

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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CINEMA SQUARE, LLC,

Plaintiff,

- v -

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, CW CAPITAL ASSET MANAGEMENT, LLC AS SPECIAL SERVICER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

DECISION + ORDER ON MOTION

Cinema Square, LLC's (Cinema) motion for a preliminary injunction is denied because the risk that the tenant could not pay its rent is the borrower's risk, not the lender's. A state law that temporarily effects the tenant's ability and obligation to pay rent does not change this express risk allocation. The loan documents make clear that the lender did not agree to limit its rights to pursue its remedies if the borrower's ability to pay its mortgage is adversely affected due to the failure of a tenant to pay its rent. Although the loan agreement contains representations as to then-current status of the shopping center's leases, including the Galaxy theater, that have been affected by the California stay at home order, those representations all run from the borrower to the lender (NYSCEF Doc. No. 33, § 4, p. 28

["Borrower represents and warrants to Lender..."]). In addition, the loan documents do not confer upon New York courts a contractual right which the New York courts do not otherwise have to enjoin an out-of-state foreclosure sale (*Clark Tower, LLC v. Wells Fargo Bank, N.A.*, 178 AD3d 547 [2019]).

The agreement between the parties is a loan transaction where the lender's return was defined in the loan documents and the borrower's recourse was limited except for environmental and for bad boy carve-outs (NYSCEF Doc. No. 7). The loan documents afford the lender the right to foreclose in the event of a borrower default (*id.*). This is exactly what has occurred here. The borrower's argument that there has been a frustration of purpose of the loan fails. Although it is true that the borrower represented that the lease was in full force and effect at the closing of the loan transaction and the lender required a rent roll to see if at closing there was sufficient rent to justify the loan, the lender never agreed that the obligation to pay the loan was contingent upon the tenant under the lease paying rent or that the lender's remedies would be limited in the event that the tenant's ability to pay rent may be effected by a state law. In addition, the borrower is obligated under the loan documents to preserve the collateral (*id.*). This obligation may very well include enforcing the tenant's obligation to pay rent to the extent that it is possible under Governor Newsom's executive order. The borrower does not submit as part of its moving papers the lease with Galaxy theater, which may very well include a provision which obligates the tenant to pay rent when there has been a state law which temporarily effects its ability to pay rent. (*see e.g., Victoria Secret, LLC v Herald Square Owner LLC*, 70 Misc 3d 1206[A], 2021 WL 69146 [Sup Ct NY Cnty January 7, 2021]).

It is of no moment that Governor Newsom's executive order may have made it unlawful to operate movie theaters except at reduced capacity or not at all for some period of time (Nelson Aff.,

NYSCEF Doc. No. 46, ¶ 3; *see also* Local Emergency Order of San Louis Obispo County, NYSCEF Doc. No. 10)). The result here is also not changed by the fact that the Governor’s executive order affords relief to tenants in their obligation to pay rent. As discussed above, the loan documents make clear that this is the borrower’s risk, not the lender’s. Moreover, unlike certain state laws enacted during the COVID-19 pandemic, including Governor Cuomo’s executive order in New York (NY Exec Orders 202.8, 202.81) which expressly prevents commercial foreclosures, Governor Newsom’s executive order N-60-20 and state of emergency proclamation does not currently prevent foreclosures (CA Exec Order N-60-20; NYSCEF Doc. No. 35] – i.e., the temporary California commercial eviction moratorium, in effect from March 16, 2020 to July 31, 2020 has expired. Finally, in any event, as discussed above, this court otherwise lacks the authority to enjoin an out-of-state foreclosure (*Clark Tower, LLC*, 178 AD3d 547).

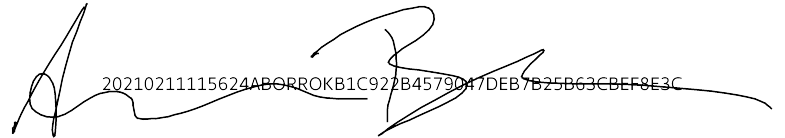
Accordingly, it is

ORDERED that the motion is denied; and its further

ORDERED that the defendants are directed to serve a responsive pleading within twenty days of the decision and order.

2/11/2021

DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:


CASE DISPOSED  
 GRANTED  DENIED  
 SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN


NON-FINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

 OTHER  
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: