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INTRODUCTORY MATERIALS

Small Claims Overview

I. Procedure
   A. Small Claims Action
      i. Summary Ejectment, $ Owed, or Return of Personal Property
      ii. $10,000 or less
      iii. At least one defendant must reside in county

   B. Service of Process
      i. Personal service by sheriff
      ii. Certified mail, return receipt requested
      iii. Service by delivery service
      iv. Voluntary appearance
      v. (SE cases only: Service by posting)

   C. Counterclaim
      i. Must be filed with clerk prior to time case is set for trial
      ii. Written
      iii. For $10,000 or less

   D. Continuance
      i. Both parties agree: allowed
      ii. Motion by one party: allow only for good cause shown
      iii. Special rule for summary ejectment actions

   E. Failure to appear
      i. By defendant: Take plaintiff's testimony just as usual
      ii. By plaintiff: dismiss

   F. Amendment of complaint
      i. Freely allowed
      ii. Usually only issue is whether defendant has sufficient notice

   G. Voluntary dismissal (without prejudice)
      i. Plaintiff has the right to take a voluntary dismissal at any time before conclusion of plaintiff's evidence

   H. Entering judgment
      i. May reserve judgment for up to 10 days (special rule for summary ejectment actions)
      ii. Party may give notice of appeal in open court, or by seeing clerk

   I. Clerical errors: judge may correct without notice to parites

   J. Rule 60(b) motions to set aside judgment for excusable neglect
      i. Must be authorized by CDCJ to hear these motions

ii. Requires notice to other party and hearing
iii. If motion by defendant, must also show meritorious defense

II. Torts:
A. In negligence cases In North Carolina, contributory negligence is a complete defense.
B. Conversion is an intentional tort, in which the plaintiff proves:
i. Plaintiff is the owner or lawful possessor of property;
ii. Defendant wrongfully took or wrongfully retained that property;
iii. Conversion, sometimes referred to as "forced sale," entitles the plaintiff to recover the fair market value of the property at the time and place of conversion as well as interest on that amount.

III. Contracts
A. Bargained-for exchange

B. Contracts by minors
i. Voidable at the option of the minor
ii. Exception: contracts for necessaries

C. Statutes of limitation
i. Contracts for the sale of goods: 4 years
ii. Other contracts: 3 years
iii. Contracts under seal: 10 years
iv. NOTE: Partial payment on account starts statute running over again. A creditor who accepts partial payment of a debt does not waive the right to bring an action for the remainder of a debt.

D. Contracts that must be in writing
i. Contracts for the sale of goods for $500 or more
ii. Retail installments sales contracts
iii. Security agreements

E. Terms of a contract
i. Parole evidence rule: Evidence of contract terms in the form of conversation between the parties is not allowed to change or contradict a written contract, unless
a. That evidence is offered to clarify a term that is vague or unclear, or
b. The evidence is of a modification of the written contract that occurred after the written contract was completed.
ii. Implied terms: In contracts for the sale of goods, there is an implied term (called an implied warranty of merchantability) that the goods will be fit for the ordinary purpose for which they are used, assuming the seller is someone who sells these goods in the ordinary course of business.

F. Parties to a contract
1. Husband and wife do not have authority to bind each other to contracts, unless one is acting as an agent for the other. Marriage agency.
2. An agent <u>does</u> have authority to enter a contract on behalf of the principal.

3. Under the theory of joint and several liability, a creditor having a contract with two debtors has the option of suing either or both for the entire amount due.

IV. Actions to recover personal property

A. By a non-secured party: Requires evidence identical to conversion claim, plus evidence that defendant is in possession of property, but remedy is return of personal property, along with cost of repairing damage to property and for loss of use.

B. By a secured party:
   i. SP must prove

      a. Security agreement
         i) Written
         ii) Signed
         iii) Dated
         iv) Contains a description of the property.

      b. Default by defendant

      c. Defendant is in possession of property.

      NOTE: Amount of underlying debt is not relevant.

   ii. Retail Installment Sales Act
      a. Applies to consumer credit purchases in which seller finances purchase
      b. Seller allowed to take security interest only in property sold, or in property previously sold by same seller and not yet paid off.
      c. Attempt to take security interest in other property is void.
      d. FIFO rule applies to allocation of payments when several goods bought from same seller.

V. Summary Ejectment
   A. Procedure
      i. Property manager may sign complaint, but owner must be listed as plaintiff
      ii. Service by posting? No money judgment
      iii. Judgment on the pleadings available if all requirements satisfied

   B. Grounds
      i. Breach of lease condition (forfeiture clause?)
      ii. Failure to pay rent (demand/10-day wait/tender)
      iii. Holding over
         a. Lease ends when it says it ends
         b. Month to month: 7 days
         c. Week to week: 2 days
         d. Year to year: 30 days
         e. Special rule for mobile home lots: 60 days

iv. Criminal activity

C. Consumer Protection Laws
   i. Late fees (maximum amount, agreed-to in lease, at least 5 days late)
   ii. Administrative fee
   iii. No self-help eviction
   iv. Security deposit
   v. Residential Rental Agreements Act
      LL has duty to keep premises in safe and habitable condition and make all repairs
   vi. Domestic violence victims
   vii. Special rules for military service members
   viii. Retaliatory eviction prohibited

SMALL CLAIMS GLOSSARY

(INFORMAL, UNOFFICIAL, AND JUST FOR MAGISTRATES NEW TO SMALL CLAIMS)

Action (sometimes **"legal action," "civil action," "lawsuit," "suit," claim" or "case")**
The formal procedure for seeking resolution of a dispute by the court system.
"In this _____, plaintiff seeks to recover damages in the amount of $5,000 from defendant."

Amount in controversy.
The dollar value of the remedy plaintiff seeks. When plaintiff is asking for money, the amount in controversy is the amount of money s/he's seeking. When plaintiff is asking for the return of property, the value of the property is the amount in controversy.

Answer
A written response by defendant to the plaintiff's claims. Required in most courts, but unusual in small claims court.

Complaint
The legal document that begins a lawsuit. It states the facts and explains what action the court is asked to take.
"I see by the complaint that plaintiff is seeking $5000 as damages resulting from the defendant's breach of contract."

Damages (sometimes **"money damages")**
May refer either to the injury plaintiff is complaining about or the monetary sum plaintiff is asking for. Money damages are the most common remedy sought by plaintiffs.
"Plaintiff suffered damages as a result of Def's negligence," or *"Plaintiff seeks $5,000 in damages."*

Defendant
The person being sued.

Ex parte
This term is Latin and means "by one party." Magistrates commonly hear this term in two contexts. *Ex parte communication* refers to the unethical practice of discussing a case outside of court with one party. An *ex parte DVPO* is a temporary emergency protective order issued in domestic violence cases without notice to the other party, having the purpose of protecting the plaintiff from domestic violence during the interval until a full hearing can be scheduled.

Judgment
A final decision made by the judge after hearing and considering all the evidence.

Order
A formal ruling by the judge that is not a final decision on the case based on the evidence. The most important thing to understand about an order is that it is different from a judgment.
"The judge ordered a continuance." "The judge ordered the action discontinued because of bankruptcy." "The judge ordered the case dismissed when plaintiff failed to appear."

Party
Refers to both plaintiff and defendant
"Both parties are present and the court is ready to proceed."

Plaintiff
The person who filed the lawsuit.

Pleadings
The complaint and, if there is one, the answer.
"I see by the pleadings that plaintiff says he was injured by defendant's negligence," means the same thing as *"I see by the complaint that plaintiff says . . . "*

Pro Se
A party is *pro se* when she represents herself, rather than being represented by an attorney. Also referred to as an *SRL*—self-represented litigant.

Process
A term that includes both the complaint and the summons given the Def

Remedy (also **"relief,"** sometimes "**prayer for relief"**)
What the plaintiff is asking for.

Service of process (sometimes just **"service")**
The formal legal procedure for giving a Def notice that s/he is being sued.
"It appears that Def has not yet been served."

Summons
The legal document that notifies a defendant that s/he is being sued and informs the defendant when and where the trial will be held.

SMALL CLAIMS PROCEDURE

The Mysterious World of Small Claims Procedure

Every so often I get telephone calls from attorneys, fresh from a rare appearance in small claims court, calling to offer some helpful observations about the need for more and better training of small claims magistrates. I suspect that chief district court judges and clerks of superior court receive similar calls. While magistrates, like the rest of us, sometimes make mistakes, I've learned that it is often the attorney, rather than the magistrate, who is in error, for reasons that are entirely understandable. After all, attorneys share that fundamental rite of passage of having suffered through two agonizing (at least for some of us) semesters of law school mastering various aspects of the Rules of Civil Procedure. And Rule #1 (literally) assures us that "These rules shall govern the procedure in superior and district courts of the State of North Carolina in **all** actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." GS 1A-1, Rule 1. So what's up with small claims?

The answer lurks in that last portion of Rule 1 referring to "a differing procedure . . . prescribed by statute." That "differing procedure" is set out, in what must be admitted is a not-exactly-intuitive sequence, in GS Ch. 7A, Art. 19, *Small Claims Actions in District Court*. Much like the situation related to juvenile law described recently in this blog by my colleague, Sara DePasquale, the North Carolina Rules of Civil Procedure apply to small claims actions unless they don't, which, as it turns out, is a good deal of the time. The purpose of this post is to identify and briefly discuss the most significant areas in which small claims procedure departs from the more familiar rules set out in GS 1A-1.

Service of process. Unless the action involves a motor vehicle lien, service by publication is not available in small claims court. GS 7A-217; 7A-211.1.

No answer required. A defendant's failure to file an answer in a small claims action constitutes a general denial. GS 7A-218.

Venue is jurisdictional. A chief district court judge has authority to assign a case to small claims court only if at least one defendant resides in the county. GS 7A-211. If this requirement is not satisfied, the action has not been "assigned" and any judgment entered by a small claims magistrate is not a valid judgment. GS 7A-212. A different rule applies in actions to enforce motor vehicle liens. GS 7A-211.1.

Limits on available relief. GS 7A-210(2) defines "small claims actions" in terms of the relief sought by the plaintiff. The statute permits actions to recover money damages (subject to the $10,000 amount in controversy limit), actions to recover possession of personal property, and summary ejectment actions to be assigned to small claims court. Conspicuously absent from the list are actions seeking some sort of coercive order or injunctive relief.

No Rule 12(b)(6) motions. Motions to dismiss for failure to state a claim pursuant to GS 1A-1, Rule 12(b)(6) "shall not be used." If a complaint contains information insufficient to "allow a person of common understanding to know what is meant," the clerk, chief district court judge, or magistrate hearing the case has authority to order the plaintiff to amend the complaint to provide more details. GS 7A-216.

Limit on length of continuances. In an action for summary ejectment and/or past due rent, a continuance for good cause is limited to five days or the next session of small claims court, whichever is longer, unless all parties agree to a longer period. GS 7A-223(b).

No compulsory counterclaims. Failure to file a counterclaim in small claims court does not bar the defendant from asserting the claim in a separate action. GS 7A-219.

No default judgments. In every action, regardless of whether defendant files an answer or is present at trial, the plaintiff must prove the essential elements of the case by the greater weight of the evidence. GS 7A-218; 7A-222. The sole exception to this requirement appears in GS 42-30, which authorizes a magistrate to grant judgment on the pleadings in favor of the plaintiff in an action for summary ejectment provided certain requirements are met.

Time periods are abbreviated in small claims court:

- The trial date is set "as soon as practicable" after a case is assigned to small claims court, GS 7A-213, within 30 days in most cases and within seven days in summary ejectment actions. GS 7A-214; 42-28.
- The defendant must be served at least five days prior to trial in most actions, GS 7A-214, and at least two days prior to trial in actions for summary ejectment. GS 42-29.
- The magistrate may delay entering judgment for up to ten days in most actions, GS 7A-222(a); in actions for summary ejectment the magistrate is required to enter judgment on the day of trial unless (1) the case is complex, in which event judgment may be delayed for up to five days, or (2) the parties agree to a delay. GS 7A-222(b).
- Notice of appeal must be given within ten days of judgment, and costs of appeal must be paid within 20 days (10 days if the action is one for summary ejectment). GS 7A-228(b).

Appeal from a small claims judgment is to district court for trial de novo. GS 7A-228; 7A-229.

It's easy to understand why an attorney with a general civil practice might assume that the GS 1A-1 sets out the rules of the game in small claims court, without ever thinking to consult GS Ch. 7A in search of other rules. In fact, as we've seen, there are numerous points of divergence. You may have also noticed that even within the specialized world of small claims procedure actions for summary ejectment occupy an even smaller procedural world of their own. I'll be talking about that world the next time I write.

The Clerk of Court's Role in Small Claims Cases

When a litigant presents a complaint and asks that the case be heard in small claims court, a clerk has different responsibilities than when a plaintiff wishes to file any other sort of civil case. Those responsibilities are critically important, and failure to perform them correctly can lead to additional time and effort on the part of court officials, added expense and delay for litigants, and even judgments ultimately declared void. The source of these additional duties are several little-known statutory provisions in G.S. Ch. 7A, Art. 19, governing small claims procedure.

Assignment. A magistrate's has no authority to hear a case in small claims court until and unless the action is *assigned* by the chief district court judge. A chief district court judge may assign a case to small claims only if two conditions exist: first, the case must fall within the definition of a *small claims action* set out in GS 7A-210. Second, the defendant must reside in the county. (If there are two or more defendants, at least one must reside in the county.) GS 7A-211.

Definition of small claims action. GS 7A-210 defines a small claims case as one satisfying three requirements:

(1) The amount in controversy does not exceed $10,000.

(2) The remedy sought by the plaintiff is money damages, recovery of personal property, and/or summary ejectment. (Actions to enforce motor vehicle liens are governed by GS 7A-211.1, and are not addressed in this post.)

(3) The plaintiff has requested assignment to small claims court. Use of an AOC-approved complaint form constitutes a request for assignment.

No assignment, no jurisdiction. If a case does not fall within the definition of a small claims action, or if no defendant resides within the county, the chief district court judge has no authority to assign a case to small claims. A magistrate's judgment in a case which has not been assigned by the chief district court judge is void. G.S. 7A-212.

An order of assignment. Chief district court judges obviously don't ponder whether to assign each of the approximately 200,000 small claims cases filed in North Carolina each year, nor are they required to do so. G.S. 7A-211 states that assignment may be made "by specific order or general rule." So far as I know, the clerk's office in every county has on file an *order of assignment* in which the chief district court judge directs the clerk to calendar for small claims those cases which conform to requirements set out in the order. Typically, an assignment order closely tracks the statutory requirements set out above.

When a plaintiff files a complaint and asks that the case be assigned to small claims court, G.S. 7A-213 says what happens next: "If, pursuant to order or rule, the action is assigned to a magistrate, the clerk issues a magistrate summons . . . as soon as practicable after the assignment is made." Stated another way, after accepting the complaint, the clerk must determine whether the chief judge's order of assignment applies to this particular case. If so, the clerk is to issue a magistrate summons.

How does the clerk make this determination? The clerk must consider the contents of the complaint in light of the requirements of the order of assignment. There are three areas of inquiry.

First, does at least one defendant reside in the county? If not, the chief district court judge has no authority to assign that case to small claims court. GS 7A-211. If the clerk places such a case on the small claims calendar, the legal status of that case is no different than if the clerk scheduled a capital murder case for small claims—the small claims magistrate has absolutely no authority to proceed.

Second, is the amount in controversy indicated on the face of the complaint within the limit specified in the chief judge's order? G.S. 7A-210 sets a maximum limit on the chief judge's discretion in assigning cases, so no case may be assigned to small claims if the amount in controversy exceeds $10,000. The chief judge is perfectly free to limit assignment to cases involving a lesser amount, however, and in several counties chief judges have done exactly that. Because the clerk's role is to implement the assignment order, the inquiry is whether the assignment order in effect in a particular county directs that a particular case be calendared in small claims court. If a litigant files a complaint seeking $8,000 and the chief judge's order limits small claims assignment to cases with an amount in controversy not exceeding $5,000, the $8,000 case has not been assigned pursuant to the order, even if the clerk mistakenly schedules the case to be heard in small claims court.

Third, is the plaintiff seeking one of the remedies approved by the statute as falling within the definition of a small claims case? This is seldom an issue for clerks at the complaint-filing stage, because most litigants use AOC form complaints indicating that the plaintiff is seeking money damages, summary ejectment, recovery of personal property, or some combination thereof. Sometimes it is only when the magistrate begins to hear the evidence in a case does it become clear that it does not meet the definition of a small claims action after all. The procedure for responding to the sudden discovery that the court lacks jurisdiction to proceed is often problematic, and one that I will write about next time.

A fundamental tenet is that clerks of court should not read pleadings and advise litigants about their contents. Similarly, all new clerks are told that clerks should not function as gatekeepers to the justice system, picking and choosing what cases may be filed and which ones will be turned away. Many times I have heard a clerk say that a case should be calendared for small claims without further inquiry upon plaintiff's request. Because of the unique procedural rules governing small claims actions, however, those familiar, well-intentioned practices are problematic. The statutory scheme relies on clerks to properly implement the chief judge's order of assignment by checking the complaint to determine whether the case is one "assigned" to small claims court. This is not to say that a clerk should offer the litigant legal advice, nor that a clerk should refuse to allow a complaint to be filed. But as GS 7A-213 makes clear, accepting a complaint for filing is only the first step. The second step, determining whether the case is assigned to small claims, requires additional action.

Assignment to Small Claims Court: What Happens When Things Go Wrong?

My last post discussed the clerk of court's role in determining whether a case is eligible for small claims court under the terms of the chief district court judge's order of assignment (hereinafter, *OA*). This post addresses what happens when things go wrong: What options do court officials have when a case turns up on the small claims calendar that does not meet the requirements for assignment to small claims court?

Improperly Assigned or Non-Assigned?

The law differentiates between two types of errors leading to this situation. The first, which seldom occurs, arises when the chief district court judge makes an error in the *OA*, directing assignment of cases which are actually not eligible to be heard in small claims. Imagine, for example, that the *OA* directs assignment of cases seeking money damages in which the amount in controversy does not exceed $12,000. If the clerk calendars an $11,000 case for small claims, that case was assigned by the chief district court judge, but the assignment was improper. In such a case, GS 7A-212 provides that the magistrate's judgment is not subject to attack as void, voidable, or irregular—the "sole remedy for *improper assignment* is appeal for trial de novo."

The second type of error is far more common, and the consequences more serious. In this circumstance, a case is placed on the small claims calendar despite the fact that it does not fall within the scope of the *OA*. In the example above, imagine that the OA set a $10,000 limit, but the clerk ignored the order and calendared the $11,000 case for small claims. In this situation, the clerk's action is a nullity, the case *has not been assigned* to small claims court, and any judgment entered by the magistrate is invalid. GS 7A-212.

What should court officials do? When a non-assigned case turns up on the small claims calendar, a number of considerations come into play. Clearly, it is improper for the magistrate to simply ignore the issue and proceed to enter an invalid judgment. Should the magistrate dismiss based on lack of subject matter jurisdiction in this situation, and if so, should the dismissal be with or without prejudice? Would it be better for the magistrate to simply return the case to the clerk? Can the magistrate permit amendment of the complaint to correct the difficulty, thereby rendering the case eligible for assignment? Is there some way for the magistrate to transfer the case directly to the proper court?

"[E]very court necessarily has inherent judicial power to inquire into, hear and determine the questions of its own jurisdiction." Burgess v. Gibbs, 262 N.C. 462, 465 (1964). A magistrate always has legal authority to dismiss a case in which subject matter jurisdiction is lacking, even if neither party raises the issue. Because AOC G-108, the General Order Form used to record dismissals, contains separate checkboxes labeled "with prejudice" and "without prejudice," magistrates sometimes wonder which box they should check. My recommendation is that the magistrate check neither box, but instead indicate on the judgment that the reason for dismissal is lack of subject matter jurisdiction.

While dismissal is always an available option, it may not be the best choice when the face of the complaint clearly discloses that a case is ineligible for assignment. The law anticipates that the clerk who takes such a complaint will refuse the plaintiff's request that

the case be heard in small claims court. See GS 7A-215, titled *Procedure upon Nonassignment of Small Claims Action.* Had the clerk complied with this statute, the nonassigned case would eventually have been rerouted for trial in district court. When a case is improperly sent to small claims court instead, it adds insult to injury to then dismiss the case, subjecting the plaintiff to the inconvenience and cost involved in refiling the case in the proper court. In this instance, it may be preferable for the magistrate to simply return the nonassigned case to the clerk who should then act as much as possible in accordance with the statutory procedure.

When a case is not eligible for small claims because no defendant resides within the county, the magistrate's options are limited to dismissal or returning the case to the clerk. When the problem arises because the amount sought by plaintiff exceeds the maximum amount established by the OA, however, most magistrates make use of a third option: they invite the plaintiff to amend the complaint to reduce the amount sought to one not exceeding the permissible amount specified in the *OA*. If the plaintiff agrees, the magistrate proceeds to hear the case. This practical solution is troublesome from a legal point of view because of the timing. The statutory requirement related to amount in controversy does not restrict a magistrate's authority to enter judgment for an excessive amount, but rather restricts the chief district court judge's authority to assign such a case to begin with. Conceptually, amending the complaint when the case comes on for trial is effective only if the amendment somehow retroactively causes the case to have been "assigned" to small claims. This practice is at best an uneasy fit with the GS Ch. 7A procedures for assignment, and the alternatives of dismissing the case or returning it to the clerk are unattractive solutions because of their inefficiency. In this situation in particular, an ounce of prevention may be worth a pound of cure; thus, the best practice is for clerks to prioritize enforcing the amount in controversy in requirements in deciding whether to calendar a case for small claims.

In some counties it has long been common practice for a small claims magistrate confronted with a nonassigned case to simply transfer the case directly to district court. The appeal of such a simple, straightforward method of getting a case to the appropriate court is easy to understand, but there is no statutory authority for this procedure. Returning the case to the clerk instead is, as described above, an authorized means of accomplishing the objective while ensuring that the statutory requirements (such as issuance of civil summons) are satisfied.

Thus far our discussion has focused on cases in which the reason for nonassignment is readily apparent from the complaint and the appropriate forum for the case is easily identified. In this context as in so many others, summary ejectment cases require special consideration. That will be the topic of my next post.

You Ain't the Boss of Me!

The (Lack of) Authority of a Small Claims Magistrate to Order a Person to Perform an Act

During the last few weeks, several magistrates have called with questions about widely-varying fact situations that have one thing in common: in each case, the plaintiff wants a court order directing someone to do something. This request is a trap for the unwary magistrate, who may almost immediately be faced with what to do when the order is defied. Imagine, for example, that you direct the tenant in a summary ejectment action to clean the apartment and hand in the keys. The tenant does move out, but he takes the key with him, and leaves the apartment filthy. The landlord asks you what happens now. The fact that you have no satisfactory answer for him reflects one of the reasons you should not award such a remedy. The most significant reason, though, is that you have no legal authority to do so.

At common law, courts were frequently called upon to issue what is sometimes called a *coercive order*: an order directing a party to follow the court's direction or else face the contempt power of the court. District and superior court judges today frequently issue such orders. Whether it is ordering a company to reinstate an employee, a doctor to remove a feeding tube, or a nightclub to turn down the music after midnight, the availability of this remedy is well-established. In the case of actions based on contract, the law even has a special name for the remedy: a party who wishes to force the defendant to carry out her obligations under a contract is said to be seeking an order of "specific performance." Defendants who defy a coercive order may be imprisoned until they comply, under the civil contempt power of the court, or fined and imprisoned as punishment for defying an order of the court, under the criminal contempt power of the court. *See* G.S. Ch. 5A.

The statutes that identify the cases a small claims magistrate is authorized to hear are G.S. 7A-210 and G.S. 7A-211.1. It is interesting to note that the former identifies those cases in terms of the remedy the plaintiff is seeking: A small claims action is an action in which "[t]he only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing. . . ." G.S. 7A-211.1 authorizes magistrates to hear actions "to enforce motor vehicle mechanic and storage liens." Conspicuously absent from this list are the remedies of specific performance and injunctive relief —orders directing a party to perform, or cease to perform, a particular act.

In some ways, this list of available remedies is very broad indeed. The statute allows a magistrate to hear any civil action in which the plaintiff is seeking monetary damages, so long as the amount is $5000 or less. Theoretically, you may hear cases involving unfair trade practices, medical malpractice, slander, breach of warranty, false imprisonment, complex commercial contract cases—the type of case is not limited, so long as it falls within the allowable monetary limit. The result is that magistrates often hear cases involving an extremely wide range of challenging legal concepts as well as complex fact situations (thus, the name of this publication: *Big Law*). Similarly, a magistrate may hear any case for summary ejectment -- even if the underlying contract is a commercial lease involving millions of dollars -- so long as the remedy sought is possession only (or damages within the $5,000 limit).

I imagine some of you are thinking, "Wait a minute. When we hear some of these cases, we ARE ordering someone to do something. We're ordering the tenant to move out, or the defendant to hand over personal property, or DMV to transfer title." Certainly, the effect of your judgment is often to force a party to do something he'd rather not do. But if you look closely at the language of the judgment you enter, you'll notice that it does not contain such mandatory language. It doesn't say "Defendant, you must pay plaintiff $5,000," or "Defendant, you must give plaintiff the washing machine." There is instead a small, but extremely significant, difference, at least from a legal point of view. The judgment says instead something like, "It is ordered that the plaintiff recover possession," or "It is ordered that the plaintiff recover the following principal sum," or "that the defendant be removed from and the plaintiff be put in possession of the premises at. . . ." Orders containing language such as this require additional proceedings before the defendant is forced to comply. As you know, the usual process is that a clerk issues a writ (either of execution or of possession) based upon the judgment, and that writ actually directs not the defendant, *but the sheriff*, to take certain steps.

Contrast this situation with an order issued by a judge ordering a defendant to sign a particular document. In this case, no writs issue, and no sheriff is involved in implementing the court's order. Instead, a defendant who fails to comply will be ordered to appear and show cause why he or she should not be held in contempt. As you know, a magistrate has no such contempt power, aside from the power to punish direct criminal contempt committed while the court is sitting for business.

This distinction is a relatively subtle one, and it is not surprising that plaintiffs don't always observe it in deciding what remedy to request in a small claims action. One area in which the issue often arises involves motor vehicle sales. Let's look at some examples:

> Example 1: Billie and Sam agree that Billie will buy an old Mazda from Sam, paying $200/month until the total purchase price of $1800 has been paid. After Billie pays the full amount, Sam refuses to hand over the title. Can Billie obtain a judgment in small claims court ordering Sam to hand over the title? Can Billie obtain a judgment in small claims court ordering DMV to transfer title to Billie? The answer is no. While Billie may be able to obtain an order in district court requiring Sam to perform his part of the contract, that remedy is not one that a small claims judge is authorized to grant.
>
> Example 2: First National Bank brings an action against Danny Debtor seeking a money judgment in the amount of $2,000. After proving that Danny owes the money, First National asks that you enter an order authorizing the bank to seize funds in Danny's savings account to satisfy the judgment. Do you have authority to do so? Again, the answer is no. While First National may actually have the right to seize the funds pursuant to its contractual agreement with Danny, a small claims magistrate has no authority to order such seizure. At first glance, this remedy may not appear to be a coercive order—after all, you're not ORDERING First National to seize the funds. By authorizing the seizure, however, you are effectively forcing Danny to satisfy the judgment without the protections offered by the usual procedure First National must use to enforce a judgment.
>
> Example 3: Larry Landowner brings an action for money owed based on the presence of Ernie Encroacher's livestock on his property. Larry contends that Ernie continues to allow two cows and a horse to roam and graze on his property, even after Larry informed Ernie that the animals were wandering on to his land. Larry asks that you

award him $5000 as rent for Ernie's use of the property and order Ernie to remove the animals. Can you order Ernie to do so? No. Again, you have no authority to enter a coercive order requiring Ernie to remove his livestock. Larry must seek this remedy in district or superior court. [1]

What should you do when you are confronted with a case in which the plaintiff is seeking a coercive order? It is entirely appropriate in this situation to provide the plaintiff not with advice, but rather with information. Explain to the plaintiff that while he or she may be entitled to the requested relief, it is not available in small claims court. If a coercive order is a relatively minor aspect of what the plaintiff wants, the plaintiff may agree to drop that request and proceed with the remainder of the lawsuit. If, on the other hand, what plaintiff really wants is to put an end, once and for all, to Ernie's continual, bothersome trespassing animals for example, it makes more sense for the plaintiff to take a voluntary dismissal without prejudice and re-file his action in a court authorized to grant the relief he wants.

[1] Just for curiosity's sake, what about Larry's claim for back rent? Assuming, as the facts indicate, that there was never any sort of rental agreement between Larry and Ernie, there is no legal basis for Larry to collect rent. Larry's claim is actually a misnamed effort to collect damages for a tort—a civil wrong—called "trespass to property." The law provides that Larry is entitled to nominal damages—say, $1—if Ernie knowingly allows his animals to trespass on Larry's land. In addition, Larry is entitled to any actual damages caused by the trespass. For example, if the animals consume most of Larry's sunflower crop, he would be entitled to recover lost profits as well.

Service of Civil Process: 2009 Legislation

The 2009 General Assembly enacted into law two bills governing service of process in small claims cases, each of them in apparent response to the fact that defendants in these cases sometimes have little time to prepare for trial.

Service of Process in Summary Ejectment Actions

The first new law, SL 2009-246, amends GS 42-29, governing service of summons in summary ejectment actions. As many of you know, small claims procedure in these cases is geared toward minimizing the time a landlord must wait for trial on the landlord's claim for possession of rental property. Existing law requires a law enforcement officer who receives a summons for service to mail a copy of the summons and complaint to the tenant "no later than the end of the next business day or as soon as practicable." GS 42-29 goes on to state that the office may attempt to telephone the defendant within five days after summons is issued, to arrange for service. In cases in which tenants are not served in this manner, the law requires the officer—before the end of this five-day period-- to go to the defendant's home to attempt service. S.L. 2009-246 adds to this provision a requirement that the officer's visit occur at least two days prior to trial (excluding legal holidays). If service is not accomplished at the time the officer visits, existing law directs the officer to "affix copies to some conspicuous part of the premises claimed" (service by posting).

This law imposes a requirement on law enforcement officers charged with serving civil process, rather than on magistrates who hear small claims cases. Further, the new law does not address the consequences of non-compliance. As a result, questions have arisen about what *a magistrate* should do when a summary ejectment action appears on the small claims docket and the defendant was served less than two days before trial. The question may come up in any of several contexts. First, the magistrate may call the case and learn that both parties are present in court. Because the General Assembly's intention was to provide tenants with additional time to prepare for trial, it is clear that the magistrate must grant the defendant's request for a continuance, for at least as long as necessary to allow for two days notice. The law provides that in calculating time periods, the first day is not to be counted. Accordingly, if the defendant is served on Monday, the magistrate must grant a defendant's request for a continuance if the trial is held on Tuesday. The case may be heard, however, on Wednesday (two days after service), and a magistrate may choose to grant an even longer continuance if that seems appropriate.

A second question arises on these facts if the tenant does not request a continuance (which is likely to happen in cases in which the tenant is unaware of the new two-day rule). The answer to this question is not specified in the statute. In light of clearly expressed legislative intent, however, the magistrate should, at a minimum, inform the defendant that she or he is entitled to two days notice before being forced to appear in court and defend against the lawsuit. If the tenant expresses a clear affirmative desire to proceed with the hearing, a magistrate may consider that as a valid waiver of the tenant's rights and hear the case that day. In the absence of a knowing waiver, however, I do not believe the magistrate should hear the case, given clear legislative intent to the contrary. If a magistrate hears the case that day after finding waiver by the defendant, the best practice would be to note the waiver in the judgment. By doing this, the magistrate will preserve for the record the fact that the tenant's right to minimum notice was observed.

The next question arises when the plaintiff is present in court, but the defendant is not. If service was made sooner than two days prior to trial, my opinion is that the magistrate should continue

the case on the magistrate's own motion. Given that the purpose of the amendment is to allow adequate time for a defendant to receive notice of an upcoming trial, it is of particular concern that the defendant may not appear for trial *because* of inadequate notice. This is particularly true in cases in which service is accomplished in some substituted manner, such as by handing a copy to defendant's spouse or by posting. In these cases, there is a real possibility that defendant may be completely unaware that a trial is scheduled. Even when service is made directly on defendant, however, the notice may have been inadequate to permit the defendant to arrange to attend court the next morning. Magistrates may want to confer with their clerks about the mechanism for notifying both the clerk's office and the parties when a case is continued for this reason.

A harder question arises when neither party appears for trial. In the typical case, of course, a magistrate dismisses the plaintiff's lawsuit with prejudice for failure to prosecute. But what if the plaintiff has called to inquire about service and has been informed that service was accomplished later than was required by law? A plaintiff might decide that an appearance is unnecessary because the trial is certain to be postponed. One might argue that in this situation the plaintiff had no intention of "failing to prosecute." On the other hand, the justice system has long taken the position that when a case is scheduled for trial, a plaintiff must either appear for trial or seek a continuance. A plaintiff who does neither has no legal right to object if the case is dismissed. (And if a defendant does appear and waives the right to a continuance, a magistrate should strongly consider dismissing the action with prejudice, given the effort the defendant has made to comply with the demands of the summons.) Absent legislative or appellate court guidance, a magistrate is left to consult with colleagues and perhaps the chief district court judge about how such cases should be handled.

Service of Process in Non-Summary Ejectment Small Claims Cases

The second legislative amendment related to service of process in small claims cases also raises questions. S.L. 2009-629 amends GS 7A-214, the statue governing the time within which a small claims action must be heard. That statute provides that small claims actions are to be scheduled for trial no later than 30 days after the complaint is filed. The new law inserts a sentence stating that the magistrate "shall order a continuance" in small claims actions other than summary ejectment actions when service is accomplished less than five days before trial. GS 7A-214 goes on to say that the time set for trial may be changed if all parties agree. The statute concludes with the familiar sentence authorizing a magistrate to grant continuances "for good cause shown."

Again, legislative concern that defendants have adequate time in which to prepare for trial is apparent in this amendment. The law prior to amendment allowed a defendant to be served on Monday afternoon and the trial to be held at 9:00 AM on Tuesday. In this situation, the defendant was left to hope that the plaintiff would agree to a continuance or, failing that, that the magistrate might find such short notice "good cause" for a continuance. In fact, many magistrates might have reasoned that no good cause existed as a matter of law, given that all statutory time limits and procedural rules had been observed. With this background, the General Assembly's desire to guarantee defendants at least five days notice is certainly understandable. The new time limit is consistent with the existing rule applicable to motions filed in district and superior court: GS 1A-1, Rule 6(d) requires that in all such motions, the other party must be given at least 5 days notice before the matter is heard.

The questions that arise with this law relate to the mandatory aspect of the statutory language. When both parties appear for trial and the defendant seeks a continuance, the way is clear: a magistrate is required to grant a continuance. The same is true if the plaintiff appears and the defendant does not; again, the defendant's very absence tends to support the concern that she or he may not have received adequate notice that a trial date was looming. The mandatory language of the statute makes clear that the defendant is not required to ask for a continuance—the "default setting," so to speak, is a continuance whenever the defendant has not received the required notice. The statute does not

indicate how long the continuance should be, but the underlying legislative intent suggests that the continuance should be long enough to allow the defendant at least five days to prepare for trial.

As we discussed in reference to the new law applicable to summary ejectment actions, a more challenging legal question is presented by the situation in which the defendant appears and asks to waive his or her statutory right to a continuance. It is common for parties to a lawsuit to waive various rights in the course of trial, and there is generally no obstacle to them doing so, provided that the waiver is made knowingly. It is easy to imagine that many defendants, aware that they have no defense to the plaintiff's claims, might wish to dispose of the case quickly, rather than be forced to travel twice to the courthouse. Indeed, it is difficult to imagine a good reason for denying defendants the right to make this choice. This question is made difficult only by the mandatory language of the statute: "the magistrate shall order a continuance." When one considers the absurdity of ordering a continuance in the face of objections from--and to the detriment of--both parties, however, it seems reasonable to read this language as requiring a continuance unless waived by the defendant. The same reasoning arguably applies to the situation in which the plaintiff fails to appear and the defendant appears. Because the right to a continuance—and the ability to waive that right—belongs to the defendant, it seems entirely justified to expect plaintiffs to either attend court or risk losing their case in the event the defendant appears and waives continuance.

Once again, the most perplexing aspect of the new law is presented when neither party appears. Should the magistrate dismiss the action with prejudice based on plaintiff's failure to prosecute? On the one hand, it makes little sense to continue a case out of concern for a defendant having adequate time to prepare when the result without the protective amendment would be to dismiss the action entirely—a result likely to be welcomed even more enthusiastically by defendants. On the other hand, the statutory language is mandatory, and the defendant is not present to make a knowing waiver of his or her right to a continuance. It seems likely that different counties—and different magistrates—will adopt different policies about the proper way to handle this situation. Whatever the policy, though, it should be one that is applied consistently, so that all parties are able to make decisions about their actions based on legal consequences that are predictable.

Counting time

A final issue raised by both new laws concerns calculating time. GS 1A-1, Rule 6, sets out the general rule for calculating time in civil matters. That provision states that the first day of the time period is not included, and the last day is included (unless it is a Saturday, Sunday, or legal holiday, in which case the time period runs over to the next day when the courthouse is open and doing business). **In cases in which the time period is less than seven days,** however, Saturdays, Sundays, and legal holidays are not included. The result is that small claims actions, other than those for summary ejectment, may be heard no earlier than one week after service of process (i.e., if service is accomplished on Monday, the case may be heard no sooner than the following Monday). The new law applicable to summary ejectment actions specifically requires that service be accomplished "at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays." Previous versions of the bill had excluded "weekends and legal holidays", but the reference to "weekends" was deleted from the final bill. The result is an exception to the general rule set out in GS 1A-1, Rule 6, with weekend days counted toward satisfaction of the two-day requirement. Consequently, service on Friday would allow a case to be heard on Monday, since Monday is the third day following service.

Caveat and Summary

As we have seen, the proper application of these two amendments is unclear in some situations and likely to remain so until further guidance is provided by the General Assembly and/or the appellate courts. This memo has attempted to set out a rationale in support of one possible resolution of these issues, but whether the appellate courts will answer the questions addressed in the manner as the author necessarily remains uncertain. For purposes of clarity and ease of reference, the author's recommendations are summarized below, but magistrates are as always reminded that the suggestions herein are just that—suggestions—and should not be regarded as dispositive of the questions addressed.

Obviously, the language of the two amendments is not identical, and thus the legal issues presented are somewhat different. Nevertheless, the author's suggestions about how to dispose of cases in which inadequate notice is present are the same, and are as follows:

If both parties appear, the magistrate should continue the case unless the defendant makes a knowing waiver.

If only the plaintiff appears, the magistrate should continue the case.

If only the defendant appears, the magistrate should continue the case unless the defendant makes a knowing waiver. If the defendant waives the right to a continuance, the case should be dismissed for failure to prosecute.

If neither party appears, the author makes no recommendation other than to suggest that the magistrates in each county discuss the question and adopt a consistent policy for responding to these cases.

If you have questions or concerns or would like to discuss the contents of this memo further, please don't hesitate to call or email me:

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Small Claims Mailbox: Questions from Magistrates about Service of Process

Author : Dona Lewandowski

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Service of process in small claims cases, like many other small claims procedures, requires reference to North Carolina's Rules of Civil Procedure (GS 1A-1) as modified by GS Ch. 7A, Art. 19 (Small Claims Actions in District Court). In today's blog post, I'm going to explore that law by sharing some (lightly edited) email inquiries I've received from magistrates over the last few years. But first, a quick overview of why we care so much about service of process.

As you all know, the legal term for a court's authority to act in any particular case is jurisdiction, and it comes in two flavors: subject matter jurisdiction, which refers to the court's authority to decide this particular kind of case, and personal jurisdiction, which refers to the court's authority over this particular defendant. A court acquires the authority to act with regard to this defendant only if the defendant receives legally adequate notice of the lawsuit and is accorded an opportunity to present a defense. With one big exception discussed later, personal jurisdiction is an all-or-nothing sort of thing: a court either has it or it doesn't, and there are only two ways to get it: either the defendant is served with process, or the defendant makes a voluntary appearance in the case. A small claims defendant may be served with process in several different ways, including service by the sheriff and by certified mail. A voluntary appearance may occur in different ways as well: the defendant may actually show up in the courtroom for trial, or file an answer, counterclaim, or some other response amounting to participation in the case. Any one of these events is sufficient to give the court full personal jurisdiction.

Now, on to some questions:

I have a question about service on a Complaint for Money Owed case. The defendant is a corporation with an out-of-state address. The plaintiff has filed an Affidavit of Service of Process by Publication. . .needed as two attempts to deliver certified mail were not accepted. Is the publication a legal service if the defendant DOES NOT appear? Is the publication a legal service if the defendant DOES appear?

This is a great question, because it brings up several important things for magistrates to keep in mind:

- Service by publication is not permitted in small claims cases, except in some circumstances in actions involving a motor vehicle lien. GS 7A-217; 7A-211.1.
- A plaintiff who is unable to accomplish service of process except by publication isn't altogether out of luck. Service by publication is often a permissible method of service in trial courts other than small claims. GS 1A-1, Rule 4(j1).
- Voluntary appearance by a defendant is one of the two ways that a court acquires personal jurisdiction over the defendant, and it is a satisfactory substitute for service of process. GS 7A-217(3).
- A defendant with an out-of-state address raises questions not about service of process, but rather about the mandatory venue rule applicable in small claims court. GS 7A-211 permits a case to be assigned to small claims only if at least one defendant resides in the county in which the case is filed. This is another reason a case otherwise appropriate for small claims might have to be filed in district court instead.
-

The Clerk of Court brought by a lady with a question about whether a private investigator could serve a small claim for money owed. She has hired a PI, and he told her that he would serve the paperwork. Is this a valid service?

Maybe. GS 1A-1, Rule 4(h1) allows service by a private process server if the plaintiff has previously attempted service "by a proper officer" (that is, by the sheriff) who returned the summons unserved. Note that use of a private process server is NOT permitted in actions for summary ejectment, however, even in the event of an unsuccessful prior attempt at service.

I know that a registered agent should be served with a lawsuit against a corporation but can the officers be served in lieu of or in addition to the registered agent? In my case the registered agent is now deceased.

GS 7A-217, titled Methods of subjecting person of defendant to jurisdiction, governs service of process on individuals in small claims cases, but service on business entities such as corporations is governed by the general rules for service set out in GS 1A-1, Rule 4(j)(6). A corporation may be served by serving an "officer, director, or managing agent" of the corporation, or by leaving copies in the office of one of these people with the person in charge of the office. The corporation's registered agent is also a person who may be served, but the law does not require this; persons holding any of the listed positions are equally appropriate for service. The identity and contact information for these individuals is a matter of public record at the NC Secretary of State's website. The statute also permits a corporation to be served by registered or certified mail or designated delivery service addressed to an officer, director, or managing or registered agent.

On Friday, the office manager for a company that files numerous eviction notices on a regular basis came to court, and our file showed service by posting, but then she presented a certified mail card showing personal service. Question 1: Does the certified mail card need to be in the shuck before the court date, or can it be presented in court? Question 2: Does sheriff service supersede certified mail service? Question 3: If not, can magistrate award money judgment, based on that certified mail service?

Again, I like this question because it raises several important issues.

- Many magistrates are unfamiliar with service by certified mail, probably because most folks who file small claims cases don't know that it's available. Such service is authorized both for individuals (GS 7A-217) and corporations (GS 1A-1, Rule 4(j)(6), and it bypasses the sheriff's office altogether. Service in these cases is proven by affidavit and the signed delivery receipt. There is no requirement that these documents be included in the shuck prior to trial.
- Service by posting in a summary ejectment action presents a unique legal circumstance, in which a small claims magistrate acquires limited jurisdiction to act in a way that affects only the defendant's possessory interest in the posted property. You might think of this as "a little bit of jurisdiction." The court's authority in such a case does not extend to entering a money judgment. The magistrate who asked the question was not so limited, however, because service by certified mail gave the court full personal jurisdiction to award both possession of the rental property and a money judgment.
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Minimum Notice Requirements in Small Claims Actions

It's not hard to understand why every state in the United States offers its residents a small claims court. Small claims courts offer two advantages increasingly hard to come by in the court system: they're cheap, and they're fast. In 2009 the North Carolina General Assembly took steps to ensure that small claims cases aren't decided too fast by enacting minimum notice requirements. Prior to this legislation, a small claims defendant might be served Monday evening for a trial held Tuesday morning. The legislation enacted two separate amendments establishing different minimum notice requirements for (1) summary ejectment actions, and (2) all other small claims cases. As we shall see, despite their differences, the guiding principles for magistrates implementing the legislation are the same for both types of lawsuits.

The Two-Day Rule for Summary Ejectment Actions

When the sheriff's office receives a copy of the summons and complaint in a summary ejectment action, G.S. 42-29 requires prompt action: a copy must be mailed to the defendant "as soon as practicable," and a deputy must attempt personal service at the rental premises within five days. This visit must occur "at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays." If service is not accomplished at this point, the officer is authorized to post the process in a conspicuous place. The statute is silent on the legal effect of service not complying with the statutory minimum.

The Five-Day Rule for All Other Small Claims Actions

While the Two-Day Rule imposes a requirement on officers serving process, the Five-Day Rule directly applies to magistrates. G.S. 7A-214 states "if the time set for trial is earlier than five days after service of the magistrate summons, the magistrate shall order a continuance."

What Should the Magistrate Do When a Case Comes Up Too Soon?

What should a magistrate due when the minimum notice rule is violated? It depends on who shows up for trial.

If both parties appear and defendant requests a continuance, the magistrate should grant the continuance for at least sufficient time to comply with the relevant statute. In a summary ejectment action, if the defendant is served on Monday and the case is heard on Tuesday, the defendant's request that the trial be delayed until Wednesday should be granted. Similarly, an action for money owed served on Monday and called for trial on Thursday must be continued upon defendant's motion to the following Monday.

Both parties appear, but the defendant does not ask for a continuance or otherwise raise the issue of minimum notice. Neither statute makes the minimum notice requirement contingent on being raised by the defendant. In this situation, the magistrate should inform the defendant that the law entitles small claims defendants to a minimum time to prepare a defense and/or consult an attorney and offer to continue the case for a period complying with the applicable statutory minimum. If the defendant prefers to proceed immediately, the magistrate should note on the judgment that the defendant made a knowing waiver of the right to (five days/two days) minimum notice.

Only the plaintiff appears. When a defendant is not present at a summary ejectment action and service of process occurred the day before trial, there is a very real possibility that inadequate notice

is a factor in the defendant's absence. In other small claims cases the statutory language compels a continuance, and a knowing waiver is not possible because the defendant is not present in court. In both situations, the magistrate must continue the case on his or her own motion. The defendant is entitled to notice of the new trial date, and the procedure for this notification will vary depending on local continuance policy.

The plaintiff does not appear. When the plaintiff does not appear at trial, the violation of the minimum notice requirements is complicated by the established rules and procedures for dealing with plaintiffs who fail to appear and prosecute their claims. Obviously, if the court dismisses the case for failure to prosecute, the minimum notice violation does not arise. But what if the plaintiff's absence is prompted by the minimum notice violation? Imagine the following facts: The defendant is served on Monday in an action for money owed. The trial is scheduled for Wednesday. The plaintiff calls the Clerk's office on Tuesday and learns of the late service. Knowing that G.S. 7A-214 states that the magistrate shall grant a continuance in this situation, the plaintiff does not appear for trial on Wednesday. Assuming that the magistrate does not dismiss on these facts, should the result differ if the defendant appears and requests dismissal? What if the action is for summary ejectment rather than money owed?

In my opinion, there's much to be said for the traditional rule that a plaintiff who neither appears for trial nor requests a continuance will not be heard to object if the case is dismissed. Continuing a case when neither party has asked for a continuance and neither party appears places a burden on the court system to re-schedule the case and notify parties of the new trial date. And of course the magistrate can only speculate about the reasons a plaintiff does not appear—in reality, the court is unlikely to know whether the plaintiff was (unwisely) relying on the violation of the minimum notice requirements and assuming the case would be continued. The minimum notice statutes do not provide an answer to this issue, and reasonable minds are likely to differ about the best practice. Whatever the resolution, magistrates are strongly urged to coordinate with other small claims magistrates in their county (and district) so that procedurally identical cases receive a consistent response.

Counting time

GS 1A-1, Rule 6, sets out the general rule for calculating time in civil matters. That provision states that the first day of a time period is not included, and the last day is included (unless it is a Saturday, Sunday, or legal holiday, in which case the time period runs over to the next day when the courthouse is open and doing business). In cases in which the time period is less than seven days, however, Saturdays, Sundays, and legal holidays are not included. The result is that small claims actions, other than those for summary ejectment, may be heard no earlier than one week after service of process (i.e., if service is accomplished on Monday, the case may be heard no sooner than the following Monday).

The law applicable to summary ejectment actions specifically requires that service be accomplished "at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays." The first version of this legislation excluded "weekends and legal holidays" but the reference to "weekends" was deleted from the final legislation. The result is an exception to the general rule set out in GS 1A-1, Rule 6, with weekend days counted toward satisfaction of the two-day requirement. Consequently, service on Friday would allow a case to be heard on Monday, since Monday is the third day following service.

Counting Time Under Rule 6

- Don't count the first day
- Do count the last day
- Do count holidays and weekends
  - UNLESS less than 7 days
- If courthouse is closed on last day, time is extended to end of next day it's open
- If judgment is mailed, add 3 days.

Appeal: Time

Entry of judgment

- written
- signed
- filed

right to appeal (10 days)

open court

in writing to clerk

Counting Days

Judgment entered on Monday

Entry on	M	T	W	Th	Fr	Sa	Su	M	T	W	Th	Fr	Sa	Su
0	1	2	3	4	5	6	7	8	9	10				

Entry	Th	Fr	Sa	Su	M	T	W	Th	Fr	Sa	Su	M	T	W
	0	1	2	3	4	5	6	7	8	9		10		

Judgment entered on Friday

Extended time for appeal when judgment is mailed

Entry	T	W	Th	Fr	Sa	Su	M	T	W	Th	Fr	Sa	Su	M	T
0	1	2	3	4	5	6	7	8	9	10	**11**	**12**	**13**	⬆	

Judgment entered and magistrate mails on T, W, or Th: add 3 days

Extended time for appeal

Busy magistrate forgets to mail until Day 10: 10-day period is tolled. Maximum toll is 90 days from entry.

