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, CWCAPITAL ASSET MANAGEMENT LLC, AND WELLS FARGO BANK, N.A.'S SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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ARGUMENT

Defendants 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") and CWCapital Asset Management LLC ("CWCAM"), together with Wells Fargo Bank, N.A. ("Wells Fargo"; together with Lender and CWCAM, the "Lender Defendants")[1] submit this supplemental memorandum of law in further opposition to Plaintiff Cinema Square, LLC's ("Plaintiff") motion for a temporary restraining order and preliminary injunction and in support of the request of Lender Defendants that the existing TRO dissolve by its terms and not be extended past the hearing on February 11, 2021. Lender Defendants wish to respond to certain points raised during the February 4, 2021 hearing and in the Supplemental Affirmation of David K. Fiveson ("Supp. Fiveson Aff.," Dkt. No. 25) and the Supplemental Affidavit of Jeffrey C. Nelson ("Supp. Nelson Aff.," Dkt. No. 26).

I. Plaintiff Misunderstands the Loan Agreement's Choice-of-Law and Choice-of-Forum Provisions

In the Supplemental Nelson Affidavit and at the hearing, Plaintiff erroneously claimed that that Lender's institution of an action in the Superior Court of the State of California seeking the appointment of a receiver for the encumbered property (the "California Action") constitutes a breach of the Loan Agreement's forum selection clause and an "admission" that California law should apply here. (Supp. Nelson Aff. ¶ 4.) Plaintiff also argued that, notwithstanding a clear

[1] Wells Fargo is identified in the caption incorrectly as "JOHN DOE d/b/a WELLS FARGO COMMERCIAL MORTGAGE SERVICING." The undersigned counsel has been retained to appear on behalf of Wells Fargo in this action in addition to appearing on behalf of Lender and CWCAM. Counsel was confirmed for retention after the Court's issuance of the temporary restraining order ("TRO") on February 4, 2021. Wells Fargo joins in the papers and arguments previously submitted by Lender and CWCAM, will abide by the TRO but respectfully joins with Lender and CWCAM in requesting that the TRO be dissolved at the hearing on February 11, 2021.

mandate from the Appellate Division that New York courts cannot bar the foreclosure of a lien on out-of-state real property, this Court may do so because (a) the forum selection clause in the Loan Agreement is "mandatory and exclusive," and (b) the Court has jurisdiction over the parties. Both of these arguments rest on a misunderstanding of the Loan Agreement and of controlling New York law and an improper meshing of the separate concepts of choice of law and choice of forum.

The Loan Agreement contains a forum selection clause: "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 consents to jurisdiction in such suit. (Ex. A § 10.6(b).) But the forum selection clause is not "mandatory and exclusive," as Plaintiff would have it. It contains an important carve-out: "Notwithstanding the foregoing, Lender shall have the right to institute any legal suit, action or proceeding for the enforcement or foreclosure of any lien on any collateral for the loan in any federal or state court in any jurisdiction(s) that Lender may elect in its sole and absolute discretion[.]" (*Id.*) The plain language of the forum selection clause, read as a whole, does not "manifest an intention to limit jurisdiction to a particular forum," and so it is not mandatory and exclusive. *Brooke Grp. Ltd. v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996). The California Action's institution in California complies with the forum selection clause.

The reason why the California Action does not violate the forum selection clause is easily explained. The Loan Documents (as defined in the Loan Agreement) grant Lender a lien on all Rents and state that any Rents received by Borrower "shall be deemed to be collateral for the Loan. (*Id.* §§ 3.1(i), 3.10.) The California Action seeks the appointment of a receiver for the collection of Rents. (Nelson Aff. Ex. A ¶ 25.) It is therefore an action for the "enforcement . . .

of any lien on any collateral for the loan." (Ex. A. § 10.6(b).) It is equally clear that while California law applies to the procedure for the appointment of a receiver, New York law would apply to any dispute that might arise in the California Action regarding Plaintiff's payment obligations under the Loan Agreement or the occurrence of a default. (Ex. A. § 10.6(a).) By commencing an action in California and relying on California procedural law, as required by the Loan Agreement, Lender has not waived the application of New York law to "matters of construction, validity and performance" of the Loan Agreement in this or any other action.

