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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0571**

Tonka on the Creek LLC,
Appellant,

vs.

Vlada Gazalabova,
Respondent.

**Filed November 25, 2019
Affirmed
Reilly, Judge**

Hennepin County District Court
File No. 27-CV-HC-19-1010

Christopher T. Kalla, Douglas E. Turner, Hanbery & Turner, P.A., Minneapolis, Minnesota
(for appellant)

Mark Iris, Mid-Minnesota Legal Aid, Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Reilly, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

REILLY, Judge

In this eviction action based on holding over after notice to quit a month-to-month tenancy, appellant-landlord argues that the district court erred in determining that landlord waived its right to terminate the tenancy based on late payment of rent as good cause under 26 U.S.C. § 42 (h)(6)(E)(ii)(I). Because we conclude that under the particular facts of this

case, the good-cause requirement to terminate a section 42 tenancy was not satisfied, we affirm.

FACTS

Appellant-landlord Tonka on the Creek LLC owns a 100-unit residential property in Minnetonka, Minnesota. Twenty percent of the units are affordable housing units under the section 42 low income housing tax credit program. The tenants in these units pay 50% of the market rent rate and do not pay for city water, sewer, trash or gas.

Respondent-tenant Vlada Gazalabova has leased a section 42 apartment unit from landlord since 2016. On November 3, 2017, the parties entered into a new lease agreement with a retroactive renewal date of July 1, 2017. The lease term was July 1, 2017 to August 30, 2018. Under its terms, the lease continued as a month-to-month tenancy after the term expired. Under the lease, rent is due on the first of the month. Rent paid after the third of the month is subject to a late fee. Throughout her tenancy, tenant paid rent late nearly every month. In 2017 and 2018, tenant paid her rent on time once. On November 3, 2017, the day the lease was signed, tenant had an outstanding rent balance for the month of November. Although the record reflects that tenant received numerous notices regarding unpaid rent and outstanding balances,¹ there is no dispute that landlord never refused tenant's late rent payments.

¹ The record includes notices dated February 6, 2017; March 6, 2017; December 14, 2017; January 9, 2018; May 10, 2018; September 20, 2018; October 31, 2018; November 7, 2018; November 27, 2018; and December 4, 2018.

On December 27, 2018, tenant received notice that her lease would terminate and she must vacate the premises by February 28, 2019 at 12:00 p.m. Landlord did not provide tenant with the reason for its non-renewal in the termination notice. Tenant had an outstanding balance of \$5.00 on December 27, 2018.

Tenant did not vacate the rental property by February 28, 2019. Landlord filed an eviction action on March 4, 2019, alleging holdover after notice to vacate. Landlord filed an amended eviction complaint on March 22, 2019 adding the following language: “[g]ood cause for non-renewal is repeated late payment of rent.”

The matter was tried in March 2019 and the district court issued its decision in favor of tenant. Landlord appeals.

D E C I S I O N

Landlord argues that the district court erred as a matter of law in determining that landlord could not terminate the section 42 tenancy for late rent payments, without warning, after consistently accepting late payments.

Section 42 rental housing is regulated under section 42 of the Internal Revenue Code. “A recipient of section 42 tax credits is prohibited from terminating a tenancy ‘other than for good cause.’” *Cimarron Village v. Washington*, 659 N.W.2d 811, 815 (Minn. App. 2003) (quoting 26 U.S.C. § 42(h)(6)(E)(ii)(I)). “Minnesota courts have not established a bright-line definition of ‘good cause’” in this context. *Id.* As such, this court determines “good cause” on a case-by-case basis. *Id.* at 817. Eviction proceedings are civil in nature, and “generally the only issue for determination is whether the facts alleged

in the complaint are true.” *Id.* Therefore, this court reviews whether the district court’s findings of fact are clearly erroneous. *Id.*

The district court found that landlord had proven by a preponderance of the evidence that tenant committed repeated minor lease violations due to late payment of rent. However, the district court also found that tenant proved the following defense by a preponderance of the evidence: “[w]aiver of Landlord to assert late payment of rent as the good cause basis by accepting, and never refusing, a late payment.” The parties dispute whether the district court found that landlord failed to establish “good cause” to non-renew, or if it found that landlord waived its right to rely on late payment of rent as the “good cause” basis to non-renew when landlord accepted late rent payments. We need not resolve this dispute because the end result here is the same.

