



## Should I Accept My Tenant's Rent Payment?

James A. Gober

When a retail (or office) tenant falls behind in its rent payments, landlords or their representatives frequently ask what appears to be a simple question: "Should I accept the tenant's rent payment?" The answer is not at all simple and could easily be wrong if the landlord does not carefully consider its business objectives and the applicable law.

A landlord should fully understand the legal interpretation and implications of its lease as the first step in the process. Next, the landlord should consider its business objectives and applicable law found in the lease, case law, and statutes. To know exactly what law applies, the landlord must evaluate all facts possibly relevant under the law to the pursuit of those business objectives.

For example, the landlord's acceptance of late payments on two or more past occasions without a demand upon the tenant for exact compliance with the payment terms provided in the lease could create a statutory "mutual departure" defense so that rent is no longer due on the date provided in the lease. However, assessment of late fees by the landlord whenever a tenant's rent payment is late would avoid that mutual departure defense. Numerous other legal principles may govern how to proceed.

The landlord's notices and other communications with the tenant concerning past due rent are particularly relevant in considering whether a rent payment should be accepted. Whether the landlord's notices are effective will depend on whether they were given in the manner required under the lease, and the lease may provide for notices to be given on multiple occasions before certain remedies can be exercised. Also, careless communications can result in an estoppel that binds a party to an unintended position or may create a waiver of rights that otherwise would have existed.

Frequently, the landlord's objective is either to get the tenant to pay past due rent or to proceed with eviction of the tenant from the leased premises. That objective may weigh in favor of or against lease termination. Even if the landlord's preference is to have the tenant bring rent payments current, the threat of eviction is a useful and powerful tool to accomplish that objective. Depending upon where the eviction process or termination remedy stands and the other remedies provided under the lease, the answer to the question of whether to accept a rent payment will differ.

### **Accepting Payments After Demand But Before Filing a Dispossessory Action**

A demand for possession of the leased premises is a prerequisite in the eviction process. When that demand is made by the landlord, the tenant may offer a rent payment for the full amount owed or just some portion of the debt. As a general practice, it would be wise for the landlord to accept that payment if it cures the default completely or is relatively substantial. If rent remains past due in any amount, the landlord can immediately recommence the eviction process with a new demand for possession. On occasion, however, the landlord's primary objective is to recover possession of the leased premises as swiftly as possible, in which case the landlord may elect not to accept any payment.

If the landlord's preference is to evict the tenant if it fails to bring rent current, the acceptance of rent after the demand for possession is made can create a defense in the eviction proceeding. Thus, the

landlord needs to know how any tender of rent by the tenant will affect the landlord's ability to proceed with eviction. In a dispossessory proceeding based upon nonpayment of rent, including the case where a lease has been terminated for nonpayment, a landlord **cannot** accept payment of rent from its tenant before the dispossessory action is filed if it wants to proceed with an eviction. Where the lease has been terminated for nonpayment of rent, the landlord's acceptance of a rent payment before the eviction proceeding is filed would reinstate the lease.

## **Accepting Payments After the Dispossessory Action Commences**

In contrast to the situation described above, the law for many years has been that acceptance of a rent payment **after** the eviction proceeding is filed does not create any such defense. To clarify this situation to some extent, a law was passed almost 20 years ago that applies to the situation where a tenant seeks to establish a complete statutory defense to eviction. By law, a tenant has the right to establish that complete defense—but just once in every twelve month period—by paying all rent allegedly owed plus the landlord's court costs associated with filing the dispossessory proceeding. By amendment of the statute, the law was clarified to provide that, after the dispossessory proceeding is filed, tender and acceptance of less than all rent allegedly owed plus the court costs will not be a bar or defense but will only be considered by the trial court when determining what rent amount is owed.

To avoid any misinterpretation or misapplication of the applicable law by the court and law enforcement authorities, the landlord may elect to accept rent from the tenant after an eviction proceeding is filed only under a court order. The court order governing rent payment is provided by statute and can be established at the beginning of a case for the landlord's protection.

## **Accepting Payments After Judgment**

Regardless of what the law actually provides, some courts, sheriffs, and marshals in Georgia have practices and procedures in conflict with the governing law. More than a few of these courts, sheriffs, and marshals will not allow the landlord to evict the tenant if a payment is accepted after the writ of possession is issued regardless of the amount of the payment. If the payment tendered by the tenant following judgment fully satisfies the past due rent owed and covers a period of time beyond the judgment date, then the landlord's acceptance could reinstate the lease or create a statutory tenancy at will. By contrast, a payment of less than the amount of the judgment should have no such effect because the landlord has the right to collect its judgment for past due rent.

Regardless of the situation, a landlord can avoid legal problems and achieve business objectives by taking the proper approach to the question of whether to accept a late rent payment.

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