



## Outside Counsel

## Expert Analysis

# What Is Rent For? Clearing Up Common Misapprehensions

The term of a lease is pre-maturely terminated on the fifth day of a month. How much rent is due for that month? The entire monthly rent? A pro-rated amount? Nothing? If the tenant tendered the full monthly rent, must a portion be returned? If the landlord accepts the entire monthly rent, does that vitiate the termination or at least entitle the tenant to remain in possession for the rest of the month?

The uncertainty that may arise from these questions is based on a misapprehension commonly held not only by laypersons, but also by many experienced attorneys.

Under most leases, rent is due on the first day of each month during the term. This rent is commonly referred to as the rent "for" such month, so that the rent due on April 1 is typically called "the April rent."

The common misapprehension is that such rent is the consideration for the tenant's use and occupancy of the leased premises during such month, i.e., that "the April rent" is being paid on account of the tenant's occupancy of the premises during the month of April. This misapprehension would lead to the conclusion that if such consideration is not "earned," i.e., if the tenant does not have possession of the premises for the entire month, then the entire "monthly" rent is not due in full.

In fact, "the April rent" due on April 1 is not consideration for the tenant's possession, occupancy or use of the premises during the month of April. It is merely an installment payment that is due on April 1.

A lease is the demise to the tenant of an estate in land. Specifically, it is the demise of the right to exclusive possession and control of premises, for a term. Rent is the consideration for the demise to the tenant of the leasehold estate.<sup>1</sup>

At common law, absent an agreement to the contrary, this consideration is due at the end of the term. "Because rent is to be paid for the actual use and enjoyment of the property and no 'debt accrues until such enjoyment has been had,' rent does not become due until the end of a period."<sup>2</sup> If the period, the term of the lease, is one year, the rent is due at the end of the year.

Landlords generally avoid the application of this common law rule by providing in the lease that the rent, the consideration for the demise, is to be paid in installments during the term.

Although any arrangement is possible, generally leases provide for payment of the rent in equal monthly



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installments, due in advance, on the first day of each month during the term.

Where a lease requires the rent to be paid in installments, the entire installment payment accrues and is due and owing in full on the due date.<sup>3</sup>

For this reason, where a lease provides for rent to be paid in equal monthly installments due on the first day of each month during the term, and the term of the lease is terminated on the fifth day of a month, the termination is irrelevant to the rent which was due and payable on the first day of such month. On the first day of the month the lease had not been terminated and was still in effect. On such day an installment of rent became due and payable, in full.

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What may happen after the date on which the installment payment accrues and becomes due and owing does not affect the tenant's obligation with regard to such installment payment. As stated by the Appellate Division, First Department, in an early case,<sup>4</sup> "if by the terms of his lease rent is to be paid in advance, the tenant comes under an absolute engagement to pay it on the day fixed, and he is not relieved from that engagement by the fact that the property is destroyed by fire, and he is liable to pay the rent due in advance even though the destruction takes place on the very day it falls due." Similarly, a landlord's acceptance of the tenant's surrender in mid-month "does not affect [landlord's] right to recover the rent that had previously accrued...by the terms of the lease, the rent was payable in advance on the first day of each month; and [landlord] is, therefore, entitled to the rent that had become due and owing on the...1st day of [the month]."<sup>5</sup> The obligation accrued and was due and owing in full before the end of the term.

An oft stated rule in landlord-tenant practice is that a notice pre-maturely terminating the term of a lease based on the tenant's material default under the lease may be vitiated by the landlord's acceptance of rent. But this simple recitation is incomplete. An accurate recitation of the rule is that acceptance of rent which absent the termination would have accrued after the termination date will vitiate the termination. That is because acceptance of such rent is inconsistent with the termination.<sup>6</sup>

On the other hand, there is no inconsistency as between termination of the lease and acceptance of rent which had accrued prior to such termination.<sup>7</sup>

For example, if a landlord serves a notice terminating a lease on June 15, 2009, and then accepts the installment of rent due on July 1, 2009, that would be inconsistent with the termination. It would evidence an intention on the part of the landlord to continue the tenancy beyond the termination date of June 15, because that payment could not have become due as rent if the term had ended on June 15. As such, it would vitiate the termination.

Conversely, if after the June 15, 2009, termination date the landlord had accepted a payment of rent arrears which had been due in 2005, there would be no inconsistency with the termination. The payment accrued and was due and owing in full prior to the termination date. The same would be true for a payment which had been due on June 1, 2009.

Thus, where a lease provides for rent to be paid in installments due on the first day of each month during the term, and the term is pre-maturely terminated mid-month, the entire installment of rent due on the first day of such month is due and owing, and may be accepted by the landlord without vitiating the termination.

1. 219 *Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979).

2. Milton R. Friedman, *FRIEDMAN ON LEASES* (5th ed. 2007) at §5:1.1.

3. *Sperry v. Miller*, 8 N.Y. 336 (1854), *Werner v. Padula*, 49 A.D. 135, 63 N.Y.S. 68 (1st Dept. 1900).

4. *Werner v. Padula*, 49 A.D. 135, 138, 63 N.Y.S. 68 (1st Dept. 1900).

5. *Barkley v. McCue*, 25 Misc. 738, 55 N.Y.S. 608 (A.T. 1899).

6. *South Park Associates, LLC v. Renzulli*, 94 F.Supp.2d 460 (S.D.N.Y. 2000).

7. *Subway Restaurants Inc. v. Marnetti*, 2003 NY Slip Op 51225U, 2003 Misc. Lexis 1115 (A.T. 2d Dept. 2003), *George Ringler & Company v. Schmekzeisen*, 123 Misc. 394, 205 N.Y.S. 419 (A.T. 1st Dept. 1924).