ARTICLE: GOT PRIVITY? UNDERSTANDING PRIVITY OF ESTATE AND PRIVITY OF CONTRACT IN CALIFORNIA REAL PROPERTY LEASES

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Introduction.

Parties to real estate contracts often change over time, whether as the result of an assignment, financing, or otherwise. Relatedly, additional parties (beyond those named in the underlying contract) may claim a property interest in the subject of such a contract, perhaps in connection with a security interest in the underlying fee in the form of a mortgage or a deed of trust, or a security interest in a leasehold estate by way of a leasehold mortgage. Just as it is fundamentally important for parties to real estate contracts to understand the nature and priority of their real estate interest as it relates to the rights of other interested parties, it is also crucial that parties be aware of the nature of the contractual relationships (and the consequential rights and obligations) between the various parties with potentially competing interests in the real property at issue. The distinction between privity of estate and privity of contract is an important part of this understanding, and as the recent California case, *BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach*,[1] makes clear, awareness of the distinction, which may appear esoteric at first glance, becomes crucial for understanding the ongoing rights and obligations of parties to real estate contracts as well as those of their successors and assigns.

As an introduction to the distinction between privity of estate and privity of contract, it is helpful to look first at the recognized dual nature of a real property lease. That is, a real property lease is both a conveyance of a real property estate, and a contract between the landlord and tenant, resulting in two different sets of rights and obligations: first, those arising by law based in the landlord-tenant relationship (privity of estate), and, second, those arising under the contractual terms of the lease (privity of contract).[2] To enforce the special contractual covenants of the lease against the tenant, which do not stem from the privity of estate, the tenant must execute the lease, and for a landlord to enforce the same against a lessee's successor, such successor must expressly assume the lease itself.[3]

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Whittwood.

A. ***Whittwood*** **Factual Background**.

In *Whittwood*, a shopping center tenant ("Tenant") and the original owner of the shopping center entered into a 15-year lease in December 2006 (the "Lease"). [4] In January 2007, Tenant recorded a memorandum of lease, executed by the original owner of the shopping center and Tenant.[5] The memorandum of lease notified successors of the Lease term and transfer restrictions contained therein.[6] Shortly after the Lease was recorded, Farmers & Merchants Bank of Long Beach ("Lender") loaned funds to Tenant and secured the loan through a deed of trust, identifying the leasehold estate as collateral for the loan.[7] The Lease required the Landlord's consent to any transfer, sale, assignment, or other conveyance; Landlord had the right to void any transfer to which it did not consent.[8] The Lease also permitted Tenant to encumber its leasehold interest through a mortgage.[9] The specific Lease provision stated that, upon a foreclosure, the Lender would succeed to the Tenant's interest under the Lease, and in such event, the Lender would assume all of Tenant's obligations under the Lease.[10] The Lease did not direct the Tenant to obtain an assumption from a mortgage lender as was required for other types of transfers.

Tenant defaulted on the loan and, in February 2009, the Lender foreclosed on the leasehold interest pursuant to its deed of trust. Lender recorded a trustee's deed upon the sale identifying itself as the successful bidder of the leasehold estate.[11] Ultimately, the Lender transferred its interest in the Lease to Whittier JC LLC ("Whittier"), of which the Lender was the managing member.[12] The Lender executed a tenant estoppel certificate on Whittier's behalf, which stated that Whittier was the successor in interest of Tenant and further stated that the Lease termination date was March 31, 2023.[13]

Whitter made rent payments through July 2014; however, when the original owner of the shopping center sold the shopping center to respondent BRE DDR BR Whittwood CA LLC ("Landlord") in October 2014, Whittier discontinued rent payments, and surrendered possession of the property in December 2014.[14]

B. ***Whittwood's*** **Procedural History**.

Landlord filed a complaint against the Lender alleging breach of contract and damages.[15] Landlord also filed a motion for summary adjudication on the issue

of whether the Lender had a contractual duty as successor to Tenant to comply with the Lease.[16] The trial court granted the Landlord's motion for summary adjudication and found that the construction deed of trust and notice of sale specifically identified the Lease and, upon foreclosure, the Lender succeeded to Tenant's rights and obligations under the Lease.[17]

On appeal, the court applied a de novo standard of review to the interpretation of the Lease and related documents.[18]

