UNDISCLOSED COUNTY MUNICIPAL COURT
UNDISCLOSED COUNTY, OHIO

LENNY LANDLORD,	*	
	*	**Case No. 2016 CV 000000**
Plaintiff,	*	
	*	
VS.	*	**POSTHEARING BRIEF**
	*	
TAMMY TENANT,	*	
	*	
Defendant.	*	
	*	

COMES NOW the Defendant, by counsel, and as and for her posthearing brief, states as follows:

STATEMENT OF THE FACTS

On September 1, 2006, the Defendant, Tammy Tenant ("Tenant"), and her husband conveyed a certain parcel of realty commonly known as 123 Easy Street, Somewhere, Ohio (the "Property"), to the Plaintiff, Lenny Landlord ("Landlord"). *See* Warranty Deed. The deed was made expressly subject to a 99-year lease, also executed on September 1, 2006, for that portion of the Property that housed a beauty shop operated by Tenant. *See* Lease Agrmt.

Regarding rent, the Lease states as follows: "LESSEE agrees to pay the sum of One Thousand Two Hundred Dollars ($1,200.00) per year commencing _____." Lease ¶ 3. Thus, the Lease expressly provides for an annual rental amount of $1,200 but fails to specify when it is due. *See id.*

For the 10 years that Tenant has been operating under the Lease, Tenant has paid Landlord at least two times per calendar year and sometimes as much as four times per calendar year, for a total of $1,200 per calendar year. For instance, Tenant wrote the following checks to Landlord (all of which were marked as exhibits in the case):

Check No.	Date of Check	Amount of Check	Memo Line
2173	01/07/14	$300	Rent til April
2204	05/22/14	$300	Rent
2221	07/15/14	$300	Rent[1]
2341	08/05/15	$700	Rent
2373	12/01/15	$500	Ending Rent 4-2015
2445	08/18/16	$600	Rent
2467	11/16/16	$600	Rent 2016

On November 15, 2016, Landlord commenced the instant action against Tenant alleging that Tenant had failed to timely pay $300 in rent that was purportedly due September 1, 2016. *See* Forcible Entry & Detainer/Compl. for Eviction. Notably, Landlord has regularly accepted and deposited/cashed all of Tenant's rent checks over the past 10 years except the last one, which was tendered on November 16, 2016, the day after Landlord commenced the instant lawsuit.

[1]Although Tenant could not produce a fourth $300 check during calendar year 2014 to be entered as an exhibit, Landlord does not dispute that Tenant delivered a fourth $300 check to him during calendar year 2014.

QUESTION PRESENTED

Did Tenant breach the Lease by failing to timely pay Landlord rent by September 1, 2016?

ARGUMENT

I. TENANT DID NOT DEFAULT UNDER THE LEASE BY FAILING TO TENDER THE FULL $1,200 IN RENT TO LANDLORD BY SEPTEMBER 1, 2016

It is well settled that "leases are contracts and, as such, are subject to traditional rules governing contract interpretation." *Heritage Court L.L.C. v. Merritt*, 187 Ohio App.3d 117, 2010-Ohio-1711, 931 N.E.2d 194, ¶ 14 (3d Dist.). "The fundamental purpose of contract interpretation is to determine and carry out the intention of the parties, and the intention of the parties is presumed to lie in the language used in the lease agreement." *Id.*

"When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37. "Contractual terms are ambiguous if the meaning of the terms cannot be deciphered from reading the entire contract, or if the terms are reasonably susceptible to more than one interpretation." *Arnold v. Burger King*, ___ Ohio App.3d ___, 2015-Ohio-4485, 48 N.E.3d 69, ¶ 57 (8th Dist.).

In the instant case, the Lease is undeniably ambiguous as to when the rent is due. All the Lease says is that the rent is $1,200 per year without specifying when the lease term

commences or when the rental payment is due. *See* Lease ¶ 3; *cf. Milbourn v. Aska*, 81 Ohio App. 79, 77 N.E.2d 619 (3d Dist. 1946) ("Where the terms of a written lease as to the time of its commencement are clear and unambiguous, such time controls[.]"), paragraph one of the syllabus.

To resolve this ambiguity, this Court must engage in contract interpretation.

A. Absent Any Specification To The Contrary, Annual Rent Is Due At The End Of The Calendar Year.

"Where a lease agreement does not state a specific time for performance of an enforceable promise or covenant, performance is required within a reasonable time. A reasonable time in such cases is . . . derived from the surrounding conditions and circumstances that the parties had in contemplation upon execution of their agreement." 65 Ohio Jurisprudence 3d, Landlord and Tenant, Section 115 (footnotes omitted).

