Wednesday, October 23, 2024
2:15 PM – 3:15 PM

Workshop 2

Negotiating SNDAs and Estoppels: Overcoming Deal Fatigue and Keeping Your Client Awake

Presented to

2024 ICSC+U.S. LAW
JW Marriott Orlando Grande Lakes, Orlando, Florida
October 23-25, 2024

by:

Spencer Stein
Goldfarb & Fleece LLP
560 Lexington Avenue, 6th Floor
New York, NY 10022
212-891-9145
sstein@gflegal.com

Wes Pickard
Parker, Hudson, Rainer & Dobbs LLP
303 Peachtree St NE, Suite 3600
Atlanta, GA 30308
404-420-4332
apickard@phrd.com

Understanding and negotiating SNDAs and Estoppel Certificates is a critical component of leasing, acquisitions, dispositions and financings in the world of retail real estate. Although these documents are generally treated as ancillary to, or a "check the box" function of, any such transaction, a properly drafted SNDA or Estoppel Certificate can set expectations, allocate risk, and ensure that each party to a transaction exits said transaction with the full benefit of their bargain. Conversely, poorly drafted SNDAs and Estoppel Certificates can saddle the parties to such documents with long-lasting liabilities and unexpected consequences.

I. SNDAs

a. What is an SNDA?

An SNDA stands for "subordination, non-disturbance and attornment agreement". The typical parties to an SNDA are (1) a party with prior or superior rights to a property, such as a mortgagee or a ground lessor (hereinafter generically referred to as a "Mortgagee"; and the agreement pursuant to which the Mortgagee has such prior or superior rights is hereinafter referred to generically as a "Mortgage"); (2) a party in direct privity of contract with the Mortgagee, who is usually the owner (either in fee, or by virtue of a ground lease) of the property (hereinafter generically referred to as a "Mortgaged Property"; and the party owning such Mortgaged Property, a "Landlord"), and (3) a party who has an interest in the Mortgaged Property and privity of contract with the Landlord, but not with the Mortgagee (hereinafter generically referred to as a "Tenant"). The most common scenario for executing an SNDA involves a Tenant negotiating a lease agreement (hereinafter generically referred to as a "Lease") with a Landlord and wanting to ensure that, if the Mortgagee ever forecloses on the Mortgage, the Mortgagee (or its successor in foreclosure) will recognize and honor the rights negotiated by Tenant in the lease agreement. If a Lease is subordinate to a Mortgage, and there is no SNDA, and unless the Tenant and the Mortgagee otherwise agree at the time of the foreclosure, a foreclosure of the Mortgage will terminate the Lease by operation of law.

The SNDA is a three-legged stool: first, the Tenant agrees to subordinate the Lease to the Mortgage[1]; second, the Mortgagee agrees that, in the event that the Mortgagee forecloses the Mortgage, the Mortgagee will not terminate (or permit the termination of) the Lease as a part of the foreclosure proceedings; and third, in exchange for the Mortgagee agreeing to not terminate the Lease as a part of the Mortgagee's foreclosure proceedings, the Tenant agrees to attorn[2] to the Mortgagee (or, importantly, a successor landlord, usually a party purchasing the Mortgaged Property at foreclosure, or via deed in lieu of foreclosure (hereinafter generically referred to as a "Successor Landlord")) on the terms and conditions set forth in the SNDA.

An SNDA can be recorded or not recorded in the real estate records of the jurisdiction in which the Mortgaged Property is located. Whether to do so (Tenants should always want to put the public on notice of their rights, Mortgagees and Landlords typically do not want to deal with the hassle of having the SNDA in the title records) usually depends on the leverage of each party in a given transaction.

b. Important Negotiating Points

i. ***Recognition of Tenant Rights***. Practically speaking, the most important concept for all parties to an SNDA is to ensure that all material Tenant rights in the Lease are expressly recognized by the Mortgagee. A Mortgagee-friendly SNDA will provide that the Mortgagee or a Successor Landlord will assume some, but not all of the Landlord's obligations under the SNDA.[3] As an example, a Mortgagee-friendly SNDA will state that

---

[1] Often, the Mortgage is already prior or superior to the Lease, rendering the "subordination" leg of the SNDA unnecessary. Industry custom is nonetheless to have the Tenant subordinate (or, more accurately in that context, confirm such subordination) the Tenant's Lease. In contexts where a Landlord is acquiring a Mortgaged Property with existing leases and doing so through a Mortgage of the Mortgaged Property, then – technically – the Tenant is the party with the superior or prior rights; however, most leases contain so-called "automatic subordination" provisions that "automatically" make a Lease subordinate to a new Mortgage, rendering those prior or superior rights into later and inferior rights. Why would a Mortgagee providing financing for a Mortgaged Property whose Leases are all already subordinate to the lien of the Mortgagee's Mortgage want SNDAs? The answer: for such a property the rent stream from such Leases is the real value of the Building; if foreclosing the lien of the Mortgage means terminating all of those Leases by operation of law, then the Mortgagee would be wiping out the value of the Building in the process of foreclosing the Mortgagee's lien.

