

## Alert | Litigation



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### **New York Court: UCC Article 9 Sales Not Barred by Restrictions on Foreclosures**

In a noteworthy May 18, 2020 decision and order, Justice Frank P. Nervo of the Supreme Court of the State of New York, County of New York held that New York State’s moratorium on mortgage foreclosures did not apply to a mezzanine lender’s (Mezz Lender) non-judicial auction of pledged collateral under Article 9 of the Uniform Commercial Code (UCC). See 1248 ASSOC. MEZZ II LLC v. 12E48 MEZZ II LLC, No. 651812/2020 (NYSECF No. 58, May 18, 2020.) Further, the court vacated a temporary restraining order that halted the auction and the court’s previous determination that Mezz Lender’s request for a preliminary injunction was non-essential because it fell within the moratorium on foreclosures.

Under the UCC, a secured party can take possession of collateral after a debtor’s default and dispose of the collateral to satisfy its claims against the debtor through a non-judicial sale, however, the secured party must proceed in a commercially reasonable manner. Here, a mezzanine borrower (Mezz Borrower) sought to enjoin Mezz Lender from proceeding with a non-judicial auction of pledged assets on two grounds. First, Mezz Borrower argued that the non-judicial sale was unlawful under New York Executive Order 202.8 (EO 202.8), pursuant to which enforcement of any commercial foreclosure was barred. Second, Mezz Borrower alleged that Mezz Lender “rigged” the sale process by failing to provide proper notice, and thus, did not meet the UCC’s requirement for a commercially reasonable sale.

In opposition, Mezz Lender argued that that EO 202.8 did not suspend the UCC and that a non-judicial UCC sale—in contrast to a mortgage foreclosure—did not constitute enforcement of a “foreclosure of real

or commercial property.” Further, Mezz Lender argued it had conducted a commercially reasonable sales process.

Justice Nervo agreed with Mezz Lender, denying Mezz Borrower’s motion for a preliminary injunction, on the grounds that a foreclosure is a “judicial proceeding,” whereas the proposed UCC sale “addresses a disposition of collateral pursuant to Article 9 of the UCC, a non-judicial proceeding.” Justice Nervo noted that EO 202.8 “addresses enforcement of a judicially ordered foreclosure,” in contrast to the “sale of pledged interests” resulting from “the parties’ agreement, as guided by the UCC.” With regard to Borrower’s allegations that the sale was conducted in a commercially unreasonable manner, Justice Nervo found such damages “merely speculative” and such damages could “be properly remedied subsequent to sale.”

## Implications

Justice Nervo’s decision and order is the first written opinion in New York State directly addressing whether a non-judicial sale of pledged assets under the UCC is barred under the New York Executive Orders barring residential and commercial foreclosures through at least June 20, 2020 (and possibly through August 20, 2020, depending on circumstances). While this is a trial court decision, and thus not binding precedent, as the first written opinion on the issue, it will likely have persuasive authority should the issue arise again.

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