



**Friday, October 25, 2019**

**12:00 PM – 1:15 PM**

**Workshop 28**

**Lenders and Landlords and Tenants, Oh My! –  
Balancing the Competing Interests in Estoppels, SNDAs and Recognition  
Agreements**

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## Elements of a Tenant Estoppel:

1. Copy of Existing Lease, Amendments and Modifications;
2. The Commencement and Termination Date of the Lease;
3. Name(s) of the Tenant(s);



4. Current Monthly Rent;
5. Security Deposit;
6. Parking and Storage Allotments;
7. Free Rent Periods and Tenant Allowances Paid by Landlord;
8. Negotiated Termination Rights;
9. Statement as to Whether Either Party is in Default.



# Case Studies

### **CASE 1 FACTS:**

- Original Owner (“OO”) and Tenant (“T”) enter into triple net lease whereby OO agreed to construct a building with T pre-paying certain rents.
- OO failed to deliver on time, resulting in T being entitled to a rent abatement.
- Landlord (“LL”) purchases the shopping center, and as part of its due diligence obtains a tenant estoppel certificate.
- Estoppel certificate states that T did not receive any rent abatements, nor did T prepay rent.
- T vacates premises and LL sues to recover unpaid rents.
- T claims it was owed a rent abatement (as agreed upon with OO).



**CASE 1 HOLDING:**

- The trial court found for the LL, but awarded substantially less than what LL sought in its complaint.
- The Court of Appeals reversed and remanded finding that the trial court erroneously construed the estoppel.

***Freshman v. Attaboy Manufacturers' Representatives, Inc., 92 AP-638, 1993 WL 20061 (Ohio App. Feb. 2, 1993).***

### CASE 2 FACTS:

- Subtenant (“ST”) leased retail space and adjacent storage space per a sublease with T.
- In 1996, ST and LL agree to exchange storage space and waive a rent increase in 1998.
- T was not advised in advance of the exchanged space, but T knew on the date of the exchange that it occurred and did not object.
- Lease was never modified in writing and the original storage space was re-rented.
- In 1997, T and ST executed an estoppel certificate for LL stating that there were no offsets, abatements, or defenses against fixed or minimum rent, escalation rent or additional rent payable under the lease.
- In 1998, LL increased the rent and ST refused to pay citing the 1996 agreement. ST brings an action for declaratory judgment against LL for reformation of the lease.
- LL brings an action against ST for nonpayment of rent.

### **CASE 2 HOLDING:**

- The cases were consolidated and the trial court granted summary judgment in favor of the ST. The trial court stated that the T had been partially evicted and neither T nor ST were obligated to pay the rent increase until they were given possession of the original storage space.
- The appellate court, reversed and granted summary judgment for the LL on the grounds that the T had acquiesced to the exchange of the storage space and that the estoppel certificate executed by the T and ST barred the partial actual eviction defense.

***SRM Card Shop, Inc. v. 1740 Broadway Associates, L.P., 769 N.Y.S. 2d 483 (2003).***



### **CASE 3 FACTS:**

- LL and T were successors in interest to Original LL and Original T under a 25-yr commercial lease.
- Prior to LL purchasing the property, T signed an estoppel certificate affirmatively representing that the lease expiration date was October 31, 1998.
- The actual lease expiration date was 8 months after the date stated in the estoppel.
- T did not timely exercise option to renew and LL then initiated an eviction.

### **CASE 3 HOLDING:**

- The trial court made the determination that the actual lease termination date was 8 months after the date cited in the estoppel and therefore found in T's favor.
- The court of appeal reversed the decision, stating that the estoppel was a “written instrument” for evidentiary purposes under California law and T was estopped from contradicting the expiration date in the estoppel certificate.

***Plaza Freeway Limited Partnership v. First Mountain Bank, 81 Cal.App. 4<sup>th</sup> 616 (2000)***

### CASE 4 FACTS:

- T entered into Lease with Original LL in 1988.
- Lease was amended in 1991 by way of a written addendum modifying the rent (“1991 Addendum”).
- Prior to the June 1996 rent increase, a second addendum was circulated between T and Original LL which proposed a further modification to the rent amount (“1996 Addendum”).
- The 1996 Addendum was never executed, but the Original LL charged rent at the amount indicated therein.
- In 1997, LL purchased the property from Original LL, and T executed an estoppel identifying the original lease and 1991 Addendum as the operative lease documents.
- LL began charging rent at the amount calculated in 1991 Addendum. T refused and sued LL for breach of contract and declaratory relief.

### **CASE 4 HOLDING:**

- The trial court found the 1996 Addendum to be an enforceable oral modification of the lease and entered judgment in favor of the T.
- On appeal, the PA Superior Court vacated the trial court's judgment, noting that "the whole purpose of tenant estoppel certificates is to avoid the very situation that resulted in this lawsuit."

***Liberty Property Trust v. Day-Timers, Inc., 815 A.2d 1045 (2003)***

## SNDAs

- What does the lease say?
- To what does the tenant subordinate?

## Non-Disturbance

- Tenant must not be in default.
- Lender may seek the procedural right to name tenant in a foreclosure action.

## Attornment

- Tenant will agree to attorn to lender as its new landlord, but...



- Lender will try to limit its liabilities.



Lenders frequently seek to shield themselves from liabilities and obligations respecting:

- acts/omissions of prior landlord
- return of deposits not actually received
- offsets/defenses against prior landlord
- rents paid more than 1 month in advance

- amendments made without lender's consent
- prior landlord's consent to assignment without lender's approval
- completion of construction work or capital improvements
- tenant reimbursements for construction

## Other SNDA Provisions

- Tenant purchase rights
- Notice and opportunity to cure defaults
- Casualty and condemnation proceeds

## Sublease Recognition Agreements

- Circumstances where a landlord will agree to recognize a subtenant
- Protections for subtenant
- Protections for landlord



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