

BE SURE TO CYA IN THE SNDA
Landlord's and Tenant's Competing Interests in the Negotiation of SNDA Agreements

By: Johnny Carpenter

On occasion, an ancillary leasing document, the Subordination, Non-disturbance and Attornment Agreement (“SNDA”), will present potentially deal-breaking issues during lease negotiations between a landlord (“Landlord”) and a tenant (the “Tenant”). An SNDA, a document entered into by Landlord’s lender (“Lender”) and a tenant of leased space on Landlord’s property (the “Premises”), sets forth the lien priority between the Lender’s deed of trust and the Tenant’s lease (the “Lease”), while preserving the Tenant’s rights in the Premises upon the Lender succeeding to the interest of Landlord upon an enforcement action under the deed of trust (a “Foreclosure”).

Generally, a Lender requires that all Leases be subordinate to the lien of the Lender’s deed of trust either by a self-subordination provision in the Lease and/or pursuant to an SNDA. Such lease subordination provides comfort to Lender (i) that, by virtue of its senior priority, the provisions of its deed of trust govern over any conflicting provisions of the Lease and (ii) the Lender is not stuck with non-performing leases or leases with undesirable terms, economics or otherwise, which could adversely affect the Lender’s exit strategy in a Foreclosure situation. Lender will request lease subordinations from its Landlord borrower during the negotiation of loan document (the “Loan Documents”) and provide Landlord with Lender’s form of SNDA to present to the Tenants.

Conversely, Tenant wants to ensure that its interest in the Lease will not be disturbed and Tenant can continue to use and occupy the Premises after a Foreclosure. In exchange for Tenant’s agreement to subordinate its Lease, during Lease negotiations, the Tenant will condition its subordination to its receipt of an SNDA satisfactory to Tenant. Landlord would, most likely, only agree to this provision for only the most desirable tenants, as it may adversely affect Landlord’s ability to finance its Property.

Typically, the SNDA is a Lender-friendly, take it or leave it form, which generally provides, among other things, that notwithstanding any conflicting provision in the Lease, the terms of the Loan Documents will control. Of course, each tenant will have a different level of negotiating leverage with Lender. In circumstances where Tenant has the ability to negotiate the SNDA, Tenant should focus on how, among other things, the treatment of tenant allowances, set-off rights, rent abatements, security deposits and options (e.g. rights of first offer or rights of first refusal), are altered by the term of the SNDA and the Loan Documents.

A re-occurring example of conflicting provisions in the Lease and the terms of the Loan Documents is the application of condemnation awards and insurance proceeds. Tenant and Landlord will often agree in the Lease that any condemnation awards and insurance proceeds will be applied by Landlord (or made available to Tenant) to rebuild and restore the Premises. Conversely, a Lender customarily will require in the Loan Documents that all condemnation awards or insurance proceeds will be applied to the debt. In negotiating the SNDA, Tenant will introduce language to the effect of “all condemnation awards and insurance proceeds paid or payable with respect to the Leased

Premises, and received or receivable by Lender shall be applied and disbursed in accordance with the terms of the Lease.” Only in limited circumstances would a Lender consider such a provision, for example, in the case Tenant has invested significant funds for its initial build-out and has re-build obligations under the Lease and leases the whole or a substantial portion of Landlord’s property. As mentioned above, pursuant to the SNDA, the terms of the instrument with priority, the Lender’s deed of trust, will determine how Landlord will apply any condemnation awards and insurance proceeds, notwithstanding conflicting terms of the Lease relative to condemnation awards and insurance proceeds.

The foregoing example is one of many of problematic issues that sometimes arise in the context of overall lease negotiations. A landlord and a tenant are reminded to consider any potentially deal-breaking issues lurking within the four corners of an SNDA during lease negotiations.

For any of your other real estate needs, please contact an attorney in our real estate group:

Barry C. Greenberg	bgreenberg@rosenbergmartin.com
Stanley S. Fine	sfine@rosenbergmartin.com
Cynthia L. Spell	cspell@rosenbergmartin.com
Shawn J. Sefret	ssefret@rosenbergmartin.com
Hilary J. O’Connor	hoconnor@rosenbergmartin.com
Gail Stern	gstern@rosenbergmartin.com
Patrick M. Martyn	pmartyn@rosenbergmartin.com
Caroline L. Hecker	checker@rosenbergmartin.com
Sheelagh Allston	sallston@rosenbergmartin.com
Kari M. Kelly	kkelly@rosenbergmartin.com
Eric Kunimoto	ekunimoto@rosenbergmartin.com
Jennifer Zohorsky	jzohorsky@rosenbergmartin.com