

WHAT IS AN SNDA AND DO I NEED ONE?

BY BERT ROSENBLATT & ANDREW STEIN

A Subordination and Non-Disturbance Agreement – SNDA – commonly called a “non-disturb” is an agreement that your landlord asks its lender to provide. The agreement basically says that if the building goes bankrupt and the lender takes control of the building from the landlord, the lender will honor your lease.

But I have a lease. I’m protected...right?

Actually, without an SNDA, you’re not protected. Your lease is an agreement with a landlord that allows you to use and occupy space based on certain conditions for a specified period of time. If your landlord sells the building, your lease will still be in full force and effect with the new owner of the building. But if the building owner defaults and a lender takes over the building, you have no privity with lender. In other words, a landlord’s act of default eradicates your rights to use and enjoy space in the building. Your lease may be deemed null and void should it be in the best interest of the lender. Technically speaking you’re screwed.

But technically speaking and practically speaking are two very different things.

Let’s consider a typical Manhattan office building. Take for example The Met Life Building above Grand Central Station. There may be a hundred tenants in the building. They’ve signed leases at various times. Some are above market, some below. In the unlikely event that Tishman Speyer who owns the building defaults on its loan and a lender takes over, it would be a monumental task to empty

the building of current tenants or even under-market tenants. There would be devastating delays, legal costs, brokerage fees and construction fees just to name a few that would make it very unappealing for most lenders to be willing to terminate leases and stop existing cash flow. We mention this because the path of highest utility and of least resistance will almost always be to keep collecting rent from current tenants. In other words, the chances of actually getting kicked out your building, in the event of a Landlord default, are small.

There’s a building on 8th Avenue called Worldwide Plaza. This building was one of the first commercial buildings in NYC to fall victim to the economic melt-down of 2008. In 2007, at the top of the market, the building sold for \$1.7 billion; two years later, the landlord gave it back to Deutsche Bank, the lender, who then had to resell it for just \$485 million – effectively getting just ¼ of the price that the building had originally been bought for. Was the building emptied of all rent paying tenants? No, they were just fine.

The practical reality is that tenants are only kicked out when the current owner of the building can make more money by repositioning the building.

What might this mean?

Let's say you've just signed a 10 year lease in a small building on Broome Street. Right now, it's an office or a loft building full of commercial tenants. Two years down the road, your landlord defaults on his payments, and the lender steps in. The bank now controls the real estate. If Donald Trump comes in and buys the note and decides that the highest and best use of the building is luxury residential, he is fully in his rights to evict all tenants and do as he pleases with the asset.

So what's the lesson? Common sense. If you're talking about a large office building, it is almost unheard of that tenants without non-disturbs in place get evicted. However, if you're talking about a smaller building where there may be a better use of the real estate, you want to be careful and go in eyes open, protecting yourself.

How hard is it to get an SNDA?

The short answer is "very." Landlords don't like to give these agreements primarily because doing so requires them to contact their lender and say, "listen, if I go under and you take over, will you do me a favor and honor a particular lease or leases in the building?" Lenders don't often say yes to this and hence, landlords hate to ask. But they will if the tenant has enough leverage or if the landlord wants the deal badly enough, or if the landlord knows the lender will sign off.

How important is an SNDA?

We all know the reality of today's economic environment. Since the downturn in 2008, a lot of landlords have had trouble paying their bills. Many landlords bought their buildings at the height of the market at unrealistically high prices when banks were lending a staggering 100% on big ticket buildings ranging from 500–700 million and more. But even with these perfect storm conditions, the vast majority of tenants are fine.

So how do you get an SNDA?

That's something your broker can help you navigate – but it's important to know that for the most part, landlords do not want to give SNDAs and that they're only likely to get them if the tenant is really big. You're not likely to get one for a 5,000 square foot tenant, but for a 50,000 foot tenant, it's much more possible. We've seen Tenant's give up great deals because they're worried about the lack of SNDA. The key is to talk through the issue with your broker and lawyer. Know that it's expensive for lenders and banks to uproot everyone and start from scratch. It's a lengthy and expensive process, and there has to be a lot of potential money on the table to make any sort of conversion worth it. Understand your risk and let common sense rule the day.

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