SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 53

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,

Defendants.

Index No. 650645/2021

DEFENDANTS WILMINGTON TRUST, NATIONAL ASSOCIATION AND CWCAPITAL ASSET MANAGEMENT LLC'S MEMORANDUM OF LAW IN OPPOSITION TO TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

Plaintiff Cinema Square, LLC ("Plaintiff") purchased a shopping center in 2015 using the proceeds of a 10-year $7.8 million mortgage loan (the "Loan") currently securitized and held by 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 ("Lender"). The Loan is currently serviced on behalf of Lender by Defendant CWCapital Asset Management LLC ("CWCAM").

In inducing the loan of these substantial sums, Plaintiff gave an unconditional promise to repay the Loan in fixed amounts on a fixed schedule. It was the ability to rely on enforceability of these fixed promises that induced the making of the Loan in the first place, enabling Plaintiff to purchase the shopping center that it now seeks to retain possession of without repaying the Loan that enabled the purchase.

Plaintiff stopped making payments on the Loan in April 2020, claiming financial hardship because one of its commercial tenants stopped paying rent. The Lender did not commence foreclosure until September 27, 2020, when it caused a Notice of Default to be recorded in the official records of San Luis Obispo County in California, where the property is located, pursuant to applicable law. Plaintiff is now more than ten months and over $831,000 in arrears. It asks this Court to prevent Lender from exercising its contractual remedies for default—and to permit Plaintiff to retain the loan proceeds without paying a dime of principal or interest for nearly a year—because, supposedly, COVID-19 restrictions have made it "impossible" to pay what is owed under the parties' agreement.

Even if a New York Court could enjoin foreclosure on an out-of-state property—and it cannot—no Court in this State has accepted such an argument, and for good reason. It is black letter law that a contract cannot be evaded simply because a party has encountered financial

difficulty or economic hardship. And a judge-created *ad hoc* "my tenant did not pay me, so I don't have to pay you" moratorium would rupture the orderly workings of the entire commercial finance system. It would further usurp the role of the legislature and executive and yield inconsistent and unfair results. That would also likely make it more difficult and expensive for future borrowers to obtain commercial mortgages.

There is no basis in law or fact for Plaintiff to obtain the relief it seeks. And issuing such an order would be contrary to the public interest. The application should be denied.

FACTS

I. The Loan Agreement

Plaintiff acquired a small shopping center located at 6917 El Camino Real, Atascadero, California 93422 on or about December 31, 2015 for a purchase price of $13 million. (Affidavit of Jeffrey T. Nelson ("Nelson Aff.") ¶¶ 2, 6.) Plaintiff financed the acquisition of the shopping center through a $7.8 million loan (the "Loan") from Jeffries Loancore LLC ("Jeffries" or "Original Lender"). (*Id.* ¶ 8.) The Loan was securitized and is now held by Lender. CWCAM serves as special servicer for the Loan.

Plaintiff's obligations under the Loan are governed by a loan agreement between Plaintiff and the Original Lender dated December 31, 2015 (the "Loan Agreement"). (Ex. A; Nelson Aff. ¶ 7.) The Loan Agreement requires Plaintiff to make monthly debt service payments of $41,013.52 on the sixth of each month between February 6, 2016 and January 6, 2026, and to make monthly payments into reserve accounts that will be disbursed back to Plaintiff if certain conditions are met. (Ex. A §§ 2.2(b), 3.4, 3.5.) The payment obligations are unconditional. In particular, payment is due even if the Plaintiff's tenants fail to pay rent. (*Id.* §§ 2.2(b) (requiring fixed monthly payments); 3.11(b) (requiring Plaintiff to make payments each month regardless of whether or not the Deposit Account contains enough deposited Rents to cover the payments).

