
LAW OF SUMMARY EJECTMENT

DEFINITION AND GROUNDS FOR BRINGING ACTION.

Summary ejectment is the legal procedure that a landlord uses to oust a tenant. May be used to oust from dwelling, commercial building, mobile home or mobile home space. May be used when:

- Tenant violated a provision of lease for which eviction is specified.
- Tenant failed to pay rent even if lease fails to specify this.
- Lease has expired and tenant refuses to leave.
- Tenant or other person has engaged in criminal activity on the premises. (This provision applies to residential leases only).

Remedy is always possession of property to landlord and sometimes money judgment also.

WHO MUST BRING SUIT?

Real party in interest is the landlord. Agent or attorney may not sue in own name. But don't dismiss for failure to list landlord as plaintiff; allow plaintiff to amend complaint listing proper plaintiff.

Agent may sign complaint in summary ejectment case, if landlord is plaintiff and agent has actual knowledge of facts.

SERVICE OF PROCESS.

Sheriff may serve defendant

- Personally,
- by leaving at defendant's dwelling with person of suitable age and discretion,
- or by mailing a copy first class mail to defendant and posting the summons and complaint on the premises from which he is being evicted.

Plaintiff may serve defendant by certified mail return receipt requested.

Jurisdiction is also established by defendant's voluntary appearance.

GROUNDS FOR SUMMARY EJECTMENT: PROOF REQUIRED OF PLAINTIFF.

#1: Violating a condition in the lease. Landlord must prove the following four things and may prove the fifth.

- That he is landlord and that defendant is tenant.
- Lease provision seeking to enforce (for example, rent due on first day of month or no pets allowed).
- That lease specifically provides that lease forfeited and landlord may reenter and evict for breach of the lease condition involved.

If written lease, must see provision in lease.

If oral lease, landlord must testify that he and tenant agreed when entering into lease that if condition not met, landlord could reenter and evict.

- Provision breached (for example, tenant did not pay rent on time or tenant kept a dog on premises).
- Any damages due:

unpaid rent.

damages for occupancy from end of lease period to date of judgment.

special damages for physical injury to property (damages beyond normal wear and tear).

Tender not allowed to stop judgment from being entered.

#2: Action brought for failure to pay rent. Landlord must prove first four things and may prove fifth.

- That he is landlord and that defendant is his tenant.
- Terms of lease regarding amount of rent due and when due that he is seeking to enforce.

- Breach of lease by tenant (i.e. tenant did not pay rent on first of month).
- That landlord made demand from tenant for rent at least 10 days before filing lawsuit. This statute (G.S. 42-3) was enacted to protect landlords who have not provided in their lease for automatic forfeiture with a right to reenter and evict for failure to pay rent. Essentially, it provides that if there is no automatic forfeiture clause so that the landlord cannot sue under A. above, forfeiture of the lease occurs ten days after a demand for payment is made.
- Any damages due (same as for breach of condition of lease).

Tender available to defendant until judgment rendered. Magistrate must dismiss the lawsuit if defendant tenders to plaintiff full amount of rent due plus court costs

#3: Action brought for holding over after end of lease period. Landlord must prove the following four things and may prove fifth.

- That he is landlord and that defendant is his tenant.
- Terms of lease regarding length (i.e. lease is for one year or lease is month-to-month).
- Breach of lease (i.e., term of lease has ended and tenant has not left).
- That landlord has given defendant notice to end the term.

If written lease, whatever notice (if any) lease requires.

If tenancy for years (which means for a definite period of time) and no lease requirement for notice, no notice is required.

If periodic tenancy, proper notice given to terminate lease.

Year to year—one month before end of year.

Month to month—one week.

Week to week—two days.

Mobile home space—60 days.

- Any damages due (same as for breach of condition of lease).

Tender does not stop lawsuit.

#4: Action brought for unlawful criminal activity.

Landlord must prove one of the following things.

- Criminal activity occurred on or within the individual rental unit leased to the tenant.

Criminal activity means activity that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance); any activity that would constitute conspiracy to commit a drug offense; or any other criminal activity that threatens the health, safety, or right of peaceful enjoyment of premises by other residents or employees of the landlord.

Tenant is defined as person who is signatory on lease.

