
BRIEF SUMMARY OF TENANT PROTECTION LEGISLATION

The Residential Rental Agreements Act is set out in G.S. Chapter 42, Sections 38 to 44. This law, which was passed in 1977, re-wrote the common law to provide that landlords must maintain residential rental premises to be fit to live in, and to make clear that a tenant's right to such housing cannot be waived. Prior law had followed the rule of *caveat emptor* ("let the buyer beware").

WHAT DOES THE LAW PROVIDE?

The law imposes 5 distinct obligations on a landlord:

He must comply with building and housing codes.

He must keep premises in a fit and habitable condition.

He must keep common areas in safe condition

He must maintain and promptly repair electrical, plumbing, heating, and other supplied facilities and appliances.

He must install a smoke detector and keep it in good repair.

There is something a little confusing about this: some of these overlap. Rental premises might, for example, have a broken furnace that violates obligation #4 above, but the fact that it's below-freezing in the house also means the premises are not habitable. The reason it matters is that different rules apply as far as the notice that's required. Let's look at that more closely.

Only one of the five obligations have a notice requirement written specifically into the statute: a landlord's obligations with regard to electrical, plumbing, and other "facilities and appliances" arise only if he has written notice that repair or maintenance is necessary. After receiving notice, the landlord is entitled to a "reasonable time" to make repairs. The exception to this requirement is when there is an emergency. If the shower handle breaks off and water is pouring out of the tub onto the floor, the law will not require the tenant to notify the landlord in writing and then wait a few days before imposing an obligation on the landlord to make a repair.

A common-sense rule applies to the other four obligations: the tenant must give whatever notice is necessary to reasonably permit the landlord to fulfill his obligations. If there's a leak in the roof, for example, the tenant must notify the landlord before it's reasonable to expect the landlord to repair it. In that case, however, oral notice is acceptable. It may be that in some cases, no notice at all is required, when the evidence demonstrates that the landlord actually knew of the problem (for example, there were holes in the floor before the tenant moved in).

Waiver: The RRAA is a consumer-protection statute. Like other consumer protection legislation, the rights of the parties are not created by contract—or agreement—in these cases. Instead, the obligations of the landlord are imposed by law—even if the contract says nothing about them, **or even if the lease says the tenant waives those rights**. The statute is clear that a tenant doesn't waive his rights by signing a lease providing for waiver; nor does a tenant waive his rights to fit and habitable housing by agreeing to rent a place with obvious defects, even if the landlord specifically tells him about them. If a tenant rents a house without air conditioning, that's fine. But if a tenant rents a house with air conditioning and then the air conditioning tears up, the landlord has a statutory obligation to repair the air conditioning, even if the lease says otherwise.

Sometimes a landlord will say, “I know the house wasn’t up to code, but that’s why the rent was so low. I agreed to let him live in the house for low rent, and he agreed that he would do some work on the house for me.” The RRAA anticipated this, and sets out the following rule: An agreement between the landlord and tenant that the tenant will work on the house and be paid by the landlord is fine, so long as the agreement is entered into AFTER the lease agreement is complete, and the arrangement for payment by the landlord for the tenant’s work is separate from the rent payment.

Sometimes a landlord will say, “The reason the house isn’t up to code is that the tenant himself keeps damaging it.” This allegation, if true, is a valid defense to the landlord’s violation of the Act. The tenant also has obligations under the Act, including refraining from deliberately or negligently damaging any part of the premises. The obligations of the landlord and tenant are “mutually dependent”—that is, each of them is obligated only if the other keeps his part of the bargain. If a tenant violates his obligation to avoid damaging property, it relieves the landlord of his obligation to keep the property in good repair. Obviously, this rule makes good sense, but is a potential swamp, since each party may be in flagrant violation of the Act and point to the other’s violation as excusing their own.

REMEDIES: WHAT HAPPENS WHEN A LANDLORD FAILS TO MEET HIS RESPONSIBILITIES UNDER THE ACT?

At the outset, you are confronted with two apparently contradictory provisions of the Act that have worried commentators. On the one hand, the obligations of the landlord and the tenant under the Act are “mutually dependent”—that is, each of them is obligated only if the other keeps his part of the bargain. Based just on this provision, one might reasonably conclude that a tenant’s obligation to pay rent “depends” on the landlord’s provision of fit and habitable premises. But another section of the Act specifically says that a tenant may not “unilaterally withhold rent prior to a judicial determination of the tenant’s right to do so.” What does this mean?

