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Latest Manhattan Trial Court Decision — Splitting with Other Justices — Throws UCC Mezzanine Foreclosures During COVID-19 Pandemic into Doubt.

Citing the COVID-19 pandemic, Manhattan Commercial Division Justice Jennifer Schechter, in Shelbourne BRF LLC, Shelbourne 677 LLC v. SR 677 Bway LLC, enjoined a mezzanine lender from strictly foreclosing on its pledged equity collateral until October 15, 2020.

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Justice Schechter's decision lies in stark contrast to the decisions of Manhattan Justice Frank Nervo in *1248 Assoc Mezz II, LLC v. 12E48 Mezz II LLC* and Manhattan Commercial Division Justice Andrea Masley in *D2 Mark LLC v OREI VI Investments LLC*. In both those cases, the courts concluded that Governor Cuomo's Executive Order placing a moratorium on foreclosures did not apply to UCC foreclosures of mezzanine collateral, *i.e.* UCC sales of a pledged ownership (equity) interest in the borrower/fee owner of the real property. Justices Nervo and Masley confined their analyses to whether the terms of the sale were reasonable, with Justice Nervo determining the proposed sale was commercially reasonable and Justice Masley determining the proposed sale was not commercially reasonable. Justice Masley issued an injunction, ordering the sale could not be held before July 24, leaving the mezzanine lender with the ability to sell the collateral after July 24, while Governor Cuomo's moratorium on mortgage foreclosures was still in place.

By contrast, Justice Schechter held that, though the Governor's Executive Order "by its terms, does not apply [to mezzanine foreclosure sales] the same logic does."

Justice Schechter went on to note that the valuation of mezzanine collateral is based upon the value of the underlying real estate and that "[s]evere turmoil in the real estate market due to the pandemic makes the notion of a sale resulting in payment of fair market value highly uncertain." On this basis, Justice Schechter restrained the sale of the mezzanine collateral until at least October 15, 2020, the first date that mortgage foreclosures may currently be scheduled.

Justice Schechter's decision creates a split of authority among the Manhattan trial courts on the issue whether a mezzanine borrower can restrain a mezzanine foreclosure on the basis of the COVID-19 pandemic and associated emergency orders without any further showing; as opposed to whether the terms, method and manner of a particular sale are commercially reasonable in light of the COVID-19 pandemic. Should the gubernatorial moratorium on mortgage foreclosures be extended beyond October 15, 2020, we can expect additional litigation on the issue of whether mezzanine foreclosures are *per se* prohibited during the moratorium period.

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Please contact an attorney in MSF's Commercial Litigation Group if you need assistance with respect to this information.



Stephen B. Meister
Founder | Partner, Real Estate & Litigation
212.655.3551 | sbm@msf-law.com



Howard S. Koh
Partner | Commercial Litigation
212.655.3587 | hsk@msf-law.com

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