C. ***Whittwood's* Analysis**.

The court's primary focus was the distinction and relation between privity of contract and privity of estate. The court stated:

> A lease of real property is both a conveyance of an estate in land (a leasehold) and a contract. It gives rise to two sets of rights and obligations - those arising by virtue of the transfer of an estate in land to the tenant (privity of estate), and those existing by virtue of the parties' express agreements in the lease (privity of contract).[19]

Additionally, the court noted that a leasehold estate for years is sufficient interest in real property to be security for a deed of trust, and a mortgagee who takes lawful possession of the premises from a tenant under the lease is an assignee of the lease. The assignee's/lender's liability under the lease upon foreclosure of the leasehold estate depends on whether the assignee/lender has taken possession of the premises and/or if the assignee/lender has expressly assumed the obligations of the lease.[20]

If assignee/lender has taken possession of the premises, but has not expressly assumed any obligations under the lease, then privity of estate exists and assignee/lender is bound by all lease covenants that run with the land so long as assignee/lender is in possession of the premises.[21] On the other hand, if assignee/lender expressly agrees with the assignor/landlord to assume the obligations of the lease, then privity of contract also exists. Privity of contract will bind the assignee/lender to the terms of the lease regardless of whether assignee/lender is in possession of the premises. An assumption agreement creates privity of contract between the landlord and assignee/lender; landlord, as a third party beneficiary, may enforce all terms of the lease regardless of whether the landlord was a party to the assumption agreement.[22]

In analyzing the facts, the *Whittwood* court cited *Enterprise Leasing Corp. v. Shugart Corp*., which found an express assumption of contractual obligations of

the lease is necessary to hold an assignee/lender liable for the lease obligations absent possession of the premises.[23] Otherwise, without the express assumption of contractual obligations of the lease, the lease covenants bind and inure to an assignee/lender only as long as assignee/lender remains in possession of the premises, and the lease covenants terminate when assignee/lender terminates its possession of the premises.[24]

In *Whittwood*, Landlord argued that Lender assumed the lease obligations for the full term of the Lease because the foreclosure and purchase of the deed of trust referenced the Lease, which constituted an express assumption of the lease terms. The court disagreed with Landlord and stated that an "express assumption of a real property lease requires specific affirmation by the assignee to bind itself to the lease obligations."[25]

Moreover, the court distinguished, among other cases, *Bank of America National Trust & Savings Association v. Moore*, in which the court found that the defendant assumed the obligations of the lease by signing a document that expressly stated that defendant, as assignee, accepts, assumes, and agrees to perform all of the terms of the lease, thereby creating privity of contract between the defendant and landlord.[26] The California Supreme Court has classified such assignments as "express agreements" because assignee expressly agrees in writing to be bound by the terms of the lease. The Supreme Court has distinguished express agreements from "bare assignments." Bare assignments exist when the assignee occupies the premises but has not entered into any contract with assignor or lessor that affirmatively binds it to the covenants of the lease.[27]

Applying the same legal principles discussed above but in the context of bare assignments, the Supreme Court has routinely declined to bind an assignee by the terms of a lease when assignee did not sign the lease or any document expressly accepting the terms and obligations of the lease. In such circumstances, the Supreme Court has upheld assignee's obligation to pay rent only so long as the assignee occupies the premises. If assignee abandons the premises, the assignee's obligation to pay rent terminates.[28]

The *Whittwood* court compared the facts of that case to *Kelly v. Tri-Cities Broadcasting, Inc*. In *Tri-Cities*, the lessee and landowner entered into a lease, which stated that any assignee would assume the lease obligations. Lessee sold its business, including the lease, to defendant. The purchase agreement and bill

of sale acknowledged the existence of the lease, but the *Tri-Cities* court ultimately found that no evidence was presented to establish that the defendant assumed the lease. Thus, *Tri-Cities* held that where no express assumption of the lease exists, the assignee is not bound by the terms of the lease if the assignee is not in possession of the premises.[29]

