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## NEW YORK'S FORECLOSURE MORATORIUM GOT YOU STUCK ON THE SIDELINES?

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Since the COVID-19 pandemic began earlier this year, New York's Governor Cuomo has issued a number of Executive Orders limiting the ability of a lender to foreclose its mortgage. By Executive Order 202.64, issued on September 18, 2020, Governor Cuomo extended the prohibition on initiating "a foreclosure of any commercial mortgage for nonpayment of such mortgage" through October 20, 2020. Given recent reports of increased COVID outbreaks in New York City, we expect that Governor Cuomo will extend the foreclosure moratorium beyond October 20, 2020.

New York's foreclosure moratorium has left many lenders and servicers believing (or being counseled to believe) that they must wait until the foreclosure moratorium is lifted before exercising remedies. Borrowers, on the other hand, appear to be emboldened to ignore their obligations under the loan documents because they believe lenders are powerless.

In keeping with its reputation of fighting hard for its clients, Thompson & Knight refused to keep its lending clients sidelined and crafted a strategy that provides our clients with an option to exercise remedies without violating either the foreclosure moratorium or New York's election of remedies. Looking beyond the Mortgage, other documents executed in connection with the loan such as the Loan Agreement, Assignment of Leases and Rents, provide lenders with alternative remedies to pursue, or, an alternative basis to pursue certain remedies. For example, while seeking the appointment of a receiver often accompanies a mortgage foreclosure, the appointment of a receiver is, as a matter of law<sup>1</sup>, a separate and distinct remedy from a mortgage foreclosure that is often consented to by borrower under the Loan Agreement and Assignment of Leases and Rents. In other words, a lender need not assert a cause of action for foreclosure in order to seek the appointment of a receiver.

Thompson & Knight successfully utilized its strategy of seeking a receiver under the Loan Agreement in the matter Wilmington Trust National Association, etc. v. Winta Asset Management LLC, et al., which involved a landmark building in NYC's financial district. In a decision issued on September 28, 2020, Judge John G. Koeltl, District Judge of the United States District Court for the Southern District of New York, granted Thompson & Knight's contested motion on behalf of the lender for the appointment of

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<sup>1</sup> See Fed. R. Civ. P. 66 and NY CPLR Sec. 6401(a) "Appointment and powers of temporary receiver. (a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party."

a receiver. By his decision, Judge Koeltl notes that “the elimination of rental income is a direct impairment of the plaintiff’s collateral that, in part, consists of the rental income from the property. This impairment is above and beyond a mere ‘danger of diminution of the property [.]’”

With the appointment of a receiver, the lender can secure its collateral, including any income generated by the real property, and work to stabilize the property until New York’s foreclosure moratorium expires. At that point, the lender can seek to amend its pleading to include a cause of action for foreclosure under NY’s RPAPL Sec. 1301(3)<sup>2</sup>.

Although Governor Cuomo is likely to extend New York’s foreclosure moratorium beyond October 20, 2020, lenders and servicers need not remain on the sidelines while borrower defaults mount.

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<sup>2</sup> See VNB New York Corp. v. Tibor J. Paskesz, 131 AD3d 1235 (2d Dept. 2015)