In the instant case, because the amount of rent is stated annually, *see* Lease ¶ 3 ($1,200 per year), the rent is due annually. *See* Annotation, *Time When Rent Payable in Absence of Provision of Lease Fixing Time Applicable to All Payments*, 126 A.L.R. 565, Section I(a) (1940 & Supp.) ("Where by the contract the rent is payable either yearly, half yearly, quarterly, monthly, or weekly, and there is no provision for payment at any particular time during such periods, . . . the rent is not due and payable until the end of those respective periods." (citing numerous cases)); Restatement of Property 2d, Landlord and Tenant,

Section 12.1, Comment c (1977) ("In the absence of a specification as to the due date of the rent, it is due at the end of the period covered by the rent.").

Accordingly, because the Lease expressly states the rent in annual terms, without any specification of when it is due, the rent is due on December 31 of each calendar year. *See Bankers Bldg. v. Bishop*, 326 Ill. App. 256, 61 N.E.2d 276 (1945) (abstract only) (where amount of annual rental is fixed in a lease but no dates are specified for payment, in absence of custom or usage to contrary, rental is payable at end of the year);[2] *see also Gallagher v. Billmaier*, 79 Ohio Law Abs. 417, 154 N.E.2d 472, 480 (Lucas County Ct. 1958) ("In the absence of an agreement of a contrary intent, rents are not due in advance but at the end of each period[.]").

Consequently, Tenant had until December 31, 2016 to pay the $1,200 rent for calendar year 2016. Thus, at the time Landlord filed suit on November 15, 2016, Tenant could not possibly have been late paying the rent, because the due date had not yet come to pass. In any event, Tenant tendered the outstanding $600 in rent due for calendar year 2016 on November 16, 2016, well before the December 31 due date. *See Trio Mobile Homes, Inc. v. West*, 240 Ga. 474, 476, 241 S.E.2d 234 (1978) (where lease agreement required that rent was payable monthly, and not that rent be paid on first day of the month, lessee's alleged failure to pay by the first of the month did not constitute a breach).

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[2]Decisions from other states, albeit not binding on the Ohio judiciary, may be cited as persuasive authority. *See Solomon v. Cent. Trust Co. of Ne. Ohio*, 63 Ohio St.3d 35, 41, 584 N.E.2d 1185 (1992).

Therefore, it is clear that Tenant did not fail to timely pay rent. Because that is the sole ground for Landlord's action, the action must be adjudicated in Tenant's favor and/or dismissed.

B. The Time For Paying Rent Is Established By The Parties' Conduct

"An agreement that the rent is payable at a particular time may be raised by implication from the acts or circumstances of the parties." 52A Corpus Juris Secundum, Landlord and Tenant, Section 1159 (footnotes omitted); *e.g.*, *Consol. Mgmt., Inc. v. Handee Marts, Inc.*, 109 Ohio App.3d 185, 191, 671 N.E.2d 1304 (8th Dist. 1996) (applying this rule of interpretation).

The Ninth District has noted that a learned treatise on contract law has "identified primary and secondary rules of contract construction" whereby "[p]rimary rules are always applicable, while secondary rules are applicable only after primary rules have been applied and the contract's meaning remains uncertain or ambiguous." *Malcuit v. Equity Oil & Gas Funds, Inc.*, 81 Ohio App.3d 236, 239-240, 610 N.E.2d 1044 (9th Dist. 1992), citing *Raphael v. Flage*, 9th Dist. Lorain No. 89CA004539, 1989 WL 109122, citing 4 Williston on Contracts, Section 617, at 699-702.

One of the major rules of contract interpretation is the rule of practical construction. *See* 11 Williston on Contracts, Section 32:14 ("Given that the purpose of judicial interpretation is to ascertain the parties' intentions, the parties' own practical interpretation

of the contract—how they actually acted, thereby giving meaning to their contract during the course of performing it—can be an important aid to the court. Thus, courts give great weight to the parties' practical interpretation." (footnotes omitted)).

