

Commercial Tenant's Lease – Estoppel and Attornment Considerations

15 Feb 2017

[Roy L. Kaufmann](#)

A standard provision of commercial lease agreements is an agreement by the Tenant to execute estoppel certificates, and to attorn to a lender.

An estoppel certificate is a statement from the tenant to either a lender or a prospective purchaser that clarifies:

- what property is leased (often includes square footage)
- the length term of the lease
- that the lease has or has not been modified
- whether there are any renewal options
- whether there is any first right to purchase, expand the demised premises
- the dollar amount of the rent
- the dollar amount of the security deposit
- whether there has been any subletting or assignment of the lease
- the percentage of real estate taxes or Common Area Maintenance ("CAM") charges paid
- Whether there are any outstanding claims by the Tenant against the Landlord or set offs

When a tenant is asked to sign an estoppel certificate, careful attention must be paid to make sure that the recitals are accurate. Remember, if you fail to assert any claims you might have against the landlord, you will not be able to assert those claims against the addressee of the estoppel certificate.

Unless the lease is recorded, if a lender forecloses on commercial property, the lender usually has the option to terminate the lease and seek possession. Whether the lender decides to do this or not depends on the circumstances. If, for example, the foreclosing lender (or the purchaser at a foreclosure auction) decides that it would be better to empty the building to enhance resale or new construction possibilities, the tenants might be instructed to vacate.

Astute tenants, especially tenants occupying all or much of the building, at the time of initial lease negotiations, would want to include a requirement that the current lender execute a "non-disturbance agreement" saying that, if the lender does foreclose, it will not disturb the tenant's lease, as long as the tenant is in good standing. A tenant would also prefer to record the lease (or a shorter form of the lease called a "Memorandum of Lease") at the D.C. Recorder of Deed or at the Virginia or Maryland courthouses, so that, if the property is refinanced, the new lender's mortgage is subordinate to your recorded lease. This would eliminate the successor lender's ability to terminate the lease.

While a landlord may or may not be willing to secure a non-disturbance agreement from the lender for the benefit of the tenant, landlords usually do not permit recordation of a lease so that future purchases or refinances do not have complications.

A lender's agreement not to disturb may be conditioned upon certain waivers by the tenant. Leases often require the tenants quickly execute all-encompassing "Subordination, Non-Disturbance, and Attornment Agreements ("SNDA"). The terms of the SNDA may not even be set forth in the lease and the document may compromise tenants significantly. As the name of the document implies, the tenant is agreeing that the mortgage being taken out by the landlord is senior

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to the lease (and could result in the lease being terminated in the event of a foreclosure, that the lender agrees not to use its right to terminate the lease under certain scenarios, and that the tenant agrees to accept the lender as the new landlord, in the event of a foreclosure.

At the time of lease negotiations, the tenant might try to seek carve-outs from the SNDA provisions in the lease, such as:

- The foreclosing lender is still responsible for the tenant's security deposit
- The lender's rights to anything other than collection of rent only spring into effect when there is an actual foreclosure
- The lease continues in full force and effect as long as the tenant was current in its rent when the foreclosure occurred
- Set-offs or claims that the tenant may have against the landlord may be preserved against the lender as long as they are reported to the lender, in writing, within 10 days after the tenant receives notification of a foreclosure or other default from the lender
- Landlord defaults must be cured with the same amount of time as tenant defaults

It is likely that landlords will balk at some of the foregoing requests for inclusion in the lease. It depends entirely upon the relative leverage of the landlord and tenant.

SNDA's also usually provide that no lease amendment is binding upon the lender unless the lender has signed off on the amendment. Tenants should insist on that sign-off if there are any changes, extensions or other agreements benefiting the tenants. Similarly, tenants should put the lenders on notice of any defaults by the landlord.

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TAGGED: Attornment Agreements, commercial foreclosures, commercial lease agreements, commercial leasing, Commercial Tenant's Lease, estoppel certificate, Non-Disturbance, Subordination