[2] According to *Black's Law Dictionary* (11th ed. 2019), "attorn" is helpfully defined as "to agree to be the tenant of a new landlord."

[3] The Mortgagee/Successor Landlord's rationale for this is that they did not make their loan to the Landlord and receive a Mortgage with the expectation that they would own the Property and be subject to all liabilities under the

the Mortgagee will not be responsible (in any event) for "any obligation under the Lease to make, pay for, or reimburse Tenant for any construction, alterations, demolition, or other improvements with regard to the Premises." Unless the Tenant specifically negotiates to have the Mortgagee "recognize" (or agree to honor) an obligation to perform tenant improvements, or an obligation to pay a tenant improvement allowance, then a foreclosure by the Mortgagee will eliminate any obligation for anybody to perform such obligations. In addition to the obligation to perform tenant improvements or to pay a tenant improvement allowance, important Tenant rights include: preservation of purchase options, expansion rights and similar rights for the Mortgaged Property; large security deposits paid, or letters of credit given; a Landlord's obligation to restore any casualty or condemnation; rent abatement rights; and Lease termination rights. If a Mortgagee is inclined to recognize any such Tenant rights, the Mortgagee will usually receive an accommodation from the Landlord so as to ensure the Mortgagee is protected (e.g., if the Tenant right is a tenant improvement allowance, the Mortgagee will require the Landlord to escrow the tenant improvement allowance with the Mortgagee and have the Tenant receive same directly from the Mortgagee).

ii. *Continuing Defaults*. Most SNDAs will provide that a Mortgagee is not liable for or bound by any act or omission of a prior landlord (including the Landlord). The rationale for Mortgagees is simple: the making of a loan to the Landlord, and foreclosing any collateral because of nonpayment of such loan, should not expose the Mortgagee to unlimited liability as it relates to the leases of the collateral signed by the Landlord. The difficulty that this puts Tenants in is also clear to see: if a Landlord fails to perform the Landlord's obligations in a Lease (which often extend to maintenance and repair of building structure and systems, construction of tenant improvements, repair and maintenance of common areas, and similar obligations), and if Tenant does not have any remedies against a Successor Landlord, then a Tenant can be left with a prolonged or protracted state of landlord default. Although many SNDAs require Tenants to provide Mortgagees with notices of default provided by Tenant, Tenant attorneys are encouraged to incorporate (and many Mortgagee attorneys will accept) risk sharing as to any Landlord defaults existing at the time of foreclosure, which risk sharing is accomplished by providing parameters around what defaults a foreclosing Mortgagee will be subject to: A sample provision is as follows:

"Notwithstanding anything to the contrary in the Lease or the Security Instruments, Successor Landlord shall not be liable for or bound by any of the following matters . . . (a) any default or breach in the Landlord's obligations under the Lease occurring prior to the time Successor Landlord succeeds to the interest of Landlord in the Premises, except for ***[or to the extent of] any default or breach that is continuing as of the date the Successor Landlord succeeds to the interest of Landlord in the Premises, provided that Successor Landlord has actual notice of such default or breach and a reasonable period to cure same (not to exceed one hundred twenty (120) days) (any such breach or default, a "Continuing Default")*** *. . .."*

