

Understanding additional agreements in commercial leasing deals

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Tenants may not realize they'll be expected to sign additional documents regarding the lease after the landlord and tenant have signed the lease. However, if the landlord seeks to sell or obtain new financing for the property, the prospective purchaser or the landlord's lender will commonly require that the landlord obtain from the tenant a subordination, nondisturbance and attornment agreement (frequently called an "SNDA") and an estoppel certificate.

The purposes of the SNDA and estoppel certificate are different, but both are important to a purchaser or lender in determining whether to buy the property from the landlord or to loan the landlord funds.

Both are complex documents that will affect the tenant, so the tenant should evaluate each document before signing.

Agreements

The SNDA spells out the future rights and relationship of the lender and the tenant, usually in the case of a foreclosure, and is designed to protect both their interests.

If the landlord defaults on the loan with its lender and there is a foreclosure, the lender protects its collateral (which is the property) while the tenant is able to remain in the space, provided it continues to comply with the lease terms.

The first part of the SNDA requires the subordination by the tenant to the lender. If the tenant is in the building before a loan is in place, a court typically would view the tenant's rights in the property to be prior to, and thus superior to, the lender's rights in the property.

This situation can be problematic if the lender needs to foreclose the property; therefore, the lender will want the tenant to subordinate its interest in the property to the lender's interest.

The second part of the SNDA is the lender providing a nondisturbance agreement for the tenant's benefit. When the tenant is in a subordinate position to the lender, if the

lender forecloses on the property, the lender can terminate the lease and the tenant's ability to remain in the space.

Therefore, to protect itself from this process, the tenant will need the lender to execute a nondisturbance agreement whereby the lender agrees that if there is a foreclosure, provided the tenant isn't in default, the tenant can remain, and the lease won't be terminated.

The third part of the SNDA is referred to as an "attornment," which means that the tenant recognizes a new landlord. When the lender acquires the property, either through the foreclosure process or otherwise, the lender will want the tenant to agree to be bound by the lease and to recognize the lender as the new landlord, so the lender can enforce the lease and require the tenant to continue paying rent.

Estoppel Certificate

An estoppel certificate is a statement signed by the tenant that provides factual statements about the status of the lease. In legal terms, a tenant is estopped from later claiming something different than what the tenant represented in the estoppel certificate.

The landlord may ask the tenant to state whether any defaults exist (by either the landlord or tenant), if there are amendments to the lease, the current rent amount and similar matters.

These certificates are important, as the lender or potential purchaser will want to know that any statements and representations about the landlord's compliance with its obligations to the tenant under the lease are accurate, since the buyer will become (and a lender may become) the new landlord that will be responsible for any continuing obligations of the prior landlord (such as a roof that leaks).

Sometimes the lender may ask for more than just factual information in the estoppel certificate, such as an obligation of the tenant to notify the lender when it provides any notices to the landlord. The tenant should carefully evaluate such additional requests.

The Lease

In evaluating any requests for an SNDA or an estoppel certificate, the best place for the tenant to start is by reviewing the lease, which often will address both the SNDA and estoppel certificate and any requirements on the tenant to deliver such documents to the landlord.

The lease may specify the time period that the tenant has to complete an SNDA or estoppel certificate (typically 10 days), the matters to be covered by the tenant in an

SNDA or estoppel certificate, and helpful factual information for completing the estoppel certificate, such as the current rent and amount of security deposit.

The complex nature of loan and lease arrangements for commercial properties necessitates that the potential purchaser or the landlord's lender is provided information about the status of the lease, and what will happen should the landlord default in its loan with the lender. Therefore, it's common for a tenant to be required to execute an SNDA and an estoppel certificate.

The tenant should carefully review such documents, as they will affect the tenant's rights and obligations.

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