Plaintiff's argument, that this Court should set aside the holding of the Appellate Division in *Clark Tower, LLC v. Wells Fargo Bank, N.A.* that a New York court has no "right to enjoin an out-of-state foreclosure sale" because that case concerned a permissive forum selection clause rather than a mandatory one, is equally without merit. 178 A.D.3d 547, 548 (1st Dep't 2019). The IAS court's decision that it could issue an injunction against an out-of-state foreclosure sale because it had jurisdiction over the parties *rejected* the contention that it mattered whether such jurisdiction arose out of a permissive or mandatory forum selection clause and was, in any event, reversed on appeal. *Clark Tower, LLC v. Wells Fargo Bank*, 2019 WL 1877203, at *2 (N.Y. Sup. Ct. N.Y. Cty. Apr. 26. 2019)*, rev'd*, 178 A.D.3d 547 (1st Dep't 2019). Controlling law is that, whether or not a New York court had jurisdiction over the parties, it "may not decide issues directly affecting title to real property located in another State" and cannot "enjoin an out-of-state foreclosure sale."[2] *Clark Tower, LLC*, 178 A.D.3d at 547–48.

[2] None of the cases cited by Plaintiff supports their position. The closest, *Gibson v. Am. Loan & Tr. Co.*, 12 N.Y.S. 444 (1st Dep't 1890), concerned an action by the bondholders of a Nebraska utility company seeking to stay the company's fraudulent conveyance of all of its assets to a new company (stealing them out from under the bondholders) while they sought the appointment of a new trustee to control the Nebraska utility and thwart the fraudulent conveyance. Although the injunction that issued technically stayed a collusive foreclosure (the means of the fraudulent conveyance), the effect on real property was incidental—this was an action by bondholders to

In any case, Plaintiff's argument rests on an incorrect premise—that the forum selection clause here is "mandatory and excusive." But, the clause is neither. It permits the institution of an action for the enforcement or foreclosure of any lien in any jurisdiction (particularly, of course, the one where the property that is the subject of the lien is located!). Thus, Plaintiff remains free to seek an injunction in the California Action currently pending between the parties. Plaintiff's contention that "if this Court cannot restrain Defendants, no court can regardless of the circumstances" is categorically false. (Supp. Fiveson Aff. ¶ 3.)

II. The Purpose of the Loan Transaction Was for a Loan to Be Made—and Repaid

Plaintiff has distorted the purpose of the transaction evidenced by the Loan Documents. Simply put, the purpose of the transaction evidenced by the Loan Documents was for Original Lender to make a loan—and for Plaintiff, unconditionally, to pay it back!

This is clear both from the unambiguous language of the Loan Documents and, perhaps more starkly, from the key Loan Document conspicuous by its omission from Plaintiff's filings—the governing promissory note (the "Note"). *See* Affidavit of Kendall Green sworn to February 8, 2021 (Supp. Green Aff."), Ex. A.

Review of the Note makes it clear why perhaps Plaintiff chose to omit attaching it to Plaintiff's moving papers. In the first paragraph of the Note, Plaintiff "hereby ***unconditionally promises to pay*** to the order of" the Original Lender the principal sum of $7.8 million, all accrued interest and all other charges under the Loan Agreement (emphasis added). Simply put, as the Court's questions on February 4 reflected the Court's understanding, the transaction at

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protect corporate assets against waste. *Gibson*, 12 N.Y.S. at 447 ("The action is against the trust company, which is a corporation formed under the laws of this state, and it is therefore directly subject to the jurisdiction and authority of this court. Indeed, there would seem to be no other authority provided for the removal of the trustee beyond that which the courts of this state are authorized to exercise.").

issue is a loan. Original Lender advanced the Loan to Plaintiff. Plaintiff promised to pay it back. The remaining provisions of the Loan Documents are designed to secure Plaintiff's compliance with that promise to repay and to protect Lender's security in the event that Plaintiff fails to meet its unconditional obligation to repay and the Lender resorts to its security.

