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| <b>Clark Tower, LLC v Wells Fargo Bank, N.A.</b>                                                                                                                                                                               |
| 2019 NY Slip Op 31158(U)                                                                                                                                                                                                       |
| April 25, 2019                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 651319/2019                                                                                                                                                                                                     |
| Judge: Marcy Friedman                                                                                                                                                                                                          |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

|                   |                              |
|-------------------|------------------------------|
| -----X            | INDEX NO. <u>651319/2019</u> |
| CLARK TOWER, LLC, | MOTION DATE _____            |
| Plaintiff,        | MOTION SEQ. NO. <u>001</u>   |

- v -

WELLS FARGO BANK, N.A. AS TRUSTEE FOR THE  
REGISTERED HOLDERS OF J.P. MORGAN CHASE  
COMMERCIAL MORTGAGE SECURITIES TRUST 2007-  
CIBC20, COMMERCIAL MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2007-CIBC20, C-III ASSET  
MANAGEMENT LLC, MIDLAND LOAN SERVICES, INC.,  
AXONIC CAPITAL LLC,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3-26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 57, 58, 59, 60, 61, 62, 63, 64  
were read on this motion for PRELIMINARY INJUNCTION

In this action, plaintiff, Clark Tower, LLC (Clark), seeks a preliminary injunction restraining defendants from foreclosing, in a Tennessee nonjudicial foreclosure proceeding, on Clark Tower (the property), a building owned by plaintiff and located in Memphis, Tennessee. Defendant Wells Fargo Bank, N.A. (Wells Fargo) is the Trustee for a commercial mortgage-backed securities Trust known as the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Trust 2007-CIBC20, Commercial Mortgage Pass-Through Certificates Series 2007-CIBC20 (the Trust). Wells Fargo, as Trustee for the Trust, is the holder of the mortgage at issue. Wells Fargo and the Trust are collectively referred to as the Holder. Defendant C-III Asset Management LLC (C-III) is the special servicer authorized to act on behalf of the Holder. According to the complaint, defendant Midland Loan Services, Inc. (Midland) is the master servicer for the loan, and defendant Axonic Capital LLC (Axonic) is an

investment advisor and was directing certificateholder for investors in a certain note. (Compl. ¶¶ 7, 8.)<sup>1</sup>

The parties agree that Tennessee law applies on both the standard for granting a preliminary injunction and on the grounds on which a nonjudicial foreclosure may be enjoined. Under Tennessee law, the “following factors generally must be considered by the trial court when deciding whether to grant a preliminary injunction: [¶] (1) the threat of irreparable harm to the plaintiff if the injunction is not granted; [¶] (2) the balance between this harm and the injury that granting the injunction would inflict on defendant; [¶] (3) the probability that plaintiff will succeed on the merits; [¶] and (4) the public interest.” (Moody v Hutchinson, 247 SW3d 187, 199-200 [Tenn Ct App 2007], appeal denied Mar. 3, 2008.)

As a threshold matter, the court holds that it has jurisdiction to enjoin the Tennessee foreclosure proceeding. There is longstanding authority that a court ordinarily lacks subject matter jurisdiction to decide issues which “affect the title” to real property located in another state. (Johnson v Dunbar, \_\_\_\_\_ Misc 2d \_\_\_\_\_, 114 NYS2d 845, 849 [Sup Ct, Kings County 1952], affd 282 AD 270 [2d Dept 1953], affd no opinion 306 NY 697 [1954]; Posner v Handelsman, 179 AD2d 723, 723 [2d Dept 1992].) Here, however, the parties expressly provided, in the Loan Modification Agreement that is the basis for the foreclosure proceeding, for the courts of the State of New York to exercise jurisdiction “as to any claims or disputes between Obligor [Clark

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<sup>1</sup> The Trust, C-III, and Midland are represented by the same counsel. (See Apr. 3, 2019 Oral Argument Tr., at 3 [4/3/19 Tr.].) These defendants have submitted opposition papers to Clark’s motion for a preliminary injunction. The memoranda of law submitted by these defendants will be referred to as the Trust Memos. The roles of the Trust and C-III, as discussed above, are acknowledged by these defendants. (Trust Memo. In Opp., at 1.) Wells Fargo is represented by separate counsel. (See Mar. 7, 2019 Oral Argument Tr., at 3.) Wells Fargo, as Trustee, claims that it has no involvement in the foreclosure, that it granted a power of attorney to C-III to commence the foreclosure, and that it “defers to C-III’s position in connection with” Clark’s motion for a preliminary injunction. (Trustee Memo. In Opp., at 1-2.) Axonic is also represented by separate counsel. (4/3/19 Tr., at 3.) Axonic appeared at oral argument on the motion on March 21, 2019 and April 3, 2019 but has not submitted opposition papers to Clark’s motion.

