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Case No. S _____

IN THE SUPREME COURT OF CALIFORNIA

DR. LEEVIL, LLC,

Plaintiff and Respondent,

v.

WESTLAKE HEALTH CARE CENTER,

Defendant and Appellant.

**SUPREME COURT
FILED**

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After a Decision of the Court of Appeal
Second Appellate District, Division Six
Court of Appeal No. B266931
Superior Court, County of Ventura Case No.: 56-2015-00465793-CU-UD-
VTA
The Honorable Vincent J. O'Neill, Jr.

CRC
8.25(b)

PETITION FOR REVIEW

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I.

STATEMENT OF ISSUES PRESENTED.

1. Whether California Code of Civil Procedure section 1161a requires title be perfected before a notice to quit is served following a foreclosure sale.
2. Whether inclusion of a nondisturbance clause in a lease modifies an “automatic” subordination clause contained in the lease.
3. Whether the trial court erred in summarily ruling on the issues presented for the first time at trial without sufficient notice and opportunity for Petitioner to present full argument and evidence.

II.

WHY REVIEW SHOULD BE GRANTED

The issues presented in this Petition concern two matters of first impression before this Court. The first involves a split of authority created by the Second Appellate District’s Opinion and Order in this case, filed on March 7, 2017,¹ regarding whether California Code of Civil Procedure section 1161a² requires title be recorded before a three-day notice to quit is served following a foreclosure sale.

In its Order, the Second Appellate District, Division Six, determined that California Code of Procedure section 1161a does not require that title be recorded before a notice to quit is served. However, the recent opinion ordered published by this Court in *U.S. Financial, L.P. v. McLitus*, 6 Cal.App.5th Supp.

¹ The Second Appellate District, Division Six’s Order Filed March 7, 2017 is attached hereto as Exhibit “A,” and throughout this Petition will be referred to as the “Order.”

² Unless otherwise specified, all statutory references are to the California Code of Civil Procedure.

1, 211 Cal. Rptr. 3d 149 (Cal. App. Dep't Super. Ct. 2016), *as amended* (Dec. 2, 2016) (*McLitus*) holds to the contrary:

[T]he sale was perfected at the time the three-day notice was served, but not the title. Thus, the plaintiff could not provide defendant with a valid three-day notice. The court below mixed the issues of sale and title, but perfecting title is not interchangeable with perfection of the sale under this statutory scheme.

Unless and until the Plaintiff has duly perfected title, an unlawful detainer action for possession is not yet ripe for determination. (*Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540-541.)

Although the Second Appellate District was aware of this holding, having ordered supplemental briefing on *McLitus*, the Appellate Court stated that it was “not persuaded by the reasoning of *McLitus*” and rejected Petitioner’s contention that the Notice to Quit served by Respondent was premature as title had not yet been recorded. (See Exhibit A, pp. 6-7). The factual positioning of this case and *McLitus* are virtually identical.

The decision by the Appellate Court creates a split of authority on the issue of whether title needs to be recorded as a prerequisite to filing a notice to quit and commencement of an unlawful detainer action. Therefore, the Court should grant this Petition in order to secure uniformity of decision on this issue.

This uniformity of law is especially key where, as under the unlawful detainer statutes being interpreted here, the law requires strict compliance in order to obtain a judgment. Such an area of law is not tolerant of splits of authority, and the issue should be decisively resolved.

The second issue raised on this appeal also requires this Court to settle an important question of law not previously addressed by this Court, which has led to confusion and ambiguity in the interpretation of contracts involving common “SNDAs” or subordination, nondisturbance and attornment clauses. Specifically, the question of whether a party can enforce a subordination clause in a lease without being bound by a corresponding nondisturbance clause in that same lease is not only an important question for the interpretation of leases containing such clauses, but it is also a novel issue for the California Courts.³ Subordination, nondisturbance, and attornment clauses are common in commercial leases. *Miscione v. Barton Development Co.*, 52 Cal.App.4th 1320, 1339 (1997); *Miller & Starr California Real Estate*, 1 Cal. Real Est. Digest 3d, Deeds of Trust § 14. In general. Therefore, the issue of how to interpret a lease after foreclosure that has both a subordination and nondisturbance clause is an important question of law, and one that has yet to be considered by this Court.

