Landlord and Tenant Rights and Obligations

And

Evictions – Working Around Excuses and Traps to Legally Dispossess a Tenant in Default

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The respective rights and obligations of a particular landlord and its tenant are determined by the terms of the lease agreement they enter into, within the construct of applicable law. Applicable law can include a mix of statutory law enacted by the General Assembly and case law (also called "common law") resulting from judicial opinions rendered over the years, including particularly common law relating to property rights and contracts. In some situations applicable law may supply a term that the lease is silent about, "filling a gap" in the lease. In other situations, applicable law may be in direct conflict with a term of the lease, in which case the offending lease term is likely to be deemed void and replaced with the term supplied by applicable law.

Although statutes have been enacted specifying some responsibilities of the parties in connection with *residential* leases governed by North Carolina law, the responsibilities of parties to a *commercial* lease are generally less likely to be established by statute and are more extensively within the control of the parties to the lease as they tailor and agree to the terms of the lease. A simple example of this dichotomy is the landlord's duty to make repairs to the leased premises: a residential landlord is under a statutory duty to make certain repairs whereas a commercial landlord has no such duty in the absence of a lease provision allocating that responsibility to the landlord. Moreover, an analysis of the rights and obligations of a landlord and tenant in a commercial lease relationship also differs because commercial premises are not subject to an implied warranty of habitability and because there is no statutorily-mandated mutuality of obligations among parties to a commercial lease. The focus of this section is accordingly on the rights and obligations of parties to residential leases (as opposed to commercial

leases), although some of the principles and provisions covered are applicable to commercial leases as well.

A full discussion of the manifold substantive and procedural issues that may arise in a dispute (and the potential litigation of claims) between a landlord and its tenant exceeds the scope of these written materials. Instead, these materials focus on a residential tenant's underlying rights and related landlord responsibilities in connection with the following circumstances: (1) delivery of the premises at lease inception; (2) physical defects and maintenance responsibilities; (3) security deposits; (4) disclosure of lead-based paint risks; (5) premises subject to foreclosure; (6) leases coupled with options to purchase; (7) notice requirements relating to expiration of the lease's term; and (8) disposition of personal property left behind in the premises by a tenant.

A. Landlord's Obligation to Deliver Premises at Inception of Term

The common law places an implied duty upon a landlord to deliver possession of the premises to the tenant at the outset of the lease term (or other agreed "delivery date") to effectuate the tenant's leasehold interest in the premises, and most written leases explicitly require delivery of the premises as well. Disputes over the "delivery date" for premises subject to a commercial lease are not uncommon, often because the "delivery date" is tied to the completion of construction work by the landlord. In many commercial leases, the date on which the tenant must begin to pay rent (the "rent commencement date") is linked to the "delivery date," so the date on which the landlord delivers the premises to the tenant in a condition consistent with the lease's requirements affects the accrual date for the tenant's obligation to pay rent. With residential leases, however, the delivery date, rent commencement date, and first date of the term are usually all the same.

Unless a lease term clearly provides to the contrary, the landlord's implied duty is not just to deliver possession to the lessee, but to deliver "exclusive" possession of the premises to the lessee, meaning no other party has a concurrent right to possession of the same premises. North Carolina adheres to the so-called "English Rule" with respect to the landlord's delivery of exclusive possession at the commencement of the lease's term, as distinct from the "American Rule" that applies in some other states. Whereas the "American Rule" requires only that the landlord to deliver a right of exclusive possession to the new tenant, the "English Rule" requires the landlord to deliver the actuality of exclusive possession, such that the landlord is in breach of the implied covenant to deliver exclusive possession if another party remain in possession when the new tenant's term commences. See Sloan v. Hart, 150 N.C. 269 (1909).

Timely delivery of the premises to a new tenant can be tricky for a landlord (either residential or commercial) if the landlord has entered into a lease with the new tenant while still dealing with a holdover tenant who refuses to leave the same premises. Even though the holdover tenant may be the party most responsible for interfering with delivery of the premises to the new tenant, the "English Rule" followed by North Carolina's courts places responsibility squarely and solely on the landlord to deliver the premises to the new tenant in accordance with the new tenant's lease. See Westport 85 LP v. Casto, 117 N.C. App. 198 (1994); Shelton v. Clinard, 187 N.C. 664 (1924). Landlords are accordingly advised to avoid entering into a lease with a new tenant that calls for delivery of the premises as of a specified date unless they are confident that an existing tenancy for the same premises will terminate first and that the existing tenant will not hold over (or that they have ample time to resolve any holdover by the existing

tenant, including through legal process if necessary). The landlord's implied duty to deliver possession does not, however, require the landlord to intervene if a third party interferes with a tenant's right of possession after exclusive possession is given by the landlord to the tenant at the inception of the lease's term. See Westport 85 LP v. Casto, 117 N.C. App. 198 (1994).

In addition to the landlord's implied duty to deliver possession, the covenant of quiet enjoyment in favor of a tenant that is implied under North Carolina law (and expressly included in many leases) can be a factor in disputes over possession arising after possession is delivered by the landlord. The implied covenant of quiet enjoyment requires the tenant to have quiet and peaceable possession of the leased premises throughout the term of the lease. See Andrews & Knowles Produce Co. v. Currin, 243 N.C. 131 (1955). However, the covenant of quiet enjoyment only protects the tenant from acts by the landlord, a party claiming under the landlord, or a party claiming title to the premises superior to the landlord's title – it does not protect the tenant generally from acts of third parties that disrupt the tenant's possession. See Huggins v. City of Goldsboro, 154 N.C. 443 (1911).

B. Physical Condition of the Premises and Maintenance Responsibilities

A residential landlord's duties to its tenant do not end with delivery of the premises at the start of the lease's term. Under common law, the residential landlord is bound by an implied warranty of habitability requiring that the premises be delivered and maintained in a habitable condition, and certain aspects of the warranty of habitability that is implied at common law were codified by the North Carolina General Assembly in 1977 when it enacted the Residential Rental Agreements Act ("RRAA"), which is

contained in Article 5 of Chapter 42 of the North Carolina General Statutes. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362 (1987). The RRAA by its express terms "determines the rights, obligations, and remedies under a rental agreement for a dwelling unit" in North Carolina. Every residential tenancy in North Carolina is therefore subject to the RRAA. With respect to maintenance obligations, the RRAA requires a residential landlord to:

1. Comply with applicable building and housing codes;
2. "Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition";
3. Keep all common areas in a safe condition;
4. Maintain all "facilities and appliances" (including electrical, plumbing, sanitary, heating, ventilating, and air conditioning) supplied or required to be supplied by the landlord in good and safe working order;
5. Provide and maintain operable carbon monoxide detectors (for most premises) and smoke detectors (including battery replacement at the outset of the tenancy in the absence of an agreement to the contrary); and
6. Repair or remedy any of twelve "imminently dangerous" conditions within a reasonable period of time of receiving notice or knowledge of the condition(s), such conditions being: unsafe wiring; unsafe flooring or steps; unsafe ceilings or roofs; unsafe chimneys or flues; lack of potable water; lack of an operable lock on any exterior door; broken windows or ground-level windows without operable locks; lack of operable heating (within certain specified system performance parameters); lack of an operable toilet; lack of

an operable bathtub or shower; rat infestation attributable to building flaws; and mosquito infestation or mold resulting from excessive standing water, sewage, or flooding problems.

N.C.G.S. § 42-42(a).

Questions often come up about whether and how a tenant needs to affirmatively notify its landlord of problems with the premises so as to trigger the landlord's repair obligations under the RRAA. No notice from the tenant is required for problems existing at the outset of the lease term (because the landlord is obligated to deliver defect-free premises at the beginning of the lease), and oral notice of problems needing repair that arise during the term of the lease is generally adequate, although written notice is preferable because it is easier to prove. Oral notice alone, however, does not suffice (necessitating delivery of written notice of the problem to the landlord), to trigger the landlord's repair obligations for non-emergency problems with "appliances and facilities" and with plumbing, sanitary, electrical, and HVAC systems, N.C.G.S. § 42-42(a)(4), and for problems with smoke and carbon monoxide detectors. N.C.G.S. §§ 42-42(a)(5) & 42-42(a)(7), unless the problems at issue are serious enough to render the premises unfit or uninhabitable. See Surratt v. Newton, 99 N.C. App. 396 (1990). It is important to note that the "appliances and facilities" the landlord is required to maintain include not just the minimal facilities mandated by the RRAA (e.g., locks on exterior doors and heat), but any "appliances and facilities" of an optional nature supplied by the landlord with the premises (e.g., dishwasher, washer/dryer, air conditioning). Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486 (1988)(hot water not required by RRAA but landlord had agreed to provide hot water pursuant to the lease).

The RRAA entitles a tenant to decline to take possession of residential premises if the landlord fails to deliver the premises in the condition called for by the lease. Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486 (1988). The rights of a tenant in connection with N.C.G.S. § 42-42 cannot be waived, even if the tenant explicitly or implicitly accepts premises out of compliance with the statutorily-mandated standards, including by taking possession of the premises with knowledge of the defects at the beginning of the term. N.C.G.S. § 42-42(b); Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486 (1988). If a landlord violates the requirements of N.C.G.S. § 42-42(a), remedies available to the tenant in a civil action include: actual damages in an amount equal to the difference in fair rental value of the premises free of defects and the fair rental value of the premises as they are (compromised by the defects), not to exceed the amount of rent actually paid by the tenant; special and consequential damages; and, possibly, an order for prospective rent abatement. N.C.G.S. § 42-44(a); Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206 (1999); Cotton v. Stanley, 86 N.C. App. 534 (1987). Moreover, N.C.G.S. §§ 42-44(a1) and -44(a2) prescribe certain penalties that may be imposed on a landlord or tenant concerning the provision, repair, or replacement of smoke and carbon monoxide detectors.

Whether or not a residential tenant can withhold rent based on a landlord's failure to repair defects in the premises is a recurring issue. Although the tenant's remedies as outlined above are broad, and the landlord's obligation to provide a residential tenant with "fit" premises and the tenant's obligations to pay rent and maintain the premises (in certain specified respects) are "mutually dependent," N.C.G.S. § 42-41, the RRAA includes an express prohibition against the unilateral withholding of rent by a tenant

based on issues with the condition of the premises unless the tenant has obtained a judicial determination that rent should be abated. N.C.G.S. § 42-44(c). Also, it should be noted that tenants themselves are allocated certain fundamental responsibilities for maintaining premises they lease under N.C.G.S. § 42-43, and that a tenant's willful destruction or damaging of the leased premises constitutes a Class 1 misdemeanor under N.C.G.S. § 42-11.

Courts have held that in some circumstances a tenant may be in a position to establish that the landlord's repair and maintenance practices constitute "unfair and deceptive trade practices" allowing an award to the tenant of treble damages and attorneys' fees pursuant to N.C.G.S. § 75-1.1. Creekside Apartments v. Poteat, 116 N.C. App. 26 (1994). Under the definition of "landlord" contained in N.C.G.S. § 42-40(3), the tenant may seek to hold not just the owner(s) of the premises, but also rental agents (property managers, brokers, etc.), responsible for violations of the RRAA. See Baker v. Rushing, 104 N.C. App. 240 (1991); Surratt v. Newton, 99 N.C. App. 396 (1990). North Carolina courts have held that a landlord who negligently fails to make repairs can be held responsible for damage to a tenant's personal property. See, e.g., Pierce v. Reichard, 163 N.C. App. 294 (2004)(landlord that declined to address rotten tree limb pointed out by tenant was liable for damage caused to tenant's vehicle when limb fell).