iii. *Lease Amendments and Terminations*. For similar reasons as stated above (i.e., a desire to limit the Mortgagee's liability), many SNDAs will state that Mortgagees are not bound by amendments, modifications, cancellations or terminations of the Lease made without their prior written consent. This provision is typically acceptable to Tenant with certain caveats such that: Mortgagee's consent shall not be unreasonably withheld, delayed or conditioned; consent is only required in cases where the Mortgagee's consent is required under the Mortgage; and consent is not required for amendments, modifications or terminations contemplated by the Lease, such as to confirm the exercise of a renewal or expansion right set forth in the Lease or termination rights upon casualty or condemnation. Further, in order to ensure that in the event of a foreclosure, the Lease, as amended, is recognized, it is in both parties' best interest to ensure that any Mortgagee has reviewed the amendment and formally consented thereto. Additional complications arise when there are abnormal circumstances, such as a simple corrective amendment for a Tenant, or an amendment, modification or termination trying to be completed within a short time frame. Mortgagees are rightfully concerned to not be badgered with minor requests for approval, or be forced into approving an amendment, modification or termination without having requisite time to consider same. Tenants are rightfully concerned that a Mortgagee may receive a request, and because any individual Lease is usually far down the list of concerns for a Mortgagee, may never provide a response to a request for approval. Tenant attorneys can have success with providing an outside date for the Mortgagee's response to a request for approval (see sample provision below), but – depending on the Mortgagee – stating that the Mortgagee cannot "reasonably withhold, condition or delay" their consent is the best that can be done.

Notwithstanding anything to the contrary in the Lease or the Mortgage, Successor Landlord shall not be liable for or bound by any of the following matters . . . (d) any modification, amendment or termination of the Lease, or any

---

Lease; the cost of the loan does not factor in this risk. As such, the Mortgagee (and, by extension, any Successor Landlord) must have certain prescribed limits as to such liability, which are then a major negotiating point in any SNDA.

waiver of any terms of the Lease, made without Lender's prior written consent ***(such consent not to be unreasonably withheld, conditioned or delayed (and such consent to be deemed granted if not given or withheld within five (5) business days after request is made therefor))****, provided Successor Landlord's consent shall not be required with respect to any termination, modification or amendment which is not subject to Mortgagee's consent pursuant to the terms of the Mortgage or which is contemplated pursuant to the terms of the Lease.*

iv. *Abatement and Termination Rights*. Most SNDAs will contain a provision that (i) requires the Tenant to notify the Mortgagee of any Landlord default under the Lease and (ii) prevent Tenant from exercising any abatement, offset or termination rights until after the Mortgagee has had an opportunity to cure the Landlord default. This is generally acceptable to the Tenant with the following caveats/revisions: (x) the period of the Mortgagee to cure the Landlord default shall not apply to Tenant's offset/abatement rights, and (y) Landlord agrees to promptly notify Tenant of its intention to cure the Landlord default, diligently pursuing such cure and complete the cure within an agreed period of time. A sample provision is as follows:

Tenant shall provide Mortgagee with copies of all written notices of default sent to Landlord pursuant to the Lease ***which would entitle Tenant to cancel or terminate the Lease or to claim an abatement of the rents payable thereunder****. Tenant agrees that, notwithstanding any provisions of the Lease to the contrary, no notice* ***of cancellation or termination thereof*** *shall be effective unless Mortgagee shall have been given notice of default giving rise to* ***such cancellation or termination, provided (i) Mortgagee shall promptly notify Tenant of its intention to cure such default, (ii) Mortgagee shall cure such default within thirty (30) days after the giving of such notice, or if such default cannot be cured within thirty (30) days, within a reasonable period of time (not to exceed ninety (90) days) after the giving of such notice, and thereafter diligently pursue any action necessary to cure such default (it being understood that all other remedies available to Tenant under the Lease shall not be tolled (and shall be unaffected) during the foregoing cure period with Landlord's and Mortgagee's cure period running concurrently)****.*

c. Key Takeaways.

SNDAs are important documents for Mortgagees, Landlords and Tenants, although how important to each such party will depend on the details of a given transaction such as the length of the Lease and the size of the Tenant's investment in the Mortgaged Property. SNDAs provide Mortgagees with the security of knowing that their Mortgagee will be superior to the Lease (subject to the terms and conditions of an SNDA), and provide Tenants (and Mortgagees) with the security of knowing that the Lease will not be terminated by operation of law (or otherwise) if a foreclosure of the Mortgaged Property occurs. Tenant attorneys should take care to address and ensure that a Successor Landlord will be liable to cure "continuing defaults" under certain circumstances, pay improvement allowances and perform Landlord's work. Further, Tenant attorneys should examine the circumstances under which a Mortgagee will be bound by Lease amendments, modifications or terminations – without doing so, such amendments, modifications or terminations may not be recognized after a foreclosure.

II. **Estoppel Certificates**.

a. What is an Estoppel Certificate?