> The rule of practical construction may be applied in several circumstances as follows:
>
> > "[T]he practical construction made by the parties may be considered by the court as an aid to its construction when the contract is ambiguous, uncertain, doubtful, or where the words thereof are susceptible to more than one meaning, *or when a dispute has arisen between the parties after a period of operation under the contract*." (Emphasis added.) 18 Ohio Jurisprudence 3d (1980) 46, Contracts, Section 160.
> >
> > This court has specifically provided:
> >
> > "Where a dispute arises relating to an agreement under which the parties have been operating for some considerable period of time, the conduct of the parties may be examined in order to determine the construction which they themselves have placed on the contract." *Natl. City Bank v. Citizens Bldg. Co.* (App. 1947), 48 Ohio Law Abs. 325, 335, 74 N.E.2d 273, 279.

Consol. Mgmt., Inc., 109 Ohio App.3d at 191, 671 N.E.2d 1304.

In the instant case, because the parties have allowed for multiple rental payments throughout the year, provided that the total amount of $1,200 is paid each calendar year, and have done this for the past 10 years, that practice ought to be deemed to be the intent of the ambiguous Lease. *See, e.g.*, *id.* (trial court properly used the rule of practical construction to determine construction that parties themselves gave to a lease where parties had entered into course of conduct more than 10 years earlier); *cf. Parks v. Dunn*, 46 Ohio Law Abs. 6,

8, 68 N.E.2d 357 (Dayton Mun. Ct. 1946) ("The Court finds that there is no evidence that the plaintiff entered into any agreement with his tenants respecting the time and place of payment of the rental. . . . Since only several weeks elapsed since plaintiff acquired the property there is no evidence of prior conduct between these parties upon which the Court could impose any implied agreement.").

Therefore, it is clear that Tenant did not fail to timely pay rent, and because that is the sole ground for Landlord's action, the action must be adjudicated in Tenant's favor and/or dismissed.

C. The Rule Of Practical Construction Prevails Over The Rule Of *Contra Proferentem*

At trial, Landlord contended "that where there is doubt or ambiguity in the language of a contract it will be construed strictly against the party who prepared it." *McKay Mach. Co. v. Rodman*, 11 Ohio St.2d 77, 80, 228 N.E.2d 304 (1967). Admittedly, Tenant's prior counsel drafted the Lease at issue here.

However, this rule of contract construction is a secondary rule of interpretation. *See* 11 Williston on Contracts, Section 32:12 ("This rule is frequently described by the Latin term *contra proferentem*, literally, against the offeror, the party who puts forth, or proffers or offers, the language." (footnotes omitted)). And, thus, if the ambiguity is clarified by application of a primary rule of construction, then there is no need to resort to a secondary

rule of construction such as *contra proferentem*. *See, e.g.*, *Malcuit*, 81 Ohio App.3d at 240, 610 N.E.2d 1044; *see also* 11 Williston on Contracts, Sections 32:1, 32:8.

Although *Williston on Contracts* technically categorizes the rule of practical construction as a secondary rule too, it is often given greater importance than other secondary rules. *See* 11 Williston on Contracts, *supra*, Section 32:14 ("The conduct of the parties . . . provides *nearly conclusive evidence* of the parties' contractual intentions. This is particularly true when the contract is ambiguous." (emphasis added)). Indeed, this makes eminent sense given that the polestar of contract interpretation is to give effect to the parties' intent. *See Heritage Court L.L.C.*, 187 Ohio App.3d 117, 2010-Ohio-1711, 931 N.E.2d 194, at ¶ 14.

Moreover, "[t]he rule of *contra proferentem* is generally said to be a rule of last resort and is applied only when other secondary rules of interpretation have failed to elucidate the contract's meaning." 11 Williston on Contracts, *supra*, Section 32:12 (citing numerous cases in a footnote); *accord* 17A Corpus Juris Secundum, Contracts, Section 425 ("The rule should be employed as a last resort, when there is not any evidence showing the parties' intent and all other rules fail to resolve the ambiguity." (footnotes omitted)); *see also Premier Title Co. v. Donahue*, 328 Ill. App.3d 161, 166, 765 N.E.2d 513 (1993) ("In fact, as we understand it, the rule is not an interpretive one at all. Instead of seeking to divine the intent of the parties, the rule merely assigns the risk of an unresolvable ambiguity to the party responsible for creating it.").

