Tenant Estoppel Certificates: Purposes and Interpretations

Brian D. Huben
Katten Muchin Rosenman LLP
Los Angeles, California

The Purpose of Tenant Estoppel Certificates

By definition, an estoppel certificate is "[a] signed statement by a party (such as a tenant or mortgagee) certifying for another's benefit that certain facts are correct, as that a lease exists, that there are no defaults, and that rent is paid to a certain date. A party's delivery of this statement estops that party from later claiming a different state of facts." *Black's Law Dictionary*, 572 (7th Ed., 1999).

The prospective purchaser of a shopping center has a keen interest in obtaining estoppel certificates from as many tenants as possible because "[a]n estoppel certificate (also called an estoppel statement or estoppel letter) is a writing given by a lessee setting forth specific facts pertaining to the lessee-lessor relationship, with the intention that a third party (normally, the lender or a purchaser of the fee interest) rely on the statements." Alvin L. Arnold & Jeanne O'Neill, *Real Estate Leasing Practice Manual,* § 35:1 (West Online 2005). "The purpose of an estoppel statement is twofold: (1) to give a prospective purchaser or lender information about the lease and the leased premises and (2) to give assurance to the purchaser or lender that the lessee at a later date will not make claims that are inconsistent with the statements contained in the estoppel." *Id.*

Depending on the size of the shopping center at issue, a 100 percent response rate from tenants may not be feasible, but "a buyer should insist on estoppel certificates from all tenants whose tenancies are a key component of a property's cash flow." Stephen A. Cowan, *Negotiating the Sophisticated Real Estate Deal 2004: High Stakes Strategies in Uncertain Times: Strategic Analysis of Due Diligence Issues,* 39, 58 (*PLI Real Estate Law & Practice Course Handbook,* Series No. 2948, 2004). As part of its due diligence, a purchaser will rely upon tenant estoppel certificates in determining the offering price for the shopping center, and whether the price ultimately paid is reasonable, given the property's income-generating capacity.

Despite their widespread usage, there are relatively few reported decisions interpreting the effect of tenant estoppel certificates in landlord-tenant lease disputes.

Cases Interpreting Tenant Estoppel Certificates

Cases interpreting tenant estoppel certificates are largely driven by the facts of each dispute. Common to all of the disputes, however, is a determination that the shopping center purchaser (as well as a landlord) is entitled to rely upon the representations made by a tenant in an estoppel certificate.

Ohio

In *Mark-It Place Foods, Inc.* v. *New Plan Excel Realty Trust, Inc.,* 156 Ohio App.3d 65 (2004), New Plan purchased a shopping center after obtaining an estoppel certificate during its due diligence period. A dispute later arose about an exclusive use violation. All parties moved for summary judgment; on appeal, the Ohio Court of Appeals affirmed in part and reversed in part, and remanded the cause for further proceedings. The court of appeals noted that New Plan, as the purchaser of the shopping center, was entitled to rely upon a January 1993 estoppel letter (obtained during the course of its due diligence prior to purchasing the center). New Plan had introduced evidence of reliance on the representation made in the estoppel certificate. *Mark-It Place Foods,* 156 Ohio App.3d at 88 - 89, 91 and 94. On remand, the trial court was charged with determining whether New Plan's reliance was reasonable under the facts of the case.

In *Freshman* v. *Attaboy Manufacturers' Representatives, Inc.*, 92 AP-638, 1993 WL 20061 (Ohio App. Feb. 2, 1993), Attaboy entered into a triple net lease with the landlord's predecessor-in-interest in 1984. Attaboy was required to pay minimum rent on a monthly basis, along with real estate taxes and hazard insurance, and periodically execute and deliver estoppel certificates to the landlord. (The tenant acknowledged that the estoppel certificates might be relied upon by a prospective purchaser of the shopping center.) The original landlord agreed to construct a 12,000 square foot (sf) building for the tenant, and the tenant agreed to pre-pay certain rents. Although delivery of the completed building was scheduled for February 1984, it did not occur until April 1984; as a result, the tenant was entitled to rent abatement under the terms of the lease. In December 1986, Freshman purchased the shopping center. As part of the landlord's due diligence, the tenant executed an estoppel certificate which acknowledged that it had not received any rent concessions, and had not made any payments to the landlord as advanced or prepaid rent. When Attaboy subsequently vacated the property, Freshman's attempts to collect unpaid rent, property insurance and property taxes were unsuccessful, and litigation followed. The trial court found for Freshman, but awarded substantially less than what was sought in the complaint.