Clark seeks the preliminary injunction against all of the named defendants.

Tower, LLC and its individual guarantors] and Holder [Wells Fargo as Trustee for the Trust] pertaining to, or any other matters arising out of or related to, this agreement or any of the loan documents.” (Loan Modification Agreement, made as of July 8, 2015, ¶ 25 [all capital letters in original].) This jurisdictional provision required the Obligors to submit to the jurisdiction of the New York courts for these claims and disputes, and reserved the right to the Holder to take action in another jurisdiction to collect the indebtedness. (*Id.*) As defendants correctly note, the provision is a permissive consent-to-jurisdiction provision, not a mandatory and exclusive forum selection clause. (Trust Memo. In Opp., at 12-13.) Defendants fail, however, to cite any authority that in the face of a contractual provision which expressly confers jurisdiction over disputes arising out of or related to the loan, a New York court may not enjoin an out-of-state foreclosure proceeding pending resolution of such disputes.<sup>2</sup>

The court further holds that Clark meets its burden of showing entitlement to a preliminary injunction under Tennessee law. Tennessee Code Annotated § 29–23–202, which applies to nonjudicial foreclosure proceedings under a trust deed or mortgage, provides: “The party applying for relief in such case shall distinctly state how, when, and to whom the debt or any part of the debt secured aforementioned has been paid, or any circumstances of fraud which vitiate the contract.” “In other words, there are only two grounds for a court to enjoin [a nonjudicial foreclosure sale]: repayment of debt owed, or fraud that would vitiate a mortgage contract.” (*Dauenhauer v The Bank of New York Mellon*, 2013 WL 209250, at \*3 [M D Tenn

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<sup>2</sup> The court also rejects defendants’ contention that it should abstain from granting the injunction because there is already pending litigation between the parties in Tennessee. (Trust Memo. In Opp., at 9.) In the Tennessee litigation, the Holder seeks the appointment of a receiver, claiming that events of default have occurred under various loan documents. (See Receivership Complaint, ¶¶ 28-36, NYSCEF Doc. No. 24.) While there are overlapping issues in the Tennessee and the instant actions, the Tennessee action does not seek a determination as to whether the foreclosure may proceed. The Tennessee Court has not yet issued a decision as to whether to appoint a receiver. Moreover, defendants have advised this court that they have sought a continuance of that action. (See NYSCEF Doc. No. 63.)

Jan. 16, 2013], citing Tenn Code Ann § 29-23-202; accord Faria v Wilson & Assocs., PLLC, 2015 WL 291270, at \* 3 [Tenn Ct App Jan. 21, 2015], appeal denied May 15, 2015 [“In Tennessee, proceedings to enjoin foreclosures involving real property are governed by statute”]; Crockett v Mutual of Omaha, 2015 WL 4656533, at \* 4 [Tenn Ct App July 30, 2015]; Johnson v Synovus Bank, 2016 WL 1268311, at \* 3 [W D Tenn Mar. 3, 2016]; Goodman v Nationstar Mgtg., LLC, 2018 WL 3020326, at \* 6 [Tenn Ct App June 18, 2018], appeal denied Oct. 10, 2018.) Other courts have considered five total grounds for granting an injunction: “the mortgage was obtained by fraud; [¶] . . . a total failure of consideration; [¶] . . . the mortgage execution evidences some accident or mistake against which equity gives relief; [¶] . . . the debt secured by the mortgage is paid; or [¶] . . . recovery against the debt secured is barred by a statute of limitations.” (Lebs Partnership, Ltd. v Northwestern Mut. Life Ins. Co., 1992 WL 25001, at \* 2, \* 4 [Tenn Ct App Feb. 14, 1992], appeal denied May 18, 1992, citing Held v Tennessee Tit. Co., 223 Tenn 545, 550-551 [1969]; see also The Learning Connections, Inc. v Kaufman, Englett & Lynd, PLLC, 2012 WL 13103015, at \* 10 [M D Fla Jan. 18, 2012] [recognizing that Tenn Code Ann § 29-23-202 “provides two bases on which a complainant may file an application for an injunction to enjoin a foreclosure sale” but further noting that “[i]n addition to the statutory provisions, Tennessee courts have recognized [five] mandatory grounds for enjoining a foreclosure sale. . . .”].)

