

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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CINEMA SQUARE, LLC,

Plaintiff,

-against-

**SUMMONS**

JEFFRIES LOANCORE, LLC, LRES CORPORATION, as trustee or agent for WILMINGTON TRUST, NATIONAL ASSOCIATION, as trustee for the benefit of Holders of Comm 2016-DC2 Mortgage Trust Commercial Mortgage Pass Through Certificates, Series 2016-DC2, WILMINGTON TRUST, NATIONAL ASSOCIATION, as trustee for the benefit of Holders of Comm 2016-DC2 Mortgage Trust Commercial Pass Through Certificates, Series 2016-DC2, JOHN DOE d/b/a WELLS FARGO COMMERCIAL MORTGAGE SERVICING, and CW CAPITAL ASSET MANAGEMENT LLC, as special servicer,

Index No.

Venue is New York County as it is the County chosen by the parties to the Loan Agreement at issue.

Defendants.


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**TO THE ABOVE NAMED DEFENDANTS:**

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default.

Dated: New York, New York  
January 27, 2021

BUTLER, FITZGERALD, FIVESON  
& McCARTHY  
A Professional Corporation  
Attorneys for Plaintiff

By:   
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TO: JEFFRIES LOANCORE, LLC  
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Orange, California 92868

WILMINGTON TRUST, NATIONAL ASSOCIATION  
c/o LRES Corp.  
765 the City Drive South, Suite 300  
Orange, California 92868

JOHN DOE d/b/a WELLS FARGO COMMERCIAL  
MORTGAGE SERVICING  
401 S. Tryon Street, 8<sup>th</sup> Floor  
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Charlotte, North Carolina 28202

CW CAPITAL ASSET MANAGEMENT  
900 19<sup>th</sup> Street NW, 8<sup>th</sup> Floor  
Washington, DC 20006

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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CINEMA SQUARE, LLC,

Plaintiff,

-against-

JEFFRIES LOANCORE, LLC, LRES CORPORATION,  
as trustee or agent for WILMINGTON TRUST,  
NATIONAL ASSOCIATION, as trustee for the benefit of  
Holders of Comm 2016-DC2 Mortgage Trust Commercial  
Mortgage Pass Through Certificates, Series 2016-DC2,  
WILMINGTON TRUST, NATIONAL ASSOCIATION, as  
trustee for the benefit of Holders of Comm 2016-DC2  
Mortgage Trust Commercial Pass Through Certificates,  
Series 2016-DC2, JOHN DOE d/b/a WELLS FARGO  
COMMERCIAL MORTGAGE SERVICING, and CW  
CAPITAL ASSET MANAGEMENT LLC, as special  
servicer,

**COMPLAINT**

Index No.

Defendants.

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Plaintiff by its attorneys Butler, Fitzgerald, Fiveson & McCarthy A Professional  
Corporation, complaining of defendant alleges as follows:

**PRELIMINARY STATEMENT**

1. This action is brought pursuant to CPLR § 3001, seeking a judgment  
declaring that a certain deed of trust described herein is excused from enforcement under  
California Civil Code § 1511 and common law force majeure, impossibility of performance and  
frustration of purpose based on alleged defaults in payment since May 1, 2020 resulting from the  
COVID-19 pandemic, and seeking a preliminary and permanent injunction restraining the sale or  
transfer of the property encumbered by the deed of trust to enforce the underlying indebtedness  
based on such alleged defaults.

### THE PARTIES

2. Plaintiff, Cinema Square, LLC (“Plaintiff”) is a Delaware limited liability company, owner of the premises known as 6917 El Camino Real, Atascadero, San Luis Obispo County, California 93422, APN/Parcel ID: 029-361-048 and 029-361-049 (“Premises”) and the borrower under a certain Loan Agreement dated December 31, 2015 (“Loan Agreement”) in the principal amount of \$7,800,000 (“Loan”).