No one is absolutely certain, because there have actually been only a few appellate cases interpreting the RRAA. It seems clear, though, that a tenant who withholds rent because the landlord violates the RRAA risks being evicted for failure to pay rent. A much safer course would be to pay rent and then bring an action in rent abatement; a tenant who prevails in this action will recover damages for the landlord’s past violation of the Act and may well also secure a “judicial determination of [his] right” to withhold future rent until the landlord complies with the law.

If a tenant does not adopt this safer course, but instead withholds rent, one leading commentator suggests the following approach:

First, determine the actual amount of rent owed, after factoring in the amount of offset to which the tenant is entitled due to the landlord’s breach of the RRAA. If that amount is zero, dismiss the action. If the amount is greater than zero, the next step depends on the specific basis for the action:

If the action is based on breach of a lease condition for which forfeiture is specified, the landlord is entitled to possession upon making the usual showing.

If the action is based on failure to pay rent, however, the tenant may successfully defend by tendering the amount which the magistrate has determined is actually owed.

What about “repair and deduct?” Can a tenant hire someone to fix the roof, pay for it out of his own pocket, and then take that amount out of the rent? We don’t know, and the commentators are divided in their predictions.

Until North Carolina courts clarify the law, it seems likely that many courts will cautiously allow tenants to do this, with the facts of the individual case being important (a tenant who gives notice, waits a long time, and then spends a small amount of money being much more likely to prevail than a tenant who fails to give notice and makes major repairs, such as replacing a roof).

Who is responsible? Clearly, the owner of the property is subject to the Act, but in a surprising case, the Court of Appeals found that a property manager (who had authority to make repairs) was also subject to liability under the Act. *Surrat v. Newton*, 99 NC App 396 (1990).

What is the statute of limitations applicable to actions based on violations of the RRAA? 3 years.

Procedure: The Act states that a tenant may enforce his rights under the Act by civil action, including "recoupment, counterclaim, defense, setoff, and any other proceeding, including an action for possession." Thus, a magistrate may be confronted with applying the Act in any of the following circumstances:

1. The landlord brings an action for possession and/or money damages, and the tenant defends by contending that the landlord violated the Act.
2. The landlord brings an action for possession and/or money damages, and the tenant brings a counterclaim for rent abatement based on the landlord's violation of the Act.
3. The landlord brings an action for money damages, and the tenant responds by arguing that the landlord's damages should be reduced ("set-off") because of his violation of the Act.
4. The tenant files an action for rent abatement.

How are damages calculated? The tenant is entitled to the difference between the FRV (fair rental value) of the property as warranted and the FRV of the property as it actually is, plus any incidental damages (for example, the tenant had to buy a space heater when the furnace stopped working). NOTE: A tenant may only recover up to the amount of rent he actually paid. If he lived in the property and paid no rent, for example, he is not entitled to also recover money damages.

How are damages proven? No expert testimony is required. Witnesses may offer their opinion about the FRV of property, and the magistrate may also rely on his own experience in determining reasonable damages.

Are punitive damages allowed? No, punitive damages are not authorized in actions for breach of contract. Treble damages under G.S. 75-1.1 (prohibiting unfair or deceptive acts or practices affecting commerce) are available, however, if the tenant is able to demonstrate the essential elements of that claim.

RETALIATORY EVICTION

G.S. 42-37.1 to 42-37.3: North Carolina has a strong public policy protecting tenants who exercise their rights to safe housing. When a landlord files an action for summary ejectment, a tenant may *defend* against ejectment by proving by the *greater weight of the evidence* that the landlord's action is *substantially in response* to one of several listed events that has occurred within the last 12 months.

What are those events?

1. Asking landlord to make repairs;
2. Complaining to government agency about violation of law;
3. Formal complaint lodged against landlord by government agency;
4. Attempting to exercise legal rights under law or as provided in lease;
5. Organizing or participating in tenants' rights organization.

Remedy: If a tenant successfully demonstrates retaliatory eviction, the magistrate must deny the landlord's request for possession (although the landlord is entitled to back rent in any case). Furthermore, a tenant may have an independent action for an unfair or deceptive act or practice (with treble damages) under G.S. 75-1.1.