Finally, the role of the courts in the interpretation of these clauses and application of extrinsic evidence regarding the drafting and intent of the parties is also an important issue of law for this Court’s determination. Here, the trial court summarily ruled on these issues without sufficient notice and opportunity for Petitioner to present full argument and evidence. The trial court’s actions essentially deprived Petitioner of its right to a jury trial as there were factual questions to be resolved. Whether or not, even in an unlawful detainer action,

³ There are cases discussing whether or not a party in possession of a property after foreclosure can enforce an attornment clause in a lease, in order to make the lessor pay rent under the lease, but no cases considering the issue of whether a lessor may enforce the lease’s nondisturbance clause to resist eviction. (See, e.g., *Miscione v. Barton Dev. Co.*, 52 Cal. App. 4th 1320, 1326 (1997); *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469 (1998); *Dover Mobile Estates v. Fiber Form Products, Inc.*, 220 Cal. App. 3d 1494 (1990).

the trial court can order a late briefing and hearing on issues raised on the first day of a trial and deprive a party of a jury trial is an important question of public policy.

Therefore, this Petition should be granted as to all of the issues stated above.

III.

FACTUAL BACKGROUND

A. Background

Prior to entry of Judgment in this action, Petitioner Westlake Healthcare Center was the licensed operator and tenant of a 99-bed residential care facility located at 250 Fairview Rd., in Thousand Oaks, California (the “Premises”). (2AA at T49 402 ¶2.)⁴ Petitioner operated the facility under a license granted by the State of California. (2AA at T49 402 ¶2.)

B. The 2002 Lease.

Until February 2015, the Premises was owned by nonparty Westlake Village Property L.P. (“Westlake L.P.”). On March 12, 2002, Petitioner entered into a written Lease with Westlake L.P. pursuant to which Petitioner leased the Premises from Westlake L.P. for a term of 20 years. (2AA at T37 301-307.)

Among other things, the Lease contained the following provision at Paragraph 19:

19. Subordination. Landlord shall have the right to subordinate this Lease to any deed of trust or mortgage encumbering the Premises, any advances made on the security thereof and any renewals, modifications, consolidations, replacements or extensions thereof, whenever

⁴ Citations to Appellant’s Appendix shall be in the following format: ([Volume]AA at T[tab number] [page number].)

made or recorded. Tenant shall cooperate with Landlord and any lender which is acquiring a security interest in the Premises or the Lease. Tenant shall execute such further documents and assurances as such lender may require, provided that Tenant's obligations under this Lease shall not be increased in any material way, and Tenant shall not be deprived of its rights under this Lease. Tenant's right to quiet possession of the Premises during the Term shall not be disturbed if Tenant pays the rent and performs all of Tenant's obligations under this Lease and is not otherwise in default. If any beneficiary or mortgagee elects to have this Lease prior to its deed of trust or mortgage and gives written notice thereof to Tenant, this Lease shall be deemed prior to such deed of trust or mortgage whether this Lease is dated prior or subsequent to the date of said deed of trust or mortgage or the date of recording thereof.

(2AA at T37 304-05.) The Lease also included a standard subordination provision at Paragraph 21 in the "General Provisions" section of the lease, which reads: "Subordination. This lease is and shall be subordinated to all existing and future liens and encumbrances against the Premises." (2AA at T37 306.)

C. Loan Secured by the Premises.

In 2008, Westlake L.P. obtained a loan from TomatoBank, N.A. (the "Bank") to refinance the property ("2008 Loan"). (1AA at T23 135-37.) The note was dated July 10, 2008, and had a maturity date of July 10, 2013. (Id.)

