

Thursday, October 27, 2022
2:15 PM – 3:30 PM

Workshop #19

SNDA AND ESTOPPEL NEGOTIATIONS

Presented to

2022 ICSC+U.S. LAW
JW Marriott Grande Lakes, Orlando, Florida
October 26-28, 2022

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Tenant estoppels and SNDAs are both important instruments in the world of commercial leases. While often seen as a minor document presented in an acquisition or financing transaction, as outlined below, the information and covenants set forth in these documents can have long term consequences, and these should be carefully reviewed and negotiated no matter the status of the deal.

I. Tenant Estoppels

Tenant estoppels are often required by buyers or lenders prior to acquiring property or making a loan secured by real property. These are often seen as formalities to confirm the leases are in place without existing default, but as outlined below, the representations set forth therein can have real consequences.

a. Representations Made in the Estoppel

One critical issue for tenant estoppels to analyze prior to signing an estoppel is understanding the specific representations being made, if those representation will be enforceable after the relevant deal closes, and who can rely on those representations. It should be noted that while estoppels do not create a contractual relationship between the signatory and third parties, that does not mean they do not have legal consequence. Oftentimes, however, estoppel certificates can be relied on by third parties for the representations made therein by the signatory, particularly where the estoppel itself acknowledges that it may and is being relied upon for certain actions.¹

California has come the closest to creating a contractual relationship and imposing liability after the execution of a tenant estoppel. In *Plaza Freeway v. First Mt. Bank*, the court states “when a tenant signs and delivers an estoppel certificate as required under the commercial lease agreement, that tenant is bound to the recitations of fact contained therein.”² Ohio, New York, and Pennsylvania courts have also held that third-party purchasers are entitled to rely on the representations made in a tenant estoppel certificates received prior to the purchase.³

A resulting question is whether or not certain language is required to allow third parties to rely on the estoppel. Specifically, must the estoppel (i) identify that it is being relied upon for certain activities and (ii) identify such third parties as those that may rely. Courts will look at the document itself to identify the intent of

¹ Brian D. Huben, *Tenant Estoppel Certificates: Purposes and Interpretations*, 6 Shipping Center Legal Update (2006).

² 81 Cal. App. 4th 616, *629 (4th Dist. Ct. App. 2000).

³ See e.g. *Liberty Property Trust v. Day Timers, Inc.*, 815 A.2d 1045, 1052 (Pa. Sup. Ct. 2003).

the document and benefit to the recipient. For example, in *Corzac Inc. v. City & County of San Francisco*, a court found that a tenant certification “for the benefit of the Port of San Francisco and no other person or entity” could not be relied upon by a tenant who assumed a lease because there was no evidence the certification was intended for use by third parties.⁴ In contrast, the Pennsylvania Superior Court has determined that a party that was identified as the beneficiary in the tenant estoppel could rely on the representations made therein.⁵ Similarly, the *Plaza Freeway* court relied on the fact the tenant estoppel provided “[t]he foregoing certification is made with the knowledge that Purchaser is about to purchase the Property, that Lender is about to fund a loan on the Property, and that said parties are relying upon the representations made in making such purchase and funding such loan” to determine that tenant was estopped from asserting the lease had a different termination date than that provided for in the certificate.⁶

From this, parties receiving estoppels should be sure that the estoppel identifies that it is being provided for their reliance and for the specific actions being taken based on such information. Where giving estoppels, tenants should prefer certification language and avoid reliance language if possible. Where reliance language is necessary, tenants should be cautious to limit who will rely on the estoppel (i.e., only the lender giving the loan and not a future participant or assignee of a loan) and for what specific purpose it may be relied upon to limit potential consequences and liability. For example, where giving an estoppel for the landlord to receive a loan, tenant may want to limit who may rely on the estoppel to the lender making the loan for the making of the initial loan so that future participants and assignees of said loan cannot assert claims based on the estoppel. Notably, if landlords want to rely on representations made in an estoppel, it must be listed as a party that may rely on the estoppel, specifically, in estoppels given in connection with loans where estoppels are usually limited to only lender reliance.

b. Informal Amendments

One key issue with estoppels in leasing is confirming that *all* agreements made are incorporated into the estoppel. The lender or other third party requesting an estoppel certificate can only be notified of the informal agreement when the tenant lists it in the document. While it can seem obvious that lease files should incorporate all terms of a lease, in practicality, lease amendments are often made verbally, through email, or other informal writing and can be easily omitted from the full lease file.⁷ For example, in the *Liberty Property Trust* case, a written addendum to the lease identifying a lower rent to be paid by tenant was never executed, but tenant had, post-oral modification, executed a tenant estoppel stating it could be relied upon by the property buyer, but also indicating that no oral modifications to the lease existed. Therefore, trial court held that the higher rent listed in the written lease was enforceable against tenant using equitable estoppel principles because of the representations made in the tenant estoppel and relied upon by the now landlord.⁸ Ultimately, where ambiguities exist between an estoppel certificate and the lease, courts will read the lease and estoppel together to rectify such ambiguities.⁹

Generally, courts are reluctant to enforce oral covenants against successor landlords where tenant estoppel certificates are silent on the existence of covenants. In *Vu*, a tenant alleged that an oral covenant of exclusive use with a predecessor landlord modified a written lease. The tenant presented a successor

⁴ 2016 Cal. Super. LEXIS 9748, *13-4 (San Francisco Cnty. Sup. Ct. 2016).

