

Checklist for Orders in Summary Ejectment Cases

Facts Establishing Grounds for Summary Ejectment

NOTE: Unless the landlord is moving for judgment on the pleadings, the landlord has the burden of proving by a preponderance of the evidence each essential element of their claims.

- **Holding Over—GS 42-26(a)(1)—NC Small Claims Law p. 162**
 - Landlord-tenant relationship
 - Terms of the lease regarding its length
 - (Fixed-term tenancy) The parties had a tenancy for a period of ____ ending on _____.
 - (Periodic tenancy) The parties had a tenancy from _____ to _____.
 - Terms of the lease regarding procedure for termination, if any
 - Fixed-term tenancy-no notice is required unless the lease requires it
 - Periodic tenancy-notice per the lease unless the lease is silent, then notice per GS 42-14
 - Year-to-year 30 days
 - Month-to-month 7 days
 - Week-to-week 2 days
 - Mobile home lot 60 days
 - Notice given terminated the lease at the end of the period (week, month, or year).
 - Tenant failed to vacate at the end of the lease term.
 - Landlord has not accepted any rent after the end of the lease term.
- **Breach of a Lease Condition for which the Right of Reentry is Specified—G2 42-26(a)(2)—NC Small Claims Law p. 158**
 - Landlord-tenant relationship
 - The parties agreed, as part of the lease, to the condition that the landlord is seeking to enforce.
 - e.g., The rent is payable on the first of the month.
 - e.g., The tenant may not keep pets on the property.
 - The parties agreed, as part of the lease, that the lease will terminate if this condition is breached.
 - The lease contains a forfeiture clause that allows the landlord to terminate the lease and reenter if the tenant
 - e.g., fails to pay the rent on the first of the month.
 - e.g., keeps a pet on the property.

- e.g., engages in criminal activity on the premises.
- The tenant violated this condition.
 - e.g., Tenant failed to pay rent on _____.
 - e.g., Tenant kept an unauthorized pet, a _____, on the property.
- Landlord followed procedures in the forfeiture clause, if any.
 - e.g., Forfeiture is automatic upon breach of the lease for failure to pay rent when it is due.
 - e.g., Landlord notified the tenant in writing that the pet was not allowed on the property and that if the pet was not removed in 5 days, landlord would terminate the lease.

*NOTE: The unconscionability discussion on p. 160 of NC Small Claims Law is out of date. The NC Supreme Court in *E. Carolina Reg'l Hous. Auth. V. Lofton*, 369 N.C. 8 (2016), answered the question of whether the landlord has to prove that the result of enforcing the forfeiture is not unconscionable. The Court held that “the equitable defense of unconscionability is not a consideration in summary ejectment proceedings.”

- **Statutory Implied Forfeiture for the Failure to Pay Rent—G2 42-3—NC Small Claims Law p. 160**

- Landlord-tenant relationship
- Terms of the lease require the tenant to pay a certain amount of rent and to pay it by a certain time
 - e.g., The parties have an oral lease. The parties agreed that the tenant would pay rent of \$_____ every _____ on the _____.
 - e.g., The parties have a written lease agreement. The written lease requires the tenant to pay rent of \$_____ on the _____.
- The tenant breached the lease by failing to pay the rent when it was due.
- The landlord made a demand after the rent was due that the tenant pay the rent and gave the tenant at least 10 days after the demand to pay the rent before filing the lawsuit.
 - The plaintiff made demand for the rent on _____. The plaintiff filed the action for summary ejectment on _____.
 - The demand was clear and unequivocal and required the defendant to pay all past due rent.
- The tenant has not yet paid the full rent owed.

- **Expedited Eviction of Drug Traffickers and Other Criminals—GS 42-63—NC Small Claims Law p. 178**

- Landlord-tenant relationship if the *landlord* is attempting to evict the *tenant* and all members of the tenant’s household (*complete or conditional eviction*)