D. ***Whittwood's* Holding**.

Similar to *Tri-Cities*, *Whittwood* held that the Lender was not bound by the terms of the Lease because the Lender did not expressly assume the Lease, nor was the Lender in possession of the premises. No express assumption was found because the Lender did not sign the Lease and the foreclosure documents did not contain an express agreement to assume the Lease. Further, the court noted that while the deed of trust, notice of trustee's sale, and deed upon sale referenced the memorandum of lease, no document provided an express assumption of the covenants or provisions contained in either the Lease or the memorandum of lease.[30]

The court opined that the Landlord could have protected itself by requiring the Lender to sign the Lease or a document expressly stating that the Lender assumed the lease obligations. The court further suggested that the Lease could have been drafted to require that the assignor/Tenant to obtain an assumption from the assignee/Lender.[31]

Implications of the Privity Dichotomy

A. **Conveyance of the Landlord's Estate**.

In general, absent a contrary provision in the lease, a landlord's assignment, sale, or other transfer of the lease does not affect the existing lease.[32] Under such circumstances, the buyer, assignee, or other transferee takes the place of the original landlord under the lease. Therefore, the successor landlord becomes bound by all of the lease terms, and in return, the tenant becomes obligated to the successor landlord under the lease.

Section 821 of the California Civil Code states:

> A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had.[33]

California case law has established the general rule that a sale by a lessor, during

an unexpired lease term, under which a tenant is occupying, where a condition is attached, does not of itself terminate or nullify the lease, or authorize the landlord to treat the lease as terminated without offering to fulfill the condition. Instead, the effect is to substitute the new holder of the reversion to the rights of the original landlord. The buyer then becomes the landlord by law and the tenant becomes a tenant of the new owner.[34] The notion that a lease remains in effect after a new party (not party to the original lease) obtains a fee interest in the underlying property is an exception to the general rule that covenants are generally enforceable only by and against the original parties and by their legal successors in interest by privity of contract.[35] Further, a personal covenant obligates only the original parties; however, a covenant that runs with the land is binding on successive owners.[36]

Where a party to a lease agreement is seeking to enforce a lease covenant against a former owner of the property, liability under the lease depends on whether there remains any privity of contract *or* privity of estate between the original parties to the lease.[37] The original landlord to a lease may terminate its privity of estate if the landlord transfers the entire term of the lease, the entire physical premises, and its entire interest in the property; however, privity of contract between the original landlord and tenant may survive such transfer. [38] This distinction was the focus of *Del Taco, Inc. v. University Real Estate Partnership,* where a California Court of Appeal had to determine whether certain covenants continued to obligate the original landlord after the landlord's transfer of the property, which included the lease, during the term of the lease.[39]

In 1996, Del Taco entered into a ground lease with University Real Estate Partnership.[40] The lease required the landlord to maintain and repair the common areas during the term of the lease. Common areas included parking areas and walkways that were subject to the rights of all tenants of the shopping center.[41] In May 1998, University sold the property, including the leased premises, to Third Street.[42] In June 2000, the sewer line serving Del Taco failed and Del Taco paid over $80,000 for the repair.[43] In February 2001, Del Taco sought relief against University and Third Street for the costs of the repair under the terms of the lease.[44] Del Taco argued that the express covenants in the lease (i.e., to maintain and repair the common area during the term of the lease, and to provide utilities of sufficient capacity as specified in the lease), supported a continuing duty on University to provide a properly constructed, maintained, and repaired sewer line.[45] Del Taco also contended that the lease contained

implied covenants that supported its claims against University. Such covenants included the implied covenant of the duty of good faith and fair dealing to implement the purposes of the lease.[46]

The lease contained terms expressly promising to maintain the common area during the term of the lease, and to provide a four-inch capacity sewer line. The *Del Taco* court relied on the following from the Restatement Second of Property:

> A transferor of an interest in leased property, who immediately before the transfer is obligated to perform an express promise contained in the lease that touches and concerns the transferred interest, continues to be obligated after the transfer if: (a) the obligation rests on privity of contract, and he is not relieved of the obligation by the person entitled to enforce it; or (b) the obligation rests solely on privity of estate and the transfer does not terminate his privity of estate with the person entitled to enforce the obligation, and that person does not relieve him of the obligation.[47]