- Individual rental unit was used in any way in furtherance of or to promote criminal activity.
- Tenant, any member of tenant's household, or tenant's guest engaged in criminal activity on or in immediate vicinity of any portion of entire premises.
- Tenant gave permission to or invited person to return to or reenter property after that person was removed and barred from the entire premises.
- 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 the unit.

Tenant may prove as an affirmative defense one of the following four things.

- Tenant did not know or have reason to know that criminal activity was taking place within the individual unit.
- Tenant did not know or have reason to know that individual unit was being used in furtherance of criminal activity.
- Tenant did not know or have reason to know that member of household or guest engaged in criminal activity on or in the immediate vicinity of the premises.
- Tenant had done everything that reasonably could have been expected under the circumstances to prevent the commission of criminal activity.

Affirmative defense cannot be successfully used if eviction is second or subsequent proceeding against tenant unless tenant can prove by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second instance of criminal activity.

Exemption from eviction—court may choose not to evict if, taking into account the circumstances of the criminal activity and the condition of the tenant, the court finds by clear, cogent, and convincing evidence that immediate eviction 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.

Court may issue *conditional eviction* order against a tenant when

- Member of tenant's household or tenant's guest engaged in criminal activity and that person is not a party, or
- Someone other than tenant committed offense for which eviction is specified and court denied eviction of the tenant.

Conditional order is enforced by motion in the cause.

Court may issue *partial eviction* order against person who engaged in criminal activity on premises, but who is not the tenant.

Partial eviction orders that person removed and barred from the premises, but lease tenant remains in possession.

Provision covers adult or minor member of tenant's household.

TENANT'S DEFENSE: WAIVER OF BREACH

Landlord waives breach if accepts rent after breach with knowledge of breach.

Defendant must prove that

- The plaintiff accepted rent from the defendant rent after the breach of the lease.
- The rent accepted was rent that came due after the breach (i.e., future, not past due, rent), and

- When accepting the rent, the plaintiff knew of the breach.

If defendant proves waiver, plaintiff is not entitled to a judgment for possession.

Defense of waiver of breach does not apply when eviction is for engaging in criminal activity on the premises (G.S. 42-73). Nor does it apply when the plaintiff is a public housing authority unless the PHA has taken no action against the tenant for the violation within 120 days (G.S. 157-29).

JUDGMENT OF MAGISTRATE (AOC-CVM-401).

In all cases in which the magistrate's judgment is that defendant be evicted (whether or not a money judgment will be entered), the magistrate must make a finding as to the undisputed amount of rent in arrears. The sole purpose of requiring this finding is to allow the clerk's to set the stay of execution bond if the defendant appeals and wants to remain on the premises until the case is heard in district court. See Section IX below.

If plaintiff proves his case and defendant was served by some method other than posting and first class mail, or if defendant was served by posting but defendant was present at trial, plaintiff entitled to:

- Judgment for possession.
- Rent due until date of judgment.
- Other damages proved.

If plaintiff served by posting and defendant is present at trial, magistrate should check block that defendant was present at trial.

If the plaintiff proves his case and the defendant was served by posting and has not made a voluntary appearance, the magistrate should not consider the question of back rent or other money damages, but should instead decide only the issue of possession. In this instance, the judgment entered by the magistrate must clearly reflect that plaintiff's claim for money damages was not before the court. This is important because the plaintiff may eventually want to bring an action for money, and if the record is unclear about whether that question has already been heard and decided, plaintiff may lose his right to have that claim heard.

If plaintiff fails to prove his case, enter judgment that plaintiff failed to prove case and action dismissed.

JUDGMENT ON THE PLEADINGS.

In one instance the magistrate must enter judgment without any testimony from the plaintiff. The judgment is based solely on the pleadings (i.e. the complaint).

The magistrate shall give judgment for possession based solely on the filed pleadings if the following four qualifications are met:

- The pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed (block number 3 under #3 on AOC-CVM-201, Complaint in Summary Ejectment);
- The defendant has not filed an answer;
- The defendant fails to appear on the day of court; **and**
- The plaintiff requests, in open court, a judgment based on the pleadings.

If the plaintiff is seeking possession based on failure to pay rent (first block under #3 on complaint form), holding over after the end of the lease (second block) or criminal activity (fourth block), this law does not apply. Under oath, plaintiff must prove that he or she is entitled to a judgment for possession. The same is true if plaintiff is seeking possession for breach of a condition of the lease for which reentry is specified based on a condition other than failure to pay rent.