An Estoppel Certificate is a certificate that, once executed by the certifying party (hereinafter generically referred to as the "Certifying Party"), "estops"[4] the party from asserting otherwise in a future legal proceeding; an estoppel certification becomes a legal conclusion that cannot later be contravened by such party in a court of law. The value of an Estoppel Certificate is primarily to the party that is relying on the certifications (hereinafter generically referred to as the "Reliance Party"): generally, a Mortgagee or a Landlord. However, Tenants can and do request Estoppel Certifications from Landlords (and even, occasionally, from Mortgagees) and can derive the same benefits. In addition to revealing various important facts and details of the condition of a transaction, Lease or property that can otherwise be difficult for the Reliance Party to ascertain, the Estoppel Certificate also binds or estops the Certifying Party from denying the facts so certified and permits the Reliance

[4] According to *Black's Law Dictionary* (11th ed. 2019), "estop" is helpfully defined as "to bar or prevent by estoppel," and "estoppel" is defined as "A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." From *Everest and Strode's Law of Estoppel* 1 (3d ed. 1923): "Estoppel may also be defined to be a legal result or 'conclusion' arising from an admission which has either been actually made, or which the law presumes to have been made, and which is binding on all persons whom it affects."

Party to rely on the same, creating a direct cause of action (where one would not otherwise exist) between the Reliance Party and Certifying Party should the matters so certified be false.

The following is a common list of topics covered by Estoppel Certificates provided in connection with Leases: (a) fundamental lease provisions, such as the lease term, rental terms, rent commencement date, status of security deposit and tenant improvement allowances or other inducements; (b) that there are no contingent lease payments being held by Landlords (such as a large prepayment of rent)[5]; (c) whether any tenant improvements or any other ongoing work is happening in the Tenant's premises; (d) the dates of the Lease and all amendments and modifications and whether the Lease is in full force and effect; (e) violations of law, or presence of hazardous materials in the Premises; (f) any defaults by the Landlord and Tenant; (g) whether or not the Lease has been assigned or the Premises have been sublet; and (h) whether or not the Certifying Party is subject to any bankruptcy or insolvency proceedings.

b. Important Negotiating Points.

i. *Knowledge Qualifiers*. For the Certifying Party, because an Estoppel Certificate is an attempt to certify what is true, accurate and correct, distinguishing between certifications that are true, accurate and correct as written, and certifications that are only so to the extent of the Certifying Party's knowledge, is a critical consideration. Take the following example:

Example 1

"*There is no existing default on the part of the Landlord in any of the terms and conditions of the Lease and no event has occurred which, with the passing of time or giving of notice or both, would constitute an event of default by Landlord under the Lease.*"

If the Certifying Party executes an Estoppel Certificate containing this statement, then the Certifying Party will be estopped from asserting the existence of a default by the Landlord on the date of the Estoppel Certificate under the Lease for all intents and purposes. But what if there is a default under the Lease that the Certifying Party is unaware of? For example, unbeknownst to a Tenant, a Landlord may have just agreed with a third party to construct a new retail building directly in the middle of the Tenant's parking field or agreed to lease to one of Tenant's competitors in violation of the Lease. Compare with the following example:

Example 2

"***To [the best of] [actual knowledge of] Tenant's knowledge**, there is no existing default on the part of the Landlord in any of the terms and conditions of the Lease and, **[to the best of] [actual knowledge of] Tenant's knowledge**, no event has occurred which, with the passing of time or giving of notice or both, would constitute an event of default by Landlord under the Lease.*"

With the added language, the Tenant would only be estopped from asserting a default under the Lease to the extent that the Tenant was aware of same as applicable to the specific knowledge qualifier, resolving any issues that could be created by the Landlord defaulting under the Lease in a manner not known to the Tenant. Reliance Parties should accept such changes, other than with respect to certifications which can be directly verified by the Certifying Party. For example, a knowledge qualifier should not be acceptable as to the certification of fundamental lease provisions, or a default by the Certifying Party, or the validity of the Lease or the amount of fixed rent then payable. A Certifying Party should also consider being specific with respect to whose knowledge, exactly, is being referred to when the term is used. The following is a sample provision:

"For purposes of this Estoppel Certificate, the terms "to Tenant's knowledge," or any similar knowledge qualification used herein, shall be deemed to mean the actual knowledge of _____ and _____ (each, a "Knowledge Person") and shall not be construed, by imputation or otherwise, to refer to the knowledge of any other affiliate of Tenant or to any other officer, agent, manager, representative or employee of Tenant or any affiliate thereof or to impose upon any Knowledge Person any duty to inquire or investigate the matter to which such actual knowledge, or the absence thereof, pertains."

ii. *Ensuring the Accuracy of the Certifications*. Attorneys for Certifying Parties should not assume the truth, accuracy and correctness of the certifications being made in an Estoppel

[5] A Mortgagee may have concern about such a state of affairs – if the Landlord is holding a large prepayment of rent, then Mortgagees generally want to have that amount applied towards their loan or (at a minimum) escrowed for payment of operating expenses of the Mortgaged Property.