As security for repayment of (and not in substitution of Plaintiff's unconditional promise to pay) the Loan, Plaintiff "pledge[d] and assign[ed] to Lender, and grant[ed] to Lender a security interest in, all [Plaintiff's] right, title and interest in and to all Rents" from Plaintiff's commercial tenants. (*Id.* § 3.10.) Tenants accordingly are required to pay Rents directly into a Clearing Account, from which the Rents are transferred either to Lender or to Plaintiff depending on whether a Cash Management Period had been declared. (*Id.* § 3.1.) A Cash Management Period, in which Rents are swept into an account controlled by Lender, can be declared when Plaintiff defaults or upon the occurrence of other events which increase the risk profile of the Loan. (*Id.* § 1.1 ("Cash Management Period" and "Lease Sweep Period" definitions).)

An Event of Default occurs when "any portion of the Debt is not paid when due." (*Id.* § 8.1(a)). Upon the occurrence of an Event of Default for non-payment "and at any time and from time to time thereafter, in addition to any other rights or remedies available to it pursuant to the Loan Documents or at law or in equity, Lender may take such action, without notice or demand . . . that Lender deems advisable to protect and enforce its rights against [Plaintiff] and in and to the Property," including foreclosing on the subject property (*Id.* §§ 8.2.1, 8.2.2.)

The Loan Agreement does not contain any force majeure provision. Nor does it contain any provision relieving Plaintiff of its unconditional payment obligations because of nonpayment by a tenant (whether defined as a Major Tenant under the Loan Agreement or otherwise). Far from it, the Loan Agreement makes clear that Plaintiff must make all payments even if there are not enough Rents to cover such payments. (*Id.* § 3.11(b).)

II. Choice of Law

The Loan Agreement contains an express New York choice-of-law provision that states, in relevant part: "In all respects, including matters of construction, validity, and performance, this Agreement and the obligations arising hereunder shall be governed by . . .the laws of the

State of New York applicable to contracts made and performed in such state (without regard to principles of conflict of laws)." (*Id.* § 10.6(a).) The choice-of-law agreement contains a narrow carveout for the "provisions for the creation, perfection, and enforcement of the liens created pursuant to the Loan Documents" which "shall be governed by . . . the law of the state . . . in which the property is located." (*Id.*) That makes sense, since New York law unequivocally is that New York courts cannot enjoin a foreclosure sale of real property in another state. *Clark Tower, LLC v. Wells Fargo Bank, N.A.*, 178 A.D.3d 547, 547-548 (1st Dept. 2019).

But the Loan Agreement makes clear that this foreign state law, which applies only to the creation and enforcement of the liens, does *not* apply to the "construction, validity and enforceability of all Loan Documents and the Debt." For these matters, "the law of the State of New York shall govern." (Ex. A § 10.6(a).)

III. Plaintiff's Default

Plaintiff has not made any payments due under the Loan Agreement since April 6, 2020. (Affidavit of Kendall Green ("Green Aff.") ¶ 10.) Each missed payment constitutes a separate and independent Event of Default, entitling Original Lender or its assignee to foreclose upon the shopping center. (Ex. A §§ 8.1(a), 8.2.1).

On or about October 27, 2020, Defendant LRES Corp. (the "Trustee") recorded a Notice of Default and Election to Sell Under Deed of Trust, Assignment of Leases and Rents and Security Agreement, which provides that Plaintiff may cure the default and avoid the sale by paying $551,704.63 in arrears as of October 6, 2020. (Nelson Aff. ¶ 18; Ex. F.) Plaintiff owes as of January 6, 2021 $831,440.43 in past due payments and other amounts due and owing under the Loan Documents. (Green Aff. ¶ 11.) The Trustee has not yet recorded a Notice of Sale and cannot undertake the foreclosure sale of the property until it does so. After a Notice of Sale is recorded and published, Plaintiff will still have the opportunity to reinstate the Loan pursuant to

applicable law as well as at least three weeks to pay off the outstanding balance of the Loan and avoid foreclosure. (Nelson Aff. Ex. F.)