⁵ *Liberty Property*, 815 A.2d at 1052.

⁶ 81 Cal. App. 4th at 24.

⁷ It should be noted that while lease amendments are often made verbally between landlords and tenants, many states require leases to be in writing (and most likely amendments thereto as well). See NY CLS Gen Obligation § 5-703 (requiring interest in real property other than leases for less than one year to be in writing), Cal. Civ. Code. § 1624(a)(3) (requiring contracts concerning real property to be in writing), and 68 P.S. § 250.202 (requiring leases of more than three years be in writing). See also *Liberty Property Trust*, 815 A.2d at 1048 (noting that the trial court found an oral modification of lease was an enforceable oral modification to a written lease). Where a writing is required, an email can be a written contract that is enforceable under the statute of frauds, so long as it contains definite terms. See *Worldwide Subsidy Grp., LLC v. Fed'n Int'l de Football Ass'n*, 2014 U.S. Dist. LEXIS 197539, *43-4 (C.D. Cal. 2014). See Restatement 2D of Contracts § 131 (“A contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed or by or on behalf of the party to be charged, which (a) reasonably identifies the subject matter of the contract, (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and (c) states with reasonable certainty the essential terms of the unperformed promises in the contract.”).

⁸ *Liberty Property Trust*, 815 A.2d at 1049; see also *Plaza*, 815 A.2d at 628 (“Even if the estoppel certificate contains an erroneous recitation of the lease terms, the facts contained in the certificate are conclusively presumed to be true”).

⁹ Joseph Tobener, *Estoppel Certificates*, TOBENER RAVNESCREFT (Dec. 20, 2021).

<https://www.tobenerlaw.com/estoppel-certificate/>

landlord with an estoppel certificate that stated all rights and obligations were written in the lease. The court held that the tenant ratified the written agreement by presenting the certificate.¹⁰

Given the fast pace nature of the current economy, informal agreements are a necessary part of commercial leasing. In reality, often the person filling out tenant estoppel forms is not the business side decision maker for a company's leases. Therefore, it is critical that a lease file include all lease agreements and modifications, including notes regarding oral communications, so that when reviewed, any tenant estoppel will be accurate for the agreements as of the date thereof. Because courts will review estoppels as part of determining ambiguities for the lease, particular attention should be paid by tenant and its counsel in completing these documents. Notably, even though landlords are often not completing the estoppels or receiving them, landlords should be quick to correct any errors noticed in an estoppel that could result in reduced rent or other obligations from tenant to landlord.

c. Formality of Signatures

Often, tenant estoppels are one of the final pieces of a deal, which can often leave parties looking to have estoppels delivered as efficiently as possible, including by electronic mail. An estoppel is a legal document that requires a legal signature under the jurisdiction where the document is signed.¹¹ The same requirements of contract law apply to estoppel certificates to determine if the document is duly signed. A legal signature is "simply someone's name written in a stylized fashion."¹² All that is truly needed for the estoppel certificate to be validly signed is a mark or signature that "adequately records the intent of the parties to be involved in a contractual agreement."¹³ The signature can happen on paper or electronically since the Electronic Signatures in Global and National Commerce (E-SIGN) Act was passed in 2000.¹⁴ While e-signatures and other forms of signatures are allowed under federal law, there still is variation from state-to-state. It is always wise to check the signature requirements of the relevant state before deciding on which type of signature is allowed. Most states will have similar requirements, but it is better to double check before executing an estoppel certificate to make sure that everything is squared away to form a valid and binding contract.

Some courts have determined that a party's failure to read an estoppel agreement does not necessarily render it unenforceable.¹⁵ In the *Yee* case, the court found that a commercial tenant was bound by an estoppel agreement, despite not reading it, because courts have consistently held that parties are bound by documents they sign for public policy reasons, provided there is no misrepresentation. Conversely, in *120 East 56th St. LLC v. Ciminelli*, the Court held that the estoppel agreement was not enforceable when it would have materially altered the lease, but was not executed.¹⁶ In that case, estoppel certificates were electronically distributed to many tenants and the lease contained a comprehensive merger clause prohibiting any modification unless in writing and signed by the party to be charged.