Entry	T	W	Th	Fr	Sa	Su	M	T	W	Th	Fr	Sa	Su	M
0	1	2	3	4	5	6	7	8	9	10	11	12	13	14
time tolled											**1**	**2**	**3**	**4**

T	W	Th	Fr	Sa	Su	M	T	W
15	16	17	18	19	20	21	22	23
5	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**

File Under 'Boring But Important': Counting Time in Small Claims Court

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : Civil procedure, Rule 6small claims

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Small claims magistrates know that the small claims statutes are filled with rules about time limits. For example, small claims cases must be calendared for trial within 30 days of the complaint being filed, but summary ejectment actions must be calendared within seven (excluding weekends and holidays). A defendant must be served no later than five days before trial in all small claims actions other than summary ejectment, which requires only a two-day notice. The list goes on. Magistrates often ask about how to calculate these various time periods and the purpose of this post is to provide information about that often confusing task.

Our starting point is GS 1A-1, Rule 6(a) of the Rules of Civil Procedure, which establishes clear rules for counting time, summarized as follows:

- The first day of the relevant event (e.g., a complaint is filed) is not included, but the final day is, *unless*
- The final day is a weekend or legal holiday on which the courthouse is closed, in which case the final day is the next business day (*see also GS 103-5),* and
- If the time period is less than seven days, intermediate weekend days and holidays are excluded.

Rule 6(a) is easy to apply. Take, for example, GS 7A-214, which provides that, in all small claims cases other than summary ejectment, "if the time set for trial is earlier than five days after service of the magistrate summons, the magistrate shall order a continuance." Imagine that summons is served on Wednesday, June 1. Applying Rule 6(a), the fifth day after service is calculated as follows:

- Wednesday: Day 0 (don't count the first day)
- Thursday: Day 1
- Friday: Day 2
- Saturday/Sunday: Intermediate weekend days excluded because the time period is less than 7 days
- Monday: Day 3
- Tuesday: Day 4
- Wednesday: Day 5 (Earliest allowable day for trial)

As you can see, calculating time under Rule 6(a) is straightforward. What is sometimes less straightforward, unfortunately, is whether Rule 6(a) applies to a particular time period. GS 1-593 states that "The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the Rules of Civil Procedure." Rule 6(a) itself states that it applies to "computing any period of time prescribed or allowed (1) by these rules, (2) by order of court, or (3) by any applicable statute, including rules, orders or statutes respecting publication of notices. . . ." (*numbering added by author).* But what is an "applicable statute"? Does the Rule apply to any and all time periods, so long as they appear in a statute? A definite answer to this question is surprisingly elusive.

What is clear is that Rule 6(a) applies to calculating time periods set out in the Rules of Civil Procedure and to similar statutory procedural rules such as those contained in GS Ch. 7A, Art. 19, governing small claims court, as well as to statutes of limitations. Winston v. Livingstone College Inc., 210 NC App 486 (2011) (stating the Rule ""applies to all

computations of time for statutory periods set forth in the General Statutes, including the statute of limitations. . . .") Even when Rule 6(a) does not apply, the NC Supreme Court has noted the "well established general rule" that in calculating time, one terminal day is counted and the other excluded, Harris v. Latta, 298 NC 555 (1979), and thus in many cases it matters little whether Rule 6(a) applies or not. See Pearson v. Nationwide Mutual, 325 N.C. 246 (1989) fn. 3, in which Justice Exum specifically recognizes and chooses not to answer the question in that particular case.) When a Rule 6(a) question comes up in small claims court, the issue typically involves the third aspect of the Rule: business days or calendar days?

As noted above, Rule 6(a) provides that in calculating time periods of less than seven days, intervening weekends and legal holidays are to be excluded. Thus, in the example above concerning the five-day minimum notice period for small claims actions other than summary ejectments, the actual time between service and trial is seven calendar days. GS 1A-1, Rule 1 states that the NC Rules of Civil Procedure – including Rule 6(a) -- apply "except when a differing procedure is prescribed by statute." Often, the legal analysis in Rule 6(a) cases boils down to whether a statute prescribes a "differing procedure."

Let's look at a couple of examples, beginning with an easy one. GS 42-28 requires a summary ejectment action to be calendared for trial at a time "not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays." Under Rule 6(a) seven days means seven calendar days; interim weekends and legal holidays are not excluded. Because GS 42-28 specifically says otherwise, however, Rule 6(a) does not apply to this time period, and we follow the statutory requirement requiring seven business days. (Note: If the final day falls on a weekend or holiday, however, the time for trial does not expire until the next day the courthouse is open, whether under Rule 6(a) or under GS 103-5).

Now let's look at a slightly trickier example. GS 42-29 requires service of process in summary ejectment actions to take place "within five days of the issuance of the summons, but at least two days prior to [trial], excluding legal holidays." The phrase "excluding legal holidays" is a clear indication of "a contrary procedure"-- Rule 6(a) never excludes holidays but not weekends – and so Rule 6(a) does not apply. The statute thus requires that service be accomplished at least two calendar days before trial unless a holiday intervenes. If trial is scheduled for July 5, service of process must occur no later than July 2.

The more challenging question related to this statute is presented by the "five days" time limit applicable to the sheriff. If the phrase "excluding legal holidays" modifies both the five-day period and the two-day period, the sheriff has only five calendar days (excluding legal holidays) in which to serve the tenant. On the other hand, if Rule 6(a) applies to the five-day period, intervening weekends as well as holidays are excluded. Based solely on legislative history, my opinion is that Rule 6(a) does in fact apply to calculating the five-day period in this statute, but in truth the statute is ambiguous.

For small claims magistrates, the application of Rule 6(a) will come up most often in a procedural context and thus will generally apply absent inconsistent statutory language such as that set out above. The larger question of whether and to what extent Rule 6(a) applies to non-procedural time periods set out in the General Statutes (for example, GS 42-26's requirement that rent must be at least five days late before a late fee may be imposed) awaits clarification by our legislature and appellate court.

Servicemembers' Civil Relief Act Applies to Family Cases Too

This entry was contributed by Cheryl Howell on February 13, 2015 at 5:00 am and is filed under Adoptions, Child Welfare Law, Civil Law, Civil Practice, Civil Procedure-General, Family Law, Small Claims Law. http://civil.sog.unc.edu/servicemembers-civil-relief-act-applies-to-family-cases-too/

In January we were reminded by the North Carolina Supreme Court in *In Re J.B.* that:

1) We have military personnel living throughout our state, not just in districts with military facilities, and

2) The federal Servicemember's Civil Relief Act, 50 U.S.C. app. sec. 501, et. seq., (SCRA) applies to **all non-criminal judicial and administrative proceedings** involving service personnel, including domestic and juvenile cases.

The Act contains *no exception* for any civil proceeding. So it covers custody, divorce, support, equitable distribution, 50B and 50C cases, abuse, neglect and dependency proceedings and termination of parental rights.

So what does the SCRA Require?

First: An Affidavit from Plaintiff

If a defendant has not made an appearance, no judgment can be entered until plaintiff files an affidavit stating whether defendant is in the military. 50 U.S.C. app. sec. 521. The term 'judgment' is defined as "any judgment, decree, order, or ruling, final **or temporary**." 50 U.S.C. app. sec. 511(9). The Act states: "[T]he court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit –

(A) Stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) If the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service."

The Act places responsibility for making sure the Affidavit is filed on the court. For an example of a court form created to help comply with this requirement, see the form adopted in Wake County.

If plaintiff's affidavit does not establish that defendant is in the military, the court can proceed with the case. However, the court may require a bond to compensate a defendant later allowed to set aside a judgment because he or she actually was in military service. In addition, the court can enter any other order "the court determines necessary to protect the rights of the defendant under this Act." 50 U.S.C. app. sec. 521(b)(3).

Second: Appointment of Attorney for Servicemember

If plaintiff's affidavit or other information before the court shows that a defendant who has not made an appearance is in the military, "the court may not enter judgment until after the court appoints an attorney to represent the defendant." 50 U.S.C. app. sec. 521(b)(2). As previously stated, the term 'judgment' is defined by the SCRA to include all orders, including temporary orders. This means the court cannot enter any order – temporary or permanent – before

appointing an attorney when defendant has not made an appearance. The SCRA does not define the role of the attorney, but it does require that the attorney attempt to contact the service member and consider requesting a stay of the proceedings. 50 U.S.C. app. sec. 521(d)

Third: Stay of Proceedings

After counsel has been appointed for a servicemember who has not made an appearance , the court must stay the case for *at least* 90 days either "upon motion by the appointed counsel, or on the court's own motion, if the court determines that:

1. There may be a defense to the action and a defense cannot be presented without the presence of the defendant; or

2. After due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists."

50 U.S.C. app. sec. 521(d).

The Act does not define 'stay of proceedings.' The term certainly means the trial court cannot enter final judgment, but does it prohibit the court from entering temporary orders, such as temporary custody or emergency domestic violence protective orders? North Carolina courts have not addressed the issue but at least one state supreme court has held the stay does not mean a court loses jurisdiction to act so it does not prohibit a court from entering temporary orders in custody cases, noting that a child's life does not go into "suspended animation" while a service member is on duty. *Lenser v. McGowan,* 191 S.W.3rd 506 (Arkansas, 2010). *See also* N.C. Gen. Stat. 1-75.12(stay pursuant to that statute does not terminate jurisdiction of trial court until 5 years after it is granted).

Fourth: When the Servicemember Has Notice of the Proceeding

A servicemember who has notice of the proceedings may request a stay pursuant to Section 522 of the Act. The SCRA specifies that a request for a section 522 stay does not constitute an appearance "for jurisdictional purposes," 50 U.S.C. app. sec. 522(c), but does not say that the request does not constitute an appearance for other purposes. This indicates that a servicemember who requests this stay is *not* entitled to a court-appointed attorney, pursuant to 50 U.S.C. app. sec. 521(b)(2) discussed above, because the request is an appearance.

Section 522 provides that, at any stage of the proceeding before final judgment the court may upon its own motion, and shall upon motion of the service member, stay the proceeding for *not less than* 90 days if:

3. A letter or other communication establishes that a servicemember's military duty requirements materially affect the servicemember's ability to appear and gives a date when the servicemember will be available to appear; and

4. A letter or other communication from the servicemember's commanding officer shows that the servicemember's military duty prevents appearance and that leave is not authorized for the servicemember at the time of the letter.

The court is not required to grant the stay unless the court concludes, based on this information provided, that the servicemember's current military duty requirements materially affect the servicemember's ability to appear.

If the initial Section 522 stay is granted, a servicemember can request an additional stay "based on continuing material effect of military duty on the servicemember's ability to appear." 50 U.S.C. app. sec. 522(d)(1). In support of the request for additional time, the court must receive letters or communications containing the same information required for the first stay request. If the court refuses the additional time, the court must appoint an attorney for the servicemember before proceeding with the case. 50 U.S.C. app. sec. 522(d)(2).

How is the Court-Appointed Attorney Paid?

SCRA does not answer this question. This appears to be a wonderful opportunity for pro bono service.

There's definitely more to be said about the SCRA, but this covers the basics.

Big Law: Basic Bits of Bankruptcy

As many magistrates know from dealing with federal housing law, things can get especially complicated when federal law intersects with state law. Because bankruptcy law is an extremely complex subject, when I get a question involving that subject the image that comes to mind is the scene from the old movies when the hero shoves a cross in the face of Dracula: “Back! Back, you monster!” But the truth is the portion of bankruptcy law relevant to small claims is not complex at all.

In this first post to the Big Law Listserv, I want to take a look at six frequently asked questions and their answers. If you have follow-up questions, concerns, or comments, send them to me. I’ll do another post next week addressing the issues you raise, as well as sharing one interesting telephone call I received recently on the subject.

Here are six Basic Bits for your small claims tool kit:

Basic Bit #1: *What to do when you hear that the defendant may have filed for bankruptcy.*

Bankruptcy is significant in small claims court for one reason only-- the automatic stay provision. This federal law forbids creditors from trying to collect debts from the debtor, whether by calls and letters demanding payment, by filing or persisting in a legal action on the debt, or by seeking to enforce a judgment obtained before the stay went into effect. The stay also applies to secured parties attempting to repossess or sell secured property. A creditor who violates the automatic stay provision may be subject to civil damages, sometimes including attorney fees and punitive damages. The "automatic" part of an automatic stay means that the debtor is entitled to the stay even if it went into effect several hours ago and creditors have not yet received formal notification. A judgment entered by a magistrate in small claims court in violation of the automatic stay provision is void, and a magistrate who knowingly enters judgment when a stay is in effect violates federal law. So, when you hear the word "bankruptcy," the first thing you should do is STOP, and find out some details.

The most important detail is whether the debtor has actually **filed a petition** for bankruptcy. Sometimes a defendant may indicate that he plans to file for bankruptcy. In one case, a defendant presented a letter from his lawyer stating that the attorney represented him in his “bankruptcy case.” Closer questioning revealed that the debtor had not yet actually filed a petition. The automatic stay provision is triggered when a petition is filed, so be alert to this particular detail.

Basic Bit #2: *What does the debtor have to do to prove that she is entitled to the stay?*
Nothing. Because the stay is automatic when a petition for bankruptcy is filed, its protections are in force even if the debtor is not prepared to prove that she has actually filed for bankruptcy. The stay clicks into place the moment the petition is filed. A magistrate with reason to suspect that the defendant may have filed for bankruptcy has a couple of options. If the magistrate has

doubts about whether the defendant has actually filed for bankruptcy, the magistrate can determine the facts by consulting the appropriate bankruptcy court. (Details about how to accomplish this will be provided in the next post.) Another option is to continue the case to allow time for the parties to gather documentation for their claims—whether a claim by the plaintiff that the debtor has not actually filed for bankruptcy, or a claim by the defendant that she has.

Basic Bit #3: *If the magistrate has reason to believe that the debtor has filed for bankruptcy, what does the magistrate do with the case?*
The magistrate should use AOC G-108, checking the block near the bottom of the page labeled "BANKRUPTCY." This places the case on inactive status, so that a creditor may reinstate his claim in the future (assuming it is not resolved in the bankruptcy proceeding) without paying another filing fee or risking dismissal due to the statute of limitation. A magistrate should not dismiss a case because of the automatic stay provision.

Basic Bit #4: *If the stay begins when a bankruptcy petition is filed, when does it end?*
The purpose of the automatic stay provision is not to forever bar a creditor from securing payment of a debt, but is instead to allow time for a bankruptcy trustee to develop some sort of payment plan that treats all creditors fairly. In what is known as Chapter 7 bankruptcy, the trustee identifies and collects all qualifying property belonging to the debtor and invites creditors with outstanding claims against the debtor to make their claims known. The trustee will sell the qualifying property and distribute the proceeds among the creditors. The debtor is then "discharged" from any further liability on pre-bankruptcy debts. At this point, the stay no longer applies (although the debtor will almost certainly have a compelling defense in that the debt has been discharged in bankruptcy). Other reasons a stay might terminate arise when a case is closed or dismissed. A bankruptcy case is closed when a payment plan has been developed and the debtor has complied with the plan. A case is dismissed when the bankruptcy court finds that the debtor is for some reason not entitled to pursue the claim.

EXAMPLE: Creditor filed an action against Debtor in small claims court seeking to repossess a washer-dryer set. As soon as he is served, Debtor files for Ch. 7 bankruptcy, triggering the automatic stay provision. The small claims judge correctly uses G-108 to place the case on inactive status, pending resolution of the Ch. 7 case. The bankruptcy court dismisses the case based on a provision in the Bankruptcy Code allowing dismissal if (1) the debtor is an individual; (2) the debts are primarily consumer debts; and (3) granting relief would be a substantial abuse of the bankruptcy law. (For example, the debtor has a history of running up consumer debt and then seeking discharge in bankruptcy court.) The plaintiff/creditor returns to small claims court with a copy of the dismissal. The clerk of court now has authority to re-calendar the case for hearing in small claims court.

Basic Bit #5: *What should I do if I entered judgment before I learned that an automatic stay was in place?*
The best course of action is to confer with your supervisor about how to proceed. Because you had no authority to enter judgment in violation of the automatic stay, your judgment is void. A magistrate does not have the power to set aside a void judgment, but a district court judge does. Neither a plaintiff nor a defendant benefits from having a void judgment on the record—the

defendant for obvious reasons, and the plaintiff because any attempt to enforce the judgment would subject him to potential liability at the hands of the bankruptcy court. Ideally, one of the parties will file a motion asking a district court judge to declare the small claims judgment void, but in the absence of a motion by one of the parties, the district court may proceed on its own motion.

Basic Bit #6: *Does the automatic stay apply to actions by a landlord to recover possession of rental property?*
Yes. A leasehold interest in property is a thing of value in the eyes of the law, and an effort to take it from a debtor violates the stay provision. Landlords faced with the prospect of tenants living rent-free for an indefinite period are not without recourse, however. Bankruptcy law provides landlords with a procedure for seeking modification of the stay to allow collection of rent, and sometimes to regain possession of the rental property. Recent changes in federal law have complicated the determination of whether a stay is in effect as far as a summary ejectment action is concerned, but in every small claims case the magistrate should assume the stay applies unless the plaintiff is able to furnish documentation from the bankruptcy court that it does not.

Summing it up:
--If you hear the word bankruptcy mentioned in connection with a small claims case, STOP and inquire whether the debtor has actually filed a petition for bankruptcy.
--Remember that the debtor is not required to prove that a petition has been filed.
--Use AOC-G-108 to place a pending case on inactive status while the stay is in place.
--Read carefully orders from the bankruptcy court to determine whether the stay remains in place, has been modified, or has ended.
--If you enter judgment and discover later that the automatic stay was in place, confer with your supervisor about how to proceed.
--Remember that the automatic stay applies to actions to recover possession, both of personal property and of rental property.

Next post:
--How to tell whether a defendant has filed a petition for bankruptcy;
--A small serving of information about exceptions to the automatic stay provision;
--An interesting case example.
--Your questions, answered.

Bankruptcy and Small Claims Court, Part 2

HOW CAN I BE SURE? As mentioned in Part 1, the automatic stay is activated when a person actually files a petition for bankruptcy. Sometimes you may not be sure whether a defendant is exploring the possibility of filing for bankruptcy, or has gone so far as to file a petition. That information is available by calling VCIS (Voice Case Information Systems. That number for the North Carolina Eastern District is 866-222-8029, option 12. The number for the Middle District is 910-333-5532. For the Western District, the number is 800- 884-9868. There is no charge for this service. When I gave it a try, I found it to be fast and simple.

WHAT'S A RESIDENTIAL LANDLORD TO DO? There are times when a landlord is simply stunned to learn that the small claims judge is unable to proceed simply because a tenant has filed a petition for bankruptcy. When they ask, you can tell them, "No, this does NOT mean that he gets to live there forever rent-free." The law provides landlords with a way to regain possession of rental property if the tenant does not pay rent. That's the good news. The bad news is (1) the landlord has to seek this relief directly from the bankruptcy court, (2) most landlords are able to effectively access this relief only by hiring an attorney, and (3) there is a $150 filing fee associated with the motion for modification of a stay.

I contacted the Bankruptcy Court for the Eastern District and asked the clerk what magistrates should say when landlords ask what they should do next. I thought maybe the Court might have some simple procedure (similar to small claims court) that would allow landlords to act for themselves, rather than having to hire an attorney. If not that, I thought there might at least be a brochure answering common questions that magistrates could provide to landlords in this situation. At least for the Eastern District Bankruptcy Court, that is not the case.

According to the clerk, landlords represented by counsel are usually successful in obtaining relief from the Court, but few unrepresented parties are capable of correctly following the required procedure. Also, the purpose of the law allowing a stay to be modified upon request by a landlord is NOT to allow landlords—in preference to other creditors—to obtain a judgment for back rent. Typically, in residential lease cases, the Court orders that tenants make current rent payments as those come due, or else face eviction. Consequently, when that landlord next appears in front of you, it is usually in the context of his effort to secure possession of rental property.

ROUND TWO. Quite often a landlord will reappear in small claims court, once again seeking possession of residential rental property. The question for the magistrate at that point is whether the court has regained jurisdiction to act. If the landlord shows you an order from the Bankruptcy Court dismissing the case, that determination is fairly straightforward. When the order does not dismiss the case, but instead modifies the automatic stay provisions, the small claims court's authority to proceed may not be quite so clear.

The magistrate must closely examine the language of the federal court's order to identify precisely what conditions must be present in order for the small claims judge to act. A typical order might direct that a tenant/debtor make regular rent payments as they come due, and provide that if a tenant defaults, the automatic stay is lifted as to an action to recover possession of the property. The first question a

magistrate must answer in this case is whether the tenant has defaulted in making rent payments. If so, the automatic stay is modified to allow one narrow exception: the small claims judge has authority to hear and decide an action in which the landlord seeks possession of rental property. The magistrate would thus hear the case just as any other action for summary ejectment. A magistrate would not, however, have authority to make any sort of monetary award in this situation.

WHAT WOULD *YOU* DO? (With thanks to the magistrate who sent in this question.) Company A opens an account with Pop's Building Supply, owned by Pop, and they do business for many years. Pop retires and Pop's son begins to run the business. Son believes in The Modern Way of Doing Business and incorporates the business under the name of Pop's Building Supply, Inc. The account that was originally established with the old man continues on without change, just as it has for many years. Unfortunately, the business under Son doesn't do well, and Pop's Inc. files for bankruptcy, owing a large debt to Company A. Company A brings an action for money owed against Pop's, Inc., which immediately produces its petition for bankruptcy, date-stamped yesterday. Company A says "We don't know nothing 'bout no corporation. Our contract was with Pop, and HE hasn't filed for bankruptcy." How do you rule? *See the answer below, following a brief intermission for a discussion of a completely unrelated matter.*

COMPLETELY UNRELATED MATTER: Can a magistrate perform a wedding in a county other than the one in which s/he serves? Yes. In fact, it is entirely appropriate for the license to be obtained in County A, the magistrate to work in County B, and the wedding to be performed in County C. A magistrate has legal authority to perform a wedding anywhere in the State of North Carolina. In the situation above, the license would be returned to the Register of Deeds in County A, and the fee returned to the Clerk's office in County B.

BACK TO THE CASE OF COMPANY A vs. POP'S, INC. You should refuse to hear the case based on the automatic stay provision of the Bankruptcy Code, using AOC Form G-108. The only issue before you is whether the plaintiff can proceed against this defendant, and this defendant has filed for bankruptcy. The question of whether Company A sued the right defendant is an interesting—but irrelevant—question. Company A sued Pop's Inc, and Pop's Inc. has filed for bankruptcy.
But what about that interesting question? What happens if Company A takes a dismissal against Pop's Inc., and files against Pop and Son individually. No bankruptcy problem here. Does the plaintiff win? Probably not. These facts indicate that Pop entered into an agreement with Company A to engage in a series of contracts on the following terms: Pop orders material, Company A delivers, Pop pays over time, rather than immediately. When Son placed his first order, both parties believed and behaved as though the terms of the contract remained the same, but Son had stepped into Pop's place as the contracting party. When Son incorporated, the same rationale applied to Pop's, Inc.—a contract came into existence, with terms unchanged from the original. The result is that Company A had contracts with Pop, Son, and Pop's Inc., all with the same terms. The specific evidence presented might change your opinion, but it seems extremely unlikely that either party understood that Pop would remain personally liable for debts incurred after he retired. It is also unlikely that Son formed a corporation, but wished to remain personally liable for the debts to Company A. Most likely, one of his reasons for incorporating was to avoid exposure to personal liability for business debts. Just because Pop's Inc. has declared bankruptcy doesn't mean that Company A can hold other persons responsible for performing a contract neither of them entered into. (Earlier contracts, yes, but not this one.) What if Company A came forward with a signed document in which Pop agreed to personally guarantee the debts of the corporation? That evidence, of course, would make a big difference in your decision.

SAMPLE / Opening Statement for Small Claims Court

Good morning. I am Judge _____ and this is _____ County Small Claims Court. I am going to read a list of cases that are scheduled to be tried today. If I call your name, or the name of the case you are here for, please stand, identify yourself, and tell me whether you are prepared for your hearing today. [Depending on how your calendar is designed, you may want to insert some information about the procedure for deciding which cases are tried first.} Be sure that you have turned off your cell phones, and sit quietly while the court is in session.

I want to talk with you a moment about what to expect while you're in court. Some of you may have watched small claims court on television and think that what happens here in this courtroom will be like it is on television. That is certainly not the truth. Some of you may be feeling nervous, or worried that you'll be expected to follow technical legal rules. That is also not true. The purpose of small claims court is to allow citizens who are not lawyers to come to court to tell their side of the story to an impartial judge. Everyone will have an opportunity to talk, and no one will be allowed to interrupt while someone else is talking,

When I call your case, come to front of the courtroom and sit down. The person who brought this lawsuit (the plaintiff) sits here, on my left, and the defendant sits there, on my right. I will begin by asking you to swear or affirm that you will tell the truth, and then the plaintiff has a chance to tell me about your case. I may ask some questions to be certain I understand exactly what your side of the story is. The plaintiff brought the case, and so has the burden of proving it. That means that even if I think the plaintiff MIGHT deserve to win, I would have to rule against him. To win a case in small claims court, the plaintiff has to prove that the facts are PROBABLY as he says. Also, the law must say that when the facts are as plaintiff has proved, plaintiff is legally entitled to win. The plaintiff has to prove his case well enough so that he's PROBABLY entitled to win before the defendant even has to offer a defense. That means that if you are a plaintiff, and the defendant is not here, you still must prove to the court that the facts and the law entitle you to win.

After I've heard testimony from the person who brought the lawsuit, and any witnesses the plaintiff may have, if I believe that the plaintiff appears to be entitled to win so far, the defendant has a turn to begin at the beginning and tell his or her side of the story. At that time, I'll also hear testimony from witnesses for the defendant. Again, I will ask questions if I need to so that I can be certain that I understand defendant's side of the story. Both the plaintiff and the defendant have the right to ask questions too, but I will ask you to direct those questions to me. During the trial no one should speak directly to anyone but the judge.

After I've heard both sides of the story and looked at any evidence you have, I will either tell you my decision right away, or do some research on the case and mail you my decision. Most of the time, I decide right away. If I have to delay for some reason, I am required to decide within ten days. The law gives every person the right to appeal a decision made by a judge, and I will remind you of that at the end of trial. I will write down my decision and the clerk will record it. If my decision is for the plaintiff, after ten days the plaintiff can go to the clerk and begin the procedure for collecting his money. No one has to pay any money today.

Who Can Appear on Behalf of a Party in Small Claims Court?

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : small claims procedureunaithorized practice of law

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Established law in North Carolina, and throughout the country, provides that parties to a lawsuit may represent themselves or be represented by an attorney. Representation by anyone else is generally prohibited as the unauthorized practice of law. GS 84-4. In small claims court, there are two exceptions to this general rule, and the specifics about how, whether, and when those exceptions apply are a frequent source of questions that appear in my email in-box. Let's see if we can find a calm, clear space in that jungle!

As is often the case in small claims court, one exception to the general rule is furnished by summary ejectment law. GS 7A-216, which governs small claims procedure related to the small claims complaint, provides that the complaint must be signed "by the party or his attorney, except that [a summary ejectment complaint] may be signed by an agent for the plaintiff." GS 7A-223, titled *Practice and procedure in small claims actions for summary ejectment,* states that "[i]n any small claim action demanding summary ejectment or past due rent or both, the complaint may be signed by an agent acting for the plaintiff who has actual knowledge of the facts alleged in the complaint."

The literal language of these statutes, referring only to who may sign a complaint, has always seemed to me to be curious wording. Neither statute makes reference to GS 84-4, or even to the provision of legal services other than signing the complaint. In any event, these statutes have long been interpreted to authorize the agent who signs the complaint to appear in court and present the case on behalf of the owner of the rental property. While I might prefer the law to be more specific in its authorization, I must admit that this interpretation makes sense. Landlord-tenant cases make up a majority of small claims cases, and informal observation indicates that the majority of those cases involve rental property being managed by someone other than the owner. A requirement that the owner either personally attend trial or hire an attorney to do so on behalf of the owner would substantially complicate a procedure that the General Assembly has again and again attempted to simplify. Furthermore, given that the primary witness for the plaintiff is likely to be the property manager, such a requirement would have the odd effect of rendering trials for summary ejectment unique in Small Claims Land in routinely requiring the testimony of witnesses other than the parties themselves. And what would be the point of enacting a special rule allowing the agent to sign the complaint if the landlord is still required to appear in court or hire an attorney?

The most reasonable interpretation of these statutes does seem to be that the agent who signs the complaint may also appear in court on behalf of the landlord and present the case. Conceding that, the scope of the exception established by these statutes is still not altogether clear. For example, what if the landlord signs the complaint, but then the property manager appears in court on behalf of the landlord? Does signing the complaint authorize the agent to defend on behalf of the owner against a counterclaim? What sort of "personal knowledge" is required in order for the exception to apply? What if the property management company assumed responsibility for the property last week? What if the company manages hundreds - or thousands! - of rental properties, and no one employee actually has first-hand knowledge of the details of the rental? These are questions that have not been addressed in North Carolina law, and small claims magistrates are left to do their best to determine the practical application of the statutes.

The second exception to the requirement that a party represent itself or be represented by an attorney was established by Duke Power Co. v. Daniels, 86 NC App 469 (1987), which held that corporate parties may appear in small claims court through an agent. Judge Phillips, writing a two-page opinion on behalf of the Court, said:

[I]n enacting our small claims court system and in devising the simple forms and procedures that are used followed therein . . . the General Assembly apparently intended, it seems to us, to provide our citizens, corporate as well as individual, with an expedient, inexpensive, speedy forum in which the can process litigation involving small sums without obtaining a lawyer, if they choose to do so.

In 2002, the Court of Appeals reiterated this rule in Lexis-Nexis v. Travishan Corp, 155 NC App 205. In its opinion, the Court recognized the small claims exception for corporations, but declined to extend the exception to a corporation's appearance in district court by the corporate president and sole shareholder.

There are two questions that commonly arise related to the "corporation exception" in small claims court. First, does the exception apply to other business entities such as a limited liability company or professional association? Second, what constitutes an "agent" for purposes of the exception?

No North Carolina cases have addressed the question whether the corporate exception applies to similar business entities. In my opinion, the exception should apply, because the straightforward logic of Judge Phillip's reasoning in Duke Power is no less compelling in regard to these businesses. (Obviously, the issue does not even arise in those cases in which the business is a sole proprietorship. In such a situation, the proper party is the individual who owns and operates the business, and who can appear pro se under the general rule.)

Similarly, no case has directly addressed the question of who can appear as an agent for the corporation. It is worthy of note that the agent in Duke Power was an employee in the utility company's credit department, which suggests that an agent is not required to be an officer of the corporation. A quick survey of other jurisdictions with a similar rule reveals substantial unanimity in allowing a corporate officer or employee to appear. *See e.g.*, Cleveland Bar Assn. v. Pearlmen, 832 NE2d 1193 (2005) (Ohio statute permits "bona fide officer or salaried employee" to represent corporations to limited extent in small claims court); Babe Houser Motor Co. v. Tetreault, 14 P3d 1149 (2000) (Kansas law allows corporate officer or full-time employee, in small claims only).

It's important to note that these are the only exceptions to the general rule requiring parties to appear on their own behalf or be represented by attorneys in small claims court. When a party's spouse or relative appears in court, whether to request a continuance or otherwise represent the party's interest, the magistrate should not permit that person to proceed—unless of course the person also happens to be an attorney and is appearing in that role.

New Law: Who Can Appear on Behalf of a Party in Small Claims Court and on Appeal?

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : small claims, small claims proceduresummary ejectment

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In a previous post I talked about the law related to who can appear on behalf of a party in a small claims case. To briefly reiterate, small claims law makes two exceptions to the general rule requiring parties to be represented by an attorney if they do not choose to represent themselves. One exception allows corporations to appear in small claims court through an agent. See *Duke Power Co. v. Daniels*, 86 NC App 469 (1987). The other exception, applicable only in summary ejectment actions, allows agents with actual knowledge of the relevant facts to sign the summary ejectment complaint and (presumably) represent the plaintiff/owner in the small claims action. See *GS 7A-216* and *7A-223*. Both exceptions are well-established and reasonably straightforward, subject to a few somewhat uncertain points I addressed in my previous post.

Questions sometimes arise about whether these exceptions continue to apply when a small claims case is appealed to district court for a trial de novo. My opinion has been that they did not. In the first instance – the "corporate exception" – the Court of Appeal's decision in *Lexis-Nexis v. Travishan*, 155 NC App 205 (2002) specifically refused to extend the "small claims exception" to corporate appearances in district court. While the case did not specifically deal with an appeal from a small claims action, nothing in the somewhat emphatic language of the opinion suggested that a case's origin in small claims court might call for a different rule. In the second instance – the "summary ejectment" exception – the statutory basis, set out in two different statutes, is an authorization for an agent to sign the small claims complaint. This limited authorization, in my opinion, simply could not be reasonably read to negate the otherwise-clear prohibition of the unauthorized practice of law should the case land in district court on appeal. GS 84-4.

In 2017 the General Assembly enacted Senate Bill 88, authorizing small claims magistrates to sever claims for possession and money damages in summary ejectment actions under certain conditions. 2017-S.L. 143. That legislation became effective on October 1, 2017, and its implementation has raised a number of procedural questions, some of which I addressed in a previous blog post. Somewhat overlooked in the flurry are two provisions in the new law related to the subject of this blog. Whether and how they change the law set out above is the topic of this post.

The first provision amends GS 7A-222 to add subsection (c), which states: "Notwithstanding GS 84-4, a party in a small claim action shall not be required to obtain legal representation." As mentioned above, well-established law provides that parties may be represented by attorneys or represent themselves, so this amendment appears to do little to change existing law: parties are not required to be represented by attorneys because they are entitled to represent themselves. Corporations, however, are unable to represent themselves except by an agent, and so this amendment can be read as a codification of the "corporate exception" established in *Duke Power.* The new law also answers the question about whether that exception extends to business entities other than corporations, such as LLC's and PA's.

The precise phrasing of this provision troubles me a little bit, in two ways. First, the words "[n]otwithstanding GS 84-4" seems to suggest that what follows is in conflict with that statute. GS 84-4, however, specifically limits its application to exclude situations in which a party is acting "in his own behalf as a party" or when a court appearance is "otherwise permitted by law." Assuming I understand it correctly, the amendment seems to be consistent, rather than in conflict, with GS 84-4. Second, the General Assembly chose to phrase the amendment in the negative: A party shall not be

required to obtain counsel. Because any parties capable of doing so are entitled to represent themselves as an alternative to obtaining legal counsel, the amendment is presumably implicated only when a party—a corporation, for example—is an entity other than a legally competent individual. Most significantly, the statutory phrasing does not identify acceptable alternatives to counsel in small claims actions.

Does the amendment change current law applicable to small claims court? Certainly, nothing in the amendment suggests any intention to impose additional restrictions on who may represent a party in small claims court, and so it seems safe to assume that the corporate and summary ejectment exceptions remain in place. Does the amendment expand the list of actors who might appear? As I've said, the amendment probably gives additional support to the current reading of the corporate exception as extending to other business entities. Does it authorize spouses, employees of unincorporated businesses, or helpful neighbors to appear in court on behalf of plaintiffs who can't make it for one reason or another? While there may be some narrow technical legal argument to be made for such a reading, I don't think so. The support for such a reading is slight, and the chaotic consequences of such a rule so probable that a more traditional, conservative reading seems far preferable.

The second provision amends GS 7A-228 to add a subsection making the same change for "any party in an action appealed for a trial de novo." This amendment clearly changes the law for corporations in small claims appeals. As I've said, corporations are unable to represent themselves, and necessarily always act through an agent. The "corporate exception" recognized in Duke Power applied only to small claims court, and the effort to expand the exception to district court appearances was emphatically refused by the Court of Appeals in Lexis-Nexis. The new legislation mandates some version of the "corporate exception" for small claims appeals, although it remains to be seen whether the appellate courts will expound upon the requirements for an acceptable agent in such cases.

What is not so clear is the status of the "summary ejectment exception" in small claims appeals under the new legislation. In these cases, the property owner is the real party in interest and thus the named plaintiff, but these individuals quite often do not actually appear in small claims court. They are instead represented by an agent "with actual knowledge." In the event of an appeal, these owners do have the option of appearing on their own behalf, thus not implicating the amendment's provision that no party shall be "required to obtain legal representation." This interpretation of the law does, however, result in a rule that allows greater leeway for plaintiff-landlords wishing to avoid legal fees at the small claims level than on appeal. Under the new legislation, for every other category of plaintiff, the application of the rules is the same at both levels. Of course, the inconsistency arises in the first place from the "summary ejectment exception" preferentially benefitting plaintiff-landlords at the small claims level, and there may well be sound reasons for maintaining it in light of the differences between the two courts.

Once again, we are reminded that even brief, seemingly-straightforward changes in the law often raise a multitude of uncertainties about how the new law will be interpreted and applied. At least it's never boring!

POINTS TO REMEMBER IN MAKING DECISIONS ABOUT EVIDENCE

Distinguish between the decision to admit evidence and the decision about the weight you give to evidence. In general, evidence is admissible and entitled to consideration if it is *relevant* to an issue in the case and *reliable (*that is, likely to be true).

Why?

- Small claims court is not subject to review on appeal in the same way other trial courts are, so whether evidence does or does not become part of the record is not relevant in the same way.
- Small claims cases never involve juries, and so the legal principles governing consideration of evidence that apply to trials before the judge without a jury are more relevant than are the rules used in jury trials.

Unless evidence is objected to, or unless you, the judge, feel that the evidence is such that it might improperly bias your decision, it should be freely admitted – and given appropriate weight.

When evidence is objected to, it is appropriate to rule on the objection by admitting the evidence but pointing out that its weight is to be determined.

When an attorney repeatedly objects—or when you anticipate that this may happen – it is proper to instruct the attorney to hold objections until the close of the evidence, at which point the attorney may be allowed to present arguments about its weight and admissibility.

What you might say:

> *"As you know, we are about to conduct a trial before the judge without a jury, and one of the parties is not represented by an attorney, which is often the case in this court. My policy in such situations is to be lenient in allowing evidence to be offered, so that parties may testify without interruption. At the close of the evidence, I will hear any argument the parties would like to offer about evidence that you believe I should not consider. After hearing your argument, I will carefully consider all the relevant admissible evidence and determine what weight I will give it before arriving at my decision."*

Factors to consider in assessing credibility:

Motive to lie	Corroborating evidence	Person in best position to observe
Demeanor	Ability to provide details	Which version seems more likely?

A Note on Dealing With Attorneys

~ Remember that attorneys have a different role, and thus a different agenda, than you in your role as a judge.

~Don't expect that an attorney will necessarily approve of or agree with your decisions, or the way you run your courtroom. Be respectful and polite, but be prepared to be assertive if necessary in maintaining control of the courtroom.

~ Like everyone else, attorneys vary in skill and ability. Don't assume that an attorney is more knowledgeable than you about the law, and don't accept general proclamations about what "the law says" at face value.

~ Let attorneys know that you will not rule in their favor unless they explain their argument clearly, in a way that everyone in the courtroom can understand. Communicate that you won't be intimidated into ruling favorably by a complicated jargon-laden legal argument made quickly and without regard for your ability to understand. This is an appropriate requirement, and one that an advocate should anticipate and respect.

~Never hesitate to require an attorney to establish the truth of his or her contentions by supplying a copy of a case or statute, granting a brief continuance if necessary for the attorney to obtain a copy or for you to read it carefully. Insist that copies of cases and statutes be complete, and specifically ask whether the law provided is current as of the date of trial if you have any reason to be doubtful.

~Be aware of procedural errors frequently made by attorneys unused to small claims practice.

~Particularly when confronted with an attorney who is disruptive or insists on interrupting the testimony of the unrepresented party, be prepared to cite GS Ch. 8C, Rule 611, which provides:

> *The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.*

~Similarly, when confronted with an attorney who objects to your questioning of parties or contends that your participation is inappropriate because you are "helping," be prepared to cite Rule 614, which says

> *. . . The court may, on its own motion or at the suggestion of a party call witnesses, and all parties are entitled to cross-examine witnesses thus called. . . . The court may interrogate witnesses, whether called by itself or a party.*

Small Claims Procedure for Magistrates: Judgments, Orders, and the Difference Between Them

When a magistrate has heard evidence in a case and makes a decision based on that evidence, the formal document reflecting that decision is a *judgment* of the court. Form judgments for each kind of small claims case are provided by the AOC (designated as CVM forms), and they provide a valuable guide to the finding and conclusions required for a proper judgment. While the AOC forms are convenient, the law does not require their use, and some counties routinely utilize different forms. The AOC forms do reflect thoughtful decisions about what should be included in a judgment, however, and a small claims magistrate is advised to investigate further before deciding to routinely deviate from or ignore some portion of the judgment form.

No form judgment will be a perfect fit for all small claims cases, and magistrates should remember that the ultimate goal is for the judgment to accurately set forth the court's actual decision. The judgment form is a tool that should be modified as needed to that end. Small claims judgments may be vitally important in determining the rights of parties in subsequent lawsuits, but this importance depends in large part on whether it is possible to ascertain what was decided in the small claims action. For example, if the magistrate fills out a judgment form in a negligence action by merely checking the block indicating that "plaintiff has failed to prove the case by the greater weight of the evidence," it is unclear whether the magistrate found (1) that the defendant was not negligent or (2) that plaintiff was also negligent and thus barred from recovering damages. If a magistrate provides this information in the section of the form labeled "Other," this determination of the negligence of the parties would be conclusive in a future lawsuit between them. Thus a magistrate should consider whether the circumstances in a particular case warrant additional specificity in identifying the reasons for the magistrate's decision.

A magistrate enters judgment by completing and signing the judgment form and filing it with the clerk. G.S. 7A-224. G.S. 1A-1, Rule 58. *Entry of judgment* is one of the law's Momentous Moments—like the effect of a deed, a divorce decree, or an honorable discharge, the rights of an individual are significantly different the moment after judgment is entered than the moment before. Because of this, a fundamental legal preference is expressed in the phrase "finality of judgments." A judgment can be modified or set aside, but not without observation of formal legal requirements and never without good reason.

One of many confusing facts in the world of small claims law is that when a plaintiff fails to prove the case by the greater weight of the evidence, the law (and the AOC forms) uses the term *dismissal* to describe the outcome. G.S. 7A-222(a). In the larger legal world, to say a case is *dismissed* means that it has come to an end without the court hearing the evidence and deciding it on the merits. In Small Claims Land, that's also true, but the word is used more broadly to encompass a decision on the merits against the plaintiff.

While the terminology overlaps, it's important to distinguish the two very different outcomes, one of which is a judgment on the merits and the other of which is . . .not. Instead, the other (also, confusingly, termed a *dismissal*) brings a case to an end without a judgment being entered. The AOC form for recording the latter event —and actually other

significant events occurring during the lifetime of a case—is G-108, the generic *Order* form. G-108 may be used to record a dismissal in any of the following events:

1) The plaintiff, at some point prior to completing the presentation of evidence, has decided not to go forward with the case at this time (a *voluntary dismissal*).
2) The plaintiff has finished presenting evidence (and is thus no longer entitled to dismiss the case as a matter of law) but is given permission by the court to dismiss the case (also a *voluntary dismissal*).
3) The plaintiff failed to appear for trial (an *involuntary dismissal*).
4) Neither party appeared for trial (an *involuntary dismissal*).

Dismissals, both voluntary and involuntary, are governed by G.S. 1A-1, Rule 41, and cases involving Rule 41 are some of the most confusing in civil procedure. There are a number of reasons for this, most of them involving the impact of a dismissal today on the plaintiff's right to re-file the same case at some point in the future. A voluntary dismissal can be advantageous to a plaintiff by extending the statute of limitations in his case, but an unwary plaintiff may run afoul of the "two-dismissal rule" and forever lose the right to obtain a judgment on the merits of the case. See my colleague Ann Anderson's post on this topic.

G-108, the AOC Order form, directly presents this question of whether a plaintiff will be allowed to re-file the dismissed case in the form of two checkboxes at the top of the form. If the box labeled *with prejudice* is checked, the plaintiff is barred from later filing an identical action. Checking the box labeled *without prejudice*, on the other hand, preserves the plaintiff's right to sue the defendant at a later point for the same alleged wrong.

Generally, a voluntary dismissal is without prejudice. A magistrate should check the box indicating with prejudice only if the plaintiff so indicates. An example of an appropriate fact situation would be if the plaintiff informs the court that the plaintiff wishes to take a voluntary dismissal because the defendant has paid all that is owed.

Generally, an involuntary dismissal is *with prejudice.* If the plaintiff fails to appear and the defendant appears and requests a dismissal, the law provides that the dismissal is with prejudice. When neither party appears, the same result generally applies, although a magistrate may dismiss without prejudice if justice requires.

In some cases it may be best for the magistrate to check neither box and instead explain the dismissal. A common example arises when a plaintiff files a case in small claims which is not eligible for hearing in that court. A dismissal with prejudice is subject to being understood as a ruling that the plaintiff may not refile the action in any court. A dismissal without prejudice is sometimes misunderstood by a plaintiff unfamiliar with the law to mean the case can be refiled in small claims court. In such a case the magistrate should simply check "involuntary dismissal" and write on the order form that the magistrate is without jurisdiction to hear the case in small claims court.

Entering Judgment

Write it

- Dispose of all claims as to all parties, including identification of relief requested in complaint but not considered by the court.
- Modify your judgment as necessary to make your decision clear.
- Double-check sufficiency of description of rental property in complaint
- Correctly complete "undisputed rent" and "rate of rent per" in every case.
- Identify specifically nature of "other damages" awarded.

_____
_____
_____
_____

Say it

- Read an edited version of what you've written in open court.
- Suggestion: <u>After</u> announcing your decision, provide additional information of your choice, and make that standard practice as well.

_____
_____
_____
_____

- Decide whether (and how) you will include the following information:

  The reasons for your decision
  - Opportunity to "teach school" for repeat plaintiffs
  - Write out standard language for common situations, making sure to avoid legal vocabulary and that your statements are accurate.
  - Pay special attention to explanation of impact of service by posting on money damages.

_____
_____
_____
_____

A losing party has a right to appeal to district court for an entirely new trial.
- How to do it (time limits, procedure)
- What it costs
- Available stay of execution (indigency exception)

_____
_____

The law requires a waiting period before any judgment in a civil lawsuit may be enforced. In small claims court, that period is 10 days.

- How to obtain writ of possession.
- What it costs, and what will happen.

_____
_____
_____
_____

Be extremely careful about suggesting subsequent interactions between the parties.

- A landlord who accepts money from a tenant post-judgment has entered into a new lease agreement.
- Any money paid by a tenant on a money judgment should be paid directly to the CSC.
- A landlord who attempts to gain possession of rental property without first obtaining a writ of possession may be civilly liable.

_____
_____
_____
_____

Once you're done, you're done.

Your judgment becomes official when it is written and signed by you, and it is "served" on all parties when you announce and sign it in open court. GS 1A-1, Rule 58. After that, there are only 3 ways in which it may be changed:

1. You can correct clerical errors.
2. Your judgment may be appealed. This is the procedure for addressing legal errors.
3. Your judgment may be set aside pursuant to a Rule 60(b) motion.
   - A magistrate may file a Rule 60(b) motion under extraordinary circumstances (e.g., void judgment, or judgment obtained by fraud on the court).
   - A magistrate may hear a Rule 60(b)(1) motion (seeking relief based on mistake, inadvertence, surprise, or excusable neglect) if authorized to do so by the CDCJ.
     Note: N/A to legal errors made by magistrate.
     Requires notice of motion to other party, hearing, and if defendant is movant, meritorious defense.

_____
_____
_____
_____

Sample Judgment for Plaintiff

I have listened carefully to the testimony you've presented and considered all the evidence in the case of Smith v. Jones. I am ready to make my decision (*enter judgment).*

Mr. Smith, I am going to rule in your favor on your claim for summary ejectment. Based on the evidence you've presented, I find that you and Mr. Jones entered into a lease agreement which required Mr. Jones to make monthly rental payments, due on the first of each month, in the amount of $500. I find that he paid $250 for August, and has made no payment since that time. And I find that you demanded payment of the rent at least ten days before filing this action, as required by law.

Mr. Jones, I listened to your testimony that you wanted, and intended, to pay Mr. Smith the rent, but were unable to do so because of circumstances beyond your control. I appreciate your coming to court today to explain the reason for your nonpayment, and I have no reason to doubt your word. Nevertheless, the law says that a landlord has the right to take possession of rental property when a tenant stops paying rent, even when the tenant is unable to make the payments. As a result Mr. Smith is entitled to possession of the rental premises at 110 S. Ginsberg Ave, in Colbin, NC, and to past due rent calculated up to this day in the amount of $850, as well as late fees for two months in the amount of $30, with a total judgment of $880. Mr. Jones, this judgment will earn interest at the rate of 8% until you pay what you owe to the clerk of court. The law provides that this judgment will become final after 10 days. Mr. Smith, 10 days from now if you wish to have this judgment carried out, you can go to the clerk's office to begin that procedure.

Mr. Jones, you have the right to appeal my decision to district court. You must give formal notice of appeal, and you may either do that now in open court, or you may file written notice of appeal in the clerk's office, so long as you do that within 10 days. If you do appeal, you must pay the costs of appeal to the clerk's office within 10 days.

Do either of you have any questions?

WHAT HAPPENS AFTER SMALL CLAIMS COURT

Location of Clerk's Office: _____

Notice to Both Parties

If you are either the plaintiff (the person suing) or defendant (the person being sued) and are unhappy with the decision of the magistrate, you may appeal the case to district court. You may appeal either by telling the magistrate at the trial that you want to appeal or by filing a written request with the clerk of court within 10 days after the magistrate ruled in your case. If you want to file a written request, ask the clerk to give you a copy of form AOC-CVM-303, which is the notice of appeal form. If you give written notice of appeal to the clerk, you must also send a copy of the form to the opposing parties in your case.