In 1979, a retaliatory eviction affirmative defense for residential tenants was codified by the North Carolina General Assembly. N.C.G.S. § 42-37.1. A tenant is allowed to defeat a landlord's claims for possession of the leased premises in a summary ejectment action if the tenant can present evidence to persuade the court that the action was brought by the landlord "substantially in response to" the tenant's good faith

attempt(s) to secure repairs to the premises and/or other rights of the tenant during the twelve month period preceding the filing of the summary ejectment action. However, the landlord may nonetheless overcome a retaliatory eviction defense by establishing that the tenant has failed to pay rent or has held over beyond the expiration of the term of the lease. A tenant's rights under the retaliatory eviction statute cannot be waived by the tenant. N.C.G.S. § 42-37.3.

In addition to considering compliance with the RRAA to avoid liability to a tenant for not meeting the requirements of the RRAA, residential landlords also need to be cognizant of the extent to which the RRAA imposes a duty of care and standards that apply in the context of a lawsuit alleging that negligence by the landlord concerning a dwelling unit's physical condition resulted in physical injuries to a tenant or the tenant's invitees. N.C.G.S. § 44(d) provides that a violation of the RRAA "shall not constitute negligence per se," but North Carolina's courts have established that the RRAA's enactment "left intact established common-law standards of ordinary and reasonable care" and noncompliance with the RRAA is admissible as evidence of negligence. Lenz v. Ridgewood Associates, 55 N.C. App. 115 (1981), cert. denied, 305 N.C. 300 (1982). Moreover, in making repairs required by the RRAA, the residential landlord is under a duty to exercise due care, such that the landlord can be held liable for injuries caused by negligently-made repairs. Bolkhir v. N.C. State Univ., 321 N.C. 706 (1988).

Tenants under commercial lease agreements do not enjoy the statutory protections of the RRAA or the common law protections of the implied warranty of habitability. K & S Enterprises v. Kennedy Office Supply Co., Inc., 135 N.C. App. 260 (1999). Moreover, in the absence of lease provisions to the contrary, the common law implies a

duty for the tenant to repair the portions of the premises under the tenant's control, although the landlord remains responsible for areas such as common areas outside of the exclusive control of any one tenant. See Franklin Drug Stores, Inc. v. Gur-Sil Corp., 269 N.C. 169 (1967)(duty to stop drainage into basement); Marina Food Associates, Inc. v. Marina Restaurant, Inc., 100 N.C. App. 82 (1990)(duty to fix leaking roof). Commercial (and residential) tenants potentially have recourse for a landlord's maintenance deficiencies through the constructive eviction doctrine, if the deficiencies are serious enough to drive the tenant to abandon the premises.

Constructive eviction occurs "when a landlord breaches a duty under a lease which renders the premises untenable," causing the tenant to reasonably abandon the premises. Marina Food Associates, Inc. v. Marina Restaurant, Inc., 100 N.C. App. 82 (1990)(failure to fix leaky roof). Courts have held that, as a matter of law, a constructive eviction also constitutes a breach of the implied covenant of quiet enjoyment. Id. A tenant will be unable to sustain a claim for constructive eviction, however, if it fails to abandon the premises within a reasonable time from the act of the landlord that the tenant claims renders the premises untenable. K & S Enterprises v. Kennedy Office Supply Co., Inc., 135 N.C. App. 260 (1999)(no constructive eviction when tenant remained in premises for forty-four months after roof leak began); McNamara v. Wilmington Mall Realty Corp., 121 N.C. App. 400 (1996)(constructive eviction occurred when retail tenant abandoned about seven months after landlord failed to act to attenuate excessive noise from loud music at adjacent aerobics studio). A common example of constructive eviction in the residential context is a tenant's abandonment of the premises after the landlord shuts off the supply of potable water (or other needed utilities) to the premises.

This is also an example of prohibited landlord conduct under North Carolina law, as residential landlords are not allowed to evict tenants through any approach other than a summary ejectment action under Chapter 42 of the North Carolina General Statutes.

C. Security Deposits

In 1977, the North Carolina General Assembly enacted the Tenant Deposit Security Act, codified as Article 6 of Chapter 42 of the North Carolina General Statutes. This Act mandates that a landlord can only apply a residential tenant's security deposit for certain specified items (unpaid rent, damage to the premises, etc.), N.C.G.S. § 42-51, and must account for such application of the deposit in writing (including itemization of damage to the premises and resultant repair expenses) and refund any unapplied portion of the deposit within 30 days of termination of the tenancy and delivery of the premises, unless an additional period of up to 30 days is required for the landlord to assess the amount of its claim to the deposit, in which case up to 60 days is allowed as long as the landlord provides an interim accounting after 30 days. N.C.G.S. § 42-52. The maximum security deposit a landlord is allowed to take on a residential lease under North Carolina law is the equivalent of two months' rent, which is allowed for tenancies of greater than month-to-month duration. N.C.G.S. § 42-51. (For a month-to-month lease, the security deposit cannot exceed one and one-half months' rent. Id.)

D. Disclosure to Tenants of Potential Lead-Based Paint Risks

The Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4852d) and regulations promulgated pursuant to it impose duties on a lessor of residential premises built before 1978 to disclose certain matters relating to potential lead-based paint hazards to tenants. These are federal (not state or local) requirements intended to

protect tenants based on the authority of the U.S. Environmental Protection Agency to regulate certain chemical substances under the Toxic Substances Control Act.

The lessor of a residential dwelling built before 1978 must (before the lease is executed by the tenant(s)) furnish the tenant(s) with an EPA-approved lead hazard information pamphlet, 40 C.F.R. § 745.107(1), and disclose the presence of any known lead-based paint in the premises, 40 C.F.R. § 745.107(2), along with copies of any records or reports pertaining the lead-based paint hazards in the dwelling. 40 C.F.R. § 745.107(4). The lease agreement itself is also required to include or attach certain prescribed language about potential lead-based paint risks, 40 C.F.R. § 745.113(b), and landlords are required to keep certain records relating to such disclosures for at least three years from the commencement of the lease's term. 40 C.F.R. § 745.113(c)(1).

Although many landlords are unaware of these lead-based paint rules or chose to ignore them (and enforcement of them generally has not been a regulatory priority), a landlord's failure to follow the rules can subject the landlord to substantial civil penalties imposed by EPA, with potential liability ranging into the tens of thousands of dollars.

E. Tenants in Foreclosed Properties

Residential foreclosures increased dramatically in the United States beginning in 2008, extending to both owner-occupied and leased residences. In the case of leased residences, the tenant often suffered hardships when its landlord was subject to a foreclosure. State and federal authorities responded with legislation intended to protect tenants residing in leased premises that became subject to a foreclosure proceeding. The resultant protections for tenants under North Carolina and federal law often present issues

for parties (including lenders) who become landlords by acquiring residential rental properties in North Carolina through the foreclosure process.

1. Tenant Protections under North Carolina Law

N.C.G.S. § 45-21.17(4) provides that a copy of the notice of sale for a foreclosure on a residential property containing less than fifteen dwelling units must be mailed to any person who occupies the property pursuant to a residential lease, addressed to the premises, and in the name(s) of the tenant(s), if known (and otherwise directed to "occupant" at the premises address). Any tenant with a leasehold interest in such a residential property is then allowed to terminate the lease for their dwelling unit in the property by providing the landlord with a written notice of termination to be effective on a specified date that is at least ten days after the date of the notice of sale. N.C.G.S. § 45-45.2. The tenant is then liable to the landlord only for prorated rent going forward to the specified termination date (and is specifically not liable for any damages relating to early termination of the tenancy). Id.

A party who purchases leased residential rental properties at a foreclosure sale takes title subject to the pending leases in the absence of explicit arrangements (e.g., an assignment agreement with a third party) to the contrary, and is subject under North Carolina law to requirements to give the tenants specified advance notice before bringing a post-foreclosure application seeking an order from the clerk for possession of the leased premises, as the purchaser is entitled to do pursuant to N.C.G.S. § 45-21.29. The purchaser must give the tenant(s) in the premises ten days advance notice before making application to the clerk if the property at issue contains less than fifteen dwelling units, and thirty days advance notice is required for a property containing fifteen or more units.

N.C.G.S. § 45-21.29(k)(5). It should be noted, however, that the requirements of the federal Protecting Tenants at Foreclosure Act (discussed below) currently require far more of landlords in this area than what is mandated by the advance notice requirements of North Carolina law under N.C.G.S. § 45-21.29(k)(5).

2. Tenant Protections Under Federal Law

The Protecting Tenants at Foreclosure Act ("PTFA") was passed by the United States Congress and signed into law by President Obama in 2009. PTFA was originally set to "sunset" at the end of 2012, but Congress acted in 2010 to extend the "sunset" date to the end of 2014. The PTFA's protections for tenants leasing residential properties that are foreclosed on during the tenants' tenancies are more substantial than the protections discussed above under North Carolina law, and to the extent the federal provisions are more stringent than North Carolina law, the federal provisions govern. Although Congress did not act to further extend the December 31, 2014 expiration of the PTFA, the requirements of the PTFA likely continue to apply to currently pending foreclosure actions that were initiated on or before December 31, 2014.

Under PTFA (which is codified at 12 U.S.C. § 5220), a landlord who purchases a residential rental property through a foreclosure sale is required to allow any bona fide tenant(s) residing in the property to remain in possession through the end of the term(s) of their pending lease(s), unless the purchaser will convert the property to use as their primary residence, in which case the tenant(s) are entitled to 90 days notice before they can be required to vacate. In the event the tenants are at-will, month-to-month, or do not have written leases, they are entitled to at least 90 days notice in any event under the PTFA before they can be required to vacate.

The PTFA applies to foreclosure situations only – it does not apply to short sales and other workouts. The purchaser can work around PTFA restrictions by paying the tenant(s) an agreed amount to voluntarily terminate a lease before the lease is set to expire, a practice known as "cash for keys." A tenancy is not "bona fide" so as to qualify for protection under the PTFA if it resulted from a lease of the premises by the mortgagor (former owner who was foreclosed on) to their child, spouse, or parent, or if it resulted from a lease that was not the product of an arms length transaction and/or that specifies a rate of rent substantially below market values. The PTFA does not excuse tenants in foreclosed properties from compliance with their obligations to pay rent, so the landlord is free to commence an eviction proceeding for failure to pay rent against a tenant in default under the lease at any time despite the tenant's protections under the PTFA.

F. Protections for Tenants in Leases with Purchase Options

In 2010, the North Carolina General Assembly amended the North Carolina General Statutes to add Chapter 47G, governing option to purchase contracts executed with lease agreements. The newly added provisions apply to residential lease agreements that are combined with (or executed concurrently with) an option contract for premises that will be occupied by the lessee as its principal dwelling. (These are sometimes referred to as "contract for deed" or "rent to own" arrangements.)

Under the 2010 law, option contracts coupled with residential lease agreements must be in writing and signed by the parties, must contain certain specified information (such as the option sales price and any option fees, conditions resulting in the lessee's forfeiture of the option, and the time period for exercise of the option), and must be recorded (directly or via summary memorandum) by the property owner (the lessor)

within five days of full execution. The new law mandates that the lessee be given one right to cure during any twelve month period before the option can be forfeited, and gives the lessee rights under specified circumstances to cancel the option contract and recoup money paid to the lessor (above and beyond the fair rental value of the premises) for the option. Significantly, the new law provides that a violation of any of its provisions constitutes an unfair and deceptive trade practice under N.C.G.S. § 75-1.1, exposing the landlord to potential liability for treble damages and attorneys' fees. N.C.G.S. § 47G-7.

