

# LANDLORDS CAN'T HAVE THEIR CAKE AND EAT IT TOO!

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Even if a lease doesn't give tenants the *right* to do something, that doesn't mean that tenants won't *actually* do that very thing. It happens all the time – tenants stop paying rent, assign their unassignable leases, violate use provisions, go dark, cause construction liens to be recorded against the property, and the list goes on and on and on. But what happens when a tenant partially complies with the terms of a lease? If the tenant has paid only part of what is due, can a landlord demand strict compliance, keeping a partial payment and seeking the rest? In most cases, when clients ask me this question I am quick to respond enthusiastically by saying, “Most certainly, yes!” This result is possible due to what are commonly known as “anti-waiver” provisions which are present in most commercial leases and allow landlords to accept partial performance (such as payment of a portion of rent) without waiving the right to require the tenant's full performance. However, a recent California case came to the conclusion that a commercial landlord may, by its conduct, waive a lease provision which prohibits the landlord's waiver.

In this case, the lease gave the tenant, Corinthian Colleges, Inc., the right to terminate its lease for property used for corporate offices, training facilities and classrooms four years early if it paid the landlord two payments totaling \$273,000 as an early termination fee. The tenant paid the entire amount of the termination fee, but a small portion of it, \$16,000, was “paid” by instructing the landlord to apply part of its security deposit. The landlord, Mr. B. Michael Gould, argued that when the tenant paid part of the termination fee from the security deposit, instead of paying the entire amount by check, the tenant failed to exercise its early termination right, leaving the lease in full force and effect. The landlord's argument focused on the fact that the tenant did not strictly comply with lease provisions requiring payment of the full amount of the termination fee and that the security deposit could not be considered as payment of any portion of the money due from the tenant. To his peril, Mr. Gould retained the early termination fee paid by the tenant, relying on the anti-waiver provision in the lease, contending that the lease

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termination fee was held as prepayment of future rent under the unterminated lease.

In most cases, an anti-waiver provision would mean that courts could not find that a landlord had waived its right to pursue full payment from the tenant. But in this case, the anti-waiver provision in the lease was limited solely to the tenant's payment of rent and the early termination fee was not considered rent under the lease. The Court ruled both that the anti-waiver provision did not apply to the early termination fee and that strict compliance with the conditions for the early termination of the lease by tenant was waived by the landlord when he kept every penny of the tenant's termination fee.

The landlord in this case was trying to have his proverbial cake and eat it too. This case serves as a warning that if a landlord requires strict compliance with a lease term, other than the payment of rent, the benefit of partial performance cannot be retained and must be clearly rejected. If landlords accept and retain payments that substantially comply with lease terms and then assert a default, landlords can be found to have done the unthinkable – waive an anti-waiver provision. As a consequence, landlords should be careful to use common sense when it comes to demanding strict performance of leases by their tenants. Keep in mind that courts often issue rulings based upon what seems fair to the tenant under the circumstances, rather than the strict enforcement of lease terms.