Although not stated as expressly as noted above, the Ohio courts appear to recognize the above-stated principle:

> If an ambiguity exists, courts are permitted to consider extrinsic evidence to determine the parties' intent. *Wells Fargo Bank, N.A. v. TIC Acropolis, L.L.C.*, 2d Dist. No. 2015-CA-32, 2016-Ohio-142, 2016 WL 197090, ¶ 47. Extrinsic evidence includes the circumstances surrounding the parties at the time the contract was made and the objectives they intended to accomplish by entering the contract. *Oryann, Ltd. v. SL & MB, L.L.C.*, 11th Dist. No. 2014-L-119, 2015-Ohio-5461, 2015 WL 9485646, ¶ 26. This includes consideration of the parties' negotiations. *Id.*, citing *Pharmacia Hepar, Inc. v. Franklin*, 111 Ohio App.3d 468, 475, 676 N.E.2d 587 (12th Dist.1996). *If the parties' intent cannot be determined from consideration of extrinsic evidence, then the contract must be construed against the drafter.* *Cocca Dev. Ltd. v. Mahoning Cty. Bd. of Commrs.*, 7th Dist. No. 12 MA 155, 2013-Ohio-4133, 2013 WL 5373146, ¶ 10; *Michael A. Gerard, Inc. v. Haffke*, 8th Dist. No. 98488, 2013-Ohio-168, 2013 WL 267296, ¶ 14.

Cadle v. D'Amico, 7th Dist. Mahoning No. 15 MA 0136, 2016-Ohio-4747, ¶ 24 (emphasis added); *see also Arnold*, ___ Ohio App.3d ___, 2015-Ohio-4485, 48 N.E.3d 69, at ¶ 58 ("Ambiguities are generally construed against the drafter where the parties have unequal bargaining power to select the contract language.").

Consequently, the rule of practical construction ought to trump the rule of *contra proferentem*, and because the rule of practical construction clarifies the ambiguity, *see supra* Part I.B, there is no need to resort to the rule of *contra proferentem*.

Therefore, it is clear that Tenant did not fail to timely pay rent. And because that is the sole ground for Landlord's action, the action must be adjudicated in Tenant's favor and/or dismissed.

II. ALTERNATIVELY, EVEN IF THE RENTAL PAYMENT WAS LATE, LANDLORD IS PRECLUDED FROM EVICTING TENANT BASED ON THE LATE PAYMENT

A. Time Is Not Of The Essence In The Lease

"The general rule as to contracts is that the time of performance is not of the essence unless the parties have included an express stipulation to that effect or such a requirement can be implied from the nature or circumstances of the contract. However, the parties can alter this basic rule by including an express stipulation on the matter." *Bucher v. Schmidt*, 3d Dist. Hancock No. 5-01-48, 2002-Ohio-3933, ¶ 14 (footnotes omitted); *accord Brown v. Brown*, 90 Ohio App.3d 781, 784, 630 N.E.2d 763 (11th Dist. 1993).

In the instant case, the Lease does not make time of the essence. *See generally* Lease. In fact, nowhere in the Lease does it even specify when a rental payment is due. *See id.* As such, the mere fact that Tenant tendered a rental payment a couple weeks late in a 99-year lease cannot be a valid ground for an eviction. *See* 52 Corpus Juris Secundum, supra, Landlord and Tenant, Section 423 ("A provision requiring the performance of an act by one of the parties, which does not fix the time for performance, is generally construed as requiring performance within a reasonable time; and what constitutes a reasonable time depends on the circumstances of the particular case.") (footnotes omitted); *e.g.*, *Trio Mobile*, 240 Ga. at 476, 241 S.E.2d 234 (where lease agreement required that rent was "payable monthly," and not that rent be paid on first day of the month, lessee's alleged failure to pay by the first of the month did not constitute substantial noncompliance); *cf.* Ohio Landlord

Tenant Law, Section 6:7 (2016-2017 ed.) ("[W]hen a lease expressly states a time of performance . . . then 'time is of the essence' by mutual agreement.");

Therefore, even if Tenant did not timely pay rent, that mere breach does not warrant Landlord's action for eviction, and, thus, the action must be adjudicated in Tenant's favor and/or dismissed.

B. Alternatively, Landlord Waived His Right To Evict Tenant Based On Late Rental Payments

"Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges," including contractual rights and privileges. *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 49. Indeed, "[t]he parties to a lease may . . . waive specific terms of the lease . . . implicitly[] by their acts and conduct." 65 Ohio Jurisprudence 3d, Landlord and Tenant, Section 117, citing *Real Props. Servs. Mgm't v. Harigle*, 3d Dist. Crawford No. 3-96-21, 1997 WL 430773, at *4 (July 30, 1997); *accord Galaxy Dev. LP v. Quadax, Inc.*, 8th Dist. Cuyahoga No. 76769, 2000 WL 1474502, at *3 (Oct. 5, 2000), citing *State ex rel. Ford v. Cleveland Bd. of Educ.*, 141 Ohio St. 124, 47 N.E.2d 223 (1943).