If the plaintiff also is seeking monetary damages for back rent or physical damage to the property in an action based on defendant's failure to pay rent as a breach of the lease for which reentry is allowed, the plaintiff must prove by a preponderance of the evidence any monetary damages that are due. Only the possession part of the judgment is granted without evidence.

KINDS OF LEASES.

TENANCY FOR YEARS: lease for specific period or definite period of time. Can be for a fraction of a year up to several years, but it has a specific ending date. No notice to vacate at the end of the tenancy required, since the parties are aware of the ending date but lease may specify notice.

Holding over and paying/accepting rent after end of lease period may result in creation of a tenancy from period to period.

TENANCY FROM PERIOD TO PERIOD: Lease for an indefinite, non-fixed term that is renewable from one period of time to the next, such as month to month, week to week.

Notice must be given to terminate lease as of end of the period. Unless lease provides otherwise, the following notice periods apply:

- one month, if from year to year
- one week, if from month to month
- two days, if from week to week
- 60 days to terminate lease of a mobile home space.

TENANCY AT WILL: Rare type of lease that is created if no agreement has been reached between landlord and tenant or if the lease is void or time uncertain

Terminable by either party upon giving reasonable notice

WRITTEN LEASES.

If lease exceeds 3 years from date of making, must be in writing and signed by party against whom lease being enforced; otherwise it is voidable and unenforceable.

However, if have oral lease that is required to be written, landlord may recover reasonable rental for period of occupancy.

If lease exceeds 3 years, must also be recorded with Register of Deeds to be valid against third-party lien creditors or purchasers for value from lessor

Landlord may sell premises, but buyer takes subject to lease if it is an unrecorded lease for 3 years or less or a recorded lease for more than 3 years.

APPEAL.

Must either give oral notice of appeal in open court which magistrate notes on the judgment or must give notice in writing to clerk within 10 days after judgment rendered and mail notice to other parties and must pay \$80 appeal costs to clerk within 20 days after judgment rendered

To stay (stop) execution of judgment for possession while case is on appeal, defendant (1) must sign undertaking within 10 days after judgment is entered that he will pay fu-

ture rent into the court as it becomes due; (2) must pay in cash amount of undisputed rent in arrears and (3) must pay in cash the prorated rent from date of judgment until next rental payment is due if judgment entered more than 5 working days before day next rent will be due. Magistrate must make a finding on the judgment as to the undisputed amount of rent in arrears.

If defendant appeals as an indigent, defendant does not have to post rent in arrears, but does have to post in cash pro-rated rent from date of judgment until next rent is due and sign undertaking to pay all future rent as it becomes due.

If defendant doesn't put up stay bond, landlord can have tenant removed from premises at the end of the ten-day period following judgment, but tenant will still have appeal heard.

SECURITY DEPOSIT LAW. [G.S. 42-51]

Landlord allowed to take security deposit equal to:

- two weeks' rent if week-to-week tenancy.
- 1 ½ months' rent if month-to-month tenancy.
- two months' rent if longer tenancy.

Landlord may also charge reasonable, nonrefundable fee for pets.

May use security deposit for nonpayment of rent, costs of water and sewer if furnished under GS 62-110(g), damage to premises beyond ordinary wear and tear, non-fulfillment of rental period, costs of re-renting after tenant's breach, court costs for bringing summary ejectment action, and costs of eviction proceeding.

Landlord must itemize damages and deliver list together with balance of deposit due, if any, within 30 days after tenancy ends.

Tenant may bring action to require landlord to account for and refund balance of security deposit; if landlord's noncompliance was willful, magistrate may award reasonable attorney's fees to tenant.

LATE PAYMENT FEES.

G.S. 42-46 provides that in residential rental agreements in which definite time for payment of rent is fixed late fee may be charged if:

- The parties agree to the late fee;
- If the rent is paid monthly, the late fee cannot to exceed greater of \$15 or 5% of rental payment and if the rent is paid weekly, the late fee cannot exceed the greater of \$4 or 5% of the rental payment.
- The agreement is that the fee is to be charged only if rental payment is 5 days or more late.

If the rental payment is for subsidized housing, the late fee is calculated on the tenant's share of the contract rent only.

Late fee may be charged only one time for each late payment. Can not charge late payment for second month if caused by deducting late fee for earlier month's late payment from second month's rent payment.