Whether you appeal in open court or file a written appeal, you MUST PAY $150 court costs to the clerk. These costs must be paid within 20 days of the magistrate's ruling, unless you are a tenant appealing from judgment in a summary ejectment action, in which case the costs must be paid within 10 days of the magistrate's ruling. If you cannot pay the appeal costs, you may be able to qualify to file your appeal as an indigent. If you are a tenant appealing an eviction and you want to continue to live at the premises until the case is heard on appeal, you will be required to pay past due rent to the clerk and to sign an undertaking that you will pay rent into the court as it becomes due to keep the judgment from being carried out. If you meet the requirements for appeal as an indigent, you may be excused from the requirement that you pay past due rent in order to remain on the premises while the appeal is pending.

If one party appeals, there will be a completely new trial before a district court judge. (In some cases, the matter may be assigned first to an arbitrator. If that occurs contact the clerk to have the procedure explained to you.) The clerk will notify both parties of the trial date (usually by mailing the trial calendar), and both must appear at that time. If you are the defendant and don't appear at trial, the plaintiff will probably win the case. Both parties should bring all your evidence and witnesses to the trial. The trial before the district court judge will be more formal than the one before the magistrate; therefore, you may wish to consider hiring an attorney to represent you.

Notice to Plaintiff (Party Suing)

If you won your case, your judgment against the defendant is good for 10 years. Before the end of the 10 years, you may bring another lawsuit to extend the judgment an additional 10 years. If you have won a money judgment, it becomes a lien against any land owned by the defendant, which means the defendant cannot sell that land without paying your judgment. Just because you have a judgment does not mean that you will be able to collect it. The defendant must have enough property to enable the sheriff to sell the property to satisfy the judgment. You may try as many times in the 10-year period as you wish to collect the judgment.

If you have won a judgment that the defendant owes you money, the court cannot try to help you collect that money unless you have given the defendant an opportunity to claim his or her exemptions. "Exemptions" is a legal term referring to a judgment debtor's right to shelter certain property from being seized and sold to satisfy a judgment. After the judgment is rendered, you must get two forms (Notice of Rights and Motion to Claim Exempt Property) from the clerk. You must serve these on the defendant. The back of the Notice of Rights tells you how to serve the forms. If you have not heard anything from the defendant within 20 days after you have served the Notice of Rights and Motion, you may go to the clerk ask to have an execution issued. The back of the Notice of Rights form tells you what you have to bring to the clerk. If the defendant responds to your notice and claims exemptions, you may either (1) agree with the exemptions claimed and ask the clerk to issue an execution for non-exempt property or (2) object to the claimed exemptions and have the district court judge determine the exempt property. After the district

judge determines the defendant's exemptions, you may ask the clerk to issue an execution for all nonexempt property. You will have to pay $55 to have an execution issued--$25 for the court and $30 for the sheriff. Those costs will be added to the judgment to be repaid by the defendant. An execution is an order to the sheriff to seize and sell property of the defendant to satisfy the judgment. If you know of any property that belongs to the defendant, you should attach to the execution a description of the property and where it may be found to help the sheriff. The sheriff will sell any property that can be found and turn the proceeds over to the clerk of court, who will then turn the money over to you.

If the defendant pays all or part of the money owed to you directly, you MUST go to the clerk's office and indicate how much you have been paid.

If you have a judgment ordering the defendant to turn personal property over to you and if the defendant has not turned it over within 10 days after the magistrate enters the judgment, you may ask the clerk to issue a writ of possession to the sheriff. The cost to you for having the writ issued is $25, plus $30 for the sheriff. The sheriff will then try to recover the property from the defendant and turn it over to you. You may be asked to advance the costs of having the sheriff pick up the property.

If you are a landlord and have a judgment for eviction and the tenant fails to leave the premises within 10 days after the judgment was rendered, you may pay $25 and have the clerk issue a writ of possession to the sheriff. The sheriff will then remove the defendant from the premises. You will have to pay the sheriff $30. You may be asked to advance the costs of removing the tenant's property and one month's storage costs or you may request the sheriff, in writing, to lock the premises and you will then be responsible for handling the tenant's property in the manner required by the law.

If the defendant won a judgment against you on a counterclaim, read the section below for defendants.

Notice to Defendant (Party Being Sued)

If a judgment is entered against you stating that you owe the plaintiff money and you want to pay the amount owed, it would be safer to pay the money to the clerk of court rather than to the plaintiff. If you do pay the plaintiff directly, make sure he or she notifies the clerk so the judgment won't continue to be listed against you. If you cannot or do not pay the judgment, the plaintiff will serve a notice of rights on you, telling you that you must claim your exemptions or they will be waived. <u>It is very important that you respond to that notice.</u> Exemptions are property the law allows you to keep from being taken from you to pay off judgments against you. If you fail to claim your exemptions, the sheriff will be able to seize and sell any property you own. If you fail to claim your exemptions when notified, you may ask the clerk to set aside your waiver if you have the grounds. Also, even if you have waived your statutory exemptions, you may go to the clerk any time up until the proceeds of the sale of your property have been distributed to the plaintiff and request your constitutional exemptions. The judgment is good against you for 10 years and may be extended for another 10 years. It becomes a lien against any land you own now or buy later until it is satisfied.

If you have a judgment against you to turn personal property over to the plaintiff, you may not prevent the property from being turned over to the plaintiff unless the plaintiff is a finance company and the judgment against you is to recover household goods that you listed as collateral in a security agreement with the finance company and the finance company did not lend you the money to buy those goods. In that case, the finance company must give you notice of your right to claim exemptions as described in the paragraph above and you may keep the household goods from being repossessed by claiming them as exempt.

If you are a tenant and have an eviction judgment against you, you will have to leave the premises. If you do not leave voluntarily, the sheriff may forcibly evict you and remove and store your belongings for you or may leave them with the landlord who may dispose of them in the manner allowed by the law. You will be held responsible for the costs of moving you out.

If you won a counterclaim against the plaintiff in which you were awarded money, read the section for plaintiffs to see what to do.

Relief from Judgment.

A. Clerical Errors.

1. A judge may correct a judgment containing a clerical error or an error arising from oversight or omission. The judge may act on his own motion or on motion of a party. It is up to the judge to decide what notice should be given to the parties.

2. The rule allowing judges to correct clerical errors is not intended to apply to serious errors, and many appellate cases have reversed the decisions of judges who confused the two. A judge may not amend the judgment to give new or additional relief under the guise of correcting a "clerical" error. A clerical error is different from a mistake about the facts of a situation, or about the relevant law. It is instead a mistake in the way the court's decision is expressed in the judgment, so that the judgment does not accurately reflect the decision the judge actually made.

B. Motions To Set Aside Judgment For Mistake, Inadvertence, Excusable Neglect or Surprise

1. Magistrate is authorized to rule on these motions by G.S. 7A-228, so long as the chief district court judge consents.

2. Magistrate should schedule hearing and notify all parties.

3. Deciding whether a party has demonstrated mistake or excusable neglect requires the judge to inquire into what may be reasonably expected of a party in paying proper attention to his case, when all the circumstances are considered. Examples of cases in which a finding of excusable neglect has been upheld are:

   a) a client relied on erroneous information given to him by his lawyer and so didn't come to court when he should have;

   b) a party was mentally incompetent and so failed to respond in any way to the complaint;

   c) a woman relied on her husband's assurance that he would hire a lawyer and "take care" of a case that had been filed against both of them.

4. When a defendant seeks to set aside a judgment, he must do more than demonstrate excusable neglect; he must also allege a "meritorious defense." In other words, he must allege (he does not have to prove, at this stage) facts sufficient to persuade you that setting aside the judgment would not be a waste of time.

5. Some of the things a judge should keep in mind in deciding how to rule on a motion to set aside a judgment are:

   a) The policy that, generally speaking, judgments are final, so that people feel reasonably safe in relying on them;

b) The policy that it is better to decide a case on its merits, after hearing from all the parties, than it is (1) to decide a case after hearing only from the plaintiff, or (2) to dismiss a case, having heard from neither party;

c) The court's interest in orderly procedure: we want to encourage people to take a lawsuit seriously, to make a special effort to be in court when their case is scheduled to heard, and to have all their evidence ready to present at that time;

d) Fairness to both parties, taking into consideration all the circumstances of the case; and

e) "Intervening equities:" have other people relied on the judgment, so that setting it aside might result in prejudice to them?

6. A motion to set aside a judgment for mistake or excusable neglect must be made within a "reasonable time." If the motion is not made within one year after judgment is entered, it is forever barred. In other words, the motion must be made within a reasonable time, and a period of time exceeding one year is never reasonable. G.S. 1A-1, Rule 60(b).

C. Motions To Set Aside Judgment for Grounds Other Than Mistake or Excusable Neglect.

1. Judge must hear motion to set aside judgment on grounds other than excusable neglect or mistake.

2. Other grounds include void judgment, newly discovered evidence, fraud, or irregular judgment.

NOTES:

Small Claims Court: What's the Fix When Things Go Wrong?

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : small claims; Rule 60(b)

Date : April 19, 2017

North Carolina magistrates are not required to be lawyers, and most of them aren't. Add to that the fact that most small claims litigants are not represented by attorneys and the stage is set for a challenging (and often entertaining) series of events that may not fit neatly into those rigid categories the law is so fond of. Make no mistake: this system is deliberate in design and for the most part it works quite well. Small claims court offers citizens a quick, inexpensive way to resolve their disputes, and appeals from small claims judgments by unhappy litigants are few. Errors—by litigants and by magistrates—are an expected part of this system, and the remedies for those errors are, also, deliberate in design. This, too, works well most of the time, but sometimes things can get a little confusing. I hope this post will help sort out that confusion.

We Want Judgments to be Final

A judgment by a small claims magistrate "is a judgment of the district court," and is recorded and enforced no differently from any other civil judgment. GS 7A-224. A judgment in favor of the plaintiff is likely to impact the defendant's credit rating to the same extent as any other civil judgment, and it becomes a lien on the judgment debtor's real property. GS 7A-225. A judgment in favor of the defendant may also have significant legal consequences; in any subsequent lawsuit between these same parties, the magistrate's decisions will likely be binding on that future trial judge. In addition to these interests, one might argue that the core purpose of a court system is to offer a final resolution of disputes to those who have been unable to reach such a resolution on their own. For all of these reasons, the law strongly favors the principle that judgments should be final. Even when hindsight shows that a particular judgment was wrong, the judgment still stands, unless a court determines otherwise after conducting a formal legal procedure. There are two such procedures commonly applicable to a small claims judgment, both specifically designed to balance our preference for finality of judgments against our desire for fair, legally accurate court decisions.

Appeal for Trial *De Novo*

When a litigant loses in small claims court and believes that result was wrong, the law provides an ingenious solution: a do-over! This is the method of choice for an aggrieved litigant to challenge a small claims decision – and indeed the only method for correcting a judgment flawed by a magistrate's legal error (subject to one exception, discussed below). A party who loses in small claims court has the right to appeal to district court for an entirely new trial. The procedure is simple: the party must give notice of appeal and pay the costs (presently $150). The benefits are significant: the trial will be conducted by a district court judge formally trained in the law, and a jury trial is available upon timely request by either party. The new trial will be based entirely on the evidence presented at that trial, giving a litigant who was inadequately unprepared for the small claims trial a second chance. Often litigants hire attorneys at this point, particularly in light of the increased procedural formality in a district court setting. Regardless of whether the small claims judgment was tainted by legal error or the party's own mistakes, an appeal for trial *de novo* is a fresh start.

There are two reasons why unhappy litigants don't appeal. Some litigants are put off by the additional delay and increased costs involved. Others simply miss the deadline; notice of appeal must be given within ten days of the small claims judgment being entered. For those in search of an alternative to appeal, Rule 60(b) is pretty much the only

game in town.

Rule 60(b), or "Please Erase That Judgment"

In describing the authority to set aside a judgment under Rule 60(b), the courts sometimes refer to "a vast reservoir of equitable power." A judge's authority to modify or set aside an otherwise final judgment when justice so requires is indeed vast, and the exercise of that authority has been explored in thousands of cases. For an excellent summary and analysis of relevant North Carolina law, I recommend my colleague Ann Anderson's book, Relief from Judgment in NC Civil Cases (2015/UNC SOG). In this post space allows only a brief summary of the rules related to Rule 60(b) in the small claims context.

Rule 60(b) lists six reasons for setting aside a judgment, two of which are particularly relevant to small claims law. Rule 60(b)(4) permits a void judgment to be set aside on motion of a party or on the court's own motion, any time after the judgment is entered. A judgment is not void simply because the judicial official made a legal error—the remedy for that, as we've seen, is appeal. Only when a judgment is fundamentally flawed—for example, rendered by a court without jurisdiction – is it considered *void*. If a magistrate accidentally enters a void judgment and catches the error, Rule 60 permits the magistrate to file a motion to have the judgment set aside. In this event, the motion will be decided by a district court judge. NOTE, however, that while a magistrate may file the motion, the magistrate has no authority to rule on the motion. Magistrates are not authorized to determine whether a judgment should be set aside as void—only a district or superior court judge has that authority.

Magistrates authorized by their chief district court judges do have authority to rule on 60(b) motions based on one of the six grounds: mistake, inadvertence, surprise, or excusable neglect. GS 7A-228(a), GS 1A-1, Rule 60(b)(1). The mistake referred to in this statute is not a legal error made by a magistrate, but rather a mistake made by a party. One of the most common factual scenarios leading to a Rule 60(b)(1) motion occurs when a party fails to appear for trial. The speed with which cases are calendared, the absence of an attorney to accompany a party to trial, the unfamiliar surroundings of the courthouse (not to mention the parking), and the very brief duration of the trial itself . . . there are many reasons for litigants to miss trial, and they often do so. A magistrate tasked with ruling on a motion in such a case must determine whether, in light of the surrounding circumstances, the litigant behaved in a manner that would "be reasonably expected of a party in paying proper attention to his case." Scoggins v. Jacobs, 169 NC App 411 (2005). Our appellate courts have said repeatedly that errors arising out of a party's ignorance of the law or legal procedures are not "excusable" so as to justify setting aside a judgment and requiring the other party to endure the inconvenience of a new trial. See, e.g., Grier *ex rel* Brown v. Guy, 224 NC App 256 (2012). In addition, when the defendant is the moving party, the defendant must show a meritorious defense to the plaintiff's claim. It is not necessary that the magistrate be persuaded by this defense, but rather that the forecast of evidence presented by the defendant amounts to a *prima facie* showing of a defense.

In closing, I want to emphasize one of the most misunderstood aspects of this topic. Often a small claims magistrate will realize after entering judgment that he or she has made a legal error, not so severe as to make the judgment void. **The magistrate has no authority to correct this error**: the only available remedy is appeal by the aggrieved party. There is no legal basis for a Rule 60(b)(1) motion to set aside the judgment in this circumstance, and a magistrate—even if authorized to hear motions on grounds of a party's excusable neglect – has no authority to use this means to correct a judgment based on legal error.

Draft Judgment for Rule 60 motions:

This hearing on defendant's motion to set aside the judgment in [name and case number of case] was tried before the undersigned after proper notice was given to both parties of the date, time, and location of the hearing. The Court finds as follows:

1. The undersigned has authority to rule on defendant's motion to set aside the judgment pursuant to Rule 60(b)(1) by virtue of consent of Chief District Court Judge _____ under N.C.G.S. 7A-228.

2. A magistrate has no authority to set aside judgments based on grounds other than those set out in Rule 60(b)(1), i.e., mistake, inadvertence, surprise, or excusable neglect.

3. In addition to demonstrating grounds for setting aside the judgment under Rule 60(b)(1), the law requires that defendant allege a meritorious defense.

4. Having heard and considered the evidence presented by both parties, the Court finds that defendant
   ☐ has demonstrated mistake, inadvertence, surprise, or excusable neglect justifying setting aside the judgment,
   ☐ has not demonstrated mistake, inadvertence, surprise, or excusable neglect justifying setting aside the judgment,
   and the Court further finds that defendant (has has not) alleged the existence of a meritorious defense.

Based on the above findings, it is the order of this Court that the judgment in [name and case number of case]

☐ is set aside and that a new trial before a magistrate should be held.
☐ remains in full force and effect.

CONTRACTS

CHECKLIST FOR CONTRACT CASES IN SMALL CLAIMS COURT

DOES THIS CASE INVOLVE AN AGREEMENT BETWEEN π AND Δ?

WHO ARE THE PARTIES TO THE CONTRACT?

If parties are not identical to people who entered into contract, why not?

- Agency
- Guarantors
- Joint and Several Liability
- Husbands, Wives, and Kids

WHAT ARE THE TERMS OF THE AGREEMENT?

If the agreement is in writing, ask for a copy. Read it carefully. Are the terms clear?

If the agreement is not in writing, listen to the testimony about the terms.

- ☐ Do the parties agree about the terms of their agreement?
- ☐ If they don't agree, what specifically do they disagree about? What does π contend? What does Δ contend? In the case of a disagreement, the magistrate must determine the terms, remembering that the party seeking to enforce the contract has the B/P on its terms.
- ☐ Are there terms they left out? Assuming the intent to contract is clear, the magistrate "fills in the blanks" based on evidence about what is usual and reasonable, to implement the probable intention of the parties.

What rules of evidence should the magistrate be mindful of in determining the terms?

- ☐ If a contract is written, the *best evidence* of what the parties agreed to is the written contract.
- ☐ If a contract is written, evidence about what the parties said before signing the contract is not relevant unless meaning is unclear (parol *evidence rule).*
- ☐ In an action on an account, a *verified itemized statement of the account* is sufficient to prove that Δ owes that amount of money in the absence of evidence to the contrary.

Are there additional or different terms written into the agreement by the law?

- ☐ *In contracts for the sale of goods*, is π's claim for breach of warranty?
- ☐ *In actions based on a lease,* does the landlord have additional responsibilities under the RRAA?
- ☐ *In actions involving consumer credit sales,* does the Retail Installment Sales Act affect any of the contract terms?

Before moving to the next question, stop and decide what the terms of the agreement are.

Is the agreement one that the law will enforce?

- ☐ Does it involve a bargained-for exchange?
- ☐ Is this particular defendant (rather than someone else) bound by the contract?
  - --Does the contract involve a corporation?
  - --Does the contract involve an agency relationship?
- ☐ Is there any question about Δ's ability to consent?
  - --Was Δ a minor at the time of the contract?
  - -- Is there doubt about Δ's competence to contract?
- ☐ Is there a legal rule that renders this agreement unenforceable?
  - --Is this one of the kinds of contracts the law requires to be written?
  - --Did π wait too long to file the lawsuit?
  - --Are the terms of the agreement so one-sided and unfair as to be *unconscionable*?

DID Δ BREACH THE CONTRACT?

WHAT DAMAGES IS π ENTITLED TO?

Common damage items:

- ☐ Direct damages (difference between value of promised performance and what it will cost now)
- ☐ Incidental damages (costs of preparing to perform, those incurred in response to breach, those involved in minimizing injury)
- ☐ Consequential damages (foreseeable damages resulting from breach)
- ☐ Interest from date of breach

Special cases:

- ☐ Cancelling the contract: damages for putting everything back the way it was
- ☐ Liquidated damages clauses
- ☐ Failure to return property: FMV of property
- ☐ Breach of warranty: difference between FMV of goods as warranted and FMV of goods received
- ☐ Checks NSF: Amount of check + bank charge + processing fee + amount of check x 3 ($100-$500)
- ☐ Attorney fees

Be on the lookout for:

- ☐ Duty to mitigate damages
- ☐ Joint & several liability

Fairness in the Marketplace Matters in Small Claims Court

Author : Dona Lewandowski

Categories : Civil Practice, Small Claims Law

Tagged as : small claims courtUnfair trade practices

Date : March 26, 2018

Small claims magistrates don't see many lawsuits filed by individuals alleging injury from unfair or deceptive acts (hereinafter, UTP[1]) by persons with whom they've done business -- but they should. A primary purpose of GS 75-1.1, the relevant statute, is to provide a remedy for consumers injured by unethical or improper behavior in the marketplace, even when the dollar amount of the injury suffered is relatively small. Proving a right to relief under GS 75-1.1, unlike many consumer protection statutes, is simplicity itself, often requiring an injured plaintiff to do little more than relate his story in a clear and persuasive manner. Compared to small claims cases requiring magistrates to interpret and apply multiple statutes in the light of often complicated case law, the straightforward legal principles applicable to UTP cases make them ideal for determination in small claims court. In this blog post, I'll take a quick look at some of the common procedural issues related to this claim in small claims court, review the general legal principles governing these actions, and briefly discuss case law involving GS 75-1.1 in the context of residential lease agreements.

First, the Procedure

Counterclaim or Complaint?

Often a magistrate will encounter a UTP claim in a counterclaim to an action brought by a creditor or landlord, but these claims are equally appropriate when raised in a lawsuit by the consumer. The complaint may assert only a UTP claim but often include related assertions such as breach of contract, conversion, or violation of a specific consumer protection statute.

Sometimes consumers struggle with which AOC complaint form to use and how to fill it out. *Pro* se plaintiffs are often surprised to learn that CVM-200, *Complaint for Money Owed*, is the appropriate form for all actions seeking only money damages, regardless of the basis of the lawsuit. Almost all the check boxes on CVM-200 pertain to contracts (e.g., *Action on an account,* or *For money lent*) and thus may be puzzling to litigants seeking damages for torts involving negligent behavior, property damage, or … unfair trade practices. Lawsuits such as these require the plaintiff to check the "Other" block on the complaint form, adding relevant details in the blank that follows. Ideally, the plaintiff will describe the conduct complained of, identify it as an unfair or deceptive trade practice, and mention "treble damages" in this blank, but magistrates should remember GS 7A-216's admonition that the complaint need only "enable a person of common understanding to know what is meant." If the magistrate thinks the complaint is insufficient to provide adequate notice to the defendant, the magistrate should order the plaintiff to "perfect the statement of his claim," allowing continuances as necessary.

Amount in Controversy

The amount in controversy in a UTP action is the total sum the court is asked to award: i.e., treble damages.

Statute of Limitations

The relevant statute of limitations for UTP actions is four years. GS 75-16.2.

What's a UTP?

The provisions of GS 75-1.1 are simple:

"Unfair methods of competition … and unfair or deceptive acts or practices in or affecting commerce are declared unlawful."

Many appellate opinions state that "a practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 NC 539 (1981). Other cases have said that an unfair act or practice occurs when a person "engages in conduct which amounts to an inequitable assertion of its power or position." *Johnson v. Phoenix Mutual*, 300 NC 247 (1980). Unfairness is not to be defined in the abstract, but rather in light of all the facts and circumstances involved. See e.g., *Barbee v. Atlantic Marine Sales,* 115 NC App 641 (1994). An act is deceptive, according to the courts, if it "possesses the tendency or capacity to mislead, or creates the likelihood of deception," even if statements made by the defendant were technically true. In these cases, the plaintiff is not required to prove that a defendant acted in bad faith or with the intention of deceiving the plaintiff; the concern instead is the actual effect of the defendant's behavior on the consuming public. *Marshall*. An intentional breach of a contract is not, standing alone, sufficient to establish liability for an unfair or deceptive act or practice, but such liability may be found if a breach of contract is accompanied by deceptive communications or other aggravating circumstances. *Poor v. Hill*, 138 NC App 19 (2000).

When a plaintiff proves that they have been injured by a "person, firm, or corporation" in violation of GS 75-1.1 and are thus entitled to compensatory damages, they are entitled to have those damages trebled as a matter of law. GS 75-16. In addition, if the plaintiff is represented by an attorney, the court has discretion to award "a reasonable attorney fee," provided the court expressly finds that (1) the violation was willful, and (2) the defendant unreasonably refused to "fully resolve the matter which constitutes the basis of such suit." GS 75-16.1.

Some Examples from Landlord-Tenant Case Law

Love v. Pressley, 34 NC App 503 (1977). Two days after notifying LL that they were moving out, tenants discovered that landlord had entered the premises and removed some of their property. Upon inquiry, tenants were informed that "the clean-up man had been there," but efforts to contact LL were unsuccessful. After jury determined damages for trespass and conversion by LL, trial judge found LL's actions were UTP and trebled amount awarded by jury.

Borders v. Newton, 68 NC App 768 (1984). Based on LL's statements that rental property was available and suitable for occupancy, T paid one month's rent and security deposit. In fact, city had forbidden LL to rent property, which had been declared uninhabitable When LL refused to refund T's money, court awarded that amount trebled as damages for LL's deceptive acts pursuant to GS 75-1.1.

Stanley v. Moore, 339 NC 717 (1995). Repeated efforts by LL to force Ts to vacate residential rental property, including cutting off water and power and forcefully entering property to demand that Ts leave immediately, was unlawful self-help eviction in violation of GS 42-25.6 and was UTP, entitling Ts to treble damages.

Marshall v. Miller, 302 NC 539 (1981): LL induced Ts to rent mobile homes in mobile home park by promising to provide amenities such as swimming pool and playground with no present intention or ability to do so was UTP.

Allen v. Simmons, 99 NC App 636 (1990) and many other cases as well: LL who collects rent with knowledge that rental premises are uninhabitable in violation of GS Ch. 42, Art. 5 (Residential Rental Agreements Act) violates GS 75-1.1, entitling T to treble damages.

A final note: The list of cases cited above is by no means complete. Residential lease agreements are a ripe source of UTP claims because of the many statutes protecting tenants from unfair practices in the rental of residential housing.

Remember that an identified target for GS 75-1.1 protection are acts or practices that “offend established public policy.” Several statutes found in GS Ch. 42 specifically state that violations are “against the public policy of this State.” See, for example, GS 42-46 (regulating late fees and administrative fees); GS 42-37.1 (prohibiting retaliatory eviction); Ch. 42, Art. 6 (the Tenant Security Deposit Act); GS 42-25.7 (related to LL’s treatment of T’s personal property).

[1] *Unfair trade practices* (UTPs) is a term commonly used to refer to behavior that violates GS 75-1.1 and will be used in this post. Although the term is no longer technically correct due to a statutory amendment deleting the word “trade” from the statute, its use persists.

The Court of Appeals on When a Payment is "Due"

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : residential leases, small claimssummary ejectment

Date : January 25, 2017

The North Carolina Court of Appeals issued an opinion last week that may – or may not--have some implications for residential leases in North Carolina. At the very least, RME Management, LLC, v. Chapel H.O.M. Associates, LLC (filed 1/17/2017) makes me think I should give a longer answer when a small claims magistrate asks me a particular question about summary ejectment law. But more on that later. First, let's take a look at RME.

The parties in RME were businesses involved in a long-term commercial lease dating back to 1966. In fact, they had just reached an important milestone in their relationship, in which the defendant had given notice of their intention to exercise an option to renew the lease for an additional 49 years, effective January 1, 2016.

On September 21, 2015, the plaintiff notified the defendant that it was in default of the lease. Specifically, they had not paid property taxes "when due," which plaintiff understood to be September 1. In mid-October, the defendant responded to this notice denying default, challenging plaintiff's interpretation of "when due." The defendant's' argument that under North Carolina's property tax statute, GS 105-360, payment was "due" any time between September 1, 2015, and January 6, 2016. Because it was only October, said the defendant, the property taxes were not yet "due" and defendant was not in default of the lease provision.

The lease in RME contained a forfeiture clause, giving the landlord the right to terminate the lease "upon any default of the Lessee" if that default was not corrected by the tenant within 30 days after receiving notice. On October 27, the property taxes remaining unpaid, plaintiff notified defendant of its intention to terminate the lease and filed a summary ejectment action. Defendant paid the taxes a week later. The case was dismissed at the small claims level, and the plaintiff appealed to district court for a trial de novo.

The district court judge granted summary judgment for the defendants, based in part on the following finding:

The ordinary meaning of 'pay' and 'pay when due' customarily includes an implicit grace period during which payment can be made without being overdue; few obligations, and certainly not property taxes, are expected to be paid on the very first day they become due.

The Court of Appeals agreed, essentially reasoning as follows: The lease requires payment of taxes *when due*. To determine when taxes are due, we must look to the statute, which provides:

Taxes levied under this Subchapter by a taxing unit are due and payable on September 1 of the fiscal year for which the taxes are levied. Taxes are payable at par or face amount if paid before January 6 following the due date. Taxes paid on or after January 6 following the due date are subject to interest charges.

The plaintiff argued that this statute provides that taxes are "due" on September 1, payable without penalty until January 7, and subject to a penalty after that date. The Court rejected that argument, finding that "due" and "payable" are synonymous, and that the "plain meaning" of the statute requires a finding that defendant had not breached the requirement that taxes must be paid "when due,"i.e., prior to January 7.

The result in RME makes sense, and the Court's rationale seems straightforward. On first reading, I mentally filed it as "Commercial Lease/Property Tax." But I found myself worrying about its implications for situations in my "Residential Lease/Breach of Lease Condition for Failure to Pay Rent" folder. Here's why.

Many—maybe most—written leases in North Carolina contain provisions similar to the following:

Rent is due and payable on the first of the month.

In the event that rent is paid more than five days late, a late fee of $15 or 5% of the monthly rent—whichever is greater—will be assessed….

In the event that tenant fails to pay rent when due, landlord has the right to terminate this lease without notice.

Here are two questions I'm often asked in reference to these provisions:

- If the tenant fails to pay on the 1st, can the landlord file a summary ejectment action on the 2nd?
- Does the late fee provision establish a five-day "grace period" requiring the landlord to delay filing the action until the sixth day of the month?

I have answered "yes" to the first question and "no" to the second with relative confidence on many occasions. My opinion has been that the two provisions are independent, establishing the landlord's separate rights to (1) terminate the lease if the rent is not paid when due—on the 1st; and (2) charge a late fee if the rent is more than five days late. I'm not yet sure whether or how RME changes my conclusions. But the tenor of the opinion certainly gives me pause.

Part of my uncertainty arises because the opinion makes no reference to the difference between a requirement that a payment be made *within a certain period of time* and a requirement stating that a payment is due on an identified date. This is entirely understandable, since the facts didn't involve the latter. But the Court's discussion of the "plain meaning" of the phrase "when due" is not clearly limited to payments which may be made over a period of time. The opinion quotes, but does not specifically address, the trial court's conclusion that the words "pay when due" is "customarily" understood as including an "implicit grace period." The opinion specifically notes that the lease did not contain "qualifying language," such as "when first became due." Perhaps most strikingly, the Court dismisses plaintiff's argument about the meaning of the statute with unusually harsh language, calling the argument "a nonsensical, hyper-technical construction of the lease and NC property tax law." This is not the usual language of a court carving out a fine distinction in the application of an otherwise generally accepted rule – and so it makes me wonder about the steadiness of the latter.

The facts of RME certainly accommodate a narrow reading of that case. I think it is quite likely to be cited more broadly, though. One argument may be that a tenant is not in default of a lease requiring the payment of rent on the first of the month if payment is made on the second and the lease contains a late fee provision. These facts are arguably parallel to those RME; the argument would be that because rent is not late until the sixth, it is not "due" —placing tenant in default and thus triggering the forfeiture clause—until the sixth.

I believe this argument ignores an important reality about late fee provisions in residential leases. The widespread inclusion of the five-day requirement in residential leases is not a surprisingly uniform expression of patience on the part of landlords in terms of when rent should be paid. It is instead statutorily mandated by GS 42-46 in order for a landlord to charge any late fee at all!

A different question is presented by a straightforward lease providing simply that rent is due on the first of the month, and that the landlord has the right to terminate the lease in the event of default. It seems clear to me that the tenant who fails to pay rent on the first is in default on the second – but I'm a little worried about the idea of "an implicit grace period." In fact, I've found that many landlords and tenants (and some magistrates as well) assume that a 5-day grace

period applies, no matter what the lease says.

One final observation: RME certainly indicates that “qualifying language” in a lease, clearly indicating the intent of the parties, will be given effect. While there may be some uncertainty about whether the words “when due” are sufficient to indicate clear intent, there is no such uncertainty about whether a more specific provision is enforceable. Thus, a landlord can seek summary ejectment on the second of the month if the lease contains a provision such as “Rent is due on the first and if payment is not made on or before the first, the landlord has the right to declare the lease terminated without further notice.”

Time will tell whether RME sinks into obscurity or prompts modifications of residential leases across the State, and I’ll be watching future developments with considerable interest . After reading the case many times and giving it a lot of thought, I’m still uncertain about its impact on summary ejectment law in residential cases. If you have thoughts, I’d love to hear them!

NC Consumer Finance Act

GS Ch. 53, Art. 15, the North Carolina Consumer Finance Act, governs loans made by finance companies for $15,000 or less. These companies are required to be licensed by the Commissioner of Banks. The CFA regulates the practices of these companies, including the interest rates and other fees which may be imposed on borrowers.

Violation of the CFA by an officer, agent, or employee of a covered finance company is a Class 1 misdemeanor. In addition, a violation which is not an accidental or "bona fide error of computation" results in the associated contract being void, with the borrower entitled to recover all money paid to the company.

GS 53-173 contains the following rules about Ch. 53 loans:

1. The borrower may not be required to pay interest in advance. In general, interest may not be compounded.
2. Payments must be allocated as follows:
    a. First, to late fees and other permissible charges;
    b. Second, to accrued interest.
    c. Finally to principal
3. Prepayment must be permitted without penalty.
4. Post-judgment interest is limited to 8%.
5. Interest after maturity date of a loan is limited to 8%.

GS 53-176 contains the following rules about Ch. 53 loans:

1. Loans must not exceed $15,000;
2. The term of the loan must be between 12-96 months;
3. Must not be secured by real property;
4. Must be repayable in substantially equal consecutive monthly payments;
5. Interest for a loan up to $10,000:
    a. 30% of unpaid principal up to $4,000;
    b. 24% of unpaid principal between $4,000 and $8,000;
    c. 18% on remainder.
    d. But lender must determine single simple interest rate that will yield this amount, equalized over the life of the loan.
6. 18% interest on a loan exceeding $10,000.

Other allowable fees:

1. Borrower may also be charged processing fee, no more than twice in a 12-month period, of
    a. $25 for loan up to $2500;
    b. 1% (maximum $40) for loans exceeding $2500,
2. Late fee, if
    a. Payment is at least 10 days late;
    b. Up to $15
    c. One time per late payment
    d. Not for payment which "would have been timely and sufficient" but for allocation to previous late fee
3. Deferral charges
4. Lender entitled to recover court costs "and other bona fide costs incurred in the course of bringing the action."
5. Attorney fees not allowed.

NOTE: The Act imposes additional requirements for loans made to members of the military. In addition, this brief summary does not address portions of the Act related to multiple loans made over time, or those regulating treatment of payments made pursuant to an insurance policy payable in the event of borrower's default.

What Small Claims Magistrates Need to Know about RISA's Rules: The Big Ten

1. Contract must be written, dated, and signed by the buyer.
2. Amount of finance charge (defined broadly) limited, depending on amount of purchase.
3. Duration of obligation limited, depending on amount of purchase.
4. Fees for default or payment deferral limited.
5. Prepayment of obligation always permitted, and entitles buyer to rebate.
6. Seller is required to provide buyer with receipts for payment and regular complete statements of account.
7. A buyer's claims and/or defenses apply to assignees of seller
8. Written modification or disclaimer of express warranty made by seller and relied on by buyer prohibited.
9. FIFO requirement applies to allocation of payments in case of subsequent financed purchases.
10. Reasonable attorney's fee allowed to prevailing party.

A Magistrate's Guide to GS Ch. 25A:

The Retail Installment Sales Act

This guide is intended to assist a magistrate in navigating GS Ch. 25A; it is not intended as a substitute for the statute or as a stand-alone resource.

Part 1: §§ 25A-1 to 25A-13

The first sections of the RISA address what sorts of contracts the statute does and does not cover, and provides important definitions for terms used throughout the Act. Essentially, RISA regulates consumer purchases of goods or services which are financed by the seller.

RISA does not apply to

- Direct loans
- Purchases made with a major credit card
- Installment purchases financed by a seller outside of the regular course of business
- Purchases by business entities not a natural person
- Contracts involving 4 or fewer installment payments and no finance charge
-

RISA does apply to

- Some rent-to-own" contracts, provided the requirements of GS 25A-2(b) are satisfied
- Service contracts, including funeral services, education, and hospital accommodations. GS 25A-5(a).

A *finance charge* includes loan fees, fees for credit reports, carrying charges, and other charges related to the seller's provision of credit, in addition to charges denominated as interest. GS 25A-8.

The Act distinguishes between a *revolving charge account contract* (GS 25A-11) and a *consumer credit installment sale contract* (GS 25A-12).

Part 2: §§ 25A-14 to 25A-23

These sections relate to the terms of an agreement subject to RISA: some terms are required, while others are prohibited. The most important sections are:

- Limitations on finance charges, depending on the kind of contract and the amount of money financed. GS 25A-14, -15.
- Authorization of higher charges for motor vehicles, depending on the age of the vehicle. GS 25A-15.
- Specific rules about credit life insurance and similar insurance coverage; GS 25A-17, -36
- Prohibition of confessions of judgment and warranty disclaimers. GS 25A-18, -20
- Restrictions on the seller's right to accelerate the debt. GS 25A-19
- Requirements for attorneys' fees. GS 25A-21
- Restrictions on types of collateral in which seller may take security interest. GS 25A-23.

Part 3: §§ 25A-27 to 25A-37.

These sections regulate business practices that have sometimes historically been used to exploit unwary or unsophisticated purchasers.

- FIFO rule applies to application of payments in multiple-sale situation. GS 25A-27
- Requirement that contracts be written, dated, and signed by buyer. GS 25A-28.
- Restrictions on fees for late payment and deferral of payment date, GS 25A-29, -30.
- Requirements related to buyer's early payment. GS 25A-32, 32.1.
- Establishing maximum term of agreement, depending on amount financed. GS 25A-33.
- Prohibiting balloon payments. GS 25A-34.
- Requiring seller to provide statements of account. GS 25A-35.
- Prohibiting referral sales (in which price is reduced if buyer procures other customers) in all consumer contracts. GS 25A-37.

Part 4: §§ 25A-38 to 25A-42.

These sections of the Act contain specific rules and regulations pertaining to home solicitation sales, with particular emphasis on "honeymoon period" in which buyer has the right to cancel.

Part 5: §§ 25A-43 to 25A-44.

The last part of the Act addresses the consequences of RISA violations and gives a court substantial discretion in determining whether to enforce an agreement which is extremely unfair.

- If a court determines that a portion of a consumer credit sale is "totally unreasonable under all of the circumstances" after giving all parties an opportunity to present relevant evidence on the point, the court may refuse to enforce the entire agreement or that portion of the agreement, or may rewrite the clause to avoid an unconscionable result. GS 25A-43.
- Finance charge too high (but less than twice the maximum), but seller was acting in good faith, charge reduced to allowable amount. GS 25A-44(1).
- Finance charge too high (but less than twice the maximum), and seller was not acting in good faith, no charge allowed, and seller may be required to pay double amount of finance charged paid by buyer plus attorney fees. GS 25A-44(1).
- Finance charge more than twice allowable maximum, contract is void, and buyer can retain goods. GS 25A-44(2).
- Failure to provide pre-payment rebate or charging unauthorized fees allows buyer to demand amount from seller. Ten days after seller receives demand, buyer entitled to recover three times amount not refunded within ten day period. GS 25A-44(3)
- Knowing violation of RISA is unfair practice under GS 75-1.1, allowing treble damages and attorney fees. GS 25A-44(4).

Liquidated Damages as Contract Remedy

Fact Situation #1. John is interested in renting an apartment from Mary, but he wants his wife to take a look at it first. He's worried, though, that someone else will rent the place before he can get back with his wife. John and Mary agree that John will pay Mary $200 to hold the apartment for him, and not rent it to anyone else for three days. John does not return with his wife and on the fourth day Mary rents the apartment to someone else. John sues to get his $200 back. What do you do?

_____

_____

Fact Situation #2. John is interested in renting an apartment from Mary, but he wants his wife to take a look at it first. He's worried, though, that someone else will rent the place before he can get back with his wife. John tells Mary he wants to go ahead with the deal, and promises to return tomorrow with his wife to sign the written lease. Mary agrees to rent the apartment to John, and tells him that she requires a non-refundable $200 deposit, which will be credited against his first month's rent and if when he returns to sign the lease. John's wife hates the place, and so the deal falls through. John sues to get his $200 back. How is this different from Fact Situation #1?

_____

_____

_____

Liquidated damages: "a sum which a party to a contract agrees to pay or deposit which he agrees to forfeit if he breaks some promise . . . arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach."

Penalty: "a sum which a party similarly agrees to pay or forfeit, . . . but which is fixed, not as a pre-estimate or probable actual damages, but as a punishment, the threat of which is designed to prevent the breach."

McCormick, *Damages* §146 (1935)

A liquidated damages provision is enforceable under North Carolina law when:

1. damages are speculative or difficult to ascertain, and
2. the amount stipulated is a reasonable estimate of probable damages, OR
   the amount stipulated is reasonably proportionate to the damages actually caused by the breach.

   The party challenging the validity of the provision has the burden of demonstrating that it does not satisfy the requirements for enforceability.

Rules for Determining Interest on Judgments

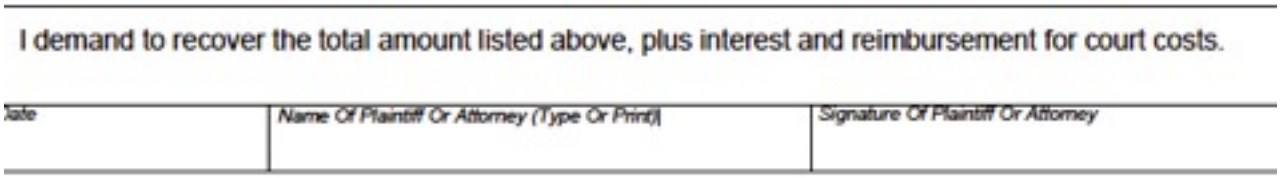
G.S. 24-5

(a) Actions on contracts: In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate. On awards in actions on contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes, however, interest shall be at the lower of the legal rate or the contract rate.

(b) Actions on Penal Bonds:[1] . . .

(c) Other Actions. - In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment under G.S. 1A-1, Rule 58, until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

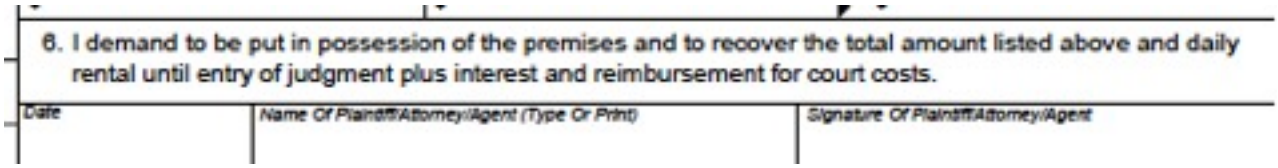
Interest is requested in every small claims case for money damages.



I demand to recover the total amount listed above, plus interest and reimbursement for court costs.

Date	Name Of Plaintiff Or Attorney (Type Or Print)	Signature Of Plaintiff Or Attorney

AOC-CVM-200 (Complaint for Money Owed)



6. I demand to be put in possession of the premises and to recover the total amount listed above and daily rental until entry of judgment plus interest and reimbursement for court costs.

Date	Name Of Plaintiff/Attorney/Agent (Type Or Print)	Signature Of Plaintiff/Attorney/Agent

AOC-CVM-201 (Complaint in Summary Ejectment)

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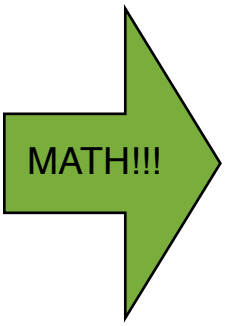
[1] What is a penal bond? A promise to pay a named sum as a penalty if a condition is not met. A bail bond is a common example, but interest on any performance bond is covered by G.S. 24-5(b). Interest on penal bonds is not the subject of this handout.

Note that a request for pre-judgment interest is built into the small claims forms, much like costs. Furthermore, NC appellate courts have held on a number of occasions that: " Where the amount of damages for a breach of contract is ascertainable from the contract itself, the prevailing party is entitled *as a matter of law* to interest from the date of the breach."[2] In other words, the judge is responsible for determining and awarding the appropriate amount of pre-judgment interest based on the evidence, including that contained in the contract itself.

So, how do you determine pre-judgment interest in an action based on breach of contract?



Interest = Principal x Rate x Time

Principal: This is the amount awarded by the court as damages arising out of breach of contract. Even though the term "principal" may be used to refer to evidence about the original amount of the debt, or to some other amount, remember that G.S. 24-5 deals with interest on judgments.

Rate: If the contract which is the subject of the action contains an agreed-upon interest rate, that same rate is used to determine pre-judgment interest. Otherwise, the legal rate of 8% per annum established by G.S. 24-1 applies.

Time: Period running from date of breach to date of judgment.

How do you determine the date of breach?

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[2] Thomas M. McInnis & Associates, Inc. v. Hall, 318 N.C. 421, 431, 349 S.E.2d 552, 558 (1986).

[3] Note that interest rates are frequently stated as annual rates. For shorter time periods, the rate must be converted accordingly. For example, an annual rate of 8% interest converts to a daily rate of 0.00021918.

The general rule is that a contract is breached when the plaintiff acquires the right to bring a lawsuit. In an action for past-due rent, for example, in which the lease contains a 5-day grace period for payment of rent, the date of breach would be on the sixth day; before that time, the landlord had no legal right to bring suit for the past-due amount.

When a contract calls for performance on a particular day, the contract is breached if the party fails to perform on that day. Often, however, date of performance is not so clearly specified. In those instances, the court must determine a reasonable date for performance.

When the evidence supports several possible dates of performance, the court may select the latest date as the date of breach.

Example: *In an action for money owed, a landlord proves that plaintiff failed to pay rent in the amount of $600 on September 1st and again on October 1st. You hear the case on October 15 and award a money judgment in the amount of $900.*

- You write $900 in the judgment form box labeled "Principal Sum of Judgment."

- Because the lease does not contain any reference to interest, the legal rate of 8% will apply. [NOTE: 8% is the annual interest rate. In order to convert that amount to the daily rate, .08 must be divided by 365.]

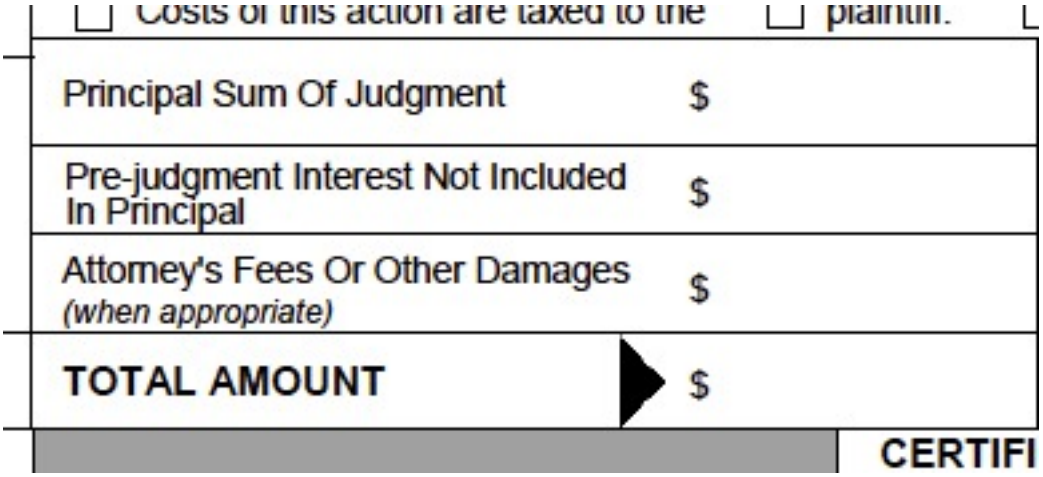
- In this case there are two separate breaches, because the tenant missed two payments:

  September: $600 (principal) x 8%/365 (daily rate) x 44 days = $5.92
  October: $300 (principal) x 8%/365 (daily rate) x 14 days = $.92

Total prejudgment interest: $6.84

Hate math? Use the "Judgment Calculator" on the nccourts.org website, found in the drop-down menu labeled "Quick Links." Or use one of the many free online calculators you'll find if you do a Google search for "simple interest online calculator."

In filling out the judgment, the magistrate must separately list the principal sum and the interest due on that amount up to the date of judgment.



Why does the law require judges to separately identify the principal sum of the judgment and the amount of pre-judgment interest? Because of the interaction of an old rule prohibiting "interest on interest," and what comes next in G.S. 24-5. . . . .

Post-Judgment Interest

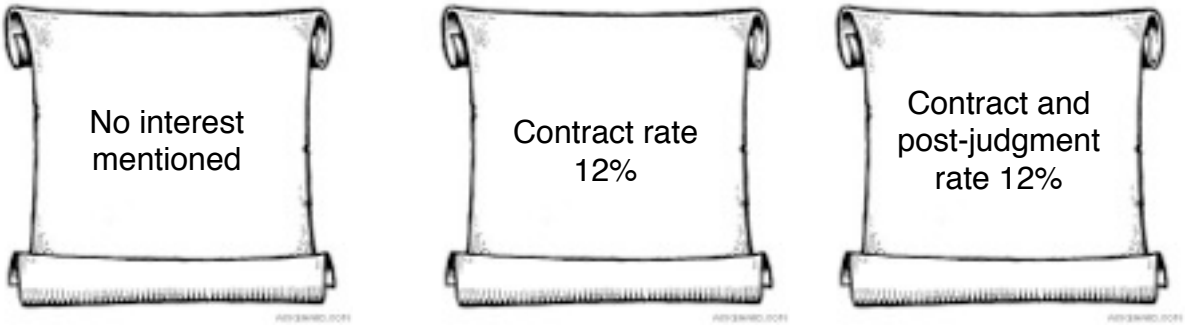
Clerks --not magistrates--are responsible for calculating interest on judgments accumulated between the time the judgment is entered and the time it is paid off ("post-judgment interest"). But magistrates still have an extremely important role to play, arising out of the following statutory provision:

> *If the parties have agreed in the contract that the contract rate shall apply after judgment, then interest on an award in a contract action shall be at the contract rate after judgment; otherwise it shall be at the legal rate.*

Thus a money judgment will gain interest until it is satisfied, subject to two rules:

First, only the "principal sum of the judgment" earns interest. Allowing interest on pre-judgment interest violates the prohibition against "interest on interest." For this reason, AOC-CVM-400, the small claims judgment form used in "money owed" cases, requires the court to break down the amount awarded into principal and interest.

