

**NORTH CAROLINA PRIVATE LANDLORD/TENANT  
LAW OVERVIEW**  
(Revised October 2005)

**William D. Rowe**  
**North Carolina Justice Center**  
**Raleigh, North Carolina**  
**(919) 856-2177**  
**[bill@ncjustice.org](mailto:bill@ncjustice.org)**

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## NORTH CAROLINA LANDLORD/TENANT LAW OVERVIEW

### I. **BRINGING THE SUMMARY EJECTMENT ACTION**

- A. **Small Claims Action**, (G.S. 7A-210 et seq.)
  - 1. Summons (AOC-CVM-100)
  - 2. Complaint (AOC-CVM-201)
  - 3. Amount in controversy not to exceed \$5,000
  - 4. Failure to file counterclaim not a bar to filing in separate action (G.S. 7A- 219)
  
- B. **Landlord-tenant statutes**, (Chapter 42 of NC Gen. Stats.)
  - 1. Summary Ejectment, G.S. 42-26 et seq.
  - 2. Summons Issues; Hearing within 7 working days, G.S. 42-28
  
- C. **Service of Process**, (G.S. 42-29)
  - 1. North Carolina Rules of Civil Procedure, Rule 4(j); G.S. 7A-217
  - 2. Tacking and mailing (Possession only)

### II. **GROUND FOR TERMINATION OF TENANCY (EVICTION)**

- A. **Nonpayment of Rent**, (G.S. 42-3)
  - 1. Where written lease establishes a monthly rent that includes water and sewer services under G.S. 62-110(g), the terms “rent” and “rental payment” mean base rent only.
  - 2. Requirements
    - a) Landlord must make a clear, unequivocal demand for rent and
    - b) File 10 days or more after demand.
  - 3. Defenses
    - a) Tender of rent due plus costs prior to entry of final judgment mandates dismissal per G.S. 42-33. Tender is not available where lessee waives notice in a written lease or where the lease provides automatic forfeiture for nonpayment of rent.

- b) Tenant is current on rent
- c) Retaliatory eviction (See IV Infra)
- d) Counterclaims
  - (1) G.S. 42-42 -Breach of Implied Warranty of Habitability - (See III Infra)

4. Cases

- a) Tucker v. Arrowood, 211 N.C. 118, 189 S.E. 180 (1937) (waiver of notice by lessee)
- b) Coleman v. Carolina Theaters, 195 N.C. 607, 143 S.E. 7 (1928) (tender during hearing cures)
- c) Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156 (1925) (tender at trial de novo, prior to final judgment)
- d) [Note: Laing v. Lewis, 515 S.E.2d 40 (1999) (landlord seeking possession based on tenant's failure to pay rent is not entitled to default judgment because tenant failed to file bond with answer)]
- e) Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982) (demand for all rent and 10 day wait)

B. **Holdover**, (G.S. 42-14, 42-14.3 & 42-26)

1. Requirements

- a) Duration of Notice to Quit must be:
  - (1) one month or more for year to year tenancy;
  - (2) seven days or more for a month-to-month tenancy; or
  - (3) two days or more for a week-to-week tenancy and
- b) Notice must be given in current term and
- c) Notice period must end with term and
- d) Notice may be oral or written
- e) If lease sets out Notice Requirements, Notice must strictly comply with lease provisions

- f) Notice to quit 30 days or more (60 days effective Jan. 1, 2006) in advance for a manufactured home owner who is renting the lot.
- g) Notice of at least 180 days of intent to convert a manufactured home community to another use. (G.S. 42-14.3 - Effective Oct. 1, 2003)

2. Defenses

- a) Acceptance of rent by landlord creates new tenancy
- b) Improper notice to quit
- c) LL's actions based substantially on tenant's or household member's status as a victim of domestic violence, sexual assault or stalking. (Applies to leases entered into or renewed after Oct. 1, 2005) See III. F. Infra.

3. Cases

- a) Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965) (creation of new tenancy after notice period)
- b) Stafford v. Yale, 228 N.C. 220, 44 S.E.2d 872 (1947) (notice must end with term)
- c) Simmons v. Jarman, 122 N.C. 195, 29 S.E. 332 (1898) (notice must be in and end with current term)
- d) Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988) (notice to terminate lease must strictly comply with lease)
- e) Goler Metropolitan Apartments Inc. v. Williams, 43 N.C. App. 648, 260 S.E.2d 146 (1979) (insufficient notice to terminate, so automatic renewal of lease)

C. **Breach of Lease**, (G.S. 42-26)

- 1. An arrearage in additional rent owed by a tenant for water and sewer services pursuant to G.S. 62-100(g) shall not be used as a basis for termination of a lease. Any partial payment of rent shall be applied first to the base rent.

2. Requirements

- a) Written lease
- b) Provision in lease specifying re-entry by landlord upon breach
- c) Clear proof of breach by tenant
- d) LL must exercise right of re-entry promptly
- e) Result of enforcing the forfeiture must not be unconscionable

3. Defenses

- a) No breach by tenant
- b) Re-entry not specified for breach
- c) Waiver by landlord accepting rent after knowledge of breach
  - (1) G.S. 157-29 - The defense of Waiver is not available where a public housing authority is the landlord unless the authority fails to either notify a tenant that a lease violation has occurred or exercises one of its remedies for such violation within 120 days of learning of the breach.
  - (2) G.S. 42-73 - The defense of waiver is not available in any eviction action brought by any landlord under Article 7 of Chapter 42 involving “criminal activity” as defined in G.S. 42-59(2). (See II.D Infra).
- d) Retaliatory Eviction per G.S. 42-37.1 (See IV. Infra)
- e) LL’s actions based substantially on tenant’s or household member’s status as a victim of domestic violence, sexual assault or stalking. (Applies to leases entered into or renewed after Oct. 1, 2005) See III. F. Infra.