The court, also relying on the Restatement Second of Property, noted that a promise by the landlord *touches and concerns* the landlord's interest in the leased property if its performance is not related to other property and the promise affects the use and enjoyment of the leased property. On the other hand, a promise that is personal to the Landlord does not meet the *touch and concern* test, and will likely not survive after the landlord's interest in the leased property is transferred.[48] Therefore, once University sold the land, as a former landlord, University would continue to be bound only by the express promises contained in the lease that touched and concerned the transferred interest if "the obligation rests on privity of contract, and [it] is not relieved of the obligation by the person entitled to enforce it; or the obligation rests solely on privity of estate and the transfer does not terminate [its] privity of estate with the person entitled to enforce the obligation. . .."[49]

The court noted that Del Taco did not provide evidence to support its theory that University remained in privity of estate with it after the transfer and, instead, the court concluded that upon University's sale of the property, it was clear that University terminated its privity of estate with Del Taco, due to the transfer of the entire term of the lease, the entire physical premises, and the entire interest in the property. Without significant analysis, the court also held that the nature of the express covenants in the lease did not support a theory that sufficient privity of contract existed to connect the express promises to University as personal to University, or to hold University liable on an ongoing basis to Del Taco, after the time of transfer of the property.[50]

Of course, it is not always tenants seeking to enforce the terms of a lease against their new landlord; often, it is the party acquiring the property subject to a leasehold via a sale or transfer of the underlying fee interest, now in the position of landlord, that seeks to enforce the terms of the lease against the pre-existing tenant. In *MHW Limited Family Partnership v. Farrokhi*, the Supreme Court of South Dakota, relying in part on California law, analyzed whether the original landlord party to a lease effectively assigned its interest in a lease when it transferred property, including the lease, to a purchaser via a quitclaim deed.[51] The original owner of the property, MWREI, agreed to lease the property to Farrokhi for a five year term (from 1996-2001). One month after the lease commencement date, MWREI conveyed the property to MHW by quitclaim deed. Mr. Wilkins Sr. was a partner of both MWREI and MHW. Farrokhi continued to pay rent to Mr. Wilkins Sr. for a time, but ultimately quit paying rent and MHW filed suit against Farrokhi to recover unpaid rent for the remaining term of the lease.[52]

Farrokhi argued that (1) the conveyance of real property by quitclaim deed did not transfer any interest in the lease because the lease was personal property, and (2) no privity of contract existed between MHW and Farrokhi because the lease was not properly assigned to MHW upon the conveyance of the underlying fee interest.

The trial court determined that the lease was properly conveyed to MHW and entered judgment in favor of MHW; Farrokhi appealed. With respect to Farrokhi's first argument above, Farrokhi argued that a transfer via quitclaim deed only transfers interest in real property and therefore, the transfer of the lease, which was personal property, via quitclaim deed was insufficient to transfer any lease interest to MHW or create privity of contract with MHW. The Supreme Court of South Dakota did not address or analyze whether a lease is classified as real property or personal property; rather, the court simply referenced a South Dakota statute that specifically provides that a person who acquires real property upon which rent is reserved or transferred is entitled to recover rent in the case of nonperformance of the terms of the lease just as the grantor could have recovered rent under the lease. In reaching its conclusion on Farrokhi's second argument above, the court relied in part on California authority. In doing so, the court cited California case law stating,

> Absent a contrary agreement of the parties, a sale by a landlord of real property during an unexpired term does not of itself abrogate the lease. Its effect is to grant

> all the rights of the original lessor to the grantee of the reversion. The grantee then becomes the landlord by operation of law and the tenant becomes a tenant of the grantee of the reversion. In determining whether a grantor retains its rights under a lease on transfer of the property, the crucial question is what the parties intended. The general rule that on sale the grantee becomes the landlord by operation of law does not apply, however, where the grantor expressly reserves its rights under the lease.[53]

The court held that MHW acquired the real property subject to a preexisting and continuing lease; therefore, MHW was entitled to recover rent and to the same remedies for nonperformance of any of the terms of the lease or for any waste or cause of forfeiture as MWREI would have had.[54]

