Real Estate Industry Alerts Tracker - August 14, 2020 Issue

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New York Extends Foreclosure Moratorium

On August 5, 2020, Governor Cuomo issued Executive Order 202.55, which, among other things, extends the ban on certain foreclosure proceedings. In particular, Executive Order 202.55 extends prior executive orders (Executive Order 202.8, as extended and amended by 202.28, as extended by Executive Order 202.48) that initially provided for a moratorium on all residential and commercial mortgage foreclosure proceedings, then extended the moratorium but modified the blanket ban to only apply to commercial borrowers (prior executive orders providing protections against residential foreclosures have been superseded by legislative action), and only to those commercial borrowers that are "eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic." Under Executive Order 202.55, the moratorium on foreclosures still only applies to commercial borrowers that are eligible for unemployment benefits or otherwise facing financial hardship due to the pandemic, but it extends such protections through September 4, 2020 (the protections under the most recent prior order (Executive Order 202.48) were set to expire on August 19, 2020).

As we reported last week, the July 24 administrative order issued by the New York Courts lifting the ban on most foreclosure proceedings carved out the foreclosure protections afforded to the aforementioned eligible commercial borrowers under the Governor's Executive Orders 202.28 and 202.48. With the issuance of Executive Order 202.55, the courts will continue to stay the ban on foreclosure proceeding against such commercial borrowers, but now, through September 4, 2020 rather than lifting such protections on August 19, 2020.

A copy of Executive Order 202.55 may be found here.

New York Courts Issue Revised Procedure for Addressing Eviction Proceedings

This week, Chief Administrative Judge Marks issued revised procedures for addressing residential and commercial eviction proceedings in response to Governor Cuomo's latest Executive Order (202.55).

Effective August 13, 2020:

- Commercial and residential evictions commenced prior to March 17, 2020, may be resumed, subject to the previous moratoriums issued by Governor Cuomo. Eviction proceeding commenced on or after March 17, 2020 continue to be suspended (residential, commercial, nonpayment or holdover).
- The stay of commencement and enforcement of commercial evictions (including those tenants "facing financial hardship" due to the pandemic remains in effect until August 19, 2020. Commercial evictions may proceed in the ordinary course, subject to Governor Cuomo's executive orders 202.8, 202.14, 202.28, 202.38, 202.48, and 202.55.
- For any residential evictions commenced before March 17, 2020 (including matters in which judgements and warrants of eviction were issued and delivered to enforcement agents, but not executed), a status or settlement conference must be held. No residential eviction may take place prior to October 1, 2020 (or a later date if there is a future state or federal moratorium on evictions).

A copy of the revised memorandum may be found here.

D.C. Court Rejects Coverage for COVID-19 Losses Absent Direct Physical Loss

Like many other restaurant owners across the county, the owners/operators of several restaurants in the District of Columbia suffered significant revenue losses as a result of closures ordered by Mayor Bowser's state of emergency declaration in response to the pandemic. The restaurant owners filed claims with their insurance company, seeking coverage for their losses under the "Ultrapack Plus Commercial Property Coverage" policy they had purchased. The insurance company denied the claims, the owners filed suit and both sides moved for summary judgment. At issue was whether the closure of the restaurants due to Mayor's executive orders constituted a "direct physical loss" under the insurance policy. The owners used the dictionary definitions of "direct," "physical" and "loss" in support of their argument that they are entitled to coverage under the policy.

First, they claimed that any losses were "direct" because they were the direct result of the Mayor's orders without any intervening action. The court rejected the argument, finding that "[s]tanding alone and absent intervening actions by individuals and businesses, the orders did not affect any direct changes to the properties."

The owners next argued that their losses were "physical" because the COVID-19 virus is "material" and "tangible" and "because the harm they experienced was a result of the Mayor's orders rather than "some abstract mental phenomenon such as irrational fear causing diners to refrain from eating out." The court also rejected this argument, noting that the owner failed to demonstrate that the coronavirus was actually present at any of their properties when they were forced to close. The court also noted that the Mayor's executive orders "did not have any effect on the material or tangible structure of the insured properties."

Lastly, the owners argued that "loss" and "damage" are distinct terms. They claimed that "damage" would require physical damage to the property, whereas "loss" incorporates "loss of use," which does not require physical damage. The court rejected this claim, noting that any "loss of use" must be caused by a "direct physical intrusion on to the property." The court found that Mayor Bowser's order did not constitute a direct physical intrusion, and granted summary judgment in favor of the insurance company.

A copy of the order may be found here.

