What Happens When the Tenant Raises the Issue of Rent Abatement?

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Rent abatement is a remedy available to tenants when landlords fail to provide them with a fit and habitable property. Some things to consider when faced with a tenant seeking rent abatement are how the claim can be asserted, what evidence the tenant is required to produce, and how damages are calculated. Read on for more information about how magistrates and judges can navigate rent abatement claims.

Generally, the lease governs the relationship between a landlord and a tenant, but the law implies into every residential lease agreement the provisions of the Residential Rental Agreements Act (RRAA), G.S. § 42-38 *et seq*. By enacting the RRAA in 1977, the legislature replaced the common law rule of *caveat emptor* ("let the buyer beware") in the landlord-tenant context with an implied warranty of habitability. The implied warranty of habitability means that the landlord impliedly warrants to the tenant that the rented residential property is fit and habitable. The RRAA creates mutually dependent obligations of the landlord to keep the property in a fit and habitable condition and of the tenant to pay rent. G.S. 42-41. Ordinarily, mutuality would mean that each party is obligated only if the other party keeps his part of the bargain; however, under the RRAA, the tenant is not allowed to unilaterally withhold rent and a tenant who withholds rent risks being evicted. G.S. 42-44(c). This is a frequent point of confusion for tenants, who may withhold rent whey they believe that the landlord has failed to keep the rental property in good condition.

But tenants leasing unfit and uninhabitable properties are not left without options. In Miller v. C.W. Myers Trading Post, Inc., 85 N.C.App. 362 (1987), the Court of Appeals construed the provisions of the RRRAA to provide "an affirmative cause of action to a tenant for recovery of rent paid based on the landlord's noncompliance" with G.S. 42-42. Therefore, although the law does not allow tenants to withhold rent prior to a judicial determination of the tenant's right to do so, a rent abatement claim may be available to tenants who have paid rent for a property that was not fit and habitable in violation of the RRAA.

For a more detailed explanation of the RRAA, see Things You Might Not Know About the Residential Rental Agreements Act | UNC School of Government, by Dona Lewandowski.

How is Rent Abatement Asserted?

The claim for rent abatement can be asserted by a tenant in one of four ways:

1. An affirmative cause of action for rent abatement brought by a tenant against a landlord based on the landlord's noncompliance with the RRAA (*See* Miller, *supra*; Cotton v. Stanley, 86 N.C.App. 534 (1987));
2. A counterclaim for rent abatement in the landlord's action against the tenant for summary ejectment (*See* Von Pettis Realty, Inc. v. McKoy, 135 N.C.App. 206 (1999); and Cardwell v. Henry, 145 N.C.App. 194 (2001));
3. A defense to the landlord's action for summary ejectment to avoid eviction by contending that the landlord violated the RRAA; or

4. A defense to landlord's action for summary ejectment arguing for a set off such that the landlord's damages are reduced because of the landlord's violation of the RRAA.

While the RRAA and case law allow for a tenant to bring an affirmative cause of action against the landlord, in the small claims context, I think it is more common for rent abatement to be raised by the tenant as a counterclaim or defense in the landlord's action for summary ejectment. Whether the claim originates in an affirmative cause of action, as a counterclaim or as a defense, it is important for the magistrate to carefully consider the tenant's evidence of violations of the RRAA, keeping in mind that the landlord's obligations under the RRAA cannot be waived by the tenant.

What Evidence is Required for a Rent Abatement Claim to Succeed?

Notice. One of the first questions the magistrate is likely to have is whether the landlord had notice of the defect. If the landlord had actual knowledge of needed repairs or the defects existed at the time the tenant moved in, then the tenant is not required to provide notice of the defect to the landlord. G.S. 42-43(a)(4) requires written notice of needed repairs to electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, except in an emergency. While G.S. 42-42(a)(4) does require written notification of such repairs, G.S. 42-42(a)(2) does not require written notification of these needed repairs if the repairs are necessary to put the premises in a fit and habitable condition. Surratt v. Newton, 99 N.C.App. 396 (1990). G.S. 42-43(a)(7) also requires the tenant to give the landlord written notice of the need to replace or repair a smoke alarm or carbon monoxide alarm.

