Civil Law Update

Landlord-Tenant Law

E. Carolina Reg'l Housing Authority v. Lofton, (filed 8/19/2016, NC Supreme Court)

The absence of unconscionability is not an essential element of a summary ejectment action based on breach of a lease condition for which reentry is specified. [See blog post, attached.]

S.L. 2016-98 (Amending GS 42-46, Authorized late fees and eviction fees, effective 7/1/2016)

Allows magistrate to award Court Appearance Fee in amount equal to 10% of monthly rent if lease so provides in LL's successful action for summary ejectment and/or money owed. Removes language providing that fee may be assessed only if neither party appeals from magistrate's judgment. [See memo, attached.]

Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc. (filed 5/10/2016, NC Court of Appeals)

The facts in this case illustrate the very careful consideration NC appellate courts give to the question whether a tenant has breached a lease condition allowing a landlord to terminate a lease. The case involved two lease provisions, one prohibiting use of the premises "for any purpose which violates any law", and the second requiring the tenant to "make all arrangements for repairs necessary to keep the Leased Premises in good condition."

The alleged violations of the "Use Restriction" provision involved such things as controlling accumulation of waste, complying with setback and watershed buffer requirements. The Court found these alleged violations inadequate to demonstrate the "unlawful purpose" required by the language of the lease.

The alleged violation of the second condition was a failure to clear debris from the property within ten days of being notified to do so by the Town. The evidence demonstrated that much of the debris had been caused by winter storms, and that the tenant was engaged in working to clear the property even before receiving notice from the Town. The tenant responded promptly to the notice, advising that volunteers were engaged in removing the debris, but completion of the work would be subject to weather conditions. Again, the Court focused on the precise language of the lease, noting that tenant was not required to complete repairs within ten days, but rather to "make all arrangements for repairs."

Crawford v. Nawrath (filed 9/6/2016, NC Court of Appeals) (unpublished opinion):

(1) Explicit opinion testimony of fair rental value is not required to determine damages for LL's breach of implied warranty of habitability. Measure of damages in action for rent

abatement is **[difference between FRV of premises as warranted]** and **[FRV of premises as is].** Actual contract rate for rent is often (but not always) evidence of "as warranted" FRV. Evidence of actual condition of premises may be sufficient to determine "as-is" FRV, based on your own "common sense and experience regarding how those defects diminish the value."

(2) LL is held to be on notice for defects existing at time of rental "which any landlord would have discovered in any reasonable inspection of the [premises] prior to leasing it to a tenant."

(3)"A LL who collects rent after having knowledge of the uninhabitable nature of a house, or just part of a house, is engaging in unfair trade practices in violation of Section 75-1.1," and may be held liable for treble damages and attorney fees.

Torts

Davis v. Hulsing Enterprises, LLC, (filed 4/5/2016, NC Court of Appeals)

Action brought by estate against Crowne Plaza Resort after decedent died of acute alcohol poisoning following consumption of 10+ drinks in hotel restaurant. Plaintiff's claim was based on negligence per se, which has the following elements:

(1) Breach of a duty created by a statute,
(2) When the statute was enacted to protect a class of people which includes the plaintiff

The statute in *Davis* was GS 18B-305(a), which prohibits ABC permittees from selling alcoholic beverages to intoxicated persons. The statute is intended to protect both the consumer and the public from the adverse consequences of intoxication.

The plaintiff alleged that defendant's actions in serving the decedent and her husband 24 drinks over a 4 1/2-hour period amounted to gross negligence. The decedent's consumption of these drinks, while contributory negligence as a matter of law, does not rise to the level of gross negligence as a matter of law. Mere contributory negligence is not a defense to a grossly negligent conduct on the part of defendant.

The plaintiff was not entitled to rely on the *doctrine of last clear chance*, which applies in the following circumstances:

(1) The plaintiff negligently placed herself in a position of helpless peril;
(2) The defendant knew or should have discovered the plaintiff's perilous position and her incapacity to escape from it;
(3) The defendant had the time and ability to avoid the injury by exercising reasonable care;
(4) The defendant negligently failed to do so;
(5) Thereby causing injury to the plaintiff.

Here, the evidence showed that the decedent was so intoxicated that she was unable to walk to her hotel room, falling to the floor and being unable to arise. Hotel employees placed her in a wheelchair and returned her, with her husband, to her hotel room, where

she was found deceased the following morning. The Court said that this evidence failed to establish that the employees should have known that decedent's level of intoxication had become so perilous that injury was inescapable.

Mansfield v. Real Estate Plus, Inc., (filed 12/1/2015, NC Court of Appeals) (unpublished opinion):

No error in allowing jury to determine whether LL was liable for injuries suffered by T when he fell on stairs when railing collapsed. T was not required to prove LL had actual knowledge of termite damage to railing when evidence showed LL had not inspected common areas for 20+ years. "Defendant cannot avoid his duty to keep the common areas in a safe condition by failing to inspect them and discover "an unsafe condition which a reasonable inspection might reveal." [Jury awarded tenant $200,000.]

In re Reid, (filed 2/11/2016 US Bankruptcy Court, M.D. NC, Winston-Salem Div'n)

NC state court judgment against LL for $37,000 arising out of unfair trade practice (i.e., conversion of personal property T left behind) was not dischargable in bankruptcy because LL's act "involved moral turpitude or an intentional wrong-doing."