4. Cases

- a) Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967) (sets out burden for LL to prevail in a breach of lease case)

- b) Winder v. Martin, 183 N.C. 410, 111 S.E. 708 (1922) (waiver by acceptance of rent)
- c) Charlotte Housing Authority v. Fleming, 123 N.C. App. 511, 473 S.E.2d 373 (1996) (reaffirms Morris v. Austraw; CHA failed to prove individual involved in criminal activity was a guest of the tenant)
- d) Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988) (breach of lease cannot be basis of summary ejection unless lease itself provides for termination by such breach or reserves right of reentry for such breach)
- e) Community Housing Alternatives v. Latta, 87 N.C. App. 616, 362 S.E.2d 1 (1987) (affirmed the holding of Winder)
- f) Office Enterprises, Inc. v. Pappas, 19 N.C. App. 725, 200 S.E.2d 205 (1973) (where L's attorney simply held T's rent check, but did not cash it, court deemed it accepted, so breach was waived)
- g) Duran v. Housing Authority of Denver, 761 P.2d 180 (Colo. 1988) (LL waived right to terminate lease based on first notice when second notice sent)
- h) Where the L accepts only the HUD subsidy and no direct payment of rent from the T, the authorities are split as to whether the subsidy is "rent" from the T sufficient to constitute waiver:
  - (1) Greenwich Gardens Associates v. Pitt, 126 Misc.2d 947, 484 N.Y.S. 2d 439 (Dist. Ct. 1984) (subsidy was deemed "rent")
  - (2) Midland Management Company v. Helgason, 158 Ill. 2d 98, 630 N.E.2d 836 (1994) (subsidy was not "rent," so no waiver)
- i) Long Drive Apartments v. Parker, 421 S.E.2d 631 (N.C. App. 1992) (Good cause and material noncompliance with lease may include tenants' failure to maintain electric service because of potential risks of frozen pipes, fire, and uninsurability).

D. **"Expedited Eviction of Drug Traffickers and Other Criminals"**, (G.S. 42-59 et. seq., Article 7 of Chapter 42).

1. Nature of Actions and Jurisdiction, (G.S. 42-60) The eviction action is a civil action which can be filed in Small Claims Court or District Court.
2. Requirements for complete eviction, (G.S. 42-63(a))
  - a) Criminal activity (See G.S. 42-59(2)) has occurred on or within the individual rental unit leased to the tenant; or
  - b) The individual rental unit was used in any way in furtherance of or to promote criminal activity; or
  - c) The tenant, any member of the tenant's household, or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or
  - d) The tenant has given permission to or invited a person to return or reenter any portion of the entire premises, knowing that the person has been removed and barred from the entire premises pursuant to Article 7 of Chapter 42 or the reasonable rules and regulations of a publicly assisted landlord; or
  - e) The tenant has failed to notify law enforcement or the landlord immediately upon learning that a person who has been removed and barred from the tenant's individual rental unit pursuant to Article 7 of Chapter 42 has returned to or reentered the tenant's individual rental unit.
3. Affirmative Defense or Exemption to a Complete Eviction, (G.S. 42-64)
  - a) Affirmative Defense - Tenant was not involved in the criminal activity, and
    - (1) did not know or have reason to know that criminal activity was occurring or would likely occur; or
    - (2) did everything that could be reasonably expected to prevent the criminal activity.
  - b) Tenant must prove the affirmative defense set out in II.D.3(a) above in a subsequent eviction action by clear and convincing evidence.



- c) Exemption - The Court is given authority to not evict if he/she is clearly convinced that the eviction would be a serious injustice which outweighs the rights, safety and health of the other tenants.
  - d) Partial Evictions - (G.S. 42-63) Court can order the removal of certain persons other than the tenant, if an affirmative defense under G.S. 42-64 is proven.
  - e) Conditional Eviction Orders - (G.S. 42-63) Court can issue conditional eviction orders where a tenant is allowed to stay, but if the tenant allows a person barred by Article 7 of Ch. 42 to return his/her tenancy will be terminated.
4. Enforcement of Eviction and Removal Orders, (G.S. 42-66)

Where the court has allowed a tenant to stay, conditioned on the tenant not allowing the evicted household member to return, and the tenant violated the order, the landlord can file a motion to evict and have it heard within 5 days of the service of the motion.

5. Expedited Proceedings, (G.S. 42-68)
- a) An eviction case must be set for trial within the first term of court falling 30 days after service of the complaint or notice of appeal from Small Claims Court. However, where a defendant files a counterclaim, the court shall reset trial for the first term of court after 30 days from the defendant's service of the counterclaim.
  - b) Continuances of hearings shall not be granted for these cases except for compelling and extraordinary reasons, as required to complete permitted discovery, to have a plaintiff reply to a counterclaim or on application of the district attorney for good cause shown.
  - c) The parties must file their responsive pleadings (answer and counterclaims and reply to counterclaims) within 20 days of the pleadings calling for a response. Extensions of time to file these pleadings will not be allowed, except for compelling or extraordinary reasons.
  - d) Any party (including tenants), who fails to file a responsive pleading in District Court within 20 day time period, shall be subject to default.