B. **Assignment of Lessee's Interest**.

Absent an express assumption of a lease by an assignee, there is no privity of contract between the assignee tenant and the landlord, and the assignee tenant is thus not liable for covenants that are not otherwise binding under the privity of estate. However, an assignee tenant that expressly assumes the obligations of the lease in writing will be bound by privity of contract with the landlord to perform the contractual covenants contained in the lease.[55] Therefore, the assignment of a lessee's interest in the leasehold estate must include the assignee's express consent and assumption of the contractual obligations of the lease in order to hold assignee liable for those obligations. California case law has held that there must be an express assumption of the contractual obligations of a real property lease in order to hold an assignee liable for the lease obligations.[56] Lease covenants that run with the land bind an assignee only as long as it remains in possession of the premises; however, the lease obligations terminate when the assignee terminates possession of the leased premises. Merely accepting an assignment of a lease does not bind the assignee to the lease terms beyond the period of occupancy unless the assignee expressly assumes the lease.[57] An express assumption requires a specific affirmation by the assignee to bind itself to the lease obligations.[58] The specific affirmation must be an oral or written statement that assignee agrees to be bound by the terms of the lease.[59]

Rex Investment Company Ltd v. S.M.E., Inc. addressed the issue of when an assignee of a lease is bound by the terms of the lease after the assignee terminates possession of the leased premises.[60] In June 1985, Rex entered into a commercial lease agreement with NE Nebraska, wherein Rex leased a building to NE Nebraska for the purpose of operating a Burger King restaurant.[61] During

the lease term SME took possession of the building and began operating the Burger King restaurant. SME paid rent to Rex and performed all obligations under the Lease.[62] SME sold its interest in the Burger King franchise to Calexico Group, Inc. and SME vacated the property.[63] In May 2014 (during the second five-year extension term of the lease), Rex stopped receiving payments due under the lease.[64]

Rex argued that SME breached the lease by failing to pay rent and property taxes, and by failing to keep the property in good repair. SME argued that its obligations to Rex ended when it vacated the property in 2012 and therefore it was not liable for any rent, taxes, or property damage that accrued after 2012.[65] Because Rex and SME never signed a written lease with one another and SME never expressly assumed the lease obligations, the court found in favor of SME.[66]

An assignment of a lessee's interest that does not include assignee's express assumption of the lease obligations could have significant consequences for the landlord and the assignee tenant if the assignee tenant abandons or terminates its possession of the leased premises. As discussed above, the assignee tenant is liable only to the extent it is in possession of the leased premises (without an express assumption of the lease obligations); however, the assignor tenant remains in privity of contract with the Landlord. Therefore, if assignee tenant is no longer in possession and did not expressly assume the lease obligations and the assignor tenant was never released from its obligations, then the assignor tenant will remain liable for all lease obligations.[67]

C. **Leasehold Mortgage**.

The *Whittwood* court acknowledged that a mortgagee who takes lawful possession of the premises from the lessee is considered an assignee; however, as discussed above, the liability of an assignee depends on whether the assignee merely takes possession of the premises, or whether the assignee expressly assumes the obligations of the lease. In *Whittwood*, the lender was not a signatory to the lease, but, as discussed above, merely executed the tenant estoppel certificate on Whittier's (assignee) behalf. Although the Court did not discuss in detail, it appears that the tenant estoppel certificate may have been insufficient to bind the lender to the lease because the lender did not sign the tenant estoppel certificate personally and the lender was not a party to the underlying lease. Further, the foreclosure documents did not contain any express assumptions of the lease. Therefore, while the lender acknowledged the lease, the lender never expressly assumed any lease obligations.

As the Court noted in *Whittwood*, upon foreclosure of the leasehold estate, a landlord should insist that no lender will have any rights under the lease without first providing a written assumption agreement to the landlord, and such agreement should expressly state that the lender agrees to assume the obligations of the lease. Merely stating in the lease that the lender will assume the liabilities under the lease is not sufficient to protect the landlord's interest in rent payments or other rights under the lease, if the lender is not a signatory to the lease.

Without the lender's express assumption of the lease obligations, the lender will not be in privity of contract with the landlord. Privity of contract cannot be implied, nor agreed to by an assignor of the interest on behalf of assignee. Without privity of contract, the landlord cannot demand payment of rent from a lender that is no longer in possession of the premises.