Second, the law has a "default setting" providing for post-judgment interest at the legal rate. For the contract rate to apply to post-judgment interest, the parties must specifically agree to this in writing. Notice the difference between this rule and the rule that applies to pre-judgment interest.



Pre-J Rate	8%	12%	12%
Post-J Rate	8%	8%	12%

These two rules generate two responsibilities for magistrates. First, the magistrate must separately identify the principal amount of judgment and the amount granted as pre-judgment interest, since only the former gains post-judgment interest. Second, the magistrate must indicate whether the contract between the parties contains a specific provision establishing the rate at which a judgment arising out of the contract will draw interest.

Exception for consumer credit contracts[4]: The last sentence in G.S. 24-5(a) sets out an exception for these contracts, limiting post-judgment interest to the lower of the contract rate or the legal rate.

A magistrate can be sure to provide the clerk with all necessary information by completely filling out the AOC-CVM-400 judgment form:

☐ the case involves a breach of contract and the date of breach is: _____.
- ☐ the contract provides for pre-judgment interest on damages for breach at the rate of _____% and/or post-judgment interest at the rate of _____%.
- ☐ the contract does not provide a specific pre-judgment interest rate.
- ☐ the contract does not provide a specific post-judgment interest rate.

[4] ". . . contracts pursuant to which credit was extended for personal, family, household, or agricultural purposes. . . ."

Pre- and Post-Judgment Interest in Cases Not Involving Contracts

The rules about interest on judgments in cases not based on breach of contract are set out in G.S. 24-5(c). Not surprisingly, these rules are simpler, since the statutory 8% rate applies across the board. Briefly summarized, the statute provides that *a judgment for compensatory damages in an action based on tort draws interest at 8% beginning when the case is filed and continuing until the judgment is satisfied.* In all other cases, pre-judgment interest is not allowed. Applying these rules, then, requires only that a magistrate understand the terms *"tort"* and *"compensatory damages."*

A person who suffers injury to person or property at the hands of another may bring an *action in tort* to recover damages for the injury. A tort is frequently defined in terms of what it is not: it is not an action based on breach of contract, in which one party to an agreement is complaining that the other party failed to perform as required. Some scholars have said that a tort always involves three essential elements: a duty owed by defendant to the plaintiff, a breach of that duty (whether negligently or intentionally), and a resulting injury to the plaintiff (whether to person or property). Virtually all small claims cases involve either contract or tort.

Compensatory damages are damages calculated to place the plaintiff in as near as may be to the condition s/he would have occupied had the defendant's tortious action never occurred. Such damages may include compensation for both direct economic loss and less tangible injury such as pain and suffering. Similar to the above discussion concerning the definition of tort, compensatory damages are sometimes defined in terms of what they are not: they are not punitive damages. Furthermore, the general rule is to treat damage awards arising out of statutory penalties as punitive, rather than compensatory, damages. In an action based on unfair or deceptive practices under G.S. 75-1.1, for example, plaintiff's actual damages are compensatory, but the statutory award of treble damages is not, and thus would not generate pre-judgment interest under G.S. 24-5(c)

Putting It All Together: An Example

Larry Landlord brings an action in summary ejectment seeking (1) possession, (2) $900 in past-due rent, and (3) $400 for damage to rental property. The evidence shows the following:

- The parties have an oral lease agreement.
- Tommy Tenant did not pay his monthly rent payment of $600 on September and he missed another payment on October 1.
- Larry Landlord did not demand the rent from Tommy before filing this action on October 5.

- Tommy got drunk and ran into the metal support for the carport, causing $400 worth of damage.

You hear the case on October 15.

Your Judgment:

(1) Possession denied because of failure to make proper demand.

(2) Past due rent granted, in the amount of $906.84. (See p. 3)

(3) Damage to rental property (which is a tort) granted as follows:

> $400 (amount of damage) x 8% (annual legal rate) divided by 365 to determine daily rate x 10 days (beginning when complaint filed and ending when case is heard)
>
> $400 x 0.00021918 x 10 days = $.88

(4) Total money judgment $906.84 + $400.88 = $1308.72

Statutes of Limitation

Most intentional torts:	3 years
Negligence actions:	3 years
Contract for services:	3 years
Contract for sale of goods:	4 years
Contracts under seal:	10 years

Contracts Required to be Written

Contract for the sale of land.

Lease for more than 3 years.

Promise to pay the debt of another.

Retail consumer credit installment contract.

Contract for the sale of goods for $500 or more.

Security agreement.

Attorneys' Fees

Examples of authorizing statutes below. See Small Claims Law, pp. 91-94 for important restrictions.

G.S. 6-21.2: Plaintiff is suing to collect a debt and written agreement between parties contains provision for attorneys' fees. Notes, conditional sales contracts.
G.S. 6-21.3: Action on a check.
G.S. 25A-21: Actions involving consumer credit sales contracts.
G.S. 25-9-615(a)(1): Actions arising out of repossession of collateral.

LANDLORD-TENANT LAW

A Lease is a Contract

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : small claimssummary ejectment

Date : August 23, 2017

Summary ejectment law is a complicated, confusing mishmash of modern-day consumer protection legislation, centuries-old property law, and plain old contract law, Getting in too deeply can lead to a person starting to throw around phrases like *livery of seisin* (a very old term from feudal England that basically required the old landowner to hand the new landowner a piece of dirt). That slip into madness is not required. While there's nothing intuitive about livery of seisin, we've all understood contract law since childhood. My six-year-old son once traded his 3-year-old sister two stuffed animals for lifetime rights in "the good chair." In the complicated world of summary ejectment law, sometimes it's useful to remember a simple truth: a lease is a contract. So let's think about what we all know about contracts, and then apply that knowledge to leases."Get it in writing" is familiar consumer advice for a reason. When an oral agreement is reduced to writing, the law treats the writing as the definitive expression of what the parties agreed to and will enforce it accordingly.

An oral lease is enforceable (assuming it does not exceed three years), but its terms may be a matter of dispute. A written lease definitively establishes the terms of the parties' agreement when it is signed, and testimony of contradictory oral terms will not be considered by the court (unless the oral agreement occurred sometime thereafter and is offered as evidence of modification of the written lease).

A contract may be simple or complicated. When a contract is simple and sets out only essential terms, the court may be called upon to "fill in the blanks." Sometimes the law provides a "default" answer for use when a contract is silent on a particular issue. Sometimes the court must determine a *reasonable* way to fill in a blank. Ultimately, the law seeks to enforce contracts in a manner consistent with the intentions of the parties.

Even the simplest lease must (1) identify the landlord and tenant (or their agents); (2) identify the rental premises; (3) set out the duration of the lease; and (4) state the rent or other consideration to be furnished by tenant. Satterfield v. Pappas, 67 NC App 28 (1984). In a lease repeating from period to period – e.g., a month-to-month lease – the agreement may be terminated in any way specified by the lease, whether it be 30 days' oral notice, one days' written notice, or five days' notice delivered by a rider on horseback. If the lease is silent on the matter, GS 42-14 fills in the blank by requiring 7 days' notice prior to the end of the rental period.

When parties wish to have greater control of the details of their agreement, that control is achieved through longer, more detailed contracts. Such contracts can specify precisely what is required of each party, as well as the consequences of a contract violation. The parties also have an opportunity to anticipate future events and spell out their agreement about how those events will be handled. Unless a contract provision violates public policy or otherwise runs afoul of the law, a court will enforce these provisions.

The answer to most of the questions I receive about landlord-tenant law is "It depends on what the lease says." Does a landlord have a legal right to enter rental property in the event of an emergency? Can a tenant be evicted for breaking rules set out in the lease? Can a landlord charge a late fee? Does a lease terminate if a tenant dies? Must a landlord demand the rent and wait ten days before filing a summary ejectment action? The answer to each of these questions depends on what the lease says. A well-written lease that clearly spells out the parties' agreement is an incredibly powerful tool for establishing "the rules of THIS case."

When a person breaches a contract, the other contracting party can file a lawsuit asking for damages caused by that breach. The plaintiff must provide the court with a copy of the contract if written, specifically identify the contract term allegedly breached, and prove that the defendant did in fact breach that term. In determining damages, contract provisions related to recoverable damages (e.g., attorney fees) are enforceable if not inconsistent with the law.

A summary ejectment action is a lawsuit filed by a landlord seeking the legal remedy of possession arising out of the tenant's breach of the lease. The evidence a landlord must produce in support of this claim is (1) a copy of the lease if it is written (or testimony establishing an oral agreement—and the terms of that agreement—if there is no written lease); (2) identification of the provision allegedly breached; and (3) proof that the tenant breached that provision. Whether the court will award late fees, a court appearance fee under GS 42-46, attorney fees, or other particular damage items will depend on whether and how those items are included in the lease.

In a straightforward breach of contract case, the proper parties to the lawsuit are the parties to the contract. A contract "establishes the rules of this particular case" only for the parties who agreed to those rules, and they are the correct parties in a lawsuit based on the contract. When an agent enters into a contract on behalf of someone else, the general rule is that the agent is not personally obligated by the contract and is not an appropriate party to a lawsuit: if you purchase an oven from Sears, the contract is between you and Sears, not between you and the Sears salesperson.

In a summary ejectment action, the proper parties to the action are the parties bound by the lease agreement. It is the lease agreement which establishes the essential landlord-tenant relationship between the owner of rental property and the person renting it. When an owner is represented by an agent, the agent is like the Sears salesperson: neither personally bound by the lease agreement, and not a proper party to the lawsuit.

The highly specialized nature and complexity of landlord-tenant law makes it easy for everyone involved with it to lose sight of the fundamental truth at its center: a lease is a contract. Magistrates sometimes encounter cases in which a lease downloaded from the internet has been subsequently signed by both landlord and tenant with neither of them reading or talking about its terms. This indicates a fundamental misunderstanding of how all this works. A lease is not a "thing" parties should have—it's a tool parties should use, to determine the rules for their particular agreement. The same general knowledge most of us have about contracts applies with equal force to leases. Just as with any other important contract, parties should decide on their agreement and then put it in writing. If details are important to them, they should agree on those too, and include that agreement in the writing. They should bring the writing to court. Things will go much better.

A lease is a contract, but.....

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : small claimssummary ejectment

Date : October 11, 2017

In my last post, I emphasized the contractual nature of a rental agreement. My main point was that the agreement between the landlord and tenant, whether oral or written, is where a small claims magistrate begins in a summary ejectment lawsuit. Often parties wrongly assume that some aspect of their mutual commitments "goes without saying." In fact, a summary ejectment action is at its heart a breach of contract lawsuit, and the specific terms of the contract are the starting point in determining any dispute.

While the lease is always the beginning point, the magistrate's analysis must often go further than just the parties' agreement. As I've previously discussed, landlord-tenant law is replete with special rules, some (mostly procedural) tending to favor the landlord and some (mostly substantive) tending to favor the tenant. The US Supreme Court has pointed out that these procedural advantages and consumer protections, viewed together, work to balance the legal scales related to this unique legal relationship. Lindsey v. Normet, 405 U.S. 56, 72, 92 S. Ct. 862, 873, 31 L. Ed. 2d 36 (1972). This post highlights some of the many ways consumer protection legislation affects the residential contractual agreements between landlords and tenants. The discussion that follows is limited to that sort of agreement.Consumer legislation in landlord-tenant law is scattered across a number of statutes, and some additional protective principles – usually equitable in nature – have been recognized at common law. These rules vary in their impact on a lease agreement: they may delete a lease provision by deeming it void and unenforceable, insert a provision as "implied by law," or authorize certain provisions only if they comply with statutory restrictions. Sometimes the statutes establish the consumer's right to sue the landlord for violations, while others authorize tenants to raise violations in defense of a summary ejectment action by the landlord. Violations of some of these rules have been held to constitute an unfair or deceptive practice under GS 75-1.1, resulting in awards of triple damages and attorney fees. A comprehensive list of these provisions is beyond the scope of this post, but a loosely-organized summary appears below:

Specialized Protections for Certain Kinds of Tenants:

- Victims of domestic violence, sexual assault, or stalking
  - GS 42-42.2 Prohibits discrimination in rental practices
  - GS 42-45.1 Allows early termination of rental agreement
  - GS 42-42.3 Allows change of locks on rental premises
- Persons serving in the military
  - GS 42-45 Allows early termination of rental agreement
  - 50 USC 3955 (Federal) Allows early termination of rental agreement 50 USC 3951 (Federal) Restricts evictions/seizure of personal property
- Tenants of foreclosed property
  - GS 45-21.17 Requires certain tenants to receive advance notice of foreclosure sale
  - GS 45-21.16A Allows early termination of lease by tenants in anticipation of foreclosure
  - & 42-45.2 GS 45-21.33A Allows lease to survive foreclosure
- Tenants in subsidized housing
  - Numerous federal statutes & regulations as well as NC case law (see citations & discussion in Brannon, NC Small Claims Law, pp. 184-186, 211) require strict compliance with procedural requirements and showing of good cause for termination of tenancy.

    - GS Ch. 42, Art. 7 Allows use of partial and conditional eviction in “innocent tenant” situation
- Owners of mobile home communities containing five or more lots are required to give mobile home owners who are renting spaces minimum notice of 180 days before converting land to another use which requires mobile homes to be removed from GS 42-14.3.

Protections Applicable to All Residential Tenants

- No self-help GS 42-25.6
- LL prohibited from withholding tenant’s property to coerce payment of rent or other debt. GS 42-25.7
- LL prohibited from immediate disposal of tenant’s property, but must first obtain writ of possession and then follow detailed statutory procedure making property available to tenant and disposing of property if tenant does not take GS 42-25.7; 42-25.9; 42-36.2.
- Retaliatory eviction is GS Ch. 42, Art. 4A.
- LL is required to provide fit and habitable premises, including compliance with detailed list of requirements set out in GS 42-42.
- Late fee provision in written lease for rent at least five days overdue is enforceable only if it complies with limitations on maximum amounts and rules about allocation of GS 42-46.
- Nonrefundable pet fee must be reasonable in GS 42-53
- Landlord must comply with detailed legal requirements related to security GS Ch. 42, Art. 6.
- Landlords are debt collectors under GS 75, Art. 2, and are subject to the provisions of the Debt Collection Act.
- Landlords are prohibited from engaging in housing practices which discriminate against tenants based on “race, color, religion, sex, national origin, handicapping condition, or familial status” by the North Carolina Fair Housing GS Ch. 41A.
- The federal Fair Housing Act prohibits housing practices which discriminate against tenants based on “race, color, religion, sex or national origin” and provides significant protection to tenants with disabilities. 42S.C. 3601-3619.

Statutory Provisions Related to Summary Ejectment Actions

- Provision in written lease authorizing fee if landlord files lawsuit for breach enforceable only if it complies with limitations on maximum amounts, allocation of payments, and other statutory GS 42-46.
- Provision in written lease authorizing collection of attorney fees subject to statutory requirements that tenant receive advance notice of right to avoid such fees by full payment of outstanding GS 6-21.2(5).
- Tenants are entitled to remain in rental housing while an appeal is pending upon satisfying the statutory requirements for a GS 42-34
- Tenants who are evicted pursuant to a small claims judgment and later prevail on appeal to district court are entitled to recover possession and damages incurred because of their removal. GS 42-35 and -36.
- A landlord seeking to enforce a judgment for possession more than 30 days after judgment was entered must sign an affidavit attesting that the parties have not entered into a new lease agreement and that the landlord has not accepted payment from the tenant for any period after judgment was entered. GS 42-36.1A

Special Rules for Summary Ejectment Actions

In my last post, I outlined the most significant procedural differences between general civil actions and actions brought in small claims court, which are governed in large part by GS Ch. 7A, Art. 19. Overall, the procedure in small claims court is simpler, faster, and cheaper. The substantive rules and procedures for *summary ejectment,* the most common small claims action, are highly specialized and allow for even faster relief. Summary ejectment is a legal action brought by a landlord seeking to remove a breaching tenant from possession of rental property. North Carolina joins a large number of states in offering landlords this carefully crafted remedy, which may at first appear unusual in its provision of frank preferential treatment to a particular group of litigants seeking a particular remedy. The US Supreme Court approved such specialized treatment many years ago, however, pointing out that providing an expedited procedure for these cases makes sense in the larger context of laws prohibiting the common law practice of self-help eviction. "The objective of achieving rapid and peaceful settlement of possessory disputes between landlord and tenant has ample historical explanation and support. It is not beyond the State's power to implement that purpose by enacting special provisions applicable only to possessory disputes between landlord and tenant." *Lindsey v. Normet*, 405 U.S. 56, 72, 92 S. Ct. 862, 873, 31 L. Ed. 2d 36 (1972). In this blog entry, I'll identify the most significant distinctions between the usual procedural rules applicable to small claims court and those applicable only to actions for summary ejectment.

A "simple" landlord-tenant relationship is required. It is perhaps not surprising that many litigants are drawn to the advantages of removing unwanted occupants from real property by way of an action for summary ejectment. From live-in lovers who have fallen out to sellers waving rent-to-own contracts, the range of litigants seeking summary ejectment is considerable. North Carolina courts have been steadfast, however, in refusing to extend this remedy to landowners other than landlords seeking to recover possession of real property: Only if the plaintiff and defendant are involved in a "simple landlord-tenant relationship," does a small claims magistrate have jurisdiction to hear such a case. *Marantz Piano Inc. v. Kincaid,* 108 N.C. App. 693 (1993).

Property owner may appear by agent. A special rule governs *who* can file a summary ejectment action. According to GS 7A-223(a), an "agent acting for the plaintiff who has actual knowledge of the facts alleged in the complaint" may sign the complaint—and appear in small claims court to testify. The prohibition in GS 84-4 against the unauthorized practice of law has no application in these cases. (Note, however, that the owner of the property is the real party in interest, and must be named as plaintiff in the action.)

Expedited trial and special rules for service of process. A summary ejectment action must be calendared within seven business days after the complaint is filed. GS 42-28. The sheriff is required to serve the summons within five days from the time the case is filed, and at least two days (excluding legal holidays) prior to the trial date. For summary ejectment cases only, service of process may be made by first class mail

accompanied by posting the summons and complaint on the rental premises. GS 42-29. In this event, service is insufficient to support an award of money damages, but plaintiff can proceed with a claim for possession of the rental property.

Judgment on the pleadings. Default judgments are not permitted in small claims court and--with one exception—plaintiffs are required to demonstrate their right to recover by the greater weight of the evidence regardless of whether the defendant appears. The single exception to this rule arises in actions for summary ejectment. GS 42-30 excuses the plaintiff from producing evidence in support of his claim provided that (1) the defendant has been served; (2) the defendant does not appear at trial or file an answer; (3) the complaint alleges as grounds breach of a lease condition for which reentry is specified; and (4) the plaintiff requests judgment on the pleadings in open court.

Continuances limited and prompt decisions required. In 2013 the General Assembly amended GS 7A-223 to restrict the court's authority to grant continuances in actions for summary ejectment. The new law provides that a continuance may be granted only for good cause and limits the length of a continuance to five days or the next session of small claims court, whichever is greater, unless the parties consent to a longer period. The same legislation amended GS 7A-222 to prevent magistrates from reserving judgment in summary ejectment actions without the agreement of the parties unless the case is "more complex." In the latter event, the magistrate may reserve judgment for no more than five business days.

Appeal. In the event a party in a summary ejectment action wishes to appeal for trial de novo in district court, costs of appeal must be paid within 10 days from the time judgment is entered, subject to exception related to a claim of indigency in some circumstances. (Appellants in other small claims cases have 20 days to pay costs.) GS 7A-228(a). In 2013 the General Assembly enacted subsection (b) of this statute authorizing the district court to dismiss an appeal by a tenant in a summary ejectment action without further hearing if the court finds that the tenant has failed to participate in the case by taking any of a list of enumerated actions.

Enforcing the judgment. According to GS 42-36.2(a), a sheriff must execute a writ of possession within five days after the writ is issued.

The cumulative effect of these special rules is profound. It is perhaps best illustrated when one considers that in the usual civil action the defendant has 30 days after being served with the complaint in which to file an answer, By contrast, at the end of that same period of time the defendant in a summary ejectment action may find himself standing with his belongings on the sidewalk in front of his former home.

Procedure & Timeline for Summary Ejectment Actions

Complaint filed with clerk of court in county in which tenant resides. Action must be filed in name of property owner, but agent having personal knowledge of facts may sign complaint.

Clerk will accept complaint and set trial date within 7 days, not counting weekends and holidays. (Thirty days for all other small claims actions.)

The clerk issues a summons, which informs the defendant of the lawsuit and the time and place of hearing. The plaintiff may choose to serve by registered or certified mail, signature confirmation, or designated delivery service. If so, plaintiff must provide magistrate with signed receipt and affidavit of service. (Form AOC-CV-662, available at www.nccourts.org, under "Forms.")

If plaintiff does not choose this option, the clerk will send the complaint and summons (referred to as *process)* to the sheriff for service.

Upon receipt of process, sheriff is required to mail a copy by first class mail by end of next business day "or as soon as practicable." The officer must go to the defendant's residence within five days—but at least two days prior to the trial date—"at a time reasonably calculated to find the defendant at the place of abode" to attempt personal service. If unable to serve the defendant personally, the officer must post the process on the premises (*service by posting*).

If service is by posting and the defendant does not appear at trial, the magistrate has authority only to award possession of rental premises. Personal service is required in order for a judicial official to award a money judgment. A landlord who files an action for money and possession must make a choice when service is by posting: if the landlord wishes to delay trial in order to pursue personal service, the landlord may ask the magistrate for a *continuance.* A landlord who does not want to delay regaining possession of the property may drop the claim for money damages and bring a later lawsuit for those damages. Sometimes a plaintiff will ask the magistrate to formally *amend* the complaint to reflect this modification.

Small claims law requires that plaintiffs produce evidence in support of their claims even when the defendant does not appear at trial. The sole exception to this general rule is available to plaintiffs seeking summary ejectment. These plaintiffs may

obtain a judgment of possession without producing any evidence if all the following requirements are satisfied:

1. The plaintiff requests *judgment on the pleadings* in open court;
2. The defendant has been served;
3. The defendant is not present in court and has not filed an answer; and
4. The basis for summary ejectment, as reflected by the complaint, is failure to pay rent in violation of a lease containing a forfeiture clause.

The availability of judgment on the pleadings may mean plaintiffs, especially those having a number of cases, spend much less time in court. However, magistrates are not authorized to award money judgments in cases decided under this provision. A plaintiff seeking both possession and a money judgment must, as usual, support the request for money with evidence.

At the close of the evidence, the magistrate may either announce the judgment in open court or, in complex cases, *reserve judgment.* If the magistrate reserves judgment, s/he is required to mail a copy of the judgment to the parties within five business days.

If the plaintiff/landlord obtains a judgment awarding him or her possession, the law provides that that judgment does not become final and enforceable for ten days. During that ten-day period, either party may give notice of appeal if dissatisfied with the magistrate's decision. That ten-day time limit is strictly enforced. Notice of appeal may be given in open court, or by going to the clerk's office and filing written notice. The appealing party has 10 days in which to pay costs of appeal [exception for indigent appellants—see GS 7A-228 (b) and (b1)], and to request a jury trial if desired. The non-appealing party also has the right to ask for trial by jury. GS 7A-230.

At the end of ten days, if the tenant has not given notice of appeal, the plaintiff may initiate enforcement of the judgment by asking the clerk to issue a *writ of possession.* [Note: a plaintiff who waits longer than 30 days to seek a writ is required to sign an affidavit swearing that s/he has neither entered into a formal lease with the defendant nor accepted rent money from the defendant "for any period of time after entry of judgment. " The clerk will not issue a writ unless the landlord signs the affidavit.]

The sheriff is required to enforce the writ of possession within 5 days after receiving it.

If either party appeals the magistrate's judgment, the case will be heard *de novo* in district court. A *de novo* hearing is an entirely new trial, as though the case had never been heard in small claims court. On appeal, either party may ask that the case be tried at the first session after the appeal has been docketed, but the court has discretion to first try other pending cases if deemed necessary. GS 42-

34(a). Unless a continuance has previously been granted, the court must grant a continuance if a party seeks discovery, asks the court to allow further pleadings, or moves for summary judgment.

The 2013 General Assembly enacted GS 7A-228(d), establishing a new procedure allowing the court to dismiss an appeal by defendant on motion of plaintiff demonstrating defendant has failed to participate in the action in a number of enumerated ways. The procedure requires the plaintiff to serve defendant with a motion containing the information that failure to respond within 10 days may result in the appeal being dismissed without a hearing. If defendant fails to respond to the motion, the court may dismiss the appeal upon reviewing the file and determining that the statutory requirements have been met.

While an appeal is pending in district court, a plaintiff may elect to dismiss the case, and the effect is to essentially erase the judgment of the magistrate. Note that this is a Rule 41 voluntary dismissal <u>of the case,</u> as opposed to a dismissal <u>of the appeal</u>. First Union National Bank v. Richards, 90 NC App 650 (1988).

At trial, the usual, more formal, rules of district court apply. At the district court level, corporate parties must be represented by an attorney. Lexis-Nexis v. Travishan Corp., 155 NC App. 205 (2002).

One of the most confusing procedural topics in summary ejectment concerns the tenant's right to occupy the rental property during the pending appeal of a judgment awarding possession. <u>Appeal by a tenant/defendant does not automatically delay the plaintiff's right to recover possession of the rental property</u>. Nothing else appearing, the plaintiff is free to pursue eviction following the expiration of the 10-day notice of appeal period. In such a case, GS 42-35 and 42-36 provide that a tenant who wins on appeal is entitled to be restored to possession and to recover damages caused by his removal.

There is a procedure, however, which permits a tenant to continue to occupy rental property pending appeal. GS 42-34. That procedure has three components:

(1) the tenant must pay into the clerk's office any unpaid rent that both parties agree is owed (*undisputed rent*). Thus, if the plaintiff contends that the tenant owes $1000 in back rent, but the defendant claims that the correct amount is $500, the tenant must pay $500 into the clerk's office. [Note: this requirement does not apply to tenants found to be indigent by the court.]

(2) if the action for summary ejectment was based on failure to pay rent, and the judgment of the magistrate was entered more than 5 working days before the end of the rental period, the appellant must pay that prorated amount to the clerk's office.

(3) The tenant must sign an undertaking to continue to make the rent payments, as they come due, to the clerk's office. Failure to make a payment within five days of the due date results, at the plaintiff's request, in termination of the stay, permitting immediate enforcement of the judgment for possession.

It is common for parties as well as clerks and other court personnel to confuse a situation in which the tenant fails to obtain—or maintain—a stay and that in which a tenant's appeal is in jeopardy. For example, a tenant who gives notice of appeal and pays costs within 10 days might appear on Day 12 seeking a stay. If the plaintiff has obtained a writ of possession, the clerk will refuse to issue the stay, but this has no impact on the pending appeal. (And if the plaintiff has not yet obtained a writ of possession, the clerk should issue the stay.) *See* Fairchild Properties v. Hall, 122 NC App 286 (1986).

GS 42-34.1 provides further instructions for the period immediately following the district court trial:

- If tenant has obtained a stay pending appeal and the district court rules in favor of the plaintiff-landlord, the tenant must continue to pay rent to the clerk as required by the undertaking during the 30-day period following judgment. Despite the general rule prohibiting enforcement of judgments during the 30-day appeal period, a tenant who fails to comply with the undertaking during this period is subject to eviction.

- If the landlord prevails at the district court level and there is no appeal, the tenant must pay for the period of possession following the judgment. In addition, the clerk must disperse any amount of rent in arrears in accordance with the stipulation of the parties or, failing that, as directed by the judge.

- If the landlord prevails in district court and tenant appeals, enforcement of the district court judgment is stayed so long as the tenant continues to comply with the requirements of the undertaking. The clerk is not authorized to disperse rent in arrears until all appeals have been resolved. If the tenant fails to perfect the appeal or the appellate court rules for plaintiff, the judgment for possession becomes immediately enforceable.

New Legislation regarding Summary Ejectment

Author : Dona Lewandowski

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Landlords often encounter a frustrating situation when they file a lawsuit for eviction and past due rent, resulting, ironically, from the interaction of two laws intended to benefit landlords. First, GS 42-29 requires the sheriff to expedite service of process by mailing the tenant the complaints and summons "as soon as practicable." Within the next five days, and at least two days before the trial, the officer must visit the tenant's home to attempt personal service. If no one answers the door when the officer knocks, the second special rule for summary ejectment cases kicks in, allowing the officer to simply post the summons and complaint on the door. Such "service by posting" allows the trial to go forward even though the tenant has not been personally served.

In all other small claims lawsuits, a defendant must be served in a way more likely to provide actual notice of the trial. Usually the officer either hands the paperwork to the defendant or leaves it with someone living there. Sometimes service is accomplished by certified mail or delivery service requiring a signature. Obviously, tacking notice of a lawsuit to the tenant's door is a less certain way of notifying the defendant of the trial, and a landlord in that situation may recover at most possession of the rental property – a money judgment is not allowed. The rationale is that service by posting is likely to provide adequate notice to a tenant living on the property, who will probably see the posted material, and that a tenant no longer living on the property is probably less concerned about being evicted anyway.
This reasoning obviously doesn't apply to judgments requiring defendants to pay money. A tenant who has moved away is not likely to see a notice that she or he is being sued for money, and so service by posting is legally insufficient notice, in terms of due process, to allow a judgment for back rent or other money damages.

The combined result of these laws is that many summary ejectment cases are served by posting simply because there isn't time for the sheriff to make a second trip to the tenant's home to try again for personal service. This works well for landlords who just want their property back. Landlords asking for both possession and back rent, however, are faced with a choice: they may withdraw their claim for money damages and go ahead with their claim for eviction (filing a second lawsuit later for money), or they may ask that the case be continued in order to pursue personal service on the tenant.

The 2017 General Assembly addressed this problem in 2017-S.L. 143. Effective October 1, 2017, the new law amends GS 7A-223 as follows:

In any small claim action demanding summary ejectment and monetary damages, and where service of process has been achieved solely by first-class mail and affixing the summons and complaint to the premises pursuant to G.S. 42-29, the plaintiff, or an agent pursuant to subsection (a) of this section, may request that the claim for summary ejectment be severed from the claim for monetary damages. Upon a finding that personal service was not achieved for one or more defendants, the magistrate shall sever the claim for monetary damages and proceed with the claim for summary ejectment. If the magistrate severs the claim for monetary damages, the plaintiff may extend the action in accordance with G.S. 1A-1, Rule 4(d). The judgment of the magistrate in the severed claim for summary ejectment shall not prejudice the claims or defenses of any party in the severed claim for monetary damages.

The new law makes two additional changes: It amends Rule 4 (h1) to specify that the second summons—in which money damages is the only claim left to be determined—may be served by a private process server. And it amends GS

7A-222 and 7A-228 to provide that parties in small claims actions, and in appeals from those actions to district court, “shall not be required to obtain legal representation.”

At first glance, the effect of this new legislation seems modest. Landlords have long had the right to file separate lawsuits for possession and money damages. GS 42-28. Thus the effect of the new law is not to permit a recovery of money damages where such recovery was not previously available. Regardless of whether those claims are determined in one lawsuit involving severed claims or two separate lawsuits, a landlord is faced with the inconvenience and expense of serving two summons and making two court appearances. The primary impact of the new law on landlords is the savings of the $96 costs of court fee associated with filing a second lawsuit. (Because costs are taxed to the tenant when the landlord wins a money judgment, this savings will benefit tenants as well.)

The immediate challenges for the court system posed by this legislation are administrative and procedural. While “partial” judgments are common in the other trial courts, the practice is new to Small Claims Land. The AOC form judgments used by small claims magistrates do not contemplate partial disposition of an action and will likely require revision. There will probably be case management issues as well, arising, for example, when a landlord delays or never gets around to following up on the still-pending claim for back rent.

Most of the questions that immediately occur to me relate to the procedures for appeal. It seems apparent that the legislature intended a magistrate’s judgment for possession to be enforceable even though a claim for money damages is pending and the case has not yet been finally and completely decided. Can a tenant immediately appeal from the judgment for possession? If an immediate appeal is available, do the usual rules governing appeal – including the procedure for staying enforcement while appeal is pending – apply? If the tenant does appeal, may be the pending claim for back rent be considered by the small claims magistrate—or does the appeal to district court deprive the small claims court of jurisdiction? Should the district court in the de novo appeal treat the claim for rent as part of that case, even if this claim has never been addressed by the small claims magistrate? If the tenant does not immediately appeal from a judgment for possession, does the tenant have the right to challenge that judgment on a later appeal from the final judgment concerning back rent? Does it matter whether the tenant does or does not prevail in the trial determining the claim for money damages? In other words, is the tenant an “aggrieved party” for purposes of appeal if the tenant lost at the first hearing, for possession, but won at the second hearing, for money damages? There are a number of other questions, related to appeal as well as to other aspects of this bifurcated trial that will have to be resolved before this new legal procedure will be smoothly integrated into existing practice. For now, more questions than answers, but stay tuned . . .

Is Service by Posting Available in Non-Residential Leases?

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : service by posting, small claimssummary ejectment

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North Carolina small claims magistrates across the state report that most summary ejectment actions are served by posting, and that's not surprising. GS 42-29, the statute establishing the procedure for service of process in such cases, establishes a very narrow window within which the officer must operate: the officer must visit the defendant's place of abode to attempt personal service within five days of the summons being issued, but at least two days prior to the court date. For the most part this brief span of time does not permit an officer to make a second effort at personal service. Consequently, in those instances in which no one opens the door to accept service, the officer is instructed by the statute to post the complaint and summons to a conspicuous place on the rental premises. This method of service -- variously referred to as *service by posting* or *nail and mail* -- has long been a legally permissible alternative means of service in certain circumstances. In this blog post, I'm going to explore whether and how this works in a situation in which the rental agreement involves something other than a residential setting.

As I've written previously, the familiar Rules of Civil Procedure set out in GS 1A-1 apply to small claims court "except when a differing procedure is prescribed by statute." GS 1A-1, Rule 1. A number of "differing procedures" applicable to small claims court are set out in GS Ch 7A, Art. 19, including GS 7A-217, which provides:

- ***7A-217. Methods of subjecting person of defendant to jurisdiction.***

When by order or rule a small claim action is assigned to a magistrate, the court may obtain jurisdiction over the person of the defendant by the following methods:

(1) By delivering a copy of the summons and of the complaint to the defendant or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When the defendant is under any legal disability, the defendant may be subjected to personal jurisdiction only by personal service of process in the manner provided by G.S. 1A-1, Rule 4(j)(2).

(2) When the defendant is not under any legal disability, the defendant may be served by registered or certified mail, signature confirmation, or designated delivery service as provided in G.S. 1A-1, Rule 4(j). Proof of service is as provided in G.S. 1A-1, Rule 4(j2).

(3) When the defendant is under no legal disability, the defendant may be subjected to the jurisdiction of the court over the person of the defendant by written acceptance of service or by voluntary appearance.

(4) In summary ejectment cases only, service as provided in G.S. 42-29 is also authorized.

Notice that the first three sections of this statute clearly address service of process on a defendant who is a natural person, whether or not under a legal disability. The provisions of GS 1A-1, Rule 4(j)(1) & (2)—which governs service under these circumstances in civil actions generally—have clearly been replaced in small claims cases by this statute. What about different circumstances, though? What if the defendant is a corporation or partnership, for example? Because there is no statute setting forth a "differing procedure" for small claims, the procedure in Rule 4(j)(6)&(7) applies. *See* Brannon, NC Small Claims Law p. 16, fn. 39.

You've probably spotted the lingering question by now: how are we to understand part (4) of the small claims statute, the part that allows "service as provided in GS 42-29" in summary ejectment actions? GS 42-29 is the statute we began with, requiring the officer to "make at least one visit" to the defendant's "place of abode." If unable to serve the defendant personally at that point, the statute directs the officer to leave copies at "the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." This language obviously tracks the language used in the statute set out above referring to service of process on natural persons. It contemplates service on a tenant who is not a business entity. Consider in this light the final sentence of GS 42-29: "If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed." (emphasis added).

No North Carolina case has addressed the meaning and application of these statutes in a non-residential context. It seems to me that small claims magistrates might reasonably interpret them in two different ways. First, one might argue that service by posting in a non-residential summary ejectment action is simply not authorized by law. In support of this argument, note that the statutes authorizing service by posting, GS 7A-217 and 42-29, both use language clearly contemplating service on a natural person pursuant to a visit to that person's home. Nothing in these statutes directly authorizes service by posting process on a business establishment, and there is reason to question whether such service would meet minimal due process standards. See *Greene v. Lindsey*, 456 U.S. 444 (1982), in which the US Supreme Court noted the significance of a residential setting in determining whether service by posting can be safely assumed to provide an interested defendant with actual notice of a pending eviction action.

The second, more conservative argument one might make stops short of declaring that service by posting is authorized only in residential evictions, but instead permits such service in all actions for summary ejectment provided that the statutory requirements set out in GS 42-29 are satisfied. One of the challenges to this interpretation concerns the application of the statutory language referring to the defendant's place of abode, but there is a more significant limitation: the statute requires that the process must be posted on "the premises claimed," i.e., the rental premises. When the rental premises are something other than residential property, the statute requires the officer, after first attempting personal service on the defendant, to travel to the rental premises to post the summons and complaint. There are a number of practical concerns about whether this requirement is actually satisfied in common practice.

The requirement that process be posted on the rental premises, if posted at all, is an extremely important one. In all other small claims cases, such service is considered insufficient notice to a defendant, and even in summary ejectment actions service by posting is insufficient to support entry of a money judgment against the defendant. The rationale for an award of possession of rental property based on posted service is dependent upon the fact that notice was posted on the property at issue. Posting notice somewhere other than the rental premises, even at the defendant's home, is simply insufficient.

On the Civil Side: Subject Matter Jurisdiction in Actions for Summary Ejectment

For hundreds of years, the law has provided a procedure for landlords to obtain assistance from the justice system in ousting a tenant and taking back rental property. In North Carolina in the late 19th Century, just as today, "proceedings in ejectment" were one of the most common types of civil cases filed. I recently spent some time reading many older landlord-tenant cases in an effort to trace the development of the law pertaining to subject matter jurisdiction in summary ejectment cases. I began with some reservations about the continued relevance of these cases. After all, North Carolina's entire court system was revised – and the Rules of Civil Procedure adopted– after many of these cases were decided. Justices of the peace no longer hold court, and appeal from small claims court is to district—not superior—court today. What I found striking in doing this research was actually how little has changed. The questions in the late 1800s may have used different legal terminology, but would be familiar to any small claims magistrate. One of the most common issues, for example, was whether a seller/landlord could regain possession of property subject to a rent-to-own agreement by way of summary ejectment. Another was whether a buyer by way of foreclosure could use summary ejectment to oust the former owner. What I found is that the rules governing jurisdiction in ejectment cases have remained remarkably consistent in application, although the underlying rationale for the rules has, from the beginning, been considerably more variable. This post attempts to summarize those procedural rules where they are clear. In my next post, I'll discuss some troublesome areas in which clarity is lacking.

Clear Rules

- A landlord-tenant relationship is an essential element of a summary ejectment action, and the plaintiff must establish the existence of such a relationship in order to avail itself of the specialized procedure and remedy established by GS 42-26. *Credle v. Gibbs*, 65 N. C., 192 (1871); *McCombs v. Wallace*, 66 N. C., 481 (1872); *Hughes v. Mason*, 84 N.C. 472, 474 (1881)

- An action seeking to recover possession of real property must fall within the more narrow confines of an action for summary ejectment to be eligible for assignment to small claims court. A magistrate has no jurisdiction to consider an action for possession based on any ground other than summary ejectment. GS 7A-210; GS 7A-211.

- If defendant files a written answer denying plaintiff's title, assignment to small claims is withdrawn and the action is scheduled for trial before a district court judge. GS 7A-223(a).

- Assuming no answer is filed challenging title, a magistrate has authority to hear evidence and determine whether the action is in fact one for summary ejectment (i.e., whether there is a landlord-tenant relationship between the parties). *Foster v. Penry*, 77 N.C. 160, 162 (1877).

- If a magistrate finds insufficient evidence of a landlord-tenant relationship, the magistrate should make a finding that the court lacks subject matter jurisdiction and dismiss the action. *Hargrove v. Cox*, 180 N.C. 360, 104 S.E. 757, 759 (1920)

- In an appeal for trial de novo from a small claims judgment in a summary ejectment action, the district court should determine whether a landlord-tenant relationship exists between the parties and, if such a relationship is not established, the district court should dismiss the case for lack of subject matter jurisdiction. *Hayes v. Turner*, 98 N.C. App. 451, 454, 391 S.E.2d 513, 515 (1990)

- A landlord may file an action for ejectment in small claims court, district court, or superior court. *Carolina Farm Credit v. Salter*, 113 N.C. App. 394, 398, 439 S.E.2d 610, 612 (1994) [citing *Stonestreet v. Means,* 228 N.C. 113, 115, 44 S.E.2d 600, 601 (1947)].

- A trial court should consider its own authority to act even if neither party raises a question about subject matter jurisdiction and dismiss the case if subject matter jurisdiction is lacking. *Hayes*.

- No trial court has subject matter jurisdiction to determine a claim based on the purely statutory remedy of summary ejectment established by GS 42-26 in the absence of a simple landlord-tenant relationship. *Heights Credit Union v. Boyd*, 104 N.C. App. 494, 497, 409 S.E.2d 742, 743 (1991)

  When the appellate courts have found that the district or superior court lacked subject matter jurisdiction in these landlord-tenant cases, it has been for two reasons. First, some cases have focused on the rule that a court is without jurisdiction to consider an appeal from a court that itself lacked jurisdiction (sometimes stated as “jurisdiction is derivative”). In other cases, however, the courts have ignored the procedural posture of the case and simply stated that a court has no jurisdiction in an action for summary ejectment in the absence of a landlord-tenant relationship.

  Why does it matter?

  In the small claims context, magistrates’ authority to award possession of real property is limited to summary ejectment actions, and the magistrate is entirely lacking authority to consider any other basis for awarding possession of real property to plaintiff. In the absence of a landlord-tenant relationship, these cases are not eligible for assignment to small claims court. In previous posts I’ve suggested that a magistrate return to the clerk cases not meeting the statutory requirements for assignment, so that the case may be heard in district court. Whether this procedure is appropriate in these circumstances depends on whether the district court has authority to consider the case. The answer to that question is unclear and will be the subject of my next post.

When the Nanny Won't Leave: NC Law on When Employees are Tenants

In 2014 the story of a California family and a live-in nanny who refused to leave after her employment ended made international news –- including Dr. Phil! According to media accounts, the parties agreed that the nanny would provide childcare and light housekeeping in exchange for room and board. An argument ensued as to whether the nanny was performing her duties as originally agreed, and her employment was terminated. When the nanny retired to her bedroom rather than vacating the property, the situation deteriorated further. Law enforcement refused to intervene, saying the dispute was "a civil matter." Eventually the nanny voluntarily moved out. One media account commented, "Even though the nanny is gone, [one of the family members] says she still casts a long dark shadow in her home, saying, 'As far as I see it, she's, in a way, like a vampire and she hasn't yet drained us.'"

Perhaps the California nanny case attracted attention because people empathized with the family's plight. In a society where fired employees are routinely directed to clean out their desk and then escorted off the premises, the notion of being required to share living quarters for the time it takes to secure a judgment for eviction was horrifying -- and surprising. Like many people, I assumed that the nanny's right to live in the home ended when her employment did. It made me wonder whether the result would be the same under North Carolina law.

The fundamental idea that a landlord-tenant relationship is subject to particular legal rules dates back at least several hundred years, and our law today continues to attach great significance to whether a particular agreement falls within that category. At its heart, the landlord-tenant relationship is about the right to possession. Our starting point is that a landlord-tenant relationship is created when a party legally entitled to possession (the landlord) transfers that right to another (the tenant) in exchange for something of value (usually, but not necessarily, rent). To be valid, their agreement must specify only (1) the duration of the transfer and (2) the specific value the landlord is entitled to receive. In other words, we must know how long the lease will last and what the tenant must pay.

The creation of this relationship transforms the legal rights of both parties. The landlord who enters the property without the tenant's permission may face civil liability and criminal prosecution for trespass. With few exceptions, it is the tenant, not the landlord, who determines who may visit the property. Perhaps most significantly, a residential tenant may be forcibly removed from the premises only through a summary ejectment proceeding.

In general, an agreement as described above is understood by everyone to create a landlord-tenant relationship. Questions arise, though, when a person who occupies the landlord's property is employed by the landlord. Clearly, that person is an employee. The legal issue is

whether that person is also a tenant. In other words, does the employee enjoy the benefits and suffer the burdens that accompany classification as a *tenant,* involved in a *landlord-tenant relationship?*

There are surprisingly few North Carolina appellate cases, and no statutes, addressing this determination, but we do have one thorough treatment of the issue. In Simons v. Lebrun, 219 N.C. 42 (1941), Mr. Lebrun had been hired by the plaintiff to act as manager and custodian of two adjoining rental properties. The agreement between the parties was detailed and addressed Lebrun's rights and responsibilities both as an employee and as an occupant of a portion of one of the properties. For example, in addition to the room he occupied free of rent, Lebrun was allowed to use the kitchen, provided it was not being used by one of the tenants. His responsibilities were typical of those commonly performed by property managers, but also included supervision of the properties to ensure that no improper use of the premises – such as cooking outside of designated areas—occurred. When the rental properties were fully occupied, Lebrun was entitled to share in the profits, and when they were unoccupied, Lebrun was personally responsible for some portion of the utilities. After only two months, the plaintiff gave notice of his desire to terminate "the entire agreement" in thirty days, directing Lebrun to "see to it that everyone, including yourself, have vacated the house" by that date. When Lebrun failed to vacate, plaintiff filed a summary ejectment action based on holding over. Lebrun defended by challenging the court's jurisdiction; because he was not a tenant, he argued, there was no landlord-tenant relationship upon which to ground an action for summary ejectment.

The Court began by noting the "general rule" that "a person who occupies the premises of his employer as part of his compensation is in possession as a servant, and not as a tenant." The rest of the opinion, however, shifts sharply away from this generalization to an examination of cases setting a relatively high standard for its application.

The trend of thought in text–books and in decisions of other jurisdictions is that in order to establish relationship of master and servant, or employer and employee, with respect to occupancy by the servant, the occupancy must be reasonably necessary for the better performance of the particular service, inseparable from it, or required by the master as essential to it.

Following a lengthy review of these authorities, the Court disposed of Lebrun's argument in two short sentences:

Applying these principles to the case in hand, the contract of employment does not require the defendant to occupy a room in either house, nor does it appear to be essential for it is self–evident that he could not actually occupy a room in both houses. It is, therefore, clear that the occupancy by defendant was as tenant of plaintiff.

The test established by Simons has never been applied by the NC appellate courts and so we have no additional information about its application to particular facts. It is interesting that the Court

makes no comment about whether Lebrun's presence on the premises was "reasonably necessary for … better performance," assuming that phrase means something different, and lesser, than "inseparable" or "essential." Also surprising was the Court's almost offhand dismissal of Lebrun's argument in pointing out that he could not occupy rooms in two houses. (Because the premises were adjacent, it seems likely that living in one building provided him with more ready access to the other than he would have enjoyed had he lived across town.) What we are left with, it seems, is a "general rule" that is the opposite of the one stated: absent evidence that occupancy is a condition of employment, employees dwelling in housing furnished by their employers are likely to be categorized as tenants.

There are two things I find particularly interesting about this case. First, the result seemingly differs from those reached by courts in many other states at the time it was decided, despite the Court's claim to be consistent with "the trend of thought." Language from other jurisdictions contain numerous references to whether the occupancy was "independent" of the employment or instead "subsidiary" to it – a test that I believe might have yielded a different result in Simons. Secondly, this case was decided at a time in history when this decision would have been favorable to landlords. Tenants at the time had fewer legal rights than employees in some situations. Today, categorization as a tenant triggers numerous consumer protection rules, including the prohibition against self-help eviction and the application of the implied warranty of habitability.

And what about the California live-in nanny? I believe even the Simons Court would have refused to classify her as a tenant, thereby rendering her a trespasser after her employment was terminated. Interestingly, California law has resolved this issue by statute, establishing a single summary procedure for removing various types of unauthorized occupants, including employees as well as tenants.

North Carolina Criminal Law Blog: Trespass vs. Ejectment

By Jeff Welty

Article: http://nccriminallaw.sog.unc.edu/trespass-vs-ejectment/

This entry was posted on October 11,2011 and is filed under Crimes And Elements,Procedure,Uncategorized

Suppose that Bob Boyfriend moves in with Gina Girlfriend. Bob lives in Gina's apartment for several months. He isn't on the lease and doesn't pay rent, but he does buy most of the couple's groceries and does a fair share of the cleaning and other household chores. The relationship sours, and Gina asks Bob to leave. Bob refuses. Gina goes to the magistrate's office and asks the magistrate to issue an arrest warrant charging Bob with trespassing. Should the magistrate issue the warrant?

The answer depends on whether Bob is a tenant or a guest. If Bob is a tenant, then he may be "evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with" the eviction procedures in Chapter 42 of the General Statutes. G.S. 42-25.6. In other words, as a Georgia court put it, a "person who lawfully occupies property as a tenant cannot be ejectedfrom the property through a prosecution for criminal trespass." *Williams v. State*, 583 S.E.2d 172 (Ga. Ct. App. 2003). *See also People v. Evans*, 516 N.E.2d 817 (Ill. Ct. App. 1 Dist. 1987) (explaining that a tenant must be evicted rather than removed using the trespass statutes).

On the other hand, if Bob is just a long-term guest, then his failure to leave when told to do so is first-degree trespass under G.S. 14-159.12 (defining first-degree trespass to include when a person "without authorization . . . remains . . . [i]n a building of another").

