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August 19, 2009

Disturbia 

Survival of lease amendments in foreclosure

In this time of "blend, extend and amend" remember that **A LEASE AMENDMENT MAY NOT SURVIVE A FORECLOSURE** by your landlord's lender, even though the lease itself does survive. This can lead to curious results since, these days, lease amendments may lower the rent and provide other valuable concessions to the tenant in return for an extension of the term. If the amendment is terminated by a foreclosure, then the tenant loses these concessions and the landlord loses the extension.

SOLUTION

To avoid this result, **BOTH LANDLORDS AND TENANTS SHOULD CONSIDER OBTAINING A SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT (an "SNDA") FOR SIGNIFICANT LEASE AMENDMENTS.**

ANALYSIS

All real estate deal makers know that when a deed of trust or mortgage is foreclosed, the foreclosure typically terminates liens and encumbrances, including leases, which are junior to the deed of trust or mortgage. A lease that is junior to a deed of trust is terminated by a foreclosure under that deed of trust unless there is some agreement, such as a Subordination, Non-Disturbance and Attornment Agreement, or perhaps a lease provision, which alters this result and prevents termination of the lease.

If a lease is senior to a deed of trust and the lease is amended after the deed of trust has been recorded, then, absent agreement to the contrary, the amendment is terminated by a foreclosure under the deed of trust. *R-Ranch Markets #2 v. Old Stone Bank* 16 Cal. App. 4th 1323 (1993).

Obtaining the lender's consent to a lease amendment may seem like an unnecessary hassle for landlords. But not getting the consent may cause even larger problems for landlords: (i) it may be more difficult for a landlord to work out a loan if the lender believes that foreclosure would terminate lease amendments that the lender believes are not favorable; (ii) failing to obtain consent may violate the terms of the landlord's loan documents; and (iii) if foreclosure terminates a lease amendment, then the bids at the foreclosure sale may reflect a lower value and thus increase potential exposure for payment of a deficiency by

the borrower (after a judicial foreclosure) or by any guarantor of the loan.



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