

Legislative Update 2009: Civil Law

Summary Ejectment

Fees in Summary Ejectment Actions (For Residential Leases Entered Into On or After Oct. 1, 2009)

A landlord who files a complaint for summary ejectment or money owed may charge ONE of the following fees, provided the parties have agreed to the charge in the lease:

Complaint Filing Fee

Not to exceed \$15 or 5%, whichever is greater, only if:

- tenant was in default
- LL filed complaint for SE or money owed
- tenant cured the default
- LL dismissed the claim prior to judgment.

Fee may be charged as part of amount required to cure default.

Court-Appeal Fee

Equal to 10% of monthly rent if

- tenant was in default
- LL won a SE action or action for money owed
- neither party appealed.

Second Trial Fee

Not to exceed 12% of monthly rent. Available if

- de novo trial is held in district court on appeal from small claims court action for SE or money owed
- tenant was in default
- LL prevailed on appeal.

The following rules apply to the complaint-filing fee, the court-appearance fee, and the second-trial fee:

1. LL is allowed to charge only one of the three fees.
2. LL may not deduct payment of that fee from subsequent rent due (same rule applies to late fees).
3. LL may not claim failure to pay one of these fees as a default leading to a subsequent SE action.
4. LL may not put in a lease or claim any fee for filing a complaint for SE or money owed other than the three above and an attorney's fee if allowed by law. NOTE: This provision effectively prohibits the current practice of charging an "administrative fee" for leases entered into on or after Oct. 1, 2009.
5. Any contrary provision in a residential rental agreement is void.
6. If rent is subsidized by a governmental unit, determination of fee shall be based on tenant's share of contract rent (same rule as for late fees).

Carbon-monoxide detectors

In 2008, the General Assembly amended GS 42-42 (Landlord to provide fit premises) to add a requirement that landlords provide at least one carbon monoxide detector per rental unit per level,

effective Jan. 1, 2010. The law sets out details essentially identical to the requirements applicable to smoke detectors.

Imminently dangerous conditions

GS 42-42, mentioned above, requires landlords to do a number of things, including complying with building codes, maintaining fit and habitable premises, keeping common areas safe, providing smoke detectors, etc. The 2009 General Assembly added to this list of landlord obligations a requirement that landlords act quickly in response to “imminently dangerous conditions,” defined as any of the following:

- Unsafe wiring, flooring, steps, ceilings, roofs, chimneys, or flues
- Lack of, operable toilet, bathtub, or shower
- Lack of operable locks on all doors leading to the outside
- Broken windows or lack of operable locks on all windows on the ground level
- Lack of heating facilities capable of heating living areas to 65° F when it is 20° F outside 11/1 to 3/31.
- Rat infestation resulting from structural defects
- Lack of potable water
- Excessive standing water, sewage, or flooding caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold.

The new law requires that landlords must act to remedy any of these conditions upon learning of them “within a reasonable period of time based upon the severity of the condition.” The law specifies that the landlord is entitled to recover “the actual and reasonable costs” when the condition results from the fault of the tenant.

Security deposits

The General Assembly amended GS 42-52, effective October 1, 2009, to address the common situation in which a landlord is unable to determine the precise amount of a claim against the security deposit within the statutory limit of 30 days after termination of the tenancy. The new law allows landlords to provide an interim accounting within 30 days, followed by a final accounting within 60 days after obtaining possession of the rental property.

GS 42-55, the section governing remedies available for a landlord’s willful violation of the legal requirements pertaining to residential security deposits, also received legislative attention this session. Under the new law, a landlord’s willful failure to follow the law in this area voids the right to retain any portion of the security deposit, and the tenant may obtain reimbursement for attorney fees as well.

Charges for water & sewer service

Landlords have long had the right to charge tenants for costs of providing water and sewage services, but GS 62-110 required landlords to base charges on the user’s metered measure of consumption of water. In the case of apartment complexes, many older buildings had plumbing systems that could not be modified to permit precise individual measurement of the amount of water used by individual tenants. In the 2009 Session, the General Assembly amended the law to allow lessors of apartment buildings built before 1989 to allocate the cost of water among tenants based on their use of hot water. The new law contains detailed provisions specifying the requirements that a landlord must meet in order to charge tenants fees calculated in this manner. Magistrates confronted with small claims cases involving such fees should be aware that a more detailed examination of the new law may be required. These amendments to GS 62-110(g) are set out in S.L. 279 and apply to leases entered into on or after Oct. 1, 2009.

Service of Process

GS 42-29, the statute governing service of process in summary ejectment cases, was amended to require that service be accomplished at least two days (excluding legal holidays) prior to the date set for trial. The new law applies to actions filed on or after Oct. 1, 2009. The statute does not address the question of what should happen in the event service is accomplished later than allowed by law, but it seems likely that the magistrate should consider favorably any request for a continuance in such case.

Small Claims Procedure

In response to concerns that the expedited process for trying small claims actions disadvantaged defendants receiving last-minute notice, the General Assembly amended GS 7A-214. The new law requires magistrates to order a continuance in any small claims action (other than summary ejectment) in which a defendant is served less than five days before the date of trial. The statutory language providing that the magistrate “shall order a continuance” suggests that the delay is mandatory, even if neither party has requested a continuance.