ARGUMENT

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing." *1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011). "Pursuant to CPLR § 6301, a court may grant a temporary restraining order and preliminary injunction upon a showing of: (1) a likelihood of success on the merits, (2) irreparable injury, and (3) a balancing of the equities in the movant's favor." *Madison Hospitality Mgmt. LLC v. Acacia Network Housing, Inc.*, No. 656639/2020, 2020 WL 7692215, at *1 (N.Y. Sup. Ct. N.Y. Cty. Dec. 23, 2020). Plaintiff must demonstrate its entitlement to a preliminary injunction "by clear and convincing evidence." *Gilliland v. Acquafredda Enters., LLC*, 92 A.D.3d 19, 24 (1st Dep't 2011).

I. Venue Is Improper, and New York Law Applies in Any Event

"The Courts of one State may not decide issues directly affecting title to real property located in another State." *Clark Tower, LLC*, 178 A.D.3d at 547. Thus, a New York court may not enjoin an out-of-state foreclosure sale. *Id.* at 547–48 (noting that the court identified "no authority allowing an out-of-state foreclosure sale to be enjoined"); *see also Fielding v. Drew*, 94 A.D. 2d 687, 687 (1st Dep't 1983) (reversing order enjoining foreclosure action pending in Maryland). This is consistent with CPLR § 507, which limits venue in any "action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" to the county in which the property is located. The subject property here is found in San Luis Obispo County, California, which is where Plaintiff's action should have been filed. *See* Cal. Code Civ. Proc. § 392(a) (requiring an action concerning real property to be filed in the county where the property is located); *Cannon v. Aurora Bank*, 2012 WL 12882879, at *3 (C.D.

Cal. May 8, 2012) (holding that California Code of Civil Procedure § 392 applies to actions to enjoin foreclosure of real property).

In any event, Plaintiff improperly relies upon California substantive law despite the Loan Agreement's clear and unambiguous choice-of-law provision. (Fiveson Aff. ¶ 13.) The Loan Agreement makes clear that the "in all respects, including matters of construction, validity, and performance," the Agreement is governed by New York law. (Ex. A § 10.6(a).) The Loan Agreement then carves out a narrow exception which applies the law of the state in which the subject property is located *only* to those provisions concerning "the creation, perfection, and enforcement of the liens" and makes clear that, even in such a proceeding, "the law of the state of New York shall govern the construction, validity, and enforceability of all loan documents and the debt." (*Id.*) The Deed of Trust contains a similar choice-of-law provision, which states that "with respect to matters relating to the creation, perfection, and *procedures relating to the enforcement* of this Deed of Trust," the law of the state in which the subject property is located applies, but that New York law governs all other "matters relating to this Deed of Trust and the other Loan Documents and all of the indebtedness or obligations arising hereunder or thereunder." (Ex. B § 26 (emphasis added).) [1]

In other words, under both the Loan Agreement and the Deed of Trust, California law governs the procedure by which the Lender or Trustee may foreclose on the subject property (which is located in California), while New York law governs the construction of the Loan Agreement and the parties' respective obligations under such agreement, including Plaintiff's payment obligations.[2] Whether or not Plaintiff defaulted under the Loan Agreement is plainly a

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[2] Any argument by Plaintiff that New York's commercial mortgage foreclosure moratorium entitles Plaintiff to the relief it seeks would be unavailing. New York cannot prohibit foreclosure of mortgages for properties located in other states, see *Clark Tower, LLC, supra*, 178 A.D.3d at

question of New York law, and not California law, because it does not concern the procedural requirements for foreclosure.

II. Plaintiff Cannot Demonstrate a Likelihood of Success on the Merits Because Impossibility Cannot Rest on Mere Financial Difficulty

Plaintiff seeks a declaration that its conceded failure to make any monthly debt service payments for the past nine months does not breach the Loan Agreement and that its performance be excused under the related doctrines of impossibility, impracticability, frustration of purpose, and force majeure. (Complaint ¶¶ 48–54.) But none of these permits a commercial counterparty to cease performance merely because economic conditions have temporarily shifted and performance has become more expensive or less profitable. Plaintiff is not likely to succeed on the merits of its claim.

