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**Linden Corporation, Respondent, v. Patricia Simard, Appellant**

**No. C3-87-1599**

**Court of Appeals of Minnesota**

February 2, 1988, Decided

February 3, 1988, Filed

**COUNSEL:** James P. Fossum, Brainerd, MN for appellant. Kent E. Nyberg, Grand Rapids, MN for respondent.

**JUDGES:** Considered and decided by Forsberg, Presiding Judge, Crippen, Judge, and Kalitowski, Judge, with oral argument waived.

**DECISION**

The trial court issued a writ of restitution requiring appellant Patricia Simard to vacate her apartment owned by respondent Linden Corporation. Simard appealed on the ground that respondent waived notice to vacate by subsequently accepting rent. Unequivocal evidence of waiver precludes the [2] landlord's claim of nonpayment of rent as a basis for evicting the tenant.

**Reversed.**

**UNPUBLISHED OPINION**

CRIPPEN, Judge

On February 8, 1986, appellant entered into a six month lease with respondent for an apartment in a subsidized housing complex called the Hill City Apartments. After six months, the lease converted into a month-to-month tenancy. On December 23, 1986, the property manager sent appellant a notice to vacate on or before January 31, 1987, due to failure to pay the November 8 rent. Appellant then paid the rent due and nothing further occurred regarding the late payment.

On April 8, 1987, because rent in prior months had allegedly been paid late, an attorney for Linden Corporation sent a letter to appellant advising that her lease would terminate effective May 8, 1987. On May 8, appellant gave her personal check for the rent amount to the caretaker of the apartment, Mavis Gowell, which was their usual procedure for paying rent. On June 8, appellant delivered a postal money order to Ms. Gowell in full payment of June rent.

[3] On June 23, 1987, a summons and complaint in unlawful detainer was issued against appellant alleging the absence of timely payment of rent due on May 8th. The hearing was held on July 6, 1987. Both parties were represented by counsel.

Appellant testified that she paid Gowell May and June rent on the eighth of each month, and that she sent July's rent by certified mail to Linden Corporation's office in Elk River. She also testified she learned from her bank that the personal check had not been cashed. Gowell admitted that appellant timely paid the May and June rents. Gowell testified that she had in her possession the personal check for May's rent and a money order for June's rent, and that both checks were delivered but neither had been negotiated or deposited.

Appellant argued that respondent had waived the notice to vacate of April 8th by accepting subsequent rental payments. The court found for respondent, and ordered a writ of restitution issued on August 5, 1987, requiring appellant to vacate her apartment.

Waiver by acceptance of rent.

A landlord's subsequent acceptance of rent acts to waive the right to rely on any prior alleged breaches of the lease, known at that time, as a basis for the unlawful detainer action. *Priordale Mall Investors v. Farrington*, 411 N.W.2d 582, 584 (Minn. Ct. App. 1987). Acceptance of rent operates as an election by the lessor to continue the lease. *Id.* The fact that similar prior breaches have been waived does not [4] necessarily operate to waive a current breach of the lease terms. *Zotalis v. Cannellos*, 138 Minn. 179, 181, 164 N.W. 807, 808 (1917).

In *Kenny v. Seu Si Lun*, the general principle was established that money tendered by the tenant and received by the landlord as rent is paid as rent," and bars the landlord from asserting past causes of forfeiture known to him at the time of the payment. 101 Minn. 253, 257, 112 N.W. 220, 221 (1907).

The trial court's order was based on failure to vacate as instructed in the landlord's April 8 letter. It is perhaps questionable whether the caretaker's receipt of Simard's first payment without cashing the check constituted acceptance of rent. Under *Priordale Mall* and *Kenny*, however, taking Simard's June money order payment constituted acceptance and waiver as to the April notice to quit. The payment was taken for the period subsequent to the announced expiration date of May 8th and prior to the June 23 filing of the unlawful detainer action. A money order is similar to cash in its negotiability.

Finally, payments received in the spring of 1987 replicated the December 1986 episode, in which respondent called for termination of the lease then abandoned termination plans while continuing to take rent.

Respondent Linden Corporation accepted Simard's rent payments and thereby waived its notice to vacate for nonpayment or late payment of rent.