New York City Comptroller Proposes Small Business Tax Breaks

Last week, New York City Comptroller Scott Stringer proposed several measures to aid small businesses during the pandemic. Among other things, the proposed measures include refundable business income tax credits for retailers, restaurants and personal service businesses with annual revenue below $5 million. The tax credits would be used to allow such small businesses to recoup money spent to adapt their spaces as a result of the pandemic (i.e., purchasing safety equipment and reconfiguring space for outdoor dining). Comptroller Stringer also proposed the elimination of New York City's 25% tax on liquor licenses, as well as tax incentives for retailers in high vacancy corridors.

Additional information may be found here.

Heard Around the Industry

Mall Operator Considers Turning Sears and J.C. Penney Stores Into Amazon Fulfillment Centers: The largest mall owner in the U.S. has been in talks with Amazon to convert some of the its anchor department stores into Amazon distribution hubs. Discussions have focused on converting current or former J.C. Penney and Sears stores, as both chains filed for Chapter 11 bankruptcy protection and have been closing dozens of stores nationwide. The conversion of big box spaces to Amazon distribution centers is likely to impact smaller tenants that count on spillover traffic from department stores and may trigger co-tenancy clauses under their leases.

Additional information may be found here.

Non-Bank and Other Alternative Lending Collapses During Second Quarter: According to a new lender survey by CBRE, the vast majority of commercial real estate ("CRE") loan originations during the second quarter were originated by banks. Banks closed over 70% of CRE originations during the second quarter as compared with the second quarter of 2019 when banks closed about 35% of loan originations. On the other hand, commercial mortgaged-backed securities, which accounted for 12% of originations during the second quarter of last year, only accounted for 1% of CRE originations during the second quarter of 2020. Other non-bank lenders, such as REITS, finance companies and debt funds (but not life insurance companies) also saw originations drop in the second quarter as compared to same period last year. On a whole, non-bank lenders, which accounted for about 25% of loan originations in the second quarter of last year, only accounted for 5% of CRE loan originations during the second quarter of 2020. The survey also indicated that total loan volume also dropped, as the CBRE Lending Momentum Index fell nearly 30% quarter over quarter and was down 20% as compared with last year.

Additional information may be found here and here.

CMBS Delinquencies Rates Rise in July for the Fourth Consecutive Month: A new report by Fitch Ratings reveals that the delinquency rate for the CMBS market rose to 4.98% in July, the highest it has been since April, 2014, when the delinquency rate was 5.13%. The delinquency rate in

July was 139 basis points higher than the June delinquency rate and represents the fourth consecutive month in which CMBS delinquencies rose. The increase resulted from $8.4 billion in new delinquencies, which outpaced $1.7 billion in resolutions. According to Fitch Ratings, the velocity of loan transfers to special servicing remains high and the volume of specially serviced loans is expected to continue to increase through the remainder of the summer.

The following are the delinquency rate changes from June to July, by property type:

- Retail: 11.58% (up from 7.86%)

  The increase is attributable to $4 billion in new delinquencies, which outpaced $714 million in resolutions.

  Note, however, that the regional mall delinquency rate jumped by 959 basis points from June to July (10.31% to 19.90%) due to 32 regional malls with $3.1 billion in loans becoming newly delinquent.

- Office: no change (1.92%)
- Hotel: 16.64% (up from 11.49%)
- Mixed Use: 5.86% (up from 4.17%)
- Industrial: 0.54% (down from 0.67%)
- Multifamily: 0.65% (up from 0.59%)

  Note, the student housing delinquency rate dropped from 5.47% in June to 4.87% in July, due to the resolution of two large student loan deals (one for $29.7 million and another for $16.9 million).

- Other: 1.70% (up from 0.93%)

Additional information may be found here and here.

Hotel Industry Suffers Low Demand and Burns Thorough Cash Reserves as Hotels Gradually Re-Open: The hotel industry, which is among the hardest hit real estate sectors as a result of the pandemic, had started to experience increased demand in last several months. However, a surge in COVID-19 cases in July caused the demand for hotels to flatten once again. Hotel REITs and brand giants have reported losses and monthly cash burns as they attempt to weather the storm. The largest lodging REIT reported a net loss of $365 million in the second quarter, with a monthly cash burn of $100 million to $110 million expected through the second half of 2020. Another major hotel REIT reported a second quarter net loss of $131 million with a month cash burn of between $19 million and $24 million. As the country continues to try to control the pandemic, hotels do not expect to see any substantial improvement in business or other travel for the remainder of the year. While hotels have started to open, REITs have reported that many of their hotels have remained closed, particularly larger hotels that are conference-oriented.

Additional information may be found here.