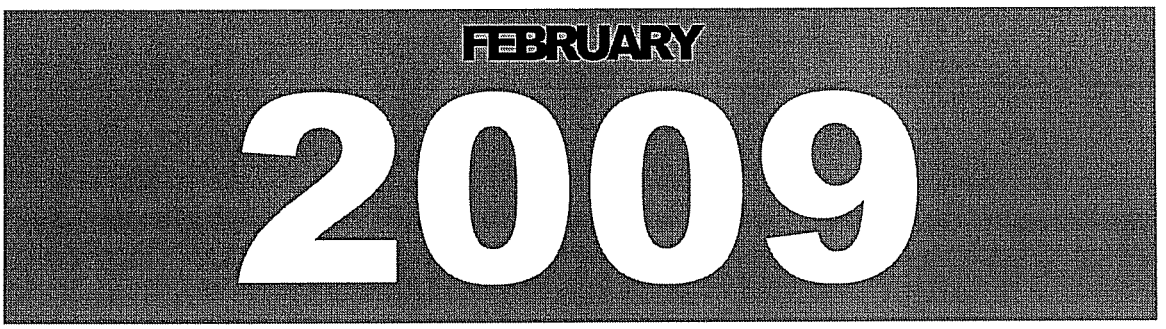

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COMMERCIAL LEASE NEWSLETTERS

EXECUTION OF LEASE INSTRUMENTS BY "AUTHORIZED AGENT" OR PROPERTY MANAGERS ON BEHALF OF THE LANDLORD

On occasion I note situations that are in litigation in which I review leases from my clients that are being entered into between a prospective Commercial Tenant (in some residential cases also) and the Landlord. The lease is executed by the Tenant on their behalf, but on behalf of the Landlord, it is executed by either the Landlord's property manager or some type of authorized representative agent.

This always creates problems, especially when the agency is not described or is certainly not authorized. Here are some basic fundamentals in reference to execution of a lease by a party who is not actually the owner.

EXAMPLE:

Let's assume the property is owned by a company known as "ABC Landlord Inc." ("ABC") and you retain the services of a "Commercial Broker, LLC" to represent ABC's interest as its commercial property and leasing manager.

The lease is prepared and is properly executed by the Tenant. The authorized representative of the Tenant, who is actually going to be in possession, should be signing the lease in front of two (2) witnesses who should sign opposite the Tenant's name. Note that any lease for a period of time in excess of one (1) year needs to be executed in front of two (2) witnesses for it to be enforceable barring certain exceptions to the statute of fraud. In an abundance of caution, each and every lease instrument should always be signed by the Tenant with two (2) witnesses signing opposite their names. Tenant and Landlord should have two (2) witnesses signing opposite each one (1) of the parties' names.

In our example, instead of "ABC" signing the lease, we have "Commercial Broker, LLC" executing the lease either in some capacity as agent or representative of ABC.

This creates an immediate problem as to whether the lease in enforceable and signed by the party with full authority to do so. According to Florida law, a Lessor must possess some right, title or interest that enables the Lessor to lease the property to another or any attempt to lease the property is void. IPC Sports, INC. vs. State of Florida, 829 So. 2d 330 (3DCA 2002). It escapes many commercial property managers that a lease agreement is actually a conveyance of an interest in land for a term of years. A five (5) year lease for example is actually a conveyance of an interest in real estate for a term of five (5) years, no different than a conveyance of a deed.

As such and using our example, such conveyance has to be signed by the party that has authority to effect such conveyance. If not, then a number of difficulties could arise. The commercial property manager can acquire valid authorization from the Landlord to act on their behalf in the form of a Power of Attorney with two (2) witnesses signing opposite the Landlord's name and appointing the agent to act on his behalf. Also note, under **§608.409(4)** of Florida Statutes, an LLC may not transact business or incur debts, except that which is incidental to setting up the business or obtaining contributions, until the effective date and time of the company's existence. Sometimes issues can arise in a situation in which an entity is to receive authorization to act on behalf of the Landlord, but the entity is not formed prior to the lease being signed.

As you can see from the above and foregoing, it is critically important that leases not only be originally prepared in a clear and concise manner (see January 2007 commercial newsletter) but also be executed in an appropriate format to avoid enforceability problems.

Consider the following:

a. A property owner believes it is going to set up a company that would actually be the title holder of its commercial building.

b. The actual owner of the company, believing that the company has been formed, executes the lease agreement on behalf of the company which has not yet been fully formed as a matter of law and is not a valid Florida entity.

c. The Tenant executes the lease and the principals of the Tenant execute guarantees, guarantying the lease agreement to the cooperation which was not yet formed.

There is an argument that can be advanced by the Tenant that the lease is not enforceable nor is the guaranty enforceable. This is not a result discussed.