

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,

REPLY 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. I submit this affirmation in reply to the opposition submitted by Defendants and in further support of Plaintiff's motion to restrain Defendants from proceeding with a foreclosure and/or sale of the Premises.

Choice Of Forum And Choice Of Law

3. Defendants argument that the choice of forum clause is anything but mandatory ignores that clear language in the Loan Agreement. While Defendants point to language in the Loan Agreement that allows the Lender to choose any court to foreclose its lien, Plaintiff is not provided the same choice. In short, the choice of forum clause is mandatory for Plaintiff. Plaintiff had to bring this action in New York according to the Loan Agreement.

4. Defendants, likewise, contort the choice of law provisions of the Loan Agreement to best suit its purposes, applying New York Law and/or California Law when most beneficial. It is submitted that to the extent California Law applies to the enforcement of the lien (which the Loan Agreement states), then California Law should apply in defense to such enforcement. To that extent, and as set forth in Plaintiff's initial moving papers, California Civil Code § 1511 is implicated. That statute excuses performance **"When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse."**

5. Here, Galaxy theatre has been prevented, by operation of law, from operating.¹ To Your Honor's point, raised at the argument for the TRO, we agree that had Galaxy Theatre's revenues simply fallen off for lack of business, then Plaintiff has no case. A slumping business is clearly foreseeable. However, a National Pandemic forcing the closure of movie theaters as a matter of law, as is the case here, is not foreseeable. That is the distinguishing factor.

¹ While Defendants cite various articles about the theater being allowed to open more than the three days Galaxy actually did open, the fact remains, Galaxy theater has, for all intents and purposes, been shut down since March, 2020. Mr. Nelson verified Galaxy was required to install air filtration systems as a condition to opening after September 22, 2020. Once installed, the County was reclassified to a Tier 1 shutdown. The fact remains Galaxy only opened (at 25% capacity) for three days in November 2020, and has been essentially shut down since March 2020. At the risk of sounding snide, selling discounted popcorn can hardly be said to be an operational theater.

6. It is submitted that based upon California Civil Code § 1511, Plaintiff's performance is excused, at least temporarily. Again, Plaintiff is not arguing that it is not in default. Plaintiff is not arguing that it will not have to pay arrears in the basic loan payments. Rather, Plaintiff simply seeks to stay any foreclosure sale until such time that Galaxy Theatre can legally operate once again.

Defendants Do Not Refute The Essential Purpose Of The Loan Was The Rental Stream

7. Defendants have not presented any evidence based on personal knowledge to refute the fact that the entire purpose of the Loan Agreement between the signatory parties to the agreement, was premised on Galaxy Theatre being operational and paying rents. No affidavit from Defendants has been presented to refute that fact. Notably, no affidavit from the originating lender Jeffries LoanCore, LLC is submitted.

8. Likewise, Defendants present no affidavit from anyone with firsthand knowledge to refute the following facts: (i) the all rents were paid directly to a Lock-Box controlled by Defendants; (ii) Defendants would first pay themselves directly from that Lock-Box prior to remitting any remainder to Plaintiff; (iii) Defendants never ran a credit check of Plaintiff or its members prior to making the loan; and (iv) Defendants looked solely to the rental stream for payment of the loan.

9. It is submitted that Defendants present no evidence from anyone with firsthand knowledge to refute the fact that the rental stream (largely from Galaxy) was the essential purpose of the purchase and Loan Agreement.

10. Unrefuted is the fact that Plaintiff's never would have purchased the Premises or entered into the Loan Agreement without the Galaxy rental stream based on it being operational. From its inception, the loan was to be transferred and sold to a CMBS pool. In order to sell the loan to a CMBS pool the stream of revenue had to have a margin sufficiently

above the mortgage payments. The loan would never had existed without the rents paid by Galaxy. That was the entire purpose of the Loan Agreement, now frustrated by California Law imposed by reason of an unforeseen pandemic.

Galaxy Has Generated No Revenue Since The Lock-Down Orders

11. Defendants argue that Tier 2 restrictions were in place from September 22, 2020 through November 16, 2020 and it was Galaxy's "choice" to only open for three days during that time. As set forth in the Reply Affidavit of Jeffrey Nelson it cost Galaxy money to reopen for the three days that it did.

12. According to Galaxy's CEO, whom Mr. Nelson spoke to, Galaxy's financials reveal that in 2019 ticket sales averaged \$153,188 per month. In 2020, starting in April, box office revenue was \$0. When Galaxy opened for the three days in November (13-15) before it was shuttered again, box office revenue was \$1,426. The film rental costs exceeded that amount.

13. Mr. Nelson also verifies that Galaxy had to install air filtration systems under government shutdown conditions in order to lawfully open at 25% capacity under the Tier 2 restrictions. Mr. Nelson verifies that once the system was installed (under Covid-19 conditions), the County went back to a Tier 1 shutdown shortly thereafter.

Equity Favors Plaintiff And A Stay Of The Foreclosure Sale

14. To the extent that this case is one in equity, the equities clearly favor Plaintiff. Through no fault of its own, Plaintiffs faces the loss of its entire investment due to an unforeseen government lockdown. Plaintiff is not seeking to nullify its obligations under the Loan Agreement and acknowledges that it will have to pay arrears incurred. Plaintiff simply seeks some time to allow the theaters to open again so the purpose of the Loan Agreement can be accomplished.

15. Moreover, as set forth in the reply affidavit of Jefferey Nelson, Federal Legislation passed on December 27, 2020 provides grants for “Shuttered Venues” for past expenses, including rent from March 2020 through December 2021 (Grants for Shuttered Venue Operators, Section 24 “Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues”). Galaxy has advised that it will apply for this grant. Galaxy, which had more than 90% financial impairment as the result of the pandemic will be given priority.

16. Defendants mention the Note was not submitted with the moving papers. Paragraph three of the Note (Exhibit A to Kendall Green supplemental affidavit) incorporates all the terms of the Loan Agreement which also governs the Note in case of any inconsistency. The omission of the Note from the moving papers is of no consequence.

Dated: New York, New York
February 10, 2021



DAVID K. FIVESON