6. Discovery, (G.S. 42-70)
  - a) Discovery is permitted in cases filed in or appealed to District Court.
  - b) The defendant (tenant) must initiate discovery during the time to file an answer and counterclaim.
  - c) The plaintiff (landlord) must initiate discovery within 20 days of services of an answer or counterclaim filed by a defendant.
  - d) Responses to discovery requests must be completed within 20 days.

7. No Waiver Defense, (G.S. 42-73)

The defense of waiver is not available in any eviction action brought by any landlord under Article 7 of Chapter 42 involving “criminal activity” as defined in G.S. 42-59(2)

### **III. AFFIRMATIVE ACTIONS OR COUNTERCLAIMS BY TENANTS**

A. **Breach of Obligations by Landlord**, (G.S. 42-42)

1. Requirements
  - a) Proof of landlord’s failure to
    - (1) Comply with building and housing codes; or
    - (2) Maintain the premises in a fit and habitable condition; or
    - (3) Keep all common areas in a safe condition; or
    - (4) Maintain all facilities and appliances supplied or required to be supplied in a good and safe working order.
    - (5) Provide and maintain operable smoke detectors
  - b) Notice to Landlord
    - (1) Must be written only for plumbing/electrical problems, except in emergencies or when repairs

are necessary to put premises in a fit and habitable condition;

- (2) May be oral for most defects, though written notice is helpful;
    - (3) Not necessary for defects existing at the time lease term began;
    - (4) Written notices of defects in Smoke Detectors
  - c) Compliance by tenant with G.S. 42-43 and rental obligation
2. Waiver of tenant's rights under G.S. 42-42 is not allowed per G.S. 42-42(b).
  3. Relief available
    - a) Actual damages equaling the difference between the fair rental value of the premises free of defects and the fair rental value of the premises in their defective condition (Damages for rent abatement cannot exceed the total amount of rent paid by the tenant)
    - b) Consequential damages
    - c) Prospective rent abatement (See G.S. 42-41)
    - d) Treble damages and attorney's fees (G.S. 75-1.1)
  4. Penalties (G.S. 42-44 (a1) & (a2))
    - a) Landlord liable for an "infraction" and subject to a fine of not more than \$250 for each violation if she/he fails to provide, install, replace, or repair a smoke detector under G.S. 42-42(a)(5) within 30 days of receiving written notice.
    - b) Tenant must reimburse the landlord the reasonable and actual cost for repairing or replacing a smoke detector within 30 days of receiving written notice if tenant disabled or damaged the smoke detector. Tenant is responsible for an "infraction" and subject to a fine of not more than \$100 for each violation if she/he fails to make reimbursement within 30 days.
  5. May be asserted against owners or rental agents having actual or apparent authority to comply with G.S. 42-42.

6. May be asserted as defenses or counter claims as well and may seek recoupment or setoff.
7. Tenant may not unilaterally withhold rent prior to judicial determination that she/he may do so. (G.S. 42-44(c))
8. Cases
  - a) Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206, 519 S.E.2d 546 (1999); disc. rev. den. 351 N.C. 371, 542 S.E. 2d 661 (2001) (proper measure of damages in rent abatement action based on breach of the implied warranty of habitability is difference between fair rental value in a warranted condition and the fair rental value in its unwarranted condition; however, damages cannot exceed total amount of rent paid by the tenant...also, tenant is entitled to any “special and consequential damages alleged and proved”)
  - c) Creekside Apartments v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, disc. review denied, 338 N.C. 308, 451 S.E.2d 632 (1994) (Tenants were entitled to rent abatement for period during which rental premises were unfit; Landlord’s difficulty in operating apartment complex does not excuse breach of G.S. 42-42(a); Judge can not deny rent abatement based on Landlords’ reasonable efforts)
  - d) Foy v. Spinks, 105 N.C. App. 534, 414 S.E.2d 87 (1992) (Reaffirms holdings of Surratt & Miller and contains language re: jury instructions)
  - e) Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991) (Agent for LL could be held liable for breach)
  - f) Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990) (Affirmed Miller, supra and Surratt, supra)
  - g) Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990) (Rental agent proper party; No written notice of defects which make premises unfit and uninhabitable necessary; In action for rent abatement, damages include only those amounts actually paid)
  - h) Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486, 366 S.E.2d 534 (1988) (Ch 42 does not, per se, require the provision of a hot water heater. But LL obligated to provide

operable hot water heater if agreed to do so, see G.S. 42-42(a)(4))

- i) Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692, disc. review denied, 321 N.C. 296, 362 S.E.2d 779 (1987) (fair rental value of property may be determined by fact finder from evidence of the dilapidated condition of the premises)
- j) Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987) (Measure of damages is the difference between the fair rental value if as warranted and fair rental value in unfit condition)
- k) Jackson v. Housing Authority of City of High Point, 73 N.C. App. 363, 326 S.E.2d 295 (1985) (discussion of obligation to repair in wrongful death framework)
- l) Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982) (breach of G.S. 42-42 as evidence of negligence)
- m) Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)