So, how do we know whether Bob is a tenant or a guest? We know that "[t]he payment of rent is not essential to the creation of a tenancy at will." *Williams*, *supra*. But a tenant must make some regular contribution *in exchange for the right to live in the residence*. Note that many gracious long-term guests will make regular contributions to their hosts' households, whether by buying groceries, mowing the lawn, or offering to babysit their hosts' children. But such contributions do not turn the guests into tenants, any more than a dinner guest becomes a tenant because she brings a bottle of wine to show appreciation for her host. So, if Bob bought groceries and helped clean up because he was trying to be a considerate long-term guest, he was not a tenant. But if the parties — Bob and Gina — viewed the groceries and housework as Bob's equivalent to rent, then Bob was a tenant.

There will be some cases in which it isn't really clear whether a person is a guest or a tenant. The best that a magistrate can do it dig into the facts, including the nature and frequency of the contributions made by the person in question as well as any discussions the parties had about rent or tenancy. If that still leaves a murky situation, it may be best to err on the side of caution and use the summary ejectment procedures rather than trespass as a means of getting the person out of the residence.

I'll conclude by noting that I'm not an expert on landlord-tenant law. Another take on some of these issues appears in this memo by the Charlotte-Mecklenburg Police Department. Check it out, and if you believe that my analysis above is incorrect or incomplete, please let me know or post a comment.

Trespass or Eviction?

Wrong Question!

Rule #1: Decide the case in front of you.

Rule #2: Don't give legal advice, and certainly don't give incorrect legal advice.

Sitting as a small claims magistrate

As a small claims magistrate, you are called upon to determine whether the jurisdictional requirement of a landlord-tenant relationship is satisfied in actions for summary ejectment. Remember that you never have to determine the correct legal category for a relationship – which might have many possible answers – but rather only whether the relationship may be categorized as a "simple landlord-tenant relationship." The existence of a LL-T relationship ultimately depends on the intent of the parties expressed through a written agreement or, absent that, their behavior. The essence of a LL-T relationship is that a party entitled to possession of the property agrees that the other party may temporarily take possession in exchange for something of value.

Distinguish these relationships:

1. License to use the property. A lease grants the **right to possess** property, which is a property interest that may be inherited, sold, or levied upon. A license grants the licensee permission to do acts on land which would otherwise be a trespass. E.g., parking lot.

2. Innkeeper-guest. Consider all circumstances, remembering that labels used by parties are disregarded. Whether parties rely on premises as their permanent residence particularly significant. Baker v. Rushing, 104 NC App 240 (1991); Shepherd v. Bonita Vista Prop., 191 NC App 614, aff'd 363 N.C. 252 (2009).

3. Employer-employee: When defendant is employed by plaintiff, LL-T relationship exists only if occupancy is "reasonably necessary for the better performance of the particular service, inseparable therefrom, or required" by the employer. Simons v. Lebrun, 219 NC 42 (1941).

4. Action brought by owner's estate to oust occupant who entered prior to death of owner, with owner's permission. Estate of Hawkins v. Wiseman, 191 NC App 250 (2008); Jones v. Swain, 89 NC App 663 (1988).

5. Seller-buyer relationship: A "simple landlord-tenant relationship" does not exist when relationship between parties also involves a contemplated purchase of the property at some future point, raising issue of buyer's entitlement to accounting or "an adjustment of equities." Hauser v. Morrison, 146 NC 248 (1907). See also GS Ch. 47H.

6. Incidental occupancy: contract between parties is primarily one for services, with occupancy incidental. E.g., residential treatment centers, nursing home, DV shelter.

7. Prior owners/occupants (not tenants) of foreclosed property.

8. Guests, adult children, other occupants initially taking possession with permission, with permission revoked.

Sitting as a criminal magistrate

Note GS 14-159.12, providing that person who commits trespass by reentering after having been removed by writ of possession is Class I felony requiring minimum $1000 fine. Tenant who holds over, or who fails to vacate after entry of judgment but prior to service of writ of possession, is not trespasser, and LL who attempts self-help eviction during this period is himself potentially liable.

Second-degree trespass includes offense in which person lawfully enters property of another, but remains after being told to leave by "owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person."

When permission for occupancy is revoked, courts have required that occupant be allowed as reasonable time to vacate property.

Interest protected by trespass laws is *right to possession*.

- Even though landlord has title to property, tenant's right to present possession is superior to landlord's, making unauthorized entry of landlord possible criminal trespass.
- Tenant's right to possession includes right to permit others to enter property, absent contrary provisions in lease. Even if lease provides to contrary, tenant may have superior right to allow guests in some circumstances.
- Persons with equal right to possession are incapable of trespass. E.g., joint owners of property, co-tenants.
- Privilege to enter property is defense to criminal trespass charge.

Tenants at will: not entirely clear whether self-help eviction violates law.

Business or Shelter: When the Commercial/Residential Distinction Makes a Difference in Landlord-Tenant Cases

My topic for today's post is drawn from an email I received last week from a magistrate asking several great questions. Here's what she wrote:

"I was just thinking about tenant/landlord relationships and types of leases. . . . What are the differences between regular lease agreements and that for commercial properties that we as magistrates need to know? Do they both have the same notice requirements? Are commercial property evictions cases that magistrates would preside over in small claims court? Are the grounds for eviction identified in [Small Claims Law] on page 157 the same for commercial leases?" In preparing to answer these questions, I learned some things I thought some of you might find interesting.

What's Different?

In addition to consumer protection legislation, which is discussed below, there are a few statutes designed specifically for either commercial or residential rental situations. They are:

- Residential landlords seeking to evict tenants for criminal activity may rely on G.S. Ch. 42, Art. 7. Note, however, that commercial landlords are free to provide include in the lease a provision for forfeiture upon criminal activity by tenants, and the courts will enforce such a provision in the same way as any other *breach of a lease condition for which re-entry is specified*.
- A residential landlord confronted with a deceased tenant's unclaimed property can benefit from the statutory procedure set out in G.S. 28A-25-7 for lawfully disposing of the property. G.S. 42-36.3.
- A landlord is entitled to assert a possessory lien on tenant's property only if the lease is commercial [G.S. 44A-2(e)] or for a *mobile home space* [G.S. 44A-2(e20].

What's the Same?

For the most part, the law governing landlord-tenant disputes does not vary based on whether a tenancy is commercial or residential.

- An action for summary ejectment may be filed in small claims court regardless of whether the property involved is residential or commercial, and this is true even if the rental property is worth millions (so long as any claim for money owed does not exceed the magistrate's jurisdictional limit).
- Small claims procedural rules, including those unique to summary ejectment actions (discussed in a previous post here), do not vary.
- With the exception discussed above related to criminal activity, the grounds for summary ejectment (i.e., breach of a lease condition for which reentry is specified, implied forfeiture for failure to pay rent, holding over) are the same.

- A tenant's right to tender as a defense in an action for summary ejectment based on the statutory implied forfeiture clause in G.S. 42-33 does not depend on whether the lease is for residential or commercial property.
- The affirmative defense of retaliatory eviction, set out in G.S. Ch. 42, Art. 4A, is equally available in commercial and residential leases.

Consumer Protection & Residential Leases

At common law commercial and residential leases were treated similarly. That changed in North Carolina— and across the country -- in the late 1970s and early 1980s, when consumer protection for residential tenants became the focus of legislative concern. Traditional common law rules followed the principle of *caveat emptor* ("Let the buyer beware"), placing heavy reliance on the parties' ability to negotiate an agreement to their mutual benefit and satisfaction. One of the most challenging tasks for a small claims magistrate is to become familiar with the statutory provisions that impact residential rental agreements regardless of contrary provisions in the lease. These statutes have no application to commercial leases, but may transform a residential agreement, effectively removing some clauses and inserting others. Here's a list:

- Self-help eviction is prohibited. G.S. 42-25.6.
- Landlords are prohibited from interfering with tenants' personal property except in specific ways set out in the statute. G.S. 42-25.7 – 25.9.
- Landlords are required to provide and maintain fit and habitable rental premises. G.S. Ch. 42, Art. 5. [For an interesting discussion of tenant remedies for failure to repair in a commercial context, see Gardner v. Ebenezer LLC, 190 N.C. App. 432 (2008)].
- Military personnel, tenants residing in foreclosed property, and victims of domestic violence are entitled to certain preferential treatment, including the right to early termination of lease agreements. G.S. 42-45, 42-45.1, 42-45.2.
- Landlords must comply with statutory requirements in order to charge a late payment fee. G.S. 42-46.
- Landlords must comply with statutory requirements in order to charge an administrative fee connected to filing an action for summary ejectment and/or money owed. G.S. 42-46.
- Landlords must comply with statutes regulating security deposits. G.S. Ch. 42, Art. 6.

These rules apply in residential rental agreements even if the lease specifically provides to the contrary. They have no application to commercial leases. The law's assumption in these cases is that commercial entities, having at least roughly equal bargaining power, should be free to negotiate contract details without the courts second-guessing their decisions. See Sylva Shops Ltd. v. Hibbard, 175 N.C. App. 423 (2006) (holding that courts will enforce lease provision excusing the landlord from the common-law duty to mitigate damages in commercial leases only.)

I hope this brief journey through this aspect of landlord-tenant law has been helpful to you, and many thanks to the magistrate who wrote me with the question!

The SCRA & Summary Ejectment

Purpose of the SCRA:

The purpose of the SCRA is to strengthen and expedite national defense by giving servicemembers certain protections in civil actions. By providing for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect servicemembers during their military service, the SCRA enables servicemembers to focus their energy on the defense of the United States.

www.uscourts.gov

The SCRA is very clear: if you're in harm's way in our nation's military, you can devote your whole energy to our nation's service without worrying what's happening in a courthouse back home. The law was enacted to protect active duty military personnel from unfair punishment as a result of their service. If a credit rating is damaged by a foreclosure, it can impact national security clearances. The kind of stress and enormous toll on military families caused by an illegal foreclosure or threat of eviction can be devastating to a servicemember's military readiness.

Statement by U.S. Rep. Brad Miller, http://bradmiller.house.gov

The Affidavit Requirement:

- Applies to any civil action or proceeding in which defendant does not make appearance.
- Court "shall require the plaintiff to file with the court an affidavit" "before entering judgment for the plaintiff."
- Affidavit must state "whether or not Δ is in military service" and show necessary facts in support, or
- State inability to determine whether Δ is in military service.

If Δ is in military service and has not appeared, judgment may not be entered until attorney is appointed to represent defendant.

If court cannot determine whether Δ is in military service, court may require π to post bond.

Affidavit is a written statement declared to be true under penalty of perjury.

An individual with a Power of Attorney is an authorized legal representative of the SM.

The Stay Requirement

After attorney is appointed under this section, court must stay proceedings for at least 90 days if (1) there may be a defense to the action which cannot be presented in Δ's absence, or (2) attorney has been unable to contact Δ or determine existence of meritorious defense.

NOTE: A different section of the SCRA governs stays requested by SM.

Judgment entered not in compliance with requirements is voidable if challenged by SM.

Eviction

The SCRA extends special protection to SMs or their dependents residing in rental property with monthly rent not exceeding $3451.20.

Self-help eviction and/or unlawful interference with tenants' property is a misdemeanor under federal law, punishable by fine or up to 1 yr. in prison.

"This section protects SMs and their dependents from eviction for nonpayment of rent. It does not preclude eviction, but it does set up the process through which that remedy must pass.. . . . Upon the SM's or family member's request [and upon evidence that ability to pay rent is 'materially affected' by military service], the court must stay the proceeding for roughly ninety days." *The SCRA Guide,* http://www.americanbar.org/content/dam/aba/migrated/legalservices/lamp/downloads/SCRAguide.authcheckdam.pdf. In addition, the SCRA authorizes the court to "adjust the obligation under the lease to preserve the interests of all parties" and to "grant the landlord . . . such relief as equity may require."

Note protection extends to dependents, broadly construed.

Waiver requirements: (1) in writing, in separate document; (2) executed during period of service; (3) making specific reference to lease; (4) signed by SM.

Early Termination of Lease

	GS 42-45	SCRA
Grounds	PCOS 50 mi.+; early or invol. discharge; 90+ deployment	Lease prior to active duty; PCOS; 90+ deployment
Lease ends . . .	In case of deployment, shorter of: (1) Notice + rent due date + 30 days OR (2) notice + 45 days. For other grounds, 30 days after notice.	Notice + rent due date + 30 days
Liquidated damages for early termination	Yes, if less than 9 months of term; < 6 mos./1 mo. rent; 6-9 mos./half mo. rent	None
Waiver	Not permitted	See above
Applies to spouse who co-signs?	Unclear	Yes
Notice	Written & orders or letter from CO	Written & orders or letter from CO

Don’t Try This at Home: Self-Help Evictions

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : landlord-tenant, small claims, summary ejectmentunfair acts or practices

Date : April 25, 2018

A magistrate once told me that the advice given to members of the public by many law enforcement officers and courthouse personnel may be summarized as *ATM*: *Ask the Magistrate*. The locations of magistrates’ offices, unlike those of judges, are known to the public, and their doors are -- if not actually open – at least accessible. Their telephone numbers are publicized, and when the public calls, that call will be answered by a magistrate. So it’s not surprising that magistrates spend a significant amount of time interacting with citizens seeking legal assistance, walking that fine line between helpfully providing legal information and carefully refraining from giving legal advice. While the questions a magistrate may be asked on any given day are likely to vary over a truly amazing range of topics, there are a few subjects that come up all the time. One of them – the subject of this post – has to do with whether and under what circumstances a landlord may lawfully force a tenant to vacate rental premises—a practice commonly referred to as *self-help eviction*.The first distinction that must be observed in answering this question is between residential and commercial tenancies. A commercial landlord is not prohibited from using self-help eviction, provided that the tenant’s ouster does not cause a breach of the peace. The most common method of accomplishing this is by padlocking the door of the rental premises. Despite the availability of this alternative, many commercial landlords elect to file a summary ejectment action instead. While slower and more expensive, eviction by way of the court system allows a landlord to avoid exposure to tort liability for wrongful eviction. If, despite best efforts and good intentions, self-help eviction results in a breach of the peace, or the landlord is mistaken in believing there are legal grounds for eviction, a landlord may come to regret attempting self-help eviction in commercial situations.

Self-help eviction in residential leases has been prohibited by law since 1981. GS 42-25.6. The law states that a tenant may be “evicted, dispossessed or otherwise constructively or actually removed” only by the summary ejectment procedures set out in GS Ch. 42. The 1981 legislation also prohibited residential landlords from seizing and holding tenant’s property for the purpose of enforcing the tenant’s obligation to pay rent (called *distress* and *distraint* in the statute). GS 42-25.7.

FAQ’s about Self-Help Eviction

- May a residential landlord use self-help eviction if the tenant specifically waives her legal rights and gives written permission in the lease for the landlord to do so?

No. The rule against self-help eviction is based not on an individual tenant’s contractual rights, but rather on North Carolina’s public policy interest in maintaining public peace. GS 42-25.6 & -25.8.

- Other than padlocking, what actions by a landlord might be considered unlawful self-help eviction?

Constructive eviction occurs when the tenant’s use and enjoyment of the rental premises are interfered with to such a degree as to effectively deprive the tenant of the benefits of possession. Common examples are turning off electricity or water for the rental premises, but any action by the landlord rendering the premises uninhabitable would fall in to this category.

It is likely that landlords “who mislead tenants into believing that they are being subjected to judicial or legal process”

would be found to have engaged in unlawful self-help eviction as well, although there are as yet no North Carolina cases on this point. See Webster, Real Estate Law in North Carolina Sec. 6.07, fn. 124.

- What remedies are available to a residential tenant in the event of self-help eviction?

GS 42-25.9(a) provides that a landlord's removal or attempted removal of a tenant in violation of the statute permits the tenant to elect either to recover possession of the rental premises or terminate the lease, and also to recover actual damages caused by the landlord's actions. For example, a tenant who returns home to find the door to his home padlocked will be entitled to collect (1) the cost of emergency alternative lodging – such as the cost of a hotel – for the time necessary to arrange comparable alternative housing, (2) the costs reasonably associated with locating a new place to live, including moving costs, and (3) any increased rent required for comparable new lodging for the remainder of the rental period. Additional damages may be awarded for deprivation of or injury to the tenant's property caused by the landlord's actions. A tenant who is padlocked might seek the fair market value of the property under a conversion theory of recovery, or instead seek the return of the property along with damages associated with loss of use and the need for repair or replacement. The type and degree of damages related to tenant's property will of course vary widely depending on the particular facts.

While the law specifically authorizes these damages to be awarded in response to self-help eviction, a tenant in such a case is not limited to actual damages. The North Carolina Supreme Court in Stanley v. Moore, 339 NC 717 (1995) held that a tenant who demonstrates that the landlord committed an unfair or deceptive practice in violation of GS 75-1.1 is also entitled to relief under that statute, which provides for treble damages and the recovery of attorney fees. So long as the trebled amount of damages and attorney fees do not exceed the magistrate's jurisdictional limit, a tenant might bring such a case in small claims court, using the AOC "Complaint for Money Owed" form.

- What does the Servicemembers Civil Relief Act (50 U.S. Code Sec. 3951) have to say about self-help evictions of servicemembers entitled to protection under that Act?

The SCRA provides that a person who knowingly attempts or does evict persons protected under that Act except by court order is guilty of a misdemeanor punishable by fine, imprisonment for up to one year, or both.

Small Claims Magistrates: Don't Make These Mistakes in Summary Ejectment Cases!

After teaching and advising magistrates about landlord-tenant law for a little more than a decade, I've become familiar with their most common errors – which have, somewhat discouragingly, remained pretty much the same throughout that time. All of these errors arise from neglecting to independently analyze the requirements and defenses of each of the four grounds for eviction. Those grounds are briefly summarized below, followed by a list of errors most often made when magistrates confuse them. If you are such a magistrate, please consider having this blog post tattooed somewhere on your body:

Ground #1: Breach of a lease condition for which reentry is specified. GS 42-26(a)(2).

When a landlord agrees in advance with a tenant that a particular breach by the tenant will authorize the landlord to terminate the lease and regain possession of the property, the small claims magistrate is being asked to do no more than enforce the contract between the parties. The landlord must demonstrate that (1) the lease contains a provision to this effect (a *forfeiture clause*), (2) that the tenant breached the lease in a manner triggering the landlord's right to terminate, and (3) that the landlord followed whatever procedure, if any, is specified in the lease for effectuating that right.

NOTE: This ground will hereinafter be referred to as *breach of a lease condition* for the sake of brevity, but remember that both parts are required for a valid forfeiture clause: (1) the lease identifies a lease provision or provisions, the breach of which (2) authorizes the landlord to "reenter," or in other words, to declare the lease forfeited.

Ground #2: Failure to pay rent. GS 42-3.

When a landlord fails to include a forfeiture clause in the lease, **Ground #1** obviously does not apply. Nothing else appearing, this landlord's only remedy for a non-paying tenant is to terminate the lease as soon as possible. Recognizing the injustice of this outcome, particularly in fixed-term leases for a year or more, the General Assembly enacted GS 42-43, the "landlord's life preserver" provision. This statute *implies* a forfeiture clause allowing the landlord to terminate the lease for non-payment of rent provided (1) the landlord made a clear and unequivocal demand for unpaid rent, and (2) waited at least ten days before filing a summary ejectment action. *Tender* (paying all rent owed and court costs in cash) at any point prior to judgment is a complete defense to summary ejectment. GS 42-33.

NOTE: Grounds #1 and #2 are mutually exclusive. The lease either has or does not have a forfeiture clause triggered by failure to pay rent. If it does, Ground #1 applies. If it does not, Ground #2 applies. Stanley v. Harvey, 90 NC App 535 (1988). A landlord with a forfeiture clause in the

lease does not have the option of pretending otherwise and winning summary ejectment by satisfying the requirements of Ground #2.

Ground #3: Holding over. GS 42-26(a)(1)

This ground for summary ejectment simply recognizes the rule that a tenant must leave rental property when the lease comes to an end. Thus, the landlord need prove only that (1) the lease has ended and (2) the tenant is still there. A lease for a fixed period ends when it says it ends: a one-year lease beginning on January 1 ends on December 31 with no additional action or notice required. A lease that repeats from period-to-period must be terminated by appropriate notice. The length and procedure for notice are established by the lease, and if the lease is silent, by GS 42-14. Cherry v. Whitehurst, 216 N.C. 340 (1939). This ground at first appears deceptively simple, but when the lease provision for the termination procedure is confusing and/or one or both of the parties disregard the lease altogether, these SE cases can be some of the most difficult.

Ground #4: Criminal activity

GS Ch. 42, Art. 7, establishes a statutory ground for summary ejectment based on criminal activity. There are very few cases interpreting these statutes, and thus the relevant law is almost wholly contained in the statutory language. Unlike the other three grounds for summary ejectment, this ground is seldom confused with other grounds. Sometimes criminal activity is specifically addressed by a forfeiture clause in the lease, but Art. 7 continues to be relevant even then. GS 42-75.
https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_42/GS_42-75.pdf.

Common Errors

1. Contrary to the beliefs of many folks involved in landlord-tenant law, there's no such thing as ten-day notice. It's a mythical beast that follows around the Emperor in his new clothes. A requirement that a landlord wishing to evict a tenant must first give a ten-day notice appears nowhere in case law or statutory law. My best guess is that this creature came into being when the ten-day demand requirement for Failure to Pay Rent was confused with the statutory notice required to terminate a lease related to Holding Over.

Another possible source of confusion arises from the practice of some landlords of giving a "Pay or Quit" notice, setting up two alternative grounds for eviction. A landlord is entitled to possession upon proving either ground, but whether a landlord has done so requires separate analysis of each ground. The "Pay" portion of the communication must be a demand for the rent satisfying the

10-day requirement to prevail on Failure to Pay Rent, while the “Quit” portion must satisfy the separate requirements of notice required to terminate the lease.

2. Tender is a defense to Failure to Pay Rent. It is not a defense to a summary ejectment action based on any other ground. A landlord who accepts payment, whether partial or full, may confront a defense based on waiver, but this doctrine is entirely separate from the legal doctrine of tender.

3. The “60-day-rule” for mobile home spaces applies only to SE actions based on holding over, and even then only when the lease itself does not provide for a different notice to terminate the lease. There is no legal requirement related to “sixty days” when the ground for SE is breach of a lease condition, failure to pay rent, or criminal activity.

4. The statute authorizing landlords to include a “no waiver” provision in the lease allowing them to accept partial rent payments while retaining the right to seek summary ejectment applies only to actions based on breach of a lease condition. GS 42-26(c).

The Tenant Tenders: Does the Landlord Lose?

In my most recent post, *G.S. 42-3: The Landlord's Life Preserver*, I discussed summary ejectment based on the implied forfeiture provision set out in that statute. Confusion about when ejectment may be obtained on this ground, as distinguished from ejectment based on an explicit forfeiture provision in the lease itself, easily ranks #1 on my list of Most Common Summary Ejectment Errors. At the end of my previous post, I promised to next address tender as a defense to an action for summary ejectment. It comes as no surprise that the majority of North Carolina appellate cases involving tender present this same error in a different context. As is so often true in navigating the law of summary ejectment, correct identification of the ground for relief is the first step that renders subsequent steps simple. As we shall see*, it is only when the landlord is reaching for the G.S. 42-3 life preserver that tender has potential application to the case.*

The Statute

G.S. 42-33 in its current form has been the law in North Carolina since 1873. The statute, titled *Rent and costs tendered by tenant*, provides:

If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed.

Note the following points of interest about this law:

- It applies to any action to recover possession of leased property, and is not limited to cases seeking "summary ejectment." Green v. Lybrand, 39 N.C. App. 56 (1978).
- A tenant may tender any time prior to judgment.
- Effective tender includes "rent due and the costs of the action."
- The statute addresses the situation in which a landlord refuses to accept tender by providing that the tenant may pay the amount "into court for the use of the plaintiff." In this event, according to the statute, the defendant is entitled to recover "all subsequent costs." No North Carolina case has addressed this provision.

When Is Tender Available?

Perhaps the most significant words in G.S. 42-33 are "upon a forfeiture for the nonpayment of rent." Obviously, when a tenant is holding over after a lease has come to an end, that tenant will not be allowed to extend the lease against the wishes of the landlord merely by offering to pay rent. See Seligson v. Klyman, 227 N.C. 347 (1947). But what if the lease contains a forfeiture clause triggered by the tenant's failure to pay rent? Our appellate

courts have said that tender is not available in this situation. When a landlord has reserved the right to declare the lease forfeit upon the tenant's default in the rental contract, the law will not override that contractual agreement, It is only when the rental contract itself does not authorize forfeiture – and thus a landlord must resort to the statutory implied forfeiture to recover possession of rental property – that the right to tender becomes potentially applicable. Ryan v. Reynolds, 190 N.C. 563 (1925); Charlotte Office Tower v. Carolina SNS, 89 N.C. App. 697 (1988); Couch v. ADC Realty Corp., 48 N.C. App. 108 (1980).

Sometimes the basis for summary ejectment is not altogether clear. In Couch the lease seemed to contemplate the landlord's right to declare the agreement forfeited for failure to pay rent, although there was no specific provision to that effect. Instead, the lease stated that there would be no termination for breaches other than failure to pay rent until the tenant was first given an opportunity to cure. The trial court found as a fact that the parties intended the landlord to have the right to terminate the lease if tenant failed to pay rent, and that "the entire contract between the parties" reflected this intention. The Court of Appeals rejected this contention, stating that the right to declare a forfeiture must be expressly stated in the lease.

For our purposes, Couch is significant because of what happened next. Absent an enforceable forfeiture clause, the landlord's right to recover possession, if that right existed at all, was necessarily based on G.S. 42-3, the statute providing for an implied forfeiture for failure to pay rent. Consequently, tender was an available defense. On remand, said the Court, the trial court should determine whether the amount tendered by the tenant was correct, and if it was, the action for summary ejectment should be dismissed.

What Constitutes an Effective Tender?

North Carolina appellate courts have not yet been called upon to discuss what is required for effective tender. At a minimum, the statutory language requires the tenant to offer costs of court and "rent due," but the meaning of the latter is unclear. For example, if rent in the amount of $600 is due on the 1st of each month, and the case is heard on the 15th, is "rent due" $300 or $600? The statutory reference to "found to be due . . . at the time of such payment. . . or refusal" might suggest the correct answer is $300. But such a reading invites a situation in which the tenant is once again in default the very next day. Absent guidance from the appellate courts, the School of Government has taken the position that magistrates should require tenants to pay the full amount necessary to bring them into compliance with the lease—in the example above, $600.

Effective tender does not require a tenant to pay a landlord all money damages to which a landlord might be entitled. Clearly, amounts due because of damage to rental property are outside the scope of "rent due and costs." A more difficult question is presented when the rental agreement authorizes the landlord to charge late fees. No North Carolina case has addressed this question.

The Significance of Effective Tender

Timely tender of rent due and costs is a complete defense to a summary ejectment action based on the implied forfeiture law set out in G.S. 42-3. Even when a landlord offers to forgive money damages in such a case, the trial court must dismiss an action for possession in response to effective tender. A landlord who wishes to avoid this result can easily do so by including a forfeiture clause in future lease agreements.

G.S. 42-3: The Landlord's Life Preserver

At common law a landlord confronted with a non-paying tenant had only one hope for regaining possession of rental property: a lease provision spelling out that default by the tenant would trigger the landlord's right to repossess the property. In such a case, an action for summary ejectment amounts to a request that the court enforce the agreement of the parties. Absent such agreement, the landlord could only terminate the lease as soon as possible and attempt to collect unpaid rent in the usual way: an action for money owed, with all of the attendant problems associated with the collection of money judgments.

The common law rule is still the rule when it comes to personal property. If you buy a car on the installment plan, the seller has no right to repossess the car if you default unless part of your agreement specifically gives the seller that right. But North Carolina long ago established a different rule for unwary landlords. GS 42-3, sometimes referred as the statutory forfeiture provision, allows landlords to regain possession of rental property upon tenant's failure to pay rent even though the rental agreement is silent on the consequences of default. That statute says:

> *In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease*.

The North Carolina Supreme Court explained the purpose of this provision in *Ryan v. Reynolds*, 190 N.C. 563 (1925): "The statute was passed to protect landlords who made verbal or written leases and omitted in their contracts to make provision for re-entry on nonpayment of rent when due. The consequence was that often an insolvent lessee would avoid payment of rent, refuse to vacate, and stay on until his term expired." This "life preserver" is available only under certain circumstances, however, which are discussed in this post.

<u>The landlord (or the landlord's agent) must demand the rent.</u>

As we shall see, the law related to statutory forfeiture is concerned first and foremost with avoiding the situation in which a tenant fails to pay rent and continues to occupy the property. Allowing the landlord to recover the property in the absence of a contractual right to do so is a last resort—after efforts to obtain rent have failed. Thus the statute requires the landlord to (1) demand payment of the rent, and (2) wait ten days for the tenant to comply with the demand, before filing an action to recover possession. A landlord who is unaware of this statutory purpose may find the requirement perplexing. "Why should I demand payment from a tenant in default when the tenant is well-aware that the rent is late?" Sometimes landlords attempt to accomplish this requirement by inserting a lease provision to the effect that a continuing demand for payment is in effect with no further action required. Sometimes the argument is made that the summary ejectment complaint itself is a demand. These arguments miss the point of the demand requirement: a landlord is more likely to recover rent if (1) the landlord communicates to the non-paying tenant that the rent is late, must be paid, and that the consequences of failure to pay will be eviction, and (2) waits ten days for the tenant to come up with the money.

What is required for an effective demand?

Snipes v. Snipes, 55 N.C. App. 408, *aff'd* 306 N.C. 373 (1982) is the only NC case to discuss the nature of the demand required by GS 42-3. In *Snipes* the landowner told the tenant that she "wanted to get all this business settled." The Court of Appeals said: "We hold that to constitute a 'demand' under N.C.G.S. 42-3, a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent is necessary. . . . The demand must be made with sufficient authority to place the lessee on notice that the lessor intends to exercise [the] statutory right to forfeiture for nonpayment of rent."

Summary Ejectment for Criminal Activity

Step 1: What are the grounds?

--Breach of a lease condition (involving criminal activity), or

--G.S. Ch. 42, Article 7: Expedited Eviction of Drug Traffickers and Other Criminals

What the rules are depends on what the grounds are.

Breach of a lease condition:

--Check for forfeiture clause.

Public housing cases will always have written lease with forfeiture clause.

Example:

The Landlord may terminate this lease for. . .

(1) Drug-related criminal activity engaged in, on, or near the premises, by any tenant, household member, or guest, and any such activity engaged in or on the premises by any other person under the tenant's control; . . .

2) Criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control

--that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents, or -that threatens the health. . . by persons residing in the immediate vicinity of the premises.

Questions to ask:

1. Who? Tenant is clear, and so is household member. A guest is defined by HUD as "a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant." A "person under the tenant's control," on the other hand, is defined as "a person, although

not staying as a guest . . . in the unit, [who] was at the time of the activity in question on the premises because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant."
Considerable litigation has focused on what it means to be "under the tenant's control." Consider whether person was on premises as result of invitation, or did she "just drop by"? Under the "One Strike" policy endorsed by HUD, a tenant is strictly liable for a person's conduct while on the premises, if they are there with consent, even if the tenant is not aware of the specifics of the conduct, or could not have reasonably foreseen the conduct.
"Innocent tenant" situation was addressed in cases involving public housing authorities by HUD v. Rucker, 535 U.S. 125 (2002), holding that PHA can elect to evict even if tenant was without fault (overruling a number of cases holding that PHA must demonstrate fault on part of tenant in order to deprive tenant of property interest in leasehold).
Note: Rucker upheld only the PHA's **right** to elect eviction. Immediately after the case was handed down, the Secretary of HUD sent the following letter to all PHA:

"I would like to urge you, as public housing administrators, to be guided by compassion and common sense in responding to cases involving the use of illegal drugs. Consider the seriousness of the offense and how it might impact other family members. Eviction should be the last option explored, after all others have been exhausted."

Note: Rucker applied to public housing authority cases. Whether it also applies to cases brought under Section 8 or other federally-supported housing has been debated, and the answer is not clear. No North Carolina law specifically addresses the issue.

2. What?

In the lease provision quoted above, there are several important things to notice about what activity may result in termination.

HUD's definition of "drug-related criminal activity" is use or possession with intent to sell, distribute or use". Some courts in other states have interpreted this language as excluding simple possession, but there is significant disagreement within the legal community about which interpretation is correct.

The impetus for including this lease provision in public housing leases was concern about those communities becoming overrun with drug traffickers, and leases usually contain several provisions addressing the issue of substance abuse by tenants. The inclusion of "other criminal activity" expresses a more limited concern, and it is accordingly more limited. Other criminal activity is ground for eviction only if the activity threatens the health, safety, or right to peaceful enjoyment of other tenants or neighbors. This wording indicates that the landlord must demonstrate more than criminal behavior—that there

must be in addition some reasonable basis for concluding that the activity itself threatens protected others in one of the specific ways.

The law is clear that a conviction is not required, nor is it even necessary that the person in question be charged. The court's determination of whether the lease provision has been breached is independent of the judicial system's criminal process. If a particular behavior HAS resulted in a conviction, that finding that the person engaged in that behavior is binding on the small claims magistrate. On the other hand, if a person has been acquitted, the magistrate may still find that the activity occurred, due to the lesser burden of proof applicable in civil court.

Some leases have specific provisions concerning "violent" criminal behavior, and there may not be the same requirement that such behavior affect the health, safety, or peaceful enjoyment of the premises. The magistrate must carefully read the specific language to ascertain whether a breach of the lease occurred.

Sometimes a question is raised about whether unlawful behavior is "criminal", either because the behavior in question is an infraction under state law, or because the behavior results in a juvenile proceeding (which is technically distinct from a "criminal" prosecution). Because there is no law deciding this question, a magistrate is left to a careful consideration of the language of the lease and the behavior in question, in light of the underlying policies for de-criminalizing certain behaviors and favoring increased safety in federally-subsidized housing.

3. Where? One of the issues present in many cases involves where the activity occurred. In the above lease provision, note that a different rule applies depending on the status of the wrongdoer: drug-related criminal behavior may occur in, on, <u>or near</u> the premises if the person involved is a tenant, household member, or guest, but must occur in or on the premises if the person is a "other person under the tenant's control." Other lease provisions may contain language such as "on or off" the premises, applicable to certain types of activity. A determination of whether a lease condition is breached will require consideration not only of WHAT the behavior was, but also WHERE it occurred.

   The location of the activity may be important in two other ways. First, behavior that happens away from the rental property may be much less likely to affect the health, safety, and right to peaceful enjoyment of protected persons. Second, as the specific language of the lease provision above indicates, the question of whether an invitee is "under the tenant's control" becomes much more difficult to demonstrate when that person is away from the rental premises.

4. When? Sometimes the timing of the activity is an issue that needs to be considered. Generally, criminal behavior occurring prior to the tenancy will not satisfy the requirement of "threatening the health, etc." In some cases, however, a magistrate might

find that prior criminal behavior DOES support a finding that the health and safety of the other residents and neighbors are threatened. One example might be the case of a chronic sex offender. Often, the lease will contain specific provisions that may also apply, addressing chronic substance abuse, failure to disclose relevant information in the rental application, or violent behavior.

If the magistrate determines that the lease contains a forfeiture clause prohibiting certain behavior, and that that lease condition has been violated, the next inquiry is whether the landlord followed appropriate procedure in terminating the lease. How will the magistrate know what appropriate procedure is?

First, the lease itself will often set out the procedure for terminating a lease. One lease used by HUD-assisted landlords says, for example:

The landlord's termination notice shall be accomplished by (1) sending a letter by first class mail, properly stamped and addressed, to the tenant at his/her address at the project, with a proper return address, and (2) serving a copy of said notice on any adult person answering the door at the leased dwelling unit, or if not adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door. Service shall not be deemed effective until both notices provided for herein have been accomplished

This lease contains other provisions concerning the content of the notice of termination, including a requirement that the tenant be advised of his right to meet with the landlord to discuss the proposed termination upon request during the ten days following the notice. Whatever the lease requires, in terms of procedural protections for tenants threatened with eviction, the landlord must provide in order to satisfy the requirements for obtaining a judgment awarding possession.

The second source of information for the magistrate concerning required procedure are HUD regulations specifying the procedure for termination. While these requirements are often incorporated into the lease, this is not always the case. If an attorney for the tenant attempts to defend on the grounds that proper HUD procedure was not followed, the magistrate should ask to be supplied with a copy of the relevant regulations and should give the landlord an opportunity to respond.

If a landlord successfully demonstrates that a breach of the lease condition resulting in forfeiture has occurred, and that proper procedure has been followed in exercising that right of forfeiture, there are two significant additional considerations for the magistrate before deciding on a judgment.

First, in 2005, Congress passed the Violence Against Women Act (42 USC 1437d), which responded to the troubling situation created when an act of domestic violence is perpetrated against a public housing tenant on the premises. All too often, this criminal activity resulted in

eviction of the tenant/victim, leaving other potential victims forced to choose between submission to domestic violence or eviction from low income housing. The federal law provides that individuals cannot be evicted for domestic violence perpetrated by others unless the landlord demonstrates that continued tenancy would pose "an actual and imminent threat" to other persons on the property. Landlords have the option of a "bifurcated" lease (similar to NC's partial eviction), authorizing landlords to evict only the perpetrator. Landlords may require certain specified documentation of the tenant's status as a domestic violence victim.

The second qualification restricting a landlord's right to evict based on breach of a lease condition was established in a recent Court of Appeals case, Lincoln Terrace Associates v. Kelly, 179 N.C. App. 621 (2006). In Lincoln Terrace, a tenant receiving federally assisted housing was threatened with eviction for criminal behavior by one family member, who damaged property, assaulted another tenant, and disturbed and harassed other tenants, all in violation of a specific lease provision. Faced with these facts, the Court of Appeals said:

In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture; and (4) that the result of enforcing the forfeiture is no unconscionable.

The Court also said:

When termination of a lease depends upon notice, the notice must be given in strict compliance with the contract as to both time and contents.

In this case, the property manager testified to having given proper notice, but failed to introduce a copy of the actual notice in support of the landlord's claim. The Court of Appeals found that the landlord was not entitled to a judgment on these facts.

Waiver as a defense?

Most public housing leases provide that a landlord does not waive the right to seek ejectment based on criminal activity by continuing to accept rent. G.S. 157-29(d) goes further and specifies that in North Carolina, whether or not the lease is silent about waiver, no waiver occurs unless the housing authority fails to notify the tenant within 120 days that a violation has occurred or to take steps to seek a remedy for the violation.

G.S. Ch. 42, Art. 7: Expedited Eviction of Drug Traffickers and Other Criminals

North Carolina has its own version of the federal law we've been discussing, set out in G.S. 42-59 through -76 (sometimes referred to Article 7 evictions). Because HUD requires leases to contain a forfeiture provision applicable to criminal activity, landlords participating in HUD housing will generally choose to proceed under breach of a lease condition—federal law is generally more favorable to them. Consequently, Article 7 is more typically relied upon by private landlords --who do not have the protection of a relevant forfeiture clause --confronted with a tenant's criminal activity. While very similar to federal law, Article 7 contains some important differences.

Complete eviction.

Grounds:

The landlord must prove one of the following five things to evict the tenant (which includes everyone taking under the tenant):

(1) Criminal activity occurred on or within the individual rental unit leased to the tenant. Criminal activity is:
   a. conduct that would constitute a drug violation under G.S. 90-95 (except possession of a controlled substance);
   b. any activity that would constitute conspiracy to violate a drug provision;
   c. or any other criminal activity that threatens the health, safety, or right of peaceful enjoyment of premises by other residents or employees of landlord.

   "Individual rental unit" means an apartment or individual dwelling or accommodation that is leased to a particular tenant.

(2) The individual rental unit was used in any way in furtherance of or to promote criminal activity.

(3) The tenant, any member of the tenant's household, or any guest of the tenant engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises.
   a. "Entire premises" means a house, building, mobile home or apartment that is leased and the entire building or complex of which it is a part, including the streets, sidewalks, and common areas.

(4) The tenant gave permission to or invited a person to return to or reenter the property after that person was removed and barred from the entire premises.
   a. The person could have been barred either by a proceeding under Article 7 of General Statutes Chapter 42 or by reasonable rules of a publicly-assisted landlord.

(5) The 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 tenant's rental unit.

Affirmative defense. The landlord need not prove that the tenant was at fault. However, the tenant may raise and prove such a claim as an affirmative defense to the eviction.

If the landlord proves one of the five grounds for eviction, the tenant may avoid complete eviction by proving that

he or she was not involved in the criminal activity and

did not know or have reason to know that criminal activity was taking place or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

had done everything that reasonably could have been expected under the circumstances to prevent the commission of criminal activity, such as requesting the landlord to remove the offending household member's name from the lease, reporting prior criminal activity to appropriate law enforcement authorities, seeking assistance from social service or counseling agencies, denying permission, if feasible, for the offending household member to reside in the unit, or seeking assistance from church or religious organizations.

G.S. 42-64 provides that if tenant establishes affirmative defense court shall refrain from ordering the complete eviction of tenant.

A second time is harder: A tenant may not successfully use one of these affirmative defenses if the eviction is a second or subsequent proceeding brought against the tenant for criminal activity unless the 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.

Relief on grounds of injustice. Even if the landlord has proved grounds for eviction, a magistrate may choose not to evict the tenant if, taking into account the circumstances of the criminal activity and the condition of the tenant, the magistrate finds, by clear, cogent, and convincing evidence, that immediate eviction or removal 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 of the leased residential premises.

It is not a defense to an eviction that the criminal activity was an isolated incident or otherwise had not reoccurred or that the person who actually engaged in the criminal activity no longer resides in the tenant's individual unit, but such evidence can be considered if offered to support affirmative defenses or as grounds for the magistrate to choose not to evict the tenant.

Connection between eviction and criminal charges. Just as in the case of breach of lease conditions, discussed earlier, a landlord may pursue an eviction for criminal activity even though no criminal charge has been brought. If criminal charges have been brought, the eviction may go forward before the criminal proceeding is concluded or if the defendant was acquitted or the case dismissed. If a criminal prosecution involving the criminal activity results in a final conviction or adjudication of delinquency, conviction or adjudication is conclusive proof in the eviction proceeding that the criminal activity took place.

Defense of waiver of breach does not apply. G.S. 42-73 specifically provides that landlord is "entitled to collect rent due and owing with knowledge of any illegal acts that constitute criminal activity without such collection constituting waiver of the alleged defaults."

Conditional eviction:

The magistrate may issue against a tenant when the landlord proves that the criminal activity was committed by someone other than the tenant and the magistrate denies eviction of the tenant or the magistrate finds that a member of the tenant's household or the tenant's guest has engaged in criminal activity but that person was not named as a party in the action.

A conditional eviction order does not immediately evict the tenant, but rather provides that as an express condition of the tenancy, the tenant may not give permission to or invite the barred person to return to or reenter any portion of the entire premises. The tenant must acknowledge in writing that he or she understands the terms of the court order and that failure to comply with the court's order will result in the mandatory termination of the tenancy.

A landlord, who believes that a tenant has violated a conditional eviction order, may file a motion in the cause in the original eviction case. That motion shall be heard on an expedited basis and within fifteen days of service of the motion.

At the hearing, the magistrate shall order the immediate eviction of the tenant if the magistrate finds that:

(1) the tenant has given permission to or invited any person removed or barred from the premises to return to or reenter any portion of the entire premises;
(2) the tenant has failed to notify appropriate law enforcement authorities or the landlord immediately upon learning that any person who had been removed and barred has returned to or reentered the tenant's individual rental unit;
(3) or the tenant has otherwise knowingly violated an express term or condition of any order issued by the court under this statute.

Partial eviction.

Magistrate may order removal from a tenant's premises of a person other than the tenant (and not disturb the tenant) when the magistrate finds that person has engaged in criminal activity on or in the immediate vicinity of some portion of the entire premises.

For the magistrate to have jurisdiction to remove a person other than the tenant (and not the tenant), the person to be removed must have been made a party to the action. If name of person is unknown, complaint may name defendant as "John (or Jane) Doe", stating that to be a fictitious name and adding a description to identify him or her.

Any person removed also is barred from returning to or reentering any portion of the entire premises.

Fees in Summary Ejectment Actions

For Leases Entered Into On or After Oct. 1, 2009

Late Fees

In residential leases, parties may agree to late fee for payments five or more days late. When rent is paid monthly, the maximum fee is $15 or 5%, whichever is greater. In case of weekly rent, maximum is $4 or 5%, whichever is greater.

Complaint Filing Fee

Authorized for written leases not to exceed $15 or 5%, whichever is greater, only if:
---tenant was in default
---LL filed complaint for SE
---tenant cured the default
---LL dismissed the claim.
Fee may be charged as part of amount required to cure default.

Court-Appearance Fee

Authorized for written leases, equal to 10% of monthly rent if
---tenant was in default
---LL won a SE action
---neither party appealed.

Second Trial Fee

Authorized for written leases in event of new trial following appeal from small claims judgment. Not to exceed 12% of monthly rent. Available if
---tenant was in default
---LL prevailed

Additional Rules

LL can charge only one of the last three fees, and that fee may not be deducted from subsequent rent payment or asserted as ground for default in subsequent SE action. Prohibits LL from attempting to charge a larger fee and provides lease provision in violation of law is void.

New Legislation on Landlord's Out-of-Pocket Expenses

One of the General Assembly's last acts before adjourning in June was the enactment of S.L. 2018-50 (S 224), amending landlord-tenant law in apparent response to a decision by a Wake County Superior Court Judge. *See* "It's Landlords vs. Tenants in Eviction Battle," Raleigh News & Observer 6/18/2018.

Hargrove v. Grubb Management, Inc.

Superior Court Judge Shirley ruled in favor of plaintiff/tenant Jordan Hargrove in an action against his landlord for unfair debt collection practices in violation of GS 75-54. The judge's decision was based on a finding that the landlord had violated GS 42-46 by charging Mr. Hargrove $191 in connection with a prior summary ejectment action dismissed by the landlord before trial. According to media accounts, the landlord required payment of the following fees as a condition of dismissing the action: (1) all past-due rent and the next month's rent in advance; (2) a late fee of $43.75 pursuant to GS 42-46(a); (3) an administrative fee of $43.75 pursuant to GS 42-46(e); (4) $96 reimbursement for court costs and $30 for service of process; and (5) attorney fees. (I'm guessing at these amounts based on the information in the news articles and order.)

Judge Shirley found the fees in (4) and (5) above to be improper under GS 42-46(h)(3), which – prior to this amendment—provided:

It is contrary to public policy for a landlord to put in a lease or claim any fee for filing a complaint for summary ejectment and/or money owed other than the ones expressly authorized by subsections (e) through (g) of this section, and a reasonable attorney's fee as allowed by law. (Emphasis added.)

Note: The portion of Judge Shirley's order related to attorney fees found that such fees are not authorized by GS 6-21.2 in an action for summary ejectment unaccompanied by a claim for unpaid rent.

New law

Judge Shirley's decision surprised and alarmed many in the property management community, and the General Assembly responded by amending GS 42-46 to add the following sections:

(i) Out-of-Pocket Expenses. – In addition to the late fees referenced in subsections (a) and (b) of this section and the administrative fees of a landlord referenced in subsections (e) through (g) of this section, a landlord is also permitted to charge and recover from a tenant the following actual out-of-pocket expenses:

(1) Filing fees charged by the court.

(2) Costs for service of process pursuant to G.S. 1A-1, Rule 4 of the North Carolina Rules of Civil Procedure and G.S. 42-29.

(3)Reasonable attorneys' fees actually incurred, pursuant to a written lease, not to exceed fifteen percent (15%) of the amount owed by the tenant, or fifteen percent (15%) of the monthly rent stated in the lease if the eviction is based on a default other than the nonpayment of rent.

(j) The out-of-pocket expenses listed in subsection (i) of this section are allowed to be included by the landlord in the amount required to cure a default.

SL 2018-50.

The amendment also makes a conforming change to GS 42-46(h)(3), adding these fees to the list of those allowed. The new law became effective June 25, 2018.

Relevance to small claims magistrates

The primary rule established by the new law – that landlords charging the listed fees are not engaging in an unfair business practice – will affect very few small claims cases, due to the rarity of unfair business practices cases in that court. The provision making tenants responsible for court costs – including service fees—reflects current practice across the State in judgments in which the landlord is the prevailing party. The exception to this – occurring when service is by posting and the tenant does not appear – is not affected by this legislation. Nor does this legislation affect the amount a tenant must tender in order to defeat a claim for summary ejectment based on the statutory implied forfeiture established by GS 42-3.

The most significant aspect of the new law for small claims magistrates is the provision related to attorney fees. In general, attorney fees may be awarded only if authorized by a statute applicable to the particular sort of case being tried. The law related to attorney fees in summary ejectment cases has been somewhat unclear for years. When a provision in a written lease authorizes such fees, they have been upheld in actions for money damages caused by a tenant's breach of lease. WRI/Raleigh v. Shaikh, 183 NC App 249 (2007). The statutory authorization in these cases has been found in GS 6-21.2(1) based on the character of the written lease as "evidence of indebtedness" under that statute. That rationale was approved in NC Indus. Capital v. Clayton, 185 NC App 356 (2007), this time not only in connection with the claim for money damages, but also for attorney fees incurred in a previous summary ejectment action related to the same rental property. The Court indicated that attorney fees incurred "for participation in other proceedings to expedite collection or preserve assets" – such as a summary ejectment action – might be permissible under GS 6-21.2 if the plaintiff proves them reasonably related to the "principal proceeding" of collecting

a debt. No case law, however, specifically approved an award of attorney fees based on GS 6-21.2 in a simple summary ejectment action in which the landlord was seeking only to recover possession of the rental property.

S.L. 2018-50 changes all that. The amendment to GS 42-46 allows a landlord in a summary ejectment case to recover “reasonable attorney fees actually incurred” if agreed to in a written lease. The fees may not exceed 15% of the amount owed by the tenant, or 15% of the monthly rent if the action is based on a breach other than unpaid rent.

As with any new statute, there are questions about the details associated with the new law’s implementation. As we learn more, I’ll be sure to share with all of you!