In 2013, Westlake L.P. obtained an extension to the 2008 Loan. (1AA at T23 139-47.) The Extension Agreement between Westlake L.P. and the Bank was entered into on September 16, 2013. In connection with that extension, the Bank alleged that Petitioner executed a Subordination Agreement that made the Lease subordinate to the 2008 Loan. (1AA at T2 15-21.) Petitioner denies ths allegations and contends that the Subordination Agreement was fraudulently induced or was signed by mistake. (1AA at T17 101-03.)

D. Transfer of the Debt to Respondent and Foreclosure.

In 2014, the Bank sold the loan to Respondent. (1AA at T23 149-52.) Respondent subsequently foreclosed on that loan via the power of sale contained in the Deed of Trust. (1AA at T2 11-12.) On February 19, 2015, Respondent proceeded with a non-judicial foreclosure sale and purchased the Premises via a trustee's deed upon sale. (1AA at T2 11-12.) Respondent recorded the trustee's deed upon sale on February 25, 2015. (1AA at T2 11.)

E. Service of Three-Day Notice to Quit

On February 20, 2015, before the trustee's deed was even recorded, Respondent purported to serve a three-day notice to quit on Petitioner's office manager. (1AA at T23 154-57.)

Respondent thereafter commenced the underlying unlawful detainer action on April 1, 2015. (1AA at T2 9.)

IV.

PROCEDURAL BACKGROUND

On April 1, 2015, Respondent filed its Complaint for Unlawful Detainer after Completion of Power of Sale from a Foreclosure by a Trustee's Deed ("Complaint"). (1AA at T2 9.) On the caption page of the Complaint, Respondent cites "CCP §§ 1161/1161a(b)(3)" and states that this is an "Action Based on Code of Civil Procedure Section 1161a." (1AA at T2 11.)

The Complaint alleges that Respondent "acquired title on February 19, 2015 via a trustee's deed upon sale recorded on February 25, 2015. The trustee's deed upon sale granted, plaintiff a 100% ownership interest. Title has been duly perfected." (1AA at T2 11.)

After demurrer, Petitioner filed its Answer on April 30, 2015. (1AA at T17 99.) After various continuances, the case was set for trial on July 15, 2015. (2AA at T36 289.)

Pursuant to the trial court's order, on July 1, 2015 and July 2, 2015, Petitioner timely filed five motions in limine, including a Motion in Limine No. 1 for Judgment on the Pleadings. (1AA at T23 119; 1AA at T24 163; 1AA at T25 168; 1AA at T26 207; 1AA at T29 222.) The Motion for Judgment on the Pleadings ("MJOP") was made on the grounds that (1) Respondent did not properly serve its Notice to Quit or Pay Rent, as it had not perfected title at the time it served the Notice to Quit; and (2) Respondent sought to evict "all occupants," although the patient occupants were not named in the Complaint. (1AA at T29 222-23.)

On July 15, 2015, on the first day of trial, Respondent filed a "Request for Evidence Code Section 402 Hearing and/or For Separate Trial on Issue of the Automatic Lease Subordination Provision in the Former Lease" ("402 Motion"). (2AA at T37 290.) The 402 Motion requested that the trial court have a separate hearing regarding the subordination clause in the Lease. (2AA at T37 290-91.) Although styled as a request for a 402 hearing, the 402 Motion was essentially an untimely motion for summary judgment.

Over Petitioner's strenuous objection, on July 16, 2015, the trial court determined that it would hold a "bench trial" on the issues raised in the 402 Motion. (Reporters' Transcript ("RT") 26:4-16.) The trial court ordered both parties to submit any briefs on the issue by 3:00 p.m. on Saturday, July 18, 2015. (RT 38a:23-38b:3.)

Both Petitioner and Respondent filed their briefs on July 18, 2015 as requested by the trial court. (2AA at T41 313; 2AA at T42 338.) In its brief, Respondent raised for the first time the argument that it was not in privity with

Petitioner and therefore was not bound by the nondisturbance clause under the Lease.

