IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC 10-1356
4th DCA CASE NO.: 4D 08-486
CIR. CT. CASE NO.: 04-14172(08)
CONS. WITH 05-17836(08)

PAYLESS FLEA MARKET, INC.,
a Florida Corporation,

Petitioner,

vs.

ILENE RICHMOND

Respondent.

_____
/

PETITIONER'S BRIEF ON JURISDICTION INVOKING COURT'S DISCRETIONARY REVIEW OF AN OPINION OF THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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PREFACE

The Petitioner Payless Flea Market, Inc., was the Appellee in the District Court and will be referred to in this Brief as either "Payless or Appellee." The Respondent Ilene Richmond, was one of three original Appellants in the District Court (the remaining appellants settled with Payless in S&I's Involuntary Bankruptcy Proceedings). In this Brief, Ilene Richmond will be referred to as either "Richmond or Appellant."

Reference to the Fourth District Court of Appeal, June 9, 2010 Decision in S&I Investment, et.al., v. Payless Flea Market, Inc., ___ So. 3d ___, No. 4D08-486 (June 9, 2010) will be referred to in this Brief as the "Opinion."

Reference to the Record on Appeal In the District Court will be designated by use of the symbol "R" followed by the volume number(s), page(s) and lines of the Record. "R. Vol.___, pg. ___, Ln.___."

Reference to the First Supplement to the Record on Appeal In the District Court, the November 9, 2007 hearing transcript, will be designated by the use of the symbol "S.R." followed by page numbers and lines of the Record. Reference to Second Supplement to the Record on Appeal In the District Court, the August 8, 2007 hearing on Summary Judgment, will be designated as "2 S.R.A." followed by page number(s) and lines of the Record.

STATEMENT OF THE FACTS AND CASE

In August of 1995, S&I and Payless entered into a ten-year commercial lease for a building on Las Olas Boulevard (R.Pl.Exh.3). Milton Richmond signed the agreement on behalf of the lessor, S&I (R. Pl. Exh. 3, pg. 6). This initial lease between S&I and Payless only had one subscribing witnesses as to Milton Richmond's signature. However, the parties honored the terms of the lease.

In early 2003, Payless, through Isaac Asulin, and S&I Investments, through its managing partner, Ilene Richmond, entered into negotiations to renew the earlier lease. On page 2, of its Opinion, dated June 9, 2010, in S&I Investments v. Payless Flea Market, Inc., the Fourth District Court of Appeal acknowledged that "in February of 2003, Asulin contacted Ilene Richmond about renewing the lease, which was due to expire in August 2004." (See also R.Vol. 15, pg. 339; R.Vol.17, pg. 823). Over the next six months, the parties exchanged proposed renewal leases. (R. Vol. 17. pgs. 339, 352, Pl. Exh. 1; Def. Exh. 1) On page 2, the court stated that:

> On October 8, 2003, Ilene and her attorney, Mr. Stolar, dropped a proposed lease with Asulin for his review, at which time they discussed final changes. Ilene and Stolar returned on October 16, 2003, to execute the lease. Only one change was made in the percentage of sales tax; both parties initialed the change. Ilene and Asulin signed the lease, which was witnesses by one of Asulin's employees. (See also R. Vol. 15, pgs. 359, 363, 370, 377, 386, 387,417) (Def's Exh. "22")

The Landlord's attorney directed and handled the execution of the renewal

lease. David Stolar told Isaac that they needed a witness to execute the lease. At his request for a witness, Isaac called Shandy Beth-Yair, one of his employees, to act as a witness. (R. Vol. 15, pg. 393) When Ms. Beth-Yair arrived, David Stolar explained to her that the lease was being signed and they needed someone to be a witness and she would be signing as the witness (R. Vol. 15, pg. 394) David Stolar did not ask for a second witness. (R. Vol. 15, pg. 393-394) David Stolar watched Ilene and Isaac sign as well as the witness. They were all present while the lease was signed, and each page was initialed and witnessed. On page 8, of the Opinion, the Fourth District Court of Appeal recognized that "Mr. Asulin and Ilene Richmond could have witnessed each other's signatures."