- Landlord must prove the defendant is a member of the tenant's household or a guest of the tenant if the landlord is attempting to evict a *resident* or a *guest* but not the tenant (*partial eviction*)
- Facts supporting one or more of the following:
 - *Criminal activity* occurred on or within the *individual rental unit* leased to the tenant.
 - Activity that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance)
 - Activity that would constitute conspiracy to violate G.S. 90-95 (except conspiracy to possess a controlled substance)
 - Any other activity that threatens the health, safety, or right of peaceful enjoyment of the premises by other residents or employees of the landlord
 - The individual rental unit was used in any way in furtherance of or to promote criminal activity.
 - See explanation of criminal activity above
 - The tenant, any member of the tenant's household, or any guest of the tenant engaged in criminal activity on or in the immediate vicinity^{***} of any portion of the *entire premises*.
 - See explanation of criminal activity above
 - Identify who committed the criminal activity and their relationship to the tenant
 - Identify the part of the entire premises-house, building, mobile home, or apartment, the entire building or complex of buildings or mobile home park, including streets, sidewalks, and common areas
 - Identify the spatial relationship between the premises and where the criminal activity took place if it was in the immediate vicinity (consider the limits of the premises, whether the defendant was in the line of sight of the premises, the ease of reentry from the defendant's location, and other relevant factors)
 - The tenant gave permission to a person to return to the property after that person was removed and barred from the entire premises.
 - Identify the person allowed to return to the property.
 - Facts proving that the tenant allowed the person to return to the property.

- The person was removed by an order for summary ejectment based on criminal activity entered on _____. OR
- The person was barred by the reasonable rules of a publicly assisted landlord.
- The tenant failed to notify a law enforcement officer or the landlord immediately upon learning that a person who was removed and barred from the tenant's individual unit had returned to that rental unit.
 - When the tenant learned of the person's return
 - When or if the tenant contacted law enforcement or the landlord about the person's return
 - The person was removed by an order for summary ejectment based on criminal activity entered on _____. OR
 - The person was barred by the reasonable rules of a publicly assisted landlord.

*NOTE: Terms in italics are defined in GS 42-59.

**NOTE: Criminal activity may also be a breach of a condition of the lease, and the landlord may choose to pursue breach since the defense available to tenants in the statutory provision for criminal activity is not available for breach of a lease condition. All public housing leases include a condition prohibiting criminal activity.

***NOTE: *Immediate vicinity* is not defined by statute or in case law related to summary ejectment. In the criminal law context, the Supreme Court set out factors to consider for the detention of occupants in the immediate vicinity of a premises being searched pursuant to a search warrant. *Bailey v. U.S.*, 568 U.S. 186, 201 (2013).

****NOTE: Depending on the facts of the case, you may order a *complete eviction* (the tenant and all members of the tenant's household), a *partial eviction* (specified persons other than the tenant), or a *conditional eviction* (the tenant may be evicted in the future if certain conditions are violated). Sometimes, a partial eviction is ordered with a conditional eviction. The party being evicted must be named on the complaint and be served with the summons and complaint. The statute allows the landlord to list a fictitious name as a defendant if the defendant's true name is not known at the time the action is filed; the landlord must also add a description sufficient to identify the defendant.

Damages

- **Unpaid Rent**
 - Amount agreed upon in the lease
 - Up to the date of judgment

- **Damages for Occupancy after the End of the Lease**
 - Fair rental value for tenant's continued occupancy of the premises after the term of the lease has ended
- **Physical Damage to the Property**
 - Exceeds normal wear and tear
 - Measure is difference between FMV of property before and after damage.
 - Cost of repair may be relevant to determination but is not itself the proper measure of damages.
- **Contract Damages for the Remainder of the Term**
 - When lease is for a fixed period, damages for remainder of term
 - NOTE: landlord has duty to mitigate damages
- **Authorized Fees, Costs, and Expenses GS 42-46**
 - Late Fees
 - Assessed for payments that are five or more calendar days late
 - Parties agreed to late fees
 - Monthly rent-maximum fee is \$15 or 5% whichever is greater
 - Weekly rent-maximum fee is \$4 or 5% whichever is greater
 - Administrative Fees
 - Second Trial Fee
 - In the written lease
 - Tenant was in default.
 - Landlord prevailed in district court.
 - Cannot exceed 12% of the monthly rent.
 - Out-of-Pocket Expenses and Litigation Costs
 - Filing fees charged by the court
 - Costs for service of process
 - Reasonable Attorneys' Fees
 - If the landlord is the prevailing party, reasonable attorneys' fees actually paid or owed, pursuant to a written lease, not to exceed fifteen percent (15%) of the amount owed by the tenant, or fifteen percent (15%) of the monthly rent stated in the lease if the eviction is based on a default other than the nonpayment of rent. In cases where a tenant appeals a summary ejectment to district court, a landlord is entitled to an award of all actual reasonable attorneys' fees paid or owed if a court determines that the tenant knew, or should have known, the appeal was frivolous, unreasonable, without foundation, or in bad faith or solely for the purpose of delay.