On July 20, 2015, the trial court held a “bench trial” on the issues raised in Respondent’s 402 Motion, which consisted of basically oral argument by counsel. The trial court did not allow Petitioner to present any evidence on the issues. At the hearing, the trial court ruled that Respondent was not bound by the nondisturbance provision in the lease. (RT 39:24- 40:23; RT 57:9-23.) Relying on the argument raised for the first time by Respondent in its Saturday briefing, the trial court held that there was a lack of privity with Respondent and Petitioner therefore could not bind Respondent to the nondisturbance clause. (Id.)

The Motion for Judgment on the Pleadings was also heard on July 20, 2015. The trial court determined that the deed was “deemed recorded as a matter of law.” (RT 59:7-17.)

The remaining issues after the bench trial were whether or not the notice to quit was properly served on Petitioner, and whether or not there would be holdover damages. (RT 74:18-23, 75:3-6.) On July 21, 2015, Petitioner and Respondent stipulated to an agreement to resolve those issues. (RT 155:8-156:26.) Petitioner withdrew its defense on the issue of proper service of the notice to quit, and judgment was entered by the trial court in favor of Respondent. (Id.)

The Notice of Entry of Judgment was filed on July 21, 2015, and was entered onto the docket on July 22, 2015. (1AA at T1 1; 2AA at T45 354.)

On September 16, 2015, Petitioner filed its notice of appeal. (2AA at T46 358.) Petitioner filed its opening brief on April 12, 2016 and Respondent filed its brief on July 14, 2016. Oral argument before the Court of

Appeal was heard on November 9, 2016 and the matter was taken under submission.

On December 5, 2016, after Oral Argument, the Court of Appeals ordered that the submission be vacated for further briefing. Specifically, the Court of Appeal requested “letter briefs on *U.S. Financial, L.P. etc., v. McLitus*, San Diego County Superior Court, Appeal Division (Case No. 37-2016-00201 1 16-CL-UD-CTL), ordered published by the California Supreme Court on December 2, 2016 (S237852).” (See Order Vacating Submission and Order For Supplemental Letter Briefs, dated December 5, 2016.)

The parties subsequently submitted letter briefs regarding *U.S. Financial, L.P. etc., v. McLitus*, San Diego County Superior Court, Appeal Division (Case No. 37-2016-00201 1 16-CL-UD-CTL), ordered published by the California Supreme Court on December 2, 2016 (S237852) (hereinafter referred to as “*McLitus*”).

The Appellate Court issued its Order on March 7, 2017, affirming the trial court’s ruling. (See Exhibit A.) In particular, the Appellate Court rejected the arguments raised by Petitioners on appeal and the decision by the *McLitus* court and held that perfected title is not required prior to service of a three-day notice to quit. (Order at p. 8-9). The Appellate Court further departed from the reasoning of the trial court holding that Respondents were not bound by the nondisturbance clause, but nonetheless reached the same conclusion by interpreting the Lease against Petitioner and in favor of Repondent, even though Respondent was not a party to the Lease. The Appellate Court also rejected Petitioner’s arguments that it should have been allowed to present testimony and evidence regarding the intent of the parties to the Lease in including the nondisturbance clause in the Lease.

V.

LEGAL DISCUSSION

A. This Petition for Review Should be Granted as There is Currently a Split of Authority as to Whether or Not Title Must be Recorded Prior to Service of a Notice to Quit.

As discussed above, the Appellate Court's Order regarding whether "perfected title" is required prior to service of a notice of quit has created a split of authority in the courts. This split of authority warrants review by the Supreme Court in order to create uniformity of decision.

Section 1161a provides in pertinent part:

(b) In any of the following cases, a person who holds over and continues in possession of a manufactured home, mobilehome, floating home, or real property after a three-day written notice to quit the property has been served upon the person, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in Section 1162, may be removed therefrom as prescribed in this chapter:

...

