Real Estate Industry Alerts Tracker - December 4, 2020 Issue

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Federal Court Upholds NYC Law Rendering Personal Guaranties in Commercial Leases Unenforceable

On November 25, 2020, the United States District Court for the Southern District of New York upheld the “Personal Liability Provisions in Commercial Leases” of Section 22-1005 of the New York City Administrative Code (the “Guaranty Law”). The Guaranty Law, which was enacted on May 26, 2020, renders personal guaranties contained in commercial leases unenforceable if the tenant has been impacted by the pandemic. It only applies when the guarantor is a natural person (not an entity) and only covers pandemic-related lease defaults occurring between March, 2020 and March, 2021. The Guaranty Law provides that the landlord may never collect from the personal guarantor for payments due for that time period (even after the pandemic ends). The owners of small commercial and residential buildings had challenged the law, claiming that it violates the Contract Clause of the United States Constitution. The court noted that, when determining whether a law violates the Contract Clause, one must determine: (a) whether the contractual impairment is substantial; (b) whether the law serves a legitimate public purpose and if such purpose has been demonstrated; and (c) whether the means to accomplish that public purpose were reasonable and necessary. The court found that the Guaranty Law imposed a substantial impairment to the owners’ contracts, as such guaranties are an essential inducement for landlords to enter into the leases. It further found that, even though the contractual impairment was limited (it applies only to certain guarantors and for a limited time period), the impairment is permanent since the landlords were prohibited from enforcing the guaranty as to those payments even after the pandemic ends. As to the second test, however, the court found that New York City passed the Guaranty Law to benefit the public interest and not itself or any special interest. Lastly, as to whether or not the Guaranty Law was reasonable and necessary to advance the public interest, the court noted that the Second Circuit is extremely deferential to policy seeking to advance a legitimate public interest. On that basis, the court determined that the Guaranty Law is reasonable and necessary and upheld the law.

LIBOR May Get An 18-Month Reprieve

Global banking regulators originally targeted December, 2021 for the end of the London Interbank Offered Rate ("LIBOR"). However, due to continuing challenges within the financial industry related to the transition away from LIBOR, it may remain as a benchmark interest rate until June 30, 2023. The ICE Benchmark Administration, a wholly owned subsidiary of the Intercontinental Exchange ("ICE"), indicated earlier this week that it would consult with market participants about its intention to continue to publish all but two maturities of U.S. dollar LIBOR until June 30, 2023. Currently, there are seven LIBOR maturities: overnight, one-week, one-month, two-month, three-month, six-month, and 12-month. ICE intends to cease publication of the least commonly used benchmarks (the one-week and two-month benchmarks) after December 31, 2021, but continue the others until June 30, 2023. ICE said it still plans to cease other currencies' LIBOR publications at the end of 2021, namely the British Pound, the Euro, Swiss Franc and Japanese Yen. U.S. banking regulators published a joint statement earlier this week encouraging lenders to stop using LIBOR in new contracts "as soon as practicable" starting at the end of 2021. The banking regulators expressed their concern that continuing to underwrite contracts with the LIBOR benchmark after 2021 "would create safety and soundness risks." However, they acknowledged that the continued publication of LIBOR through June 30, 2023 "would allow most legacy [U.S.] LIBOR contracts to mature before [the benchmark] experiences disruption."

Additional information may be found here.

District of Columbia to Issue Grants to Landlords

On November 30, 2020, Mayor Muriel Bowser announced that the District of Columbia (the "District") will provide $10 million in Housing Stabilization Grants to owners of affordable housing and small rental properties whose tenants have been unable to pay rent during the pandemic. Under the program, the District will provide grants of up to $2,000 per unit and cover 80% of the rent arrears if the landlord forgives the other 20% The program covers rent accrued from April 1, 2020 through November 30, 2020. The grant program will be administered by the D.C. Housing Finance Agency ("HFA") and the Department of Housing and Community Development ("HCD"). HFA will administer grants for income-restricted affordable housing properties that receive local or federal funds while HCD will administer grants for smaller landlords with 20 units or fewer. Grant applications are being accepted until December 10, 2020.

Additional information may be found here and here.

CMBS Volume Hits 8-Year Low

Kroll Bond Rating Agency ("KBRA") issued its 2021 CMBS Outlook covering the year-to-date KBRA-rated CMBS trends and it forecasted lending activity for 2021. CMBS volume for the year 2020 was originally forecasted to be $95 billion, but was adjusted downward to $53-$55 billion due to the devastating impact of the pandemic. This represents an 8-year low for CMBS originations. All major property sectors experienced year-over-year declines, with hotel properties experiencing the largest decline (70.9%). Across the board, commercial and multifamily mortgage loan originations were 47% lower as of third quarter this year as compared to the same period last year. This includes CMBS originations as well as loan originations from commercial banks, life insurance companies, Fannie Mae, and Freddie Mac. KBRA's latest analysis projects that CMBS loans for 2021 will increase slightly to $60 billion, but loan volume will remain linked to GDP growth, low interest rates, and effective

vaccine distribution. In its report, KBRA predicts continued demand for multifamily assets, industrial assets (specifically last-mile distribution centers), certain pockets of office assets, and essential retail.

Additional information may be found here and here.

Florida Adopts the Uniform Commercial Real Estate Receivership Act

Several months ago, Florida joined the states of Arizona, Maryland, Michigan, North Carolina, Nevada, Oregon, Tennessee, and Utah in adopting the Uniform Commercial Real Estate Receivership Act (the “UCRERA”). Prior to Florida’s adoption of the UCRERA, lenders seeking to have a receiver appointed in a foreclosure action faced a significant hurdle even when the underlying mortgage loan documents provided the lender with an absolute right to have a receiver appointed. Florida courts were loath to do so absent extraordinary circumstances, as they did not view the appointment of a receiver as a matter of right. Receiverships were viewed as an extreme measure to be granted only when the lender demonstrated that the property was being wasted or there was a serious risk of loss unless a receiver was appointed. With the adoption of the UCRERA, a lender’s ability to obtain a receiver in Florida has increased. Unlike prior precedent, which again required a lender to demonstrate waste or other serious risk of loss, the UCRERA considers waste or significant risk of loss as only one factor to be considered in the determination of whether a rent receiver should be appointed. Florida Statutes Section 714.06(2) also requires the court to consider other relevant facts and circumstances in determining whether or not to appoint a receiver, including:

- Whether in the loan documents, the borrower agreed to the appointment of a receiver on default;
- Whether the borrower agreed, after default and in a signed record, to the appointment of a receiver;
- Whether the property and any other collateral held by the lender is insufficient to satisfy the secured obligation;
- Whether the borrower failed to turn over to the lender proceeds or rents that the lender was entitled to collect; and
- Whether the holder of a subordinate lien obtained appointment of a receiver for the property.

A copy of the statute may be found here.