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# COMMERCIAL LEASE NEWSLETTER

## THE TWO WITNESS RULE REVISITED
## (NOW HEADING TO THE SUPREME COURT)

Recently, in a June 2010 case, the two (2) witness rule is again addressed and continues to create problems for landlords and tenants. This case is S&I Investments v. Payless Flea Market Inc. 35 Fla. L. Weekly D 1308 (4th DCA 2010). It appears that this case is now potentially headed to the Supreme Court since the opinion conflicted with the prior case in the Third District Court in Taylor v. Rosman 312 So. 2d 239 (3rd DCA 1975). To the extent that the opinion conflicted with the Taylor case, it was certified for a conflict to the Supreme Court of Florida.

Here again are the two (2) witness rule basics as applied to the recent facts in the S&I Investments:

1. Florida Statute §689.01 provides that the lease of a term for more than one (1) year should be in writing and signed in the presence of two (2) subscribing witnesses. This has been applied to all leases in excess of one (1) year inclusive of renewal terms/renewal leases.

2. In the case of S&I Investments v. Payless, they were negotiating a renewal of an existing lease (no discussion as to whether the original lease had been signed by two (2) witnesses). The original lease was set to expire in August 2004 and the timeline was that in February 2003 the principal of Payless (tenant) contact S&I (landlord). They exchanged draft leases.

3. In October of 2003, well prior to the August 2004 expiration date, a proposed and revised lease was provided to the landlord. October 16, 2003 the landlord executed the lease but there was only one (1) witness, notwithstanding the fact that two (2) subscribing witnesses were required. The landlord gave the tenant the executed original copy and kept the other copy.

4. In this case, the landlord indicated that it would require both owners representing the landlord to execute the lease and the fact that a signature of one (1) of the owners did not bind the landlord, but required signature and approval of the other owner. Further, at that point in time, the tenant's principal asked to keep the original lease so he could "review it". The tenant later brought a breach of lease action against the landlord based upon the lease and convinced the court that it did not need to be signed by two (2) witnesses pursuant to Florida Statute §689.01 because the lease was renewal rather than a new lease.

5. The Fourth District Court of Appeal found that the trial court had committed an error and reversed the trial court's judgment. The Fourth District Court of Appeal and S&I Investments held that, regardless of whether the lease was deemed a new or renewal lease, two (2) subscribing witnesses were are nonetheless required. This was the finding by the Appellate Court in S&I Investments v. Payless Flea Market, Inc. which requires two (2) subscribing witness for a lease in excess of one (1) year and is consistent with Florida Law §689.01 and they found that as the lease contained only one (1) subscribing witness, it failed to comply with the statute and was void from its inception.

6. Further, one of the interesting facts in this case is that the tenant was operating a Flea Market and disregarded the landlord's demands during the course of these issues and continued to sublease to subtenants. At a jury trial, the jury found that the lease was valid and that the landlord interfered with the tenant. As indicated above, the Fourth District Court of Appeals reversed the trial court holding the lease was invalid citing Skylake Insurance Agency, Inc. v. NMB Plaza, LLC, 33 Fla. L. Weekly D 2215 (Fla. 3rd DCA 2008) See January 2010 Commercial Newsletter issued by this Author on the Skylake Insurance case. The Court in S&I however noted that there is a potential conflict in the Taylor case the Court found that there were two (2) successive leases, and specifically indicated:

***"The two rental agreements are substantially the same form contracts, and both agreements were even executed in a similar manner (including one witness to the signature of the landlord and tenant).***

***It is our conclusion, therefore, that the second agreement was not a "new lease" as contended by the appellee, but merely constituted an extension by renewal of the first lease. Cf., Kornblum v. Henry E. Mangels Company, Fla.App.1964, 167 So.2d 16; Leibowitz v. Christo, Fla.1954, 75 So.2d 692.***

*[*241]* ***Further, we hold that the appellee is estopped to defeat the second lease agreement by asserting Section 689.01 because she and her deceased husband occupied the apartment for almost two years under the similar first rental agreement, making rental payments thereunder. Arvanetes v. Gilbert, Fla.App.1962, 143 So.2d 825; Lipkin v. Bonita Garden Apartments, Inc., Fla.App.1960, 122 So.2d 623."***

It is this author's opinion that there is a distinction between the finding in S&I Investment v. Payless Flea Market and the Taylor v. Rosman case. In Taylor v. Rosman there is a renewal of the exact same lease which coincidently was defective from the very beginning since it only had one (1) witness as well as the fact that the tenant occupied the premises for over one (1) year under the "renewal".

In the case of S&I v. Payless Flea Market, the facts are distinctly different:

1. There were changes to the lease, although the question would be whether they were substantial or not. They were not exactly the same and;

2. The Landlord objected to the lease indicating that:

    a. There was no authority for the landlord to sign without getting corresponding authorization from the co-owner of the landlord and;

    b. The landlord notified the tenant immediately that it wanted the lease back and wanted to cancel the prior signature and objected to the fact that the lease had not been signed by two (2) subscribing witnesses;

    c. The opinion of the author is that it seems that if the Supreme Court takes this case on, the conflict will be resolved by a type of estoppel theory, that is the person objecting to the enforceability of the lease cannot accept the benefits of the lease (such as in the Taylor v. Rosman case) and thereafter object because the lease has a defect in reference to the two (2) witness rule.

**SUMMARY**: In all leases, as previously indicated in a number of prior newsletters, a lease for more than one (1) year should be signed by the appropriate and responsible party with full authority to execute on behalf of the landlord or tenant and those witnesses should be witnessed by two (2) witnesses who should sign opposite the person executing the lease. Varying from this procedure will be at the peril of the landlord, tenant or property manager.