It has long been established that a landlord's acceptance of late rent can amount to a waiver of the established rental due date.

> Where a course of dealing has been established between the parties where the tenant tenders, and the landlord accepts, payment of installments of rent at times substantially later than the due dates prescribed in a written lease, the

> landlord thereby waives any right to claim forfeiture by reason of the late payments, unless he gives the tenant advance notice of his intention to require strict compliance with the terms of the lease.

Colombo Enters., Inc. v. Convenient Food Mart, Inc., 8th Dist. Cuyahoga Nos. 80634, 81075, 80719, 81076, 80925, 81074, 2003-Ohio-154, ¶ 20, quoting *Lauch v. Monning*, 15 Ohio App.2d 112, 239 N.E.2d 675 (1st Dist. 1968), paragraph one of the syllabus.

In *Crossroads Somerset Ltd. v. Newland*, 40 Ohio App.3d 20, 531 N.E.2d 327 (10th Dist. 1987),[3] the Tenth District held that a landlord could not evict a tenant based on a late payment policy, because the landlord had failed to enforce the policy three times following the tenant's violation of the policy. *See id.* at 23, 531 N.E.2d 327. Given the landlord's acquiescence in receiving late rental payments, the court found that the landlord had waived the application of the late payment policy. *Id.*; *accord Finkbeiner v. Lutz*, 44 Ohio App.2d 223, 226-27, 337 N.E.2d 655 (1st Dist. 1975) (where approximately one sixth of rent checks from 1958 through 1973 were tendered late without protest by landlords, failure of landlords to make timely objection to such admitted breaches of lease by tenants amounted to waiver, and, thus, such breach could not be a ground for termination of the lease); *see also Real Prop. Servs.*, 1997 WL 430773, at *4 ("The testimony in the present case as to the late payments could constitute a waiver of the [landlord's] right of strict compliance.").

In the instant case, Landlord accepted Tenant's routine tender of rent payments after September 1 for *10 years*, not just three payments as was the case in *Newland* or the two-

[3] *abrogated on other grounds by Colonial Am. Dev. Co. v. Griffith*, 48 Ohio St.3d 72, 549 N.E.2d 513 (1990).

times-per-year as in *Finkbeiner*. Thus, if the landlords in *Newland* and *Finkbeiner* waived their rights, then certainly Landlord waived his rights in the instant case, too. *See also Milbourn*, 81 Ohio App. 79, 77 N.E.2d 619, paragraph three of the syllabus ("Where a lessor, for several rent installment periods, accepts, in a course of dealing, overdue payments of rent without warning or notice to the lessee of termination of the lease, lessor cannot terminate the lease for such a default, even though the right to do so is granted by the terms of the lease."); *Horvath v. Gorman*, 60 Ohio Law Abs. 538, 98 N.E.2d 447, 450 (Cleveland Mun. Ct. 1951) ("[Landlord] has a right to accept payments after the due date and after that has been done for a considerable period of time he ought not to be permitted [to] claim a default of rent on the part of a tenant unless the tenant has been advised that in the future the time of the rent due date will not be waived.").

Admittedly, the Lease contains a "no-waiver" clause. *See* Lease ¶ 7 ("No waiver of any of LESSOR'S rights hereunder shall be construed to be a waiver of any other rights that LESSOR may have."). "A no-waiver provision in the lease preserves the landlord's right to the payment of the rent on the due date." Restatement (Second) of Property, Landlord and Tenant, Section 12.1, Comment c.

However, like any contractual provision, even an ant-waiver clause is itself subject to waiver. *See 3637 Green Rd. Co. v. Specialized Component Sales Co.*, 8th Dist. Cuyahoga No. 103599, 2016-Ohio-5324, ¶ 22. Here, given the 10 years of accepting Tenant's rental payments after September 1 each year, Landlord has waived the no-waiver provision in the

Lease, at least with respect to the timing of rental payments. *See, e.g.*, *id.* at ¶ 24 ("In this case, there is substantial, competent credible evidence in the record to support the conclusion that [landlord] waived the lease's no-oral-modification and written waiver provisions by its subsequent course of conduct acknowledging the rent reduction."); *EAC Props., L.L.C. v. Brightwell*, 10th Dist. Franklin No. 10AP-853, 2011-Ohio-2373, ¶ 26 (landlord waived increased holdover rent, even though lease contained an antiwaiver provision, by accepting without complaint original rent amount for 13 consecutive months after lease expired).

