



## Mean What You Say, Say What You Mean: Tenant Estoppels Do Work



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One of the standard tasks in real estate work is reviewing and analyzing tenant estoppels in connection with a potential loan or real estate purchase of a building with commercial tenants. A tenant estoppel is a signed certificate made by a tenant certifying for the benefit of a potential buyer and/or lender of a property that certain material terms of its lease are correct as of a certain date. Potential lenders rely on tenant estoppels for purposes of their underwriting and due diligence by taking into account representations from the tenant, such as the actual rent that is currently being paid, the amount of outstanding improvement allowances, whether any defaults, offsets or abatements to rent exist and expiration dates.

In May of 2021, the Illinois Court of Appeals (the “Court”) held that estoppels are enforceable against a tenant’s subsequent actions and claims. In *Uncle Tom’s, Inc. v. Lynn Plaza, LLC* (2021 IL App (1st) 200205 (May 21, 2021)), the plaintiff, Uncle Tom’s, Inc. (“Uncle Tom’s”), leased and operated a restaurant known as Market Square Restaurant in a strip mall owned by the defendant, Lynn Plaza, LLC (“Lynn Plaza”). Uncle Tom’s lease was set to expire in 2013, and in 2005, Uncle Tom’s attempted to exercise its 15-year extension option under its lease, but the parties could not agree on the square footage of the renewed lease for purposes of calculating base rent for the extension period. In 2011, Uncle Tom’s filed a complaint with the Circuit Court of Cook County (the “Circuit Court”) for declaratory judgment on the rent issue and also filed an equitable accounting claim for certain disputed amounts of common area maintenance (“CAM”) charges that Uncle Tom’s had paid to Lynn Plaza over the years. Uncle Tom’s complained that Lynn Plaza incorrectly charged and received certain CAM charges that were not included in the description of CAM charges under the lease. The disputed CAM charges were for management fees (billed and paid in January of 1998 for the year 1997) and easement charges for the use of a parking lot owned by a neighboring power company, which Uncle Tom’s had been paying for with CAM charges for

almost 10 years. In July of 1998, in connection with a loan Lynn Plaza was seeking for the strip mall, Uncle Tom's principal executed a tenant estoppel certificate representing to the proposed lender that "rent had been paid through July 1998" and that "there were no defenses to or offsets against the enforcement of the Lease or any provision thereof by the Landlord." The Circuit Court granted summary judgment in favor of Lynn Plaza finding that Uncle Tom's was estopped from challenging the disputed CAM charges based on the estoppel certificate its principal had signed.

The case came to the Court on appeal from the judgment entered into by the Circuit Court and the Court reviewed the estoppel issue *de novo*. Uncle Tom's argued three points:

1. Uncle Tom's argued that the estoppel did not specifically mention the CAM charges at issue, so it could not be estopped for these CAM charges. The Court denied this argument reasoning that the lease specifically included CAM charges as additional rent and Uncle Tom's certification was clear on the issue – that rent had been paid and that "there were no defenses to or offsets against the enforcement of the Lease or any provision thereof by the Landlord" (*i.e.*, Lynn Plaza had not violated the lease by assessing these CAM charges). The Court went on further to hold that estoppels are not meant to include and capture every single provision of a lease, as it would be a tedious process for all parties and the statements are clear on their own.
2. Uncle Tom's also argued that it did not know of the CAM charges it would incur after July 1998 (the date of the estoppel), so it could not be estopped for charges it did not know about. This argument was based on *K's Merchandise Mart, Inc. v. Northgate Ltd. Partnership* (359 Ill. App. 3d 1137 (2005)), where the Court held that a tenant was not barred from challenging the management fees assessed by its shopping center landlord because "the events prior to the execution of the estoppel certificate did not rise to the level that [the tenant] should reasonably have known of the management fee." Here, the Court rejected Uncle Tom's argument based on the *K's Merchandise* case because of Uncle Tom's "contemporaneous knowledge of the significance of the disputed charge at the time it executed the estoppel certificate." Before Uncle Tom's signed the estoppel certificate, Uncle Tom's knew of the disputed 2018 CAM management fee charges for six months and the disputed CAM easement charges for almost 10 years. Uncle Tom's even went further and hired an attorney to dispute the CAM charges for the management fees. The amount of the disputed CAM management charges was also \$15,698, and this amount was specifically called out with a note flagging the item in the CAM reconciliation statement. The Court reasoned that this was not the same as the *K's Merchandise* case because there, the tenant received the reconciliation statement two months prior to signing the estoppel and the charge was for \$300 embedded in a line item. The level of knowledge was not the same.
3. Uncle Tom's lastly tried to argue that the doctrine of equitable estoppel was not applicable here because there was no showing of a "misrepresentation or concealment of a material fact" (or the fraud element of equitable estoppel). The Court agreed with the Circuit Court here that this case was not based on an allegation of fraud, but on the execution of the estoppel

itself.

The Court ultimately concluded that Uncle Tom's was in fact estopped from challenging the inclusion of the disputed management and easement fees in CAM charges. What we learn here from the Court's holding, other than the fact that, yes, you can hold a tenant accountable for what it represents in its tenant estoppel, is that: (1) when a statement is clear, such as "there is no defense or offset," every specific, single kind of offset/defense that can occur under a lease need not be called out, (2) lack of knowledge of facts may be a defense to being estopped, but when there is clear evidence of the knowledge, this defense will not cut it, and (3) fraud may be a defense to a claim of an estoppel. So there you have it: a real-life example of a tenant being held accountable in practice and "estopped."