

**SUPREME COURT OF THE STATE OF NEW YORK**  
*Appellate Division, Fourth Judicial Department*

609

**CA 23-02045**

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

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DEUTSCHE BANK TRUST COMPANY AMERICAS, AS  
TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS  
FARGO COMMERCIAL MORTGAGE SECURITIES, INC.,  
COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES,  
SERIES 2011-C4, ACTING BY AND THROUGH RIALTO  
CAPITAL ADVISORS, LLC, AS SPECIAL SERVICER  
UNDER THE POOLING AND SERVICING AGREEMENT  
DATED AS OF AUGUST 1, 2011, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC,  
BRETT J. FITZPATRICK, DAVID A. HUCK, LORETTA  
FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF  
J. MICHAEL FITZPATRICK, DECEASED, GERALD E.  
KELLY, DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANT.  
(APPEAL NO. 2.)

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PHILLIPS LYTTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), AND  
HOLLAND & KNIGHT LLP, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

KAVINOKY COOK LLP, BUFFALO (SCOTT C. BECKER OF COUNSEL), FOR  
DEFENDANT-RESPONDENT FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (MATTHEW J. BECK OF  
COUNSEL), FOR DEFENDANT-RESPONDENT BRETT J. FITZPATRICK.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR  
DEFENDANT-RESPONDENT DAVID A. HUCK.

BENGART & DEMARCO, LLP, TONAWANDA, LAW OFFICE OF PHILIP MILCH, AMHERST  
(PHILIP A. MILCH OF COUNSEL), FOR DEFENDANT-RESPONDENT LORETTA  
FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF J. MICHAEL FITZPATRICK,  
DECEASED.

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Appeal from an order of the Supreme Court, Chautauqua County  
(Emilio Colaiacovo, J.), entered November 28, 2023. The order denied  
the motion of plaintiff seeking, inter alia, leave to amend the  
complaint.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by granting the motion insofar as it  
seeks leave to amend the complaint upon condition that plaintiff shall

serve the proposed amended complaint within 30 days of the date of entry of the order of this Court and as modified the order is affirmed without costs.

Same memorandum as in *Deutsche Bank Trust Co. Ams. v Fredonia Temple/Brigham Apts. LLC* ([appeal No. 1] – AD3d – [Nov. 15, 2024] [4th Dept 2024]).

Entered: November 15, 2024

Ann Dillon Flynn  
Clerk of the Court