Therefore, even if Tenant did not timely pay rent, Landlord waived Tenant's breach, and, thus, the action must be adjudicated in Tenant's favor and/or dismissed.

C. Alternatively, Landlord Is Estopped To Complain Of Tenant's Late Payments

"Equitable estoppel precludes recovery when 'one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment.'" *Glidden Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, at ¶ 52, quoting *State ex rel. Chavis v. Sycamore City Sch. Dist. Bd. of Educ.*, 71 Ohio St.3d 26, 34, 641 N.E.2d 188 (1994).

The party claiming an estoppel "must demonstrate four elements: (1) that the defendant made a factual misrepresentation; (2) that it is misleading; (3) induces actual reliance which is reasonable and in good faith; and (4) which causes detriment to the relying

party." *MacDonald v. Auto-Owners Ins. Co.*, 2012-Ohio-5949, 989 N.E.2d 569, ¶ 48 (3d Dist.). In assessing these four elements, relevant factors to consider include

> [(a)] the nature of the representation; (b) whether the representation was in fact misleading; (c) the relative knowledge and experience of the parties; (d) whether the representation was made with the intent that it be relied upon; and (e) the reasonableness and good faith of the reliance, given all the facts and circumstances.

Id. (citation omitted).

In the instant case, Tenant can easily satisfy all four elements of an estoppel. By continually accepting rental payments after September 1 each year for over the past 10 years, Landlord misled Tenant into reasonably believing that her payments were timely, and, thus, allowing Landlord to now strictly enforce a September 1 due date for the annual rental payments would cause Tenant a significant detriment in that Landlord now seeks to terminate a 99-year lease (with 89 years remaining) based on a single payment that was tendered a mere three weeks late.

For example, in *Finkbeiner*,

> the [tenants] admittedly failed to make timely payments of rent on numerous occasions throughout the duration of the lease. The [landlords] conceded that the late payments were nevertheless accepted without question or qualification and that at no time did they notify the [tenants] that the lease would be strictly enforced with regard to specific clauses within the agreement. The court held, "Where a course of conduct is engaged in between the parties to a lease, which acts are contrary to specific provisions therein, such conduct will speak for itself, and the parties will be estopped from denying that conduct and its immediate logical consequences." [*Id.* at syllabus. *See also Galaxy Dev. Ltd. P'ship,* 2000 WL 1474502.]

Colombo Enters., Inc., 2003-Ohio-154, at ¶ 21, quoting *Finkbeiner*, 44 Ohio App.2d at 225, 337 N.E.2d 655; *e.g.*, *id.* at ¶ 22 (following *Finkbeiner* in holding that landlord was estopped to enforce its contractual right to terminate the lease and reenter the premises if tenant failed to cure a late rent payment where landlord demonstrated a pattern of accepting late payments of rent); *Gonzalez v. Archer*, 718 So. 2d 889, 889-890 (Fla. Dist. Ct. App. 1998) (landlord was estopped from claiming that tenant was in default of lease due to late rental payments, where landlord accepted all untimely rental payments without protest and never notified tenant that he was in default of lease due to the late payments).

Moreover, the antiwaiver provision in paragraph 7 of the Lease does not preclude Tenant's estoppel theory. *See, e.g.*, *Consumers Distrib. Co. v. Hermann*, 107 Nev. 387, 392-394, 812 P.2d 1274 (1991) (landlord was estopped from charging late penalties and interest where landlord had not computed or demanded payment of late penalties or interest provided for by lease for entire five years of lease term, despite nonwaiver provision contained in lease).

Therefore, even if Tenant did not timely pay rent, Landlord is now estopped to complain about Tenant's breach, and, thus, the instant action must be adjudicated in Tenant's favor and/or dismissed.

CONCLUSION

In light of the foregoing arguments and authorities cited, it is clear that there is no basis for Landlord's action and claims against Tenant.

WHEREFORE, Tenant respectfully requests that this Court enter an order as follows:

A. Render final judgment against Landlord and in favor of Tenant;

B. Dismiss this action with prejudice; and

C. Grant Tenant any other and further relief the Court deems just and necessary.

Respectfully submitted,

TAMMY TENANT

By: _____