The court of appeals later opined that the trial court erroneously construed the tenant estoppel certificate executed by Attaboy, and reversed and remanded. Addressing the purpose of the estoppel certificate, the court of appeals noted that "this certificate estopped Attaboy from claiming any prepaid rent against plaintiff. There may have been some question of what the overpayments were for in 1986, but this particular estoppel certificate was sought for the protection of *plaintiff*, as is typi-

cally done in commercial lease transactions." *Freshman,* 1993 WL 20061 at *4 (emphasis added). The court of appeals also recognized that "[e]stoppel certificates are useful devices to preserve and enhance the marketability of commercial property." *Id.*

Similarly, in *Katz* v. *M.M.B. Co.,* No. 50579, 1986 WL 5298 (Ohio App. May 8, 1986), the landlord and the tenant entered into a five-year lease in 1978. In 1979, and again in 1981, the tenant executed estoppel letters in which it affirmatively stated that it had no claims or set-offs with respect to rent paid under the lease. In 1984, the tenant sued the landlord for breach of contract, claiming it had paid annual rent in excess of that required by the lease. The trial court held that the landlord had overcharged the tenant. On appeal, the landlord contended that the trial court erroneously failed to apply the doctrines of waiver or estoppel to bar the tenant's action. The Ohio Court of Appeals noted that the landlord's rent bills were itemized to reflect the amounts paid in rent, operating expenses and electricity, and concluded that the tenant should have known by the time the estoppel letters were executed in 1979 and 1981 that he was being overcharged. The court of appeals went on to hold "that when the tenant signed the letters waiving his claims upon the lease, he was on constructive notice that its terms were being violated." Katz, 1986 WL 5298 at *3. The court of appeals concluded that the "letters estop the tenant from claiming he has been overcharged." *Id.* Somewhat inconsistent with that statement however, the court of appeals affirmed in part, reversed in part, and remanded the case to the trial court to determine the extent of the landlord's liability for overcharges *after* the 1981 estoppel letter, finding that the tenant had waived only that portion of overcharged rent preceding the 1981 estoppel letter, and was, therefore, entitled to a refund for all overcharged rent thereafter.

New York

In *SRM Card Shop, Inc.* v. *1740 Broadway Associates, L.P.,* 769 N.Y.S. 2d 483 (2003), the subtenant plaintiff took possession of retail sales space and adjacent storage space under a 1988 sublease with Hallmark. The original landlord then sold the building to the defendant in 1990. In 1996, the subtenant agreed with the landlord's agent to exchange the adjacent storage space for noncontiguous space in the building's basement, and the agent agreed to waive a December 1998 rent increase. Although Hallmark (as the sublessor) was not advised in advance of the proposed storage space exchange, a Hallmark representative was notified of the exchange the day it occurred and did not object. The lease was never modified in writing, and the original storage space was rented to another tenant. In 1997 (after the 1996 space exchange and before the originally scheduled 1998 rent increase), Hallmark and the subtenant plaintiff executed an estoppel certificate for the landlord, which stated (among other things) that there were no offsets, abatements, or defenses against fixed or minimum rent, escalation rent or additional rent payable under the lease. In December 1998, the landlord implemented the scheduled rent increase, and the plaintiff refused to pay, citing the 1996 oral agreement. The subtenant brought a declaratory action against the landlord for reformation of the lease, and the landlord commenced a separate action for nonpayment of rent. After the cases were consolidated, the trial court granted summary judgment in favor of the subtenant. The trial court found that Hallmark had been actually partially evicted, and neither Hallmark nor the subtenant was obligated to pay the increased rent until possession of the original storage space was restored. On appeal, the landlord argued that Hallmark had acquiesced to the storage space substitution, and the estoppel certificate executed by Hallmark and the subtenant barred the partial actual eviction defense. The appellate division of the supreme court agreed, reversed and granted summary judgment for the landlord.

Pennsylvania

In *Liberty Property Trust* v. *Day-Timers, Inc.,* 815 A.2d 1045 (2003), Day-Timers entered into a 1988 lease with Liberty's predecessor-in-interest. The lease was amended in 1991 by way of an addendum, and provided for a flat rental charge through June 1, 1996, with annual increases thereafter based upon percentage increases in the Consumer Price Index (CPI). Prior to the June 1996 increase, Day-Timers was notified by the original landlord that the rent would increase by only 8% as opposed to 15%.