KEY POINTS ABOUT LANDLORD-TENANT LAW & DAMAGES

Damages that might be awarded to LL in summary ejectment action

Unpaid rent, up to date of judgment

Damages for occupancy after lease is terminated.

Damages for remainder of term[1]

Premature termination by T:

If T raises mitigation issue: measure is amount LL would have received had T not breached, reduced by amount recovered by mitigation.

If T does not raise mitigation issue: amount LL would have received, reduced to present value.

NOTE: possible issue about whether termination was in fact premature: DV victims; members of military & families; surrender of leasehold by T; constructive eviction by LL.

LL terminates possession, but not lease: damages same as above.

Late fees & administrative fees under GS 42-46 (residential leases)[2]

Must be in lease
LL forfeits completely if exceeds statutory maximum
May not be deducted from rent payment so as to make rent late again
Subsidized housing: based on T's share of rent
Late fees: must provide 5-day grace period
"Rent concession" may be challenged as disguised late fee
Administrative fees provision is new law: note correction on p. 170 SCL.

Other fees contained in lease: often subject to rules re liquidated damages.

[1] Summary ejectment (typically) terminates the lease, and the right to payments pursuant to the lease, but the LL nevertheless has a claim for breach of contract damages when lease period extended into future.

[2] GS 42-46 is not applicable to commercial leases, which are subject to the usual rules about liquidated damages provisions.

Physical damage to rental property

Must exceed normal wear & tear

Measure is difference between FMV of property before and after damage.

Attorney fees under GS 6-21.2

Must be agreed to in lease

15% of rent due, unless lease specifies lower amount

Notice requirement applies, giving T notice of claim for fees and 5 days from mailing to pay outstanding balance.

Damages That Might Be Awarded to Tenant in Action against Landlord in Residential Context

Unlawful self-help eviction (whether actual or constructive)

GS 42-25.6 – 25.9 gives T right to sue to recover possession of property and actual damages.

Courts have held this to be an UTP, with consequent availability of treble damages and attorney fees.

Unlawful interference with T's property

Same rules as above apply.

T also has option of suing for conversion.

Retaliatory/wrongful eviction: generally used as affirmative defense, but T may recover damages through UTP claim.

Violation of Security Deposit Act (GS 42-50 - -56)

Violation of trust account provisions: LL forfeits entire deposit

T may sue for accounting, return, & damages from other violation.

Willful violation: Actual damages plus attorney's fees.

Possible violation of UTP law.

Rent abatement

Measure of damages is difference between FRV of property as warranted and FRV of property as is.

T may not recover more than has paid.

LL who accepts rent while aware that premises violate RRAA commits an UTP.

Things You Might Not Know About the Residential Rental Agreements Act

Small claims magistrates are by now thoroughly familiar with GS Ch. 42, Art. 5, the Residential Rental Agreements Act (RRAA). Claims arising under the Act are routinely raised and determined in small claims court. Even so, there are a few aspects of the Act about which I often receive questions.

A Quick Overview

In 1977 North Carolina joined many other states in enacting legislation creating an implied warranty of habitability in every residential lease.The law requires landlords to furnish "fit and habitable" premises that comply with applicable housing codes and to maintain and repair premises as necessary to keep the premises in satisfactory condition. GS 42-42. The obligation of tenants to keep premises clean, safe, and undamaged (aside from normal wear and tear) is also detailed in the Act. GS 42-43. Notably, the Act specifies that the tenant's obligation to pay rent and the landlord's obligation to maintain the premises are "mutually dependent," reversing the common law rule. GS 42-41. The rights and obligations created by the Act "are enforceable by civil action," GS 42-44(a). which includes "recoupment, counterclaim, defense, setoff, and any other proceeding including an action for possession." GS 42-40(1).

What's Covered – and What's Not

The RRAA does not apply to temporary lodging such as that available in hotels, nor does it apply to vacation rentals. Interestingly, it also does not apply to dwellings furnished without charge. GS 42-39. The Act does apply to mobile homes *and mobile home spaces,* and "grounds, areas, and facilities normally held out for the use of residential tenants." GS 42-40(2). In Pierce v. Reichard, 163 NC App 294 (2004), the Court of Appeals found that a landlord's failure to remedy a dangerous situation created by storm damage to a tree violated the RRAA, noting that "the yard surrounding a rental unit is deemed part of the premises" and thus warranted to be fit and habitable.

Who's Covered – and Who's Not

The obligations imposed by the RRAA apply to the property owner and may apply to a property manager as well. GS 42-40(3) includes in the definition of "landlord" anyone "having the actual or apparent authority of an agent to perform the duties imposed by" the Act. In Surrat v. Newton, 99 NC App 396 (1990) the Court of Appeals rejected a real estate agent's argument that his liability for violation of the Act should be limited to the amount of his commission, holding instead that as a "landlord" under the statute, the measure of damages to which tenant was entitled was independent of how much the agent was paid for his work.

A List of Unsuccessful Arguments About Why the Act Should Not Apply

The tenant waived the right to habitable housing by accepting the premises in "as-is" condition: The Act's requirements of fit and habitable housing apply to all residential leases as a matter of law, and tenants do not have the power to release them from those requirements. GS 42-42(b). This means that a tenant's explicit written statement that he has inspected the premises, is aware of their defective condition, understands that the rent has been reduced accordingly, and knowingly waives all rights under the RRAA is of no legal effect.

The tenant's didn't give written notice: Obviously, a landlord is not responsible for failing to repair defects the landlord doesn't know about, but the Act requires written notice in only one set of circumstances, set out in GS 42-42(a)(4)(maintenance and repairs of listed group of facilities and appliances), and even that requirement is subject to exception. Generally speaking, the Act requires only that the landlord be notified of defects and given a reasonable opportunity to repair them. In the case of defects in existence at the time the rental began, landlords are assumed to be aware of them and no further notice by the tenant is required. Dean v. Hill, 171 NC App 479 (2005).

The landlord made reasonable efforts: The RRAA requires a landlord to "do whatever is necessary to put and keep the premises in a fit and habitable condition." A landlord's good faith but unsuccessful efforts to accomplish this mandate are not a defense to violations of the Act. Creekside Apts. V. Poteat, 116 NC App 26 (1994).

The rent was reduced to a fair price due to the defects: The purpose of the RRAA is to establish a minimum standard of habitability in residential rental housing, not to ensure fair pricing for sub-standard housing. For this reason, the measure of damages in an action for rent abatement requires determination of the difference between the fair rental value of the property in compliance with the Act and fair rental value of the property in its actual condition. Note that the actual contract rent is not part of this formula (although it may be relevant evidence of "as warranted" value in some circumstances). Von Pettis Realty, Inc. v. McKoy, 135 NC App 206 (1999).

The tenant unilaterally withheld rent: When the RRAA first became law, there was considerable confusion about two apparently inconsistent provisions in the legislation. GS 42-41 states that "The tenant's obligation to pay rent under the rental agreement . . . and the landlord's obligation to comply with [the provisions of the Act] shall be mutually dependent." GS 42-44(c), on the other hand, states that "The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so." Legal scholars and appellate judges have discussed at some length how, consistent with the rules of statutory construction, both provisions might be read together in a way giving meaning to each. Space does not allow a thorough discussion of the legal reasoning and eventual resolution of this issue, but it is clear under current law that a landlord's violation of the Act may be an effective defense against a summary ejectment action even when that action is based on tenant's nonpayment of rent. For additional information, see Joan Brannon's NC Small Claims Law p. 197-199; Webster's Real Estate Law in NC, Sec. 6.05[1][b]; Von Pettis Realty,

supra; Miller v. C.W. Myers Trading Post, 85 NC App 362 (1987).

Conclusion

The implied warranty of habitability in residential rentals is an important, complicated, and often misunderstood aspect of landlord—tenant law, and one that is sometimes given short shrift when raised by tenants in summary ejectment actions. Typically, the evidence in eviction actions is short and to-the-point, and these cases, although numerous, are quickly disposed of. When a tenant raises a habitability defense, the various players may be caught off-guard by the abrupt change in pace. The evidence related to such a defense must address at a minimum: (1) the existence of the defect; (2) whether the type of defect violates the Act; (3) the landlord's awareness of the defect; (4) the duration of the defect; and the fair rental value of the property (5) with and (6) without the defect. When the defense involves multiple defects – which is often the case—the evidentiary phase of the trial lengthens accordingly. Furthermore, the evidence in many cases may require time to consider—there are often photographs, timetables, copies of correspondence, repair bills, etc., in addition to testimony. When a tenant has not filed a counterclaim, the landlord may be surprised by the defense and unprepared to rebut tenant's claims. A magistrate may be surprised as well and concerned about the numerous cases on the calendar still waiting to be heard. For all these reasons and more, magistrates may sometimes have to continue and/or reserve judgment in these cases, in order to reach a fair and just result in accordance with the law.

Must a Tenant Introduce Opinion Evidence of Fair Rental Value in an Action for Rent Abatement?

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : landlord-tenant, Residential Rental Agreements Actsmall claims

Date : September 7, 2016

On Tuesday the NC Court of Appeals handed down an opinion in Crawford v. Nawrath, a Mecklenburg County case involving the calculation of damages for violation of the Residential Rental Agreement Act (RRAA). The Crawford opinion is unpublished and thus does not constitute controlling legal authority but nevertheless is interesting and informative, both procedurally and substantively.

The Usual Facts

Crawford involved facts familiar to anyone with more than a passing interest in landlord-tenant law. The tenant rented a house for more than a year until the landlord gave notice of its intention to terminate the tenancy, demanding that the tenant vacate the property in two weeks. The tenant promptly requested an inspection by the Mecklenburg Building Standards Department, and the inspection revealed twenty code violations, three of which were deemed dangerous and in need of immediate repair. Evidence offered by the tenant at trial was that the landlord had promised to repair some of the defects before she took possession, but failed to do so. After she moved in, she continued to ask that the landlord make repairs, and some repairs were in fact attempted but were insufficient to render the premises habitable. Some of the specific defects established by the evidence were windows painted shut, several leaks in the roof, rusty and deteriorating kitchen cabinets, holes in the foundation, unsafe wiring, lack of operable smoke and carbon monoxide detectors, and a number of others.

The Usual Procedure

At the small claims level, the magistrate granted the landlord's request for summary ejectment and awarded the tenant $500 on her counterclaim for rent abatement. On appeal by the landlord, the primary issue before District Court Judge Rebecca Tin was the tenant's claim for rent abatement and unfair and deceptive trade practices. Judge Tin ruled against the tenant, finding that she had presented no evidence of the fair market value of the property either in its warranted condition or its unwarranted condition. Without such evidence, said the Judge, any award of damages would be no more than "speculation."

But Then Something Happened

During the following week, while researching another case, Judge Tin read the 1987 case of Cotton v. Stanley , 86 NC App 534, in which Judge Eddie Greene, on very similar facts, discussed the evidence required to determine damages in an action for breach of the warranty of habitability. Judge Tin became concerned that her decision in Crawford was not in compliance with the law set out in Cotton and *sua sponte* filed a motion pursuant to GS 1A-1, Rule 59, to set aside her judgment and reconsider the evidence of damages in light of that opinion. After hearing arguments from both parties, she did just that, entering an amended judgment awarding the tenant money damages on both claims.

Determining Damages in an Action for Rent Abatement

The measure of damages in a rent abatement action is the difference between two figures: (1) the fair rental value of the premises as warranted (i.e., in full compliance with the RRAA), and (2) the fair rental value of the premises in their actual condition, in addition to additional damages proved by the tenant. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362 (1987). The amount awarded must not exceed the amount actually paid by a tenant for the rental premises. Surratt v. Newton, 99 N.C. App. 396 (1990). In Cotton, just as in Crawford, there was abundant evidence of multiple violations of the RRAA, persisting over time and rising to a level rendering the premises uninhabitable -- but no *direct evidence* of the "as-is fair rental value." *Direct evidence*, said the Cotton Court, would consist of "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." Is such opinion testimony essential to the tenant's right to recover?

The Cotton Court answered with a resounding "no," characterizing the argument as "meritless." Evidence of the condition of the premises is "indirect evidence of fair rental value," permitting the jury to determine fair rental value "[f]rom their own experience with living conditions." Crawford echoed this result: "[T]he trier of fact can reasonably infer the fair market value of a rental property in its unwarranted condition by considering the defects found and the trier of fact's own common sense and experience regarding how those defects diminish the value." Similar reasoning governs determination of "as-warranted" fair rental value: the amount of rent initially agreed to by the parties is "some evidence" of that value, although not binding on the court, and direct evidence is not required.

Other Useful Reminders

As I said, Crawford was not a published opinion, and it does not lay down new law. But the the opinion does remind us of answers to two other questions that often come up in rent abatement cases:

- A landlord who collects rent while having knowledge that a rental property—or just part of a rental property—is uninhabitable has committed an unfair trade practice under GS 75-1.1 and is thus subject to treble damages. Pierce v. Reichard, 163 N.C. App. 294 (2004).
-
- A landlord is held to knowledge of patent defects that any landlord would have discovered in any reasonable inspection of the premises prior to handing possession over to the tenant.

A Pat on the Back for the Judge

The Court of Appeals specifically commended the trial judge for acting to correct the error in the first judgment. The Court noted that "[g]iven the small amount of damages at issue in this matter, as in many landlord-tenant disputes, compared to the cost of pursuing an appeal, it is possible this matter would not have reached this Court otherwise."

Big Law: The SE Judgment Form, Part 1

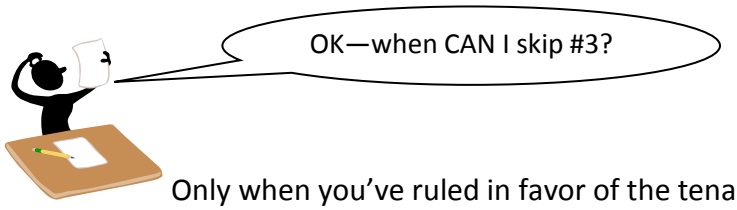
This post is the first in a series responding to questions that sometimes come up about the judgment form in actions for summary ejectment. Today, I'm focusing on #3 under FINDINGS (which I'm going to call "#3" for the rest of this post). [1] It looks like this:

3. ☐ a. there is no dispute as to the amount of rent in arrears, and the amount is $ _____ .
   ☐ b. there is an actual dispute as to the amount of rent in arrears. The defendant(s) claims the amount of rent in arrears is $ _____, and this amount is the undisputed amount of rent in arrears.

Confusion Worse Confounded

Question:	What does #3 have to do with the amount of rent I award?
Answer:	Nothing at all.
Response:	Well, THAT certainly clears things up. . . .

It's important to understand that what you write on the form for #3 is unrelated to the amount of back rent the plaintiff wants or the magistrate awards; these amounts may be the same, or they may be completely different. Because #3 is not actually part of what the court is ordering, some magistrates routinely ignore it as unnecessary surplusage. But that's a mistake. You should fill out #3 in the "regular" case in which the plaintiff seeks possession and a money judgment and you find in plaintiff's favor. And you should also fill out #3 in when plaintiff wins possession in a case served by posting. What if the landlord asks for back rent and possession, and you ruled against him on his claim for money, awarding possession only? Fill out #3. What if the plaintiff isn't even asking for money damages? Fill out #3.



Only when you've ruled in favor of the tenant. As we shall see, when there's no possibility of an appeal by the tenant, #3 is unnecessary surplusage, and you can cruise right on by.

[1] Don't you love the law? Only lawyers could come up with a form that says there's a dispute about the amount followed by a blank labeled "undisputed amount"!

Why It's Important:

The clerk is first on the list of people you'll help by filling out #3, because this information is vital to the performance of the clerk's responsibilities. It's a good idea for you to understand why this is true, so you can do <u>your</u> job of providing citizens with accurate information about small claims procedure.

Citizen-Defendant:	*Do I have to get out right away?*
Mighty Magistrate:	*You have 10 days to decide whether you want to appeal my decision for another trial, next time in district court. After 10 days, the plaintiff has the right to have the sheriff put you out.*
Citizen-Defendant:	*If I appeal, do I still have to get out after 10 days?*
Mighty Magistrate:	*Not necessarily. There's a procedure for "staying"—delaying—the judgment and you can see the clerk for details if you want to do that. Usually, the procedure requires that you* ***pay the clerk the amount of rent you both agree is due . . . .***

There it is: "undisputed rent" is <u>the amount that the landlord claims is due and the tenant does not contest.</u> It is important because this is the amount, for starters, that the tenant must pay in order to remain on the rental property while the appeal is pending. The tenant also must pay future rent, as it comes due, into the clerk's office while the case is on appeal. Requiring the tenant to make these payments is an effort to minimize the harm to the landlord caused by the tenant remaining on the property while the parties wait for the district court trial.

But the law does not require the tenant to come up with just any amount the landlord demands, regardless of how unreasonable it might be. G.S. 42-34(b) directs a magistrate to determine the amount of undisputed rent due. For example, a tenant claiming payment to the landlord, or seeking rent abatement due to violation of the Residential Rental Agreements Act, will be required to pay only that amount s/he agrees is owed in order to stay the judgment (in addition to paying rent as it comes due, of course). The amount actually due will be determined at the de novo trial in district court, and the clerk will disburse the funds being held as directed by the district court judge. If the funds held by the clerk are insufficient, the landlord will of course have the usual option of seeking to execute on his judgment for the balance due.

Determining how to fill out FINDING #3 is usually pretty simple. Most of the questions that come up involve cases in which the defendant, for one reason or another, has not been heard from at all. The General Assembly anticipated that problem, making it clear that an amount becomes "disputed" only when a tenant appears at trial to dispute it. You can test your understanding by considering the following four scenarios. In each case, ask yourself whether you would check Box 3(a), 3(b), or no box at all, as well as the amount you'd write in the blank on this part of the judgment form.

Scenario 1: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but obviously Larry is asking for only possession in your court. He'll file a Superior Court action for the money. Tammy Tenant Inc. contends that a proper interpretation of the lease reveals that the company owes only $20,000.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 2: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but Larry is in small claims court seeking possession only. Tammy Tenant Inc. was served, but does not appear at trial.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 3: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Tonya Tenant appears and denies that she owes Luke any money at all. You believe Luke's evidence, and rule in his favor.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

Scenario 4: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Service is by posting, and Tonya Tenant does not appear at trial.

☐ 3(a) $_____ ☐3(b) $_____ ___ No box at all.

(See Answers, last page.)

Potential Problem: When a plaintiff is seeking only possession of rental property, plaintiff's testimony sometimes does not include information about the amount of rent in arrears. After all, that is not an issue in the case, and so a plaintiff might understandably omit that information. Absent such testimony, how can a magistrate complete #3? The statute provides two acceptable answers. First, the magistrate can simply ask the plaintiff—and the defendant, if the defendant is present—what rent, if any, is in arrears. Secondly, the law permits a magistrate to rely on allegations made in the complaint (assuming the defendant does not appear and dispute that amount). In either event, it is important to remember that the magistrate is not making a judicial determination of the amount actually owed by the defendant, but is instead merely recording the parties' contentions about the amount.

Back to our small claims case:

Citizen-Defendant: *If I appeal, do I still have to get out after 10 days?*

Mighty Magistrate: *Not necessarily. There's a procedure for "staying"—delaying—the judgment and you can see the clerk for details if you want to do that. Usually, the procedure requires that you pay the clerk the amount of rent you both agree is due . . . .*

Citizen-Defendant: *But I owe $4,000! I can't come up with all of that money right away. I don't HAVE any money—if I did, I would pay my rent!*

Mighty Magistrate: *If you are indigent, you are not required to pay all of the rent in arrears in order to remain on the property while the appeal is pending. You will be required to pay rent into the clerk's office each month as it comes due, however, and you may be required to make a payment for the rent for the rest of this month. If you decide to appeal and want to remain on the property until your appeal is decided, you should talk with the clerk about whether you qualify as an indigent for the purpose of the bond required to stay the judgment of this court.*

A Little Something Extra:

I'm going to close with a different answer to the tenant's question. This answer combines a variety of responses to the tenant's indication that she might be indigent. It might be interesting to ask yourself whether you've ever said any of these things—or all of these things! While I respectfully argue that these comments should be avoided, that's just my opinion, and there are many magistrates who take a contrary position. What's your opinion? I'll include responses—without identifying information—in the next post.

Citizen-Defendant: *But I owe $4,000! I can't come up with all of that money right away. I don't HAVE any money—if I did, I would pay my rent!*

Mighty Magistrate: Well, if you admit you owe the rent, what are you appealing for? If you're just appealing so that you can stay on the property, you're not supposed to do that anyway. You expect Mr. Landlord here to just let you live there rent-free? He has to make a living too, you know. If you can come up with what you owe, that's one thing, but if you can't pay the bond to stay while you appeal, you'd be better off just going ahead and moving out. If you need more time, maybe Mr. Landlord will work with you here—I don't know. Otherwise, you're going to have to either come up with what you owe, or move.

Here's my argument for why you should resist the impulse to say something like this, however tempting it may be: Your most important responsibility is to offer citizens a *neutral* and *detached* forum for resolving their disputes. Even though the magistrate has entered judgment and the case is over, a magistrate who abandons the appearance of neutrality at this point and begins to advocate for the landlord leaves everyone in the courtroom with the impression that s/he wasn't really neutral to begin with.

A second argument relates to the important and complex topic of how to respond appropriately to questions from litigants about procedure—including how to appeal. Because that topic could easily be the subject of a Big Law post in its own right, I'm going to save it for another day. Let me just state my opinion, though, that it is improper to respond to questions from either party with non-responsive statements amounting to lecturing about what the magistrate believes is proper or improper behavior. (In other words, a party who asks how to appeal should not receive an answer containing the words "pond scum." ☺) That's my argument. Let me know what you think.

I hope this issue of Big Law is helpful to you in correctly completing FINDINGS #3 on the Summary Ejectment Judgment Form, and in responding appropriately to defendants who ask for information about the procedure. In the next issue, we'll continue our discussion of some of the challenging portions of this judgment form. If you have questions or comments, either about this post or in anticipation of the next, please feel free to send them to me—they are enthusiastically welcomed!

(Answers to Scenarios)

Scenario 1: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but obviously Larry is asking for only possession in your court. He'll file a Superior Court action for the money. Tammy Tenant Inc. contends that a proper interpretation of the lease reveals that the company owes only $20,000.

☐ 3(a) $_____ ☑3(b) $20,000 ___ No box at all.

Scenario 2: Larry Landlord files an action for possession of commercial property. He contends that Tammy Tenant Inc. owes $40,000 in back rent, but Larry is in small claims court seeking possession only. Tammy Tenant Inc. was served, but does not appear at trial.

☑ 3(a) $40,000 ☐3(b) $_____ ___ No box at all.

Scenario 3: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Tonya Tenant appears and denies that she owes Luke any money at all. You believe Luke's evidence.

☐ 3(a) $_____ ☑3(b) $0 ___ No box at all.

Scenario 4: Luke Landlord files a summary ejectment action seeking possession, back rent of $4,000, and $1,000 damage to property. Service is by posting, and Tonya Tenant does not appear at trial.

☑ 3(a) $4,000 ☐3(b) $_____ ___ No box at all.

OUTLINE ON RIGHTS REGARDING TENANT'S PROPERTY

RESIDENTIAL LEASES: PROPERTY OTHER THAN MOBILE HOME AND CONTENTS.

A landlord has no authority to do anything with a tenant's property until the landlord has brought a summary ejectment action, won a judgment for possession, and had the sheriff execute a writ of possession to enforce the judgment.

- The need for the landlord to deal with property remaining will arise only if the landlord selects the padlocking method of execution.

After the sheriff padlocks the premises under a writ of possession, the landlord has three alternatives for dealing with the tenant's property remaining on the premises. The landlord must hold property for ten days and then may throw away, dispose of, or sell any items of personal property remaining on the premises.

- During the ten-day period the landlord may remove the property and store it or may leave the property on the premises.

- If the tenant requests the property during that ten-day period, the landlord must release the property to the tenant during regular business hours at an agreed upon time.

If the landlord decides to sell the property, the landlord must give written notice to the tenant by first-class mail to the tenant's last known address at least seven days before the date of the sale.

- The notice must indicate when and where the sale will occur and how surplus can be claimed by tenant and what happens to it if not claimed.

- The tenant is entitled to return of the property, upon request, any time before the day of the sale, which means that in this circumstance, the tenant is entitled to recover the property more than ten days after the sheriff has served the writ of possession.

- The statute does not set out any procedure for how the landlord must sell the property or what kind, if any, advertising is required. (It is unclear whether the court would impose some reasonableness standard on the manner of sale.)

- The landlord may apply the proceeds of sale to unpaid rent, other damages, storage fees, and sale costs.

- Any surplus must be disbursed to the tenant, upon request, within ten days of the sale.

- If not requested by the tenant within ten days of the sale, the landlord must give the surplus proceeds to the county government of the county in which the real property is located.

If the total value all of the personal property left on the premises *is less than $500* (increased from $100 by the General Assembly in 2012), the property is considered abandoned five days after execution of a writ of possession. At that time the landlord may throw away or dispose of the property.

- If the tenant requests the property before the expiration of the five-day period, the landlord must release possession to the tenant during regular business hours or at a time agreed upon.

If a tenant abandons personal property with a total *value of $750 or less* (increased from $500 by the General Assembly in 2012), or fails to remove such property at the time of execution of a writ of possession, the landlord may immediately remove the property and deliver it to a nonprofit organization that regularly provides free or at a nominal cost clothing and household furnishings to people in need.

- The nonprofit organization must agree to identify and separately store the tenant's property for thirty days.

- It must release the property to the tenant at no charge if the tenant requests release during the thirty-day period.

- Landlord must give notice to tenant of name and address of organization to which the tenant's property was delivered by
  - posting notice at the rented premises
  - posting notice at the place where the rent is received, and
  - mailing copy of notice by first-class mail to the tenant's last known address.

RESIDENTIAL LEASES-MOBILE HOME AND CONTENTS.

If the tenant rents a mobile home space so that the tenant brings a mobile home on the landlord's lot, separate rules apply.

If the mobile home has a fair market value *of $500 or less,* the landlord may dispose of the mobile home and its contents as specified in section I above.

- The landlord determines the value of the mobile home.

Because a mobile home is a motor vehicle, the landlord must notify DMV if the landlord wishes to sell the mobile home.

The landlord must get permission of the local tax collectors before moving the mobile home.

If the mobile home has a fair market value of *more than $500,* the landlord must dispose of the mobile home and contents as provided in G.S. 42-2(e2).

- The mobile home must be titled in the name of the tenant. If owned by someone else, the landlord cannot acquire a landlord's lien in the mobile home.

- The landlord must get a judgment for possession and must have a writ of possession issued to enforce the judgment.

- After the writ has been executed, the landlord may immediately remove the property from the land and store it.

- The landlord must release the mobile home and contents to the tenant during regular business hours or at a time mutually agreed upon for 21 days after the writ has been executed.

- Twenty-one days after writ has been executed, whether the property remains on the premises or whether the landlord has removed and stored it, landlord has a lien on the property for the amount of rent due at the time the tenant vacated the premises; for the time up to 60 days from vacating the premises to the date of sale; for physical damages to the property beyond normal wear and tear; and for reasonable expenses costs and expenses of the sale.

    - The landlord must dispose of the property by selling it at a public auction pursuant to G.S. 44A-4.
    - The statute requires the landlord to post the notice of sale at the courthouse and to advertise in a newspaper in certain instances.
    - The landlord must give notice of the sale to the tenant.

- Because the mobile home is a motor vehicle, the landlord may not sell the mobile home without notifying DMV and getting permission to sell the vehicle.
- The purchaser may not move the mobile home without first getting permission from the local tax collector.

COMMERCIAL LEASES.

The old landlord's possessory lien statute, G.S. 44A-2(e), continues to apply to commercial leases.

Landlord may sell property.

- Under G.S. 44A-2(e) if property has been left on premises for at least 21 days after tenant vacated premises and landlord has a lawful claim for damages against tenant, may sell property.

- Lien is for amount of rent due at time tenant vacated and for the time, up to 60 days, from the vacating of the premises to the date of sale; for any sums necessary to repair damages to the premises caused by the tenant, except for normal wear and tear; and for the reasonable costs and expenses of selling the personal property.

- Notice must be given and property must be sold at public sale under provisions of G.S. 44A-4.

- If at any time before the expiration of the 21-day period tenant requests his property, landlord must turn it over to tenant.

- Lien does not have priority over any prior perfected security interests.

Landlord may store property.

- Under G.S. 44A-4(e) landlord may remove tenant's property and store it if left on the premises at least 21 days after the tenant vacates the premises or at least 10 days after the landlord has received a judgment for possession.

- Property placed in storage belongs to the tenant, who is entitled to recover it from storage.

- If property stored with person who in ordinary course of business stores property, that person will have a storage lien under G.S. 44A-2(a) and may require the tenant to pay the storage costs before releasing the property to him. (If property stored in self-storage facility, owner is entitled to a lien under G.S. 44A-41.)

Landlord may donate property to charity.

- Under G.S. 44A-2(e) if the total value of all property remaining is less than $100, then any time more than 5 days after tenant has vacated or sheriff has padlocked the premises, landlord may remove the property and donate it to any charitable organization.

Security Deposit Squabbles

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : landlord-tenantsummary ejectment

Date : November 1, 2017

Once, when my son was seven and went to summer camp, I asked the camp counselor how he was doing. She said that he was doing fine, except that he had threatened to sue her for breach of contract when she changed her mind about whether he could dig up a (very large) rock he found. That wasn't the first—or last—time I struggled to explain to my son that suing people is not the simple speedy solution to problems that he imagined. Small claims magistrates tell me that successful plaintiffs sometimes expect to recover the amount awarded from the defendant at the end of the trial. Certainly, many a plaintiff has been dismayed to learn that the trial is often merely the first of several steps necessary to collect money damages.

Landlords are entitled to collect a security deposit in order to avoid the need to file a lawsuit for reimbursement for certain specific damages caused by a tenant's breach. GS Ch. 42, Art. 6, the Tenant Security Deposit Act, regulates this practice in residential tenancies in an attempt to prevent certain unfair and deceptive acts historically associated with security deposits. In this post, I'll explain the basics of the law and address a few of the most common questions asked about its application.

Major Provisions

- Deposits must be placed in a trust account in a NC bank or similar institution (with insurance company bond alternative)

- LL must notify tenant of bank/insurance company name & address within 30 days of lease beginning.

- Maximum amount is equivalent of:

two weeks rent	for week-to-week tenancy
1 ½ months rent	for month-to-month tenancy
two months rent	for terms greater than month-to-month

- LL may use security deposit for only eight breaches enumerated in statute.

- Nonpayment of rent and costs for utilities
- Property damage, exceeding that caused by normal wear and tear, including damage to smoke and carbon monoxide alarms.
- Costs due to early termination (other than that authorized by law, or due to uninhabitable conditions and/or constructive eviction)
- Unpaid bills resulting in lien against rental property
- Costs of re-renting made necessary by tenant's breach
- Costs of removing and storing property after summary ejectment action
- Court costs

- Late fees and administrative fees as authorized by GS 42-46.

- LL must account for deductions and return balance of deposit to tenant within 30 days of lease termination. If LL is unable to determine extent of damages due within 30 days, LL is allowed to make interim accounting within 30 days and final accounting and return of balance within 60 days.

- In the event tenant's address is unknown, LL must retain balance due tenant for at least six months.

- If the LL transfers the property during the tenancy, the LL must either (1) transfer deposit, minus lawful deductions, to new owner and notify tenant of this, or (2) return deposit, minus lawful deposits, to tenant.

- The law applies to individuals and businesses "engaged in the business of renting or managing" residential rental property (other than single rooms).

Remedies for Violation

The Tenant Security Deposit Act has been discussed in few appellate cases, and that discussion has been brief, with the exception of *Neil v. Kuester Real Estate Services, Inc.*, 237 NC App 132 (2014). *Neil* is a lengthy opinion containing a detailed analysis of GS 42-55, which provides:

If the landlord or the landlord's successor in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. The willful failure of a landlord to comply with the deposit, bond, or notice requirements of this Article shall void the landlord's right to retain any portion of the tenant's security deposit as otherwise permitted under G.S. 42-51. In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, such willful noncompliance is against the public policy of this State and the court may award attorney's fees to be taxed as part of the costs of court.

Neil arose in an odd context, as an appeal from a Superior Court ruling refusing to certify the case brought by tenant/plaintiffs as a class action lawsuit. The dispositive issue was whether damages would need to be separately determined for each member of the class. The facts complained of by the tenants in *Neil* was that the landlord consistently deducted costs of cleaning (carpets, bathrooms, appliances), painting, and stove drip pans from security deposits, as well as a $40 "administrative fee" established in the lease for violation of any of approximately 40 listed health, safety, and maintenance regulations. The tenants' argument was that the consistent use of unauthorized deductions resulted in the landlord's forfeiture of the entire security deposit, thus eliminating the need for individual determination of damages.

The *Neil* Court rejected this argument, finding instead that the statute actually establishes four separate possible remedies, depending on the precise violation. These remedies are:

1. The Appropriate Refund Remedy: applies when a landlord fails to account for and refund the balance owed: tenant is entitled to accounting and refund of balance minus proper deductions
2. The Full Refund Remedy: applies when a landlord willfully violates GS 42-50 (the provision requiring deposit in a trust account or obtaining insurance bond, with notice to tenant); tenant is entitled to full refund, despite landlord's otherwise legitimate claims for deductions, as penalty for deliberate violation of this provision.
3. The Damages Remedy: applies when tenant has suffered actual damages from landlord's failure to comply with the Act.
4. The Attorney's Fees Remedy: applies when a landlord's noncompliance with the Act is willful.

Practical Questions

Magistrates often ask whether and how they should take a security deposit into account when determining money damages in a summary ejectment action. I suggest that they ignore the existence of the security deposit unless it is an identified issue in the lawsuit. The nature of summary ejectment actions often means that consideration of how the security deposit should be allocated is premature. Granting a tenant's request to credit amount already held by the landlord as a security deposit toward the money judgment of the court unfairly deprives the landlord of the opportunity to use the deposit for permissible deductions discovered or incurred after judgment is entered.

A second area of confusion involves the relationship between authorized deductions from the security deposit and additional money damages that might be claimed by the landlord. Remember that these two areas overlap but are not co-extensive. For example, it seems clear (at least to me) that the $40 fee for rules violations is not an authorized deduction from the security deposit. It may, however, be an enforceable damage claim based on the tenant's agreement to that lease provision. (Or, it may be an unenforceable liquidated damages clause due to its nature as a penalty, but that's another blog post!)

A final note, just for the record: I'm skeptical about the other deductions in *Neil* as well. While routine maintenance cleaning is often claimed as a deduction from security deposits, none of the statutory deductions seem to cover such a charge. This issue was not before the *Neil* Court, and the Court did not directly address it.

Selected Issues and Recent Developments in Landlord-Tenant Law

Selected Issues

Administrative fees: In 2009 the General Assembly amended G.S. 42-46 to establish a procedure allowing landlords to assess one of three fees for the expense and inconvenience involved when a landlord is forced to resort to the legal system to enforce his or her contractual rights against a tenant. The amount of the fee increases based on how deeply the case penetrates into the civil justice system before finally terminating. The law provides that a landlord is permitted to charge only one of the three fees, and the case must have come to a definite end before the appropriate fee can be identified and thus assessed. This requirement that the case must have completely terminated before a fee can be assessed has proven to be confusing to many landlords, who sometimes express dissatisfaction with a magistrate's refusal to award an administrative fee at a premature stage of the proceedings.

The Three Situations

In the first situation, a landlord files a complaint for summary ejectment but, upon the tenant's belated compliance with the lease, takes a voluntary dismissal before judgment is entered. The fee connected to this circumstance, called a complaint-filing fee, is limited to $15 or 5% of the monthly rent payment, whichever is greater. Because the case ends prior to entry of judgment of any sort, a magistrate never has an opportunity to award this "complaint-filing fee," subject to the single exception discussed below.

In the second situation an action for summary ejectment actually goes to trial and resolves in a judgment favorable to the landlord. The applicable "court-appearance fee" is limited to 10% of the monthly rent and is authorized only if neither party appeals the judgment of the magistrate. The period for giving notice of appeal ends 10 days after judgment is entered, and thus a magistrate has no way of knowing at the time judgment is entered whether the landlord will be entitled to the court appearance fee or, instead, the larger amount appropriate in the third situation, discussed below.

In the third situation, the original small claims case is ultimately resolved in favor of the landlord by a district court judge following an appeal for trial de novo. The fee authorized in this event, not surprisingly, is termed a "Second Trial Fee and cannot exceed 12% of the monthly rent. In this situation the district court judge is able to include the fee in the judgment because the case has come to an end.

Despite the fact that magistrates are rarely authorized by law to award one of these fees in a summary ejectment judgment, there have been a number of complaints across the state from landlords about a magistrate's refusal to do so. It is important that small claims magistrates are able to recognize those circumstances in which an award of an administrative fee is appropriate. That situation arises when the fee has been incurred in a

previous action. For example, a landlord who brings an action ("Action #1") and then takes a voluntary dismissal when the tenant comes up with the rent is entitled to charge the tenant a "complaint-filing fee," assuming the written lease authorizes such a fee. Imagine that the tenant refuses to pay the fee and furthermore defaults on the rent again six months later. The landlord again files for summary ejectment ("Action #2"), seeking unpaid rent and the unpaid complaint-filing fee associated with Action #1. In this situation the magistrate can award the fee related to Action #1, and could for the same reason award a court-appearance fee if Action #1 had been decided in favor of the landlord with no appeal. Action #1 has, in either situation, finally resolved and the magistrate is able to identify the appropriate fee. Only in such a case will a magistrate have authority to award administrative fees pursuant to GS 42-46.

Recent Developments

Security deposits: GS 42-55 establishes "four distinct remedies" for violation of the Security Deposit Act:

> "(1) where a landlord 'fails to account for and refund the balance of the tenant's security deposit as required,' tenants can bring a civil action to receive the required accounting and appropriate refunds due them ('the appropriate refund remedy');
>
> (2) where a landlord 'willfully fails to comply with the deposit, bond, or notice requirements of this Article,' a tenant can seek refund of the entire security deposit, even if the landlord would otherwise be entitled to retain some portion thereof ('the full refund remedy');
>
> (3) where a tenant has incurred damages from the landlord's failure to comply with the Act, the tenant may sue to recover those damages ('the damages remedy'); and
>
> (4) where a landlord's noncompliance is willful, the tenant can seek attorney's fees ('the attorney's fees remedy").
>
> While the damages remedy and the attorney's fees remedy could be sought in conjunction with each other or with the other remedies, the appropriate refund remedy and the full refund remedy are mutually exclusive. The first allows only for the required accounting and proper refund of the security deposit, while the second entitles a tenant to a total refund, even if the tenant's actions would otherwise subject his deposit to partial or complete forfeit."

Neil v. Kuester Real Estate Services, Inc., ___ N.C. App. ___ (filed 11/4/2014).

Essential elements for breach of a lease condition:

> "[A] tenant may be summarily ejected from a particular premises when the tenant has 'done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.' In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is

clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable."

"Unconscionable" means "excessive, unreasonable, or shockingly unfair or unjust."

This result is not inconsistent with federal law, including HUD v. Rucker, 535 U.S. 125 (2002). The Rucker case "merely authorizes the eviction of an 'innocent' tenant while the fact that the tenant is unaware of the criminal activity being engaged in in his or her apartment is only one aspect of a broader unconscionability analysis that would not, in each and every instance, preclude the eviction of an 'innocent' tenant."

Facts relied upon by Court:

- T was unaware that babysitter was involved in drug-related criminal activity in T's apartment;
- Police did not charge T with crime despite fact that drugs were found on her premises;
- T consented to search of her home;
- T has never been accused of criminal conduct while residing on the rental premises;
- T has never been accused of violating any provision of the lease;
- T has never been the subject of complaints by the neighbors;
- T has had no further contact with babysitter;
- T lost her job after babysitter was arrested, causing her to have difficulty finding reliable child care;
- T has three small children who live with her and has no alternative housing available.

Eastern Carolina Regional Housing Authority v. Lofton, ___ N.C. App. ___ (filed 12/16/2014)(rev. allowed by NC Supreme Crt 6/15).

Liability for rent as between co-tenants: T_1 & T_2 entered into one-year lease agreement with LL, with agreement between themselves that each person would pay half the rent. After 4 months T_1 moved out, and T_2 paid entire amount due under lease for remainder of year. At the end of the year, T_2 brought this lawsuit seeking to recover amount she paid on T_1's behalf. T_1 argued on appeal that T_2 had a duty to mitigate damages by attempting to renegotiate lease with LL to obtain rent reduction. HELD: T_1 waived this argument by failing to raise it in the trial court.

Trial court's judgment in favor of T_2 was supported by the evidence. Provision in judgment ordering T_1 to pay the amount awarded within 60 days was, however, unauthorized. A trial court has no authority to alter by order the statutory provisions regulating enforcement of a money judgment.

Clark v. Bichsel, 767 S.E.2d 145 (NC App, filed 1/6/2015).

Landlord-Tenant Law: NC Small Claims Law by Brannon (2009)

The chapter on Landlord-Tenant Law in Joan Brannon's book on small claims law continues to be an outstanding reference. While a few portions of the text have been rendered inaccurate by subsequent legislation or case law, the majority of these relate to procedural modifications applicable to small claims court. Readers should be aware of the following changes:

- The unconscionability issue discussed on p. 160 was directly addressed by the NC Supreme Court in Eastern Carolina Regional Housing Authority v. Lofton, 789 SE2d 449 (2016), in an opinion holding that a landlord is not required to produce evidence negating the possibility that eviction in the particular circumstances would be unconscionable.

- References throughout the text to damages not exceeding $5000 should read "10,000" due to legislation in 2013 increasing the jurisdictional amount for small claims cases.

- The section on page 170 referring to "Other Contractual Fees" has been substantially amended by legislation enacted in 2009 amending GS 42-46 establishing a hierarchy of permissible administrative fees.

- In 2012 the General Assembly added GS 42-26(c) permitting a landlord to accept partial payment of rent in certain circumstances without waiving the right to pursue eviction. This legislation is an important addition to the discussion of waiver beginning on p. 171 of the book.

- The section labeled *Security Deposits* on p. 189 of the book should be supplemented with legislation making minor amendments to GS 42-51. In addition, Neil v. Kuester Real Estate Services, Inc., 237 NC App 132 (2014) is an important case limiting the "full refund" remedy for violation of the Act to willful violations of GS 42-50, the provision related to the deposit of funds to a trust account.

- The section on pp. 190-192 governing a landlord's right to dispose of tenant's property should be revised to correct references to dollar amounts and time periods in accordance with statutory amendments set out in GS 42-25.9 and 42-36.2.

Pesky Questions

These are the questions you hear all the time, the ones you wish you could answer. But you shouldn't. Mostly because you don't KNOW the answer to the question they're really asking. But also because these folks usually need legal advice, not information. Sometimes—but not often—these questions actually come up in a small claims lawsuit. Here's where you can find some information to get you started.

Mobile Homes (Appendix pp. 119 – 138)

Information related to common misunderstandings:

Sixty-day notice is required only to end a tenancy (1) for a mobile home space (2) when the lease does not specify a different notice period and (3) the lease does not identify a definite end-date. Whether the lease has ended is relevant in summary ejectment cases only when the ground for ejectment is holding over.

A summary ejectment action is not an inexpensive way for a landlord to have a mobile home removed from rental property. While the sheriff's office will enforce a writ of possession by removing all of the tenant's property, including a mobile home, the landlord is required to advance the costs of removal and one month's storage fee, which will be added to the costs owed by tenant.

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Dead Parties (GS Rule 25(a)/Substitution of parties upon death. . . ; GS 28A-25-7/Removal of tangible personal property by landlord after death of residential tenant

Information related to common misunderstandings:

A leasehold interest in property survives the death of the tenant and passes as personal property to tenant's heirs. (NOTE: Whether this is true of tenancies from period to period and/or subsidized tenancies questionable.)

A landlord's death does not automatically terminate a lease.

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Tenant's Property Left Behind (Appendix p. 107 & 135; GS 42-25.7, -25.9, -36.2, GS Ch. 44A, Art. 1)

Information related to common misunderstandings:

A landlord is prohibited from interfering with a residential tenant's personal property in a manner not specifically authorized by statute regardless of contrary provisions in a lease.

A landlord must file a summary ejectment action and obtain a writ of possession as a prerequisite to disposing of a residential tenant's property even if that property appears to have been abandoned, subject to one exception. GS 42-25.9(d) authorizes a landlord to donate abandoned property to a charitable organization under some conditions.

Liens (GS 44A, Arts. 1 & 4)

Information related to common misunderstandings:

A lien is a right to sell property belonging to a debtor in order to recover the amount owed from the proceeds of sale.

A residential landlord does not have a lien in a tenant's personal property, subject to one exception: a landlord of a mobile home space has a lien on a tenant's personal property left behind arising 21 days after execution of a writ of possession. GS 44A-2(e2) sets out detailed requirements for this lien.

A non-residential landlord has a lien on personal property remaining on the rental property arising when the tenant has vacated the rental premises for 21 days after the paid rental period has expired.

The owner of a self-storage facility has a lien on property stored at the facility, as well as the right shared by other non-residential lessors to self-help eviction, rendering SE actions typically unnecessary for these landlords. GS 44A, Art. 4.

While a landowner may assert a motor vehicle lien for storage of a motor vehicle abandoned for at least thirty days on the landowner's property pursuant to GS 20-77(d), this lien is not available to a residential landlord for a tenant's motor vehicle remaining on rental property.

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What to Do about Unlawful Self-Help Eviction (GS Ch 42, Art 2A)

Information related to common misunderstandings:

Self-help eviction—meaning removing tenant from possession without filing a summary ejectment action—may be actual or constructive. The traditional common law rule permitting self-help eviction has been changed in NC, as it has in the majority of states, to permit its use only in commercial leases.

A residential landlord who engages in self-help eviction – whether actual or constructive – is responsible for resulting damages and is likely to be found to have committed an unfair trade practice as well.

Although a residential landlord who engages in self-help eviction has significant exposure to potential civil liability, there is no immediate action a magistrate can take to restore a tenant to the tenant's home.

A magistrate should never attempt to advise a tenant about the legality of taking steps to re-enter the home.

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_____
_____
_____

"Would It Be OK if I Just . . . . ?"

Information related to common misunderstandings:

When a tenant owns a leasehold interest in rental property, that tenant owns the right to exclusive possession of the property. Unless a landlord has retained the right to re-enter the property, a landlord who does so is subject to being charged with trespass. Even if a landlord has retained such a right in the lease, the exercise of that right must be consistent with the specific provisions of the lease as to circumstances, required notice to tenant, and so on.

A tenant's prolonged absence from rental property does not, in and of itself, terminate the lease nor does it give others the right to take possession of tenant's property.

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"How do I Get These *Other* People Out?"

Information related to common misunderstandings:

A judgment in favor of the landlord in a summary ejectment action authorizes removal of the named defendant from the rental premises as well as all others who "take through" the tenant, or in other words, are permissive occupants of the property.

A landlord should name and serve all tenants who joined in the lease, and should not name permissive occupants with whom the landlord has no landlord-tenant relationship (e.g., "all others").

A tenant is presumed to have the right to sub-let the premises unless the lease provides otherwise. Even if the lease prohibits sub-letting, a sub-lease is not rendered invalid by such a provision, and it is grounds for termination of the original lease only if that lease so provides. If the landlord prevails in a summary ejectment action against the original tenant, the sub-lessees will be removed as permissive occupants of the tenant. A landlord cannot evict subtenants without evicting the original tenant, due to the lack of a landlord-tenant relationship with the former.

A Judgment for Possession Is Only Step 1 in Summary Ejectment Cases

Most small claims actions in North Carolina are for summary ejectment: an action by a landlord asking the court to terminate the lease of a breaching tenant and award possession to the landlord. In residential leases, landlords are prohibited by law from "self-help" evictions – i.e., forcibly removing a tenant and his property, padlocking the premises, or rendering the premises uninhabitable by cutting off electricity or water. GS 42-25.6. The magistrate's role in summary ejectment ends when the magistrate makes a decision (*enters judgment*). But for the landlord, a favorable judgment is simply the first step in a lengthier and more complicated process.

Consider the following scenario: Laura Landlord wins her summary ejectment action against Tommy Tenant. The magistrate announces a decision in Laura's favor and completes a written judgment form. With a copy of the written judgment in hand, Laura might understandably assume that Tommy must immediately vacate the property, but that is not the case. That written judgment is not the piece of paper she needs to oust Tommy. The value of the judgment is that it entitles Laura to ask the clerk to issue a writ of possession directing the sheriff to remove Tommy. But that's not going to happen tonight – or tomorrow. First, we must wait to see whether Tommy appeals the magistrate's judgment.

In district or superior court, the losing party has thirty days to decide whether to appeal the court's decision. That time period is much shorter – only ten days -- for small claims judgments. The rule for all these courts is that no action to enforce the judgment is permitted until the time period for appealing has expired. GS 1A-1, Rule 62(a). Laura must wait ten days before taking the next step toward regaining possession of her rental property. GS 7A-228(a).

For this blog post, assume there is no appeal. Ten days after judgment is entered, Laura can go to the clerk's office and request a writ of possession. The clerk will collect $25 for the execution fee, GS 7A-308(a)(5). In addition, the sheriff's fee for serving the writ of possession is $30. GS 7A-311. These fees will be added to the costs Tommy is responsible for.

Sometimes landlords are surprised by the additional costs involved in taking this next step toward obtaining possession and, in seeking to avoid them, make a mistake. Reasoning that their right to the property has been settled by the small claims judgment, they enter the rental property without first obtaining a writ of possession. This is somewhat analogous to having a winning lottery ticket and deciding to steal the jackpot: the ticket entitles the holder to complete the procedure for claiming the money, but only that. Skip the procedure? Legal problems are likely to follow.

After the writ is issued, the sheriff has five days to execute it, and the first step is to notify Tommy of the approximate time of eviction. GS 42-36.2(a). This notice must comply with detailed requirements set out in the statute related to when and how it must be served and what information

it must contain. GS 42-36.2(d). At the scheduled time, the sheriff removes Tommy and all his belongings from the rental premises.