#### 8. Law Review Articles

- a) Who is a Tenant? The Correct Definition of the Status in North Carolina, 21 N.C. Cent. L.J. 79 (1995)
- b) An Update on Contract Damages when the Landlord Breaches the Implied Warranty of Habitability: Surratt v. Newton and Allen v. Simmons, 69 N.C. L. Rev. 1699 (1991)
- c) Miller v. C.W. Myers Trading Post: N.C. Adopts Expansive Tenant Remedies for Violations of the Implied Warranty of Habitability, 66 N.C. L. Rev. 1276 (1988)
- d) North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations, 56 N.C. L. Rev. 785 (1978)

### B. Wrongful Eviction

- 1. Any eviction not in accordance with Chapter 42, Article 3 or Article 7. (See G.S. 42-25.6)

2. Recovery in an action brought under G. S. 42-25.6 is limited to actual damages and costs. (See G.S. 42-25.9)
3. Alternative remedies of trespass, conversion, and unfair trade practices including treble damages, may also be available. (See G.S. 42-25.9(C))
4. Self help eviction where “residential tenancies” are involved are prohibited. (See G.S. 42-25.6)
5. Transient occupancy in a hotel, motel or similar lodging subject to regulation by Commission for Health Services is not protected. (See G.S. 42-39(a))
6. Cases
  - a) Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995) (Tenants can recover punitive or treble damages for wrongful evictions. Overrules holding in Dobbins that tenant limited to actual damages.)
  - b) Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991) (Even though building is called a ‘hotel’ and residents called “guest,” residents can be protected from self help evictions depending on actual nature of tenancy. See When a Hotel is Your Home, Is There Protection?, 15 Campbell L. Rev. 295 (1993).)
  - c) Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984)
  - d) Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981) (landlord re-entry prior to enactment of Chapter 42, Article 2A)

C. **Relief available if eviction later reversed**

1. G.S. 42-35 - Restore Tenant to Possession
2. G.S. 42-36 - Tenant may recover damages for removal

D. **Tenant Security Deposit Act**, (G.S. 42-50 et seq.)

1. Requirements
  - a) T has vacated for 30 days or more and
  - b) L has not returned or accounted for the security deposit or

- c) L has made improper deduction from the deposit
- 2. Relief Available
  - a) accounting of funds
  - b) recovery of balance of deposit
  - c) resulting damages
  - d) attorney's fees
- 3. Defenses
  - a) LL applied the funds properly and
  - b) held the balance for 6 months if T's address was unknown or
  - c) mailed the tenant an accounting
- 4. No cases have construed this Act to-date

E. **Personal Injuries**

- 1. Negligence in maintaining safe conditions in common areas
  - a) Conley v. Emerald Isle Realty, Inc., 350 N.C. 293, 513 S.E.2d 556 (1999) (landlords and their agents who lease furnished residences for a short term are absolved from liability for personal injury caused by failure to repair)
  - b) Collingwood v. General Elec. Real Estate Equities, Inc., 89 N.C. App. 656, 366 S.E.2d 901 (1988), rev'd in part, 324 N.C. 63, 376 S.E.2d 425 (1989) (developer's compliance with building code did not preclude liability for fire. RRAA supplements, but does not preempt common law duty of care)
  - c) Allen v. Equity & Investors Management Corp., 56 N.C. App. 706, 289 S.E.2d 623 (1982) (child on bike hit 4- to 6-inch tree stump in common pathway)
  - d) O'Neal v. Kellett, 55 N.C. App. 225, 284 S.E.2d 707 (1981) (fall on unlighted outside common stairs)
  - e) Lenz v. Ridgewood Associates, 55 N.C. App. 115, 284 S.E.2d 702 (1981) (fall on icy sidewalk)

2. Negligence in maintaining private areas
  - a) DiOrio v. Penny, 331 N.C. 726, 417 S.E.2d 457 (1992) (L not liable under G.S. 42-42 for injuries sustained by T who slipped on staircase where L had not been notified of problems with staircase)
  - b) Bolkhir v. NC State University, 321 N.C. 706, 365 S.E.2d 898 (1988) (L liable when tenant's child pushed out glass panel in storm door and injured himself)
  - c) Mudusar By & Through Baloch v. V.G. Murray & Co., 100 N.C. App. 395, 396 S.E.2d 325 (1990) (L not required, absent some specific agreement or covenant to repair, to install or maintain protective window screens)
  - d) Jackson v. Housing Authority of High Point, 73 N.C. App. 363, 326 S.E.2d 295 (1985) (implied warranty or negligence from G.S. 42-42 allowed recovery for wrongful death)
  - e) Starkey v. Cimarron Apts., Inc., 70 N.C. App. 772, 321 S.E.2d 229 (1984)
  - f) Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982) (G.S. 42-42 did create duty of care but tenant was contributory negligent by continuing to use step after knowing unsafe)
3. Common Law Duty to warn
  - a) Prince v. Wright, 141 N.C. App. 262, 541 S.E.2d 191 (2000) (G.S. 42-42 does not supplant landlords' common law duty to warn tenants of hazardous conditions of which landlords know or should know)

F. **Protections for Victims of Domestic Violence, Sexual Assault or Stalking** (Applies to leases entered into or renewed after Oct 1, 2005)

1. "Protected tenant" means a tenant or household member who is a victim of domestic violence under Ch. 50B of the General Statutes or sexual assault or stalking under Ch. 14 of the General Statutes. (G.S. 42-40)
2. Nondiscrimination – (G.S. 42-42.2) - L shall not terminate, fail to renew a tenancy, refuse to enter into a rental agreement, or



otherwise retaliate based substantially on (i) the tenant, applicant or a household member's status as a victim of domestic violence, sexual assault or stalking or (ii) the tenant or applicant having terminated a rental agreement under G.S. 42-45.1.

