

Wave Goodbye to the Waiver Defense in Some Landlord/Tenant Disputes

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On May 1, 2020, in *Winston Affordable Housing, LLC v. Roberts*, the North Carolina Supreme Court clarified the law surrounding a landlord's acceptance of rent after issuing a non-renewal notice because of the tenant's breach of the lease.

The Supreme Court held that landlords under certain types of automatically-renewing leases may accept rent after they issue a non-renewal notice and before the end of the lease term without waiving any lease violations. This is a welcome exception to the general rule that "acceptance equals waiver."

Generally, if a landlord accepts rent from a tenant while knowing that the tenant is in breach of the lease, he waives the breach. Acceptance of rent is deemed an affirmation by the landlord that the lease is still in effect. If the landlord wants to declare the tenant in breach and terminate the lease, he is expected to refuse rent and evict the tenant. If the landlord accepts rent, all prior breaches are typically waived, and the landlord must wait for a new violation to declare a breach and enforce his rights.

Winston Affordable Housing (WAH) provides federally-subsidized housing for low-income tenants. WAH's leases track the federal laws governing federally-subsidized housing. WAH can terminate the lease only for reasons specifically listed in the lease or other good cause. If the lease is not terminated, it renews automatically every year. If a material breach or other good cause to terminate occurs, WAH can declare that the lease will not renew at the end of the current term.

In October 2016, WAH notified Deborah Roberts it was not renewing her lease when the term ended on December 31, 2016, because she was in breach. But WAH accepted monthly rent from Roberts through the end of the year. When the new year came, and Roberts was still living in her apartment, WAH filed a summary ejection action.

The Small Claims Court and District Court held that WAH could evict Roberts, but not for the reasons alleged in its summary ejection action. They held that WAH could evict her for non-payment of rent that came due after her lease ended and while she lived in the apartment during the eviction process. As to the original reasons why WAH sought to evict Roberts, the courts held that WAH had waived those breaches by accepting Roberts's rent payments. The North Carolina Court of Appeals affirmed, and the case went to the North Carolina Supreme Court.

The Supreme Court noted that the lease listed non-renewal as a remedy available to WAH if Roberts breached. The Supreme Court also noted that WAH's notice cited the specific lease provisions it contended Roberts violated and specified her alleged violations. The Supreme Court further noted that, rather than evicting Roberts immediately, WAH gave her almost three months to find another place to live or prepare a defense to the eviction.

On these facts, the Supreme Court found an exception to the general rule that a landlord's acceptance of rent waives known breaches of the lease. While the Court did not determine whether Roberts committed the alleged violations or breached the lease, it did determine that WAH's acceptance of rent on these facts could not have waived the alleged breaches or its remedy of non-renewal.

This is a narrow exception to the general rule that "acceptance equals waiver." It only applies to automatically-renewing leases with non-renewal as a remedy for breach. A landlord wishing to exercise this remedy must notify the tenant of the breach and tell him or her that, because of the breach, the lease will not renew at the end of its current term. Afterwards, the landlord should accept rent only through the end of the lease term (unless the parties enter into a new written agreement for a temporary arrangement).

While narrow, the Supreme Court's decision is practical. Without this exception, the general rule would have required landlords, giving advance notice of non-renewal in similar cases, to forfeit all rent payments due for the remainder of the lease term. Landlords would have an incentive to terminate leases and pursue eviction upon the minimum notice required, rather than orchestrating an orderly departure in which they still got paid.

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