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Insights

Commercial Real Estate and Tenant Estoppel Certificates: Enforcement by Illinois Courts

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Tenant Estoppel Certificates are a commonly used tool in commercial real estate transactions. One of their many purposes is to evidence a written statement by a party, such as a tenant, that verifies things such as the amount of rent due under a lease agreement, whether any defaults exist, or what the overall terms of the lease are. Tenant Estoppel Certificates also can be useful in subsequent litigation by estopping the tenant from providing an inconsistent statement.[1] Thus, before funding a loan, lenders often require tenants to provide Tenant Estoppel Certificates that affirm things such as a property's rental income or the terms of a written lease. Illinois courts consistently have recognized the significance of Tenant Estoppel Certificates in the commercial real estate space, and consistently preclude parties from contesting leases or raising defenses that contradict matters stated in an executed certificate.[2] Recently, in a lease dispute between Lynn Plaza, LLC ("Landlord") and Uncle Tom's, Inc. ("Tenant"), the Appellate Court of Illinois ("Appellate Court") held that the Tenant was barred from challenging certain lease provisions because of a Tenant Estoppel Certificate it executed over 13 years prior for the Landlord's lender. This decision not only reaffirms the significance of Tenant Estoppel Certificates, but further shows their far-reaching effects.

In 1978, the Tenant entered into a 35-year lease (the "Lease") for an unimproved portion of a strip mall, where it built a restaurant the following year. In addition to monthly rent, the Lease required Tenant to pay a 10% *pro rata* share of common area maintenance ("CAM") costs. The Landlord began including a property management fee as part of its CAM costs charged to Tenant in 1997, nearly 20 years after the Lease's execution. The Tenant initially objected to the inclusion of the property management fees as CAM costs, but eventually continued paying its *pro rata* share. Sometime in July 1998, the Landlord obtained a loan secured by the real estate leased by the Tenant. The lender providing the loan to the Landlord required Tenant to execute a Tenant Estoppel Certificate (the "Certificate") to confirm that in addition to being current on Lease payments, the Tenant had no defenses to offset enforcement of the Lease.[3]

In 2011, after the Tenant exercised its option to extend the Lease, the Tenant filed a complaint in Illinois state court to resolve a dispute about the proper square footage to be included in the Lease's new rent calculation. The Tenant's complaint also sought an equitable accounting because Tenant alleged there were discrepancies in the CAM costs assessed against Tenant, such as inclusion of the property management fees.[4]

On appeal, the Appellate Court was asked to address a myriad of issues, including whether certain expenses properly were charged as CAM costs.[5] Instead of addressing all of the issues, the Appellate Court determined that it only needed to look at the Certificate to affirm the lower court's ruling concerning the CAM costs. The Appellate Court noted that the Tenant knew the Landlord was including property management fees in the CAM costs approximately six (6) months before the Tenant signed the Certificate in 1998.[6] As the Appellate Court observed, the "purpose of an estoppel certificate is to give assurance that the party making the estoppel

statement at a later date will not make claims that are inconsistent…"[7] In this case, although the Tenant gave the Certificate to the Landlord's lender as assurance, the Certificate expressly stated that the Tenant had no defenses to enforcement of the Lease "or any provision thereof;" accordingly, the Appellate Court held that the Landlord also could rely on this statement. Furthermore, although the Tenant claimed the Certificate did not expressly address the CAM charges in the Lease, the breadth of the language used in the Certificate estopped the Tenant from raising this argument altogether.

The opinion in *Lynn Plaza, LLC* underscores the utility in obtaining, and the broad implications of, Tenant Estoppel Certificates. Lenders typically require Tenant Estoppel Certificates before issuing loans to ensure the lender will be adequately secured by the real estate in question and to ensure there is no potential litigation that would jeopardize the priority or adequacy of the lender's interests. Although the Landlord's lender was not involved in the litigation between Tenant and Landlord, by requiring the Tenant to sign the Certificate, the Landlord was protected in subsequent litigation, which was in the lender's financial interest as well, assuming the Landlord was still indebted to the lender. *Lynn Plaza, LLC* is a reminder to commercial lenders and borrowers that Tenant Estoppel Certificates serve important functions which extend beyond loan origination. Similarly, the decision demonstrates that comparable documents, such as Subordination, Non-Disturbance and Attornment Agreements ("SNDAs"), which clearly set forth the respective property rights of lenders, landlords, and tenants, are critical in commercial loan transactions, and they also can protect parties in subsequent litigation.

Takeaway: *Lynn Plaza, LLC* is a useful reminder that Tenant Estoppel Certificates and SNDAs can prove invaluable to parties in commercial real estate transactions and are enforced in Illinois courts. Similarly, parties should take great care when drafting (and reviewing) them before signing them. While Indiana courts have not addressed similar facts to those present in *Lynn Plaza, LLC*, Indiana courts also adhere to the principles of equity and "force a party to follow through on what it says or otherwise represents it will do."[8] Thus, the importance of Tenant Estoppel Certificates and SNDAs are similarly important in Indiana, as it seems likely Indiana courts would reach the same result.

Krieg DeVault provides services in the areas of **Real Estate**, **Commercial Real Estate Lending**, and **Creditors' Rights and Bankruptcy**.

[1]*See Uncle Tom's, Inc. v. Lynn Plaza, LLC*, 2021 IL App (1st) 200205, 1 (May 21, 2021).
[2]*See K's Merch. Mart, Inc. v. Northgate Ltd. P'ship*, 359 Ill. App. 3d 1137, 835 N.E.2d 965 (4th Dist. 2005); *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, 979 N.E.2d 480.
[3]*Uncle Tom's, Inc.*, at 10.
[4]*Id.* at 19.
[5]*Id.* at 50.
[6]*Id.*
[7]*Id.* at 51.
[8]*NIPSCO Indus. Group v. N. Indiana Pub. Serv. Co.*, 125 N.E.3d 617, 625 (Ind. 2019), *reh'g denied* (Sept. 13, 2019).

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