3. Changing locks – (G.S. 42-42.3) - L must change locks after oral or written request by a “protected tenant” or tenant may do so if L does not as follows:

- a) If perpetrator is not a tenant in the same dwelling unit, no documentation required and locks must be changed within 48 hours of notice.
- b) If perpetrator is a tenant in same dwelling unit, protected tenant must provide L with a copy a court order barring the perpetrator from the unit and L has 72 hours to change locks.
- c) Once L is provided with court order requiring perpetrator to stay away from the dwelling unit, no duty of L to allow access unless court order allows for access to retrieve personal belongings and no liability of L if follow the law.
- d) Excluded perpetrator remains liable under the lease for rent or damages to the dwelling unit.
- e) Protected tenant bears expense of lock change and must provide key to L if change lock themselves.

4. Early Termination of Rental Agreement –( G.S. 42-45.1) Any “protected tenant” may terminate his or her rental agreement by providing L with written notice effective at least 30 days after L's receipt of the notice.

- a) Notice to the L must be accompanied by either: (i) a copy of a valid protective order, other than an ex parte order; (ii) a criminal order restraining contact with the “protected tenant”; or (iii) a valid “Address Confidentiality Program” card issued pursuant to G.S. 15C-4.
- b) A victim of domestic violence or sexual assault must also provide the L a copy of a safety plan which recommends relocation provided by a domestic violence or sexual assault program.

- c) Upon termination of the rental agreement, the “protected tenant” is liable for rent prorated to the effective date of the termination notice.
- d) Perpetrator excluded from the dwelling unit and any other tenant of the dwelling unit remain liable for rent or damages to the unit.

G. **Early Termination of Rental Agreements by Military Personnel** (G.S. 42-45)

1. Members of U.S. Armed Forces may terminate their rental agreement by providing the L written notice accompanied by either a copy of official military orders or written verification signed by their commanding officer if:
  - a) required to move more than 50 miles or more from the rental dwelling due to a permanent change of station order; or
  - b) prematurely or involuntarily discharged or released from active duty; or

(Notice of lease termination under either “a” or “b” above shall be effective on a date stated in the notice that is at least 30 days after the L’s receipt.

- c) deployed for more than 90 days. Notice of lease termination shall be effective 30 days after the date the next rental payment is due or 45 days after the L’s receipt of the notice, whichever is shorter.
2. The T is not liable for any damages or penalties if the rental agreement is terminated 14 or more days prior to occupancy.
3. T is liable for rent due under the rental agreement prorated to the effective date of the termination date.
4. T is liable for liquidated damages, as set out below, if less than 9 months of the tenancy has been completed and the L has suffered actual damages due to loss of tenancy:
  - a) one month’s rent or less if less than 6 months of lease completed.
  - b) ½ month’s rent if at least 6 but less than 9 months of lease completed.

5. These provisions may not be waived or modified by the parties.

#### IV. **RETALIATORY EVICTION** (G.S. 42-37.1)

- A. Applies to evictions filed substantially in response to tenant's good-faith attempt to secure repairs or other rights within twelve months prior to filing.
- B. L may prevail if T has failed to pay rent or otherwise breached the lease.
- C. Cases
  1. Spinks v. Taylor, supra
  2. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968)

#### V. **EXECUTIONS IN EJECTMENT CASES**

- A. **Stay is obtained by posting rent bond**, (G.S. 42-34)
  1. Absent a stay, the writ of execution may be issued on the eleventh day after judgment. No execution may occur without a duly issued writ.
  2. Three Requirements for obtaining a stay of execution:
    - a) Tenant must sign an undertaking to pay the tenant's share of future rent as it comes due;
    - b) If the magistrate's judgment was entered more than five (5) working days before the next rent is due, tenant must post, in cash, the prorated amount of rent for the days between the date that the judgment was entered and the next day when rent will be due under the lease; and
    - c) Tenant must post, in cash, the amount of rent in arrears or, if the rent was in dispute, the undisputed amount as determined by the magistrate in the "Findings" portion of the judgment. (See G.S. 42-34(c1): A defendant who is authorized to appeal as an indigent does **not** have to pay the rent in arrears to stay execution, but must comply with a. and b. above).
      - (1) Tenant may post a different amount than the one found by the magistrate if:

- a. the tenant appeared in the small claims trial;
- b. the magistrate's findings indicate that the rent in arrears was not in dispute; and
- c. an attorney representing the tenant on appeal signs a pleading stating that there is evidence of an actual dispute as to the amount of rent in arrears.

(2) [Note: Laing v. Lewis, 133 N.C. App. 172, 515 S.E.2d 40 (1999) (landlord is not entitled to default judgment because tenant failed to file bond with answer)]

- d) Any party may move for modification of amount or due date and clerk or the court shall hold a hearing within 10 days.