Residential lease provision contrary to these provisions is against public policy of state and void and unenforceable, which means landlord gets no late fee rather than one reduced to lawful amount. [*Friday v. United Dominion Realty Trust, Inc*, 155 N.C. App. 671, 575 S.E.2d 532 (2003)]

Lease provision for administrative fee that would be charged if legal papers are filed against tenant is enforceable and is not a late fee. [*Friday v. United Dominion Realty Trust, Inc*, 155 N.C. App. 671, 575 S.E.2d 532 (2003)]

In commercial lease parties may contract to whatever late fee is agreeable.

IMPACT OF SERVICEMEMBERS' CIVIL RELIEF ACT (SCRA) ON SUMMARY EJECTMENT PROCEEDINGS

The SCRA is a federal law that came into effect in December, 2003. Its purpose is to protect individuals serving in the military from being forced to divide their energy and attention between defending our Country on the one hand and responding to various legal proceedings (enumerated in the Act) on the other. The SCRA is a complex piece of

legislation and will only be dealt with briefly in this outline. If you encounter a case in which the SCRA is involved, be sure to seek assistance from the SOG or AOC if you are uncertain about how the law impacts the particular fact situation before you.

BASIC PROVISIONS:

The SCRA applies to all servicemembers (SMs) on active duty (including members of the National Guard and Reserve ordered to report). Some sections of the Act also apply to family members of a SM.

If a SM or a SM's dependent seeks a stay in a summary ejectment proceeding, the court must grant a stay of the proceedings "for a period of 90 days, unless in the opinion of the court, justice and equity require a longer or shorter period of time." 50 U.S.C. App. Sec. 531. This provision applies, however, only if the tenant's ability to pay the rent is "materially affected" by the SM's military service.

Federal law also provides that the magistrate may "adjust the obligation under the lease to preserve the interest of all parties."

The SCRA also allows a SM to terminate a lease if:

- The SM entered into the lease before entering active duty, *or*
- The SM entered into the lease after entering active duty and subsequently received orders for a permanent change of station or deployment for at least 90 days, *and*
- The premises had been occupied by the SM or his or her dependents.

Termination must be in writing and accompanied by a copy of military orders.

Effective date of termination is 30 days after the first date on which the next rent is due after notice is given. For example, John gives notice on April 15, and his rent is due on the first of each month. Termination is effective on May 31.

The landlord is not entitled to retain the security deposit because of early termination.

In addition to the SCRA, which is federal law, North Carolina has also addressed the issue of providing protection to members of the military in the landlord-tenant context. That legislation is contained in G.S. 42-45 and -46. When federal and state law each regulate the same subject, the rule is that state law cannot restrict the rights created by federal law, but state law may add to or expand those rights. Consequently, the two

statutes must be considered together. For the most part, the SCRA is the governing law, but in one circumstance, North Carolina law provides protection not found in federal law: members of the military who are “prematurely or involuntarily discharged or released from active duty” are entitled to early termination of leases under G.S. 42-45.

TENANT’S RIGHTS

RESIDENTIAL RENTAL AGREEMENTS ACT (G.S. 42-38 TO -44), specifies duties of landlord and tenant regarding rental property.

LANDLORD IS OBLIGATED TO:

- Comply with building and housing codes.
- Keep premises in fit and habitable condition.

What notice required? Statute doesn’t address. Oral notice is sufficient (*Surratt v. Newton*); no notice may be required if conditions existed prior to rental.

In making a determination about whether premises are habitable, ask yourself, “Would a reasonable person find the dwelling wholly or partially uninhabitable due to defects?” You should also consider the following factors:

- Compliance with housing and sanitary codes
- Does defect affect vital facility?
- Length of time defect persisted
- Age of dwelling
- Whether tenant caused defect

- Keep common areas in safe condition.
- Maintain and promptly repair electrical, plumbing, heating, and other supplied facilities and appliances.

Unless it’s an emergency, written notice to landlord is required, and landlord has reasonable time to repair.

- Install smoke detector and keep in good repair.

TENANT'S REMEDIES

G.S. 42-40(1) provides that tenant may enforce rights under this Chapter by civil action, including "recoupment, counterclaim, defense, set-off, and other proceeding including an action for possession." This claim is sometimes referred to as claim or action for rent abatement.

Tenant may enforce remedy against landlord, rental management company, or any other person with actual or apparent authority to perform statutory duties.