ISSUES PRESENTED

I. Whether the Supreme Court has jurisdiction to review the decision of the Fourth District Court of Appeal pursuant to Article V, §3(B)(3) of the Florida constitution and Rule 9.030(a)(2)(A)(iv) and 9.030(a)(2)(A)(vi) Florida Rules of Appellate Procedure because the decision expressly and directly conflict on the same question in law in Taylor v. Rosman, 312 So. 2d 239(Fla. 3d DCA 1975)

II. Whether the Supreme Court has jurisdiction to review the decision of the Fourth District Court of Appeal pursuant to Article V, §3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv). Florida Rules of Appellate Procedure because the decision expressly and directly conflicts with the decisions on the same question of Law in Gill v. Livingston, 158 Fla. 557, 29 So.2d 631 (1947).

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case directly and expressly conflicts with a prior decision of the Third District Court of Appeal in Taylor v. Rosman 312 So.2d 239, 241 (Fla. 3d DCA 1975) on the same question of law. The Fourth District Court certified the conflict. Pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv) and 9.030(a)(2)(A)(vi), the Florida Supreme Court has jurisdiction to invoke discretionary review of the decision in this matter.

The decision of the Fourth District Court of Appeal additionally directly and expressly conflicts with a prior decision of the Florida Supreme Court in Gill v. Livingston, 158 Fla. 557, 29 So.2d 631 (1947) on the same question of law. Pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), the Florida Supreme Court has jurisdiction to invoke discretionary review of the decision in this matter.

ARGUMENT

I. THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL WHICH HELD THAT A RENEWAL LEASE HAD TO MEET THE TWO-WITNESS REQUIREMENT UNDER SECTION 689.01, FLA. STAT., EXPRESSLY AND DIRECTLY CONFLICT WITH TAYLOR V. ROSMAN, 312 So.2d 239, (Fla. 3d DCA 1975). UNDER FLA. R. APP. P. 9.030(a)(2)(A)(IV) and (VI) (COURT HAS CERTIFIED CONFLICT), THIS COURT HAS JURISDICTION TO RESOLVE THE CONFLICT.

A. THE DECISION

On page 1 of the Opinion in S&I Investments, Ilene Richmond and Stephanie Richmond v. Payless Flea Market, Inc., 4D 08-486 (Fla. 4th DCA June 9, 2010)

(conformed copy attached), the Fourth District Court of Appeal held as follows:

> Ilene Richmond, the only remaining appellant, raises three issues: (1) whether the 2003 lease is unenforceable because it lacks two subscribing witnesses, as required by section 689.01, Florida Statutes...Because we reverse on the first issue, and find that the 2003 lease was void from its inception, we need not address the remaining issues
> On page 5, of the Opinion, the court recognized that:

> Payless argues, however, that the 2003 lease was a valid extension by renewal of the 1995 lease, with substantially the same terms[1] and executed in the same manner as the earlier lease. Therefore, two subscribing witnesses were not required.

On page 6, of the Opinion, the Fourth District Court of Appeal discussed Taylor v. Rosman, 312 So. 2d 239, 241 (Fla. 3d DCA 1975) (the parties' "key case on the issue") as follows:

> In Taylor, the tenant...argued the lease was unenforceable under section 689.01, because there was only one subscribing witness. Id...appellate court found that "[t]he 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)." Id. (emphasis added). The court therefore concluded 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." Id. (emphasis added). The court further held that the tenant was estopped to

[1]The trial court determined that the terms of the two leases were *substantially* the same and that their differences were not drastic enough to destroy the character of the second lease as a renewal lease. The trial court found that:

> as a matter of law, I'm finding that the lease in question is a renewal. I'm basing this ruling on the factual finding that the space is the same, the occupancy if you will in terms of that space are the same, the overlap, the fact that this same ... legally, I'm finding that the terms are substantially the same. (See Footnote 4 at page 5 of the "Opinion").

> defeat the second lease agreement by asserting section 689.01 because she and her husband occupied the apartment for almost two years under the similar first rental agreement, making rental payments thereunder. Id. at 241.

In rendering its Opinion on this issue, the Forth District Court of Appeal found that, regardless of whether the lease was deemed new or a renewal, two signatures were required under the applicable statute of frauds, §689.01." The Court stated that "to the extent Taylor suggests that a renewal lease would not have to meet the two-witness requirement under section 689.01, we disagree with the opinion in Taylor." Page 6 of the Opinion. At page 8 of the Opinion, the Court certified conflict to the extent the Court's Opinion is in conflict with Taylor v. Rosman.