B. **Dispossessed tenants who win on appeal may recover damages**, (G.S. 42-35 and 42-36)

C. LLs cannot execute on judgments for possession which are more than 30 days old unless they sign an affidavit that they have not entered into a "formal lease" with the defendant/tenant nor accepted rent for any period of time after entry of judgment (G.S. 42-36.1A)

D. **Disposition of Tenants' Personal Property**

- 1. Tenant has ten days after execution of the judgment for possession to claim his/her property. After expiration of the ten day period, the LL may dispose of the property. If the LL wishes to sell the property, he/she must give the tenant 7 days notice of the sale. The tenant can claim the property up to the day of the sale.
  - a) Presumption - Of abandonment arises 10 days after LL posts notice of suspected abandonment inside and outside the premises if T does not respond and the paid rental period has expired.
  - b) Abandoned Property - If the property left on the premises at the time of execution is worth less than \$100, it is deemed abandoned 5 days after execution and can be disposed of by the LL.
  - c) Less than \$500 - may be delivered to a qualified non-profit if the organization agrees to identify and separately store it for 30 days, releasing it to the T without charge

during that time. LL must post a notice on the premises if she/he elects this method.

- d) Manufactured homes - Those who lease the space for a manufactured home with a current value in excess of \$500 shall have 21 days instead of 10 after the LL receives a writ of possession to remove the manufactured home and any personal property within. LL may sell the property after the lien has attached. (To be covered under this statute, a manufactured home must have a current value in excess of \$500.)

2. Statutes include:

- a) G.S. 42-25.9
- b) G.S. 42-36.2
- c) G.S. 44A-2(e)

## VI. OTHER CLAIMS AND DEFENSES

### A. Real Party in Interest/Necessary Party

- 1. Rules 17 and 19 N.C.R. Civ. P.
- 2. The owner(s) of property are the real parties in interest and are necessary parties. Rental agents who are not owners may not sue in their own names, and owners may not sue under assumed (“d/b/a”) names.

### B. Failure to State a Claim on which Relief Can be Granted arises in two common ways, (Rule 12(b)(6))

- 1. L fills out the form complaint improperly; or
- 2. L alleges an installment sales contract; these are mortgages, not leases, and summary ejectment is not the proper remedy for breach.

### C. Unfair and Deceptive Trade Practices

- 1. Fraud
- 2. Inequitable assertion of L’s position
- 3. Coercive conduct on the part of L

4. Failure to make repairs, after notice, and continuing to demand rent

5. Cases

- a) Stolfo v. Kernodle, 118 N.C. App. 580, 455 S.E.2d 869 (1995) (LL rented out only single house and trailer space, such rentals were “in or affecting commerce” so as to be covered by G.S. 75-1.1)
- b) Johnson v. Phoenix Mutual Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev’d, 300 N.C. 247, 266 S.E.2d 610 (1980) (interpretation of “unfair and deceptive”)
- c) Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574, cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978) (Landlord-tenant relations are within scope of G.S. 75-1.1)
- d) Allen v. Simmons, supra (discussion of factual basis for finding of UTP in a landlord-tenant repair case)
- e) Foy v. Spinks, supra (affirms holding of Allen v. Simmons)
- f) Stanley v. Moore, supra (UTP and treble damages possible for forcible self help eviction)
- g) Creekside Apartments v. Poteat, supra (UTP when LL had due notice of conditions, delayed making repairs, and continued to collect rent; proof of actual deception not required)
- h) Leardi v. Brown, 474 N.E.2d 1094 (Mass. 1985) (lease that attempted to limit implied warranty of habitability was unfair and deceptive)

6. Remedies

- a) treble the actual damages
- b) attorney’s fees
- c) costs

D. **Violations of North Carolina or Federal Fair Housing Act**

(Protected Classes: race, color, creed, national origin, sex, handicap and familial status)

1. Statutes and Regs: N.C.G.S. 41A  
42 U.S.C. 3601 et seq  
24 C.F.R. Parts 100 et seq.
2. **Racial discrimination:** Brown v. Artery Organization, Inc., 654 F. Supp. 1106 (D.D.C. 1987) (preliminary injunction against eviction of blacks and Hispanic tenants through landlord's renovation plans)
3. **Gender Discrimination:** Beliveau v. Caras, 873 F. Supp. 1393 (C.D. Cal. 1995) (Offensive touching of tenant by manager could be sexual discrimination)
4. **Familial status (with children):** US v. Grishman, 818 F. Supp. 21 (D. Me. 1993); Hooker v. Weathers, 990 F.2d 913 (6th Cir. 1993); US v. Lepore, 816 F. Supp. 1011 (M.D. Pa. 1991); US v. Badgett, 976 F.2d 1176 (8th Cir. 1992) (landlord's policy of limiting one-bedroom units to one-person households was discriminatory); Fair Housing Council of Orange County, Inc. v. Ayers, 855 F. Supp. 315 (C.D. Cal 1994) (once plaintiff has established prima facie case of discriminatory effect of policy, burden is on owner to show legitimate non-discriminatory business reason, and some circuits require that defendant show that its policy is the least restrictive means; here defendant's policy of limiting family size of maximum of two person in small two-bedroom units was discriminatory, and defendants' proffered business reason of minimizing wear and tear on the apartments was not deemed least restrictive means); Guider v. Bauer, 865 F. Supp. 492 (N.D. Ill. 1994) (prospective tenants stated good claims against landlord and newspaper for printing discriminatory ad which stated that two-bedroom apartment was "perfect for single or couple")
5. **Handicap discrimination:** Roe v. Sugar River Mills Associates, 820 F. Supp. 636 (D.N.H. 1993) (duty to accommodate physical and mental handicaps and status of former drug addicts)

E. **Condominium Conversions**, (G.S. 47A, Article 2)

F. **Excessive Late Fees**, (G.S. 42-46)

1. Late fees can not exceed \$15 or 5% of rental payment if paid monthly, whichever is greater

2. Late fees can not exceed \$4 or 5% of rental payment if paid weekly, whichever is greater
3. Late fees where the rent is subsidized are calculated pursuant to paragraphs 2 or 3 above on the tenant's share of the rent only
4. May be imposed only one time for each late rental payment
5. Late fee may not be deducted from a subsequent rental payment so as to cause default
6. No late fee allowed for tenant's failure to pay water and sewer services provided pursuant to G.S. 62-110(g).

