

Taking the “Temperature” of a Potential Real Estate Financing Transaction – the Tenant Estoppel Certificate

by Bob Marsico on April 12, 2012

One of the first things a doctor generally does when trying to diagnose the ailment of a patient is to take the patient’s temperature to help to make an informed judgment as to the patient’s health and to find something that may not be readily apparent from a visual examination.

In the world of commercial real estate financing, lenders have their own version of the doctor’s thermometer, a tool by which the “temperature” of a potential financing can be taken. It’s called the tenant estoppel certificate. In its simplest form, the tenant estoppel certificate is a document that lenders require borrowers to obtain from commercial tenants occupying property to be financed. A lender can demand that the tenant estoppel certificate be in form and substance acceptable to the lender, in order for the financing transaction to close.

The form of tenant estoppel certificate is usually prescribed by the lender. It contains a series of representations to be made by the property’s tenants. The representations generally include the following:

- the amount of space being leased
- the base rent and additional rent, if any, being paid
- that all conditions imposed on the property owner under the lease have been fulfilled
- that the tenant has taken occupancy
- the term of the lease, the commencement and expiration dates, and that the lease is in good standing and in full force and effect
- the amount of the security deposit, if any
- the date through which rent has been paid
- the base year for calculation of expenses, if any
- whether the tenant has any claims against the landlord or any claims for rent offsets discounts, free rent, prepaid rent, reimbursements, etc.
- whether the tenant knows of any outstanding commissions payable in connection with the lease
- that the landlord is not in default in the performance of any terms of the lease
- that the tenant has not assigned, transferred or mortgaged any part of its interest under the lease
- whether the lease contains any renewal or extensions rights, options to lease further space, an option to purchase, rights of first refusal, or any other preferential rights in favor of the tenant

- whether or not the lease has been modified, and, if so, stating the modification date(s) and terms thereof.

By requiring the tenant to provide this information to the lender prior to closing, the lender can cross check the information against the rent roll, the borrower's loan application, and the background information received on the proposed financing. This will allow the lender to verify the accuracy and completeness of its body of knowledge concerning the project and the candor of the borrower. Furthermore, by giving the tenants a forum for airing disagreements, claims, and issues, between the tenant and the landlord, the prospective lender can derive a better understanding of any problems with the property which may not be revealed by an appraisal or a visual inspection. In short, the tenant estoppel certificate may assist a lender in diagnosing the health of a potential financing transaction.

It should be noted that in commercial facilities containing many tenants, lenders often recognize that obtaining a tenant estoppel certificate from every tenant may not be feasible. As a result, estoppel certificates may only be required from tenants of a certain minimum size or importance to the facility. Also, even in new construction situations, use of tenant estoppel certificates may be helpful to lenders in ascertaining that tenants who have not yet taken occupancy remain committed to their leases and have no claims of default against the landlord.

We recommend that lenders and borrowers utilize an experienced business attorney in connection with mortgage financing projects. Please contact us to discuss any questions you may have on the use of tenant estoppel certificates.