

## 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!

