

Real Estate Law: Pay close attention to Subordination, Non-Disturbance and Attornment Agreements



John Anderson

When commercial landlords borrow against their real estate, their mortgage lender will typically require signed Subordination, Non-Disturbance and Attornment Agreements (“SN-DAs”) from current

and future tenants. Commercial tenants should resist the temptation to treat SNDAs as “mere forms” and instead carefully review and negotiate them to protect their interests.

Three fundamental agreements are (or should be) contained in every SNDA. First, the Tenant agrees to subordinate its leasehold interest to the lender’s mortgage lien. Second, the lender agrees that after foreclosure it will not disturb the tenancy, provided that the tenant performs its obligations under the lease. Third, the tenant agrees that after foreclosure it will attorn to the lender (or its successor) as its new landlord.

Every mortgage lender has their own form of SNDA. These may vary widely in their approach and often contain additional obligations well beyond these three fundamental agreements. Typical issues that arise when negotiating SNDAs are below.

Subordination. Lenders’ form SNDAs often seek to subordinate the tenant’s leasehold interest to all of the terms of the mortgage document and/or other loan documents. A tenant should modify such a provision so that it only subordinates its interest to the “lien of the mortgage.” Additionally, a tenant will want to ensure that the agreement to subordinate is “subject to all of the other terms and

conditions” of the SNDA.

Insurance Proceeds. In certain circumstances, particularly for a long-term lease where a tenant is paying the landlord’s casualty insurance premiums, a tenant should negotiate language whereby the lender subordinates its right to receive casualty insurance proceeds to the extent necessary to allow the landlord to comply with its repair obligations under the lease. In other words, a tenant wants to ensure that insurance proceeds paid upon a casualty are used to repair the premises and not used to pay down the mortgage loan.

Cure Periods. SNDAs typically contain language where the lender agrees, upon foreclosure, not to disturb the tenancy for so long as the tenant doesn’t commit a default under the lease. Since leases often contain cure periods that allow tenants time to cure breaches before they ripen into a “lease default,” tenants should negotiate to incorporate such cure periods into the SNDA.

Landlord’s Work; Improvement Allowances. SNDAs often provide that the lender is not liable for landlord defaults under the lease. The tenant should condition this limitation so that it only applies to landlord defaults occurring prior to the time that the lender (or its successor) forecloses and succeeds to the interest of the landlord. In addition, for any lease under which the landlord has yet to complete certain work at the premises or has agreed to pay a tenant improvement allowance at a future date, the tenant should negotiate language providing that the lender (or its successor) assumes such obligations after it has foreclosed and succeeded to the interest of the landlord.

Amendments; Assignments; Prepayment. SNDAs typically contain provisions limiting the prepayment of rent and any other amendment, modification, termination or

assignment of the lease without the lender’s consent. First, a tenant will want to carve-out any lease assignment that the lease permits without requiring landlord’s consent. Second, a tenant should try to exclude non-material amendments from requiring lender consent. Finally, a tenant should be aware that if lender consent is required for lease terminations or material amendments (as is typical), that they are bound by that agreement as long as the SNDA remains in effect. For example, if a tenant and landlord agree to a lease termination or material amendment without getting the lender’s consent, the tenant may remain liable under the original lease in the event of a foreclosure. Because of this, tenants should keep careful track of signed SNDAs since they may be critical to interpreting a lease in the future.

Altering Lease Provisions. Some lender SNDAs include provisions that contradict or seek to supersede other tenant rights contained in the lease (e.g., set-off rights, renewal options, rights of purchase, etc.). Tenants should carefully review SNDAs and make sure to remove or modify provisions that contradict rights that they negotiated into the lease.

There is no shortage of documents and forms commercial tenants need to sign, even after their lease has been negotiated. It can seem monotonous at times, but they need to resist the temptation of viewing SNDAs as form documents not deserving much time or attention. Without careful review and negotiation, a simple signature can alter significant provisions of the lease they worked hard to negotiate.

John A. Anderson is a partner and leader of the Real Estate practice at Harter Secrest & Emery LLP. He can be reached at janderson@hselaw.com.