B. THE CONFLICT WITH TAYLOR v. ROSMAN

The Payless Opinion expressly and directly conflicts with the decision in Taylor v. Rosman, 312 So. 2d 239 (Fla. 3d DCA 1975), on two points of law:

(a) that the provisions of Fla. Stat. § 689.01 do not apply to renewal leases, and,
(b) that a party to a renewal lease may be estopped to deny the validity of the lease where it made payments under a similarly infirm initial lease.

In Taylor v. Rosman, 312 So. 2d 239 (Fla. 3d DCA 1975), the Landlord sued the Tenant "seeking to recover rent payments due under the terms of rental agreement" Taylor, supra at 240. There, the Tenant and her Husband (since deceased) had previously lived in the apartment under the initial lease. The two- year renewal lease agreement was signed on September 28, 1973 to commence on February 1, 1974 and extending to January 31, 1976.

In Taylor, supra the tenant filed a motion to dismiss. She argued that the renewal lease agreement was unenforceable, under Fla. Stat. §689.01, because there was only one subscribing witness. The lower court granted the motion. However, the appellate court reversed.

The Taylor court expressly rejected the application Fla. Stat. §689.01to the renewal lease. It concluded that the second agreement was not a "new lease" as contended by the Tenant. It pointed out that the second lease "merely constituted an extension by renewal of the first lease." Taylor, supra at 240. This holding is in direct conflict with the Payless Opinion.

The Payless decision also conflicts with the Taylor Opinion on the issue of whether an estoppel may be invoked when a party accepts benefits under a similarly infirm prior lease. The Third District Court of Appeal found such an estoppel to be appropriate as a separate ground for reversal:

> Further, we hold that the appellee is estopped to defeat the second lease agreement by asserting Section 689.01 because she...occupied the apartment for almost two years under the similar first rental agreement, making rental payments thereunder. Taylor, supra at 240.

To the contrary, on page 4 of its Payless Opinion, the Fourth District Court of Appeal discussed the estoppel argument as follows:

> Payless contends that this court should uphold the trial court's order based on the theory of estoppel. Specifically, Payless contends that Ilene is estopped to complain about the lack of two witness signatures because the renewal lease was executed under the supervision of her own counsel and with the same formality as the original 1995 lease; there were witnesses the signing that could have subscribed as the second witness, and because S&I accepted almost one million dollars in rents under the original lease,

which had only one witness.

Despite being on all fours with the fact pattern in Taylor, supra, on page 5, of its Opinion, the Fourth District Court of Appeal ruled that "We further find that, given the particular facts herein, the doctrine of estoppel does not apply."

Pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(IV) and 9.030 (a)(2)(A)(VI) the Court should accept jurisdiction to resolve the conflict which results from the decision of the Fourth District Court of Appeal in this case, which the Court has certified to be in conflict with Taylor v. Rosman, 312 So. 2d 239 (Fla. 3d DCA 1975).

ARGUMENT

II. THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL WHICH HELD THAT GIVEN THE FACTS OF THIS CASE, THE DOCTRINE OF ESTOPPEL DOES NOT APPLY EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN GILL V. LIVINGSTON, 158 FLA. 557, 29 SO. 2D 631 (FLA. 1947), UNDER FLA. R. APP. P. 9.030 (a)(2)(A)(IV). THIS COURT HAS JURISDICTION TO RESOLVE THE CONFLICT.

A. THE PAYLESS DECISION

In S&I Investments, Ilene Richmond and Stephanie Richmond v. Payless Flea Market, Inc. 4D 08-486 (Fla. 4th DCA June 9, 2010), the Forth District Court of Appeal acknowledged that Mr. Asulin and Ilene Richmond could have witnessed each others' signatures. However, it found that an estoppel would not lie because S&I challenged the validity of the second lease and did not to accept benefits under the October 2003 lease. The Opinion and the Record on Appeal established that:

(a) S&I Investments generally did not require other original or renewal leases to be witnessed by two witnesses. (See Def. Exh. "3" with attached lease and security agreement.);
(b) the 1995 lease between S&I and Payless had only one witness to the Landlord's signature;
(c) S&I accepted rent under the original 1995 lease and never challenged the manner in which the lease was executed;
(d) the 2003 renewal lease was executed at the direction of S&I's attorney who supervised the signing of the lease;
(e) either David Stolar or Ilene Richmond could have witnessed Asulin's signature and Stolar and Asulin could have witnessed Ilene Richmond's signature. (Pl. Exh. "3"; R. 1-8, R. 3-521; R. 1, pgs. 73-77; R. 2, pgs. 245-251; R. 3 pgs. 561-581; R. 4 pgs. 593-612)