Facts Establishing Defenses

- **Defeats an Element of the Grounds**
 - e.g., Landlord did not send a written notice to tenant about the pet in the property and wait 5 days before filing the summary ejectment action. Landlord failed to follow the procedures in the forfeiture clause for terminating the lease.
 - e.g., Landlord made demand for the rent on the 1st and filed the complaint on the 9th. Landlord failed to wait 10 days after making demand for rent before filing the summary ejectment action.
 - e.g., Landlord gave tenant five-day notice to vacate. Landlord failed to give seven-day notice as required by GS 42-14 for a month-to-month tenancy.
- **Waiver of the Breach**
 - Landlord learned that tenant had breached the lease by _____ and continued to accept rent after the tenant's breach.
 - **Important Exception:** In actions for breach of a lease condition for which reentry is specified, GS 42-26(c) allows landlords to include a provision in the lease that the landlord's acceptance of partial rent or partial housing subsidy payment does not waive the tenant's breach for which the right of reentry is reserved. Waiver also does not apply in evictions for criminal activity.
- **Tender—GS 42-33**
 - Defendant tendered to the landlord the rent due and the costs of the action before judgment.
 - **NOTE:** Tender is only a defense for actions brought under GS 42-3, the statutory implied forfeiture for nonpayment of rent.
- **Defenses to Eviction for Criminal Activity—GS 42-64(a) (not available for breach of a lease condition where the breach is criminal activity)**
 - Tenant proves that they did not know or have reason to know that
 - Criminal activity was taking place or would likely occur within the individual rental unit,
 - The individual rental unit was being used in any way in furtherance of or to promote criminal activity, or
 - Any member of the tenant's household or guest was engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises.
 - Tenant proves that they did everything that reasonably could have been expected under the circumstances to prevent the commission of criminal activity. Possible actions include:

- Requesting the landlord to remove the offending household member's name from the lease,
- Reporting prior criminal activity to appropriate law enforcement authorities,
- Seeking assistance from social service or counseling agencies,
- Denying permission, if feasible, for the offending household member to reside in the unit, or
- Seeking assistance from a church or religious organization.

*NOTE: If the tenant tries to raise either of the defenses in this section in a second or subsequent proceeding for criminal activity brought against the tenant, the tenant's burden of proof is clear and convincing evidence.

- **Exemption to Eviction for Criminal Activity Due to Injustice—GS 42-64(c)**
 - Tenant proves by **clear and convincing evidence** that even though grounds for complete eviction have been established, immediate eviction or removal would be a serious injustice, the prevention of which overrides the need to protect the rights, safety, and health of the other tenants and residents.
- **Violations of the Residential Rental Agreements Act (RRAA)—GS 42-44**
 - How the landlord knew of should have known of the defect
 - e.g., At the time the tenant rented the property, there was a hole in the ceiling which the landlord told the tenant he would fix after she moved in, but the hole was never repaired.
 - e.g., The tenant sent a text message to the landlord giving her notice that the toilet in the bathroom was not working.
 - Reasonable efforts, if any, of landlord to correct the defect
 - Tenant's cooperation with or resistance to getting the defect repaired
 - e.g., The tenant stayed home from work for the plumber to come, but the plumber never showed up. The landlord never made the appointment.
 - e.g., The plumber attempted to fix the toilet, but the tenant denied the plumber entry to the property.
 - Time period that tenancy coincided with the defect
 - The amount of rent actually paid by the tenant for months when the property was unfit
 - Fair rental value of the property in compliance with the RRAA
 - Evidence of what the property would rent for on the open market
 - Unless there is evidence to the contrary, the contract rent may be taken as the fair rental value of the property as warranted.
 - Fair rental value of the property with the defects

- Expert testimony is not required.
- The tenant may give their opinion of the fair rental value of the property in its unfit condition.
- The tenant's testimony about the dilapidated condition of the property is sufficient for judicial officials to determine the fair rental value.
- Evidence of any incidental damages

*NOTE: Violations of the RRAA can be raised as a defense in an action for summary ejectment or to offset the money damages owed to the landlord. To deny the landlord's possession claim based on failure to pay rent, the tenant would have to prove that the rent should be abated to an amount that leaves the tenant owing nothing to the landlord. If the action is based on the statutory forfeiture for nonpayment of rent, the tenant can tender the amount of rent owed plus court costs up until judgment and avoid eviction.