The relatively new provisions in Chapter 47G are intended to protect tenants who enter into certain "rent to own" arrangements for a primary residence. Many landlords and real estate professionals remain unaware of the new provisions and the potential liability they now face in the event they fail to comply with the provisions, including for example the requirement that an option executed concurrently with a residential lease be recorded.

G. Notice Requirements Relating to Expiration of the Lease's Term

A tenant in possession pursuant to a periodic tenancy (rather than a fixed-term tenancy) that is not in default of its obligations under the lease is usually entitled to receive minimum advance notice before the landlord can terminate the lease upon the expiration of a periodic term. Likewise, the landlord also is entitled to minimum notice from the tenant in advance of the expiration of the period if the tenant wants to terminate a periodic lease before it renews for another period. A landlord or tenant desiring to terminate a residential lease in connection with the impending expiration of a periodic term accordingly must be cognizant of the advance notice it is required to furnish. Otherwise, if the landlord or tenant fails to give the required notice in time, the lease will

typically continue for at least one additional period. If the lease specifies procedures for notice of termination of a periodic tenancy, then those procedures govern. See Stanley v. Harvey, 90 N.C. App. 535 (1988) ("the parties' lease may require a notice of termination that differs both in type and extent from that allowed under Section 42-14"); Cherry v. Whitehurst, 216 N.C. 340, 343 (1939)(42-14 does not prevent agreement for different notice arrangements because the provisions of 42-14 are permissive).

On the other hand, if the lease for a periodic tenancy does not address the issue of advance notice of termination, then the amount of notice required depends on the lease's period, as specified by N.C.G.S. § 42-14. The advance notice required by section 42-14 is as follows: for a year-to-year lease, one month or more before the end of the current year of the tenancy; for a month-to-month lease, seven days or more before the end of the current month of the tenancy; for a week-to-week lease, two days or more before the end of the current week of the tenancy. (Note that despite these rules, there is a special rule under section 42-14 for mobile home lots subject to periodic tendency, requiring notice at least 60 days before the end of the current rental period, regardless of the length of the tenancy. Also, 180 days advance notice is required from a landlord who operates a mobile home community and plans to convert the land used for that purpose to a different purpose. See N.C.G.S. § 42-14.3.)

If a party's notice of termination fails to comply with the lease's advance notice provisions (or in the absence of such provisions, the rules of N.C.G.S. section 42-14), then the tenancy will continue for an additional period, with the tenant required to pay rent at the normal rate for that period and otherwise adhere to the terms and conditions of the lease. The courts are not likely to be sympathetic to landlords who fail to adhere

rigidly to notice requirements for lease termination. See Stanley v. Harvey, 90 N.C. App. 535 (1988) (when termination of lease depends on notice, notice must be in "strict compliance" with lease as to "both time and contents"). Notice of termination may be given in the alternative, however, directing the tenant to, for example, sign a new lease or vacate at the expiration of the current term. Cla-Mar Management v. Harris, 76 N.C. App. 300, 304 (1985).

If a lease is for a fixed term of one year or more, and contains no express provisions to the contrary, North Carolina law calls for a presumption that a year-to-year tenancy results when the landlord allows the tenant to hold over (by not pursuing summary ejectment against the tenant and continuing to accept rent). Coulter v. Capitol Finance Co., 266 N.C. 214 (1966). As a practical matter, this means that a tenant in possession under a lease for a fixed term of one year will be able to stay on for an additional year, absent express lease provisions to the contrary, if the landlord acquiesces in the tenant's ongoing possession and accepts rent from the tenant for a period beyond the initial year. If a tenancy at will exists (usually due to a holding over situation), and the lease does not specify the advance notice required to terminate under those circumstances, only "reasonable" notice is required. Choate Rental Co. v. Justice, 212 N.C. 523 (1937).

H. Abandoned Personal Property Left Behind by Tenants

A frequent issue for landlords is what to do with a tenant's equipment and/or personal property remaining in the premises after the tenant abandons, is dispossessed (via ejectment) or vacates at the expiration of the lease's term. There are multiple statutory provisions relating to these issues, including one from a relatively new law that

applies upon execution of a writ of possession to enforce a judgment for possession obtained through a summary ejectment proceeding filed on or after September 1, 2013. The new law amends N.C.G.S. § 42-25.9(g) to reduce from ten days to seven days the amount of time a landlord needs to wait, after being placed in possession by execution on a writ, before the landlord can dispose of a tenant's personal property remaining on the premises in accordance with N.C.G.S. § 42-36.2, if the landlord desires to handle disposal. The recent amendment therefore reduces the number of days the landlord must wait to dispose of the property itself, but it does not eliminate the existing procedural requirements the landlord must follow under N.C.G.S. § 42-36.2 before disposing of a tenant's personal property after executing on a writ of possession. Instead, the 2013 legislation amends N.C.G.S. § 42-36.2 to clarify that after being placed in possession pursuant to a writ, the landlord must first offer to release the tenant's personal property (to the tenant) if the landlord wishes to thereafter dispose of the personal property under N.C.G.S. § 42-25.9(g) upon the tenant's failure to retrieve it. Landlords taking advantage of N.C.G.S. § 42-25.9(g) to handle disposal of a tenant's property themselves therefore must remain cognizant of their ongoing need to also comply with N.C.G.S. § 42-36.2.

Under N.C.G.S. § 42-36.2, a landlord retaking possession through execution of a writ has several options for handling personal property left behind by a tenant because the tenant is not present or refuses to remove its remaining items when the sheriff's deputy is onsite to conduct a lockout. First, the landlord may have the sheriff remove the items and store them in a nearby storage warehouse at the landlord's expense. (The sheriff has discretion to require the landlord to advance the transportation expenses plus the fee for one month's storage.) Alternatively, the landlord may request that the sheriff padlock the

premises with the personal property remaining in place. For seven days from the date of execution, the landlord is allowed (but not required) to move tenant's items from the premises into storage, and during that same period is required to release the items to the tenant (from the premises or the storage warehouse) upon the tenant's request and during normal business hours or at a mutually agreed time. After the seven day period expires, and if the landlord has made an offer to the tenant to release the property but the tenant has failed to retrieve it, then the landlord is allowed to dispose of the contents, and apply any sales proceeds against the landlord's costs of obtaining and executing on the judgment for possession, in accordance with detailed provisions set forth in N.C.G.S. § 42-25.9(g). An exception to the procedures mandated by N.C.G.S. § 42-36.2 applies under N.C.G.S. § 42-25.9(h) if the value of the property in the premises at the time of the sheriff's execution is $500 or less (increased from $100 or less several years ago), in which case a five-day period applies for the tenant to retrieve the items.

Items not retrieved by the tenant within the applicable period (five days for items collectively worth $500 or less and seven days otherwise) become subject to a lien for costs relating to the ejectment and storage of the items, and the landlord may thereafter elect to sell the items at a public or private sale upon seven days written notice sent to the tenant's last known address, which notice can run concurrently with the seven-day post-execution waiting period. The landlord is then entitled to apply the sale proceeds against its losses for unpaid rent, the costs of the sale, storage fees, damage to the premises, with any remaining proceeds thereafter returned to the tenant if the tenant requests such a refund within seven days of the date of the sale, and otherwise paid over to the county government for the county in which the premises at issue are located.

Separate provisions under N.C.G.S. § 42-25.9(d) allow slightly different treatment if the tenant abandons personal property in the premises in the absence of a summary ejectment proceeding, or refuses to remove personal property when the sheriff executes on a writ of possession, and the property left behind is worth $750 or less (increased from $500 in 2012). Under those circumstances, the landlord may choose to immediately donate the items to a non-profit that typically sells such used items, provided the non-profit allows for a thirty-day "holding" period for the tenant to claim the items and the landlord provides specified notice to the tenant by posting and by mail. (There are separate provisions on this topic that apply specifically to personal property abandoned by a tenant in a mobile home.)

In 2012, the General Assembly enacted a new provision, codified at N.C.G.S. § 28A-25-7, pursuant to which the landlord of a deceased residential tenant who is the "sole occupant" of the dwelling unit at issue is allowed to dispose of the deceased tenant's personal property without the need to file a summary ejectment action and execute on a judgment for possession first, provided the landlord (i) has not been contacted by any representatives or heirs of the deceased tenant and (ii) adheres to detailed pre-disposition notification and storage procedures. A simpler procedure involving donation of the personal property items to a non-profit organization willing to store them for thirty days applies if the deceased tenant's property is worth $500 or less. (A cross-reference to the new procedure under N.C.G.S. § 28A-25-7 was added to Chapter 42 via a new subsection, N.C.G.S. § 42-36.3.)

For commercial leases, the "landlord's lien" statute (N.C.G.S. § 44A-2(e)) applies, allowing the landlord to assert a lien in and sell a tenant's property if the property

remains on the premises at least 21 days after the tenant has vacated (or remains after the landlord obtains an order for possession of the premises) and the landlord has a "lawful claim for damages against the tenant." The amount of the lien is limited to an amount adequate to cover overdue back rent, damages to the premises, and future rent for up to 60 days from the date that the tenant vacated. Personal property subject to the "landlord's lien" is to be sold via a public sale procedure involving detailed advertising and other requirements, unless it is worth less than $100, in which case it can be donated to a charitable institution five days after the tenant vacates. The "landlord's lien" is subordinate to perfected security interests in the tenant's property, which often limits its value to landlords as a practical matter.

Evictions – Working Around Excuses and Traps to Legally Dispossess a Tenant in Default

It is important for landlords to realize that the eviction process starts well before an eviction lawsuit is filed in court, and that the landlord-tenant dynamics and communications preceding the filing of the eviction action can play a major role in determining whether or not the end result of the process is a good result for the landlord. This section of the materials accordingly discusses pre-eviction considerations and aspects of laying the advance ground work for a successful eviction before it covers the mechanics of the eviction lawsuit itself.

A. Pre-Eviction Assessment, Part I – What *Exactly* Does the Landlord Want?

Every eviction proceeding begins with a landlord's assessment that it has a serious problem with a particular tenant, and landlords ordinarily do not discover the need to evict a tenant overnight. Usually, the relationship has been troubled for some time. And usually, there have been prior communications and friction between the tenant and the landlord. As soon as a landlord believes it might be developing a problem with a tenant, its first priority needs to be to review the lease and carefully evaluate (possibly with legal counsel) the full scope of the issues of concern and the tenant's default, if any. Not every action by a tenant that troubles a landlord will constitute a default under the lease, and conversely not every lease default by a tenant may be troubling to the landlord.

Although many evictions are the result of a tenant's non-payment of rent, a substantial number of evictions are based on other tenant defaults under both residential and commercial leases. Whether or not a tenant is in default based on a particular set of circumstances is usually determined by the terms of the lease, not merely by operation of

law. This is one of many reasons that a written lease is almost always preferable to an oral lease, although "gray areas" are common even with well-drafted written leases. If a landlord is in doubt as to whether or not specific circumstances qualify as default under the terms of the lease, it is usually better for the landlord to err on the side of sending an appropriate written communication to the tenant about the issues and then evaluating the tenant's response. Typically, leases will not contain any provision punishing the landlord for issuing a misguided notice of default, and a notice of default that is not warranted will often lead to a productive conversation with the tenant about the situation.

A landlord usually has multiple remedies it can employ in the event of a tenant's breach of the lease. Just because a remedy is available, however, does not mean that it is prudent for the landlord to exercise it, at least initially. The landlord's approach is often governed not just by the terms of the lease and the law (determining available remedies) but by business considerations relating to the tenant, the premises, and the landlord. It is not unusual for some legally-available remedies to be counterproductive on a practical business level, and the landlord needs to assess business issues before acting. Common considerations include: Does the landlord simply want the tenant to pay up on the rent or to stop certain conduct, or does the landlord just want the tenant out no matter what? Does the landlord want to ensure that the tenant's finances remain viable (so it can continue to pay rent)? Does the landlord want to spend money on legal fees and risk being countersued? Does the landlord believe the tenant would be "judgment proof" in the event it sues the tenant and recovers a money judgment? Does the landlord have a duty to mitigate? What are backfill options? What is the upfit situation? What does the

landlord know about the tenant's finances? Does the landlord have a broader business relationship with the tenant that the landlord wants to avoid jeopardizing?

