

# COMMERCIAL LEASE SECURITY DEPOSITS



## *COUNSEL'S CORNER*

Our Texas Courts rarely give us insight into the interpretation of commercial lease security deposits laws. Until recently. New guidance awaits.

In August 2010 ProLogis Texas II leased real property in Sugar Land, Texas, to Daryl Flood Logistics. Daryl Flood assigned the lease to FP Stores in 2013, who, in turn, subleased part of it to Tramontina US in 2014.

I intuitively like Tramontina; they have an interesting spiced, citrus-glazed short rib recipe on their website: <https://www.tramontina-usa.com/recipes/spiced-citrus-glazed-short-ribs>. Ok so that was a minor digression and possibly reflects my ADD. I'll take another pill now . . .

Tramontina paid FP a \$50,000 sublease security deposit. The sublease required FP to refund the deposit, less proper deductions, within 60 days after Tramontina vacated.

The Master Lease between ProLogis and FP Stores terminated March 8, 2015, so by operation of law – the sublease also terminated. FP vacated but Tramontina stayed, as the direct tenant of ProLogis.

A week after termination Tramontina sent a letter to FP with Tramontina's new forwarding address and demand to return the deposit within the time allowed by Texas law. Regardless, more than two months elapsed without either a return of the deposit or tender of an accounting that would provide for deposit offsets.

Tramontina sued FP for the refund of its security deposit, which by law is required to be returned within 60 days if a shorter time is not otherwise provided in the

sublease. See Texas Property Code 93.011: <https://statutes.capitol.texas.gov/Docs/PR/htm/PR.93.htm>. That same law states that a landlord can be liable for triple damages if the monies are not timely returned, or otherwise a written description of damages and itemization of charges is not timely furnished.

The trial court agreed with Tramontina's position and awarded Tramontina \$150,100 (\$50,000 times three, plus \$100 statutory damages – exactly as stipulated in the Texas Property Code) and \$25,000 in attorney's fees.

FP appealed.

The Court of Appeals found – surprise to no one – virtually no cases on point in Texas regarding commercial leases although we have had this law for 29 years. So the Court reviewed parallel Texas statutes that are relevant to residential security deposits.

In doing so, the Court decided that the landlord must prove its *good faith* to avoid liability for treble damages. *Good faith*, the Court determined, is “honesty in fact in the conduct or transaction concerned” and that the landlord did not intend to deprive the tenant of its rights or of a lawfully due refund.

From there, it was a short stretch to determine that FP had presented at least some evidence that it had intended to act in good faith.

Judgment for Tramontina is reversed; the case is returned to trial court for a do-over. See *FP Stores, Inc. v. Tramontina US, Inc.*; No 01-16-00031-CV; Court of Appeals of Texas, Houston (1<sup>st</sup> District), December 29, 2016: <https://caselaw.findlaw.com/tx-court-of-appeals/1763335.html>.

#### Lessons Learned / Questions Asked:

1. This landlord was not found responsible for triple damages. But in doing so, it had to defend a lawsuit in trial court, appeal to the Texas Court of Appeals, and if the litigation was not settled, endure yet another trial back in the district court of Fort Bend County. What do you think this landlord spent in attorney's fees - \$100k? To save \$50k?
2. While there is honor in defending your position, there is also a substantial cost in doing so. My assumption is that FP would have been \*far ahead if it would have timely complied with Texas laws and the Sublease terms.
3. In my experience, the landlords that are most at risk are the ones that do not routinely engage in commercial real estate leasing. They don't know the laws; they don't have appropriate accounting procedures for deposit return. Brokers can help rookie landlords and tenants by tracking the termination dates of leases and

subleases, and then making all parties aware that the security deposits must be timely processed.

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