3. Defendant, Jeffries Loancore LLC (“Jeffries”) is a Delaware limited liability company, the lender on the December 31, 2015 Loan Agreement and the beneficiary of a Deed of Trust, Assignment of Leases and Rents and Security Agreement also dated December 31, 2015 (“Deed of Trust”) granted to secure re-payment of the Loan.

4. Defendant, LRES Corporation (“LRES”), is, upon information and belief, the trustee or agent for Wilmington Trust, National Association, as trustee for the benefit of Holders of Comm 2016-DC2 Mortgage Trust Commercial Mortgage Pass Through Certificates, Series 2016-DC2 and the trustee and/or agent of the current owner/assignee of the note and Deed of Trust granted by Plaintiff to Jeffries.

5. Defendant, Wilmington Trust, National Association, as trustee for the benefit of Holders of Comm 2016-DC2 Mortgage Trust Commercial Mortgage Pass Through Certificates, Series 2016-DC2 (“Wilmington”) is, upon information and belief, a National Banking Association and the current owner/assignee of the note and Deed of Trust granted by Plaintiff to Jeffries.

6. Defendant, John Doe d/b/a Wells Fargo Commercial Mortgage Servicing (“Wells Fargo”) is, upon information and belief, the master servicer of the Loan.

7. Defendant, CW Capital Asset Management LLC (“CW Capital”) is, upon information and belief, the special servicer of the Loan.

### JURISDICTION, VENUE AND GOVERNING LAW

8. Pursuant to the venue selection clause in the Loan Agreement, any litigation arising from the Loan Agreement is to be heard in either New York Federal Court or the Supreme Court, State of New York, County of New York. The claims herein arise in connection with the Loan Agreement.

9. Under the Loan Agreement California Law was selected as the choice of law to be applied by this Court because this action involves the enforcement of the lien in California created by the Loan Agreement.

### FACTS

10. Plaintiff purchased the Premises on or about December 31, 2015.

11. Plaintiff paid \$13,000,000 to purchase the Premises.

12. Plaintiff paid \$5.2 million of its own funds towards the purchase price.

13. The Premises consists of commercial space with seven stores and a movie theater.

14. The movie theater, Galaxy Theaters (“Galaxy”), occupies approximately 73% of the Premises.

15. On or about December 31, 2015, Plaintiff entered into a Loan Agreement with Jeffries whereby Jeffries loaned \$7,800,000 to Plaintiff to, *inter alia*, acquire the Premises (“Loan Agreement”). Jefferies did not do a credit search of Plaintiff nor did Jefferies look to Plaintiff to be ultimately responsible for the rentals because the loan was non-recourse.

16. The Loan Agreement required monthly installments towards the interest and amount due on the loan plus funding for reserve accounts (“Monthly Payments”).

17. Since December 31, 2015, pursuant to a Three-Party Lockbox and Deposit Control Agreement, executed at the time of the Loan Agreement, all rents generated by the Premises were paid directly by the tenants to a lock box.

18. The tenants at the Premises were irrevocably notified to make all rent payments to Plaintiff for the benefit of Defendants and/or the Lender and deliver said payments to a lockbox at Union Bank, P.O. Box 45763, San Francisco, California 94145-0763.

19. The Lender required banking arrangements under which the Lender got paid automatically from the rents for loan and reserve account amounts before any excess monies were distributed to Plaintiff.

20. Pursuant to the Loan Agreement, Galaxy is described as a "Major Tenant" and the lease with Galaxy Theaters is described as a "Major Lease".

21. Pursuant to the Loan Agreement, Plaintiff could not enter, extend, or modify any Major and/or Material Lease without Defendants and/or the Lender's consent.

22. Pursuant to the Loan Agreement, Defendants and/or the Lender agreed to look solely to the Premises and the rental payments and not seek any deficiency against Plaintiff.