The district court found that “[i]t is undisputed that in 2017 and 2018, Tenant paid her rent in-full, on-time only once. However, Landlord accepted late rent payments each and every month and continually accepted partial payments.” The district court found that landlord notified tenant in writing of late payments at least ten times between February 2017 and December 2018. However, the district court noted that “[n]one of the 10 notices included warning that late payments would not be accepted or that late payments would be a good cause basis for non-renewal of the lease.” The district court also found that “Tenant had no notice prior to Landlord’s acceptance of the last late rent payment in November 2019 that landlord would hold the prior late payments against Tenant for a future eviction.” Landlord does not challenge these findings on appeal.

In *Cimarron Village*, we concluded that late payments were not properly considered a good-cause basis for termination of a section 42 tenancy. 659 N.W.2d at 814. However, this is not because late rent payments can never constitute a good-cause basis for termination of a section 42 tenancy. Rather, we concluded that because the landlord had previously issued tenants a notice of termination due to tenants exhausting the two late-payment allowances, but then subsequently rescinded the notice of termination after tenants paid their rent, those late payments were not properly considered as a factor supporting good cause for a later notice of termination. *Id.* at 817.

The facts of this case are distinguishable from *Cimarron*. But, under the particular facts of this case, we conclude that landlord did not establish good cause to non-renew based on late rent payments because landlord repeatedly and consistently accepted late rent payments without warning that late payments could be a basis for termination of the lease. The district court's factual findings regarding late payments and the parties' communications are not clearly erroneous. We note, however, that tenant's counsel conceded at oral argument that tenant now has notice that late rent payments are problematic and that landlord "would possibly have good cause now" if tenant continues to pay rent late.

Landlord also argues that the district court erred as a matter of law in concluding that, after accepting late payments, landlord could only terminate the lease if it refused late rent payments. We agree with landlord that if it had established good cause to terminate the lease based on late payments, landlord could bring an eviction action for holding over after termination of the tenancy regardless of whether landlord ultimately accepted all rent

due during the term of the lease. In contrast, in an eviction action based on breach of lease, a landlord waives the right to evict if it accepts rent with knowledge of the breach. See *Westminster Corp. v. Anderson*, 536 N.W.2d 340, 341 (Minn. App. 1995), review denied (Minn. Oct. 27, 1995); *Priordale Mall Inv'rs v. Farrington*, 411 N.W.2d 582, 584 (Minn. App. 1987); *Oak Glen of Edina v. Brewington*, 642 N.W.2d 481, 486 (Minn. App. 2002) (“Generally, a landlord who accepted rent while knowing that breaches of the lease have occurred waived the right to rely on those breaches in an action for unlawful detainer.”). But because landlord failed, based on the particular course of conduct here, to establish good cause to terminate the lease based on late payments, this conclusion does not alter the outcome.

For the same reasons, landlord’s narrow argument about a non-waiver clause in the lease does not support reversal. Landlord appears to argue that, in light of the non-waiver clause, it did not waive its right to enforce the vacate date of February 28, 2019 by accepting rent due before that date. Landlord contends that it could only have manifested its intent to waive the right to enforce the vacate date if landlord had accepted, rather than refused, March rent from tenant. Landlord relies on *Minneapolis Cmty. Dev. Agency v. Powell*, in which this court found that

even if the non-waiver provision were inapplicable and [tenant] could take advantage of it, the landlord’s conduct after the notice of termination of tenancy has been given must manifest some intent to waive the notice . . . The acceptance of rent alone does not necessarily manifest any intent to waive the notice of termination.

352 N.W.2d 532, 534 (Minn. App. 1984). Landlord's argument is focused on the wrong time period, as the issue here is not centered on whether landlord waived its right to enforce the vacate date.

An appellant bears the burden of showing that the district court erred. *See Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) ("It is well to bear in mind that on appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. Not only that, but the burden of showing error rests upon the one who relies upon it." (quotation omitted)). Landlord has not shown that the district court erred in concluding that, under the particular course of conduct between this landlord and tenant, landlord did not establish good cause to terminate the section 42 tenancy based on repeated late payments.

Affirmed.