- **Retaliatory Eviction—GS 42-37.1**

- The tenant engaged in one or more of the activities protected by the statute:
 - A good faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair under the RRAA;
 - A good faith complaint to a government agency about a landlord's alleged violation of any health or safety law, or any regulation, code, ordinance, or State or federal law that regulates premises used for dwelling purposes;
 - A government authority's issuance of a formal complaint to a landlord concerning premises rented by a tenant;
 - A good faith attempt to exercise, secure or enforce any rights existing under a valid lease or rental agreement or under State or federal law; or
 - A good faith attempt to organize, join, or become otherwise involved with, any organization promoting or enforcing tenants' rights.
- The dates of the tenant's protected conduct
- The tenant's protected conduct occurred within 12 months of the filing of the action and the eviction is substantially in response to the occurrence.
- NOTE: Landlord may prevail if:
 - The tenant breached the covenant to pay rent or any other substantial covenant of the lease for which the tenant may be evicted, and such breach is the reason for the eviction; or
 - In a case of a tenancy for a definite period of time where the tenant has no option to renew the lease, the tenant holds over after expiration of the term; or

- The violation of the RRAA complained of was caused primarily by the willful or negligent conduct of the tenant, member of the tenant's household, or their guests or invitees; or
- Compliance with the applicable building or housing code requires demolition or major alteration or remodeling that cannot be accomplished without completely displacing the tenant's household; or
- The landlord seeks to recover possession on the basis of a good faith notice to quit the premises, which notice was delivered prior to the occurrence of any of the protected activities; or
- The landlord seeks in good faith to recover possession at the end of the tenant's term for use as the landlord's own abode, to demolish or make major alterations or remodeling of the dwelling unit in a manner that requires the complete displacement of the tenant's household, or to terminate for at least six months the use of the property as a rental dwelling unit.

Facts Establishing Counterclaims

- **Violations of the RRAA—GS 42-44**
 - See above
 - NOTE: The amount recovered by the tenant cannot exceed the amount actually paid in rent.
- **Remedies for Self-Help Eviction—GS 42-25.9**
 - Evidence of actual or constructive self-help eviction or attempted self-help eviction by landlord or landlord's agent
 - Actual damages caused by the tenant's removal or attempted removal
 - Interference, if any, with tenant's personal property
 - Value of the personal property, if seeking compensation for loss, or list of property to be returned to tenant, if seeking possession
- **Unfair and Deceptive Practice Claim—GS 75-1.1**
 - Landlord committed an unfair or deceptive act or practice.
 - Continuing to demand rent for an unfit property is an unfair or deceptive act.
 - The act affects commerce.
 - Renting property is an act that effects commerce.
 - The act proximately caused injury to the plaintiff.
 - Evidence of damages
 - Damages are trebled. GS 75-16.

- Evidence of reasonable attorneys' fees if the landlord willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of the suit or the party instituting the action knew, or should have known, the action was frivolous and malicious. GS 75-16.1.
- **Violations of the NC Debt Collection Act (NCDCA)—GS 75-56**
 - For purposes of the act, a tenant is a consumer, a landlord is a debt collector, and monies owed to the landlord are debts. GS 75-50.
 - Evidence that the landlord did one or more of the following
 - Made false threats or used coercion GS 75-51
 - Used profane/obscene speech, repetitive or harassing phone calls, and phone calls to place of employment GS 75-52
 - Publicized information about debts to third parties GS 75-53
 - Made deceptive or misleading representation about the character, status, or amount of a debt, or about the collector's identity, rights, or intentions GS 75-54
 - Used unconscionable collection means, including seeking affirmations of discharge debts or waivers of statutes of limitation without proper disclosure of the effects of such affirmation or waiver; collection of fees or charges to which there is no legal entitlement; contacting a consumer after notification of attorney representation; and filing suit in an improper venue GS 75-55
 - Evidence of actual damages
 - Damages are trebled. GS 75-16.
 - Evidence of reasonable attorneys' fees if the landlord willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of the suit or the party instituting the action knew, or should have known, the action was frivolous and malicious. GS 75-16.1.
 - Optional civil penalties of not less than \$500 nor greater than \$4000 for each violation. GS 75-56.

Restitution of Tenant

- If appeal is quashed or judgment is given against the landlord, the final judgment shall, if necessary, restore the tenant to possession. GS 42-35.
- If tenant has filed a counterclaim for wrongful dispossession because the landlord was put in possession based on the magistrate's judgment, the tenant is entitled to recover damages for the removal. GS 42-36. See Remedies for Self-Help Eviction above.

