Holding Over, or The Lease Has Ended and the Tenant's Still There

The first and perhaps simplest ground for summary ejectment is holding over, described in GS 42-26(1) as occurring "[w]hen a tenant in possession of real estate holds over after his term has expired." Today, this allegation simply means that the lease has ended but the tenant remains in possession. Historically, this language was sometimes used more broadly to refer to any event resulting in termination of the tenant's right to continued possession of the property, whether because of the tenant's breach of the lease or its expiration.

The essential elements of holding over are simply (1) the lease has ended, and (2) the tenant remains in possession. Not surprisingly, when complexity arises, it's almost always due to Element #1.

Two Kinds of Leases

The simplest kind of lease includes a definite ending date. When a lease states that it ends on December 31st of the current year, or six months from the date it is signed, there is no ambiguity about when the lease terminates. This sort of lease is (confusingly) labeled a *lease for years*.[1] Even if the lease is for a week, or nine months, or three years, it falls into the category labeled "a lease for years" so long as it has a definite ending date.[2]

A different sort of lease has no predetermined ending date. A *periodic tenancy* or *tenancy from period to period* continues indefinitely until either the landlord or the tenant takes action to end it.[3] The most common residential periodic tenancies are month-to-month and year-to-year leases, but the parties may agree to a period of any length of time. Nothing else appearing, the period is assumed to coincide with the schedule for rent payments.

Example: The parties agree that rent will be paid on the first of each month. This is a month-to-month tenancy, running from the first to the last day of each month.

Example: The parties agree to a year-to-year lease, with rent to be paid on the first day of each month. This is a year-to-year lease with rent to be paid in monthly installments.

Example: The parties agree to a lease for one year, with rent to be paid on the first of each month. This is not a periodic tenancy at all, but is instead a lease for years, with a definite ending date.

Being able to classify a particular lease agreement as a lease for years or a periodic tenancy is important, because different legal rules apply to each.

[1] The term "tenancy for years" has the same meaning.
[2] A lease falls into this category even if ends upon the happening of an external event, rather than upon a certain date, provided that the occurrence of the event – and thus the day of termination – can be identified with certainty.
[3] Goler Metropolitan Apartments, Inc. V Williams, 43 N.C. App. 648 (1979), rev. denied 299 N.C. 328 (1980).

Determining Whether a Lease for Years Has Ended

Imagine that you are hearing a summary ejectment action involving a lease for one year. There is a written lease which states that the lease began May 1st of the previous year and would end on April 30 of the present year. When you hear the case on May 15, the landlord shows you the lease and testifies that the tenant has refused to vacate the property. Is any additional evidence required to establish the landlord's right to possession?

The answer is no. Because this is a lease for a fixed period with a stated ending date, no additional action by the landlord is required to terminate the lease. The tenant's right to possession ended, or expired, automatically at midnight on April 30.

The application of this rule may be, and often is, modified by the parties in the lease agreement. For example, sometimes the parties will include a provision that the lease will be automatically renewed unless one of them gives contrary notice at least thirty days prior to termination. Alternatively, the lease may provide for automatic termination subject to the tenant's right to renew the lease. Regardless of the variation, a contractual provision setting a termination date **subject to** some additional action by one of the parties necessarily makes a simple case more complicated. The general rule is that courts will strive to honor the parties' intentions as expressed in the lease agreement. This means that some cases will require the magistrate to evaluate the evidence to determine whether either party acted in a way that triggered the "subject to" provision and thus altered the termination date established by the lease.

Speaking of renewing the lease . . .

It is common, especially in commercial leases, for the agreement to contain a provision addressing whether and how the lease may be renewed – i.e., the term extended. Once again, the rule is that the courts will enforce the agreement of the parties. If, as in the example above, the parties provide for automatic renewal unless one party opts out by giving notice at least 30 days before the lease ends, and the tenant gives ten days' notice instead of thirty, that tenant is contractually bound for another year. But that's the simple case. The more difficult circumstance is presented when both parties ignore their own agreement.

For example, imagine the case in which a tenant has the right to renew for another year by giving 30 days' written notice prior to the expiration of the lease, and that the tenant gives oral notice instead. At the end of the second year, it happens again. At the end of the third year, the tenant gives oral notice and is surprised to find a "reminder" in the mail a week later indicating that the lease will end because the tenant did not provide timely written notice of its intention to renew. The legal question, of course, is whether the landlord has waived the right to insist on written notice by accepting oral notice twice before. Often the answer is yes, but the individual determination will involve consideration of all the relevant evidence.