Actions for Money Owed

S.L. 2016-52 (Conforming Full-Payment Check Law to UCC, applicable to checks written after 10/1/2016)

This new legislation amends GS 25-3-311 to modify NC law related to the defense of *accord and satisfaction*. This defense is relevant when (1) the existence or amount of a debt is disputed by the debtor in good faith, (2) the debtor tenders by check a lesser amount in full satisfaction of the debt, (3) the debtor's intention that acceptance of the tender will discharge the debt appears conspicuously on the check or an accompanying document, and (4) the creditor cashes the check. This doctrine has long been subject to an exception if the creditor instructs the debtor that such payments must be sent to a designated person or location and the debtor did not comply. The new law adds an exception providing additional protection to creditors who accidentally cash such checks by allowing them to tender repayment back to the debtor within 90 days of receipt. The amendment applies only to creditors who have not designated a person or location as the required recipient of "full-payment" checks.

Procedure

King Fa, LLC v. Ming Xen Chen (filed 7/5/2016, NC Court of Appeals)

Individual tenants entered into commercial lease to use premises as restaurant with defendant-LL on 10/11/2013, and established King Fa, a limited liability company, 5 days later. Rental premises had a leaky roof, which eventually led to health dept. closing restaurant. Written lease did not address the issue of responsibility for repairs. Plaintiff sued LL for breach of contract and breach of covenant of quiet enjoyment.

In response to defendant-LL's motion to dismiss because King Fa was not real party in interest, plaintiff filed motion asking court to find that it was real party in interest, or in the alternative, to substitute the tenants as plaintiffs. The final order (1) listed as "plaintiffs" the individual tenants; (2) contained no express ruling on the real party in interest motions; and (3) found in favor of defendant-LL's counterclaim, ordering individual tenants to pay $1800. Plaintiff's appeal is dismissed for lack of standing, based on Court's reasoning that no judgment has been entered against King Fa, LLC, and thus King Fa is not aggrieved party entitled to appeal.

Judicial Immunity

Foster v. Fisher, (filed 3/9/2016, W.D. NC Asheville Div'n)

Magistrate has absolute judicial immunity against claim brought by contemnor, even for acts taken in error, done maliciously, or in excess of authority, provided that (1) the act complained of was a judicial act, and (2) the magistrate did not act in the clear absence of all jurisdiction.

Marriage

In re Estate of Peacock (filed 6/21/2016, NC Court of Appeals)

A marriage is valid if (1) the couple freely, plainly, and seriously consent to be married in the presence of a person authorized to perform marriages , and (2) that person declares them to be married. The fact that a couple marries without first obtaining a marriage license does not invalidate the marriage. The consequence of conducting a marriage in the absence of a valid license does not fall upon the couple, but rather upon the person who performed the marriage: GS 51-6 provides that an otherwise authorized person who conducts a marriage without being in possession of a valid license is liable for a $200 penalty and is guilty of a Class 1 misdemeanor.

Unconscionability, Public Housing & Summary Ejectment

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.

Head's Up for Small Claims Magistrates: New Law Related to Court Appearance Fees!

S.L. 2016-98, effective for cases filed on or after July 1, 2016, cleared the way for small claims magistrates to award landlords an administrative fee in appropriate cases. The new law modified the requirements set out in GS 42-46(f) that must be satisfied before a landlord may be awarded a *Court Appearance Fee*.

Prior Law

In 2009 the General Assembly enacted a detailed statute authorizing and regulating a landlord's right to charge a tenant a fee if the landlord must resort to legal action due to the tenant's default. See GS 42-46(e)-(h). The new law permitted the landlord to charge only one of three authorized fees, with the maximum amount of the fee increasing depending on how far the case progressed in the court system before being finally disposed of.

Name	Maximum Amount	Case Terminates By:
Complaint Filing Fee	> $15 or 5% of monthly rent	Voluntary Dismissal
Court Appearance Fee	10% of monthly rent	LL won in small claims court & neither party appealed
Second Trial Fee	12% of monthly rent	LL won in district court following appeal

Many landlords expressed frustration with the tiered structure of the statute in connection with the Court Appearance Fee: at the time judgment is entered in a small claims case, the magistrate could not possibly know whether the case would end there (thus entitling the landlord to the Court Appearance Fee) or instead be appealed to district court (entitling the landlord, assuming the landlord is successful on appeal, to the larger Second Trial Fee). The result was that landlords were entitled to assess the Court Appearance Fee when a case was not appealed, but the fee was not included in the small claims judgment and thus was not necessarily actually collected by the landlord. [GS 42-46 (h)(2) specifically prohibits landlords from deducting the fee from subsequent rent payments.]

New Law

The new law amends GS 42-46(f) to remove the requirement that neither party appeal from the small claims judgment. The result is that a magistrate who rules in favor of a landlord in an action for summary ejectment and/or monies owed may include in the judgment a Court Appearance Fee, not exceeding 10% of the monthly rent, assuming that the landlord has demonstrated that the written lease contains a provision to that effect. The amendment specifies that in the event the tenant appeals and the district court rules in favor of the

landlord, the magistrate's award of the Court Appearance Fee is vacated, thus clearing the way for the district court judge to consider whether to award the Second Trial Fee.

If you have questions about the new law, feel free to email me at Lewandowski@sog.unc.edu or give me a call at 919-966-7288.

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