Although there is some language in the above-cases which suggests that a foreclosure proceeding may be enjoined only where a debt has been paid in full, the statute by its terms authorizes an application for relief where any part of the debt has been paid. It is undisputed here that Clark is current on its monthly payments. The parties dispute whether defendants breached the Loan Modification Agreement by wrongfully withdrawing their consent to a

refinancing, and whether defendants are barred from seeking to foreclose based on an alleged September 1, 2018 loan maturity default. (Clark Memo. In Supp., at 1-2.)

Clark makes a sufficient showing, for purposes of this motion, of the probability that Clark will succeed on the merits of its claim that Holder violated section 8 of the Loan Modification Agreement because it “unreasonably withheld” its consent to the refinancing. This claim will require resolution of complex factual and legal issues which are not properly determined on this motion. (See Becton v Thomas, 48 F Supp2d 747, 753-754 [W D Tenn 1999] [applying similar federal standards for granting of a preliminary injunction and holding that “it is ordinarily sufficient if the plaintiff has raised questions going to the merits [which are] so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation”] [internal quotation marks omitted and brackets in original].)

In holding that Clark satisfies the merits factor for the granting of a preliminary injunction, the court rejects defendants’ contention that Clark breached section 7 of the Loan Modification Agreement by failing to deposit all rents received into a lockbox. Issues of fact exist as to whether defendants waived strict compliance with this requirement based on the parties’ course of conduct over several years.

Clark satisfies the additional factors for the granting of a preliminary injunction. There is persuasive authority under Tennessee law that foreclosure of a commercial property may constitute irreparable harm. (Impac Ltd., Inc. v Third Natl. Bank, 541 SW2d 139, 140-142 [1976], affd sub nom 432 US 312 [1977]; see also Dauenhauer, 2013 WL 209250, at \* 6 [residential property]; but see Lebs Partnership, Ltd., 1992 WL 25001, at \* 4 [holding that wrongful foreclosure of office land “could have been adequately and fully compensated by money damages”].) Clark Tower, the commercial property at issue in this action, is a prominent

high-rise building, loss of which would result in irreparable harm to its owner. Although defendants may also sustain injury if they are precluded from foreclosing on the property, the potential harm to Clark outweighs that to defendants. Defendants' security interest in the property will not be affected by the injunction, and defendants will be further protected by the conditions on the injunction that the court will impose -- namely, payment of all monthly charges under the Loan Modification Agreement as they come due, deposit of all Rents and Profits into the lockbox pursuant to section 7 of the Loan Modification Agreement, and posting of an undertaking. (See Impac Ltd., Inc. 541 SW2d at 142.)<sup>3</sup> Finally, the court finds that the public interest is not disserved by the granting of a preliminary injunction in this action.

The court has considered, and is unpersuaded by, defendants' remaining objections to the granting of a preliminary injunction. On this record, as defendants have opposed the injunction on substantive and procedural grounds, but have not shown that they do not all have the authority to direct the foreclosure, the injunction will be granted as to all defendants.

It is hereby ORDERED that the motion of plaintiff Clark Tower, LLC for a preliminary injunction is granted to the following extent: Defendant Wells Fargo Bank, N.A. as Trustee for the Registered Holders of J.P. Morgan Chase Commercial Mortgage Securities Trust 2007-CIBC20, defendant C-III Asset Management LLC, defendant Midland Loan Services, Inc., defendant Axonic Capital LLC, and the agents, employees, and all other persons acting under the jurisdiction, supervision, and/or direction of defendants, are enjoined and restrained, pending the hearing of this action, from taking any act to foreclose on Clark Tower, located at 5100 Poplar Avenue, Memphis, Tennessee; and it is further

<sup>3</sup> Similar conditions would be required under New York law. (See CPLR 6312.)

ORDERED that the aforesaid injunction is conditioned upon plaintiff's payment of all monthly charges under the July 8, 2015 Loan Modification Agreement as they come due, and deposit of all Rents and Profits into the lockbox pursuant to section 7 of the Loan Modification Agreement; and it is further

ORDERED that the undertaking is fixed in the sum of \$50,000.00 conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 60 of this Court, Room 248, 60 Centre Street, New York, New York, on May 16, 2019 at 2:30 p.m.

This constitutes the decision and order of the court.

4/25/2019  
DATE

  
MARCY S. FRIEDMAN, J.S.C.

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|-----------------------|-------------------------------------|----------------------------|-------------------------------------|-----------------------|--------------------------|-----------|
| CHECK ONE:            | <input type="checkbox"/>            | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |                          |           |
|                       | <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | DENIED                | <input type="checkbox"/> | OTHER     |
| APPLICATION:          | <input type="checkbox"/>            | SETTLE ORDER               | <input type="checkbox"/>            | SUBMIT ORDER          |                          |           |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |