Intro 2/Module 3: First two grounds for SE

Breach of a Lease Condition for Which Reentry is Specified:

Outline of text in Small Claims Law, pp. 158 – 160.

A LL must prove 4 things:

1. LL-T relationship

2. Agreement by both parties in lease to rule at issue

3. Agreement by both parties in lease that violation of rule = termination of lease

4. Tenant broke the rule.

5. LL complied with any procedural requirements for termination agreed to in the lease. [Not broken out in text but stated in discussion of #3.]

#2:

Most common rule at issue is requirement that T pay rent, but it could also be a no-pet clause or prohibition against parking anywhere but designated space, or any other rule LL identifies. The central question is whether the parties agreed to this rule in the lease. If lease is written, LL should show written lease or have a really good reason why not. If lease is oral, proof will be oral testimony.

#3:

The part of the agreement saying that breaking the rule gives the LL the right to terminate the lease is critically important. The legal name for such a provision is a **forfeiture clause**. An oral forfeiture clause is uncommon, but if testimony establishes that a LL said something like, "The rent is $700, due on the first of the month, and if you're late paying it I have the right to evict you," that's all you need. There are several examples of forfeiture clauses on p. 159. As you can see, the language varies widely, but the essence is that the lease says "If you do (or fail to do) [insert identified act, i.e., pay rent], I have the right to end your possession of the property."

Note especially the following paragraph, concerning the LL's obligation to follow any procedure or notice requirement set out in the lease in declaring the lease forfeited. If the lease requires that a tenant be given notice of some sort, the LL must demonstrate strict compliance with requirements related to time and content. While Joan incorporated this into requirement #3, I list it as a separate requirement in my materials.

#4:

Finally, the LL must demonstrate that the tenant actually broke the rule at issue. This element is usually not a matter of dispute, but sometimes it is, and sometimes the dispute concerns the proper interpretation of a lease provision. That is, the parties may agree on what the tenant did, but disagree on whether those actions constitute a violation of the rule.

A Final Note on This Ground:

The last part of this section of the textbook addresses what is sometimes referred to as "the unconscionability defense." The cases discussed here have been overruled by the NC Supreme Court since the text was published, and students should simply put an X through these contents. Note, however, that an analysis closely resembling this defense continues to be part of the law involving evictions based on criminal activity – more on that in our next session!

Failure to Pay Rent (i.e., the "Life Preserver" Ground)

Text pp. 160 – 161

To be entitled to recover possession on this ground, a LL must demonstrate:

1. A LL-T relationship
2. That the lease requires the tenant to pay a certain amount of rent by a certain time
3. That the tenant breached this requirement
4. That the LL subsequently made a demand for payment of the rent, and
5. That the LL waited at least ten days after making demand to file for SE

Elements #1 – 3 are essentially the same as in Breach of a Lease Condition.
Element #4 is unique. The requirement is that, <u>after</u> the tenant fails to pay rent on time, the LL must communicate a "clear and unequivocal demand" to the tenant to pay all past rent. An A+ demand would inform the tenant that s/he has ten days to come up with the money or else be evicted. It's not clear how far from that a LL can deviate and still be found to have made proper demand.

Element #5 requires the LL to wait ten days before filing a SE action. The technical reason is that the LL has no right to SE until the ten-day period expires. In other words, under this ground, the right to eviction comes into existence only after the tenant has failed to pay all rent due ten days after demand.

Compare & Contrast: Breach of lease condition vs. failure to pay rent

Text p. 161.

Getting these two grounds confused is hands-down the most common error made by magistrates – and everyone else! – in SE law. Obviously, one reason for the confusion is that the breach – the rule the tenant has broken – in BLC cases is most often . . . failure to pay rent! Another reason these grounds are problematic is the understandable-but-completely-incorrect assumption by many landlords that a tenant's failure to pay rent = a right to evict the tenant. Despite the apparent similarity between these two grounds, they're as different from each other as night and day. In fact, they're mutually exclusive. Every lease agreement either □*has* or □*has not* a forfeiture clause. Consequently, making that determination should be Step #1 in SE cases.

How can you tell? Well, you can't, for a written lease, without looking at the lease, so start there.

Here's what doesn't work, at least not reliably.

- Asking the parties.

- Looking for a provision in the written lease labeled “Forfeiture Clause”

Here are some forfeiture clause tips:

- If the LL uses a standard written lease you see often, make a point of learning where the forfeiture clause(s) is, and what it says, including what procedures are required to exercise it.
- Be aware that many leases have forfeiture provisions in more than one place. Quite often the provision addressing rent, and often late fees, will have a forfeiture clause pertaining to that particular breach. In addition, there is often a general provision, typically labeled “Default,” near the end of the lease.
- Sometimes forfeiture clauses are written broadly, identifying “any breach of this lease,” or “any material breach” as a trigger.
- Remember that a requirement or prohibition in the lease, no matter how strongly stated, ≠ a forfeiture clause. A broken rule is just a broken rule unless the lease specifies the penalty for breach being the end of tenant’s right to possession.

If you find a forfeiture clause in a lease, that clause is “the law” of this case. A general rule of contract law is that the courts will enforce what the parties agree to. If they have agreed that being late with the rent means the LL can take the property back, the courts will enforce that agreement. If they agree that this is true only if the T is late three times, the courts will enforce <u>that</u> agreement. It’s up to the parties to agree on what rules are important enough to allow the LL to cancel the lease, and on what procedure must be followed to do so. The job for the magistrate is pretty straightforward: read the lease, get crystal clear on what they agreed to, and act accordingly.

What if a lease does not have a forfeiture clause? Under common law, a tenant could not be evicted for breaching the lease. Why? Because that was not part of the parties’ agreement. It could have been, and it wasn’t, so too bad for the LL. Everybody has the right to make a bad deal.

But the General Assembly got uncomfortable with that state of affairs. It meant a tenant could lease property for a year, move in, never pay rent, and move out at the end of the year. The LL could sue for the money owed by the tenant and get a judgment for the full amount. But there was no legal way for the LL – having no forfeiture clause in the lease – to make the tenant move before the end of the year. Solution: GS 42-3, which provides that a forfeiture clause will be “implied” if a tenant is still behind in the rent ten days after a LL demands it.

Some important things to note about this rule. First, it applies only to situations in which a LL has failed to include a forfeiture clause in the rental agreement. A LL should <u>always</u> include a FC in the lease. There is <u>never</u> a disadvantage to doing so, because it gives the LL a powerful enforcement mechanism for whatever rules are important to him/her. Like requiring the payment of rent. No FC = no enforcement mechanism for the rules in the lease.

So, a LL who doesn’t include a FC in a lease has made a mistake. And if a T breaks lease rules about having a pet, or loud parties, or parking in the wrong spot, the LL can sue for money damages, but otherwise just has to put up with such breaches until the lease is over. But when a T FAILS TO PAY RENT . . . we have a different rule. In that situation only, the law throws the LL a life preserver. The objective is to give the LL an enforcement mechanism to make the T pay rent. One part of that mechanism is to give a tenant 10 extra days to come up with the money. A second part of that mechanism is the defense of

tender – allowing the T to avoid eviction by paying all overdue rent and court costs at any point up to entry of judgment. Only as a last resort does the law allow a landlord to evict a tenant for breach of the rent requirement in a lease that has no FC.