The representations and warranties in the Loan Agreement further this end. It is true, as Plaintiff argued at the February 4, 2021 hearing, that the Loan Agreement contains representations as to the then-current status of the shopping center's leases, including the Galaxy theater. However, those representations all run ***from*** Plaintiff ***to*** Lender. *See* Loan Agreement (Nelson Aff., Ex. A), Section 4, p. 28 ("Borrower represents and warrants to Lender . . . ."). Plaintiff's argument that its own representation and warranty regarding the Galaxy lease made at the origination of the Loan should excuse its unconditional promise to pay would in essence rewrite the Loan Documents. The result would be to convert Plaintiff's own representation and warranty running in favor of the Lender to a condition to Plaintiff's obligations under the Loan Documents running in Plaintiff's own favor. That would be, at best, nonsensical.

In addition to the representations and warranties covering circumstances existing as of the time of the making of the Loan, the Loan Agreement also addresses ongoing operation, management, and financial condition of the shopping center. This is primarily through covenants contained in Section 5 of the Loan Agreement. And, like the representations and warranties in Section 4, the covenants in Section 5 run in one direction - ***from*** Plaintiff ***to*** Lender. *See, e.g.*, Loan Agreement (Nelson Aff., Ex. A), Section 5, p. 37: ("Until the end of the Term, Borrower hereby covenants and agrees with the Lender that: . . . .").

Tellingly, one of those covenants, at Section 5.10.4(i) of the Loan Agreement, allocates the risk of non-performance by Plaintiff of one of its covenants—to Plaintiff. That covenant

provides: "Borrower shall observe and perform the material obligations upon the lessor under the Leases and shall not do or permit anything to impair the value of the Leases as a security for the Debt; . . . ." By arguing that the Galaxy lease income has slowed, thereby undermining that lease as security for the Debt, Plaintiff is admitting that it has not upheld its covenant not to "permit anything to impair the value of the Leases as security for the Debt."

This covenant compels the conclusion that it is Plaintiff to whom the Loan Documents allocate the risk of non-realization of anticipated rental income from the Galaxy Lease. It is Plaintiff who has an unconditional obligation to pay the Note, regardless of whether the Plaintiff has fulfilled its covenant not to permit anything to impair the value of that Lease as security for the Debt. Enjoining Lender from foreclosing because Plaintiff failed to uphold its own covenant and keep its unconditional promise would invert the basic structure of the Loan Documents, which unambiguously impose the risk of non-payment of the Galaxy Lease on Plaintiff.

Perhaps, in receiving the Loan and using the proceeds to purchase the shopping center, Plaintiff expected that rent and other revenue generation would materialize so that Plaintiff could meet its unconditional obligation to pay the Loan without having to resort to financial sources outside the revenue generation of the shopping center. However, that does not mean that Plaintiff has the right to withhold from Lender the repayment of the Loan simply because Plaintiff's expectations in purchasing the shopping center (a transaction separate from Plaintiff borrowing the Loan) have not been met.