Damages calculated by determining difference between FRV as warranted and FRV as is, plus any special damages, but total may not exceed more than has been paid to landlord.

Proof of damages as warranted: not necessarily contract rate, but contract rate is good evidence on the point.

Proof of damages as is: in addition to usual types of evidence, magistrate may use his or her own life experience to assess FRV in light of actual condition of property.

IMPORTANT POINTS TO NOTE:

- Landlord's obligations may not be waived by tenant, either explicitly or implicitly (for example, by agreeing to rent with knowledge of uninhabitable condition).
- Statute allows landlord and tenant to enter contract *after* the lease is signed in which landlord agrees to compensate tenant for working on premises. This compensation must be something other than reduced rent.

TENANT IS OBLIGATED TO:

- Keep premises clean and safe.
- Dispose of garbage in clean, safe manner.
- Keep plumbing fixtures as clean as condition permits.
- Not damage or destroy premises or smoke detector.
- Be responsible for all damages other than that caused by normal wear and tear.
- Notify landlord if smoke detector needs to be repaired.

DUELING PROVISIONS:

*Tenant's obligation to pay rent and comply with statute and
landlord's obligation to comply with statute are mutually dependent.*

vs.

*Tenant may not unilaterally withhold rent before a judge determines
his or her right to do so.*

North Carolina appellate courts have interpreted these provisions to mean that a tenant is not excused from paying rent by landlord's violation of RRAA, but must instead seek to recover damages, either by a separate action or by raising it as a counterclaim, in court. *Note:* The statute of limitations for an action for rent abatement is three years.

Can a tenant repair and deduct? The law is not clear. In my opinion the better argument would allow the tenant to pay for the cost of repairs and deduct that amount from the rent. This is especially true in cases in which (1) the landlord has a clear obligation to repair; (2) the landlord had proper notice but failed to repair within a reasonable time; and (3) the amount of money involved is relatively small. The argument becomes harder to make if any of these three factors is absent.

RETALIATORY EVICTION (G.S. 42-37.1 TO -37.3): Statute that asserts State's public policy protecting tenants who exercise their rights to safe, decent, and sanitary housing.

Landlord may not evict a tenant in response to tenant's participation in protected activities or other listed events (but tenant's actions must be in good faith):

PROTECTED ACTIVITIES:

- Asking landlord to make repairs;
- Complaining to government agency about violation of law;
- Formal complaint lodged against landlord by government agency;
- Attempting to exercise legal rights under law or as provided in lease;

- Organizing or participating in tenants' rights organization.

HOW IT WORKS PROCEDURALLY:

In action for summary ejectment, retaliatory eviction is affirmative defense which tenant must raise and prove (by greater weight of the evidence). Tenant must prove that ejectment is "substantially in response" to occurrence within prior 12 months of one of protected acts or events.

Landlord may rebut defense by demonstrating:

- Tenant failed to pay rent.
- Tenant is holding over after termination of lease for definite period with no option to renew.
- Violations were caused by willful or negligent act of tenant.
- Displacement of tenant is required in order to comply with housing code.
- Landlord had given tenant a good-faith notice of termination before protected conduct occurred.
- Landlord plans in good faith to do one of the following after terminating tenancy: (1) live there himself; (2) demolish the premises, or make major alterations; (3) terminate use of premises as a dwelling for at least 6 months.

REMEDIES FOR RETALIATORY EVICTION:

If tenant demonstrates retaliatory eviction, magistrate must deny landlord's claim for possession, but may still enter money judgment awarding back rent. Tenant may also have action for unfair trade practices or action for damages if wrongfully evicted.

SELF-HELP EVICTION (G.S. 42-25.6 TO -25.9)

In residential leases self-help eviction is prohibited by statute. (Note that this is not the case in commercial lease situations.)

This applies to actual eviction (e.g., padlocking the property) as well as to constructive eviction (causing conditions to be so unpleasant as to force the tenant to leave—by turning off the water or electricity, for example).

The statute also prohibits landlords from seizing the tenant's property as a means of extorting the payment of rent.

REMEDIES FOR LANDLORD'S USE OF SELF-HELP:

- Tenant is entitled to recover possession of premises.
- Tenant may choose to terminate lease instead.
- Landlord is responsible for damages caused by removal.
- While punitive damages are not permitted, the courts have said that an action for unfair trade practice (which carries treble damages) is permitted.
- In the case of property, tenant may bring action for conversion.