One interesting issue is where a tenant erroneously executes an estoppel. In *Flatbush Portfolio SPE, LLC v. Taro Sushi N.Y. Inc.*, 2016 N.Y. Misc. LEXIS 2387, at *1 (King Cnty. Ct. 2016), a third party attempted to enforce the lease terms outlined in an estoppel certificate, which the tenant stated was executed by it erroneously. In that case, the parties had entered into a commercial lease that provided for future renewal options. When the property was later sold, tenant provided an estoppel certificate executed by its president that stated, "tenant has no option to renew or extend the lease term except as follows" and "None" was handwritten in the blank space. Tenant executed the estoppel, but noted when it was passed on, tenant was instructed not to complete any dates, which lead to the tenant not completing any blanks in the estoppel. When a dispute ensued, the court ultimately held the estoppel was unenforceable to alter the terms of the lease because buyer accepted the certificate

¹⁰ *Vu, Inc. v. Pac. Ocean Marketplace, Inc.*, 36 P.3d 165, 167 (Colo. App. 2001) ("By presenting Vu with the estoppel certificate, and by failing to commit any alleged oral agreement to writing, tenant ratified the prior lease agreement and did not add any additional terms."); See also *Sports World, Inc. v. Neil's Sporting Goods, Inc.*, 507 So. 2d 480, 483 (Ala. 1987) (finding that an oral covenant of exclusive use was not enforceable against a subsequent purchaser who had no notice, actual or constructive, of the restriction).

¹¹ Mariia Synytska, *Tenant Estoppel Certificate*, LAWIRINA (last visited May 28, 2021).
<https://lawrina.com/blog/tenant-estoppel-certificate/>

¹² *Id.*

¹³ *What Are the Rules Regarding the Signing of Contracts?* FINDLAW (Jan. 17, 2018).

<https://www.findlaw.com/smallbusiness/business-contracts-forms/what-are-the-rules-regarding-signatures-in-contracts.html#:~:text=As%20long%20as%20it%20adequately,anything%20that%20makes%20the%20%20paper>

¹⁴ *Id.*

¹⁵ *Yee v. Weiss*, 110 Nev. 657, 662 (Nev. 1994); See also RST. 2D of Contracts § 211 ("A recipient's fault in not knowing or discovering the facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing").

¹⁶ *120 East 56th St. LLC v. Ciminelli*, 2013 N.Y. Misc. LEXIS 4380, *3-12 (N.Y. Cnty. Ct. 2013).

with knowledge that this fact was false because it had reviewed the lease that contained the renewal option and had knowledge of the ambiguity and mistake.¹⁷

II. SUBORDINATION, NON-DISTURBANCE, AND ATTORNMEN AGREEMENTS

Subordination, Non-disturbance, and Attornment Agreements, often referred to by the acronym SNDAs, are executed by a tenant and lender prior to the making of a loan secured by real estate. The SNDA has benefits for both tenant and landlord in that it confirms in the event of a foreclosure tenant's lease may continue and tenant will attorn to lender as landlord under the lease. There can be certain points of contention between landlords and tenants with respect to an SNDA, which are outlined more in detail below.

a. Recordation

A critical issue with SNDAs is whether or not they will be recorded. Often, to accommodate closing on a particular schedule, tenants and lenders will agree not to record the SNDA. A recorded SNDA requires an original, notarized signature page, and the document must meet the local recording requirements of the recorder's office. Because of these added complications and time for delivery of original signature pages, it is common for the parties to agree to not record the SNDAs. However, the best practice for SNDAs is to always record them. An SNDA is enforceable in most states whether it is recorded or not.¹⁸ The recorded agreement "provides constructive notice to third parties of the existence of the lease and therefore affords the tenant an additional layer of protection."¹⁹ Recording the document also gives third parties, such as future participants in the loan or assignees of the loan or the tenancy, constructive notice of the agreements between lender and tenant included in the SNDAs. Some states, such as Illinois, do not require the recording of SNDAs.²⁰ Even though the rules on recording SNDAs vary from state-to-state, it is always better to record the agreement.

b. Continuing Defaults

A highly negotiated point between tenants and lenders is what will happen to existing defaults upon the lender's foreclosure of the property. Many SNDA forms specifically state that lender will not be responsible for the defaults of the landlord existing prior to the date that lender takes ownership of the property. Under this language, landlord defaults could continue in perpetuity without requiring lender to cure. Therefore, tenants should be careful to insert language that so long as defaults continue after lender becomes landlord, then lender shall be required to cure such default.

c. Tenant Improvement Allowances

Another potential issue arises where a lease contemplates certain tenant improvement allowances from landlord to tenant. Often, lenders' draft SNDAs will carve out any allowances of this type such that lender would not need to pay remaining amounts of tenant allowances not paid as of the date of foreclosure. Best practice would be for tenant to negotiate the SNDA such that it clearly identifies that lender assumes and is required to pay any unpaid amounts of tenant allowances.²¹