An example of business considerations overriding legal options involves the common situation of a tenant's failure to pay rent in full and on time. Many landlords would not threaten (much less seek) to evict a good, long-term tenant merely because a single monthly rent payment is not received on time, without having a dialogue with the tenant about it first and attempting to work with the tenant to address the underlying issues. Similarly, a good, long-term tenant's slight underpayment of rent for several months in a row is something that some landlords would tolerate in some circumstances in the interest of retaining the tenant. However, even if the landlord elects to not invoke legal remedies against a tenant in light of business considerations, the landlord should usually document the circumstances in writing with the tenant to clarify that the landlord's accommodation of the tenant does not constitute a waiver of the landlord's rights (beyond the extent intended by the landlord).

B. Pre-Eviction Assessment, Part II – What Remedies are Applicable/Available?

After a landlord has carefully assessed the issues of concern to it and the preferred resolution to the issues, the next step is to consider (again possibly with legal counsel) the remedies that are potentially available to the landlord under the terms of the lease and applicable law. Common remedies that might be available to a landlord in the event of problems with a tenant include: assessment of late fees and/or interest, issuance of notice to trigger tenant's right to cure, application of a security deposit being held by the landlord, termination of the tenant's leasehold interest and re-entry, assessment of liquidated damages, termination of the lease, institution of eviction proceedings to seek

possession and a modest amount of money owed, self-help, and filing of a collections action seeking to recover money owed by the tenant. The terms of the lease often govern the remedies that are available. Applicable law also controls the availability of many remedies, however. For instance, as is discussed further below, there are four categories of tenant conduct on which a landlord can base an eviction action under North Carolina law, a statutory paradigm that lease terms cannot override.

C. Documentation of Default and Pre-Eviction Notices to Tenant

Depending on the landlord's objective and expectations, and the requirements of the lease, the tone, content, and substantive specificity of notice to the tenant can be very important. A landlord therefore should carefully evaluate its objectives and options before sending any demand or notice of default, termination, or exercise of remedies to a tenant. If the landlord's objective is to regain possession of the premises via eviction, the landlord must consider which of the authorized bases for an eviction it expects to rely on, and tailor its notice to the tenant accordingly. If, on the other hand, the tenant has already vacated and the landlord anticipates a collections action to recover money owed by the tenant under the lease (but no judgment for possession is needed), other considerations will apply. And if the landlord does not anticipate either imminent eviction or collections proceedings, but just wants to nudge the tenant along toward curing a default, then the form of the communication will be less constrained legally but perhaps more diplomatic.

1. Form and Timing of Pre-Litigation Notices to the Tenant

If a landlord believes a particular situation is likely to result in the filing of an eviction lawsuit, it important for the landlord to be deliberate about "advance communications" preceding a potential eviction, not only so as to maximize the

likelihood that the communications will lead to improved lease compliance by the tenant and stabilization of the landlord's relationship with the tenant, but also to ensure that if the landlord ultimately needs to take legal action, it will be poised to prevail and accomplish its objectives in the courtroom. Communications of default, legal demands, and notifications of the landlord's exercise of remedies, such as notice of termination of the lease, all go hand-in-hand with legal action. Although the landlord sometimes simply wants to communicate for administrative purposes or to nudge a tenant toward compliance, on other occasions the landlord's primary reason for engaging in communications with the tenant is to lay the groundwork for imminent legal action.

Typically, a landlord should notify a tenant of the landlord's position on a lease-related issue (e.g., that the tenant is in default) in writing and as soon as possible once the circumstances at issue come to the landlord's attention. The law itself generally does not require a landlord to supply written notice to the tenant (one notable exception exists for residential leases for federally-subsidized public housing), but as a practical matter, reliance on oral notice is usually not prudent. Moreover, most commercial leases and many residential leases do require written notice. Even if the lease at issue does not require written notice, written notice constitutes far superior evidence compared to the landlord's word against the tenant's word should litigation ensue and the sufficiency of notice be challenged.

A common question is whether a landlord needs to take steps to prove that notice was actually received by the tenant. Depending on the circumstances, proof of receipt is advisable, but under North Carolina law, it is not required. Instead, proof that notice was issued (e.g., via mail) by the landlord will generally suffice. See Main Street Shops, Inc.

v. Esquire Collections, Ltd., 115 N.C. App. 510 (1994)(holding that demand was adequate when landlord mailed notice to the address specified in the lease, but tenant did not claim the mail, when lease specified written notice of default by mail). Another issue is where the landlord needs to send the notice. With residential leases, written notice will typically be directed to the premises. If a commercial lease is involved, however, it is very important to consult the terms of the lease and send the written notice to the notice address specified by the lease, which is not always the premises address. Notice may be required to corporate headquarters, a registered agent, a franchisor, or to the tenant's offices at a location other than the premises. Notice also might be required to an obsolete address that the landlord knows is no longer viable for contact with the tenant, but if that address remains the notice address specified under the lease because the tenant has not updated it, the landlord should issue notice to the obsolete address regardless to maintain compliance with the terms of the lease. Moreover, if the landlord's objective is to have a tenant that is in default cure the default, notice to the guarantors (if any) can be helpful as well, even if not required.

In evaluating how to handle notice to a tenant, a landlord must be aware of any lease terms that allow the tenant an opportunity to cure upon issuance of notice. Many commercial and some residential leases allow a tenant to cure its default within the elapse of a specified time from the landlord's issuance of notice of the default to the tenant. Some commercial leases will further provide that the tenant is to be given only a limited number of opportunities to cure upon notice of default, and if that is the case, then the importance of written notice of default is magnified because the landlord will have a difficult time proving that the tenant has exhausted its allocation of cure opportunities

without documentation that can be used to quantify previous occasions on which the tenant was given an opportunity to cure.

In addition to being cognizant of legal requirements for required elements of notice to a tenant in certain circumstances, a landlord must also be cautious that its tenant communications not be misleading, unduly oppressive, or otherwise inappropriate because North Carolina law allows even "amateur" landlords that rent just a single residential property to be sued for "unfair and deceptive trade practices" pursuant to Chapter 75 of the North Carolina General Statutes, Stolflo v. Kernodle, 118 N.C. App. 580 (1995), and it is not uncommon to see a tenant who is sued counterclaim back against the landlord under Chapter 75 based on the landlord's business practices (including communications), which allows a prevailing tenant the potential opportunity to recover treble damages and attorney fees from the landlord. See, e.g., Stanley v. Moore, 339 N.C. 717 (1995). A landlord should be aware that any written communication with a tenant could become evidence considered by a judge or jury, and communications that are disrespectful, profane, or unnecessarily hostile are ill-advised.

2. Notice Required to Initiate an Eviction

Once the landlord has fully assessed the extent of the problem (including whether the lease has been breached and how), reviewed its options/remedies, evaluated business considerations, and determined that evicting the tenant is its preferred approach for addressing the circumstances, strategic written communications consistent with that preferred approach are critical. Case law has established that North Carolina's "courts do not look with favor on lease forfeitures," Couch v. ADC Realty Corp., 48 N.C. App. 108, 114 (1980), and consequently "[w]hen termination of a lease depends upon notice, the

notice must be given in strict compliance with the contract as to both time and contents." Stanley v. Harvey, 90 N.C. App. 535 (1988). It is therefore very important for the landlord to carefully consult and comply with lease provisions governing notice of default in order to position itself for a successful summary ejectment action.

a. Demand for rent (under a lease that does not explicitly authorize termination/re-entry for failure to pay rent)

If the tenant is behind on rent and the landlord expects to pursue summary ejectment, it is important for the landlord to consult the applicable lease terms (if any) governing advance notice and opportunity to cure for non-payment of rent. If the lease does not contain provisions authorizing or governing forfeiture for tenant's non-payment of rent, then North Carolina law requires a demand by the landlord to the tenant for all overdue rent, followed by a 10-day cure period, as a prerequisite to action by the landlord to dispossess the tenant. N.C.G.S. § 42-3. North Carolina's courts have ruled that such a demand for rent must be specific. As one reported decision explains, the demand for rent under Section 42-3 must include "a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent." Snipes v. Snipes, 55 N.C. App. 498, 504 (1982)(landlord's statement that they "wanted to get all this business settled" was not an adequate demand).

b. Notice of lease termination (to allow summary ejectment based on tenant's holding over or breach of an explicit lease condition implicating forfeiture)

If the lease does contain explicit provisions concerning forfeiture for tenant's non-payment of rent, then those provisions govern, as to provision of advance notice, opportunity to cure, and other specific issues. If these provisions are such that termination of the lease for non-payment of rent (or holding over) is at landlord's option

and therefore not automatic, notice of termination of the lease must be given to the tenant before the landlord can bring a valid summary ejectment action, as the tenant's estate must have "ceased" before the summary ejectment action is brought. See Stanley v. Harvey, 90 N.C. App. 535 (1988) (notice requesting that tenant "vacate" did not suffice as notice of termination of lease to enable successful summary ejectment action). Any communication from a landlord to a tenant intended to facilitate summary ejectment for the tenant's holding over or breach of a lease condition should accordingly contain a clear statement of the landlord's termination of the lease, as such notice of termination is a prerequisite to bringing the summary ejectment action. Id.

c. Demand for Surrender of Possession

Moreover, the summary ejectment statute requires that before filing for summary ejectment based on the tenant's breach of a lease condition or the tenant's holding over, the landlord must make a "demand for surrender" to the tenant. See N.C.G.S. § 42-26. Consequently, any communication from a landlord to a tenant intended as an imminent precursor to summary ejectment for the tenant's holding over or breach of a lease condition should include a straightforward demand that the tenant surrender the premises.

d. Notice When Landlord Intends to Seek to Recover Money Owed in Addition to Possession of the Premises

If the landlord plans to use an eviction action to dispossess a tenant and also to recover money it is owed by a tenant (or if a landlord is bringing an action against a tenant exclusively for money owed, either because (i) the landlord wants the money but does not want to dispossess the tenant or (ii) the tenant has unilaterally vacated and abandoned possession), the landlord also needs to consider the written notice required to maintain its ability to collect an award of reasonable attorneys' fees as part of the money

judgment if the lease allows for the recovery of attorneys' fees. Many commercial leases and some residential leases allow for the landlord's recovery of "reasonable attorneys' fees" in the event of legal action necessitated by a tenant's default, without specifying that such fees are to be the actual fees incurred or how the magnitude of such "reasonable" attorneys' fees is to be quantified. Section 6-21.2 of the North Carolina General Statutes provides that in instances involving action to recover a balance owed on "any note, conditional sale contract, or other evidence of indebtedness," presumptive attorney fees of 15% of the "outstanding balance" owed on the contract can be recovered from the obligee, but only if the obligor notifies the obligee that (i) the contractual provisions concerning payment of attorneys' fees in addition to the amount of the "outstanding balance" will be enforced, and (ii) the obligee is allowed five days from the obligor's mailing of such notice to avoid liability for the attorneys' fees by paying off the full outstanding balance during that five-day period.

