

RENT MONEYS AND THE RABBIT HOLE

Paul A. Henderson, Esq., Law Offices of Scott M. Clark, P.C.

Any landlord who has managed a residential rental property is intimately familiar with A.R.S. § 33-1371, which is also known as the “partial payments” statute. Under this statute, a landlord “is not required to accept a partial payment of rent or other charges.” However, if the landlord receives the partial tender and accepts it without further action, the landlord loses the ability to take further action against the resident in the month in question.

Dealing with “partial” or “full” payment offers is a straight-forward task when the landlord is facing tender through traditional funds. For cash, money orders, and checks, it is merely a question of whether the total offered matches the total due. With credit and debit cards, it is even easier – as the landlord is the party responsible for selecting the amount that will be presented to the card-issuer for payment. Furthermore, automatic deduction transactions are even easier to handle, as they operate in the binary environment of whether or not there is enough money in the account. Even when facing delivery of payment through the mail or a night drop slot, the landlord has the opportunity to consider the offer and decide whether it is satisfactory.

Payment methods have evolved. The face-to-face transaction is starting to become less common as many multifamily landlords offer rent payment through Internet-based transactions and some single-family landlords permit (or even encourage) residents to deposit the rent directly into the landlord’s bank account. However, while allowing your resident to pay through an online e-payment internet portal or via direct bank account deposit, you risk permitting your resident to play games with the rental obligation. When that happens, you, like Alice, will be taking one strange trip through landlord-tenant Wonderland.

THE INTERNET IS A HARSH MISTRESS

Electronic commerce has been a staple of our daily lives for at least two decades. The ease of use of the Internet makes it easier for certain tasks to be performed, from paying bills through your financial institution’s site to purchasing the latest and greatest things at merchants ranging from Target to Tiffany’s. Many landlords have wholeheartedly adopted the Internet as a method for rent payment, both for their residents’ benefit as well as their own.

Internet-based transactions circumvent the normal methods of rent payment, because the resident is usually choosing what amount to pay – including amounts less than what is owed at that moment. While this issue does not matter to the credit-card issuer or the mortgage lender, as they can simply charge interest and penalties or seek draconian recourses, the landlord is at the resident’s mercy in an unregulated e-payment system. If the resident is able to choose how much he wants to pay, the resident can play games with you. After all, if the transaction goes through and the amount wasn’t sufficient, the landlord is trapped under the partial payments statute and the resident procures his “free lunch.”

There is an exception under A.R.S. § 33-1371 that permits the landlord to accept the non-conforming payment: the non-waiver agreement. To create an effective waiver, three elements must be assembled: an agreement that acceptance of the payment offer does not waive the

landlord's rights; a written instrument that is signed at the time the money is received, and a deadline for the payment of the remaining balance.

In order to combat partial payments through electronic systems, some landlords have sought to include language into their leases that indicate that the moneys received through online payment are not prejudicial to the landlord. Functionally, such declarations only satisfy the first condition of the waiver – the acceptance of non-waiver status. Because the contract is not being signed when the payment is received, and because there is no schedule for the payment of the remaining balance, this clause would fail to protect the landlord.

Instead, a landlord should look to the e-payment system itself, and incorporate terms into the system – terms that cannot be bypassed without checking an “I agree” box – that declare the non-waiver agreement and that demand the remaining balance be paid immediately. By plugging these two items into the e-payment system, you meet the third and final element: that the agreement be executed at the same time the moneys are offered.

Abuse can be stopped after the fact by barring the cheating resident from using the system, but this only prevents future problems without saving yourself from current troubles. If you want to make sure that “There Ain't No Such Thing As A Free Lunch,” however, be sure to protect yourself from partial payments through the Internet by incorporating the waiver language into the e-payments system. Otherwise, you really will discover that, at court, the Internet, like the moon, is a harsh mistress.

THE FOX IN THE HENHOUSE

While the multifamily landlord has to counter the potential for abuse of hands-off electronic payment systems while embracing their ease-of-use, a single-family landlord can permit a resident the opportunity to make payments directly into the landlord's bank account – and give rise to a very similar potential for abuse.

Most residents are responsible, hard-working individuals who will do their utmost to pay what is due. Unfortunately, allowing your residents unfettered and direct access to a bank account for payment can inspire less-scrupulous people to play games similar to what the multifamily landlords face.

The solutions are not as straightforward as with e-payment systems. Theoretically the conceptual language referenced that some multifamily landlords were including (but which wasn't actually effective) could be adopted if it were coupled with a statement that any partial payments will be immediately returned. However, the resident can still play games by depositing a small amount at inconvenient times, such as the day of an eviction trial.

Ultimately, while there are ways to protect a multifamily landlord from cheating through the Internet, there are fewer ways to protect single-family landlords who give residents access to a bank account number. It may be convenient for the landlord, but it really is a case of asking the fox to guard the henhouse.

IN CLOSING

Using alternative methods of rent payment makes for more convenience for the landlord, but make sure that you are keeping an eye on the opportunity for abuse. Vigilance and diligence should always be the landlord's watchwords.