A. Impossibility

"Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." *Kel Kim Corp. v. Central Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987). Where "difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282 (1968); *see also Valenti v. Going Grain, Inc.*, 159 A.D.3d 645, 645 (1st Dep't 2018) ("[P]erformance of a contract is not excused where impossibility is occasioned by financial difficulty or economic hardship."); *Warner v. Kaplan*, 71 A.D.3d 1, 5 (1st Dep't 2009)

547–48, and the commencement of an action for foreclosure in California would be governed by California law under the Loan Agreement, for the reasons noted above.

("[W]here performance is possible, albeit unprofitable, the legal excuse of impossibility is not available.").

Plaintiff argues that state and local COVID-19 restrictions prevented the shopping center's largest tenant, Galaxy Theaters ("Galaxy") from operating; that this in turn prevented Galaxy from paying rent; and that this rent shortfall has rendered Plaintiff's performance under the Loan Agreement "impossible." (Fiveson Aff. ¶¶ 35, 40.) Attempting to argue under New York law, Plaintiff claims that it is "objectively impossible for the Lender to be paid from the Galaxy's rentals due to the prohibition on the continued business at the Premises." (*Id.* ¶ 40.) But Plaintiff is not limited to paying Lender from the Galaxy rentals. Plaintiff is unconditionally obligated to pay Lender, whether the source is Galaxy rentals or other assets that Plaintiff has (or can raise, for example, through a capital call).

Plaintiff's argument thus entirely misunderstands the common law doctrine—it is not the performance of Plaintiff's *tenants* that is relevant here, but rather the performance of *Plaintiff* under the Loan Agreement. There is no reason to question Plaintiff's assertion that Galaxy's nonpayment of rent caused Plaintiff financial difficulty. But, without more, this entirely foreseeable occurrence cannot excuse Plaintiff's performance under the Loan Agreement, any more than a laid-off worker can avoid paying his home mortgage indefinitely because he is no longer earning an income. *See, e.g., Lantino v. Clay LLC*, 2020 WL 2239957, at *3 (S.D.N.Y. May 8, 2020) (financial hardship caused by COVID-19-related shutdown orders did not excuse fitness center operators from making payments owed under settlement agreement); *Ebert v. Holiday Inn*, 2014 WL 349640, at *7 (S.D.N.Y. Jan. 31, 2014) (foreclosure of Holiday Inn property did not excuse former owner from its obligations under employment agreements with Holiday Inn employees, even though the lack of income made it difficult to employ and pay the

employees); *Maesa LLC v. TPR Holdings, LLC*, No. 652685/2020, 2020 WL 5499231, at *1 (N.Y. Sup. Ct. N.Y. Cty. Sept. 9, 2020) (granting summary judgment against defendant for nonpayment because defendant submitted "no evidence or explanation of how performance was [made] impossible [by] . . . rather than being difficult due to the pandemic"); *see also Atl. Garage Mgmt. LLC v. Boerum Commercial LLC*, No. 512250/2020, 2020 WL 7350542, at *2 (N.Y. Sup. Ct. Kings Cty. Dec. 2, 2020) (finding that garage operator failed to show that performance under lease was impossible despite COVID-related financial hardship, but issuing *Yellowstone* injunction because of a factual dispute over the amount of rent arrears).

Plaintiff cannot show that the subject matter of the contract was destroyed; indeed, the shopping center located at the subject property remains open. Nelson Aff. ¶ 15; *CAB Bedford LLC v. Equinox Bedford Ave., Inc.*, No. 652535/2020, 2020 WL 7629593, at *3 (N.Y. Sup. Ct. N.Y. Cty. Dec. 22, 2020) (temporary closure of gym due to COVID restrictions did not excuse nonpayment of rent because the "subject matter of the lease was not destroyed"). Nor can it claim that its performance was made impossible by law. First of all, no law prohibits Plaintiff from tendering the Debt payments it owes!