Recent North Carolina case law reaffirms that N.C.G.S. § 6-21.2 does apply to written leases of real property, allowing a landlord bringing a collections action to recover presumptive attorneys' fees of 15% of the money owed by the tenant if the lease at issue provides for the recovery of "reasonable attorneys' fees" by the landlord in the event of legal action resulting from tenant's default. See WRI/Raleigh, L.P. v. Shaikh, 183 N.C. App. 249, 257-58 (2007)(commercial lease agreement was "evidence of indebtedness" triggering applicability of § 6-21.2 and allowing plaintiff to collect attorneys' fees equal to 15% of the landlord's damages for unpaid future rent). To qualify for a presumptive award of attorneys' fees under Section 6-21.2 equal to 15% of the money owed by the tenant in connection with a lease that allows for the landlord's

recovery of "reasonable attorneys' fees," the landlord must send a written notice to the tenant alerting the tenant of their option to avoid the presumptive 15% attorneys' fees by paying off the full delinquency within 5 days of the mailing of the notice.

D. Summary Ejectment – the Eviction Proceeding in North Carolina

Laws governing a landlord's eviction of a tenant vary widely from state to state. Although the term "eviction" is often used informally in North Carolina, the legal procedure available to North Carolina landlords to dispossess a tenant is formally known as "summary ejectment." The summary ejectment process in North Carolina is prescribed by statute, and over the years reported decisions from North Carolina's appellate courts have clarified a number of the applicable statutory provisions. If the lease at issue is commercial rather than residential, however, the landlord might have options to evict a tenant beyond the statutory summary ejectment process, which was drafted primarily with residential leases in mind but nonetheless also applies to commercial leases.

Recognizing that a landlord should be able to regain possession of its property in an expedited fashion in certain circumstances to avoid the premises being held "hostage" by a tenant unlawfully in possession ("possession is nine-tenths of the law"), the North Carolina General Assembly codified a procedure for summary ejectment into Article 3 of Chapter 42 of the North Carolina General Statutes. Although other options are not precluded for commercial leases, North Carolina law (N.C.G.S. § 42-25.6) provides that Article 3 of Chapter 42 furnishes the landlord's exclusive remedy for situations arising under a residential lease. Despite this, Article 3 does not contain everything that a landlord needs to know to bring a viable action for summary ejectment, and knowledge

of procedural rules contained in other statutes is vital lest the landlord find itself saddled with a "not-so-summary ejectment" ordeal that drags out and frustrates the landlord's ability to gain control of the premises and rent them to a new tenant.

A fundamental distinction relating to summary ejectment procedure in North Carolina (and many states) is the difference between the landlord's remedy to regain possession of the premises and the landlord's remedy to recover money damages for the tenant for rent due under the lease. A summary ejectment action in North Carolina will always seek possession of the premises. Subject to important limitations, however, the landlord has the additional option of using the same summary ejectment action to also seek to recover money that it is owed by the tenant under the lease. Although the Chapter 42 summary ejectment procedure therefore allows the landlord to couple (to an extent) an action to recover monetary damages with an action for possession, the statutory action is more oriented towards regaining possession.

Before filing a summary ejectment lawsuit in court, the landlord or its legal counsel must consider whether certain basic "prerequisites" have been met. These prerequisites include whether the proper parties are involved, whether the tenant's alleged conduct is of a type that warrants for summary ejectment, and whether sufficient advance notice was given to the tenant before filing.

1. Prerequisite #1 – A Landlord-Tenant Relationship Among the Parties Warranting Chapter 42 Summary Ejectment

Certain threshold jurisdictional requirements need to be met in order for a party to bring a Chapter 42 summary ejectment action in the first place. The most fundamental threshold requirements relate to the role of the parties. Obviously, the plaintiff should be a "landlord" and the defendant should be a "tenant." The roles of the participants

sometimes defy simple categorization in practice, however, and the precise identities of the plaintiff(s) and defendant(s) in summary ejectment proceedings are important because North Carolina law limits the availability of summary ejectment to relatively narrow circumstances.

a. A Direct Landlord-Tenant Relationship Must Exist Between the Parties.

A valid claim for summary ejectment pursuant to Chapter 42 can only be made in the context of a landlord-tenant relationship. See College Heights Credit Union v. Boyd, 104 N.C. App. 494 (1991); Jones v. Swain, 89 N.C. App. 663 (1988). Although North Carolina's jurisprudence has not established a specific definition of "landlord-tenant relationship," it is clear that the tenant must enter into "possession under some contract or lease, either actual or implied with the supposed landlord," Jones, 89 N.C. App. at 668, which contract is evidenced by some consideration, typically the payment of rent. Hayes v. Turner, 98 N.C. App. 451, 454 (1990). In practice, a number of situations arise requiring consideration of how this fundamental premise applies to the facts at hand. For example, an action for summary ejectment can be filed by a landlord against an authorized assignee, because the authorized assignee has a direct relationship with the landlord (via the assignment agreement, which essentially renders the assignee a tenant of the landlord). Conversely, a landlord cannot bring a viable summary ejectment action naming only an unauthorized assignee (essentially a trespasser) as the defendant because the unauthorized assignee lacks a landlord-tenant relationship with the landlord.

Similarly, a landlord cannot bring a viable summary ejectment action directly against a sublessee because the sublessee is not a tenant of the landlord. Instead, the landlord desiring to remove a sublessee from the premises would need to bring a summary ejectment

action naming the landlord's direct lessee as the defendant, and upon prevailing, the landlord could dispossess the sublessee, because a judgment for possession against a tenant allows removal of not just the tenant, but anyone present on the premises via the tenant's status, including sublessees, unauthorized assignees, and guests. See Stone v. Guion, 223 N.C. 831 (1944). It is worth noting that although a summary ejectment action will not lie against an unauthorized assignee/trespasser, N.C.G.S. § 42-4 expressly allows a property owner to bring an action for recovery of fair rental value against a permissive occupier in the absence of a valid lease, and such an action could enable the owner to recover compensation for up to three years of occupancy by the defendant based on the limitations period. See Simon v. Mock, 75 N.C. App. 564 (1985). An equitable action for unjust enrichment (*quantum meruit*) also may be an option for recovering money owed.

The restriction of the summary ejectment process to the landlord-tenant relationship also precludes invocation of Chapter 42 to resolve situations involving: a live-in caretaker refusing to leave the premises after the elderly gentleman she was taking care of died (In re Estate of Hawkins, COA 07-1149 (unpublished), N.C. App. (2008)); heirs occupying a decedent's property that other heirs claim an exclusive right of possession for (Hayes v. Turner, 98 N.C. App. 451 (1990)); occupancy based on an employer-employee relationship (e.g., on-site manager of a self-storage business); a mortgagee seeking to dispossess a mortgagor (i.e., foreclosure); a purchaser under a real estate purchase contract seeking to obtain possession from the seller who fails to deliver the property in accordance with the terms of the contract; or a seller seeking to recover possession from a defaulting buyer under an installment land sales contract. The

aggrieved party in these situations enjoys legal recourse to obtain possession, but not via summary ejectment.

b. The Summary Ejectment Action must be Filed in the Name of the Real Party in Interest.

Summary ejectment actions are not exempt from Rule 17(a) of the North Carolina Rules of Civil Procedure, which requires that a civil action be prosecuted by a party with a tangible stake in the outcome such that they will be directly benefited or burdened by a favorable or adverse judgment. As a practical matter, this rule means the owner of the property at issue (not the management company retained by the owner) must be named as the plaintiff in the summary ejectment proceeding. This also means that it is important for legal counsel to properly identify the correct "special purpose entity" (often a limited liability company) set up to own the particular shopping center or office park at issue, not the parent company, as the plaintiff on an ejectment complaint for commercial premises. Although the owner of the premises must be identified as the plaintiff on the summary ejectment complaint, a non-attorney agent of the owner with personal knowledge of the facts is allowed to sign the complaint. See N.C.G.S. § 7A-223. (This is the closest one can come in North Carolina to legally practicing law without a license.)

2. Prerequisite #2 – Conduct Justifying the Filing of a Summary Ejectment Action

Under North Carolina's prescribed statutory procedure, all evictions must be "for cause" and there are **four categorical bases** entitling a landlord to summarily eject a tenant for cause. Although a commercial lease may allow for additional options (see discussion below), every action by a landlord to evict a residential tenant and any action relying on the Chapter 42 summary ejectment procedure (as opposed to other remedies)

to evict a commercial tenant must be based on one of the four scenarios that are addressed separately below:

a. Ejectment for failure to pay rent under a lease lacking express remedies for nonpayment of rent (N.C.G.S. § 42-3)

Strangely, the most intuitive and commonly cited basis for summary ejectment actions in North Carolina – general failure by the tenant to pay rent – is not explicitly covered by Article 3 itself. It is not unusual for attorneys (and non-attorneys) who are unfamiliar with summary ejectment work in North Carolina to be confused by this – on its face, the "summary ejectment statute," Article 3 of Chapter 42, fails to identify non-payment of rent as a basis for dispossessing a tenant. Instead, a landlord's prerogative to evict a tenant for non-payment of rent is contained elsewhere, in N.C.G.S. § 42-3, which is part of Article 1 of Chapter 42.

Section 42-3 is actually a remedial provision that implies a right of forfeiture for leases (of questionable draftsmanship) that fail to contain explicit provisions allowing for lease termination and/or re-entry by the landlord in the event that the tenant fails to pay rent. See Ryan v. Reynolds, 190 N.C. 563 (1925). Therefore, if a lease contains explicit provisions governing forfeiture of term should rent not be paid, those provisions will trump Section 42-3. Stanley v. Harvey, 90 N.C. App. 535 (1988). And Article 3 itself does contain a provision (N.C.G.S. § 42-26(a)(2)) allowing summary ejectment for breach of a lease condition that, according to the lease, can be a basis for forfeiture. Therefore, if a lease specifies that the tenant's leasehold interest in the premises will be forfeited 20 days following written notice of default for non-payment of rent unless the default is cured within those 20 days, then that provision trumps Section 42-3, and a summary ejectment action can be brought for breach of that lease condition – not based

on N.C.G.S. § 42-3, but instead based on N.C.G.S. § 42-26(a)(2). (This distinction is significant to the availability to the tenant of the defense of "tender" under N.C.G.S. § 42-33, discussed infra.)

Although this provision implying a right of termination and re-entry for landlords when a tenant fails to pay rent is contained in Article 1 rather than Article 3, case law clarifies that Article 1 works in tandem with the summary ejectment process provided for in Article 3. Charlotte Office Tower Assocs. v. Carolina SNS Corp., 89 N.C. App. 697 (1988). Section 42-3 will only imply a right of forfeiture for non-payment of rent in leases that require the payment of rent at a definite time, although Section 42-3 applies to both oral and written leases.

In order to invoke section 42-3 to dispossess a tenant, a landlord is required to follow certain steps before initiating a summary ejectment action. The landlord (or its agent) must make an advance demand for rent on the lessee, and the demand must be "for all past-due rent," meaning the full amount of the delinquency to date (not just the amount overdue for the most recent period). After such a demand for rent is made by the landlord, the landlord must wait 10 calendar days before filing a summary ejectment proceeding. Note that the demand is to be made on the lessee, which may not be the same as the current occupant of the premises in the event of a sublease or assignment.

Decisions from North Carolina courts over the years have clarified a number of issues relating to the 10-day demand for rent required by Section 42-3. The demand for rent can be either oral or written (the latter is advisable for ease of proof), but must be affirmative and not vague – "a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent, is necessary." Snipes v. Snipes, 55 N.C.

App. 498, 504, aff'd, 306 N.C. 373 (1982)(landlord's statement to tenant that they "wanted to get all this business settled" was not an adequate demand). Section 42-3 keys the 10-day period on the landlord's making of the demand for rent, not necessarily the tenant's receipt of it, and North Carolina case law reinforces that proof that notice was furnished (e.g., via mail) by the landlord will generally suffice. See, e.g., Main Street Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510 (1994)(holding that demand was adequate when landlord mailed notice to the address specified in the lease, but tenant did not claim the mail, when lease specified written notice of default by mail).

It is important to note that regardless of the extent to which a lease characterizes obligations for the tenant to pay for water and sewer service as rent, the summary ejectment statute does not allow a landlord to evict a tenant for non-payment of costs owed by the tenant for sub-metered water or sewer service offered by the landlord to the tenant. See N.C.G.S. § 42-26(b). Moreover, payments received from a tenant must be applied toward delinquent rent before being applied to delinquent charges for sub-metered water and/or sewer, unless the tenant specifies to the contrary. Id. Although a landlord therefore cannot evict a tenant for non-payment (usually non-reimbursement) of sub-metered water and/or sewer charges, a landlord can sue a tenant in possession for money owed to collect for such charges.

b. Ejectment for tenant's breach of a lease condition for which re-entry is specified (N.C.G.S. § 42-26(a)(2)).

A second basis for summarily ejecting a tenant under North Carolina law is if the tenant breaches a condition that the lease expressly provides will result in termination of the tenant's leasehold estate (forfeiture of the lease term), either automatically, or at the landlord's option. The most common example of this sort of condition are lease

provisions providing for termination if the tenant fails to pay rent in a timely fashion, typically following notice to the tenant and expiration of a cure period. (If this sort of condition is not written into a lease, then, as discussed above, Section 42-3 will imply it into the lease.) Other common examples of this sort of condition include conditions relating to criminal activity on the premises, which are particularly important for commercial leases because the provisions of Article 7 (discussed below) authorizing ejectment for criminal activity in the absence of explicit lease provisions apply to residential leases only. (If a residential lease does contain conditions relating to ejectment for criminal activity, however, they cannot be in conflict with Article 7.) A third example, prevalent in commercial leases, is an express right of re-entry for the landlord in the event of breaches of lease conditions relating to operational default and/or unauthorized assignment.

One trap landlords must be aware of concerning ejectment for breach of a lease condition allowing termination at the landlord's option is that appropriate notice of termination must be furnished by the landlord to the tenant before the summary ejectment action is initiated, because the statute specifies that the tenant's estate must have "ceased" in order for Section 42-26(a)(2) to be applicable. See Stanley v. Harvey, 90 N.C. App. 535 (1988). If applicable lease provisions establish that termination of the leasehold estate is automatic upon breach of the specified condition, then the estate will have "ceased" regardless of notice of termination by the landlord, and notice of termination to the tenant is not required as a prerequisite to invocation of Section 42-26(2). Id. On the other hand, if the lease merely gives the landlord the option to reenter if the tenant

engages in the proscribed conduct, then the landlord must notify tenant of its election to reenter before bringing an action for summary ejectment under Chapter 42.

c. Ejectment for tenant's holding over following expiration of the lease's term (N.C.G.S. § 42-26(a)(1)).

A third basis for summarily ejecting a tenant under North Carolina law lies when the tenant holds over and continues to occupy the premises after the lease's term expires. Before filing a summary ejectment action predicated on this subsection, a landlord must ensure that the lease has terminated, resulting in a holdover situation. Whether a lease has terminated often involves notice issues, particularly if the tenancy at issue is a periodic tenancy rather than a tenancy for years. If the lease terms do not specifically address notice of termination, then North Carolina law (N.C.G.S. § 42-14) will supply presumptive advance notice requirements for termination. Moreover, a landlord who accepts rent from a tenant who holds over needs to be aware of lease provisions governing the consequences of that, and also of what will be implied by law should rent be accepted in the absence of explicit lease provisions addressing the consequences.

To prevail in a summary ejectment proceeding based on the tenant holding over, the landlord must prove that it gave adequate advance notice to the tenant that the lease would terminate at the end of the applicable term, and that the tenant did not vacate the premises at the end of the term. In holdover cases, money damages for the holdover period are determined by the "fair rental value" for the premises. Seligson v. Klyman, 227 N.C. 347, 349 (1947). The "fair rental value" will often be the lease rate (including any specified "holdover rate," often 150% of the base rent at the end of the lease's term), but the lease rate is not necessarily dispositive on the issue. For obvious reasons, a tenant who is holding over may not avoid landlord's procurement of an order for possession by

tendering rent pursuant to N.C.G.S. § 42-33. Sometimes a lease (usually a commercial lease) will allow a landlord the right to unilaterally terminate the lease without cause, usually upon the provision of certain minimum advance written notice. If the landlord delivers such notice and the tenant remains in possession, the landlord can evict the tenant for holding over beyond the expiration of the lease's term.

d. Ejectment for certain criminal activity on premises that are subject to a residential lease (N.C.G.S. § 42-63).

In 1995, the North Carolina General Assembly amended Chapter 42 to add Article 7, entitled "Expedited Eviction of Drug Traffickers and other Criminals," creating a fourth basis for summary ejectment that is applicable to residential leases only. The provisions of Article 7 are quite detailed and deviate in many respects from the procedures for pursuing eviction of a tenant on one of the other three bases, but in summary, the major features of actions under Article 7 are as follows: (1) the action need not be against a lessee – instead, it can be brought against a lessee's family member or guest who is involved in criminal activity; (2) the action can be a "complete" eviction targeting the lessee and anyone claiming a right of possession via the lessee, or a "partial" eviction targeting persons other than the lessee; (3) the action can be brought initially in magistrate's court or in district court (allowing for the availability of injunctive relief); (4) the action need not be limited to a specific unit within multi-family premises – it could specify a common area, for example; (5) not all criminal activity will trigger Article 7, although drug related activity beyond simple possession (see N.C.G.S. § 90-95) qualifies, as does any activity that broadly threatens the health and/or safety of other tenants; (6) the action can be triggered if a person other than the tenant is "banned" from the premises to the tenant's knowledge, but the tenant allows the "banned" person to

return or fails to immediately contact the landlord or law enforcement upon the "banned" person's return to the premises; (7) if Section 8 housing or public housing is involved, tenant fault must be proven; and (8) conditional ejectment orders are allowed.

e. Specialized Issues Relating to Agricultural Tenancies, Vacation Rentals, and Mobile Homes.

In addition to the four avenues for summary ejectment discussed above, there are additional provisions applicable under North Carolina law to very specific circumstances involving agricultural tenancies, vacation rentals, and mobile ("manufactured") homes. There are detailed provisions in Article 2 of Chapter 42 that apply exclusively to agricultural tenancies, and in 1999, the North Carolina General Assembly enacted the "North Carolina Vacation Rental Act" (codified as Chapter 42A), which applies exclusively to 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." Special provisions concerning mobile homes are scattered throughout the North Carolina General Statutes, in many different locations. In general, the specialized issues relating to situations involving agricultural tenancies, vacation home rentals, and the rental of mobile homes and/or mobile home lots are beyond the scope of this manuscript, although some of the most significant provisions relating to vacation homes and mobile homes lots are noted.

3. Prerequisite #3 – Adequate Advance Notice to the Tenant Before the Landlord Files the Summary Ejectment Action

The question asked probably more than any other by landlords who are not familiar with summary ejectment in North Carolina is "how quickly can I evict this tenant." Because most leases and Chapter 42 contain provisions requiring advance notice

to the tenant before a summary ejectment action is filed, the answer to that question depends as much on the terms of the lease as it does on the summary ejectment procedure.

Most leases typically require that the tenant be afforded a certain amount of advance notice (and opportunity to cure any default) before a summary ejectment proceeding can be brought. If the lease does not contain such provisions, Section 42-3 of the North Carolina General Statutes requires that the landlord wait for ten days after making a demand for rent on the tenant (assuming non-payment of rent is the basis for default/summary ejectment). Only after the advance notice and opportunity to cure required by the lease (or presumed by the law under Section 42-3) has been fully afforded to the tenant, is the landlord is free to file a complaint initiating an action for summary ejectment in North Carolina. (From that point (the filing of the action) forward, the celerity with which the process moves forward is largely mandated by Chapter 42 and certain procedural statutes, and, absent an appeal, the landlord will typically need to wait another three weeks to recover possession.)

4. Prerequisite #4 – If the Landlord is Seeking Money Owed as Part of the Ejectment Action, the Amount Sought Must not Exceed $10,000.

If the landlord wishes to recover money owed from the tenant in the same legal action used by the landlord to recover possession of the premises (the summary ejectment action), then the landlord needs to make sure that the money owed is less than $10,000.00, because that is the limit on the amount of money damages that can be awarded in an action brought under Chapter 42, although the limit is established by procedural rules applicable to small claims actions, not by Chapter 42 itself. This $10,000 limit requires a landlord to bifurcate its action for money damages from its

action for possession if the money damages sought exceed $10,000 (which is often the case for a commercial lease).

Under those circumstances, a landlord will file a Chapter 42 summary ejectment action seeking only possession and court costs, and then bring a second, separate action for money damages against the tenant in either district court (if the damages run from $10,001 to $25,000) or superior court (if the damages exceed $25,000). (Per N.C.G.S. § 7A-243, as amended in 2013 by Session Law 2013-159, actions seeking between $10,001 and $25,000 in damages and filed from August 1, 2013 through June 30, 2015 can be filed at the plaintiff's election in either district court or superior court.) A separate action is clearly authorized by Chapter 42 for money owed by the tenant to the landlord if possession only (plus court costs) is sought in the summary ejectment action. See N.C.G.S. § 42-28 (If landlord "omits to make such a claim [for money damages], he shall not be prejudiced thereby in any other action for their recovery.") However, if any money damages are sought in the summary ejectment action, the plaintiff is precluded from seeking additional money damages from the tenant in a separate (bifurcated) action, because *res judicata* principles require that all money damages must be recovered in a single action. See Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81 (1990), disc. review denied, 328 N.C. 570 (1991)(not possible for landlord to split its money damages into two causes of action such that some of the money damages are sought in one action and the remainder are sought in a different action).

Issues relating to major bifurcated collections actions brought against tenants (either in or out of possession) in district or superior court to recover money owed are beyond the scope of this manuscript. Such actions are typically based on breach of

contract (the lease), and seek compensatory damages including unpaid back rent, future rent, liquidated damages, and/or reasonable attorneys' fees. The important point for purposes of this program is that a landlord needs to avoid the potentially expensive mistakes of either seeking money owed in excess of $10,000 when filing a Chapter 42 summary ejectment action against a tenant, or seeking to recover some but not all of its money damages in the Chapter 42 summary ejectment action.

E. Summary Ejectment Procedure

Summary ejectment procedure can be broken up into major steps, including: filing and service of a summons and complaint in the appropriate county; trial to judgment before a magistrate judge; possible appeal to district court for trial *de novo*; and execution on the judgment (assuming the landlord prevails at trial and there is no appeal).

1. Complaint and Summons – Where and How to Initiate the Action

After giving the tenant adequate notice and opportunity to cure, the landlord is free to initiate a summary ejectment action by preparing and filing a complaint. This raises the procedural issues of where and how to file the complaint – issues that are not fully addressed by Chapter 42 itself. An action for summary ejectment is brought in the county where the leased premises (or a portion of them) are located pursuant to the venue provisions of N.C.G.S. § 1-76, which provides that an action for "[r]ecovery of real property, or of an estate or interest therein, or for a determination in any form of such right or interest" is to be brought in the county where the property (or a portion of it) is located. See McCrary Stone Services, Inc. v. Lyalls, 77 N.C. App. 796 (1985), disc. review denied, 315 N.C. 588 (1986); Snow v. Yates, 99 N.C. App. 317 (1990).

Every action for summary ejectment in North Carolina starts in Magistrate's Court (commonly referred to as "small claims court") regardless of whether it involves a $300/month residential lease or a $30,000/month commercial lease. Actions pending in Magistrate's Court are assigned docket numbers containing the letters "CvM" (as opposed to "CvD" for district court or "CvS" for superior court). Magistrate's Court is a subunit of district court in North Carolina, and procedure in Magistrate's Court is governed by some specific rules as well as the general rules for district court. See N.C.G.S. § 7A-223. The maximum amount in controversy for Magistrates Court is now $10,000.00, up from $5,000.00 for actions filed on or after August 1, 2013 (per N.C.G.S. § 7A-210(1), as amended by Session Law 2013-159), which is why a landlord needs to "bifurcate" its causes of action and bring a separate action to recover money owed by the tenant if the landlord wants to recover more than $10,000 in monetary damages. (Per N.C.G.S. § 7A-243(1), costs and interest are not considered in determining if the amount sought exceeds $10,000.) The filing fee imposed by the State of North Carolina for filing a complaint (including for summary ejectment) in Magistrate's Court is currently $96, and the service fee for serving the summons and complaint on each defendant is $30 (per defendant). A landlord therefore will incur a total of $126 in court costs just to file a summary ejectment action against a single lessee.

In preparing a complaint to initiate a summary ejectment proceeding, the landlord must be careful to plead all of the essential elements of the summary ejectment cause of action: (i) a valid landlord-tenant relationship between plaintiff and defendant for premises located in the county where the complaint is to be filed; (ii) the tenant remains in possession; (iii) after tenant engaged in conduct allowing ejectment (failing to pay

overdue rent within ten days of notice, holding over after lease expiration, engaging in conduct for which the lease allows reentry, or complicity in specified criminal conduct); and (iv) after landlord has demanded surrender and not given tenant permission to remain. The North Carolina Administrative Office of the Courts has prepared a form complaint for summary ejectment (Form AOC-CVM-201). This form is very helpful in terms of ensuring that a plaintiff pleads and proves all of the required elements of a claim for summary ejectment. Moreover, the magistrate judges are generally familiar with this standardized form and appreciate its use, so use of the form is strongly recommended.

After the landlord files the complaint, the Clerk of Superior Court is required by N.C.G.S. § 42-28 to issue summons(es) notifying the defendant(s) to appear for a trial of the matter before a magistrate judge within seven business days. Initial service of the summons for a summary ejectment action is by first class mail per N.C.G.S. § 42-29, and must issue from sheriff's deputies to defendant(s) "no later than the end of the next business day or as soon as practicable" to each defendant's last known address in a stamped, addressed envelope to be provided by the plaintiff. Then, within five days of issuance of the summons, sheriff's deputies are directed to attempt contact to each defendant by telephone or by visiting the defendant's abode, to arrange for personal service. See N.C.G.S. § 42-29.

If personal service on the tenant/defendant cannot be made, then the deputies are to affix the summons and complaint to the premises (called "posting" the premises). Id. This form of service by "posting" is unique to summary ejectment actions and is authorized by N.C.G.S. § 7A-217(4). If personal service is not obtained and service is effected by mail and/or "posting" the premises only, then the plaintiff can get an order for

possession and court costs, but not an award of money damages (unless defendant(s) are present at the hearing). Although no case law from the North Carolina courts has confirmed this, it is widely accepted and has been addressed in a 1992 opinion issued by the North Carolina Attorney General's Office. A landlord's decision on bifurcation (whether to seek money damages in a separate lawsuit) therefore has consequences for service of process. If a landlord elects to bifurcate and limit its action in Magistrate's Court to seeking possession and court costs, then the action is deemed *in rem* and adequate service in that action can be obtained via mail and/or posting of the premises only. However, if a landlord refrains from bifurcating and instead seeks to recover money damages of up to $10,000 (in addition to possession and court costs) in Magistrate's Court, then the action is to an extent *in personam* and personal service on the defendant(s) is necessary (first class mail to defendants and posting the premises alone will not suffice).

There is no formal procedure for the tenant to file an "answer" or motion before a summary ejectment trial in Magistrate's Court, and there are no provisions allowing for the conduct of discovery before trial. Although the presiding magistrate judge has limited discretion to allow a continuance of the trial, continuances are generally disfavored in summary ejectment proceedings, and in any event, the trial cannot be continued such that it is set more than 30 days from the date on which the action was filed, absent the consent of all parties. See N.C.G.S. § 7A-214. The rules on continuances were further tightened up in 2013 by the North Carolina General Assembly through its amendment of N.C.G.S. § 7A-223(b) to provide that for actions filed on or after September 1, 2013, "the magistrate shall not continue a matter for more than five

days or until the next session of small claims court, whichever is longer, without the consent of the parties." See N.C.G.S. § 7A-223(b) (as amended by Session Law 2013-334). In evaluating a motion for a continuance, the magistrate judge also is required to adhere to Rule 40(b) of the North Carolina Rules of Civil Procedure, which mandates that "[a] continuance may be granted only for good cause shown and upon such terms and conditions as justice may require."

2. The Summary Ejectment Trial

Based on the procedures above, a bench trial is typically conducted within ten days of the filing of a Chapter 42 summary ejectment action, without any advance discovery, a response to the complaint by the tenant/defendant, or any motions, dispositive, *in limine*, or otherwise. This is what helps to keep summary ejectment "summary" and is why the process is of benefit to landlords. The magistrate judge presiding over the ensuing bench trial has a great deal of discretion, and it is important to understand the magistrate judge's perspective. It is unusual for a magistrate judge to have a law degree in North Carolina, and many of the magistrate judges are former sheriff's deputies. The practices and legal knowledge of magistrate judges can vary greatly from one county to another. Compared to district court judges and superior court judges, magistrate judges have little to no support staff, so it can be difficult to communicate with them outside of hearings for ministerial purposes (e.g., to tender paperwork requesting a voluntary dismissal without prejudice in advance of trial). The magistrate judge presiding over a summary ejectment trial conducts the trial, makes a determination (and usually announces it in open court) and then, if the landlord carries its burden of proof, issues a "Judgment for Possession" that will typically consist of the form

judgment created by the North Carolina Administrative Office of the Courts (Form AOC-CVM-401), filled in and signed by the magistrate judge.

a. The Landlord's Case-in-Chief and Burden of Proof.

A landlord seeking summary ejectment is required to prove its case by a preponderance of the evidence in order to obtain a judgment for possession of the premises. See N.C.G.S. § 42-30; Durham Hosiery Mill L.P. v. Morris, 720 S.E.2d 426, 429-30 (N.C. App. 2011). This means that the plaintiff landlord must persuade the presiding magistrate judge that it is more likely than not that the landlord meets each of the elements of the summary ejectment cause of action, as defined by Chapter 42: (i) that a valid landlord-tenant relationship between plaintiff and defendant for premises located in the county where the complaint is to be filed, which is usually established through presentation of a written lease; (ii) that the tenant remains in possession; (iii) after the tenant engaged in conduct allowing ejectment (failing to pay overdue rent within ten days of notice, holding over after lease expiration, engaging in conduct for which the lease allows reentry, or complicity in specified criminal conduct); and (iv) landlord has demanded surrender and not given tenant permission to remain. As a practical matter, most magistrate judges will also need to be satisfied that process was served on the tenant in accordance with the statutory requirements, or that tenant has actual notice of the trial (which can be established by tenant's presence or representation at the trial).

At the summary ejectment trial, the landlord may present its evidence itself (*pro se*), through counsel, or through a non-attorney agent with personal knowledge of the facts. If a non-attorney agent is used to present the evidence, it is critical that the non-attorney agent have personal (direct) knowledge of the facts; otherwise, some magistrate

judges will take the position that the agent cannot present the case and also cannot testify as a witness, leaving the landlord in a vulnerable position (likely facing dismissal of the case). The person presenting the landlord's evidence can rely on documentary evidence (usually the lease, if written, is presented, along with a ledger for the tenant's account), their own testimony, and/or witness testimony, either live or via affidavit. If the tenant is present, they can be called as a witness and cross-examined. After the landlord's case/evidence is presented, the tenant is given a similar opportunity to present its evidence. If the tenant defendant does not attend the trial before the magistrate judge, N.C.G.S. § 42-30 mandates that the landlord is entitled to receive judgment on the pleadings in its favor for possession. The rules of evidence are not rigorously applied in magistrate's court, and the presiding magistrate judge has great discretion concerning the admissibility, authenticity, and weight of the evidence.

A plaintiff seeking possession only need not call witnesses to carry its burden of proof in a summary ejectment proceeding, and if the tenant is not present or represented by counsel at the hearing, the plaintiff need not present any evidence at all beyond a properly served complaint to obtain a judgment for possession. N.C.G.S. § 42-30. However, if the landlord wishes to receive a receive a judgment for recovery of damages for money owed by the tenant, the landlord will need to present at least some evidence establishing its entitlement to the money damages it seeks, including testimony, either live or via affidavit. Id.

b. Tenant's Defenses and Tender of Rent.

Generally, there are no formal affirmative defenses available to a tenant in a Chapter 42 summary ejectment proceeding, at least to the extent the action seeks

possession of the premises (as opposed to money damages). Instead, the tenant must present evidence to refute the landlord's evidence such that the landlord does not establish the elements of the cause of action by a preponderance of the evidence. (An example is waiver/estoppel defenses (e.g., via landlord's ongoing acceptance of rent), which negate the landlord's evidence that it is has not given the tenant permission to remain.) There is, however, one significant exception: the defense of tender. In a summary judgment action predicated on Section 42-3 (for non-payment of rent), the action must be dismissed under N.C.G.S. § 42-33 if the tenant tenders the full disputed rent to the landlord in cash at any time prior to judgment, including during the trial before the magistrate judge. However, that opportunity to tender (with the landlord having no choice but to accept) does not apply in a summary ejectment action predicated on one of the bases other than non-payment of rent per Section 42-3. Seligson v. Klyman, 227 N.C. 347 (1947).

A landlord also should be cognizant that its acceptance of rent from a tenant after the tenant has breached the lease can sometimes be construed as a waiver by the landlord of the breach, depending on the nature of the parties' communications and the terms of the lease addressing acceptance and application of partial payments. See, e.g., Office Enterprises, Inc. v. Pappas, 19 N.C. App. 725, 728 (1973)(landlord that accepted and held check from tenant could not allege breach of the lease for nonpayment even though landlord did not cash check); Automotive Group, LLC v. A-1 Auto Charlotte, LLC, COA 13-608 (unpublished), N.C. App. 2013)(landlord did not waive tenant's lease breaches when it returned all checks tendered by tenant); Gayatri MAA, Inc. v. Terrible T. LLC, COA 09-1614 (unpublished), N.C. App. (2010))(lessor waived its right to reenter based

on tenant's inadvertently insufficient monthly rent checks when lessor accepted underpayments from tenant and held them for five months without protest, thereby inducing lessee to believe that lessor would waive the requirement of payment in full as to those checks). Notably, a 2012 amendment to N.C.G.S. § 42-26 added a new subsection, N.C.G.S. § 42-26(c), which suggests that a landlord's acceptance of a partial rent payment during a pending ejectment action based on breach of a lease condition does not waive the breach upon which the action is based provided the lease contains a clause to that effect, and that the landlord's reliance on such a lease provision to accept a partial payment does not constitute an unfair and deceptive trade practice under Chapter 75 of the General Statutes.

c. Money Damages Available to the Landlord.