III. Plaintiff Has Misrepresented California COVID Restrictions Affecting Movie Theaters

In the Supplemental Nelson Affidavit, Plaintiff concedes, as it must, that Galaxy has been permitted to operate under California law since Plaintiff defaulted. (Supp. Nelson Aff. ¶ 3.) Accordingly, a number of statements in the Fiveson Affidavit were false when made. *See, e.g.*,

Fiveson Aff. ¶ 5 ("As of March 19, 2020, Galaxy has been prohibited by California law from operating its theaters."); ¶ 34 ("It is now unlawful for Galaxy to operate movie theaters in California by the operation of law since March 19, 2020[.]"). But even Plaintiff's correction is misleading. Mr. Nelson acknowledges that "Galaxy Theatre was opened for three days from November 13–15" but then claims that "Galaxy has been *allowed to operate*, at limited capacity, for *only* three days." (Nelson Aff. ¶ 3 (emphasis added).) While Galaxy apparently chose to operate for three days, it was *allowed* to operate between September 22, 2020 (when San Luis Obispo County was categorized as Tier 2) and November 16, 2020 (when San Luis Obispo County was re-categorized as Tier 1). https://www.emergencyslo.org/en/covid-status.aspx. A September 23, 2020 article in the San Luis Obispo Tribune reported that "[l]ocal movie theaters . . . are allowed to open indoors with a maximum capacity of 25% [or] 100 people, whichever is fewer" and that movie theaters in Arroyo Grande and Paso Robles were reopening. Sarah Linn, *Have you missed the movies? SLO County theaters are reopening after COVID closures*, The Tribune, Sept. 23, 2020, https://www.sanluisobispo.com/entertainment/movies-news-reviews/article245947440.html. The article includes an interview with Loren Kaplan, described as the general manager of Galaxy Theatres' Colony Square location in Atascadero, who told the newspaper that Galaxy was "prepared" to reopen when it "makes (financial) sense" to do so, and that Galaxy was receiving "a lot of requests for private screenings," an option that Galaxy may offer in the future and was available at other Galaxy locations. *Id.* Whether or not this Court considers the Galaxy interview, it is clear that Galaxy was lawfully able to open its doors between September 22, 2020 and November 16, 2020, and chose not to do so. Mr. Nelson's testimony is therefore false.

In any event, Mr. Nelson's testimony is also irrelevant. For the entire duration of the pandemic Galaxy has remained free to pay Plaintiff rent. Indeed, Plaintiff does not claim that payment of rent by Galaxy would be illegal!

Galaxy has been free to use its premises to offer goods or services to customers other than screening movies indoors—even today, when movie theaters in Tier 1 counties remain closed to indoor viewing, Galaxy is selling popcorn and gift cards to paying customers. https://www.galaxytheatres.com/movie/Atascadero/Purchase-Giant-Popcorn-and-Get-25-Gift-Card. Galaxy Theatres, LLC, the owner and operator of Galaxy, has also remained free to pay Galaxy's rent from the proceeds of the other theaters that it operates in Arizona, Nevada, Texas, and Washington (and are obviously not subject to the California restrictions cited by Plaintiff). https://www.galaxytheatres.com/movie-theater/atascadero/about.[3] And California has elected not to absolve movie theaters from paying rent or to prohibit commercial evictions or foreclosures.[4]

There is simply no basis for Plaintiff to argue that Galaxy's performance under its lease has been rendered illegal or impossible, let alone thereby rendering Plaintiff's performance under the Loan Agreement illegal or impossible. Plaintiff can and must make its unconditional contractually required Loan payments; the Loan Documents allocate risk of non-realization of revenue to Plaintiff; and, thus, if Plaintiff does not meet its unconditional obligation to pay, there

[3] If Plaintiff claims that the owner and operator of Galaxy is not obligated to use those other revenue streams to pay rent at this shopping center, then it is Plaintiff who, in negotiating a lease with Galaxy that did not so provide, has run afoul of its covenant not to permit the Galaxy Lease to be impaired as security for the Debt.

[4] A temporary California statewide commercial eviction moratorium, in effect from March 16, 2020 to July 31, 2020, has expired.

is no basis to restrain Lender from enforcing any and all contractual remedies against Plaintiff in a court of competent jurisdiction.

Dated: New York, NY.
February 8, 2021

Respectfully submitted,

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