Guns

Magistrates acquired the right, previously accorded district and superior court judges, to carry concealed handguns in courthouses when the General Assembly amended GS 14-269.4 this session. The new law applies only when

- 1) The magistrate is in the courthouse for the purpose of discharging official duties;
- 2) The magistrate is not in a courtroom, unless presiding over that courtroom;
- 3) The magistrate has a concealed handgun permit;
- 4) The magistrate has successfully completed a one-time weapons retention training substantially similar to that provided to certified law enforcement officers; and
- 5) The magistrate secures the weapon in a locked compartment when it is not on the magistrate’s person.

The new law became effective August 26, 2009.

Domestic Violence

Ex parte orders.

Court officials across the State were surprised and alarmed by the North Carolina Supreme Court’s decision in *State v. Byrd*, ___ NC ___ (2009), which contained language indicating that violation of an ex parte domestic violence protective order was not a criminal offense. The General Assembly acted quickly to clarify legislative intent, amending GS 50B-4 and 50B-4.1 to specify that ex parte orders are included in the definition of “valid protective order.”

Mandatory arrest.

The case of *Cockerham-Ellerbe v. Town of Jonesville*, from Sampson County, has received national publicity. In that case, the victim had a DVPO and had notified law enforcement on several occasions that the defendant was violating the order. Notably, the defendant dug graves in front of the victim’s

home and told her he intended to bury her and her children there. On one occasion members of the Jonesville Police Department were present at the victim's home when the defendant appeared, in violation of the DVPO. The officers told the victim they would arrest the defendant, but did not do so. The following day the defendant murdered the victim's daughter and repeatedly stabbed the victim herself. Ms. Cockerham-Elerbe sued the town, 'contending that the officers' failure to arrest the defendant was a cause of the injuries suffered by her and her daughter. The NC Court of Appeals, in a 2006 opinion, discussed the statutory provision that a LEO "shall arrest" if the officer has probable cause to believe the defendant has violated a DVPO by going to a victim's home or otherwise threatening, following, harassing, or interfering with the victim. The Court said that, while the literal language of the statute requires arrest in this situation, reading the statute literally would be unreasonable, because it would deprive LEOs of the ability to take various facts and circumstances into account. The General Assembly made it very clear that the Court of Appeals misconstrued legislative intent, referring specifically to the *Cockerham-Elerbe* opinion in stating that arrest is mandatory if the statutory requirements are satisfied, with or without a warrant.

Protection for family pets.

New legislation also responds to the not-unusual situation in which domestic violence targets pets belonging to the victim or to a minor child. The Legislature amended GS. 50B -3(a) to provide that a DVPO may extend protection to family pets. Furthermore, the order may prohibit cruel treatment of pets, and violation of this provision would require that the defendant be arrested. The new law was effective upon ratification.

The Protecting Tenants at Foreclosure Act of 2009

Effective May 20, 2009, the United States Congress passed legislation that makes significant changes in landlord-tenant law in states throughout the country. The impact in North Carolina is likely to be most noticeable in small claims court, as new owners of rental property acquired through foreclosure find themselves in the unfamiliar—and sometimes quite unwelcome—role of landlords. The PTFA essentially provides that purchasers at foreclosure now assume their interest in foreclosed property subject to the interests of “bona fide tenants”. At a minimum, the new law requires that every such tenant receive 90 days notice provided by the new owner before being required to vacate the property. As we shall see, in many cases, tenants will be entitled to remain on the property even longer.

The PTFA is very short. It applies to all foreclosures on residential property. The primary provision of the Act is as follows:

In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to__

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

(2) the rights of any bona fide tenant, as of the date of such notice of foreclosure__

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1) ,. . .

(b) Bona Fide Lease or Tenancy- For purposes of this section, a lease or tenancy shall be considered bona fide only if__

(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

(2) the lease or tenancy was the result of an arms-length transaction; and

(3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

Prior to May 20, 2009, a person seeking possession of property acquired at foreclosure could enforce a right to possession only by the procedure before the clerk set out in GS 45-21.29. When the occasional wanderer wandered into small claims court, magistrates properly found that the absence of a landlord-tenant relationship rendered summary ejectment unavailable in that case. The effect of the PTFA is that, by providing that a person acquiring property by foreclosure takes such property “subject to” an existing lease, a landlord-tenant relationship is created, even if the purchaser does not wish to become a landlord—or even if the purchaser was unaware of the lease! In effect, the purchaser at foreclosure is now treated just as any other purchaser of property: generally speaking, the purchaser “steps into the shoes” of the previous owner. The terms of the lease continue to apply to both tenant and new owner,

and the statutory obligations imposed on landlords by the Residential Rental Agreements Act apply with equal force to the purchaser at foreclosure, even if that purchaser is a bank or real estate investor.

