

# Curing Title Exceptions - Miscellaneous

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## MISCELLANEOUS

### A. Leases

#### 1. Rights of lessee and lessor under existing lease

Leases of commercial office and retail properties are not infrequently recorded in the public land records. In the event that the lease was recorded and the lessee remains in possession, the rights of the parties are enforceable with regard to the terms of the lease. Where the lessor finances its interest after recordation of a lease, questions arise concerning the extent to which the rights of the lessee are subordinate to or bound by the terms of the mortgage. Generally, if a lease is executed before the lessor's mortgage is granted, the lease is superior to the mortgage and not extinguished by a foreclosure; the purchaser at the foreclosure sale becomes the new landlord. United Gen. Ins. Agency v. American Nat'l Ins. Co., 740 S.W.2d 885, 886 (Tex.App.—El Paso 1987, no writ). However, in the event that the mortgage was granted and recorded prior to the lease, the common law rule is that a lease is ipso facto terminated when the prior mortgage is foreclosed. Kansas City Mortgage Co. v. Industrial Comm'n, 555 S.W.2d 58, 61 (Mo.App.1977); S.S. Kresge Co. v. Shankman, 240 Mo.App. 639, 212 S.W.2d 794, 801 (1948). Where at the time a land contract vendor files suit seeking foreclosure it knows, or upon reasonable diligence should have known, that a tenant is in possession of the property, the tenant's leasehold interest survives the land contract foreclosure action unless the tenant is made a party to the forfeiture litigation. Myers v. Leedy, 915 N.E.2d 133 (Ind. 2009).

Knowing of the result that may follow in light of the rule providing for the treatment of leases in mortgage foreclosure, it is competent for the parties to contract for a different result. P.M.K., Inc. v. Folsom Heights Dev. Co., 692 S.W.2d 395 (Mo.App.1985); Dover Mobile Estates v. Fiber Form Prods., 220 Cal.App.3d 1494, 270 Cal.Rptr. 183, 185–86 (1990). The usual vehicle by which the parties contract concerning the respective rights of mortgagee and tenants is the subordination, nondisturbance and attornment agreement (“SNDA”). SNDAs are pervasive in commercial real estate transactions. Generally, the SNDA is comprised of three components: Subordination is a provision by which a person's rights or claims are ranked below those of others. The nondisturbance provision provides that the mortgagee covenants that the tenant will remain on the leased premises so long as the tenant continues to comply with the terms of the lease and the lease is not in default. Finally, attornment is a provision by which the party who holds a leasehold interest in land agrees to become the tenant of a stranger who subsequently acquires the fee. When an SNDA is executed by the parties and recorded, it is generally possible for the mortgagee to obtain a loan policy in which, though the lease is a matter excepted from coverage, the lease is shown as a matter subordinate to the mortgage. However, conversely, the lessee will not find title insurance available that would in any way insure that the lessee's interest is paramount to, or will survive the foreclosure of, the mortgage, in that the title



insurer will not undertake to insure on behalf of the lessee the enforceability of the SNDA.

2. Leases not terminated or record, lessee abandoned premises

A different situation is presented when the lessee under a recorded lease has vacated the premises in whole or in part and the lease was recorded in the public land records but no termination thereof recorded. Where the lease term has expired and state law provides a time-bar to enforcement of the lease where the requisite time period has elapsed, the prospective purchaser or lender may disregard the lease. In Wisconsin, where a lease is set to expire, absolutely or upon a contingency, within a fixed or determinable time, and where 2 years have elapsed after such time, unless there is recorded a notice or other instrument referring to such continuance, extension or renewal, no action may be brought to enforce the lease. §706.09(1)(c), Wis. Stats. However, where the lease term has not expired, or where the lease provides for an automatic renewal unless terminated of record, a question arises whether the lease results in the title of the lessor seeking to sell or finance the property being unmarketable. The title insurer may, depending upon the specific circumstances, agree to accept an affidavit confirming the abandonment by the lessee or an indemnity by the lessor as a basis for deleting or providing affirmative coverage against the lease.