Where an SNDA is silent on tenant allowance language, litigation can ensue after lender takes over as landlord because there is ambiguity on the issue. For example, in both *One Commerce Square* and *Hillman v. Young St. Partners II, LLC*, the courts applied general contractual law principles for ambiguous language to

¹⁷ *Flatbush Portfolio SPE*, 2013 N.Y. Misc. LEXIS 4380, *6 ("[T]he RedSky Entities' reliance on the Estoppel Certificate to preclude Taro Sushi from exercising its option to renew is unreasonable and contrary to what they knew to be the true state of facts.").

¹⁸ *Subordination, Non-Disturbance and Attornment (SNDA): What does it mean? Why do tenants care?* CHAIN STORAGE (Oct. 12 2010). <https://chainstoreage.com/real-estate/subordination-non-disturbance-and-attornment-snda-what-does-it-mean-why-do-tenants-care>. "Recorded" in this situation means that the original signed and notarized SNDA is sent to the county recorder's office.

¹⁹ Kristen Boike and Angela Williams, *Balancing Act: How SNDAs and Recognition Agreements Can Keep Your Lease or Sublease from Collapsing*, HONINGMAN (Feb. 2021).

<https://www.honigman.com/publication-Bisnow-February-2021#:~:text=In%20Illinois%2C%20an%20SNDA%20does,an%20additional%20layer%20of%20protection>.

²⁰ *Id.*

²¹ See John Anderson, Pay Close Attention to Subordination, Non-Disturbance and Attornment Agreements, Harter Secrest & Emery LLP, (October 29, 2020) <https://www.hselaw.com/news-and-information/in-the-news/2133-pay-close-attention-to-subordination-non-disturbance-and-attornment-agreements>.

determine whether a tenant improvement allowance was assumed by successor landlord through the SNDA.²² Typically, in analyzing ambiguous contracts, a court will construe uncertainties against the drafter of the contract,²³ which for SNDAs are often lenders' forms. Many courts only resolve ambiguity as a matter of fact to be determined by a factfinder, meaning a litigation involving ambiguous contract provisions cannot be dismissed on a motion for summary judgment.²⁴ Therefore, leaving it ambiguous in an SNDA is not ideal, because the issue must be fully litigated to be determined by the ultimate factfinder.

d. Other SNDAs Drafting Considerations

For a deeper look into SNDAs, consider *McCall-SB, Inc. v. Citibank, N.A.*²⁵ In this case, the landlord executed an SNDA with a lender that subordinated a tenant's lease to a mortgage created on the landlord's property. One of the SNDA recitals provided the tenant with an assurance of non-disturbance.²⁶ Shortly thereafter, the state condemned a small portion of the landlord's property and all parties disputed their claims to the condemnation award. The tenant brought breach of contract claims against the lender, claiming that lender would breach the non-disturbance promise by asserting rights to tenant's condemnation proceedings. The court dismissed the breach of contract claim because the lender did not become an owner of the premises by asserting rights to condemnation and the court did not want to "second guess the 'commercial sense' of the parties' agreement."²⁷ Another take away from *McCall-SB, Inc.* is in the Courts discussion of recitals in SNDAs. The Court stated that, "if there were a conflict between the two, the specific non-disturbance provision would prevail over the general recital."²⁸

²² 2004 Tenn. App. LEXIS 592, *4 (Jackson Tenn. Ct. App. 2004)(holding the lender did become obligated to pay the tenant allowance) and 2022 Tenn. App. LEXIS 193, *37 (Nashville Tenn. Ct. App. 2022)(remanded for the ambiguity to be determined by a fact finder).

²³ *Dalton v. Cellular South, Inc.*, 20 So. 3d 1227, 1232 (Miss. 2009) ("Once a contract is found to be ambiguous, resolution of any uncertainties will be against the drafter of the contract").

²⁴ See e.g. See *Kim v. Doe*, 25 Misc. 3d 65, 67 (N.Y. App. Div. 2009) ("Since the language of the agreement is ambiguous, its construction may not be resolved by the court on a motion for summary judgement").

²⁵ *McCall-SB, Inc. v. Citibank, N.A.*, 2021 U.S. Dist. Lexis 126128, *2 (S.D. Tex. 2021).

²⁶ See *Id.* at *6 ("[Lender] does hereby agree with [Tenant] that, in the event [Lender] becomes the owner of the premises by foreclosure, conveyance in lieu of foreclosure or otherwise . . . [Landlord] will take no action which will interfere with or disturb [Tenant's] possession or use of the Premises.").

²⁷ *Id.* at *7.

²⁸ *Id.* at *8.