As noted above, a landlord bringing an action for summary ejectment under Chapter 42 can seek to recover money damages of up to $10,000 in the same action. The money damages the landlord is allowed to seek include a variety of damages ranging from unpaid "back" rent (including late fees, which for residential leases are limited by N.C.G.S. § 42-46 to the greater of $15 or 5% of the amount of the late payment), fair rental value for any holdover occupancy by tenant, and damages to compensate the landlord for physical damage caused by the tenant to the premises. A money judgment awarded against the tenant can include rent due through the date of judgment (the likely limit for residential leases), as well as "future rent" through the lease's prescribed termination date if the lease allows such damages to be sought by the landlord (which is likely for commercial leases). See Holly Farm Foods, Inc. v. Kuykendall, 114 N.C. App. 412 (1994). Any "future rent" sought by the landlord from the old tenant will be subject

to an offset for rent to be received from a new tenant via backfill of the premises (mitigation of damages), minus any expenses incurred in connection with backfilling the premises (e.g., broker's commission).

Under North Carolina law, the landlord is generally under a duty to mitigate its damages by making the premises available for lease to a new tenant. Monger v. Lutterloh, 195 N.C. 274 (1928); Isbey v. Crews, 284 S.E.2d 334 (1981). However, an award of future rent is only subject to evidence of offset for mitigation based on evidence of mitigation that is available at the time the award is made (at the time of the summary ejectment if the action for damages is not bifurcated). See Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81 (1990), disc. review denied, 328 N.C. 570 (1991). Parties to a commercial lease governed by North Carolina are allowed to effectively disclaim the landlord's duty to mitigate its damages. See Sylva Shops L.P. v. Hibbard, 175 N.C. App. 423 (2006); Kotis Properties, Inc. v. Casey's, Inc., 183 N.C. App. 617 (2007).

3. Judgment at Conclusion of the Summary Ejectment Trial

In 2013, the North Carolina General Assembly amended the procedural rules governing summary ejectment actions to provide that for any summary ejectment action filed on or after September 1, 2013, the presiding magistrate judge must render judgment on the same day that the presentation of evidence and legal authorities is complete, unless the parties agree to a longer period or the action is based on criminal activity, a breach other than non-payment of rent, or a Section 8 lease, in which case the judgment must be rendered within five business days. See N.C.G.S. § 7A-222(b) (as amended by Session Law 2013-334). Assuming the landlord prevails at trial before the magistrate judge and

obtains a judgment for possession, the landlord must wait for a ten-day appeal period from entry of the judgment to expire (see N.C.G.S. § 7A-228) before the landlord can request the issuance of a writ of possession, allowing the sheriff's department for the county where the premises are located to perform a lockout, effectively dispossessing the tenant from the premises. See N.C.G.S. § 42-36.2.

4. Tenant's Right of Appeal of a Judgment for Possession

A tenant facing an adverse judgment for possession is able to appeal the magistrate judge's judgment within ten days of the judgment's entry, in which case the result is an expedited *de novo* retrial before a district court judge. See N.C.G.S. § 42-34. As a practical matter, such appeals are rare because the tenant is required to post a bond equal to the amount of rent in arrears to stay execution of the magistrate's judgment during appeal, and is also required to pay rent to the clerk of court as it becomes due while the appeal is pending. Id. (The requirement for the tenant to post bond in the amount of the full delinquency in order to appeal is the reason why the summary ejectment form complaint has a space on it for the amount of rent past due, in addition to a space for the monthly rate of rent, that should be filled in even if the landlord is not seeking a money judgment.) If there is a dispute over the amount of the total delinquency, the magistrate judge has to discretion to reduce the amount of the bond the tenant must post to appeal. In 2013, the North Carolina General Assembly amended N.C.G.S. § 7A-228(b) to provide that for summary ejectment actions filed on or after September 1, 2013, an appeal to district court is to be dismissed if the appellant fails to pay the costs of court to appeal within ten days after entry of the magistrate's judgment, decreasing the period to pay from twenty days to ten. See N.C.G.S. § 7A-228(b) (as

amended by Session Law 2013-334). Under the same new 2013 law, the landlord is entitled to move to dismiss the tenant's appeal to district court if the tenant did not raise any defense orally or in writing during the initial proceeding before the magistrate judge; does not file a motion, answer, or counterclaim in the district court; and fails to make any payment due in connection with the appeal undertaking (bond) requirements to stay execution on the judgment for possession. See N.C.G.S. § 7A-228(d) (as amended by Session Law 2013-334). This new provision is intended to give landlords the ability to dismiss an appeal that is likely taken by the tenant primarily for purposes of delay.

In the event of an appeal to district court, discovery is authorized should the parties wish to conduct it. See N.C.G.S. § 42-34. At the district court level, motions practice is also likely, and the appealing tenant faces the prospect of needing to defend a motion for summary judgment. This can extend the timeframe for a trial at the district court level to 3-4 months, and the landlord can apply to the clerk during the pendency of the appeal for the clerk to pay out to the landlord any amount of the rental payments the clerk is holding that the defendant paid into the clerk and that are not claimed by the defendant in its pleadings. N.C.G.S. §42-34(e). If the tenant fails to make any ongoing payment of rent during the pendency of the appeal within five days of the date it becomes due, however, the clerk will issue execution on the magistrate judge's judgment upon application by the landlord. N.C.G.S. § 42-34(f).

It is important to note that a monetary counterclaim that a tenant is unable to assert against the landlord in Magistrate's Court because it is for an amount greater than $10,000 and therefore exceeds the jurisdictional maximum for Magistrate's Court might need to be asserted upon a *de novo* appeal at the district court level if it is deemed a

compulsory counterclaim pursuant to Rule 13(a) of the North Carolina Rules of Civil Procedure and it does not exceed the jurisdictional maximum for district court ($25,000 for actions filed on or after June 1, 2013). See Holloway v. Holloway, 726 S.E.2d 198, 202 (N.C. App. 2012).

5. Enforcing Judgments Obtained Against a Tenant

Assuming the landlord prevails at trial before the magistrate judge and obtains a judgment for possession, the landlord must wait for a ten-day appeal period to expire (see N.C.G.S. § 7A-228) before the landlord can request the issuance of a writ of possession, allowing the sheriff's department for the county where the premises are located to perform a lockout, effectively dispossessing the tenant from the premises. See N.C.G.S. § 42-36.2. As a practical matter, many tenants will vacate voluntarily once the landlord has obtained a judgment for possession, but if the tenant refuses to vacate voluntarily, the landlord will incur an additional $25 in costs to file for a writ of possession plus $30 in service fees per defendant for the service of that writ. Depending on how backlogged the sheriff's department is, it can take several days for the sheriff's department to schedule and implement a padlocking after the writ of possession's issuance, although the sheriff's department is required to execute on the writ within five days. Id. The five-day period within which the sheriff must execute was reduced from seven days through the North Carolina General Assembly's amendment of § 42-36.2(a) in 2013. See N.C.G.S. § 42-36.2(a) (as amended by Session Law 2013-334).

Chapter 42 contains a provision added in 1995 that many landlords are unaware of and that can have a major impact on the landlord's ability to execute on an order for possession. N.C.G.S. § 42-36.1A provides that if more than 30 days have elapsed since a

judgment for possession of the premises at issue is first entered, then the landlord cannot execute on the judgment unless the landlord executes an affidavit affirming that the landlord has not "entered into a formal lease" with the defendant or "accepted rental money from the defendant for any period of time after entry of the judgment." This raises an issue with application of partial payments received by a landlord from the tenant. In general, a landlord has flexibility to apply payments received to the most aged overdue amounts first (e.g., to the overdue rent for June before the overdue rent for July), unless the lease's terms require a different priority of application. (One notable exception is that N.C.G.S. § 42-26(b) requires payments to be applied to overdue rent before they can be applied to charges for sub-metered water and/or sewer services provided to the tenant by the landlord.)

If the landlord receives a judgment for money owed against a tenant (either through a combined claim for up to $10,000 owed in a summary ejectment proceeding or through a separate collections action), the landlord will need to execute via writ of execution to attempt to collect the money judgment, unless the tenant is willing to voluntarily pay the judgment. Further discussion of executing on a judgment for money owed is beyond the scope of these written materials and landlords who recover a judgment against a tenant for money owed are encouraged to consult with legal counsel concerning options for collecting on such a judgment.

F. Options Beyond Chapter 42 for Commercial Leases

The summary ejectment procedure prescribed by Chapter 42 of the North Carolina General Statures (as discussed in detail in the preceding sections) provides the exclusive remedy for the eviction of tenants in *residential* lease situations. If a

commercial lease is involved, however, the landlord is not required to proceed under Chapter 42 to dispossess a tenant, and other options may be available. Usually, however, the expedited process established by Chapter 42 is impossible to beat from the landlord's perspective because the alternative is an action in district court or superior court, which will proceed far less quickly and inexpensively. Although a commercial landlord might theoretically obtain preliminary injunctive relief fairly quickly in a district court or superior court lawsuit, it is usually difficult to impossible for a landlord to establish the irreparable harm prerequisite for obtaining injunctive relief in North Carolina because money damages generally will not qualify as "irreparable harm."

One strategic consideration that could prompt a commercial landlord to bring a lawsuit to dispossess a tenant in district or superior court (outside of the Chapter 42 paradigm) is that a non-individual tenant (a tenant that is a business entity) cannot appear *pro se* in district court or superior court whereas it would be allowed to appear *pro se* in a Chapter 42 action in magistrate's court. This can be of advantage if the landlord has more extensive resources than the tenant and can better afford the expense that is associated with retaining counsel and conducting discovery and motions practice (which are not allowed in a Chapter 42 proceeding). However, the landlord must weigh the competing consideration that the tenant will have the prerogative to assert a counterclaim against the landlord in district or superior court, whereas under Chapter 42 (in magistrate's court) the tenant is not entitled to counterclaim against the landlord, but would need to appeal from magistrate court or file a separate proceeding to bring a claim for damages against the landlord. (As noted above, an action directly against an unauthorized assignee or sublessee is not within the ambit of Chapter 42, so the landlord

bringing such an action must follow the typical procedural rules applicable to venue and jurisdiction rather than the summary ejectment procedure.)

An exception in which an alternative to Chapter 42 summary ejectment might be preferable for a commercial landlord is if the lease at issue explicitly allows the landlord to engage in forcible entry (also referred to as "self help") such that the landlord retakes control of the premises from the tenant in default without invoking legal process, reentering the premises by breaking locks if necessary, and the landlord is able to do so without disturbing the peace. See Spinks V. Taylor, 303 N.C. 256 (1981). Accordingly, if a commercial lease allows the landlord to enter the premises without court order and change the locks in the event of tenant default, and the landlord is able to do that in the middle of the night when the premises are deserted or at some other time when the tenant, the tenant's employees, and the tenant's customers are not likely to be present, that is a valid option for the landlord and it likely will enable the landlord to regain possession more quickly than a Chapter 42 summary ejectment. That does not mean that such action is without risk, as the landlord is likely to need to deal with tenant's possessions remaining in the premises, and careful handling of the situation is necessary to avoid a suit by the tenant against the landlord claiming conversion, business losses, breach of the lease, and unfair and deceptive trade practices (raising the prospect of treble damages and recovery of attorneys' fees for the tenant).

Ten days after the North Carolina Supreme Court decided Spinks v. Taylor generally authorizing self-help remedies for landlords, the North Carolina General Assembly reacted swiftly "in order to maintain the public peace" and amended Chapter 42 by enacting N.C.G.S. § 42-25.6, which expressly prohibits landlords from using self-

help to evict a residential tenant. "Self-help" for purposes of N.C.G.S. § 42-25.6 includes constructive eviction measures by the landlord, so, for instance, disconnection of utilities by the landlord to drive a tenant out is prohibited.