(3) Where the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, ***and the title under the sale has been duly perfected.***

Code of Civ. Proc. §1161a(b)(3) (emphasis added).

The *McLitus* case, ordered published by the Supreme Court, and interpreting section 1161a in conjunction with section 2924h of the foreclosure statutes, holds, in relevant part:

Contrary to the plain reading of the statute, the trial court erroneously concluded "... that under California Civil Code section 2924h(c), *title* is deemed perfected as of 8 a.m. on the

date of the sale because the trustee's deed upon sale was recorded within 15 calendar days." (Statement of Decision, italics added.)

In this case, the sale was perfected at the time the three-day notice was served, but not the title. Thus, the plaintiff could not provide defendant with a valid three-day notice. *The court below mixed the issues of sale and title, but perfecting title is not interchangeable with perfection of the sale under this statutory scheme.*

Unless and until the Plaintiff has duly perfected title, an unlawful detainer action for possession is not yet ripe for determination. (*Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540-541.)

Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt ..., which includes good record title ..., but is not limited to good record title, as between the parties to the transaction. The term 'duly' implies that all of those elements necessary to a valid sale exist, else there would not be a sale at all.

(*Kessler v. Bridge* (1958) 161 Cal.App.2d Supp. 837, 841, 327 P.2d 241.)

"A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action. [Citations.] Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements. [Citation.]" (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697, 32 Cal.Rptr.2d 635.)

A defective notice cannot support an unlawful detainer judgment for possession. Respondent's interpretation, on the other hand, would suggest that a post-foreclosure plaintiff could routinely prematurely issue a three-day notice that includes legal and factual misstatements (e.g., that the purchaser has already duly perfected title when it had not yet done so). And as argued

by Appellant, such a practice would practically prevent a defendant from effectively verifying the identity of the alleged purchaser of a property as a search of recorded documents would prove futile.

Absent a sale in accordance with Section 2924 of the Civil Code *and* a duly perfected title prior to the issuance of the notice, a post-foreclosure purchaser cannot avail itself of a summary unlawful detainer eviction proceeding. Respondent's prematurely issued notice was fatally defective, and the unlawful detainer judgment must be reversed. This matter is remanded to the trial court to vacate the January 20, 2016 judgment and to conduct any further proceedings as necessary consistent with this Decision.

McLitus, 211 Cal. Rptr. 3d at 151-52. Under the *McLitus* ruling, the trial court's ruling in this case would have been reversed, as Respondent's pleadings show that it did not have good record title at the time that it served the three-day notice to quit. Respondent alleged in its Complaint that it purchased the property at the foreclosure sale on February 19, 2015, and that it served its Notice to Quit on February 20, 2015. (1AA at T2 12.) However, title was not recorded until February 25, 2015. (1AA at T2 11.) Therefore, under the *McLitus* ruling, at the time Respondent purported to give its Notice to Quit, title had not been perfected, as it had not yet been recorded.

The Appellate Court considering Petitioner's case, however, directly disagreed with *McLitus*. In particular, the Appellate Court held:

McLitus relies on the language of section 1161a, subdivision (b)(3), which provides that "a person who holds over and continues in possession of . . . real property after a three-day written notice to quit the property has been served . . . may be removed therefrom . . . [w]here the property has been sold in accordance with [s]ection 2924 of the Civil Code . . . and the title under the sale has been duly perfected." The statute does not require that title be perfected (i.e., that the trustee's deed be recorded) before service of the three-day notice. It requires that

title be perfected before a tenant “may be removed” from the property.

(Exhibit A, pp, 6-7.)

This is a direct disagreement between the two cases, warranting review by this Court.

