to whom plaintiff has pledged, as collateral for its debt to defendant, its membership interest in 1248 Associates Mezz LLC, above referenced. There is no dispute that plaintiff is in default of the parties’ agreement.

THE INSTANT MOTION

Plaintiff moves this Court for an Order preliminarily enjoining defendant from conducting a sale of plaintiff’s membership interest in 1248 Associates Mezz LLC, the collateral for certain amounts advanced by defendant. In support of the application, plaintiff relies on the March 20, 2020 Executive Order of Governor Andrew M. Cuomo

(No. 202.8) which sets forth, in pertinent part, "There 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."

Defendant opposes the motion and asserts that Executive Order is inapplicable inasmuch as the proposed sale is of property posted to secure a loan as governed by the UCC, not a mortgage upon real property. Defendant further posits had the Executive Order intended to prohibit sales of collateralized assets (referred to as "Pledged Interests" in the Notice of Sale published by defendant) governed by the UCC, such prohibition would have been explicitly provided for within that Executive Order, as had been done with respect to New York Vehicle and Traffic Law, Business Corporation Law, Civil Practice Law and Rules and other statutes.

Defendant further notes a foreclosure to be a judicial proceeding, whereas the proposed (and Noticed) sale addresses a disposition of collateral pursuant to Article 9 of the UCC, a non-judicial proceeding.

The Court concurs with the defendant. While the terms of Executive Order No. 202.8 prohibit foreclosure of any commercial property for a period of ninety days without limitation to mortgages, that provision addresses enforcement of a judicially ordered foreclosure. The sale of the pledged interests in this matter results from the parties' agreement, as guided by the UCC.

Plaintiff's anticipation of economic damage resulting from the noticing, the manner, or timing of the sale, particularly in light of the current economic shutdown and restrictions on travel as a result of the COVID-19 pandemic, is merely speculative. However, any such damages may be properly remedied subsequent to the sale (see *Atlas v. Mezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC*, 174 AD3d 150, 162 [1st Dept 2019]; see also, *B'way 500 W. Monroe Mezz II LLC v. Transwestern Mezzanine Realty Partners II LLC*, 80 AD3d 483,484 [1st Dept 2011]). Where harm to a plaintiff's commercial property interest is the loss of investment as opposed to a loss of an unquantifiable interest, damages suffice and irreparable harm does not befall

plaintiff (id.). Thus, plaintiff has not demonstrated, on this motion, a likely success on the merits warranting injunctive relief (*1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 Ad3d 18, 39 [1st Dept 2011]). As plaintiff had not demonstrated in its papers the elements required for the issuance of a preliminary injunction, a hearing is not required (c.f. id. at 40; CPLR 6312[c]; *Jamie B. v. Hernandez*, 274 AD2d 335, 336 [1st Dept 2000]).

It is therefore:

ORDERED that the Court adheres to its determination, as set forth in the Order of April 23, 2020, that this matter is not essential as defined by the terms of New York Judiciary Administrative Order AO-278-20; and it is further

ORDERED that the Court vacates its notation on the aforesaid Order of April 23, 2020 that reads "as the preliminary injunction relief requested is encompassed by the governor's Executive Order", for consistency herewith; and, it is further

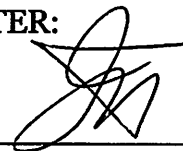
ORDERED that the temporary restraining orders issued by this Court on April 30, 2020 are hereby vacated; and, it is further

ORDERED that the cross-motion for an Order directing the plaintiff post a bond is denied as academic.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated May 18, 2020
New York, New York

ENTER:



Hon. Frank P. Nervo, J.S.C.