

SNDA's: What Tenants Want Part 1

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When a Lender requests that a Tenant sign a Subordination, Non-Disturbance and Attornment Agreement (SNDA), its primary goal is to get the Tenant to subordinate its Lease to the Lender's Mortgage, so that if the Landlord's loan with the Lender goes into default, the Lender can foreclose the Tenant's interest and extinguish the Tenant's Lease in the foreclosure, freeing up the leased premises to be rented to someone else (if that's what the Lender wants).

Of course, a Tenant does not want to subordinate the Lease unless the Lender agrees that it will not foreclose on the Tenant or disturb the Tenant's possession as long as the Tenant is not in default of its obligations under the Lease. That's a subject for another blog entry.

The Lender's secondary goal in requesting an SNDA is to get the Tenant to agree to attorn to a purchaser of the leased premises following a foreclosure, meaning simply that the Tenant will recognize the new owner as the Landlord under its Lease.

It would be nice if SNDA's were so simple. However, as commercial lending and leasing practices have evolved, SNDA's have become more complicated and Lenders' demands have become more burdensome. What are some of the additional terms that Lenders want from Tenants nowadays? Consider the following... some are reasonable and some are not. If you are a Tenant, which would you agree to?

- The Lender does not want the Tenant to amend the Lease without its approval while the Lender's loan is outstanding;
- The Lender (or its successor) who acquires the leased premises at a foreclosure sale or by deed in lieu of foreclosure does not want to be liable to the Tenant or subject to defenses, offsets or counterclaims raised by the Tenant, on account of obligations of the Landlord which predate the foreclosure sale;
- After the Lender notifies the Tenant that the Landlord is in default, the Lender wants the Tenant to attorn to the Lender as if it were the Landlord, so that the Lender can get all the benefits due to the Landlord, including rent, without any offsets, counterclaims or defenses the

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Tenant may have against the Landlord;

- The Lender (or its successor) who acquires the leased premises wants the Tenant's recourse for damages against the new Landlord to be limited to the new Landlord's interest in the leased premises, meaning that the new Landlord is only liable to the extent of its equity in the property it acquires;
- The Lender wants notices from the Tenant if the Landlord defaults under the Lease, usually with additional grace periods allowing the Lender to either effect a cure itself, or force the Landlord to do so, especially if the default is one that would allow the Tenant to terminate the Lease;
- The Lender wants the Tenant to agree not to prepay rent to the Landlord more than 1 month in advance, so that if the Lender forecloses it can get rent as it becomes due;
- The Lender doesn't want to be responsible for the Tenant's security deposit under the Lease unless the Landlord actually gave it to the Lender to hold;
- The Lender (or its successor) who acquires the leased premises does not want to be obligated to pay the Tenant any construction allowances or perform any construction that was the obligation of the Landlord;
- The Lender (or its successor) does not want to be required to provide any additional space for the Tenant's expansion of their leased premises, even if that was required by the Lease;

As you would expect, a Tenant can negotiate these terms with a Lender. Many Leases contain what is called an "automatic" subordination clause, meaning that the Lease states it is subordinate to any existing or future Mortgage granted by the Landlord to a Lender. However, unless that clause goes into detail about the terms subject to which the subordination is being given, the Tenant should still be able to negotiate subordination terms with the Lender.

At a minimum, a Tenant will want an automatic subordination clause to state that the subordination is being given with the caveat that the Lender will not disturb the Tenant's possession unless the Tenant defaults past any applicable cure period provided by the Lease.

What else do Tenants want in SNDA's? We'll cover that in a future blog entry.