Moreover, this issue is an important issue of law that should be resolved due to the nature of unlawful detainer actions. The unlawful detainer statutes require strict compliance in unlawful detainer actions. *Culver Ctr. Partners E. No. 1, L.P. v. Baja Fresh Westlake Vill., Inc.*, 185 Cal. App. 4th 744, 749 (2010) (in order to take advantage of the summary remedy of unlawful detainer, a “landlord must demonstrate strict compliance with the statutory notice requirements contained in section 1161 et seq.”). As stated above, section 1161a(b)(3) requires that a person may be removed after being served with a three-day notice to quit “Where the property has been sold in accordance with Section 2924 of the Civil Code . . . and the title under the sale has been duly perfected.” Duly perfected title includes, but is not limited to, good record title. *Bank of New York Mellon v. Preciado*, 224 Cal. App. 4th Supp. 1, 9-10 (2013) (citing *Kessler v. Bridge*, 161 Cal.App.2d Supp. 837, 841 (1958)).

Therefore, it is important that this Court resolve what the strict requirements are that a party must adhere to in order to avail itself of the summary remedy of unlawful detainer in order to evict a tenant after foreclosure. Review is therefore warranted in this case.

B. Review Should Be Granted On The Proper Interpretation Of A Lease With Both A Subordination Clause And Nondisturbance Clause After A Foreclosure Of A Junior Lien.

1. This Court Should Determine Whether The Rules Of Contract Interpretation Require That, Where A Lease Contains Both A

Nondisturbance Provision Coupled With A Subordination Clause, Both Should Be Interpreted And Enforced.

Whether or not a nondisturbance clause can be enforced against a purchaser after foreclosure in a lease purported to be extinguished by virtue of a subordination clause in that same lease is an important issue of law which should be adjudicated by this Court. The issue is one of first impression for the California Courts. Moreover, it is important that this issue of law be resolved as subordination, nondisturbance, and attornment clauses (collectively referred to as "SNDA" clauses) are common in commercial leases, and are commonly included together in commercial leases. *Miscione v. Barton Development Co.*, 52 Cal.App.4th 1320, 1339 (1997) ("*Miscione*"); *Miller & Starr California Real Estate*, 1 Cal. Real Est. Digest 3d, Deeds of Trust § 14. In general. The effect of these clauses on each other, therefore, is important as a matter of public policy.

Generally speaking, under California law, a subordinate lease is extinguished by operation of law upon foreclosure of a superior trust deed or lien. *Dover Mobile Estates v. Fiber Form Products, Inc.*, 220 Cal. App. 3d 1494, 1499 (1990), *modified* (June 7, 1990) ("*Dover*") ("foreclosure 'wipes out' all liens, encumbrances, and leases subsequent in time to the trust deed so that there is no landlord tenant relationship between a foreclosure purchaser and the occupant of the premises.") Subordinate in this context simply refers to the time of formation. The Lease at issue here was entered into in 2002, while the 2008 Loan was obtained in 2008. Thus, the lien created by the 2008 Loan was technically "subordinate" to the Lease.

However, parties to a real estate contract may contractually alter the priorities and their rights otherwise fixed by law. *Miscione*, 52 Cal. App. 4th at 1326. Thus, whether a lease is extinguished depends upon not only the timing

of the various liens and contracts, but also whether the lease contains SNDAs, and the effect and interpretation of those clauses.

The effect of the nondisturbance clause on the subordination clause was briefed extensively by the parties on appeal. However, the parties were not able to find law directly on point, making this a case of first impression. The cases principally relied on by the parties, *Miscione*, *Dover*, and *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469 (1998) (“*Principal*”), all dealt mainly with the effect of subordination and attornment clauses, or the lack thereof, on the rights of property owners to enforce leases after foreclosure. They do not directly address the effect of a lease with both a nondisturbance clause and a subordination clause where the lessee wishes to retain the lease and possession of the premises.

However, the cases do address the intent behind a nondisturbance clause. When discussing the effect of SNDA clauses the *Principal* court stated:

In order to protect itself from the loss of its lease through foreclosure of the landlord’s property, a tenant asked to subordinate its lease to any future encumbrances may negotiate with the landlord to obtain a nondisturbance agreement from any future lenders. Such an agreement provides that a foreclosing lender with a superior lien will not disturb the tenant’s possession so long as the tenant has not defaulted on the lease.