Another example: the parties have a lease for one year with no mention of renewal. At the end of the year, the tenant stays on and the landlord continues to accept rent. What description of the current (implied) agreement between the parties would be accurate? Have they (1) extended the lease, or (2) entered into a new lease? If the answer is (2), what are the provisions of the new lease – particularly, what is its term? Is it (1) a lease for another year, or (2) a month-to-month lease?

The general legal rule for dealing with this situation is one familiar to all students of contract law: As best we can, we will enforce an implied agreement in a manner consistent with the intention of the

parties. Because the old lease automatically terminated at the end of the year, I would regard this as a new lease between the parties, with the lease provisions presumptively the same as those of the old lease. The one uncertainty is the term: is this new lease also for one-year, or is it a month-to-month lease instead? Applying the general rule would make it a lease for another year, but in many parts of the state there is a strong local custom that "one-year rolls over to month-to-month." Because we are attempting to enforce the agreement in accordance with the intentions of the parties, magistrates sometimes determine that the new lease is a month-to-month.

Determining Whether a Periodic Lease Has Ended

Obviously, no lease lasts forever, and the law demands a mechanism for ending leases that don't specify an ending date. Quite often, the lease itself will provide a procedure for bringing it to an end, and when it does, failure to follow the specified procedure does not terminate the lease.[4]

Example: A month-to-month lease, with rent payable on the first day of the month, provides that either party may end the lease by giving the other written notice of an intention to end the lease at least 14 days prior to the end of the rental period. At trial on June 15, the landlord proves that on May 2 she hand-delivered written notice that the lease would end on May 31, and that the tenant has refused to leave. Is the landlord entitled to recover possession?

The answer is yes. The lease itself establishes a procedure for ending the rental, and the landlord followed that procedure. Consequently, the lease ended on the final day of the month, and the tenant remaining in possession is holding over.

A common issue in cases such as these involves allegations of insufficient or improper notice. In the example above, the landlord might have (1) given oral rather than written notice, (2) mailed notice on May 9 which was delivered on May 18, (3) hand-delivered written notice only seven days before the end of the rental period, (4) hand-delivered a notice stating that the landlord would appreciate it if the tenant could find other lodging before the end of the month, or (5) hand delivered written notice on May 1 that the lease would end on May 15. Each of these variations presents the same legal issue: does the particular factual variation involved defeat the landlord's attempt to establish that the lease is over?

When the Lease is Silent on How it Will be Terminated

Here's a common situation: The LL and T agree that (1) the T can move in on the first day of the coming month, and (2) the specified amount of rent will be due each month thereafter on the first. That's the complete agreement. That's about as brief as a lease can be and still be valid, but it IS valid: the parties have agreed to (1) the specific rental premises, (2) the amount and due date of the rent, and (3) the term – a month-to-month periodic lease. But what about the method of termination? This is one of those situations in which the law comes to the rescue by supplying a default rule for filing in the blank.

> ***§ 42-14. Notice to quit in certain tenancies.***
> *A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. Provided, however, where the tenancy involves only the rental of a space for a manufactured home as defined in G.S. 143-143.9(6), a notice to quit*

[4] When the lease is silent on how it must be terminated, GS 42-14 fills in the blanks.

must be given at least 60 days before the end of the current rental period, regardless of the term of the tenancy.

This statute provides fill-in-the-blank rules for four situations:

A year-to-year tenancy:	one month
A month-to-month tenancy:	7 days
A week-to-week tenancy:	2 days
A lease for a mobile home space	60 days (regardless of the term)

There's one more important thing to note about this statute: when not to use it: Remember that the purpose of this statute is to fill in the blank when the parties have failed to agree. If the parties have agreed – whether orally or in writing -- to the notice required to terminate the lease, the law will enforce that agreement.

Note also the general rule that notice to terminate a periodic lease is effective as of the end of the rental period (absent a clear, specific agreement between the parties for early termination – not usually the case). Consider the following example: LL and T have a month-to-month lease, with rent due on the first of the month. Seven days' notice is required to terminate the lease. (It doesn't matter whether the lease so provides or GS 42-14 fills in the blank for this example.)

- Situation 1: LL gives T notice on 7/1 that the lease will end on 7/8.
- Situation 2: LL gives T notice on 7/1 that the lease will end on 7/31.
- Situation 3: LL gives T notice on 7/24 that the lease will end on 7/31.

In which situation(s), if any, has the lease been properly terminated? [See footnote for answer[5]]

[5] Situations 2 and 3.