JANUARY

2010

KEVIN F. JURSINSKI, ESQ.
COMMERCIAL LEASE NEWSLETTER

Two (2) witnesses required on lease (revisited)

There has been further litigation addressing the execution of long term commercial leases (more than a term of one year). Again: to avoid a legal issue it is imperative that there be two (2) subscribing witnesses on your commercial lease agreements regardless of the entity or format of the document. In my December, 2008, newsletter I identified issues as to the form of the lease agreement and the fact that lease agreements for a period of time in excess of one (1) year needed two (2) subscribing witnesses, but there are exceptions for corporations and LLCs.

In December, 2008, the case of Skylake Insurance Agency, Inc. v. NMB Plaza, LLC, 33 Fla. L. Weekly D 2215 (Fla. 3rd DCA 2008) was decided and initially indicated that the LLC statute (which allows for signature of documents by the authorized representative as managing member without witnesses) would control over the formalities of §689.01 (which requires two (2) subscribing witnesses for a conveyance of interest in real property, inclusive of a lease for a period of time in excess of one (1) year).

The rationale in regard to the first Skylake Insurance Agency, Inc. v. NMB Plaza, LLC case was that the statute empowering execution of lease agreements and other conveyances of interest in real estate by an LLC authorized member might supercede the requirements of §689.01.

Section 608.4235, Fla. Stat. (2003), addresses the authority of limited liability company members, managing members, and managers. Section 608.4235 (3) provides that, unless the articles of organization or operating agreement limit the authority of a member, any member of a member-managed company or manager of a manger- managed company may sign and deliver any instrument transferring or affecting the limited liability company's interest in real property. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument.

Recently, the Third District Court of Appeals has revisited the Skylake Insurance Agency, Inc. case (Skylake Insurance Agency, Inc. v. NMB Plaza, LLC, 33 Fla. L. Weekly D 2215 (Fla. 3rd DCA 2008)) and clarified the issues as follows: Section 608.4235, Fla. Stat., spells out who may execute an instrument conveying real property on behalf of a limited liability company. This part of Ch. 608, Fla. Stat., explains which signatures third parties can rely on to convey a limited liability company's interest in real estate. Section 689.01, Fla. Stat. (2003), by contrast, governs the conveyance of real estate and imposes the two-witness requirement. The only express exceptions to §689.01 is for corporate conveyances made in accordance with §§ 692.01 and 692.02, Fla. Stat. There is no exception for limited liability companies per F.S. §608, et seq.

Again: As such the case addresses and answers the two (2) witness rule on leases signed by LLCs as follows:

> **"The question, then is whether the lease must also comply with the two-witness requirement of §689.01. In accordance with the view of the Real Property, Probate & Trust Law Section of the Florida Bar as amicus curiae, we hold that the answer is yes."**

Property managers and commercial landlords should follow the advice originally given in our December, 2008, newsletter which is that the appropriate individual authorized to act on behalf of the legal entity should sign the lease and such signature on the lease should be witnessed by two (2) separate witnesses who should sign opposite the person's name.

Capacity of Signer/Intent

There have also been a number of cases over the years addressing the issue of intent of an individual whether the individual was signing on behalf of the company, or on behalf of themselves.

Further, so there is no misunderstanding: if a tenant is going to be executing a lease on behalf of an entity, for example a corporation or an LLC, that individual should sign in the signature block indicating that the person is signing "As president" or "As its managing member" rather than simply signing their name with no designation as to their capacity.

The additional language will clarify the issue of a capacity and clearly indicate on the face of the instrument that the individual is not executing this document on their own behalf.

Credit Worthiness of Commercial Tenant

At the same time, commercial landlords should also be concerned about having leases properly documented. If you are going to be executing the lease with an entity and you expect that entity to be responsible for the payments you may wish to engage in credit

review and analysis of the individual and if necessary, request and require a personal guarantee from a financially responsible individual.

My last point addresses the local real estate economy. Recently, I heard a very well known property manager indicate the change in credit criteria for commercial tenants in today's troubled commercial real estate marketplace. His qualifications or criteria of a commercial tenant are as follows:

> ***"If they have a pulse and the check clears, they are credit worthy and a qualified tenant".***

Again, in an ideal world leases will be properly executed after a thorough review of the credit worthiness of the prospective tenant and the appropriate guarantees are acquired. However, as noted, in today's troubled marketplace with the scarcity of quality tenants, these rules may be somewhat relaxed.