Indeed, although Galaxy was temporarily prevented from opening, Galaxy is not the counterparty here, and Plaintiff cites no law or statute that prohibited Plaintiff from possessing the subject property or making payments under the Loan Agreement. *Greater N.Y. Automobile Dealers Ass'n, Inc. v. City Spec, LLC*, 70 Misc. 3d 1209(A), 2020 WL 8173082 (Table), at *10 (N.Y. Civ. Ct. Dec. 29, 2020) (holding that even if COVID shutdown order temporarily prevented tenant from occupying rental premises, the order did not render either party's performance under the lease impossible because it did not prevent landlord from rendering the premises for tenant's use or prevent tenant from paying landlord). In any case, California has

permitted movie theaters to operate outdoors in all counties and indoors in Tier 2, 3, and 4 counties since August 28, 2020. *See* https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf. San Luis Obispo County was in Tier 2 for at least some portion of the period since August 28. https://www.emergencyslo.org/en/covid-status.aspx. Thus, even if the possibility of Galaxy's performance were at issue here—and it is not—Galaxy could "lawfully operate its business notwithstanding . . . certain restrictions" and thus could not "claim that performance [was] objectively impossible." *Vector Media, LLC v. Go N.Y. Tours, Inc.*, No. 653808/2019, 2020 WL 5992328, at *1 (N.Y. Sup. Ct. Oct. 7, 2020). Even so, whether Galaxy could lawfully operate its business or not, Plaintiff lawfully could pay its Debt.

Finally, Plaintiff cannot show that the nonpayment of rent by a tenant at some point during the 10-year life of the Loan was unforeseeable at the time of contracting. Although the specific "circumstances" of the COVID shutdown may have been "unforeseen by the parties" at the time of contracting, "financial disadvantage to either of the contracting parties was not only foreseeable but was contemplated by the contract." *See General Elec. Co. v. Metals Resources Grp. Ltd.*, 293 A.D.2d 417, 418 (1st Dep't 2002); *see also UBS Real Estate Sec. Inc. v. Gramercy Park Land LLC*, No. 103763/2009, 2009 WL 10729957, at *10 (N.Y. Sup. Ct. N.Y. Cty. Dec. 11, 2009) (holding that defendant's performance was not impossible because defendant's "inability to procure a construction financing loan" during the financial crisis "could have been foreseen and guarded against" at the time of contracting, and that even if the financial crisis were unforeseeable, mere "financial or economic hardship . . . is not a basis to excuse performance.")

B. Impracticability

It is highly doubtful that the doctrine of impracticability, as opposed to impossibility, exists in New York. New York courts have rejected the doctrine as overly expansive: "If that argument prevailed, 'every debtor in a country suffering economic distress could avoid its debts.'" *Urban Archeology Ltd. v. 207 E. 57th St. LLC*, 34 Misc. 3d 1222(A), 2009 WL 8572326, at *5 (N.Y. Sup. Ct. N.Y. Cty. Sept. 10, 2009) (quoting *Bank of N.Y. v. Tri Polyta Fin. B.V.*, 2003 WL 1960587, at *5 (S.D.N.Y. Apr. 25, 2003)); *see also UBS*, 2009 WL 10729957, at *6. In any case, the doctrine of temporary commercial impracticability is limited to "situations involving extreme and unforeseen financial hardships in the context of very complex financial transactions," and does not apply to an inability to make loan payments caused by an economic downturn that, "while perhaps unprecedented, was not completely unforeseeable." *Midfirst Bank v. 159 W. 24th St. LLC*, No. 107873/09, 2010 WL 2639221 (N.Y. Sup. Ct. N.Y. Cty. June 21, 2010). Plaintiff's performance under the Loan Agreement is not excused by temporary commercial impracticability.