What if Tommy is not prepared to take possession of his property? The sheriff will deliver the property to a storage facility, after requiring Laura to advance the costs of removal and one month's storage. Like the execution fees, the money advanced by Laura will be added to the costs for which Tommy is responsible. Once Tommy and his property have been removed and the landlord has regained possession of the premises, the sheriff will fill out the paperwork (called a *return of service*), which will become part of the file in the clerk's office. The summary ejectment action is complete.

Let's change the scenario a little. Imagine Tommy is not prepared today to take possession of his property, but he'll have access to his brother's truck on Thursday, two days from now. Laura is not enthusiastic about advancing the costs of removal and storage, having some skepticism about whether she'll ever see that money again. The statute allows Laura to elect an alternative: she can sign a written statement authorizing the sheriff to simply lock the premises, leaving the tenant's property in place. By providing this statement to the sheriff, Laura can avoid paying the costs associated with removal and storage, *but she assumes the burden of disposing of Tommy's property in compliance with the law.*

Unless Laura is familiar with the law, she may be in some jeopardy at this point. She may incorrectly believe that she can refuse to return Tommy's property until Tommy pays the rent he owes her. In a residential tenancy, that action is legally prohibited, even if the written lease specifically says otherwise. Or Laura may tell Tommy that if the property isn't gone by Thursday, she'll take it all to the dump on Friday. Again, such an action is not legally permissible. GS 42-25.7. It's important for Laura to understand that there are very specific legal rules governing her treatment of Tommy's property. Failing to follow those rules may result in her being held liable for conversion of the property (the fair market value of the property) as well as an unfair trade practice (which entitles Tommy to treble damages and attorney fees). Love v. Pressley, 34 NC App 503 (1977), disc. rev. denied 241 SE2d 843 (1978).

So, what does the law say about what Laura can do with Tommy's property? The statutes are too complex to fully set out in this post –- and the details are important. The bare bones outline, minus procedural details, is as follows:

- Tommy is entitled to recover his property upon request during the next seven days, during regular business hours or at a mutually agreed upon time. Laura may move the property for storage purposes but may not otherwise dispose of it during this period. GS 42-36.2(b).
- If Laura offers to release the property during regular business hours but Tommy fails to retrieve it within seven days, Laura can throw the property away, give the property away, or sell it.
- If Laura decides to sell the property, GS 42-25.9(g) sets out detailed requirements

governing the conduct of sale, including required notice to the tenant and allocation of proceeds. The tenant is entitled to retrieve his property upon request at any time prior to the day of sale.
- If the total value of the property left behind is less than $500, the tenant has only five days to retrieve his property. GS 42-25.9(h).
- Different rules apply when the property left behind is a mobile home with a value in excess of $500. See GS 42-36.2, 42-25.9, and 44A-2(e2).
- There is a statutory procedure allowing a landlord to donate tenant's property to certain types of non-profit organizations, but this procedure is rarely used. GS 42-25.9(d)-(f).

Magistrates receive many inquiries from landlords about post-judgment procedures in eviction cases. The purpose of this post is to provide magistrates with a simple summary of these procedures as well as statutory citations to which landlords seeking legal information may be referred. In a future post, I'll look at a related topic: what happens if Tommy appeals?

Special Situations

Members of the Military (See App. pp. 23, handout titled *The SCRA and Summary Ejectment)*

Members of military & dependents have right to early termination of lease under both state & federal law.

SCRA prohibits self-help eviction of SM & dependents, and makes violation a misdemeanor, punishable by fine or up to 1 year imprisonment.

Primary impact is authorization of courts to postpone evictions for up to 3 months when military service *materially affects* ability of family to pay rent. Default stay for 90 days, but courts have significant discretion, both as to length of stay and to "grant to the landlord such relief as equity may require."

Rights under SCRA may be waived, but must be (1) in 12-point type, (2) in writing, in document separate from lease, and (3) after enlistment.

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Domestic Violence

When a tenant or household member is a victim of domestic violence, sexual assault, or stalking, landlord-tenant law is subject to significant exceptions under both state and federal law.

GS 42-42.2 (Prohibits discrimination in rental decisions based on this status)

GS 42-42.3 (Sets out obligations of landlord and tenant related to changing locks on rental property)

GS 42-45.1 (Governs early termination of rental agreement by "protected tenant")

GS 42-40(4) defines *protected tenant* as *tenant or household member who is a victim of domestic violence under Chapter 50B . . . or sexual assault or stalking under Chapter 14.*

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Bankruptcy (See App. pp. 27, 31)

Most significant rule is automatic stay upon filing of bankruptcy petition (AOC-G-108).

Special rule for enforcement of writs of possession when judgment entered prior to petition being filed. Magistrates should not advise litigants or members of the justice system about the applicability of this exception in particular cases.

Questionable LL-T Relationship

See App. p. 71

There are several situations in which magistrates may struggle to determine whether the parties are involved in a landlord-tenant relationship.

- When the relationship began as a guest-host or other permissive relationship.
- When the parties evidently attempted to create a tenancy initially, but the terms were vague or have been altogether ignored.
- When the agreement in question, if not a lease, is a license.
- When the evidence reveals some aspect of the agreement suggesting that the parties contemplated eventual purchase of the property by the alleged tenant.

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Foreclosures

GS 42-45.2 (allowing early termination by tenant due to foreclosure)

GS 45-21.33A (buyer at foreclosure takes subject to pre-existing lease)

GS 45-21.29 (clerk authorized to issue writ of possession for property purchased at foreclosure)

In 2015, the General Assembly made several changes to the law related to *foreclosure of property occupied by a tenant.*

GS 42-45.2 specifies that a tenant who receives notice of foreclosure of rental property may opt to terminate the lease effective at least 10 days but no more than 90 days after date of sale by giving written notice to the landlord. This right to early termination ends if the mortgagor cures the default prior to the tenant giving notice.

GS 45-21.33A puts in place provisions similar to the federal Protecting Tenants at Foreclosure Act (which expired on 12/31/2014) to the effect that a purchaser at foreclosure of property occupied by a bona fide tenant takes subject to the lease for a definite period (up to a maximum of a term of 1 year), unless the buyer plans to use the property as a primary residence. This provision applies only if the occupant is not the debtor, or the debtor's spouse, child or parent, the lease is written, and the terms involve rent at FRV unless subsidized.

For leases from period to period, the purchaser must give the tenant 90 days' notice before seeking a writ of possession from the clerk.

If the rental property has an imminently dangerous condition at the time of purchase, the buyer can obtain immediate possession of the property.

This law is of primary interest to clerks charged with determining whether to issue writs of possession pursuant to GS 45-21.29, one provision of the law raises a question about the role magistrates may play: GS 45-21.33A(f) provides "Nothing in this section shall be construed to limit the remedies available to the purchaser for breaches of the lease terms by the tenant."

Unconscionability, Public Housing & Summary Ejectment

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : subsidized housing, summary ejectmentunconscionability

Date : August 24, 2016

In a prior post, I talked about Eastern Carolina Regional Housing Authority v. Lofton, 767 S.E.2d 63 (2014), a North Carolina Court of Appeals case requiring a landlord seeking summary ejectment based on breach of a lease condition to prove as an essential element of the case "that summarily ejecting [the] defendant would not be unconscionable." Last week the North Carolina Supreme Court disagreed in a long-awaited opinion, making clear that "the equitable defense of unconscionability is not a consideration in summary ejectment proceedings." In so doing, the Supreme Court finally put the issue to rest, reconciling inconsistent statements of the law in several Court of Appeals cases, including Lincoln Terrace Associates v. Kelly, Charlotte Housing Authority v. Fleming, 123 N.C. App. 511 (1996), and Durham Hosiery v. Morris. Today, NC law provides that in an action for summary ejectment based on breach of a lease condition, it is sufficient for a landlord to demonstrate that the tenant breached the lease in a manner triggering the right to declare a forfeiture; the landlord has no additional burden to demonstrate that the result of such forfeiture will not be unconscionable. The Lofton opinion, written by Justice Newby, is significant for another reason: the Court also addressed the relative roles of a public housing authority (PHA) and a trial court in a summary ejectment action based on criminal activity in violation of the lease.

Lofton is an "innocent tenant" case, involving a fact pattern which has troubled courts for decades: a tenant in subsidized housing has a guest who—unknown to the tenant—engages in drug-related conduct on or near the rental premises. In 1988, in response to a public housing crisis involving drug activity, Congress enacted law requiring PHAs to include in their leases a provision permitting the housing authority to evict tenants if the tenants, their household members, or their guests were involved in drug-related illegal activity. In Department of HUD v. Rucker, the U.S. Supreme Court specifically upheld the application of this law in the "innocent tenant" circumstance, noting the strong public policy concerns in favor of providing all tenants in subsidized housing with safe housing. The bottom line in Rucker was that a PHA has discretion to evict a tenant even though the evidence establishes that the tenant neither knew nor had reason to know of the criminal activity of a household member or guest.

In tracing the development of the law, Lofton points out that the Rucker Court, as well as HUD in the days following the decision, took pains to emphasize what the opinion said, and didn't say: not that "innocent tenants" in these cases should be evicted, but rather that the PHA is vested with--and must exercise—discretion in determining whether to seek eviction. Justice Newby points out that the HUD materials reminded PHAs that the exercise of this discretion should be "guided by compassion and common sense," with an eye toward enforcing leases in a manner that "will most appropriately serve the statutory interest of protecting the welfare of the entire tenant population."

This requirement that the PHA make a discretionary decision about whether to seek eviction when grounds exist for doing so played a significant role in Lofton at every level of the court system. The trial judge denied ejectment based on a finding that the PHA erroneously believed that eviction was mandatory upon tenant's breach of the lease. On appeal to the Court of Appeals, the PHA pointed to the lease provision stating that breach of the lease condition related to criminal activity "shall be grounds for eviction" in support of its argument that it was required to seek eviction; the Court specifically rejected this argument, noting that the existence of grounds for eviction "simply means that the landlord is empowered, if it otherwise chooses to do so," to file an action for summary ejectment. The Supreme Court agreed, finding that the PHA "only considered whether the facts permitted eviction, thereby omitting the critical step of

determining whether eviction should occur in this case."

The procedure described by Lofton and the authorities cited by the opinion is as follows: (1) First, the PHA must determine whether grounds exist under the lease to evict the tenant for criminal activity by the tenant, a household member, or a guest. (2) Next, the PHA must exercise its discretion to determine whether "eviction will most appropriately serve the statutory interest of protecting the welfare of the entire tenant population," based upon consideration of "a wide range of factors." HUD has identified these factors to include "among many other things, the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy." (3) If the PHA in the exercise of its discretion decides to file an action for summary ejectment, the role of the trial court according to Lofton is as follows: "In its role as the final forum for review of government housing decisions, the Court is not to second-guess or replace plaintiff's discretionary decisions but to ensure procedural and substantive compliance with the federal statutory framework." Specifically, the court must determine whether the facts establish grounds for termination, and whether the PHA has complied with applicable rules and regulations in its handling of the case. If so, the PHA is entitled to a judgment for possession. It is inappropriate for the court to substitute its own opinion for that of the PHA as to whether eviction was the best or wisest response to the tenant's breach.

One final note: the Lofton Court specifically notes that the asserted grounds for ejectment in this case was breach of a lease condition, rather than the statutory grounds contained in GS Ch. 42, Art. 7 (Expedited Eviction of Drug Traffickers and Other Criminals). This will almost always be the case when subsidized housing is involved, because federal law requires a lease provision providing for forfeiture in the event of criminal activity. It is important to note that summary ejectment actions based on Art. 7, rather than on breach of a lease condition, will involve different legal issues and require a different analysis. One provision of the statute, for example, establishes an affirmative defense in the "innocent tenant" situation that will often yield an entirely different result than was the case in Lofton. GS 42-64.

Big Law: Summary Ejectment and Mobile Homes

This week I'm going to share some questions I've received from magistrates, involving mobile homes. I'll set out the facts for all three cases first, and then discuss how each might be resolved. For each case, ask yourself what you would do –or what additional information you might need—and then go on and read the discussion. Because I'm using these fact situations as a springboard to discuss various legal principles related to summary ejectment, the discussion for each is longer than would be necessary to decide the particular case. So, if you're a cut-to-the-chase kind of judge, you can flip to the end of this document and simply read the principles listed under Summing Up.
Thanks, as always, to the magistrates who wrote in with these questions!

A Tale of Two Counties (And Too Many Parties!)

A mobile home, owned by Owen, is located on land owned by Larry Landlord. Larry lives in your county, and the mobile home is located in your county, but Owen lives in another county. Owen rents his mobile home to Tammy Tenant. So, Tammy pays rent to Owen for the mobile home, and Owen pays rent to Larry, for the mobile home lot. In February, Tammy made her usual payment to Owen, but Owen just lost his job, so he didn't make his usual payment to Larry. When Owen defaults, Larry wants to bring a summary ejectment action. Can Larry bring an action for summary ejectment? Where, and against whom?

A Piece of Junk

A man named Sam came in today asking for help. About a year ago, Sam agreed to sell a mobile home lot to a man named Bob with the understanding that Bob would pull a brand-new 14x80 mobile home onto the lot. This part of the agreement was not put in writing. Sam just wrote down that he was selling the lot to Bob so that Bob would have something in writing to give to FEMA. Since then, Bob hasn't made any payments to Sam, and instead of a nice new mobile home, Bob has pulled a used "piece of junk" onto the lot. Bob hasn't even hooked the trailer up and is not living in it, but he refuses to move the mobile home.
Could Sam use summary ejectment to recover possession of the lot? How do you answer Sam's question about how he can get this "piece of junk," as he refers to it, off the property?

"I Get Sixty Days!"

Larry Landlord has brought an action for summary ejectment based on failure to pay rent against Tommy Tenant. Larry's evidence shows that Larry rents space in a mobile home park to Tommy. The parties entered into a month-to-month lease, with Tommy responsible for paying $150 on the first of the month. The lease was written, but Larry didn't bring a copy of the lease with him to court. Both parties agree, however, on the essential terms of their agreement. On January 15, 2010, Larry gave Tommy notice that he intended to end the lease on February 28. Tommy saw no reason to pay rent on February 1, since he was being forced out at the end of the month. Larry filed this action on March 1. Tommy argues that he should have received 60 days notice, since it takes quite a long time to make arrangements to move a mobile home. How do you rule?

A Tale of Two Counties . . .

To correctly answer this question, a magistrate must know two legal rules:

Legal Rule #1: **A landlord may bring an action for summary ejectment only against his or her tenant.** This is another way of stating the familiar rule that a landlord-tenant relationship must exist between the parties in an action for summary ejectment. Larry hasn't received rent for the lot, and the only person he can sue is the person who rents the lot from him: Owen. Larry doesn't care who's actually living on the lot, or what Owen's reasons might be for failing to make his lot rent payment on time. For Larry, it's simple: Owen agreed to pay him lot rent, and he hasn't paid.

Legal Rule #2: **An action for summary ejectment must be brought in the county in which the defendant resides.** We've said that Owen is the proper defendant, so Larry must file his action in the county where Owen lives. It makes no difference that the mobile home is actually located in a different county.

You may have noticed that this mechanical application of the rules fails to address an important question: what happens to Tammy? Shouldn't she be a party to this lawsuit? Is she at least entitled to notice that Larry has filed for summary ejectment, so that she could either prepare to leave, or decide to pay the lot rent herself in order to avoid eviction? Is it fair that she be evicted when she's made all rent payments on time and has done nothing wrong? Answers: No, no, and who knows?

Remember that the "rental property" in this case is the lot itself. The mobile home, so far as Larry is concerned, is personal property, just like a tenant's car or washing machine. Consequently, when the deputy goes out to serve the writ of possession, his or her duty is to remove the tenant (Owen) and all those who "take through" the tenant. Usually the people taking through the tenant are members of the tenant's family, but sometimes, as in this case, it's a sublessee--Tammy. The writ also requires the deputy to remove the tenant's property, if the tenant isn't prepared to do so. In this case, then, the deputy will tell Tammy (who "takes through" Owen) that she must leave. The deputy will also remove the mobile home itself, along with all its contents, and place it in storage. In practice, this seldom happens, because the landlord usually opts to have the mobile home padlocked, but left in place. Why do landlords pass up this opportunity to let the deputy worry about removing the mobile home? Because the deputy will remove it only if Larry pays the cost of removal and the first month's storage. The law provides that these costs will be added to court costs in the case, and that Larry is entitled to recover these expenses from Owen. As a practical matter, though, Larry may be doubtful about his ability to do so. Furthermore, Larry may wish to assert a "landlord's lien" under GS Ch. 44A; in this case he may want to hold on to the mobile home in order to sell it. In any event, Tammy, having paid for the right to exclusive possession of the mobile home, will be forced to vacate. In the eyes of the law, Tammy is not a party to the lease agreement between Owen and Larry, and thus she is not a necessary party to the lawsuit, nor is she entitled to notice that a judgment has been entered that will require her to vacate the property.

At first glance, this seems unfair. But remember that the law safeguards the right to freely contract, even when that right is the right to make a bad deal. Tammy either knew or could have discovered before renting the mobile home that Owen did not own the lot. The law assumes that contracting parties ask appropriate questions and make considered decisions before entering into legally binding agreements. The fundamental premise, then, is that Tammy knowingly placed herself in a more vulnerable position in exchange for some benefit—presumably, lower rent.

If you don't find the foregoing observation all that comforting, I think you'll like this one better. Tammy can sue Owen for the damages incurred as a result of his breach of contract with Tammy. By renting the

mobile home to Tammy for one year, Owen implicitly agreed not to do anything that would prevent her from having access to the mobile home. Thus, Owen is likely to be held liable for the damages caused by his failure to do so. (Of course, if Tammy's lease contains a provision saying that Owen is not responsible for paying lot rent, the result would be different.) Tammy might even have an unfair trade practice claim (with the attendant attorney fees and treble damages) against Owen, especially if he accepted rent from Tammy without informing her that the sheriff would be stopping by soon to evict her.

A Piece of Junk . . .

One issue that parties never bring up, but that magistrates nevertheless frequently confront in summary ejectment cases is the issue of whether a landlord-tenant relationship exists between the parties. It helps to think of summary ejectment as a tool developed for a very specific purpose, which may be used ONLY for that purpose: *to provide a mechanism for landlords to quickly regain possession of rental property (provided they have evidence supporting their right to do so), so that they may quickly re-rent property and thus avoid lost rental income.* The key terms in the preceding sentence are *landlords, rental property*, and *rental income*. The law does not allow use of this special tool to remove unwanted relatives, old girlfriends, or buyers who violate their purchase agreements, whether by failing to make payments or, as here, breaching some other provision of the sale contract. The oft-repeated statement that a landlord-tenant relationship is required in these cases is simply another way of saying that **a landlord must have filed the case in order to recover possession of rental property**. In this case, Sam is clearly not a landlord, and the lot is not rental property. Sam has no basis for filing a claim for summary ejectment.

But what about Sam's other question: how can he have the mobile home removed from his property? Many magistrates are asked this question often. It helps to stop and consider what Sam is actually asking. Sam wants advice about how to accomplish three goals: (1) He wants the home removed; (2) he does not want to have to pay to have it removed; and (3) he does not want his removal of the home to result in a lawsuit or a criminal prosecution. Unfortunately, he probably has a fourth goal: Sam doesn't want to have to pay an attorney for advice about how to accomplish the first three goals. What Sam wants—quite understandably—is legal advice about how to accomplish his goals without having to pay for it. Unfortunately, Sam's first three goals are not easily accomplished, even by a competent attorney, and a magistrate should not even consider attempting to advise him. No matter how much you might wish to be helpful to Sam, or how sympathetic you feel toward him, his need in this situation is clearly for legal advice: he's seeking a **recommendation** developed after **applying the precepts of both statutory law and North Carolina appellate case law** to the **particular detailed facts** of this case, accompanied by an **assessment of the risks** associated with each alternative course of action. No doubt, Sam wishes for a clear-cut and easy answer to his dilemma, but no such answer exists, and a magistrate is ill-advised to attempt to come up with one. (I hope it is clear, in light of the above discussion, that telling Sam he can burn down the mobile home is a bad idea.)

"I Get Sixty Days!" . . .

Remember the familiar rule that **in summary ejectment cases the first question that must be answered is "What are the grounds for summary ejectment?"** In this case, with no evidence of criminal activity, there are three possible grounds: (1) *Breach of a lease condition*; (2) *Failure to pay rent*; and (3) *Holding over*. As we've said before, regardless of which block the plaintiff checks on the complaint, or what the plaintiff says in court, summary ejectment is appropriate if plaintiff is entitled to it on <u>any</u> of the three grounds. Let us begin, then, with Ground #1: *Breach of a lease condition*.

The most important thing to remember about *Breach of a lease condition* is that this basis for summary ejectment is contractual—it comes into existence when the parties agree to it in the lease. Regardless of the particular language used, it boils down to one thing: the parties agree that in the event the tenant violates a particular condition of the lease, the landlord has the right to terminate the lease and require the tenant to leave. This is called a *forfeiture clause.* Because it is contractual in nature—in other words, the court is merely enforcing whatever the parties agreed to—the specific terms of the particular lease provision govern. If a certain notice is required by the lease, for example, the landlord must follow that requirement. In this case, the landlord has presented no evidence as to whether the lease contains a forfeiture clause, because he has not included the lease itself as part of his proof. So, what about that? What should a magistrate do when the landlord doesn't have a copy of the lease to show the court?

In North Carolina, a lease may be written or oral, and the terms of an oral lease are of course proven by testimony of the parties. A different rule applies, however, when a lease is written: ***A copy of the written lease must be provided to the court and admitted into evidence.*** This rule, descriptively known as The Best Evidence Rule, simply states that the best evidence of the contents of a written agreement is the agreement itself, and so must be produced by the party seeking to enforce the agreement. Because the Rules of Evidence are typically relaxed in small claims court, many magistrates have traditionally accepted oral testimony in lieu of a written lease in the absence of objection by the tenant. This is a risky practice, however, because a party's testimony about the terms of a lease may be incomplete or inaccurate, whether intentionally or inadvertently. All of us have encountered landlords who use form leases, and tenants who sign them, without actually knowing what the lease says. If you do not presently require landlords to produce a copy of the lease (in District Court, the original document would be required), you should consider changing your practice. Only by examining the lease itself can you be certain that your decision in a case is supported by the lease agreement between the parties.

In the case we're discussing, why would you like to see a copy of the lease? Because the landlord is basing his argument on Ground #2, *Failure to Pay Rent*. This basis for summary ejectment is available, however, only if the lease does NOT contain a forfeiture clause. In plain English, the law is saying that **our first choice is to enforce whatever the parties agreed to in the lease,** so if there's a forfeiture clause in the lease, that's what we go by. ***If and only if*** **the parties did not agree about what happens if the tenant fails to pay rent, the landlord may seek to recover possession under Ground #2.** In a sense, then, part of what a landlord must prove in order to recover under Ground #2 is that the lease does NOT contain a forfeiture clause.

Aside from his failure to prove the contents of the lease, what do you think about Larry's argument for eviction based on failure to pay rent? The evidence is undisputed that rent was due on February 1, and that Tommy made no payment. Is this enough? No, because Larry hasn't introduced evidence that he made demand and then waited ten days before filing this action. Strike 2 for Larry.

Turning our attention to Ground 3, *Holding over*, we recall that the notice typically required for a month-to-month lease is seven days prior to the end of the rental period. By giving notice on January 15 that he intends to terminate the rental on February 28, Larry was being quite generous by ordinary standards. After all, if the rental property in question had been an apartment, Larry could have terminated the lease on January 31! One and one-half months notice is not sufficient, however, when the rental property is a mobile home, and Tommy is correct in his contention that he is entitled to 60 days notice. Strike 3 for Larry.

We're going to change the facts now to illustrate a frequent error made in connection with the 60-day rule. Imagine that Larry does bring his written lease to court, and low and behold, it contains a forfeiture clause! The lease provides that the landlord has the right to terminate the rental agreement immediately if the tenant is more than 5 days late in paying rent. Larry wins based on Ground #1, *Breach of a lease condition*. "Wait a minute," says Tommy. "This is a mobile home. These things take time. I get sixty days before I have to move." What do you say to Tommy? "WRONG." The sixty-day rule applies only when the basis for summary ejectment is holding over. Tenants are not entitled to sixty days in which to remain on the property rent-free, to engage in criminal activity, or to violate other lease conditions. When a landlord is able to prove a basis for summary ejectment other than holding over, the sixty-day rule does not apply.

Summing Up

As you all know, it's hard for a lawyer to say a simple sentence. We feel compelled to follow any simple statement by saying "but," "unless," "except" or "provided that." There's an exception for every rule. Sometimes, though, it helps just to focus on the rule. So here are the rules—unburdened by exceptions—that will steer you right MOST of the time.

The only person a landlord can sue for summary ejectment is that landlord's tenant.

An action for summary ejectment may be filed only by a landlord seeking to recover possession of *rental property*.

An action for summary ejectment must be brought in the county in which at least one tenant resides.

A judgment for summary ejectment is effective against the tenant/defendant named in the complaint and against all who "take through" that tenant.

A sub-lessee may have a claim for damages against a sub-lessor when the sub-lessor's actions result in the sub-lessee's eviction.

The only words a magistrate should say in response to a question from a property owner about how to remove a mobile home from the owner's property are, "I can't give you advice about that. I suggest that you consult an attorney."

The terms of an oral lease may be proven by testimony of the parties to the lease.

The terms of a written lease may be proven only by the written lease itself.

A magistrate should always check a written lease for a forfeiture clause.

If a lease contains a forfeiture clause, the rights of the parties are governed by whatever the lease says.

Summary ejectment for failure to pay rent is available only if the lease does not contain a forfeiture clause.

Summary ejectment for failure to pay rent requires that a landlord provide evidence that a demand was made for rent, and that the complaint was filed at least 10 days after demand was made.

The law requires the owner of a mobile home lot to provide a tenant having a mobile home on the lot with at least 60 days notice before terminating the lease.

The sixty-day rule used to be a thirty-day rule, but the General Assembly changed the law to allow more time.

The sixty-day rule applies only to summary ejectment actions based on holding over (i.e.," The lease is ended and the tenant's still there.") If ejectment is based on another ground, the sixty-day rule has no application.

Thanks for coming along on this journey through summary ejectment as seen through the window of a mobile home. Three pretty simple questions, three fairly complex legal areas—just another example of Big Law!

Marco Polo and Mobile Home Spaces

Author : Dona Lewandowski

Categories : Small Claims Law

Tagged as : mobile homes, small claimssummary ejectment

Date : June 2, 2017

When I was a child, sharing the backseat of a station wagon with my brother and sister on long summer road trips, we used to play the *First Thing You Think Of* word association game. You know the one, where your sister says *Cold* and you say *Hot*, as fast as you can. *Salt* and *pepper*. *Marco*? *Polo*! The only thing that's really changed now that I'm grown up are the words. *Mobile home space*? If you thought *60 days*, this blog is for you.

The group of people plagued by this particular association may be small, but we sure do spend a whole lot of time trying to figure out this rule in landlord-tenant law. The source of the confusion is a statute, GS 42-14, which provides:

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

This law is almost 150 years old, but the part about rental of a mobile home space was added in 1985, and amended in 2005 to increase the required notice from 30 to 60 days. There have been no appellate cases construing this addition to the statute. Usually my experience has been that relatively minor changes in a relative minor statute which receive little or no attention in subsequent court opinions are easily overlooked, but not so in this instance. Something about the conjunction of *mobile homes* and *60 days* sparked a meld in the minds of folks interested in landlord-tenant law that has produced an entire mythology of rules. There were rumors (yes, this is what passes for interesting gossip in my life) that no writ of possession for a mobile home could issue until 60 days after judgment was entered, that service of process in a summary ejectment action on a mobile home lot must occur at least 60 days before the case could be heard, and – most commonly—that every tenant of a mobile home lot was entitled to least 60 days' notice before being evicted regardless of the ground for eviction. Tenants not paying rent, it was said, could do so for sixty days with impunity, and tenants engaged in criminal activity enjoyed similar leeway. None of these statements are true. So let's take a closer look at what the statute says, and think together about what it means.

Reviewing the Basics. In North Carolina, a landlord may evict a tenant only for one of four reasons:

- The tenant has breached the lease in a manner which—according to the lease itself—allows the landlord to terminate the lease. GS 42-26(a)(2).
- The tenant has failed to pay rent following the landlord's demand for rent, made at least ten days ago. GS 42-3.
- The tenant has engaged in criminal activity. GS Ch. 42, Art. 7.
- The lease has ended and the tenant continues to occupy the property (sometimes referred to as *holding over*). GS 42-26(a)(1).This post focuses on the last ground, *holding over*, because this ground alone might require reference to GS 42-14's 60-day notice requirement for mobile home space rentals
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Holding over is typically the simplest ground for eviction: the landlord need only prove (1) the lease is over, and (2) the tenant's still there. If the lease says "This lease will end on December 17, 2016," and the tenant is still there on

December 18, nothing else appearing, that tenant is holding over.

When a legal question does arise, it's almost always about whether the lease is over. Many leases do not identify a specific ending date, but instead are for an indefinite duration: they go on until someone takes action to end them. Ideally, the parties have agreed in advance about what action is required. For example, a month-to-month lease might provide that either party may terminate the lease by giving written notice at least 30 days in advance. In such a case, a landlord who seeks summary ejectment based on holding over must prove that notice was given, in writing, and at least 30 days in advance. Evidence that the notice was oral, or given only 20 days in advance, requires a conclusion that the lease is NOT over, and the landlord loses the lawsuit.

But what if nothing in the lease addresses how to end it? In these instances GS 42-14 comes to the rescue, specifying how much notice is required to terminate the lease: two days for a week-to-week tenancy, seven days for a month-to-month tenancy, and one month for a year-to-year lease. Thus the statute "fills-in-the-blank" when the parties themselves have left open the length of notice required to bring the lease to an end. Cherry v. Whitehurst, 216 NC 340 (1939); East Carolina Farm Credit v. Salter, 113 NC App 394 (1994).

So, what about mobile home spaces? It is important to note that holding over is the only ground for eviction with a special rule for mobile home lots. When a landlord seeks eviction based on failure to pay rent, criminal behavior, or a breach triggering forfeiture, the nature of the rental property is irrelevant. The usual rules apply. When a landlord seeks to evict a tenant from a mobile home space based on holding over, however, GS 42-14 has potential application. If the parties have agreed neither to a definite ending date nor a specific procedure for ending the lease, GS 42-14 fills in the blank, requiring a 60-day notice to terminate.

There is one lurking question raised by this statute. What if the parties in the mobile home space situation have agreed that the lease will end on December 17, 2017? Or their month-to-month lease provides for termination by written notice given 30 days in advance? In other words, does the rule permitting the parties to agree to something other than the statutory notice apply to mobile home spaces as well, or does the statute establish a minimum 60-day notice period that applies regardless of their agreement to the contrary? My reading of the statutory language places considerable emphasis on the words "*provided that,*" and my opinion is that the latter part of the statute should be read in conjunction with the other provisions, as a "fill-in-the-blank" rule. A reasonable argument to the contrary might be made, however, that the final portion of the statute should be read as a separate, independent provision: "where the tenancy involves only the rental of a [mobile home space] a notice to quit must be given at least 60 days before the end of the current rental period." Until either the General Assembly or the appellate courts address the issue, it's likely to continue being a lively topic of discussion for those of us living in Landlord-Tenant Land.

Dona Lewandowski
School of Government
3/5/07

Legal Issues Involving Mobile Homes

Summary ejectment from mobile home space:

When summary ejectment is based on holding over,

and the landlord's claim is that he gave the tenant notice that he intended to end the lease of a mobile home space, that notice must be given 60 days before the end of the rental. G.S. 42-14.

Example: Jones rents a space from Smith for his mobile home. Jones pays rent on the first of every month. To end the lease on April 30, Smith must give Jones notice that the lease will end no later than March 1. This is true whether the lease is a week-to-week or month-to-month lease. The special rule is merely a recognition that a tenant needs more time to relocate a mobile home than he does to move his belongings from one house to another.

Note: The 60-day rule does not apply if the eviction is for breach of a lease condition or failure to pay rent. Furthermore, if the lease contains a different provision about how the lease is to be terminated, the terms of the lease control. Finally, the 60-day rule does not apply to the time the tenant has to move out after judgment is entered.

When a landlord intends to convert a mobile home community to another use, 180 days notice is required.

The 60-day rule goes out the window when the owner of a mobile home park decides not to evict a single tenant, but instead to close an entire community of mobile homes. G.S. 42-14.3 deals with the situation in which the owner of a mobile home park (designed for at least five homes) decides to put the land to a different use that will require relocation of the mobile homes. The statute says that the landlord must give owners of the homes at least 180 days notice (not

60) before requiring them to vacate. The statute does not apply if the park is closing due to a governmental order. If the landlord fails to give the required notice, this failure is a defense against any action he may bring seeking possession. The statute provides that the respective rights and obligations of the landlord and tenants under the lease continue during the notice period. Thus if a tenant, upon receiving notice that the park is closing, stops paying rent, the landlord will be able to seek immediate eviction for failure to pay rent, or perhaps breach of a lease condition. The 180-day notice provision limits only the landlord's ability to terminate the lease and then seek ejectment based on holding over.

This statute contains two provisions that are unclear. First, the statute applies only if the landlord intends to convert the land "to another use." If the landlord intends merely to close the park, does this change from being a mobile home park to being land left idle constitute "another use"? No case has discussed the question thus far. Second, the statute does not directly address the question of whether a tenant may sue for damages arising out of a landlord's failure to comply with the notice provision. A North Carolina appellate court may well hold that the statute's statement that this failure may be used as a defense to ejectment, with no mention of the tenant's right to seek damages as well, implies that the statute may be used only defensively, but this remains uncertain.

The tenant is not the owner of the mobile home. When a landlord seeks to evict a tenant from a mobile home lot, questions sometimes arise about the significance of the identity of the owner of the mobile home. As a general rule, it makes little difference, since the law regards the mobile home just like other personal property brought on the lot by the tenant. Nevertheless, the issue may have practical significance.

Possibility #1: The landlord/seller may have sold the mobile home to the tenant pursuant to an installment sales contract and leased him the lot on which it is located. These are two separate agreements, but sometimes they are the subject of one written contract. Regardless of whether there is one contract or two, and no matter what the title of the document is, the analysis is the same: if the landlord/seller seeks summary ejectment, a judgment awarding possession will apply only to the lot, not to the mobile home. This may not be result the landlord/seller hoped for—he may have believed summary ejectment would let him recover both lot and property. In order to do this, however, two actions will be required:

summary ejectment for the lot, and an action to recover property for the mobile home. Finally, note that the usual rules apply to the latter. If the landlord/seller retained a security interest in the mobile home, his remedy is to proceed like any other secured party to recover possession of it. If he did not, his remedy is the same as that of any other unsecured party: he can sue the defaulting buyer for breach of contract, but he has no right to recover possession of the mobile home

Possibility #2: The mobile home is owned by a third party. Sometimes this situation arises when a tenant sells his mobile home to a third party. It may also arise when a tenant leases a mobile home space and then places a mobile home on the lot that is owned by a third party. In either case, the ownership of the mobile home is irrelevant to summary ejectment. In the eyes of the law, this situation is no different than that presented by a tenant who possesses a washing machine owned by his mother-in-law. For summary ejectment purposes, the issues before the magistrate are the same: (1) Is there a landlord-tenant relationship between plaintiff and defendant in reference to the mobile home space; and (2) do grounds for summary ejectment exist?

Possibility #3: The mobile home is owned by the tenant, but a third party has a security interest in it. The analysis in this case is identical to that in Possibility #2. The existence of a security interest is of no significance in determining whether a landlord is entitled to summary ejectment.

Landlord's authority to dispose of mobile home left on rental space. One of the questions magistrates are most frequently asked about relates to what happens after entry of judgment: landlords want to know what to do with mobile homes remaining on their property. Unlike the law discussed above, in which ownership of the mobile home is of little significance to the legal remedy involved, the law governing what happens after judgment is sometimes complex and is very much concerned with who owns the property. This is an area in which magistrates must be extremely careful to distinguish between giving information and giving advice. The appendix to this document contains a summary and discussion of the law in this area, and magistrates may wish to respond to inquiries by providing a copy of this appendix. A landlord who does not comply with the law in disposing of personal property remaining on leased premises risks being held liable under a number of legal theories; he would be well-advised to seek professional legal advice if he is uncertain of how the law applies to his particular situation.

Other issues related to summary ejectment from a mobile home.

Requirement of landlord-tenant relationship. One issue that comes up occasionally concerns the situation in which an alleged landlord seeks summary ejectment of an alleged tenant based on an agreement that is actually not a lease, but rather an installment sales agreement. Because the summary ejectment remedy is fast and inexpensive, sellers of mobile homes sometimes attempt to fashion their installment sales contract in a manner that resembles a lease. They may title it as such, refer to scheduled payments as "rent", or even insert a clause indicating the parties' intention that the document be considered a lease. None of these "cosmetic" features is determinative. The magistrate must look past the labels to the heart of the agreement to determine whether it is an agreement to purchase, in which ownership has passed to the buyer, or a lease, in which ownership of the property remains with the landlord.

Example: Smith shows you a "lease" which provides that Jones will make "rent" payments once a month for ten years, at the end of which time title to the property will be transferred to Jones. The document also says that if Jones misses a payment, the agreement about transfer of title is voided and the agreement is converted to a month-to-month tenancy. Because payment of "rent" in this case will eventually result in a transfer of title, most judges would refuse to treat this as a lease. The result is that Smith may not seek summary ejectment of Jones, but must instead pursue remedies available to him as a seller.

Residential Rental Agreement Act (RRAA)

G.S. 42-40 specifically provides that mobile homes and mobile home spaces are "premises" covered by the RRAA. Lessors of mobile homes have the same obligations as those of houses and apartments: to provide fit, habitable, and safe conditions. A tenant does not waive his right to recover for violations of the Act by taking possession of the premises with knowledge of the defect. G.S. 42-42 makes clear that landlords may not evade their responsibility under the Act by renting premises that are defective with an agreement that the tenant will make necessary repairs. While a landlord and tenant may enter into such an agreement, it must (1)be subsequent to the lease, (2) be written, (3) specify the work the tenant will do, and (4) state the benefit the tenant will receive for doing the work, with that benefit

being something more than what he already receives under the lease agreement.

Issues Arising Out of Security Interests in Mobile Homes

While there are numerous legal issues connected to actions to repossess mobile homes after default in a security agreement, the $5,000 amount in controversy requirement will keep most of these cases out of small claims court. As mentioned above, the existence of a security interest in a mobile home is of no consequence in summary ejectment cases. Because mobile homes are generally worth more than $5,000, actions to recover mobile homes as personal property brought by secured parties are generally district court actions. The same is true in the case of actions to recover deficiencies following sale of repossessed mobile homes. If a magistrate does encounter one of these cases in small claims court, however, he or she should simply remember that a mobile home is no different from any other personal property, even if it is permanently attached to the land.

Competing liens. One common fact situation encountered by magistrates is as follows: Tommy Tenant places a mobile home on Larry's Landlord's lot. Tommy owns the mobile home, but it is subject to a security interest held by Friendly Finance. When Tommy gets behind on his payments to Larry, Larry seeks summary ejectment and obtains a writ of possession. Tommy heads for the hills, leaving his mobile home sitting on Larry's lot. Larry would like to sell the mobile home and recoup some of his money. Can he?

Maybe. G.S. 44A-2(e2) authorizes Larry, as the lessor of a space for a mobile home, to assert a lien against furniture, furnishings, and other personal property, including the mobile home itself, if he (1) has a lawful claim for damages against Tommy, and (2) the mobile home is still there 21 days after the writ of possession has been executed. The statute makes clear, however, that Larry's claim does not have priority over Friendly's. Thus, if Tommy defaults in his payments to Friendly, Friendly has a legal right to come get the mobile home, assuming he is able to do so without causing a breach of the peace. If Friendly does not repossess the mobile home and Larry is able to sell it, Friendly's security interest will continue in it, and Friendly retains the right to repossess the home from the new owner.

Another issue comes up if Friendly "takes possession" of the mobile home by padlocking it. What rights does Larry have in this case? Can he charge Friendly rent, or damages for the continued loss of use of his land due to the presence of the mobile home? Can Larry have the mobile home towed, and then seek reimbursement from Friendly for the cost of removal? While a good case can be made for Larry's right to some compensation for the continued use of his land, no North Carolina case addresses the question.

Abandoned mobile homes. The issues discussed above arise only when Friendly takes possession of the mobile home pursuant to its security interest, as it is likely to do if the mobile home has value. If Friendly takes no action to repossess the home, the law is clear that Larry cannot compel it to do so [NCNB v. Sharpe, 35 N.C. App. 404 (1978)]. This situation arises when a tenant abandons a mobile home that has little remaining value, or that can be moved only with difficulty and probable damage. In this case, Larry has few attractive options, as abandoned mobile homes all over the State attest. While legally entitled to have the mobile home removed from his property, Larry will have to front the cost, which can be quite expensive, and he is likely to have difficulty recovering this expense from an absent tenant who may be judgment-proof.

A few counties have addressed the issue of abandoned mobile homes directly. Scotland County, for example, classifies abandoned mobile homes as solid waste and requires owners to remove them or face accumulating fines and jail time. Buncombe County offers free removal to qualifying property owners. Legislation that would have established a statewide fund to assist counties with removal was introduced in 2005 and may well be revived this session.

Criminal law issues related to mobile homes:

NCGS 15-58.1: Definition of "house" and "building".

Makes clear that mobile homes, manufactured-type housing, and recreational trailers are included in these terms. The result is that these structures are treated no differently from traditional structures for purpose of the laws pertaining to arson.

N.C.G.S. 14-58.2: Burning of mobile home . . .

The law provides that it is a Class D felony to commit the offense of willfully and maliciously burning a mobile home, manufactured-type house, or recreational trailer home that is the dwelling house of another while someone is present inside. While this statute may have been necessary prior to the clarification of law provided by GS 15-58.1 discussed above, this is no longer the case. First degree arson is likely to be the more appropriate charge, covering the same behavior but requiring one less element of proof (i.e., no requirement that the dwelling burned was a mobile home, manufactured-type house, or recreational trailer).

Note that a mobile home is a "building" for purposes of GS 14-59 (Burning of certain public buildings) and a "dwelling" for purposes of second degree arson.

In determining whether to charge "injury to real property" under G.S. 14-127 or "injury to personal property" under G.S. 14-160, be aware that either may be appropriate depending on the specific facts of the case. If the home is on a foundation, it is likely to be considered real property, while a home on wheels may be treated as personal property.

Appendix

Law Regulating Disposition of Tenant's Property Remaining on Mobile Home Space

Before a landlord has authority to take any action concerning the property of a residential tenant, he must obtain a judgment awarding him the right to possession of the rental property, have the clerk issue a writ of possession, and have the sheriff either lock the premises or place the property in storage. The rules discussed below apply only after this has occurred.

G.S. 42-36.2 applies to personal property, including mobile homes regardless of value. It provides that a tenant must take possession of his personal property when a writ of possession is executed. If the tenant does not do so, the sheriff shall deliver the property to a storage warehouse, unless the landlord agrees to allow the property to remain on the premises. The sheriff may require the landlord to pay for delivering the property to the warehouse as well as one month's storage fee. If the landlord refuses to advance these costs, the sheriff may refuse to remove the property. The costs of delivery and storage are charged to the tenant as court costs and constitute a lien against the property.

If a mobile home has a current value in excess of $500, the landlord's rights and obligations are controlled by G.S. 44A-(e2). That statute allows a landlord to remove and store any property (including a mobile home) remaining on the space after a writ of possession is executed. During the next 21 days, the tenant may take possession of the property at any mutually agreed upon time or during regular business hours. If the tenant does not recover the property he left behind within 21 days, the landlord may proceed to sell the property at a public sale. His right to do so is subject to two conditions:

1. The mobile home must be titled in the name of the tenant, and
2. The landlord must have a lawful claim for damages against the tenant. (Note that if the landlord and tenant have reached a contrary agreement about the landlord's rights in this event, that agreement will prevail.)

The first step in conducting a proper sale is to notify all the people who might be interested in the event. Because a mobile home is a motor vehicle in the eyes of the law (assuming no formal procedure has taken place to change its status from personal property to real property), DMV must be notified at least 20 days before a sale may take place. In addition, the landlord must notify the titleholder (i.e., the former tenant), any secured parties, and any other persons known or reasonably ascertainable who may have an interest in the property. The law states that this notice may be accomplished by taking the following steps:

1. Posting a copy of the notice of sale at the courthouse door in the county where the sale will be held;
2. Advertising the sale in a newspaper of general circulation in the same county once a week for two consecutive weeks, with the last publication date occurring at least 5 days prior to the sale; (Note: the publication requirement does not apply to mobile homes valued at less than $3,500 based on a schedule adopted by DMV.)

The law also specifies the information this notice must contain:

1. The name and address of the landlord.
2. The name of the titleholder and any other person with whom the landlord dealt.
3. A description of the property.
4. Amount of money the landlord is claiming he is entitled to (i.e., the amount of the lien).
5. The place of sale (must be either in the county where the mobile home space is located, or where the lease was entered into).
6. The date and hour of the sale (required to be on a day other than Sunday and between 10:00 AM and 4:00 PM).

The proceeds of sale are distributed in the following order:

1. Payment of reasonable expenses connected with the sale.
2. Payment of the amount owed the landlord (i.e., the amount of the lien.) This amount consists of (a) the amount of rent owed by the tenant at the time he vacated the premises, and (b) the rent due for the time after the tenant left up to the date of sale (60 days maximum), and (c) costs of repairing damages to the premises caused by the tenant not due to normal wear and tear. Any amount left over is paid to the tenant.

The law allows the landlord to purchase the mobile home at the public sale. If the landlord or someone closely connected to him purchases the property for a price significantly less than its fair market, it is of particular importance that the landlord be able to demonstrate substantial compliance with the statutory requirements concerning sale. G.S. 44A-4(g) states that a landlord who does not substantially comply with these rules (regardless of the identity of the purchaser) may be liable for damages in the amount of $100.00 and reasonable attorney's fees, in addition to actual damages resulting from his noncompliance. In addition, he may be vulnerable to an action for unfair trade practices, which entitles a successful plaintiff to treble damages.

The purchaser of a mobile home at a sale conducted under G.S. 44A must notify local tax authorities before moving the home, and he will be required to pay any back taxes owed. The purchaser should also be aware that his possession of the mobile home is subject to termination by a secured party whose interest in the property was properly recorded at the time of purchase. If Friendly Finance had a security interest in the mobile home and that security interest was recorded on the title at the time Paul Purchaser bought it, Friendly still has the right to repossess the home if the debtor defaults in making payments.

If a mobile home has a value under $500 the rules are simpler. The tenant has ten days from the time the landlord is put in possession to request the return of his property. During that ten-day period the landlord may store the property but must otherwise leave it undisturbed. Upon the tenant's request, the property must be returned to him during regular business hours or at a mutually agreed upon time. After ten days, the landlord may throw away, dispose of, or sell the property. Under most circumstances, a landlord is likely to find sale of a mobile home worth less than $500 difficult. In the event he decides to sell the mobile home, however, the statute sets out the required procedure:

1. He must give the tenant written notice by first class mail at the tenant's last known address at least seven days before public or private sale. (Note that this seven day period may overlap with the ten-day period.)
2. This notice shall state the date, time, and place of sale, and identify the allocation of proceeds: first to the landlord for unpaid rent, damages, storage fees, and expenses of sale, and then surplus to the tenant upon request. If the tenant does not

request the surplus within 10 days from sale, the amount will be paid to the county in which the property is located.

The tenant may recover his property upon request at any point up to the date of sale.

If a mobile home has a value under $100 the landlord need wait only five days after being put in possession before deeming it abandoned and disposing of it as he wishes.

Legal Issues Involving Mobile Homes:

Problems

1. Larry Landlord owns a mobile home park. He'd like to evict a troublesome tenant from the space he rents on a month-to-month basis. The lease is oral, and the rent is due on the 1st of each month. On March 1st he gives the tenant notice that the lease will end on March 30. The angry tenant refuses to give Larry the rent for March, saying, "I ain't paying, and I ain't leaving neither!" On April 1 Larry files an action for summary ejectment. Troublesome tenant is present and complains that he needs more time to arrange for the removal of his mobile home. Is Larry entitled to a judgment for possession?

2. Larry Landlord decides he's just sick of the whole business—he wants to close the park and open a drag racing track instead. He learned from his last experience and so is careful to give each individual tenant 60 days notice that their lease is ending and they should make arrangments to have their mobile homes off the rental space by the end of the sixty day period. You find yourself facing a lot of angry people, many of them waving receipts, when you come to court to hear Larry's action for summary ejectment against seven of his tenants. Larry asks if you could speed things up by hearing all seven cases at once. All seven are present (along with friends and families). What do you tell Larry?

   Larry testifies to the facts above. He admits that they're good tenants, and no one is behind on rent, but he says their leases have been terminated and he wants them out. How do you rule?

3. Larry's gone, but today Laine is in court seeking summary ejectment of a tenant from his mobile home space. The tenant says he'll be happy to leave, but points out that the mobile home belongs to his mother-in-law. Can you enter

a judgment for Laine, even though the mobile home belongs to someone else?

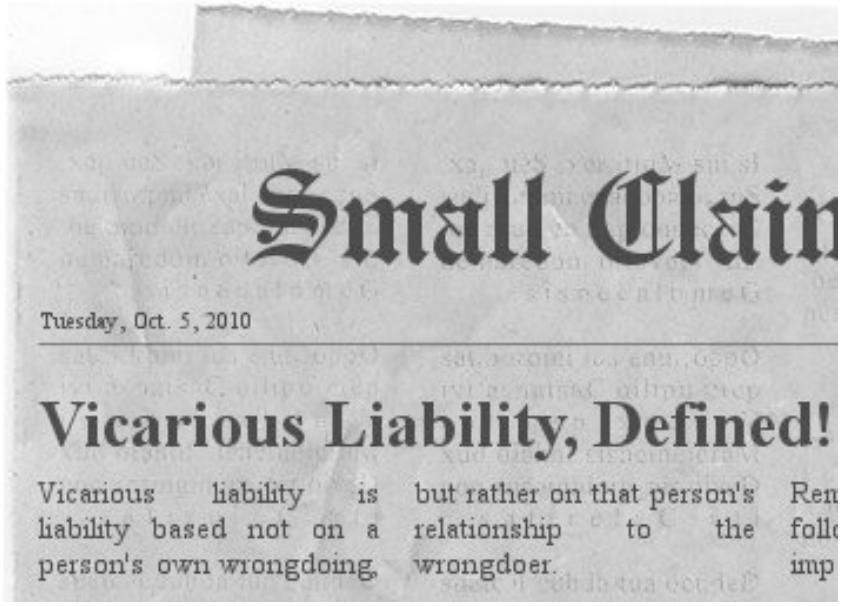
4. Laine has an idea that this tenant is going to leave without taking his mobile home with him. Since Laine has had problems with that in the past with other tenants, he asks that you enter judgment in his favor for $350 to repay him for the cost he will incur when he has to move the mobile home. He's ready to present expert testimony about the average cost of removing a mobile home if that helps.

5. While you're at it, Laine has a question about another situation. The tenant ran off and left a mobile home just sitting on the lot. Laine's not sure how much it's worth—he says, "Probably not much—you know how those things depreciate." He wants to know if he can give the mobile home to his sister. He hasn't heard from the tenant in 3 months.

6. In a change of pace Laine is in court as a defendant; his tenant has sued for damages under the Residential Rental Agreement Act. Laine admits that the trailer was in pretty bad shape when he rented it out, but explains that the tenant got a lower rate because of it. Also, since mobile homes are known to depreciate quickly, Laine says the RRAA shouldn't apply—that just wouldn't make sense. The tenant says when he walks down the hallway, he can see the grass growing through the floor. The hole makes it cold as well as a favorite place for local rats.

7. Friendly Finance has filed an action to recover personal property based on its security interest in a mobile home located on one of Laine's lots. Laine is in your office complaining about the case; the tenant owes him back rent and he believes he should be able to sell, or at least keep and re-rent, the mobile home. He says you can't hear the case since he's not a defendant.

TORTS



Small Clain

Tuesday, Oct. 5, 2010

Vicarious Liability, Defined!

Vicarious liability is liability based not on a person's own wrongdoing, but rather on that person's relationship to the wrongdoer. Ren foll imp

SO, WHAT RELATIONSHIPS ARE WE TALKING ABOUT?

--Parent may be responsible for acts of children.

--Employers may be responsible for acts of employees.

--Employers are responsible for acts of independent contractors in case of "non-delegable duties."

--Principals may be responsible for acts of agents.

--One partner may be responsible for acts of another partner.

--One person engaged in a joint enterprise may be responsible for the acts of another.

--The owner of a car may be responsible for the acts of the driver.

NOTE: ALL OF THESE INDIVIDUALS ARE RESPONSIBLE FOR THEIR OWN NEGLIGENT ACTIONS, BUT THAT IS NOT THE SUBJECT OF THIS HANDOUT. IN THESE CASES, WE'RE DISCUSSING HOLDING A PERSON LIABLE FOR ANOTHER'S INJURY, EVEN THOUGH THE PERSON HAS NOT BEHAVED NEGLIGENTLY OR OTHERWISE DONE ANYTHING WRONG.

PARENT MAY BE RESPONSIBLE FOR ACTS OF CHILDREN.

Essential Elements:

1. Defendant's child was under 18.
2. Child maliciously or willfully injured plaintiff or destroyed plaintiff's property.
3. Amount of actual damages.

Limitations: 1. Total recovery may not exceed $2,000.
2. Fact that parent no longer has custody and control (whether by court order or agreement) is complete defense.

EMPLOYER MAY BE RESPONSIBLE FOR ACTS OF EMPLOYEES.

Essential Elements:

1. Negligent person was employed by defendant.
2. Negligent person was acting within scope of employment, *or*
   employer authorized the employee to act tortiously *or*
   employer later ratified employee's tortious acts.
3. Amount of actual damages.

Limitations:

1. Distinguish between employee and independent contractor: An employer is NOT responsible for the acts of an independent contractor. Test is whether defendant maintained the right to control and direct the manner in which the details of the work were to be done. A worker is an independent contractor if that person contracts to perform work based on his own methods and judgment, retained the right to determine how and in what manner the work shall be done, reporting to defendant only in terms of result of work.

2. The courts have said that an employee acts within the scope of his employment if his actions were for the purpose of in some way furthering the business of the employer. The courts have applied this standard in a somewhat mechanical fashion, focusing on WHAT the employee was doing—assigned duties (albeit in a tortious fashion) or something else?

EMPLOYERS ARE RESPONSIBLE FOR ACTS OF INDEPENDENT CONTRACTORS IN CASE OF "NON-DELEGABLE DUTIES."

The courts have identified the following as "inherently dangerous" activities or "non-delegable" duties. This means that these areas are so important that we will hold an employer responsible even for the acts of an independent contractor.

1. Mechanic negligently repaired brakes—owner held responsible.
2. Plumber negligently repairs water heater in inn—innkeeper held responsible based on duty to guests of inn.
3. Operator of ride at fair negligently failed to close safety bar—fair owner held responsible.

ONE PERSON ENGAGED IN A JOINT ENTERPRISE MAY BE RESPONSIBLE FOR THE ACTS OF ANOTHER.

A joint enterprise exists when two or more people join together in pursuit of a common purpose, having an equal right to direct each other's actions. Persons engaged in a joint enterprise are jointly and severally liable for the negligent actions of each other.

A passenger in a vehicle may be responsible for the negligence of the driver if the two are engaged in a joint enterprise.

THE OWNER OF A CAR MAY BE RESPONSIBLE FOR THE ACTS OF THE DRIVER.

An owner of a car who is a passenger is vicariously liable for the negligence of the driver, based on the owner's legal right to control the operation of the vehicle.

Even when the owner of a car is not a passenger at the time of the negligent action, the owner is responsible if

(1) The driver is a member of the owner's family or household and lives in the owner's home;

(2) The vehicle is one used for the general "use, pleasure, and convenience of the family," and
(3) The vehicle was being so used at the time of the accident with the owner's express or implied consent.

This rule applies to motor vehicles of any type (including motorcycles and boats), whether accidents occur on or off a public highway.

This rule does NOT apply to hold one spouse responsible for the negligent acts of the other in a case in which the spouses are co-owners.

Rule of Evidence:

G.S. 20-71.1 (paraphrased): In all actions for injury to person or property by motor vehicle, proof of ownership is prima facie evidence that owner authorized driver's actions. Proof of registration is prima facie evidence of ownership as well as that operator was acting as agent (or legal equivalent) of owner.

Liability for Misdeeds of Animals

General rule: A person is not responsible for injuries caused by an animal unless a specific legal principle says he is. There are three legal principles that may result in a person being found responsible for the actions of an animal.

Principle #1: The owner or keeper of an animal with vicious propensities known to the owner or keeper is responsible for injuries resulting from those propensities.

Application of this principle requires a plaintiff to demonstrate four things:

1. The defendant is either the owner or keeper of the animal in question.

    a. A "keeper" of an animal is one who "exercises a substantial number of incidents of ownership," or in other words acts like an owner—feeding, grooming, or otherwise caring for an animal. A pet-sitter would probably be a keeper, as would a member of the household who, although not the legal owner, routinely cares for the animal.

    b. A landlord is not the "keeper" of an animal owned by a tenant merely by virtue of owning rental property.

2. The animal has vicious propensities.

    a. "Vicious" in this case has an unusual meaning. It does not mean that the animal is malicious or cruel; it means instead that the animal is dangerous, in the sense that something about it is likely to result in injury to another.

b. A large dog that jumps up on people or plays in a rough manner may be vicious within this definition. (Sink v. Moore, 267 N.C. 344 (1966).

c. A cat that scratches when it plays is not thereby vicious (Ray v. Young, 154 N.C. App. 492 (2002), nor is a dog that fights with other dogs or chases cars (Sink).

d. The clearest case of "vicious" occurs when an animal has previously behaved in a dangerous way. Evidence that a dog has bitten someone or otherwise behaved aggressively is strong support for a finding that the animal is vicious.

3. The owner or keeper of the animal knew of its vicious propensities.

   a. Actual knowledge is not required; it is sufficient if the defendant had information that would have alerted a reasonable person to the potential danger.

   b. Notice to the agent of an owner/keeper of an animal's vicious behavior is treated as notice to the agent/keeper himself. Similarly, notice to a household member is generally sufficient basis to find knowledge on the part of the owner/keeper.

4. The injury to plaintiff resulted from the animal's vicious propensity. (Tripping over a vicious dog that bites would not support a finding of liability, at least under this theory.)

NOTE: It is unclear whether under North Carolina law a defendant can escape liability by showing (1) that he took every step possible to avoid injury; or (2) that plaintiff's own negligence contributed to the injury. Many other states follow a rule of "strict liability" in these cases; that rule essentially says that if a person deliberately chooses to possess a vicious animal, he is responsible for any injury that results, even if he is entirely without other fault or if the injured party was partly at fault. It seems likely that North Carolina would follow this rule, but no case has squarely presented the issue as of yet. Even more unclear is whether the court would apply strict liability to a case in which another animal or other property is injured, as opposed to one in which a person is injured.

Principle #2: The owner or other person in control of an animal is responsible if he fails to use due care to prevent injuries that are reasonably foreseeable, given the general propensities of the animal, and the person injured is one to whom he has a duty.

In order to recover based on this principle, the plaintiff must show:

1. That the defendant had a duty to the plaintiff.

    a. The law imposes upon every person a duty to use ordinary care to protect others from injury, and so the required element of duty is generally easily met.

    b. An exception may arise, however, when the plaintiff is a trespasser. In such a case, an animal owner is responsible only for willful or wanton conduct.

    c. A concept connected to duty is the requirement that the defendant is the owner or is otherwise related to the animal in a manner making it reasonable to hold him responsible for the animal's behavior. A mere passerby has no duty to protect a person from injury by an animal he neither owns nor controls, for example.

2. That the animal injured the plaintiff.

3. That the injury was of a type reasonably foreseeable by the defendant.

    Most of the appellate cases have revolved around this issue. A recent case, Thomas v. Weddle, 167 N.C. App. 283 (2004), summarized the rules:

    a. If an animal is wild, an owner is assumed to know that it may behave in a wild (and thus dangerous) way.

    b. If an animal is large, an owner is assumed to be on notice that its size may present a risk of injury in some circumstances. (e.g., a horse may step on a child's foot).

    c. If an animal is of a breed known to be aggressive, an owner is held to notice of that fact. (Hill v. Williams, 144

N.C. App. 45 (2001) (Rottweilers are known to be an aggressive breed of dogs).

d. If an animal has behaved in a particular manner before, an owner is on notice that it may do so again:

"With regard to injuries inflicted by normally gentle or tame domestic animals, the law is clear that the test for liability is whether the owner knew or should have known from the animal's past conduct, including acts evidencing a vicious propensity, that the animal is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result." Thomas (finding no basis for imposing liability for injuries inflicted by 8-week-old kitten).

NOTE: Contributory negligence on the part of the plaintiff will bar recovery for a claim based on the defendant's negligence.

Principle #3: The defendant violated a "safety statute" and the violation resulted in injury to the plaintiff.

1. Many cities and counties have "leash laws" and other restrictions on the care and keeping of animals enacted in an effort to protect the safety of people and their property. Under the legal principle of "negligence per se", a defendant may be held responsible for injuries resulting from a violation of such an ordinance or statute without any further showing of fault or negligence on the part of the defendant.

2. To establish liability, a plaintiff must show:

   a. That the defendant violated an ordinance or statute.

   b. The law does not require that defendant actually be convicted of violating the statute, but absent a conviction the judge must be careful to closely read the precise language of the law. In Dyson v. Stonestreet, 326 N.C. 798 (1990), the North Carolina Supreme Court held that an ordinance making it illegal for an owner "to permit" an animal to run at large required that the owner either negligently or knowingly did so; it was not enough merely to show that the animal ran loose. In that case, the owner

put on evidence showing that the animal had previously responded obediently to verbal commands. The Court said this evidence prevented a finding that the owner had violated the ordinance.

c. That the statute is a "safety statute", i.e., designed to protect public safety.

d. That the plaintiff was a member of the class sought to be protected. (Example: When plaintiff was injured by defendant shooting at a trespassing dog in violation of a statute prohibiting cruelty to animals, statute sought to protect animals, not people.)

e. That violation of the statute resulted in injury.

f. That plaintiff suffered damages as result.

2. There are a number of state statutes, set out in G.S. Chs. 67 and 68, governing misdeeds of animals, the violation of which will give rise to a claim for damages based on negligence per se. Two of the more commonly violated are:

a. G.S. 67-1, which provides that the owner of a dog is liable for injury to livestock or fowls caused by the dog while off the owner's premises, and

b. G.S. 67-12, providing that a person who allows a dog older than 6 months to roam at large at night is liable for resultant injury to persons or property.

3. A plaintiff who seeks to recover damages based on allegations of violation of a safety statute is responsible for identifying the particular statute providing the basis for his suit.

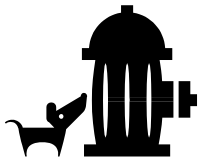
NOTE: Contributory negligence on the part of the plaintiff will bar recovery for injuries resulting from defendant's negligence based on violation of a statute.

Damages

The damages recoverable in an action based on misdeeds of an animal do not differ from those recoverable in any other action for negligence. A plaintiff is entitled to recover *out-of-pocket costs*, such as medical bills and loss of income, as well as future damages that may be reasonably foreseen (need for ongoing medical care, loss of future income, etc.) An injured party is also entitled to recover for *pain and suffering.*

If the action is one for *damage to property*, the usual measure of damages depends upon the extent of damage. If the property is destroyed, damages would be the value of the item immediately before its destruction. A lesser degree of injury might justify damages based on cost of repair. *Note that emotional distress or mental suffering is not a compensable damage item in cases involving loss of property.*

Punitive damages may be awarded if the defendant's conduct is so outrageous as to be "willful and wanton." An owner who allows a vicious dog to run free, knowing that it is likely to attack someone, may be subject to punitive damages. Hunt v. Hunt, 86, N.C. App. 323 (1987).



Special Rule for Dogs: G.S. 67-4.1 (Dangerous Dog Statute)

If a dog is a "dangerous dog" as defined in G.S. 67-4.1, its owner is liable for any injury it inflicts on people or property, even if the owner did everything he could to avoid injury.*

What is a dangerous dog? A dog that has (1) without provocation killed or inflicted severe injury on a person; (2) been declared to be a "potentially dangerous dog" under procedure established by statute; or (3) is owned for purpose of dog fighting, or is trained for dog fighting. "Severe injury" is established by showing broken bones, disfiguring lacerations, cosmetic surgery, or hospitalization as result of injury.

What is the procedure for having a dog declared "potentially dangerous"? The statute requires every city and county to designate a person or Board to handle citizen complaints about dangerous dogs. If a dog (1) has caused severe injury as defined above, or (2) killed or severely injured another animal while not on his owner's property, or (3) approached a person in a "vicious or terrorizing manner in an apparent attitude of attack" while not on his owner's property, it meets the criteria for a "potentially dangerous dog." The responsible person/board who determines a dog to be potentially dangerous gives written notice to the dog's owner, who may appeal to an Appellate Board.

In an action based on this statute, the plaintiff must show:

1. That the dog was a "dangerous dog";
2. That the dog injured plaintiff or plaintiff's property;
3. Amount of damages.

*(This is called "strict liability.")

Misdeeds of Animals/Essential Elements

Liability Theory #1: Wrongfully Keeping a Vicious Animal

- ☐ Defendant is the owner or keeper.
- ☐ Animal displayed vicious tendencies before attack. (Dog fights don't count.)
- ☐ Defendant knew or should have known that animal was vicious.
- ☐ The injury was caused by the animal's viciousness.
- ☐ Damages.

Liability Theory #2: General Negligence

- ☐ Defendant owed plaintiff a duty of care.
- ☐ Defendant failed to exert the care that a reasonable person would have taken.
- ☐ As a result, plaintiff was injured, and that injury was foreseeable
- ☐ Damages

Liability Theory #3: Negligence Per Se

- ☐ Defendant violated a statute or ordinance
- ☐ The statute was designed to protect others
- ☐ The plaintiff was among the group sought to be protected
- ☐ Violation of the statute resulted in the plaintiff's injury
- ☐ Damages

Defense: Contributory Negligence

- ☐ The plaintiff was also negligent.
- ☐ Her negligence contributed to her injury.

MISC.

Motor Vehicle Liens

A Quick Reference Guide
for North Carolina Magistrates

Dona Lewandowski
School of Government
University of North Carolina at Chapel Hill

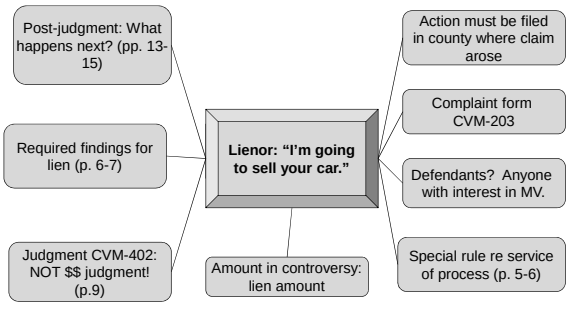
Who is suing, and what does he want?

1. Action by lienor to establish lien.
2. Action by owner to recover MV and establish lien, if any.
3. Action by lienor to recover MV and establish lien.

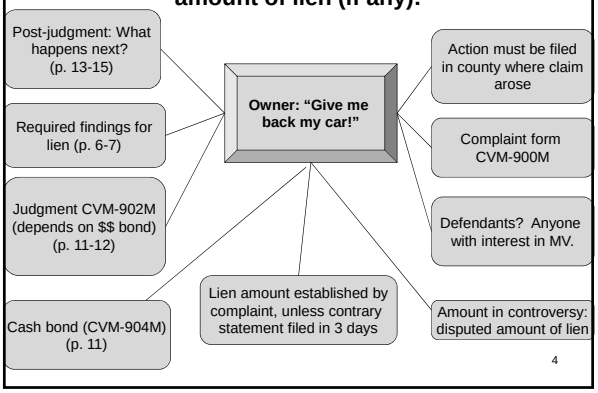
For each action, consider:

-- Service of process (page 5)
-- Cash bonds (page 11)
-- Required findings
-- Special rules for storage fees (page 8)
-- Judgment (pages11-13)
-- What happens next (pages 13-15)

1. Action by lienor to establish lien:



2. Action by owner to recover MV and establish amount of lien (if any):



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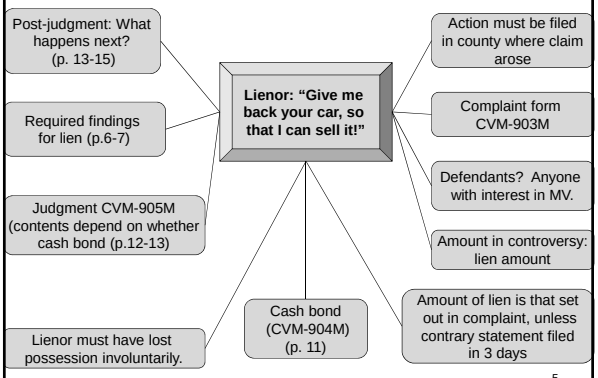
3. Action by lienor for MV and to establish lien:



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Special rule for service of process

If service by usual methods is not possible, lienor may use service by publication.

Must be:

--published once/week for 3 weeks in a row

--in a qualified newspaper commonly sold in county where action pending

--with published notice containing specific contents

Service by publication may be proven by affidavit.

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Cash bonds to recover motor vehicle

- Amount determined by complaint, or by contrary statement if filed w/in 3 days of service.
- Owner pays clerk full amount claimed in cash.
- Clerk issues CVM-901M, ordering release of motor vehicle.
- Bond eventually distributed based on judgment.

To establish lien, must show:

5. Charges are reasonable, or if not, amount of reasonable charges.

4. Charges have not been paid.

3. Has possession of motor vehicle.

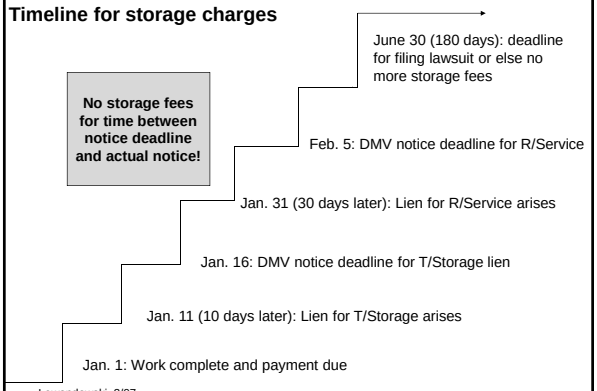
2. Had contract with owner or legal possessor.

1. Repairs, services, tows, or stores MV in OCB .

Two less common kinds of liens:

- A person in the business of parking or garaging cars for the public has a lien arising when the vehicle has been unclaimed for 10 days; and
- A landowner has a lien arising when a MV has remained abandoned on his land for 30 days. NOTE: this lien is not available to a landlord in connection to property belonging to a tenant.

Timeline for storage charges



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Judgment in action by lienor to establish lien (CVM-402)

- Authorizes lien and establishes its amount. NOT a money judgment.
- Lien is for reasonable value of services provided.
- Note special rule for storage charges (see page 8).

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Judgment When Owner Seeks Possession of MV: CVM-902M

No Cash Bond	Cash Bond
No Lien: Owner gets possession, no lien for lienor	**No Lien:** Owner gets possession, and judgment orders clerk to disburse $ to owner
Lien: Lienor gets possession, and can assert lien for amt determined by magistrate	**Lien:** Owner gets possession; judgment orders clerk to disburse $ to lienor in amount ordered by magistrate. (owner gets anything left over).
Owner fails to appear: Case dismissed. Lienor keeps possession and asserts lien as law allows	**Owner fails to appear:** Case dismissed. Magistrate directs clerk to disburse $ to lienor. (Owner already has vehicle.)

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Judgment When Lienor Wants MV Back and to Assert Lien: CVM-905M

No Cash Bond

Lien: Lienor gets possession, and can assert lien for amt determined by magistrate

No Lien: Owner keeps possession, no lien for lienor.

Cash Bond

Lien: Judgment orders clerk to disburse $ to lienor in amount ordered by magistrate. (Owner gets anything left over.)

No Lien: Action is dismissed, and judgment orders clerk to disburse $ to owner (who also keeps vehicle).

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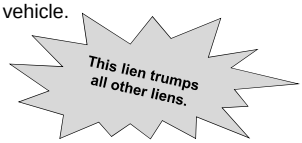
What happens next:

1. Lienor sends copy of judgment to DMV.
2. DMV authorizes sale.
3. Sale may be private or public, but must follow rules of statute.
4. Proceeds are distributed in this order: (1) expenses of sale, (2) lienor, (3) other lienors, and (4) owner of vehicle.



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Details, Details, Details. . .

Companion to “Motor Vehicle Liens: A Quick Reference Guide for North Carolina Magistrates”

Dona Lewandowski, School of Government, UNC-at-Chapel Hill, 2015

Stage 1: Before the Hearing

A lien begins when a lienor acquires possession of the vehicle (it's called a possessory lien), and it ends when the lienor voluntarily gives up possession, or when the lienor is paid the full amount owed. No written lien is filed with the Division of Motor Vehicles (DMV) or with the clerk.

A lien terminates if the lienor loses possession. This loss of possession must be with the lienor's consent, however, or because of a judge's order. If the lienor loses possession because the vehicle is taken without his consent, the lien continues to exist. On the other hand, if the lienor lets the debtor take the vehicle because he agrees to pay what he owes, the lien ends. Even if the debtor does not pay, or brings the vehicle back for additional work, the lien is not revived. The former lienholder will have to bring a contract action to recover his charges (although he may assert a new lien if the debtor once again refuses to pay for the new work done).

Payment also ends a lien. Payment may be made by owner, secured party, or legal possessor, and it must be for full amount secured by the lien (NOTE: this is contract amount, not reasonable value) plus reasonable storage fees.

First Steps in Enforcement

The first step a lienor must take to enforce his lien is to file an unclaimed vehicle report with DMV (DMV form LT-260, Rev. 9/12). When this report may be filed depends upon the location of the vehicle. If the vehicle has been unclaimed in a place of business, the report may be filed after 10 days. If the vehicle has been abandoned on a landowner's property, the report may be filed after 30 days. In either case, failure to file this notice within five days after the appropriate date limits the amount of storage charges the lienor can charge. After the five days have passed, if the lienor hasn't notified DMV that he has the vehicle, he can't charge for storage until he DOES notify DMV.

Example: David Debtor takes his car to Eddie's Garage, but can't pay Eddie's bill. Eddie waits ten days (until March 10), as is required, but gets distracted by ACC basketball and forgets to notify DMV that he has the car for 2 months. He remembers and sends in the form on

May 10. Eddie cannot collect storage for the period between March 15 (5 days after the ten-day period is up) and May 15.

The second step a lienor must take to enforce a lien is to file a notice of intent to sell the vehicle. This notice too is filed with DMV (DMV form LT-262). There are special rules regulating when notice may be filed: If the only charges are for towing and storage, the lienor may file this notice when the charges have been unpaid for 10 days. The result is that this notice sometimes may be filed simultaneously with the report to DMV that a vehicle is unclaimed. In all other cases, the lienor must wait to file this notice until charges have been unpaid for 30 days.

DMV takes the next step: When DMV receives notice that the lienor plans to sell the vehicle, it sends out a certified letter, return receipt requested, to all interested parties. Interested parties include the owner of the vehicle, any secured parties, and the person with whom the lienholder contracted, if not the owner.

Contents of notice: This notice contains the following information: name of the lienholder, nature of services performed, amount of the lien claimed, and statement of intent to sell the vehicle to satisfy the lien. This notice also informs the recipient of his or her right to request a judicial hearing to determine whether the lien is valid. If one of the recipients wants a hearing, he must ask for one within ten days by notifying DMV.

After DMV sends out this certified letter, one of three things may happen: (1) all parties receive notice and none request a hearing; (2) not all parties receive notice; or (3) one or more parties request a hearing.

(1) If all parties receive notice and none request a hearing, DMV authorizes the lienor to sell the vehicle and no court proceeding is required. This sale must be conducted according to the rules set out in G.S. 44A. (See **Stage 3,** beginning on p. 13)

(2) If one or more of the parties do not receive notice that the lienor intends to sell the vehicle (i.e., the identity of the owner or other party cannot be determined, or a certified letter is returned to DMV as undeliverable), some further proceeding is required.

If the names and addresses for all parties are known but the certified letter is returned as undeliverable, the lienor may file a special proceeding before the clerk or bring an action in small claims or district court.

If the name of the owner is unknown and the vehicle has a fair market value of less than $800, the lienor may file a special proceeding before the clerk or bring an action in small claims or district court.

Any other case involving inadequate notice must be brought in small claims or district court to establish the lien.

(3) **If any person receiving notice requests a hearing**, the lienor must bring an action in small claims or district court.

Stage 2: The Hearing

Procedure for hearings

Magistrates may hear actions to enforce motor vehicle liens if assigned to do so by the chief district court judge.

Note: These actions **must be filed in county in which claim arose**, not county of defendant's residence.

The **amount in controversy** is the amount of the lien, not the value of the motor vehicle.

Any person with an interest in the motor vehicle should be made a party to this action. This always includes the owner and secured parties. An unknown owner may be sued using description of vehicle. For example, the action may be brought against "unknown owner of white Pontiac Grand Prix, VIN #64532339866678."

Secured parties have an interest in these actions because motor vehicle liens "beat" all other liens. As a result, sale of the motor vehicle will destroy the secured party's lien. The secured party is entitled to any surplus after the expenses of sale and the amount of

the motor vehicle lien are subtracted from the sale price. In some cases, however, the secured party may wish to protect its interests by paying off the lien amount.

Service of process

If the defendant is known, the same methods of service apply as usual in small claims cases, with one exception: if the defendant cannot be served by usual methods using "due diligence", service by publication is allowed.

If the defendant is unknown, he is designated by description (see example above, on preceding page) and is served by publication.

There are special rules for service by publication:
-Publication must be in the county where the action is pending.
-Publication must be in a newspaper qualified for legal advertising and circulated in the county where action is pending.
-Publication must occur once a week for 3 successive weeks.

The publication must contain the following information:

- ✓ Court in which action is filed.
- ✓ Must be directed to defendant sought to be served;
- ✓ Must state that a pleading has been filed seeking relief;
- ✓ State the nature of the relief being sought;
- ✓ Require defendant to make defense within 40 days after date stated in notice (i.e., date of first publication);
- ✓ State that failure to respond will result in plaintiff seeking requested relief;
- ✓ Must be subscribed by plaintiff and give his address.

Statutory form for published notice (G.S. 1A-1, Rule 4(j1):
NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA _____ COUNTY
In the _____ Court
Title of action
To (Person to Be Served):
Take notice that a pleading seeking relief against you has been filed in the above-entitled action. The nature of the relief being sought in as follows: (State nature.)
You are required to make defense to such pleading not later than (_____ , ____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the _____ day of _____ , _____.

_____(Party)_

_____(Address)

Proof of service by publication: Plaintiff must file two affidavits with the clerk (to be filed in shuck), one explaining why service by publication was required, and the other an affidavit from the publisher of the newspaper showing notice and specifying the first and last dates of publication.

Three kinds of actions (and three kinds of liens)

In the typical case, a lienor appears in small claims court **seeking to establish a motor vehicle lien**. To "win," he must prove two things: that a valid lien exists, and the amount of the lien. The **proof required to demonstrate that a valid lien exists depends on the type of lien involved**, and the first thing a magistrate must do (after checking service of process) is determine what kind of lien is asserted. There are three possibilities:

1) A lien under G.S. 44A-2(d) (sometimes referred to in this material as "**RSTS in OCB**"). This lien is available to persons or businesses who repair, service, tow, or store motor vehicles in the ordinary course of business.

2) A lien under G.S. 20-77(d) (sometimes referred to in this material as "**GRPS for public**"). This lien is available to persons or businesses, who garage, repair, park, or store motor vehicles for the public.

3) A lien asserted by a **landowner** because of an abandoned motor vehicle on his property

Each lien has different elements and requires different evidence. A **lienor who claims to have the lien listed first above ("RSTS in OCB")** must show that he or she repairs, services, tows, or stores motor vehicles in the ordinary course of business. (NOTE: This lien is not available to a person who works on cars as a hobby, or as a favor, for example.) The lienor must also demonstrate that he entered into an express or implied contract for one of these services with the owner or legal possessor of the vehicle. A vehicle's "owner" may be

the person with legal title or his agent, a lessee, a secured party, or a debtor entrusted with possession of the vehicle by a secured party. A legal possessor includes anyone in possession with permission of owner, or entitled to possession by operation of law (for example, a law enforcement officer who acts with statutory authority to have a vehicle towed). The rest of what the lienor must show is simple: that the vehicle is in her possession, that proper notice has been given to DMV, and that the charges for services remain unpaid. Finally, the lienor must introduce evidence in support of the amount of the requested lien: what services were performed, the reasonable cost of these services, and the amount and justification for the additional expense of storage.

What if the lienor claims a lien under G.S. 20-77(d) ("GRPS for public")? The showing he must make is (only slightly) different. This lienor must show that he operates a business garaging, repairing, parking, or storing vehicles "for the public". Additional requirements for the establishment of this sort of lien are that the vehicle has remained unclaimed at the establishment for ten days, that an unclaimed vehicle report was properly filed with DMV, that the lienor has possession, and that the charges have been unpaid. This lien overlaps significantly with that discussed above, and a lienor who has provided repair services will typically use that lien. The G.S. 20-77(d) lien is most often asserted when the lienor is a parking deck or similar business. Again, the lienor must also support his claim of lien in a particular amount by introducing evidence of reasonable charges for the services provided.

What if the lienor is asserting a landowner's lien? The proof for this lien is very straightforward. The lienor must show only that he is the owner of land on which the motor vehicle in question has been abandoned for at least 30 days, and that a proper report has been made to DMV. The amount of the lien is established by evidence of reasonable storage charges. Note that this lien is improperly used by a landlord seeking to recover damages arising out of a rental agreement; the correct lien in that case is a landlord's lien under G.S. 44A-2(e) (commercial lease) or 44A-2(e2) (lease for a mobile home lot).

Speaking of Storage . . .

Storage is a special category of damages because of the danger that unscrupulous plaintiffs might allow a vehicle to remain on their premises for long periods of time in order to pile up charges for storage. To discourage this practice, two special rules apply to this particular item of damages:

Delayed Notice to DMV: Remember that lienors must notify DMV that they are in possession of an unclaimed vehicle after ten days have passed (30 for a landowner lien), and that they have five days to do so. Failure to make timely notification to DMV bars the lienor from asserting storage charges for the period from the fifteenth (or 35th, as the case may be) day of the lien to whenever DMV is properly notified. Note that late notification carries with it the additional requirement that the lienor must use certified mail.

Delay in Filing Action to Enforce the Lien: A lienor must file an action to enforce the lien within 180 days after storage begins or else forfeit the right to collect storage for the period after 180 days.

Note Different Rule in Express Contract for Storage: In a case in which storage is the service contracted for, it makes no sense to start the clock when storage begins. (In a one-year storage contract under this rule, the lienor would lose the right to assert a lien for storage fees halfway through the contract period!) In these cases, the clock begins to run from date of default, and the action must be brought within 120 days thereafter.

If the magistrate determines that a valid lien exists (regardless of which type of lien it is) and determines the reasonable value of the services provided and storage costs, the next step is to enter judgment authorizing the lienor to enforce the lien and specifying the monetary amount of the lien. Note that this is not a money judgment, despite the fact that the magistrate must determine the amount of the lien. This judgment is, instead, a judicial determination that the lienor has a lien. This determination clears the way for DMV to authorize the lienor to go ahead with the sale, so that he may collect the amount of the lien. In this action to establish a lien, the appropriate AOC form for judgment is CVM-402.

The second kind of action occurs when the vehicle's owner wants his car back. These cases, obviously, do not involve abandoned vehicles and unknown owners, at least not by the time they get to small claims court. Instead, these cases arise when a lienor refuses to hand over a vehicle because of unpaid charges, and the vehicle owner (or other person with an interest in the vehicle) responds by suing to recover his vehicle. In doing so, the owner will necessarily be attacking the validity and/or amount of the lien. As a result, the legal issues that the magistrate must determine are all but identical to those discussed above, even though the parties have switched places.

The owner institutes this action by filing a complaint (CVM-900M), and the procedure follows that of any other small claims case. At trial, the owner has the burden of demonstrating by the greater weight of the evidence that (1) the vehicle is not subject to a valid lien, or (2) that the amount of the lien differs from that asserted by the defendant. As to the first, the magistrate must first determine which kind of lien is at issue, so that s/he may identify the essential elements that apply. In order to defeat the defendant's contention that he holds the vehicle by authority of a lien, the plaintiff must offer evidence negating at least one of these essential elements.

Sometimes the plaintiff more or less concedes the fact that a lien exists but challenges the amount asserted by the lienor. In making this determination, there are two important factors for the magistrate to remember: **First, the amount of the lien is for the reasonable value of services provided, combined with storage.** This amount may or may not be the same as the contract amount, although evidence of the amount agreed to by the parties may be relevant in determining what charges are reasonable. **Second, the amount of the lien is established by the amount set out in the complaint,**

unless the lienor files a contrary statement within three days of being served.

The amount of lien eventually ascertained by the magistrate may be affected by several legal principles related to the rules set out above. As to "reasonable expenses" of storage, the limitations discussed on p. 8 may operate to decrease the amount a lienor may eventually recover. Also, the rule giving the lienor only three days after service of summons to file a written contest of the amount of lien set out in the complaint requires an unusually rapid response and may catch defendants by surprise. Note that in applying the three-day rule, G.S.1A-1, Rule 6(a) provides that the day the complaint is served is not counted; neither are intervening Saturdays, Sundays, and holidays.

One issue that arises sometimes in disputes about the cost of servicing or repairing motor vehicles involves the **requirement that providers of these services furnish customers with a written estimate. The Motor Vehicle Repair Act** (G.S. 20-354 – 354.9) contains a number of provisions that at first blush appear to be important in resolving cases involving motor vehicle liens. The Act applies to repair and related services involving charges of $350 or more and establishes a right to sue for damages for violation of its provisions. The Act requires covered businesses to furnish a written estimate in advance of providing services, and it prohibits substantial deviation from the estimate as well as a number of other fraudulent or deceptive practices. In addition, the Act prohibits service providers from retaining possession of a vehicle because of unpaid charges when certain conditions are met.

The scope of the Motor Vehicle Repair Act is not as far-reaching as it first appears, however. First, while the Act addresses the situation in which the final bill is significantly higher than the initial estimate (prohibiting the service provider from retaining possession of the vehicle in these cases), it does not apply to the common situation in which no estimate is provided at all. Second, the right to damages caused by a violation of the Act makes little sense in a motor vehicle lien case, in which the amount of the lien is based on the reasonable value of services actually received. In such a case, the plaintiff will have a difficult time indeed showing actual damages caused by the lack of a written estimate. While a magistrate may well be presented with important cases growing out of violations of the Motor Vehicle Repair Act, particularly those involving allegations of unfair trade

practices, it is more likely to be a red herring in motor vehicle lien cases.

"I want my car back!"

Cash bonds to the rescue

When a car owner wants to immediately regain possession of the vehicle, he may deposit with the clerk cash equal to the full amount of the lien alleged by the lienor. The clerk will then issue an Order for the Release of Property Held for Lien (CVM-901M), directing the lienor to release the vehicle to the owner. This remedy is available in any case in which a lienholder retains possession of a motor vehicle under claim of lien and is enforceable by the contempt power of the court.

One issue sometimes arises when an owner files a complaint and cash bond at the same time, and the clerk immediately issues an order for release after accepting cash in the amount specified in the complaint. Remember that the law provides the lienor with a three-day period in which to challenge the amount set out in the complaint. Often, the complaint will set out the amount allegedly due for repairs or other services but will not include the additional amount the lienor seeks for storage. The better practice would be for the clerk to delay accepting the cash bond until the lienor has had opportunity to specify the amount of the asserted lien.

The presence or absence of a cash bond has significant effect on the magistrate's judgment, as discussed below.

Entering judgment in actions by the owner to recover possession of a motor vehicle: At the conclusion of the hearing, the magistrate enters judgment on form CVM-902M. The details of the judgment depend on whether the plaintiff has deposited a cash bond.

In cases in which plaintiff has not deposited a cash bond, remember that the lienor has the vehicle and wants to sell it in order to get the money he claims to be owed. In these cases, if the owner proves that no lien exists, the judgment will state that the plaintiff is entitled to possession of the vehicle and the defendant is not entitled to a lien. If, on the other hand, the owner fails to prove that no lien exists, the

judgment will indicate that the defendant is entitled to retain possession of the vehicle and to proceed to enforce his lien in the amount determined by the magistrate, unless the plaintiff forestalls sale by paying defendant the amount of the lien. The last possibility, of course, is that the plaintiff fails to appear, in which case the action is dismissed and the lienor is left in the same position he occupied before the action was filed: in possession of the vehicle and with the remedies accordingly available to him.

In cases in which plaintiff has deposited a cash bond: remember that in this case the plaintiff has the vehicle, and the clerk has the money. The fact that the money has been paid to the clerk has significant implications for the judgment. If the plaintiff prevails, proving that there is no lien, the judgment will indicate that he retains possession of the vehicle and direct the clerk to return the money plaintiff paid in. If the defendant prevails, and the magistrate finds that a valid lien exists, then the judgment will direct the clerk to disburse the amount of the bond based on the amount of the lien as set out in the judgment. The plaintiff, of course, is entitled to retain possession of the vehicle, in light of the fact that the lien has been satisfied. Finally, if the plaintiff fails to appear, the case must be dismissed and the magistrate will direct the clerk to disburse to the defendant the amount of the bond

The third kind of action, less common, arises when the lienholder has lost possession of the vehicle and seeks to recover possession and to enforce the lien. The special element in this case is possession. Remember that being in possession of the motor vehicle is an essential element of all three liens. What is a lienholder to do, then, if the owner or someone connected to him removes the vehicle without his permission? If his loss of possession was indeed involuntary, then the lienor must seek to regain possession in order to successfully assert his claim of a lien.

The action begins when the lienor files a complaint (CVM-903M) asking for return of the vehicle and for a determination of the amount of lien. The amount of lien set out in the complaint will be binding on the parties and the magistrate unless the defendant (generally the owner, as well as secured parties) files a contrary statement within three days of service. (See the discussion above, on pp. 9-10, of legal rules relevant to this.) At trial, the lienholder has the burden of proving the existence of one of the three types of liens by the greater weight of the evidence, as well as the amount of the lien, assuming the defendant filed a timely statement challenging the amount.

In this action, as in the others, the owner or secured parties may post a cash bond in the amount of the asserted lien and thus retain possession of the vehicle. The presence or absence of a cash bond will be reflected in the judgment eventually entered by the magistrate.

If no cash bond has been posted: If the lienholder demonstrates a valid lien, including the reasonable amount of the charges, the judgment of the magistrate will indicate his right to regain possession of the vehicle and to proceed to enforce the lien in the amount determined by the magistrate (or, if applicable, in the unchallenged amount set out in the complaint). If, on the other hand, the lienholder fails in his proof, the magistrate will enter an order of dismissal, leaving the defendant in possession of the car and preventing further enforcement of the alleged lien.

If a cash bond has been posted: If the lienholder demonstrates a valid lien, the judgment of the magistrate will direct the clerk to disburse the appropriate amount of the cash to the plaintiff and return any surplus to the defendant. (The same issue as to amount is present in this instance as above; the lien will be in the amount set out in the complaint if defendant did not challenge it, and in the amount determined by the magistrate to be reasonable if the complaint amount was challenged by the defendant). The defendant will of course retain possession of the vehicle. If the lienholder fails in his proof, the magistrate will dismiss the action and direct return of the cash bond to the defendant (who also keeps the vehicle, of course).

Stage 3: After the hearing

After filing notice of intent to sell a vehicle pursuant to a lien, and following any judicial hearing that may be required because it is requested or because of notice problems, the lienholder is ready to pursue his remedy. If no judicial hearing was required, the lienor received authorization to conduct a sale from DMV soon after the certified letters containing notice of intent to sell were sent out. If a hearing was required, the lienor must send a certified copy of the judgment to DMV, which will then authorize the lienor to proceed with sale. In either case, the next hurdle for the lienor is to conduct the sale of the motor vehicle in a lawful manner.

The first decision confronting the lienor at this point is whether to hold a private sale or a public sale. The rules for both are set out in G.S. 44A-4, and won't be set out here in detail. The general provisions are as follows:

Public sale

- ✓ A public sale is required on request of any person with an interest in the property.
- ✓ Notice of sale must be sent to DMV and all interested parties at least 20 days beforehand, posted at courthouse door, and published in newspaper (unless vehicle is worth less than $3,500).
- ✓ Notice must specify a number of things, including the date, time, and location of the sale.
- ✓ The sale must be held between 10:00 AM and 4:00 PM, on a day other than Sunday.
- ✓ The lienor is allowed to purchase the property at a public sale (and only at a public sale).

Private sale

- ✓ Private sale must be conducted in "commercially reasonable" manner.
- ✓ Notice of intended sale must be given to DMV at least 20 days beforehand.
- ✓ Notice of intended sale, containing specified information including date, time, and place of sale, must be provided to owner and other interested parties at least 30 days beforehand. (This notice may be combined with initial notice of intent to sale setting out 10-day period for responding and challenging lien.)
- ✓ Private sale is not allowed if any interested party objects, asks for public sale.
- ✓ Lienor may not purchase "directly or indirectly" at private sale, and any such attempted purchase is voidable.

Damages for violation of statute

If a lienor fails substantially to follow the statutory rules for sale of a motor vehicle subject to lien, he is liable to the owner (or any other injured person) for $100, reasonable attorney fees, and any actual damages (defined as difference between fair market value of vehicle at time and place of sale and actual sale amount).

After the sale

The proceeds of sale are applied first to expenses of sale (including reasonable storage fees for period following notice of sale), and then to satisfaction of the lien, with any surplus going to “the person entitled thereto” (i.e., other lienholders, and finally to the debtor). Any purchaser for value at a properly conducted sale takes the property free and clear of any other claims or liens. The same rule applies to a purchaser who buys at a sale that was not properly conducted, assuming that the purchaser had no knowledge (or reasonable way of knowing) of the defect. These rules apply even if the purchaser is the lienor.

Action to Renew a Judgment – But Not Really

Author : Dona Lewandowski

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Many small claims magistrates hold court for years before encountering an action to renew a judgment, but when they do, they are often uncertain about it – and for good reason! North Carolina trial courts as well as appellate courts have stumbled over the nature of this unique claim for relief.

To understand this action, we have to back up ten years, to a plaintiff who goes to court [Lawsuit #1], wins the case, and obtains a money judgment [Judgment #1] against the defendant. Once that judgment has been entered, the plaintiff has ten years to try to collect it through the usual enforcement procedures available through the Clerk's and Sheriff's offices. GS 1-234.

Sometimes, though, the defendant simply doesn't have sufficient property to satisfy the judgment, and it remains partially or completely unpaid. Near the end of ten years, when the judgment is about to expire, the plaintiff may seek a way to extend the enforceability of the judgment. After all, the defendant may win the lottery a few months from now! The legal mechanism for accomplishing this is for the plaintiff to bring Lawsuit #2, for the amount remaining due on the original judgment. This lawsuit has nothing to do with the original dispute that led to Judgment #1. In this lawsuit, the plaintiff is contending that the defendant owes him money – and the debt that the defendant owes is the still-unpaid portion of Judgment #1. If the plaintiff wins this lawsuit (and this is an easy one to win), the result will be Judgment #2 – a brand-new judgment which – like all money judgments – is valid for ten years.

It's not surprising that plaintiffs – and lawyers, and judicial officials -- often call Lawsuit #2 "an action to renew a judgment." Our appellate courts have pointedly reminded us, however, that there's no such thing: "There is no procedure now recognized in North Carolina by which a judgment may be revived or renewed." See *NCNB v. Robinson*, 80 NC App. 154, 341 S.E.2d 364 (1986). Lawsuit #2 is instead an action on a debt, much like an action on a promissory note, installment sales contract, or other evidence of indebtedness. It just happens that the "debt paper" in this case is a judgment. *Raccoon Valley Investment Co. v. Toler*, 32 NC App 461, 232 S.E.2d 717 (1977).

THE USUAL RULES

Thinking about Lawsuit #2 as just another small claims action for money owed can be helpful in understanding some of the legal rules applicable to this special lawsuit:

- *Judgment #1 may be a money judgment which was entered in an out-of-state court.* This makes sense because, again, we're talking about a lawsuit on a debt as evidenced by a judgment. The origin of the judgment, whether North Carolina or Maine, is irrelevant.

- *The plaintiff must prove the case by the greater weight of the evidence.* Typically, that evidence consists of (1) a certified copy of the original judgment, entered within the last ten years, and (2) an affidavit from the Clerk showing the amount of the unpaid judgment and the current amount of accumulated post-judgment interest.

- *Only one bite at the apple.* The plaintiff is not allowed to bring Lawsuit #3 in ten years to once again extend the enforceability of the judgment. Just as in any other debt case, once the plaintiff comes to court and obtains a

judgment, the plaintiff can't just turn around and bring the same lawsuit against the same defendant a second time. [One might argue that the same reasoning that allows Lawsuit #2 should also allow Lawsuit #3: after all, isn't the judgment in Lawsuit #2 just another debt? Thankfully, the General Assembly has answered that question in GS 1-47, which specifies that "no such action may be brought more than once."]

THE SAME . . . BUT DIFFERENT.

As is often true in The Law, the simplicity of the rule treating a judgment as "just another kind of debt" is a little misleading. There are, as usual, a few footnotes:

- Separate principal from interest in your judgment. The evidence in this action must establish both (1) the unpaid portion of the principal amount awarded in the original judgment, and (2) the post-judgment interest – calculated by the clerk – owed by defendant. You may have heard that North Carolina law prohibits a court from awarding "interest on interest." Consequently, the magistrate must write the unpaid principal amount in the block labeled "Principal Sum of Judgment," and the accumulated interest in the block immediately following, labeled "Pre-Judgment Interest." [I understand that it may be confusing to read that you should list the post-judgment interest in the block labeled "Pre-Judgment Interest." In truth, this amount accrued after (i.e., "post") the original judgment, but before (i.e., "pre-") the case you're hearing.] In any event, it's important to list the amounts separately, allowing the Clerk's office to use only the principal amount of the original judgment in determining interest henceforth.

- Your judgment will draw interest at the legal rate: If the original lawsuit involved a breach of contract that provided for post-judgment interest at a particular rate, the Clerk may have used that interest rate to calculate the amount of interest owed pursuant to Judgment #1. Take note, though, that Lawsuit #2 is NOT an action for breach of contract, and the provisions of the original contract are no longer important. For the judgment in this lawsuit, use the "other" boxes on the judgment form to make clear the nature of the debt. [Many magistrates also staple a copy of the material from the Clerk's office to their judgment.] Judgment #2 will earn post-judgment interest at the legal rate. See *NCNB*, And, as I said above, only the principal sum of the judgment will earn any interest at all.

One last issue: What if the complaint mistakenly states that the action is to "to renew a judgment"? Because of the relaxed rules of notice pleading, this error is not fatal to the plaintiff's case. In *Raccoon Valley*, the plaintiff made this error, and even the trial judge used language about "renewing the judgment" in his judgment! On appeal, the defendant argued that the complaint was fatally defective and the judgment void. The Court of Appeals disagreed, stating that, while plaintiff may have used the wrong words in the complaint and the trial court's judgment may have been "inaptly expressed," the complaint provided adequate notice of the basis of the lawsuit, and the judgment was clear. In fact, the Court noted, "even our Supreme Court has on occasion spoken [of] 'an action to renew a judgment.' "

If you've never had one of these cases in your court, consider saving this post anyway—you may well need it one day!