23. The loan was made with the intent that it be sold or transferred in to a CMBS Trust.

24. To qualify for the CMBS loan status, the Loan had to meet certain financial requirements.

25. The Letter of Intent for the loan required the net rentals to be substantially above the operating costs and the loan payments.

26. To qualify, the Lender had to determine that the net rent revenue from the property was 145% of the expenses and loan payments or a ratio of 1.45 to 1.00.

27. Without this ratio of rent to expenses, the loan never would have been made by Jefferies.
28. The Loan Agreement required Plaintiff to obtain rental loss interruption insurance in an amount equal to 100% of the projected gross rents.
29. Plaintiff obtained such insurance, however, a claim made to such insurance has been denied.
30. The continued operation of the Premises by Galaxy and its direction of its rental payments to the control of the Lender for payment of the Loan Agreement was the fundamental purpose and consideration for the Loan Agreement.
31. Without the operation of Galaxy and its payments of rents toward the Loan Agreement, Plaintiff would not have purchased the Premises and would not have entered into the Loan Agreement.
32. Pursuant to the Loan Agreement, Jeffries was granted a Deed of Trust, Assignment of Leases and Rents and Security Agreement.
33. The Deed of Trust named Jeffries as “Beneficiary” and Plaintiff as Trustor.
34. The Deed of Trust was recorded against the Premises on or about December 31, 2015.
35. On or about March 19, 2020, because of the COVID-19 pandemic, California made it unlawful to operate movie theaters in the State of California.
36. On or about March 19, 2020, San Luis Obispo County made it unlawful to operate a movie theater.

37. As of March 19, 2020, Galaxy has been prevented from lawfully operating its movie theater.

38. Prior to March 19, 2020, Galaxy had been paying rent.

39. Prior to March 19, 2020, Galaxy paid approximately 84% of the rental income generated by the Premises.

40. Galaxy's last rent payment was made on or about March 1, 2020 and it has not made any rent payments since that time.

41. Plaintiff has made all Monthly Payments pursuant to the Loan Agreement from inception until May 1, 2020 and plaintiff was not in default of the Loan Agreement prior to May 1, 2020.

42. On or about October 27, 2020, LRES recorded a Notice of Default and Election to Sell Under Deed of Trust, Assignment of Leases and Rents and Security Agreement.

43. By reason of the Notice of Default and Election to Sell, LRES seeks to sell the Premises and otherwise enforce the default provisions of the Loan Agreement pertaining to payment of monthly installments since May 1, 2020.

44. Plaintiff is not in default of any provisions of the Loan Agreement other than the Monthly Payments beginning with the May 1, 2020 payment.

45. Any default by Plaintiff in the Monthly Payments is the direct result and/or consequence of California making it unlawful for Galaxy to operate movie theaters and the consequential inability of Galaxy Theaters to pay its rent to Plaintiff.

**FIRST CAUSE OF ACTION**  
**(Declaratory Judgment)**

46. Plaintiff restates and realleges each and every allegation contained in paragraphs 1 through 45 as if fully set forth at length herein.



47. The COVID-19 pandemic and the resultant laws making it unlawful to operate a movie theater in California is an unforeseeable event.

48. The COVID-19 pandemic and the resultant laws making it unlawful to operate a movie theater in California has made it impossible to perform obligations on the Loan Agreement since May 1, 2020.

49. The COVID-19 pandemic and the resultant laws making it unlawful to operate a movie theater in California has frustrated the purpose of the Loan Agreement.

50. The COVID-19 pandemic and the resultant laws making it unlawful to operate a movie theater in California are circumstances out of Plaintiff's control that has rendered performance pursuant to the Loan Agreement since May 1, 2020, impracticably.

51. The COVID-19 pandemic and the resultant laws making it unlawful to operate a movie theater in California has created an insuperable interference that could not have been prevented by Plaintiff by the exercise of due diligence.

52. The COVID-19 pandemic is a *force majeure* event excusing Plaintiff's performance of the Loan Agreement since May 1, 2020.