The tenant also has an obligation under the RRAA to keep the property clean, safe and undamaged. G.S. 42-43. The landlord is required to give the tenant written notice of the tenant's violation of G.S. 42-43 except in emergency situations. This notice issue may be relevant when a landlord attempts to raise the tenant's breaches of the obligations in G.S. 42-43 as a defense to the landlord's violations of G.S. 42-42.

Defect. At a minimum, the tenant will need to offer evidence of a defect to the leased property and show that the type of defect violates the RRAA. The tenant will also need to show how long the defect persisted after the tenant notified the landlord of the issue so that the magistrate can ascertain if the landlord has had a reasonable time to repair the defect and failed to do so. Any rent abatement that the magistrate orders needs to reflect the months the tenant paid rent and the defect went unrepaired.

Fair Rental Value. When there is sufficient evidence of notice and defect, the magistrate must next determine the fair rental value of the premises as warranted and the fair rental value of the premises in their unfit condition. For ease of the discussion, I will refer to the former as "FRV as warranted" and the latter as "FRV as is." The measure of damages in a rent abatement action is the difference between these values, so the tenant will need to prove such a difference exists.

In Cotton v. Stanley, 86 N.C.App. 534 (1987), the court held that the tenant could establish the "FRV as is" by offering either direct or indirect evidence. Direct evidence would include an opinion of what the premises would rent for on the open market from either an expert or a witness qualified by familiarity with the specific piece of property. Indirect evidence can be other facts such as the dilapidated condition of the premises as proven either by testimonial or photographic evidence or the testimony of the parties as to the FRV. In addition to the evidence offered, a magistrate, judge, or jury can reasonably infer the "FRV as is" by considering the defects found and their own common sense and experience regarding how the defects diminish the value of the property. Crawford v. Nawrath, 249 N.C. App. 463 (2016)

(unpublished). As for the "FRV as warranted," the Cotton court held that "rent agreed upon by the parties when entering into the lease is some evidence of the property's 'as warranted' fair rental value, but it is not binding." In Battle v. O'Neal, 274 N.C.App. 356 (2020), the landlord's own testimony established that the fair market value of the premises in a fit condition exceeded the contractual rent amount.

For further reading on Crawford, supra, see Must a Tenant Introduce Opinion Evidence of Fair Rental Value in an Action for Rent Abatement? | UNC School of Government, by Dona Lewandowski.

What is the Measure of Damages in a Rent Abasement Action?

"The proper measure of damages in a rent abatement action based on a breach of the implied warranty of habitability is the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition; provided, however, the damages do not exceed the total amount of rent paid by the tenant." Von Pettis Realty, Inc. v. McKoy, 135 N.C.App. 206, 210 (1999). For example, the tenant rented a two-bedroom, two-bathroom apartment whose "FRV as warranted" was $1,000.00 per month. The tenant began experiencing plumbing problems in one of the bathrooms, due to no fault of the tenant, which caused the bathroom to be inoperable. Tenant notified the landlord in writing of the plumbing problems, but the repairs were not made for three months, and the tenant paid the full amount of rent each month. If the magistrate finds that the "FRV as warranted" is $1,000 per month, but without the use of one of the bathrooms, the "FRV as is" is $800 per month, then presumably the tenant is entitled to $600.00. If the tenant paid $1,000 for the first month (when the "FRV as is" was $800), but then decided to unilaterally withhold rent until the bathroom was fixed, the total amount of rent the tenant should have paid is $2,400, so the tenant owes rent of $1,400 and could be evicted.

Additionally, the tenant may also be entitled to incidental damages, such as the cost of a space heater if the landlord's breach was failure to repair the heating unit. While case law does not set out a specific cap for these damages, the magistrate should consider what a reasonable amount would be based on the defect found. The tenant is not entitled to punitive damages, but the tenant may bring an unfair and deceptive trade practice claim, and if successful, would be entitled to treble damages and attorney's fees.

Concluding Thoughts

The purpose of the RRAA is to ensure that landlords provide tenants with residential rental property that is fit and habitable. When a landlord allows their property to fall below those minimum standards, the tenant can assert a claim for rent abatement or raise the landlord's breach of the implied warranty of habitability as a defense in an action for summary ejectment. Although summary ejectment dockets are often heavy and these cases take more time to hear, it is important that the magistrate make sure that landlords and tenants are complying with the RRAA. While the landlord's violations of the RRAA may not entirely excuse the tenant's obligation to pay rent, the landlord's violations may entitle the tenant to a reduction in the rent owed.