C. Frustration of Purpose

"The doctrine of frustration of purpose requires that 'the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.'" *CAB Bedford LLC*, 2020 WL 7629593, at *2 (quoting *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (1st Dep't 2004)). "[F]or a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis of the underlying contract; partial frustration such as a diminution in business, where a tenant could continue to use the premises for an intended purpose, is insufficient to establish the defense as a matter of law." *Dr. Smood N.Y. LLC v. Orchard Houston, LLC*, No. 652812/2020, 2020 WL

6526996, at *3 (N.Y. Sup. Ct. N.Y. Cty. Nov. 2, 2020) (quoting *Robitzek Inv. Co. v. Colonial Beacon Oil Co.*, 265 A.D. 749, 753 (1st Dep't 1943)).

It is not enough for Plaintiff to claim that "its revenue has been reduced by COVID-19." *Vector Media, LLC*, 2020 WL 5992328, at *1. As Justice Bluth put it colorfully in a recent decision finding that COVID regulations did not frustrate the purpose of a long-term gym lease, "[t]hat plaintiff's preferred use of the premises might not be profitable for a few months is not a basis for this Court to intervene and rip up the contract." *Its Soho LLC v. 598 Broadway Realty Assocs., Inc.*, No. 653648/2020, 2020 WL 7629588, at *3 (N.Y. Sup. Ct. N.Y. Cty. Dec. 22, 2020); *see also Greater N.Y. Automobile Dealers Ass'n*, 2020 WL 8173082 at *9 ("[A] four-month closure out of a five-year lease did not frustrate the overall purpose of the lease."). Nor is it sufficient for a party to claim that, in hindsight, it would not have entered into the agreement had it known about the changed circumstance. *CAB Bedford*, 2020 WL 7629593, at *3; *see also PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, (1st Dep't 2011) (holding that New Orleans company's promises to make bonus payments were not excused by subsequent economic dislocation caused by Hurricane Katrina).

Plaintiff did not enter into the Loan Agreement on the assumption that all of its tenants were guaranteed to timely pay rent each month for the duration of the ten-year mortgage—both a broad economic downturn and tenant-specific business failure were foreseeable at the time of contracting (and, arguably, likely to occur over a ten-year period). And of course, Defendants did not guarantee to Plaintiff that its ownership of the shopping center would be profitable, or that Plaintiff's rental income would always exceed its payment obligations under the mortgage. Plaintiff undertook the Loan Agreement aware of the risks inherent in commercial property ownership; the materialization of such a risk certainly cannot be said to entirely frustrate the

purpose of the mortgage loan (any more than a homeowner can evade his mortgage obligations just because the roof needs to be replaced). And, Defendants did not provide that the otherwise unconditional obligation to repay the Loan (the amount of which was loaned in full on time as required by Original Lender) would be excused if the source of revenues that Plaintiff hoped to receive so that it would not have to repay the Loan from its own financial resources did not materialize precisely as Plaintiff envisioned.[3]

D. Force Majeure

The Loan Agreement does not contain a force majeure clause. And New York has no common law doctrine of force majeure. *General Elec. Co.*, 293 A.D.2d at 418; *UBS Real Estate Securities*, 2009 WL 10729957, at *5; *see also Its Soho LLC*, 2020 WL 7629588, at *1. Plaintiff cannot rely upon force majeure to excuse its performance under the Loan Agreement.

III. Plaintiff Cannot Show Irreparable Harm

Plaintiff entirely fails to identify any irreparable harm that would be caused by the foreclosure sale of the property and the termination of Plaintiff's loan. The sole harm identified by Plaintiff is the loss of its investment. (Fiveson Aff. ¶ 45.) When "plaintiffs' interest in the real estate is commercial, and the harm they fear is the loss of their investment, as opposed to loss of their home or a unique piece of property in which they have an unquantifiable interest, they can be compensated by damages and therefore cannot demonstrate irreparable harm." *Broadway 500 W. Monroe Mezz II LLC v. Transwestern Mezz. Realty Partners II, LLC*, 80

[3] Indeed, Plaintiff has to concede that, if it would not have agreed to repay the Loan had it known that, in an unforeseen pandemic in the future, one of the leases would generate less income than Plaintiff had projected, then Plaintiff must also acknowledge that the Loan would not have been made and Plaintiff would not have acquired the encumbered property. But, instead, Plaintiff is asking this Court to let it keep the encumbered property, keep the proceeds of the Loan and not make it pay the Loan payments when due, so that all of the risk of economic loss is shifted from Plaintiff to Defendants. Plaintiff cites no source of law for this preposterous assertion of entitlement to economic inversion of epic proportion.