Note that this law is based on public policy. It won't surprise you, then, to learn that the statute specifically provides that any attempted waiver by the tenant of his rights under this law is void.

What's the obvious concern here? That a tenant will seek the protection of this law without really deserving it—in bad faith. If my lease has a forfeiture clause related to keep pets, and I get caught with my dog when the landlord drops by, I might quickly begin to organize a tenant's rights organization. That way, I think, if the landlord tries to evict me, I'll be able to claim it was because of my organizational efforts, and not the real reason—that I have a dog.

When a tenant defends in an action for summary ejectment by asserting that the landlord is actually retaliating against him or her for an action protected under the statute, the landlord may rebut that argument by showing one of the following things:

- a. Tenant failed to pay rent or otherwise broke the lease in a manner that allows eviction, and the violation of the lease is the reason for the eviction.
- b. Tenant is holding over after termination of lease for definite period with no option to renew.
- c. The violations the tenant complained about were caused by willful or negligent act of tenant.
- d. Displacement of tenant is required in order to comply with housing code.
- e. Landlord had given tenant a good-faith notice of termination before protected conduct occurred.
- f. Landlord plans in good faith to do one of the following after terminating tenancy:
 - 1) Live there himself;
 - 2) Demolish the premises, or make major alterations;

3) Terminate use of premises as a dwelling for at least 6 months.

Note that all of these grounds actually relate to the showing required of the tenant: that he is being evicted “substantially in response” to his participation in one of the protected acts. If the landlord is able to demonstrate one of the above reasons for seeking summary ejection, the conclusion must be that the action is not “substantially in response” to one of the prohibited reasons.

One question that has not yet been answered by North Carolina courts is whether, instead of seeking to evict a tenant, the landlord may retaliate for protected activity by increasing the rent. Other states have applied the same rationale to retaliatory rent increases as to retaliatory eviction, refusing to permit it on public policy grounds. This appears to be a permissible reading of the North Carolina statute, which provides: “It is the public policy of the State . . . to protect tenants and other persons . . . who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law. . . .” “The argument then would be that in raising the rent to a punitively high level, the landlord is accomplishing indirectly the same end as he would directly by eviction: termination of the tenancy. It seems probable that NC courts would refuse to allow this, but we don’t know for sure.

SELF-HELP EVICTION

Back in the old days, a landlord who wished to evict a tenant simply changed the locks, or put their property out on the sidewalk. In 1981 the North Carolina General Assembly put G.S. 42-25.6 on the statute books:

“It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed, or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in [the remaining provisions of the statute].”

--Note: This rule applies only to *residential tenancies*. Self-help eviction is perfectly permissible in commercial lease situations.

--Note also the reference to “constructively . . . removed.” The law applies not only to actual removal of a tenant from rental premises, but also to actions taken by a landlord to make continued occupancy unpleasant: turning off utilities would be the most common example.

The General Assembly took aim at another common practice in 1981:

“It is the public policy of the State of North Carolina that distress and distraint are prohibited, and that landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with [other provisions of the statute].”

This law put an end to the practice of some landlords of either seizing property owned by the tenant to compensate for unpaid rent or refusing to release a tenant’s property until that tenant paid past-due rent. As you well know (since you get hundreds of questions a year about it), landlords are now required to comply with specific legal requirements in dealing with property left behind by tenants.

As is typical of laws based on public policy, the statute provides that any attempted waiver of the legal prohibition against self-help eviction is void.

What remedies does a tenant have when a landlord violates the prohibition against self-help eviction?
The law provides that a tenant in this circumstance is

“entitled to recover possession or to terminate his lease and the . . . landlord. . . shall be liable to the tenant for damages caused by the tenant’s removal or attempted removal.”

Further, if a landlord takes possession of a tenant’s personal property, or interferes with a tenant’s access to his personal property, the statute provides that a tenant is entitled to recover possession of the property, or compensation for its value (as in an action for conversion). In addition, a landlord is liable for actual damages caused by his wrongful interference.

In addition to the actions authorized by this statute, our courts have held that a tenant may bring an action for unfair or deceptive acts or practices when a landlord violates these provisions.