

# Lecture Notes on Tenants' Affirmative Defenses & Common Claims

## Defenses to SE

Most defenses raised by tenants in SE cases attack the sufficiency of the LL's evidence establishing one of the essential elements. In an action for SE based on holding over, for example, an essential element of the LL's case is that the lease has ended. In a case in which notice is required to end the lease, a tenant's argument that effective notice was not given – whether because of the timing or failure to comply with specific lease requirements related to the manner of notice – is an attack on an essential element. Even when a tenant does not appear and present a defense, a landlord may lose in such a case.

Affirmative defenses are defenses that present some new matter to the court: essentially, an affirmative defense is one that says, "Even if you believe everything the plaintiff claims, I should still win because of this." Probably the most common affirmative defense in SE actions in small claims court is *waiver*.

### Waiver

Waiver is an equitable doctrine, meaning it is concerned with fairness. The general rule is that when a LL learns that T has breached the rental agreement in a manner entitling the LL to terminate the lease, the LL stands at a cross-road: the LL may proceed to terminate the lease or instead choose to continue on. The LL may not, however, behave in a way that is misleading. That is to say, the LL may not behave as though s/he intends to continue with the lease and then terminate the lease. A LL with the right to evict a T for violation of a no-pet provision in the lease may not give the animal dog biscuits in the morning and sue for eviction in the afternoon. Nor may a LL accept a late rent payment in the morning and sue for eviction in the afternoon. If the tenant fails to pay on June 1<sup>st</sup>, but the LL accepts June rent on the 10<sup>th</sup>, the LL has taken one step down the path of continuing on with the lease.

The rule about waiver based on accepting rent is limited to future rent; nothing prevents a LL from accepting past-due rent and proceeding with eviction. When a T makes a rent payment without specifying how it is to be allocated, however, the law assumes the T's intention in making the payment is to be able to continue with the lease. A LL in this situation who does not make clear his intention to allocate the T's payment to past due rent and continue to pursue eviction has waived the right to do so; the T is given the benefit of the doubt. This rule has no impact on the amount of money the T owes – the LL is not waiving the right to be paid, but rather the right to evict the T for nonpayment.

There are a few situations in which waiver does not apply. A LL may accept rent payments without waiving the right to evict a T for criminal activity. A housing authority governed by GS Ch. 157 does not waive the right to evict by accepting rent payments unless the authority

consents to waiver or delays enforcing its rights to evict more than 120 days. Finally, GS 42-26(c) permits a LL to accept partial rent payments without waiving the right to evict for breach of a lease condition so long as this right is reserved in the rental agreement.

#### Tender

When eviction is based on failure to pay rent pursuant to GS 42-3 – and only then – the T has the right to defeat the claim for possession by paying all rent due plus court costs at any time prior to entry of judgment. Effective tender requires that the amount be paid in cash or its equivalent, in an amount sufficient to satisfy rent in arrears and that due for the remainder of the rental period. For example, a T who failed to pay the rent of \$600 due on the first must tender the full amount of \$600 – plus court costs—if trial is held on the 20<sup>th</sup>. Because tender is an absolute defense, the LL does not have the option of refusing the offer in lieu of regaining possession. If a T has previously tendered the full amount due and been refused, the T must be prepared to do so again at the time of trial.

#### Retaliatory Eviction

The General Assembly's 1979 enactment of GS Ch. 42, Art. 4A, created the affirmative defense of *retaliatory eviction* for the purpose of protecting tenants "*who seek to exercise their rights to decent, safe, and sanitary housing.*" In addition to protecting tenants who ask their landlords to make repairs or file complaints with government agencies about a landlord's violation of health or safety laws, the statute protects tenants who participate in tenants-rights organizations. Under the law, the tenant may defend against a summary ejection action by demonstrating that "*the landlord's action is substantially in response to the occurrence within 12 months of the filing of such action of one or more of the protected acts described*" in the statute. At that point, the landlord has the opportunity to rebut with evidence any of several grounds set out in GS 42-37.1(c), including, for example, demonstrating that the lease was for a fixed period and has expired.

A few final comments about retaliatory eviction. First, there have been very few appellate cases decided since Small Claims Law was published, and the section on pp. 202-205 is an excellent summary of the law. A few issues remain unclear at the present. First, the statutory defense does not extend to commercial leases or to grounds other than those listed in the statute. Some states (including North Carolina, in a different context) have recognized a common-law defense for retaliatory acts by individuals which they would normally be entitled to when taken for the purpose of retaliation in a manner that is seriously offensive to public policy concerns. An additional question is whether a violation of the statute may be found to constitute an unfair trade practice, thus allowing a tenant to seek money damages in addition to asserting a defense against summary ejection based on the statute.

#### Self-help Eviction

In 1981 the NC General Assembly enacted GS Ch. 42, Art. 2A, prohibiting landlords in residential leases from using self-help eviction as well as from interfering with property belonging to a tenant in any manner not authorized by that statute. Landlords are required to use the summary ejection procedure to oust tenants and to obtain authorization to dispose of

tenant's property. Despite the statute, unlawful self-help eviction continues to occur with some frequency throughout the state, and magistrates seldom see these complaints in small claims court. When such a case does make it to court, a landlord may encounter significant exposure to liability. A landlord who padlocks residential property, for example, may well be found to have *unlawfully converted* all of tenant's property on the premises, with damages measured at the fair market value at the time and place of conversion. In addition, the tenant is entitled to recover the cost of alternate lodging and other expenses proximately caused by the landlord's wrongful act. If the tenant is represented by an attorney, the civil action will almost certainly assert that the landlord committed an unfair or deceptive practice under GS 75-1.1, which entitles the tenant to treble actual damages as well as attorney fees.

Note that a landlord may be found to have violated the law against self-help eviction -- even if the premises remain technically available to the tenant -- by *constructively evicting* the tenant, i.e., by causing or allowing the rental premises to become functionally uninhabitable. Examples include turning off electricity, heating, or water, removing outside doors, remove tenant's belongings to the curbside, etc.

#### Security Deposit Act

GS Ch. 42, Art. 6, sets out the Tenant Security Deposit Act. I have blogged about the Act [here](#) , and the discussion in [Small Claims Law](#) continues to be helpful and informative.

#### The Residential Rental Agreements Act

The RRAA, set out in GS Ch. 42, Art. 5, is an important statute in landlord-tenant law, establishing the most common defense/counterclaim asserted by tenants in summary ejection actions. The Act creates a minimum standard for the conditions of residential rental housing as well as a remedy for tenants living in housing failing to meet that standard. The RRAA is discussed at some length in the companion handout to this one, *What Magistrates Need to Know about the Residential Rental Agreements Act*.