

How Does New Legislation Addressing “Transient Occupancy” Impact the Landlord-Tenant Analysis in Summary Ejectment?

Every magistrate has picked up the phone to a caller who is staying at a hotel asking if he is a tenant or a hotel guest. If it is not the occupant calling, then it is the owner of the hotel asking if they have to evict the occupant or if they can take out trespass charges. Recent legislation, [S.L. 2023-5](#), defines “transient occupancy” in inns, hotels, motels, recreational vehicle parks, campgrounds, and other similar lodgings in a manner that may provide some clarification for callers who are owners and residents of these types of lodgings.

How Did North Carolina Law Treat Landlord-Tenant v. Innkeeper-Guest Relationships Prior to S.L. 2023-5?

The North Carolina General Statutes do not include a definition of “tenant,” so our understanding of what it means to be a tenant in North Carolina derives from case law. In the hotel context, the Court of Appeals in *Baker v. Rushing*, 104 N.C. App. 240 (1991) analyzed a case involving the self-help evictions of long-term residents of a building classified as a “hotel.” The court explained that determining whether the resident-plaintiffs were residential tenants requires “looking at all the circumstances, and the fact that a building is identified as a ‘hotel’ and those who reside in it as ‘guests’ is not determinative.” The factors the court considered when deciding if there was a question as to whether the residents were tenants and not hotel guests included:

- the parties’ oral leases,
- the apartments as the sole and permanent residences of the plaintiffs,
- the length of time they had resided there (some as long as six years),
- the categorization by the parties of weekly payments as “rent”,
- the layout of the individual units resembling an apartment rather than a hotel room,
- and the lack of any changes to the operation of the building after the defendants obtained a hotel license.

The residents in *Baker* sought the status of “tenant” because of the rights afforded to tenants and the obligations required of landlords under [Chapter 42](#). While a hotel guest may be locked out without judicial process (as happened in *Baker*), a tenant can only be removed once the landlord has gotten a judgment and a writ of possession in a summary ejectment action. Landlords who use self-help evictions to eject residential tenants may be liable to tenants for damages and may have to restore possession to the tenants. [G.S. 42-25.9](#). Landlords have obligations and liabilities under the [Residential Rental Agreements Act](#) (RRAA) to maintain the property in a fit and habitable condition, and tenants can sue for violations of the RRAA and may also have a claim for [Unfair and Deceptive Trade Practice](#). Residential tenants, unlike hotel guests, are also protected from retaliatory evictions by landlords when the eviction is substantially related to the tenant’s protected

conduct, such as requesting the landlord make repairs or making a complaint to a city code inspector. [G.S. Ch. 42, Art. 4A](#).

It is well established by North Carolina case law that the summary ejectment procedures in [Chapter 42](#) are only available to parties who are in a simple landlord-tenant relationship. *Marantz Piano Co., Inc. v. Kincaid*, 108 N.C. App.693 (1993). Analyzing whether parties are in a simple landlord-tenant relationship is a source of questions and confusion for citizens and magistrates, in part because there is no specific definition in the statute. Case law establishes the following elements of a landlord-tenant relationship: The landlord has the right to possess the property and transfers that right to the tenant pursuant to a contract, oral or written, specifying the duration of the tenancy and the exchange of value, typically called rent. *In re Hawkins v. Wiseman*, 191 N.C. App. 250 (2008) (unpublished). In other words, the property owner gives the tenant the use and possession of the property for a specified period of time in exchange for rent. A key difference between a tenant and a hotel guest is the tenant acquires the right to exclusive possession of the property and the hotel guest only has the use of the property.

How Does S.L. 2023-5 Define Transient Occupancy?

[Session Law 2023-5](#), effective when it became law on March 19, 2023, seeks to clarify the distinction between residential tenants and hotel guests by providing a definition of “transient occupancy” and then excluding transient occupancies from the provisions of Chapter 42, unless the parties expressly provide in their agreement that it is their intention to create a residential tenancy. However, the definition of transient occupancy is limited to fewer than 90 consecutive days, so the previous analysis of when a hotel guest might become a tenant may still be relevant in situations that do not fall within the new statutory definition or when the parties’ agreement evinces an intention to create a landlord-tenant relationship.

The new law defines “transient occupancy” as “the rental of an accommodation by an inn, hotel, motel, recreational vehicle park, campground, or similar lodging to the same guest or occupant for fewer than 90 consecutive days.” [G.S. 72-1\(c\)](#). A corresponding change was made to Article 1 of Chapter 42, “Landlord and Tenant,” by adding section [G.S. 42-14.6](#), which says: “The provisions of this Chapter shall not apply to transient occupancies as defined in G.S. 72-1(c). An agreement related to a transient occupancy shall not be deemed to create a tenancy or a residential tenancy unless expressly provided in the agreement.” Under the new law, there cannot be a landlord-tenant relationship where the occupant in a hotel or similar lodging stays fewer than 90 consecutive days, unless there is evidence of an agreement establishing a landlord-tenant relationship. Rather than having to use the judicial process of summary ejectment to remove occupants whose stays are less than 90 consecutive days, hotels and similar lodgings may restrain occupants from entering the property and remove their property at the expiration of their stay. [G.S. 72-1\(b\)](#). Guests who refuse to leave may face trespass charges.

