

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,

SUPPLEMENTAL AFFIRMATION

Index No. 650645/2021

Defendants.

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DAVID K. FIVESON, an attorney admitted to practice before the Courts of the State of New York affirms under the penalties of perjury as follows:

1. I am a member of the Bar of this Court and principal of the firm Butler, Fitzgerald, Fiveson & McCarthy, A Professional Corporation, attorneys for plaintiff, Cinema Square, LLC (“Plaintiff”). I have knowledge of the facts stated herein based on my review of the annexed exhibits, my firm’s file for this matter and based on the annexed affidavit of Jeffrey C. Nelson, Esq. stated on personal knowledge. I therefore believe the facts stated herein to be true and correct.

2. Defendants cite Clark Tower, LLC v. Wells Fargo Bank, N.A., 178 A.D.3d 547 (1st Dep’t 2019) for the proposition that New York courts cannot enjoin a foreclosure sale in another state. However, a review of the lower court decision in Clark Tower, (2019 WL 1877203) shows that the Court was faced with a “permissive” as opposed to a

mandatory and exclusive consent to New York's jurisdiction. Here, **the forum selection of New York courts is mandatory and exclusive.** As set forth in the Loan Agreement: "Any legal suit, action or proceeding against lender or borrower arising out of or relating to this agreement **shall** be instituted in any Federal or State Court in New York County, New York and borrower waives any objection which it may now or hereafter have to the laying of venue of any such suit, action or proceeding . . ." (See, Exhibit A, pages 75-76).

3. It is submitted that this distinction is critical and renders Clark Tower inapposite. Namely, Plaintiff had no choice but to commence this action in New York. To accept Defendants' position that a New York Court cannot enjoin the California foreclosure sale with this mandatory and exclusive forum selection clause would essentially leave Plaintiff without recourse. Under such a scenario, Defendants could seek to sell the property even in the absence of a default and Plaintiff would have no court in which to prevent such unauthorized sale. In short, if this Court cannot restrain Defendants, no court can regardless of the circumstances.

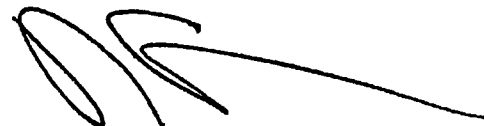
4. In Gibson v. American Loan & T. Co., 12 N.Y.S. 444 (1st Dep't 1890), the Court found that it had authority to restrain a trustee from proceeding with a foreclosure in another state. It would appear the determining factor is whether the Court has jurisdiction over the parties. Cf., NYS Chamber of Commerce v. Wall Street Buildings, Ltd., 138 Misc2d 35 (Sup. Ct. NY County 1987), where a California court could not enjoin a mortgage foreclosure in New York **because the parties were not under the jurisdiction of California.**

5. In Carpenter v. Black Hawk gold Min. Co., 65 N.Y. 43 (1875), the Court of Appeals authorized a New York trial and foreclosure sale of property located in Colorado because the proceeding in New York was authorized in the mortgage. "[T]he parties to a

mortgage must have the power to agree upon the manner in which the property may be sold to realize the security”.

6. In Mead v. Brockner, 82 A.D. 480 (2d Dept. 1903), the New York court had jurisdiction to compel the conveyance of land in another state by a party who holds title and over whom it had jurisdiction.

Dated: New York, New York
February 4, 2021



DAVID K. FIVESON