**VII. APPEAL FOR TRIAL DE NOVO IN DISTRICT COURT**

- A. Appeals from Small Claims Court to District Court must be taken within ten days under G.S. 7A-228(a) & perfected within 20 days of judgment under 7A-228 (b).
- B. Right to jury trial on appeal may be waived if not demanded in a timely manner by appellant during time to perfect the appeal. G.S. 7A-228 (b) Appellee has ten days to demand a jury trial after receipt of the notice of appeal "stating that the costs of the appeal have been paid." G.S. 7A-230.
- C. Where magistrate does not announce and sign judgment in open court at conclusion of trial, magistrate is to serve copies of judgment on all parties within three days of entry under Rule 58 of the NC Rules of Civil Procedure.
- D. In trial de novo, the judge may order repleading or further pleading by some or all of the parties; may try the action on stipulation as to the issue; or may try it on the pleadings as filed. G.S. 7A-229. But, the judge shall allow appropriate counterclaims, cross-claims, third party claims, replies and answers to cross-claims, in accordance with Rules of Civil Procedure. G.S. 7A-220.
- E. Expedited trials upon demand by either party. If the case has not been previously continued in District Court, the court shall continue the case if any party initiates discovery or files a motion to allow further pleading or for summary judgment. G.S. 42-34 (a).
- F. Staying execution of summary ejection judgments under G.S. 42-34 (b) et. seq (see V. above):
  1. time for payment calculated under Rule 6;



2. different obligation for indigents;
3. default on the bond followed by eviction of the tenant does not make ejectment moot because tenant can get writ of restitution and damages under G.S. 42-35 and 42-36.

## **VIII. PUBLIC AND SUBSIDIZED HOUSING**

Tenants who reside in public or subsidized housing have certain rights that tenants in private housing do not.

Federal Law dictates how rent is computed, and how tenants are selected and evicted. What rights a tenant has depends in large part on the type of federally assisted housing a tenant lives in. This is a complex area of the law and practitioners are cautioned to seek the advice of their local Legal Services Program before proceeding with a case involving federally assisted housing. For referrals to the nearest Legal Services office, call (919) 856-2564.

### **A. Resource Materials Regarding Federal Housing Law:**

1. 42 U.S.C. 1400 et seq. (statutes for public housing, Section 8 programs and Voucher Program)
2. Title 24 of the Code of Federal regulations - regulations for public housing, Section 8 programs and Housing Voucher Program.
3. “HUD Housing Programs: Tenants’ Rights” (3rd Ed.2004) National Housing Law Project, 614 Grand Ave., Suite 320, Oakland, CA 94610, (510) 251-9400; www.nhlp.org).

### **B. Special defense for subsidized housing tenants in conventional public housing or receiving Section 8 rental assistance,** (National Housing Act of 1937, as amended, 42 U.S.C. 1437 et seq.; 24 C.F.R.982.310; 24 C.F.R. 966 et seq.; N.C.G.S. 157-1 et seq.)

\* Note: The following cases must be read in light of Department of Housing and Urban Development v. Rucker, et al., 535 U.S.125 (2002). The U.S. Supreme Court held that 42 U.S.C. 1437d(1)(6) gives local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug related activity, regardless of whether the tenant knew, or should have known, of the drug related activity. (See also Section II. D. “Expedited Eviction of Drug Traffickers and Other Criminals” and G.S. 157-29(c) (“...(F)ault on the part of the tenant may be considered in determining whether good cause exists to terminate a rental agreement.” \* Call Legal Services for advice\*)

1. Because of the federally created housing entitlement belonging to the tenant, leases may be terminated only for good cause; and the private landlords must strictly follow the content and procedural requirements of the lease and federal regulations in terminating the lease. Goler Metropolitan Apartments, Inc. v. Williams, 43 N.C. App. 648, 260 S.E.2d 146 (1979).
2. Good cause and material noncompliance with lease may include tenants' failure to maintain electric service because of potential risks of frozen pipes, fire, and uninsurability. Long Drive Apartments v. Parker, 107 N.C. App. 724, 421 S.E.2d 631 (1992).
3. Even if a tenant technically breaches the lease, the tenant may raise an affirmative defense that the tenant was not personally at fault for the breach. Maxton Housing Authority v. McLean, 313 N.C. 277, 328 S.E.2d 290 (1985) (where wife failed to pay rent, she had a good defense that she was not personally at fault because the amount of rent was based, in part, on husband's income and husband had abandoned her).
4. The federal statute at 42 U.S.C. 1437d(1)(5) defines lease requirements for housing authorities seeking to evict families for criminal activities. On the face of it, the statute may allow eviction for the whole family if a household member or guest commits a crime. But, the congressional legislative intent, as found by the NC Court of Appeals, was to not allow eviction of innocent heads of household and family members when the tenant was not personally at fault for a household member's criminal act. In Charlotte Housing Authority v. Patterson, 120 N.C. App. 552, 464 S.E.2d 68 (1995), the tenant's son left the apartment, borrowed a gun and shot a child in another part of the housing authority property - all without the knowledge of the tenant. The court held that since the tenant was not at fault, there was no good cause to evict her and the remaining children. The court also mentioned that there was similar legislative intent regarding eviction of innocent Section 8 tenants.
5. Section 8 subsidy for the tenant's rent may not be terminated without the tenant's having a pre-termination hearing with due process rights, including cross-examination of witnesses and a decision based on competent evidence other than hearsay. Edgecomb v. Housing Authority of Town of Vernon, 824 F. Supp. 312 (D. Conn. 1993).