53. The payment obligations of the Loan Agreement since May 1, 2020 are excused from performance under California Civil Code § 1511.

54. By virtue of the foregoing, Plaintiff is entitled to a judgment declaring that its obligations under the Loan Agreement pertaining to Monthly Payments commencing May 1, 2020 and continuing during the time California has made it unlawful to operate a movie theater, are excused and do not constitute defaults under the Loan Agreement, and that said defaults are not a basis for Defendants to declare a default and transfer or sell the Premises pursuant to the

Deed of Trust, to foreclose on the Loan Agreement or otherwise enforce such default provisions in the Loan Agreement relating to Monthly Payments.

**SECOND CAUSE OF ACTION**  
**(Preliminary and Permanent Injunction)**

55. Plaintiff restates and realleges each and every allegation contained in paragraphs 1 through 45 and 47 through 54 as if fully set forth at length herein.

56. The COVID-19 pandemic and the resultant laws making it unlawful to operate a movie theater in California has made it impossible to perform the obligations pursuant to the Loan Agreement since May 1, 2020.

57. The COVID-19 pandemic and the resultant laws making it unlawful to operate a movie theater in California has frustrated the purpose of the Loan Agreement since May 1, 2020.

58. The COVID-19 pandemic and the resultant laws making it illegal to operate a movie theater in California are circumstances out of Plaintiff's control that has rendered performance pursuant to the Loan Agreement since May 1, 2020, impracticably.

59. The COVID-19 pandemic and the resultant laws making it unlawful to operate a movie theater in California has created an insuperable interference that could not have been prevented by Plaintiff by the exercise of due diligence.

60. The COVID-19 pandemic is a *force majeure* event excusing Plaintiff's performance of the Loan Agreement since May 1, 2020.

61. The payment obligations of the Loan Agreement since May 1, 2020 are excused from performance under California Civil Code § 1511.

62. Plaintiff is likely to prevail on its claims that its obligations under the Loan Agreement since May 1, 2020 are excused.

63. Plaintiff will be irreparably harmed if Defendants are allowed to foreclose the Premises and/or transfer the Deed of Trust through non-judicial foreclosure where its defenses cannot be adjudicated.

64. The harm to Plaintiff if an injunction is denied and Defendants can transfer or sell the Deed of Trust, foreclose on the Loan Agreement or otherwise enforce the default provisions are greater than any harm to Defendants if they are enjoined from enforcing the default provisions in the Loan Agreement based upon non-payment of rent since May 1, 2020.

65. Plaintiff has no adequate remedy at law.

66. The equities weigh in Plaintiff's favor.

67. By virtue of the foregoing, Plaintiff is entitled a preliminary and permanent injunction restraining Defendants from transferring or selling the Deed of Trust, foreclosing on the Loan Agreement or otherwise enforcing the default provisions relating to payment since May 1, 2020.

WHEREFORE, Plaintiff requests judgment as follows:

(a) On the first cause of action, judgment declaring that Plaintiff's payment obligations under the Loan Agreement are excused since May 1, 2020 and until California no longer makes it unlawful to operate a movie theater, and that Defendants may not transfer or sell the Premises pursuant to the Deed of Trust, foreclose on the Loan Agreement or otherwise enforce the default provisions of the Loan Agreement relating to payment of rent based on defaults occurring since May 1, 2020;

(b) On the second cause of action, a preliminary and permanent injunction restraining Defendants from transferring or selling the Premises pursuant to the Deed of Trust,

foreclosing on the Loan Agreement or otherwise enforcing the default provisions of the Loan Agreement relating to monthly payments since May 1, 2020 and until the vacature of California restrictions on the operation of movie theaters at the Premises; and

(c) That Plaintiff have such other and further relief as this Court deems proper, with costs and disbursements.

Dated: New York, New York  
January 27, 2021

BUTLER, FITZGERALD, FIVESON  
& McCARTHY  
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Attorneys for Plaintiff



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