Certificate, and should ensure such truth, accuracy or correctness through either (or both of): (1) reviewing the applicable legal documentation that is the subject of such Estoppel Certificate, and/or (2) having the Certifying Party closely review and confirm the certifications.

In addition to creating a cause of action for reliance damages for making untrue, incorrect or inaccurate statements, an Estoppel Certificate can lead to a serious and material loss of the Certifying Party's rights if handled without proper care and diligence. Consider the following example:

Example A

"Any work and all other improvements to the Premises required to be constructed or otherwise furnished by Landlord pursuant to the terms of the Lease have been completed to Tenant's satisfaction and that any design allowances, construction allowances or other allowances to which Tenant may now or hereafter be entitled under the Lease have been paid in full."

Such a statement is acceptable to make without revision, but only if (a) a tenant improvement project or renovation being conducted by the Landlord is fully complete (including the completion of any punch list items, and the expiration of any period of warranty for latent defects), and (b) the Tenant has received the all outstanding amounts of tenant improvement allowance or other allowances or credits that a Landlord is contracted to provide in a Lease. Such statement also invites concern over the status of any repair and maintenance obligations a Landlord has agreed to in a Lease. In the context where (a) the Reliance Party is the Mortgagee for a purchaser of a Mortgaged Property, (b) the Certifying Party is a Tenant who makes the above statement without qualification, and (c) the Landlord of the Tenant has outstanding construction or financial obligations, then the Reliance Party can argue that they acquired an interest in the Mortgaged Property free and clear of any obligations to the Tenant. For a multimillion-dollar renovation, that the loss of the Tenant's rights to compel the owner of the Mortgaged Property to complete same is a sobering prospect.

iii. ***Identity of Reliance Parties***. As noted above, a primary benefit of the Estoppel Certificate is creating a cause of action in favor of the Reliance Party. However, if the Reliance Party is already in privity of contract with the Certifying Party, then an Estoppel Certificate is less necessary, or – potentially – wholly unnecessary to said Reliance Party. If the Certifying Party is a Tenant, the Certifying Party should resist inclusion of the Landlord in the list of Reliance Parties. The Landlord and Tenant already have a contract (the Lease) pursuant to which the Landlord and the Tenant have set out and allocated their legal rights, responsibilities, obligations and remedies. All that an Estoppel Certificate given by one of those two parties to the other will do is operate to amend the Lease, and often in an unintended manner. As an example, if the Reliance Parties to an Estoppel Certificate include a Mortgagee, a buyer of the Mortgaged Property, and a Landlord, and the Certifying Party (here, a Tenant) executes an estoppel certificate making a statement similar to Example A above, then – not only would the Mortgagee and the buyer (potentially) acquire an interest in the Mortgaged Property free and clear of any of the Tenant's rights with respect to an ongoing tenant improvement project, but any Landlord obligations with respect thereto may be inadvertently extinguished. A large issue on its own, but especially in the event that the proposed acquisition does not move forward.

iv. ***Reliance Damages***. As discussed, false statements in an Estoppel Certificate can be grounds for reliance damages in favor of the Reliance Party. Certifying Parties should attempt to avoid and/or limit these damages. See below for a sample provision:

"Notwithstanding anything to the contrary contained herein, this Certificate is intended solely as an estoppel certificate and Tenant shall not have any liability to any party relying on this Certificate, the sole consequence of the delivery of this Certificate being that Tenant shall be estopped from denying the accuracy of the statements certified to [Landlord] [Lender] herein."

C. Key Takeaways.

Estoppel Certificates are important agreements that facilitate the purchase, disposition and financing of real estate. Estoppel Certificates help Reliance Parties learn critical information about the value of real estate, especially real property burdened by Leases or other third-party documentation. Certifying Parties should take care to ensure that the certifications in the Estoppel Certificate are true, accurate and correct, including through the use of appropriate "knowledge qualifiers" and similar limitations. Further, the certifications should be closely reviewed by Certifying Parties so as to prevent the inadvertent loss of important rights. Finally, Certifying Parties should (i) resist the inclusion in the list of Reliance Parties of individuals or entities with whom the

Certifying Party is already in privity of contract (such as, if the Certifying Party is a Tenant, a Landlord) and (ii) attempt to limit reliance damages.