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Insights

SNDA's: What Tenants Want Part 2

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In a prior blog post, we discussed what Lenders want when they request a Tenant to sign a Subordination, Non-Disturbance and Attornment Agreement (SNDA). The Lender's 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). However, it is not unusual for Lenders to request a lot more than just that.

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 past any cure period permitted by the Lease. This is a common provision to which Lenders will agree.

Complications arise when the Lender asks for more concessions from the Tenant than the mere subordination of the Lease to the Lender's Mortgage. In our prior blog post, we pointed out the following list of additional concessions that many Lenders want from Tenants nowadays. In italics after each one are comments about how Tenants (and Landlords) may respond to these requests.

- **The Lender does not want the Tenant to amend the Lease without its approval while the Lender's loan is outstanding.**

This may seem ok at first glance, but obtaining Lender approval can take time, and there are probably amendments that aren't important enough to justify the Lender's involvement. The Landlord probably won't like this because they will have to pay the Lender's attorneys' fees incurred in granting (or denying) an approval. Many Landlords and Tenants will try to limit the Lender's approval rights to amendments that materially alter the terms of the Lease or that materially and adversely affect the Landlord or the Lender. That might be a good starting point for further discussion about what types of amendments the Lender actually wants to approve.

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- **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.**

Most Tenants will agree to this, on the basis that it isn't the Lender's or purchaser's fault if they take over a Lease for which they were not previously responsible as Landlord. Large Tenants with a great deal of bargaining power (sometimes called "credit tenants," like grocery store chains, national retailers, etc.) can get the Lender to back off this kind of provision, but if a Tenant agrees to this it is important for them to raise defenses, offsets and counterclaims promptly against the landlord when they arise, recognizing that they may be lost if their assertion is delayed.

- **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 Tenant may have against the Landlord.**

The Tenant would not typically attorn to the Lender until the Lender actually becomes the successor Landlord by foreclosing the Mortgage or acquiring the property by deed in lieu of foreclosure. A Tenant should not agree to attorn to the Lender before then, unless the landlord agrees that it will not be a breach of the Lease for the Tenant to treat the Lender as the Landlord before it actually is. Additionally, a Tenant should avoid waiving offsets, counterclaims and defenses under the Lease before the Lender actually becomes 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.**

A Tenant should consider this request over-reaching on the part of the Lender. The Lease establishes the liability that the Landlord has for damages, and if the Lender or a purchaser at a foreclosure sale becomes the Landlord, they should have the same liability.

- **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.**

This is not an unreasonable request, but the Tenant should try to limit the Lender's cure rights to the same time period that the Landlord has under the Lease. If the Tenant is willing to give the Lender more time, it shouldn't be much.

- **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.**

This is a common request and should be agreeable to the Tenant, which should make sure they never prepay the rent more than one month at a time.

- **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.**

There is legal authority (but not in Florida) for the proposition that this will be the case whether it is included in an SNDA or not. Because no Florida court cases have been reported on this subject, Lenders want this language included. It may be possible for the Tenant to get the Landlord to agree to require the Lender to hold the security deposit as long as the loan remains outstanding, rather than risk its loss if the Landlord holds it and gets

foreclosed.

- **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.**

This is somewhat unusual, and should be objected to. Although the Lender will argue that it is not in the construction business, it is certainly capable of paying a contractor to do construction, and it presumably has the resources to pay a construction allowance. After all, the Tenant's rent was determined on the basis that the Landlord would pay for or perform the construction, so if the Lender is getting the rent after a foreclosure, they should pay the allowance or perform the work.

- **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.**

This is also somewhat unusual, and should be objected to. If the space is available, why shouldn't the Lender provide it? The only reasonable objections a Lender should have are (i) if the Lease gives the Tenant below market rent for the additional space and it is possible for the Lender to lease it out to another party for more, or (ii) if the Lease would require the Lender, as successor Landlord, to spend more on improving the additional space than it would if it leased the space to another party.

Many Leases contains 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. If that is the case, and the Lease does not also contain either (i) specific terms favoring the Tenant that modify or condition its subordination, or (ii) a provision that the parties will enter into an SNDA on commercially reasonable terms (or similar language), the Tenant may not have much bargaining power. If there is an automatic subordination clause in the Lease, the time to lay the groundwork for a reasonable SNDA in the future is when the Lease is signed.