A.D.3d 483, 484 (1st Dep't 2011) (cleaned up); *see also Lombard v. Station Square Inn Apartments Corp.*, 94 A.D.3d 717, 721 (2d Dep't 2012) ("Since the plaintiff does not reside in any of the subject apartments, and his interest in the apartments is commercial, involving only the potential loss of his investment . . . he failed to show that he would sustain irreparable harm absent a preliminary injunction."); *Atlas MF Mezzanine Borrower, LLC v. Macquarie Tex. Loan Holder, LLC*, 2017 WL 729128, at *3–4 (S.D.N.Y. Feb. 23, 2017); *SK Greenwich LLC v. W-D Grp. (2006) LP*, 2010 WL 4140445, at *3 (S.D.N.Y. Oct. 21, 2010). Indeed, the sole case relied upon by Plaintiff involved a movant who was facing the loss of his home, not a mere investor. *See Hairman v. Jhawarer*, 122 A.D.3d 570, 571 (2d Dep't 2014) ("The plaintiff alleges that he has resided at the property since the date of purchase[.]"). Because Plaintiff's interest in the shopping center is solely commercial, the foreclosure sale of the shopping center will not cause Plaintiff irreparable harm.

And in any case Plaintiff has failed to show that the any such supposed harm is imminent or immediate. The Trustee has not yet recorded a Notice of Sale, and even after that occurs Plaintiff will have the opportunity to reinstate the Loan under applicable law and will have at least three weeks in which to avoid foreclosure by paying off the Loan. There is simply no emergency which justifies the expedited procedure of CPLR 6313(a). *See, e.g.*, *Tesone v. Hoffman*, 84 A.D.3d 1219, 1221 (2d Dep't 2011); *Foster v. Svenson*, No. 651826/2013, 2013 WL 3989038, at *1 (N.Y. Sup. Ct. N.Y. Cty. Aug. 5, 2013).

IV. The Balance of the Equities Favors Defendants

See footnote 3, *supra*. Plaintiff acquired the Property. To do so, it borrowed from Original Lender. Original Lender made the Loan. Plaintiff asks this Court to allow Plaintiff to: (a) keep the property; (b) keep the Loan proceeds; (c) excuse repayment of the Loan and (d)

impose the entire risk of loss on Defendants, even though the Loan Documents unconditionally obligate Plaintiff to pay. The balance of the equities is decidedly one-sided.

V. Plaintiff Should Be Required to Post a Significant Bond

As shown above, no temporary restraining order should issue. But if the Court were to issue one, an appropriate bond would have to be set.

A court has the power to require an undertaking in granting a temporary restraining order. Section 6313(c) of the CPLR provides: "Prior to the granting of a temporary restraining order the court may, in its discretion, require the plaintiff to give an undertaking in an amount to be fixed by the court, containing terms similar to those set forth in subdivision (b) of rule 6312, and subject to the exception set forth therein." A temporary restraining order or preliminary injunction prohibiting the exercise of foreclosure rights should not be issued absent a suitable undertaking. *E. Fordham DE LLC v. U.S. Bank Nat'l Ass'n*, 170 A.D.3d 545, 545 (1st Dep't 2019).

Defendants reserve the right to address the appropriate amount of such undertaking should this Court issue a temporary restraining order. But of course, this Court should not do so for the reasons stated above.

Dated: New York, NY.
February 3, 2021

Respectfully submitted,

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