D. **Subordination, Nondisturbance, and Attornment Agreement**.

The privity doctrine is also important in the context of loans secured by interests in real property. One tool parties can use to manage future rights and obligations where several parties, including a lender, have competing interests in the relevant real property is a subordination, nondisturbance, and attornment agreement (an SNDA). An SNDA can, among other things, rearrange the priority of competing real property interests among lenders lending against real property and tenants leasing such real property, provide tenant with protections in the event a lender with superior priority forecloses on the underlying real property, and obligate a tenant to be bound to the lender (as the landlord) in the event the lender forecloses and becomes the owner of the underlying property. Depending on the language of the SNDA, it may in some cases create contractual privity between a tenant and a mortgagee as a direct agreement between the parties.

An example of a case in which an SNDA could have supplied contractual privity but did not is *Dover Mobile Estates v. Fiber Form Products, Inc.*[68] In *Dover,* the California Court of Appeal confirmed the general rule that, absent an SNDA, a foreclosure automatically terminates a subordinate lease. In 1985, tenant Fiber Form entered into a five-year lease with landlord, Old Town Properties, Inc. The lease provided that it was subordinate to any deeds of trust or mortgages placed on the property unless the mortgagee or beneficiary elected to have the lease be superior to the lien of the mortgage or deed of trust.[69] Old Town thereafter encumbered the property with a second deed of trust in favor

of Saratoga Savings & Loan Association, and Old Town subsequently defaulted on its loan. After Saratoga foreclosed, Dover purchased the property. Dover knew of Fiber Form's lease, deemed the lease important to its purchase of the property, notified Fiber Form of its purchase of the property, and directed Fiber Form where to make ongoing rent payments.[70] In March 1987, prompted by a downturn in its business, Fiber Form proposed reducing the monthly rental amount, and a delay in the rental increase was discussed but never accepted. In June 1987, Fiber Form gave Dover thirty days' written notice of its intention to vacate and thereafter vacated the premises and stopped paying rent. Dover filed suit to collect rent.

Fiber Form argued that it become a month-to-month tenant following the trustee's sale of the property because the trustee's sale extinguished its leasehold interest. Dover, on the other hand, argued that the lease was not terminated and instead was ratified when Fiber Form continue to pay rent after the trustee's sale.[71] The *Dover* court discussed that leases can be subordinate to a deed of trust when the lease comes after the recordation of the deed of trust and by way of a subordination agreement, and that a lease that is subordinate to a deed of trust is extinguished by a foreclosure sale.[72] Because of the automatic subordination language in the lease, the lease become subordinate to the later recorded deed of trust. The court noted language from a 1860 California case, and subsequent reliance on that case for the principle that where a trustee's sale of real property occurs with an existing lease subordinate to the trust deed, "[t]here is no privity of contract or of estate between the purchaser upon the decree of sale and the tenant. [. . .] The relation between the purchaser and tenant is that of owner and trespasser, until some agreement, express or implied, is made between them with reference to occupation."[73] The court noted specifically that if the parties had desired another result, the parties could have entered into a nondisturbance agreement, whereby the tenant's possession of the property would not be disturbed in the event of a foreclosure.[74] In other words, had the parties entered into an SNDA, the tenant would not be deemed a trespasser (because of the nondisturbance terms of the SNDA); rather, it would be deemed a tenant with an ongoing lease and obligations to the foreclosing lender as its new landlord (because of the attornment terms of the SNDA).

Conclusion

From the view of landlord and tenant, and any of the prospective successors and assigns to their contractual and real property rights and obligations, it is

crucial that real property stakeholders realize the basis of their respective interests, as this can have a profound impact on both the limits on their potential ability to enforce contractual terms, as well as potential avenues to legally stop performing under contract terms that are limited by the very nature of such obligations. Perhaps most importantly, as was emphasized in *Whittwood*, courts may be reluctant to protect parties that fail to protect themselves by misunderstanding the nature (and the resulting legal implications) of their rights and obligations under contractual and real property law. Clearly stated and fully executed agreements that set forth the various rights and obligations to be assigned and assumed between each of the relevant parties, as well as conditions that require the execution of such agreements, become critical to clarifying the ongoing obligations of parties with interests in real property.

ENDNOTES:

[1]*BRE DDR BR Whittwood CA LLC v. Farmers & Merchants Bank of Long Beach*, 14 Cal. App. 5th 992, 222 Cal. Rptr. 3d 435 (2d Dist. 2017).

[2]*Miller & Starr, Cal. Real Estate 4th* § 34:16, p. 34-47-34-48.