A potential benefit of the new definition of transient occupancy is the creation of a rule that defines

the relationship between the hotel and the occupant, removing ambiguity for all involved. An occupant who has stayed less than 90 consecutive days will know that his status is that of transient occupant and not that of residential tenant, unless the parties entered into an agreement expressly creating a residential tenancy. The obvious benefit to the hotel owner is the quick removal of a guest who is not paying or who may be causing a disturbance at the property without the time and expense of a summary ejectment proceeding. Law enforcement officers who are called out to a hotel to deal with an occupant who refuses to leave may also appreciate having a more definite rule to follow rather than the factors set out in *Baker*.

How Do the Previous Analysis in *Baker* and S.L. 2023-5 Apply When the Parties' Intention is Unclear?

But what happens when a law enforcement officer called to the hotel (or the magistrate answering the citizen question) is confronted with an occupant who says he is a tenant because he and the owner have a written agreement? Ascertaining the intention of the parties when they entered the agreement and whether at some point their intention changed (with regard to whether their relationship was that of innkeeper-guest or landlord-tenant) is not as simple as applying the 90-day limit in G.S. 72-1(c).

There is not a North Carolina case directly on point involving a written agreement between a hotel and occupants. However, a recent case out of Georgia, while not binding on North Carolina courts, demonstrates the problems that can arise even when there are written agreements. In *Efficiency Lodge, Inc. v. Neason*, ___ S.E.2d ___, 2023 WL 4088727 (2023), the Georgia Supreme Court set out a legal framework to determine whether the parties had entered into a landlord-tenant relationship rather than innkeeper-guest where the parties' written agreement contained conflicting and ambiguous terms inconsistent with their course of conduct.

Efficiency Lodge is an extended-stay motel that locked out one occupant and threatened to lock out two other occupants when they fell behind on their rent during the pandemic. The three occupants filed an action in the trial court against Efficiency Lodge asserting claims for trespass and interference with quiet enjoyment of property and seeking injunctive relief to prevent Efficiency Lodge from locking out the other two occupants. The parties' written agreement contained the following conflicting statements: "the relationship of Innkeeper and Guest shall apply and not the relationship of Landlord and Tenant" and "[g]uest shall be responsible for any and all expenses including attorney's fees and court cost incurred in affecting the eviction." Efficiency Lodge also sent a letter informing some long-term residents that they may be tenants at-will and Efficiency Lodge may have to go through the courts to evict the guests and the guests would be responsible for all court costs.

"You can call a camel an elephant but that won't make its humps disappear. Labels do not change substance." This quotation from Justice Hiram Undercofler sums up the crux of the analysis when sorting out the parties' relationships to one another. Like the North Carolina Court of Appeals

in *Baker*, the Georgia Supreme Court recognized that, when setting out the legal framework to analyze whether the parties have a landlord-tenant relationship, it is the substance of the relationship that controls and not the name given to it. The factors set out by the Georgia Supreme Court are similar to those identified by the North Carolina Court of Appeals in *Baker*.

A main difference in the cases is that the Georgia occupants had written agreements and the North Carolina occupants had oral leases. North Carolina's new definition of transient occupancy in [S.L. 2023-5](#) will not resolve this type of conflict, where the parties on the one hand deny an intention to create a landlord-tenant relationship, but on the other hand, their conduct or their agreements contradict any assertion that their relationship is simply that of innkeeper-guest. It is likely these complicated situations will end up in summary ejectment actions before magistrates, and magistrates will have to consider whether [S.L. 2023-5](#) or the analysis in *Baker* is applicable to decide the case in front of them. If it is a transient occupancy, summary ejectment would not be appropriate because the parties do not have the required landlord-tenant relationship. If it appears that the parties have entered into an agreement that creates a landlord-tenant relationship, summary ejectment may be appropriate, assuming the plaintiff proves all the elements.

Unanswered Questions and Final Thoughts

Another question that remains unanswered by [S.L. 2023-5](#) is whether the legislature intended for rentals of 90 days or more to automatically be subject to the provisions of [Chapter 42](#). This interpretation would be favored by those looking for a bright-line rule to distinguish hotel guests and tenants, but I can imagine circumstances where the parties have operated under an innkeeper-guest relationship and that has not changed simply because the occupant is there on day 90. If Chapter 42 does not automatically apply, the totality of the circumstances analysis employed by the Court of Appeals in *Baker* arguably still applies.

A number of states have statutes similar to G.S. 72-1 that define transient occupancy with a variety of limits on the number of days. Some limits are as short as 27 consecutive days and as long as 184 consecutive days. In some states, if an occupant is not transient, she is a permanent resident and can only be removed from the property following the proper judicial process. In California, there is also a statute that prohibits accommodations from forcing occupants to check out and re-register before 30 days if the purpose is to maintain the occupant's transient occupancy status. [CAL CIV CODE § 1940.1 \(2020\)](#). Without such a prohibition in the North Carolina statutes, there is a concern among low-income housing advocates that hotel owners will force long-term residents to check out every 89 days to avoid establishing a landlord-tenant relationship.

The new definition of transient occupancy promises some certainty for owners of lodgings and occupants of those lodgings as to their status as innkeeper and guest. Questions remain as to how the law applies to an agreement that may create a tenancy not within the transient occupancy definition or to an occupancy that continues for the 90th day and beyond. Magistrates in small claims hearing summary ejectment cases involving hotels and similar lodgings should first

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determine if the transient occupancy definition applies, and if it does not, determine if the analysis in *Baker* applies. Magistrates answering phone calls from owners and occupants can inform them of the new statute but should refrain from giving legal advice.