The following month, the original landlord circulated a second addendum to the lease, which proposed a further modification to the annual CPI adjustment to Day-Timers' rent. The second addendum was never executed, but rent was apparently calculated by the original landlord and paid by Day-Timers as if it were in effect. Liberty acquired the property from the original landlord in 1997. As part of the sale, Day-Timers executed a tenant estoppel certificate that identified the 1988 lease and the 1991 addendum as the operative lease documents, but made no reference to the proposed and unexecuted second addendum. After Liberty acquired the property, it charged Day-Timers rent calculated without regard to the unexecuted second addendum. Day-Timers refused to pay, and Liberty sued for breach of the lease and declaratory relief. The trial court, finding that the unexecuted second addendum was an enforceable oral modification of the lease, entered judgment in favor of Day-Timers, and Liberty appealed. On appeal, the Pennsylvania Superior Court vacated the trial court's judgment and remanded the case, noting that "no reference was made to the modification of the lease which is at the heart of this dispute." *Liberty Property,* 815 A.2d at 1051. Focusing on the central issue of the case, the superior court found that "Day-Timers made an affirmation [sic] representation in the certificate that there were *no* oral modifications of the lease, precisely the opposite of what it now claims to be the case." *Id.* (emphasis in original). Determining that the trial court abused its discretion, the superior court opined that "the whole purpose of tenant estoppel certificates is to avoid the very situation that resulted in this lawsuit." *Liberty Property,* 815 A.2d at 1052.

California

California courts have afforded estoppel certificates even greater weight than courts in other jurisdictions. In *Plaza Freeway Limited Partnership* v. *First Mountain Bank,* 81 Cal.App.4th 616 (2000), the landlord plaintiff and the defendant tenant were successors-in-interest to the original landlord and tenant under a 25-year commercial real estate lease. Prior to the time the plaintiff purchased the real property, the defendant signed and delivered an estoppel certificate, which affirmatively represented the lease expiration date to be October 31, 1998. When the defendant did not timely exercise an option to renew the lease and did not vacate the premises, the landlord commenced an unlawful detainer/eviction action against the tenant. Notwithstanding the tenant's estoppel certificate, the trial court concluded that the actual expiration date of the initial lease term was some eight months later. The court of appeal reversed, finding that the estoppel certificate was a "written instrument" for evidentiary purposes under California law, and the tenant was estopped from contradicting the October 31, 1998, date in the estoppel certificate. The *Plaza Freeway* Court concluded that "estoppel certificates are almost always used in commercial real estate transactions. They inform lenders and buyers of commercial property of the tenant's understanding of the lease agreement. Lenders and buyers rely upon the certificates in finalizing loans and purchases. Thus, application of [California Evidence Code] Section 622[1] to estoppel certificates would promote certainty and reliability in commercial transactions. A contrary conclusion would defeat the purpose behind the widespread practice of using estoppel certificates." *Plaza Freeway,* 81 Cal.App.4th at 628 B 629.

The court of appeal in California further emphasized the breadth of issues affected by a tenant's estoppel certificate in *Miner* v. *Tustin Avenue Investors LLC,* 116 Cal.App.4th 264, 273 (2004) when it opined:

> Estoppel certificates are equally critical to landlords because they affect their ability to sell commercial real property and to secure financing. Estoppel certificates inform prospective buyers and lenders of the lessees' understanding of the lease agreement. By providing independent verification of the presence or absence of any side deals, estoppel certificates prevent unwelcome post-transaction surprises that might adversely effect [sic] the building's income stream, such as: Has the tenant pre-paid any rent? Does the tenant have any known or suspected claims for lease violations? What is the tenant's understanding of provisions of the lease? Are there any modifications or amendments? Did the tenant pay a security deposit? Has the landlord made all requested improvements? Are there any subleases or assignments? Is the tenant solvent?

Practical Considerations

Not all leases carry a requirement that the tenant provide estoppel certificates to the shopping center landlord. Where such a requirement does exist, factors such as the prospective purchaser's objective (long-term hold or short-term flip), the size of the shopping center, the number of tenants and the lender involved in a purchase may dictate the time devoted to obtaining and reviewing tenant estoppel certificates. With appropriate consideration given to the economics of transactions, counsel for shopping center landlords and prospective purchasers will best serve their clients' interests by obtaining as many tenant estoppel certificates as possible and carefully examining them for accuracy during the appropriate due diligence period. Thus, the possibility of later litigation over material lease terms will be minimized.

Brian D. Huben is a partner in the Los Angeles office of Katten Muchin Rosenman LLP. His practice focuses on the representation of shopping center owners, developers and managers in litigation, and retail tenant bankruptcies.

[1] Cal. Evid. Code § 622 provides: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto or their successors in interest; but this rule does not apply to the recital of a consideration."

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