Principal Mut. Life Ins., 65 Cal. App. 4th at 1479. Thus, under a nondisturbance provision, the parties may agree that, in the event of a foreclosure, 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. See Feinstein & Keyles, *Foreclosure: Subordination, Non-Disturbance and Attornment Agreements* (Aug. 1989) Prob. & Property, 38, 39, cited in *Miscione*, 52 Cal.App.4th at 1327. In fact, “the concept of non-disturbance is

frequently intended to refer not only to non-disturbance of the tenant's right of possession, but also to full recognition of all of the tenant's rights under its lease." See Fisher & Goldman, *The Ritual Dance Between Lessee and Lender* (Fall 1995) 30 Real Property, Prob. & Trust J. 355, 357, cited in *Miscione*, 52 Cal.App.4th at 1327. Thus, a nondisturbance clause protects *the tenant's rights* to enforce the lease.

The cases are also clear where a lease also contains an attornment provision or a nondisturbance provision in addition to a subordination clause, the lease is *not* automatically extinguished and may continue. In *Dover*, the new purchaser/landlord sought to enforce a lease post-foreclosure. Relying upon the automatic subordination clause contained in the parties' lease, the court held that the lease was automatically extinguished upon foreclosure, and the landlord had no right to hold the tenant to its obligations under the lease. *Dover*, 220 Cal.App.3d at 1498-1499. The *Dover* court further stated, however:

Finally, we note that the tenant under a subordinate lease can obtain some protection by requiring the landlord to obtain from its lender a non-disturbance agreement in favor of the tenant. Such an agreement provides that the lender with a superior lien will not, "by foreclosure or otherwise, disturb the tenant's possession, as long as the tenant is not then in default under the lease." (*Johnson & Moskowitz*, Cal. Real Estate Law & Practice § 153.50, p. 153-94.) In addition, the tenant could bargain with its landlord for the right to cure the landlord's default. (*Ibid.*)

Dover, 220 Cal.App.3d at 1500. The implication of *Dover* is that, even where the lease contains a so-called automatic subordination clause, other provisions in the lease may alter the priorities and automatic termination clause.

That is analogous to the situation here where Petitioner contracted to include a nondisturbance provision in its Lease. The specific SNDA provisions here were expressly bargained for by the parties to the Lease and set

forth in a separate section in the Lease at Paragraph 19, while the so-called automatic subordination provision relied upon by Respondent simply appears as a sub-paragraph in the “Miscellaneous” section of the Lease. (2AA at T37 304-05.) Since the Lease predated the trust deed, the original lender, and Respondent as its successor, had full knowledge of *all* of the conditions in the lease and were bound by those conditions.⁵

Therefore, review of the Appellate Court’s Order regarding the subordination clause is appropriate. The Order focused on the “automatic subordination” issue but only impliedly ruled that the nondisturbance clause did not serve to keep the Lease in place. Petitioner argues that effect must be given to both the nondisturbance and subordination provisions in the Lease. A subordination clause and a nondisturbance clause can be read together with both given full effect. *Chumash Hill Properties, Inc. v. Peram*, 39 Cal. App. 4th 1226, 1233 (1995) (nondisturbance clause enforceable by sublessee against prime lessor). An interpretation that ignored the nondisturbance provision while enforcing the subordination provision runs afoul of the rules of construction. Cal. Civ. Code § 1641 (“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”); *accord Milazo v. Gulf Ins. Co.*, 224 Cal. App. 3d 1528, 1536 (1990).

As “SNDAs” are commonly included together in commercial leases, and are intended to be accorded their full meaning and intent as a whole, this Court should grant the petition for review in order to determine a key issue of law with a great impact on commercial leases.

⁵ The lender’s knowledge of the nondisturbance provision can be inferred from the timing of the documents, but to the extent Respondent disputes this fact, it is yet another error created by the trial court’s decision to adjudicate the matter without a full trial.