It is important to note that the PTFA does impose some special rules that apply only to the situation in which a landlord acquired an interest in the property pursuant to foreclosure. Specifically, a landlord seeking to end a lease from period to period, whether the period is week-to-week, month-to-month, or year-to-year, is required to give the tenant 90 days notice of the intention to terminate the lease. Thus, in an action for summary ejectment based on holding over, the plaintiff must demonstrate that the tenants received this expanded notice. Furthermore, the new law requires this notice to be given by the purchaser; a trustee in foreclosure proceedings is not authorized to provide this notice.

Another special provision applies to leases for a definite period of time. With one exception, a purchaser of property subject to a lease for a year, for example, is not permitted to bring the tenancy to a premature halt, even if the tenant receives the 90-day notice. Thus, a purchaser who acquires property through foreclosure in January which is subject to a lease running from January to December will be required to honor the lease until it terminates in December. The exception arises when the purchaser wishes to sell the property to a buyer who wants to occupy the property as a primary residence. In this case, the tenant may be required to vacate the property before the expiration of the lease, but even here the 90-day notice applies.

The answers to several questions related to these general principles are not yet certain. First, consider the case in which a purchaser at foreclosure buys property on November 30, subject to a year-long lease due to expire on December 31. Even if the property had not changed hands, the tenant would have lost any claim to possession in one month. In this circumstance, is the purchaser at foreclosure required to provide a 90-day notice? A literal reading of the statute suggests that the answer is yes, but it remains unclear whether the courts will choose to read the law literally in this circumstance, in which a tenant suffers no negative impact as a result of foreclosure. A second question is whether the “primary residence exception” would apply to the situation in which a purchaser at foreclosure wishes to occupy the property. The literal language of the PTFA confines the exception to the instance in which a purchaser at foreclosure (such as a real estate investor) transfers the property to a buyer who plans to move in. Normally, the second buyer would take subject to the lease under the usual rules governing purchases of property subject to a lease. The application of the PTFA allows a premature termination (subject to the 90-day mandatory notice) of the lease in this instance. A good argument can be made that the same policy considerations do not favor the case in which a purchaser at foreclosure hopes to occupy the property as a primary residence, and thus that the law should be read literally in this instance.

Congress, for understandable reasons, did not attempt to establish a procedure for the protection of tenants’ rights, but instead left it to the individual states to determine how to best accommodate the requirements of the law within established procedures. Until the North Carolina Legislature has an opportunity to consider how the Act should be implemented, court officials are forced to operate in the absence of clear procedural rules, leaving all involved in something of a quandary. One of the most perplexing issues concerns the determination of whether a tenant is in fact “bona fide” and thus entitled to the protection of the PTFA. This may arise in several different ways.

First, a purchaser may seek an order for possession from the clerk as part of the statutory foreclosure procedure. If the clerk determines that a possessor is not a bona fide tenant, the order of possession will issue and the magistrate will never be confronted with the case. On the other hand, if the clerk

denies the order for possession based on a determination that the occupant is a bona fide tenant and thus entitled to protection under the PTFA, the existence of a landlord-tenant relationship has been judicially determined, and subsequent disputes between the parties will be governed by landlord-tenant law. If a tenant fails to pay rent, the new owner may seek summary ejectment just as the former owner would have, and the same is true in the event of breach of a lease condition. The effect of the PTFA is to modify only the showing the purchaser is required to make in order to obtain a judgment of summary ejectment based on holding over.

A more complicated question arises when the new purchaser initiates a summary ejectment proceeding before a magistrate and the issue of the occupant's status as a bona fide tenant arises at that point. If the magistrate determines that the occupant is in fact a bona fide tenant, the usual rules apply. What should a magistrate do, however, if the evidence establishes that the occupant is not a bona fide tenant? In such a case, there is no landlord-tenant relationship. Much like a case involving a vendor-vendee, the magistrate discovers that there is no jurisdiction to decide the case only after hearing some of the evidence. In this situation, the proper procedure is for the new owner to seek an order for possession from the clerk as part of the foreclosure proceeding. Unlike the vendor-vendee situation, however, the case is no more appropriate for district or superior court than it is for small claims court, so it makes little sense to return the case to the clerk. The best way to handle matters in this case may well be to dismiss the case with prejudice, being certain to explain in the judgment that the magistrate's lack of jurisdiction is due to the fact that the occupant is not a bona fide tenant.

Not surprisingly, the scope of the Act's application is broad, consistent with Congressional intention to protect so-called "innocent tenants" from losing their homes as a result of the housing crisis. The PTFA applies to all foreclosures occurring on or after May 20, 2009, and will affect leases entered into at any point prior to a purchaser's acquisition of an interest in the property. Even if a lease is entered into the day before the foreclosure sale, the PTFA will apply, assuming that the rental agreement otherwise satisfies the requirements related to a bona fide tenancy. The Act applies to all foreclosures on residential property, including private loan agreements. It applies to property subject to federal housing assistance, including Section 8 housing, and subjects a purchaser pursuant to foreclosure to obligations included in pre-existing housing assistance payment contracts as well as leases. The PTFA will sunset on December 31, 2012.