

## OUR WAY OR THE HIGHWAY? NEGOTIATING A LENDER'S FORM SNDA FROM A TENANT'S PERSPECTIVE

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You've spent the last few weeks negotiating the lease for your new office space. The process has been a lot more time consuming than you had originally anticipated—you had to push fairly hard to gain certain concessions from the landlord in order to make the deal attractive—but now it's all smiles and you're ready to sign. The only significant item remaining is to get the landlord's existing lender (whose lien on the property predates your lease) to agree that it will not terminate or "disturb" your lease in the unlikely event that it forecloses on the landlord's property (on second thought, in these difficult times, it is perhaps not so unlikely).

Lender's agreement to not "disturb" your lease will generally come in the form of a Subordination, Non-Disturbance and Attornment Agreement (SNDA) prepared by lender—a sort of quid pro quo, wherein the lender agrees not to terminate your lease in the event of foreclosure (provided that you are not in material default under the lease), in exchange for (i) your acknowledgment that the lease remains subordinate to the lender's rights under its mortgage, and (ii) your agreement to accept the lender as the "new landlord"—with all the contractual rights and entitlements existing under the lease. Although at first glance this seems fair enough, closer inspection reveals that the SNDA goes much further than you had perhaps anticipated. For example, the SNDA may provide that in the event the lender forecloses, you are not permitted to hold the lender liable for the defaults of the landlord that occurred prior to the foreclosure (or even the lender's or subsequent purchaser's occupancy). The SNDA may also prohibit you from enforcing against the lender any rights of setoff or defenses to the payment of rent, even though the lease itself specifies a right of setoff against rent in the event landlord fails to reimburse your tenant improvement allowance. The SNDA may even absolve the lender of any obligation to rebuild the Building in the event of a casualty, despite the fact that you negotiated at length with landlord to ensure that the premises would be rebuilt under all but the most dire circumstances, given the tremendous amount that you're spending on your buildout. All this, yet you are required to continue paying rent to the lender as if you were getting all that you bargained for!

Working with your attorney here to apply a thoughtful strategy of "divide and conquer", you can negotiate a form of SNDA that can indeed get you closer to the deal that you had bargained for so mightily.

- **"Upon foreclosure, Lender shall not be liable for any act or omission of any prior lessor."** The primary goal of the lender here is to avoid any significant monetary liabilities incurred by landlord, such as cumulative year refunds due on CAM charges as the result of a tenant audit, yet the provision is often drafted broadly enough to include basic services or privileges that made the location

desirable for you in the first place. Your opening salvo should be that lender agree to accept liability for those items for which it was given notice and opportunity to cure during the time prior to foreclosure. From your perspective, the lender *should* be responsible for any such acts or omissions to the extent it has received actual written notice from you along with your notice to landlord (which the lender will have required under the SNDA) and thus had the opportunity to address the problem at that time it (after all, why should lender be allowed to sit on its hands while this is occurring, then benefit upon foreclosure?). Although this point is fair, in all likelihood it will be rejected because it guts the lender's primary goal of avoiding significant monetary liabilities incurred by landlord. Your fallback position, and the position that you must insist on, is that lender will be responsible for omissions or defaults that are chronic in nature (such as a failure to maintain common areas or structural portions of a building, which can often be the case when a landlord falls into dire economic circumstances), and continue after lender has received possession of the Property. Without the addition of such language, a foreclosing lender or subsequent purchaser could, theoretically, permit the default to continue indefinitely, and require you to continue to pay rent without any recourse whatsoever.

- **Upon foreclosure, Lender shall not be subject to any offsets, defenses or counterclaims which Lessee might have against any prior lessor.** The lender's view here is that the rental payment under the Lease is a sacred part of its security for the loan, and thus it can't take the risk that the rental stream be diminished by a setoff or similar defense to payment of rent. Again, fairness dictates that this should only apply where the lender had no "notice" and opportunity to cure the events leading up to setoff right. When this argument fails (as it surely will), the most effective approach here will be to have the lender acknowledge and "carve out" from this harsh provision any important offsets or defenses you negotiated that were essential to the original deal with landlord. For example, if the landlord was obligated to reimburse a large tenant improvement allowance over the period of the term, and you negotiated the right to offset rental payments in the event landlord failed to do this (absent the setoff right, you could be subject to a "double-hit" that could potentially put you out of business), then the lender's "no setoff" clause should be modified to permit at least *this particular* offset. Lenders will typically grant this as a matter of the most basic fairness, especially if you have not yet signed the lease, have presented the issue to landlord as a deal-breaker, and have the landlord advocating to lender on your behalf.
- **Lender shall not be required to restore the premises in the event of a foreclosure prior to full restoration of the building.** Again, you have spent a great deal of money on building out the premises, and negotiated a strong rebuild obligation on the part of landlord, and now foreclosing lender insists on having a carte blanche not to rebuild, regardless of the circumstances. While it is unlikely that you will get the lender to agree to the rebuild provisions that you negotiated with your landlord, it is often possible to appeal to the lender's sense of fairness and limit this exculpatory provision to certain specific circumstances, such as the

lender's non-receipt of the property insurance proceeds. At the very least, the lender should agree to permit you to terminate the Lease if it elects not to rebuild; in such case you should at least be entitled to the full value of your tenant improvements under your property policy. Although this right to terminate would seem obvious (I'm not aware of any tenant being forced to pay rent by a foreclosing lender after full destruction of its premises), the absence of the specific right to do so, or the absence of any time limit following the casualty after which you would be permitted to terminate, could lead to uncertainty and expense for you in determining whether and when to obtain new premises

Dealing with a lender's form SNDA's can seem daunting at first, given the draconian nature of the provisions, and the apparent lack of leverage to negotiate that a small tenant often possesses. Yet, working with your experienced tenant's attorney and applying a thoughtful (and realistic) strategy, it is possible to temper these lender risk-shifting provisions to obtain a more fair and reasonable agreement. As a practice point, it is always best to deal with the lender's SNDA *while* lease negotiations are ongoing (i.e. before the lease is signed), because at that time you will have the landlord as well as an advocate and ally in pressing the lender to agree to reasonable concessions.

If you have any questions about this approach to negotiating an SNDA, please contact Jordan Frame at (410) 895-1202 or [jframe@rosenbergmartin.com](mailto:jframe@rosenbergmartin.com). If you need any assistance with any of your other real estate needs, please contact an attorney in our real estate group:

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