

## 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 15<sup>th</sup>, 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.