B. **EXPRESS CONFLICT WITH GILL v. LIVINGSTON**

The Payless decision expressly and directly conflicts with this Court's decision in Gill v. Livingston, 158 Fla.577, 29 So. 2d 631 (Fla. 1947). In Gill, supra, this Court found that the lease was not invalid merely because it was executed with one subscribing witness. It stated that "the express provision of Section 689.01...requiring two subscribing witnesses, was not observed in the execution of the lease." Gill, supra at 631. In Gill, supra, this Court took the view that the formality of two witnesses was not required where other persons were present and could have signed as witnesses to meet the formal requirements of Fla. Stat. § 689.01. There, this Court pointed out that "as a matter of fact all four defendants were physically present at the time of execution of the lease and might have subscribed as witnesses to the signature of each other." Gill, supra at 632. Notwithstanding that the lease was executed in violation of the statute, the Court held that "the Defendants below were estopped from contending that the lease here

involved is invalid for the reason that it was executed in the presence of only one subscribing witness." Gill, supra, at 632. In Gill, supra, in holding that the Court was fully justified in finding that the parties were bound by the lease, this Court noted that the landlords:

> "have accepted benefits under the lease, have placed the lessee in possession, have negotiated to convey the lands subject to the lease, and in all respects have recognized it as being an effective conveyance, and in equity they ought not to be permitted to disavow it now." Gill, supra at 632.

In the Payless Opinion, the Court failed to consider the fact that S&I, as a general business practice, did not require two witnesses to subscribe to the lease. S&I enforced the 1995 lease and accepted payments even though it only has one subscribing witness; that for more then three years during the pending of the litigation, S&I did not challenge the lack of two subscribing witnesses in their pleadings. At no time during the trial, did S&I argue or suggest that the signatures of the parties were not theirs.

On page 7, of its opinion, the Fourth District Court of Appeal attempted to distinguish the Gill decision as follows:

> Gill v. Livingston...is also instructive. In that case, while the court found that 'as a matter of fact all four defendants were physically present at the time of execution of the lease, and might have subscribed as witnesses to the signature of each other,' the court found that estoppel applied because the lessors accepted benefits under the lease, placed the lessee in possession, 'negotiated to convey the lands subject to the lease, and in all respects have recognized it as being an effective conveyance, and in equity they ought not to be permitted to disavow it now.'

While the Gill court held that a party could be estopped to enforce the Fla. Stat. § 689.01 "two-witness" requirement when a party accepted benefits under a lease, in its opinion the Fourth District Court of Appeal failed to apply an estoppel where:

(a) more than one party was present at the time of execution that could have served as a witness to the execution of the renewal lease,
(b) the landlord's attorney directed and supervised the execution and witnessing of the renewal lease, (and could have served as a witness) and,
(c) the landlord accepted rents under the similarly infirm initial lease.

The decision of the Fourth District Court of Appeal directly conflicts with the opinion in Gill v. Livingston, 29 S0. 2d 631 (Fla. 1947).

CONCLUSION

This Court should accept jurisdiction to resolve the conflict, which results from the decision of the Fourth District Court of Appeal in this case, which expressly and directly conflicts with the decision of the Third District Court of Appeal in Taylor v. Rosman, 312 So. 2d 239 (Fla. 3d DCA 1975), and the decision of the Florida Supreme Court in Gill v. Livingston, 158 Fla. 557, 29 So. 2d 631 (Fla. 1947)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by [ ] U.S. Mail; [ ] Facsimile to: **ERIC STETTIN, ESQ.** KUVIN AND STETTIN, LLC. 2843 Executive Park Drive, Fort Lauderdale, FL 33331 and [ ] U.S. Mail; [ ] Facsimile to **BEVERLY POHL, ESQ.,** BROAD AND CASSEL, 100 SE 3rd Avenue, Suite 2700, Fort Lauderdale, FL 33394 on this ____ day of July, 2010.

By :_____
STEPHEN RAKUSIN

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief on Jurisdiction complies with Fla. R. App. P. 9.210 (a) (2), and is prepared in Times New Roman 14-point font.

By :
STEPHEN RAKUSIN

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