6. Note: For those with certificates and vouchers, once a lease has expired the landlord can evict without good cause...also, leases can now be less than one year in duration.

## **IX. VACATION RENTALS, (Chapter 42A)**

A. **Vacation rental:** (G.S. 42A-4) Recent legislation has carved a niche for vacation rentals apart from other residential rental agreements as governed by Chapter 42 of the N.C. General Statutes (largely in response to Conley). Under the new act, a “vacation rental” is “the rental of residential property for vacation, leisure, or recreation purposes for fewer than 90 days by a person who has a place of permanent residence to which he or she intends to return.” The following, though, are not included in this act:

1. Lodging provided by hotels, motels, tourist camps, and other places subject to regulation under Chapter 72 of the General Statutes;
2. Rentals to persons temporarily renting a dwelling unit when traveling away from their primary residence for business or employment purposes;
3. Rentals to persons having no other place of primary residence; and,
4. Rentals for which no more than nominal consideration is given. (G.S. 42A-3)

B. **Expedited eviction:** (G.S. 42A-24) Tenants need to be concerned about the possibility of landlords trying to use the expedited eviction process set out in this act. The expedited eviction allows a landlord to give only 4 hours notice in addition to other stipulations.

C. **Penalties for abuse:** (G.S. 42A-27) However, landlords trying to evict a tenant under this act inappropriately “shall be guilty of an unfair trade practice under G.S. 75-1.1 and a Class 1 misdemeanor.”

## **X. INTERVIEW NOTES FOR LANDLORD/TENANT CASES**

A. **Two Questions to Keep In Mind:**

1. What defenses does the client have to an eviction action?
2. What possible causes of action does the client have against the landlord?

**B. Minimum Topics to Be Discussed**

1. Rent

- a) Amount of rent;
- b) How often its supposed to be paid;
- c) What date is it due;
- d) If it is paid up or behind, and if behind, how far;
- e) Whether the client receives any rental subsidies, i.e. Farmer's Home, Section 8, Public Housing;
- f) Did the client pay a security deposit?

2. Notices Received By The Client

You need to know if any communication has been received from the landlord. If so, what did it say and was it written or oral. Also, how was it received? Regular mail, tacking, hand delivered? When was it received?

3. The Condition of The Leased Dwelling

- a) General condition of the leased unit including the roof, wiring, plumbing, flooring, doors, windows; if in bad condition, how long has it been that way?
- b) If repairs have been requested. Were the requests made orally or in writing? How often? What was covered in the requests? Did the client keep copies? Were there any witnesses?
- c) Whether or not any requested repairs have been made and, if so, which ones, and when.
- d) Whether or not the client has made repairs, and if so, money spent toward making those repairs; does the tenant have receipts?
- e) Whether or not the client has requested an inspection from the local Housing Inspection Department.
- f) Results of an inspection, including a list of deficiencies.

g) Does the client know of any earlier inspections or condemnations?

4. Terms of The Lease

a) Is it written or oral;

b) Is it week-to-week, month-to-month, year-to-year;

c) Are there any special or unusual terms or understanding, such as an option to buy or an exchange of the leased dwelling for work to be done by the client?

5. Court Action

a) Has the client or any member of the client's family been served with court papers or has the client been to court? Find out where the case is procedurally and what the important dates are, i.e. Magistrate's hearing or last day to appeal, or when the sheriff is coming; how were any court papers served? What are the landlord's grounds for eviction? What are the client's possible defenses.

b) Has the client or any member of the client's family been told they were going to be served with any court papers?

C. **Client Goals**

Find out from your client what he or she wants to accomplish. In discussing your client's goals, provide them with enough advice and information so that their expectations are not unreasonably high nor unnecessarily low. A general discussion of the client's goals should include the following topics: staying versus moving, forcing the landlord to make repairs, avoiding a money judgment; tacking; obtaining retroactive rent abatement, and in some circumstances the availability of relocation money, public housing, and Section 8.

D. **Answering The Unasked Questions**

Clients commonly have questions which they don't ask. Some of these questions are common to so many clients that they should be answered even if they're not asked. Providing the answers will often relieve your client of a great amount of anxiety and make them a more educated consumer in the future. Some of the common questions are:

1. Can I be put in jail;

2. Can my wages be garnished;
3. Can my landlord shut off my utilities;
4. Can my landlord throw my property on the street and change the locks;
5. What does it mean to be “Judgment Proof”?

Part of answering these questions is telling your client what to do if the landlord/creditor attempts any of these actions.