In the event that a leasehold mortgage or financing statement was recorded or judgments and tax liens against the lessee that are not time-barred, the abandonment by the lessee does not ipso facto mean that the mortgages or liens are unenforceable. Thus, a case by case examination of the factual circumstances will determine the extent to which title insurance providing coverage against security interests arising under the lessee will be available to the purchaser.

B. Options to Purchase, Rights of First Refusal

Options to purchase and rights of first refusal present problems similar to leases, except that defenses to enforcement that depend upon ongoing performance by the holder of the interest, lease payments, are not available. As a result, such interests tend to be immune to practical methods of indemnification by the owner. In the event that the date of performance attributable to the recorded option instrument has passed, if a statute of limitation bars the enforcement, generally, the option may be disregarded. In Colorado, the option does not constitute notice after one year following the date provided for the conveyance. §38-35-109(1), C.R.S. In California, if a recorded instrument creates or gives constructive notice of an option to purchase property, the option expires if no conveyance, contract or other instrument that gives notice of the exercise or extends the option is recorded within six months after the expiration date if the expiration date is ascertainable from the recorded instrument, or six months after recordation of the instrument's recordation if the expiration date is not ascertainable from the recorded instrument. CA CIVIL §884.010.

In the event that statute law does not time bar the enforcement of the recorded option to purchase or right of first refusal, it is possible that the title insurer may consider indemnification by the seller in lieu of a release of the option by the optionee, but it is also possible that the title insurer will require commencement of an action and judgment that bars the enforcement of the option.

#### C. Recorded Affidavits and Notices

In some locales, myriad notices, affidavits or documents revealing claims by which an individual has asserted ownership, liens, easements or other interests in real property have been recorded or filed in the public land records and are revealed to prospective purchasers and lenders typically when and as the result of the issuance of a commitment for title insurance on the eve of the closing of a transaction. Recording laws of the state do not preclude acceptance by the recorder of spurious claims unless their recording is sanctioned. For example, Wisconsin prohibits the filing of liens against public officials or employees.

Liens against public officials or employees. No lien may be filed, entered or recorded against the real or personal property of any official or employee of the state or any political subdivision of the state, relating to an alleged breach of duty by the official or employee, except after notice and a hearing before a court of record and a finding by the court that probable cause exists that there was a breach of duty.

§706.15, Wis. Stats.

Acceptance by an administrative office of the county does not necessarily mean that the instrument recorded is enforceable or the claim is valid. For example, the filing of spurious claims has been prone to certain locales where self-styled ad hoc groups of individuals alienated from local, state and national government policy or law enforcement and having common cause were or have been active. Consequently, unless the document is denied recordation on the basis of statute, in the public land records are found both instruments revealing spurious claims as well as those revealing potentially enforceable claims. Whether such documents impair the title or pose a practice risk of litigation will depend upon a painstaking examination of the document and in appropriate instances investigation of the facts.

#### D. Lis Pendens and Pending Suits

When real property is the subject of litigation it is subject to whatever judgment the court subsequently renders though a post-commencement purchaser of the land is not a party to the suit. Most state recording laws provide that pending actions do not impart notice to purchasers unless a notice of the pendency of the action, a lis pendens, is recorded and indexed in the office of the recorder. However, in the event a lis pendens is recorded and no action is commenced, a question arises whether the

lis pendens imparts constructive notice. States have enacted various statutes that provide that the lis pendens does not impart constructive notice unless an action is commenced within a finite time period. In New York, a notice of pendency is effective for a period of three years from the date of filing, and unless an extension order shall be filed, recorded and indexed before expiration of the prior period, plaintiff's failure to timely obtain the extension will invalidate the effectiveness of the notice of pendency. NY CPLR §6513.

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