SURRENDER

By Jim Straub

Surrender has been a commonly misunderstood term. In the common law, surrender means a mutual transfer of possession between the landlord and tenant, and so it is in landlord-tenant law. But common usage has led some to consider it a unilateral giving. So tenants have been able to "surrender" a property, thereby ending a tenancy and the rent obligation. This made a travesty of requiring 30 days' notice, since a savvy tenant had only to toss the keys on your best and say, "It's yours".

The law was made clearer in 2004. Surrender is defined in ORS90.100(42). It means "an agreement…between a landlord and tenant to terminate…" The agreement can be expressed or implied. The latter means that a landlord by his actions can make the relinquishment mutual, turning it into surrender. A landlord could do that by changing the locks or otherwise denying access to the tenant. This section clarifies, too, that a landlord's actions to mitigate don't trigger surrender. Cleaning the unit up, advertising, storing left-behind possessions, and showing to prospective tenants are all things a landlord should do to mitigate damages to a former tenant; and they can now safely be done without being accused of accepting surrender. But don't change the locks. Do that when the new tenant moves in.

-Norton Cabell - Oregon Rental Housing Association 2008 Law Book

We recently spent 20 minutes on the telephone with a collection agency who refused to pursue a past tenant for unpaid rent. The collection agent misunderstood the tenant's "surrender" of the rental property. It is a common misunderstanding and, therefore, our topic this month. According to the misinformed collection agent, the tenant's obligation to pay rent ended when he "surrendered" the property to the landlord. While this is sometimes true, it was not the case in the situation at hand and is not the case in many landlord-tenant situations.

Let's take the most common example. Your tenant gives you a 30 day notice that they intend to vacate the unit. Under landlord-tenant law, your tenant owes rent for the full 30 days of the notice period. If the tenant vacates early and gives you the keys, you have a good-faith obligation to make reasonable efforts to re-rent the unit within that 30 day period. That means you do what you would normally do when you have a vacancy: clean the unit, advertise it in the manner you normally would, and show it to prospective tenants. If you are able to re-rent the unit within the 30 day period, then the tenant will only owe rent until you re-rent the unit. In other words, when a tenant gives a 30 day notice and voluntarily leaves before the notice is up, the tenant owes rent for the 30 days or until you re-rent the unit, whichever comes first.

According to Norton Cabell, ORHA Legislative Director (Retired), the key here is that the tenant gave you possession voluntarily and you were simply helping them mitigate their loss. In order to do this and preserve your right to charge rent for the 30 days or until you re-rent it (whichever comes first), you must not change the locks. In Norton's opinion, you should wait until you re-rent the unit or until the 30 days are up.

Now, things become more complicated if the tenant leaves involuntarily; say because of a with-cause or a non-payment of rent notice. In these cases you've given tenants a choice: pay or leave the unit. Or, in the case of a with-cause notice (let's use noise as an example): stop making so much noise or leave. In these cases, if you are enforcing the notice, then you usually want the tenant to leave. You don't want to run the risk of them reoccupying the unit, and so you generally want to change the locks. If you change the locks, then you are denying the tenant access and can't continue to charge rent. What if you don't change the locks, though?

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