[3]*Id.* at 34-49.

[4]*BRE DDR BR Whittwood CA LLC, supra* note 1, at 996.

[5]*Id.*

[6]*Id.*

[7]*Id.*

[8]*Id.*

[9]*Id.*

[10]*Id.*

[11]*Id.* at 997.

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]*Id.* at 998.

[16]*Id.*

[17]*Id.*

[18]*Id.*

[19]*Id.* at 999.

[20]*Id.*

[21]*Id*. at 1000.

[22]*Id*.

[23]*Id*., citing *Enterprise Leasing Corp. v. Shugart Corp*., 231 Cal. App. 3d 737, 282 Cal. Rptr. 620 (2d Dist. 1991).

[24]*Id*.

[25]*Id*. at 1001.

[26]*Id*., citing *Bank of America Nat. Trust & Savings Ass'n v. Moore*, 18 Cal. App. 2d 522, 64 P.2d 460 (2d Dist. 1937).

[27]*Id*., citing *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 194 P. 1024 (1920).

[28]*Id*. at 1002, citing *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697 (1932).

[29]*Id*. at 1002, citing *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal. App. 3d 666, 195 Cal. Rptr. 303 (4th Dist. 1983).

[30]*Id*. at 1003.

[31]*Id*. at 1003-1004.

[32]*Kirk Corp. v. First American Title Co.*, 220 Cal. App. 3d 785, 808, 270 Cal. Rptr. 24 (3d Dist. 1990). See also *Miller & Starr, Cal. Real Estate 4th* § 34:124, p. 34-403 to 34-404.

[33]Civ. Code, § 821.

[34]*Upton v. Toth*, 36 Cal. App. 2d 679, 684, 98 P.2d 515 (4th Dist. 1940).

[35]*Del Taco, Inc. v. University Real Estate Partnership V*, 111 Cal. App. 4th 16, 23, 3 Cal. Rptr. 3d 311 (4th Dist. 2003).

[36]*Id*.

[37]*Id*.

[38]*Id*. at 24.

[39]*Id*. at 23.

[40]*Id*. at 19.

[41]*Id*.

[42]*Id*.

[43]*Id*. at 20.

[44]*Id*.

[45]*Id*. at 23.

[46]*Id*.

[47]*Id*. at 24, citing Restatement (Second) Property, § 16.1.

[48]*Id*.

[49]*Id*.

[50]*Id*. at 26-7.

[51]*MHW Ltd. Family Partnership v. Farrokhi*, 2005 SD 21, 693 N.W.2d 66 (S.D. 2005).

[52]*Id*.

[53]*Id*. citing *Kirk Corp. v. First American Title Co.*, 220 Cal. App. 3d 785, 270 Cal. Rptr. 24 (3d Dist. 1990).

[54]*Id*.

[55]*Miller & Starr, Cal. Real Estate 4th* § 34:131, p. 34-423-34-426.

[56]*Rex Investment Company Ltd. v. S.M.E., Inc.*, 2017 WL 4792431, *5 (S.D. Cal. 2017) citing *Enterprise Leasing Corp. v. Shugart Corp., supra* note 23.

[57]*Id*.

[58]*Rex Investment Company Ltd. v. S.M.E., Inc., supra* note 56, citing *Tri-Cities Broad., Inc.*, *supra* note 29.

[59]*Id*.

[60]*Id*.

[61]*Id*. at 1.

[62]*Id*.

[63]*Id*. at 2.

[64]*Id*.

[65]*Id*. at 3.

[66]*Id*. at 9

[67]See *Vallely Investments, L.P. v. BancAmerica Commercial Corp.*, 88 Cal. App. 4th 816, 106 Cal. Rptr. 2d 689 (4th Dist. 2001).

[68]*Dover Mobile Estates v. Fiber Form Products, Inc.*, 220 Cal. App. 3d 1494, 270 Cal. Rptr. 183 (6th Dist. 1990).

[69]*Id*. at 1496.

[70]*Id*. at 1497.

[71]*Id*.

[72]*Id*. at 1498.

[73]*Id*. at 1499, *McDermott v. Burke*, 16 Cal. 580, 590, 1860 WL 991 (1860).

[74]*Id*. at 1500.

