

Landlord and Tenant Rights and Obligations

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Must Look to Three Sources Defining Rights
and Obligations of Parties to a Lease:

1. Terms of the Lease
2. Statutes/Ordinances (state & local)
3. Judicial Opinions (common/case law)

BUT:

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BUT: Which controls if they are in conflict??

• Important Distinction

- Residential vs. Commercial

Residential: More regulated, more specified
by statute, mutually dependent
obligations (NCGS sec. 42-41)

Commercial: No mutuality of obligations,
no IWOH

• Delivery & Maintenance of Premises

- Common law implied duty
- Covenant of Quiet Enjoyment
(constructive ejection)
- Beware holdover of previous tenant
- IWOH – habitability is key concept

(Commercial leases – RCD, TI/upfit)

• Delivery & Maintenance of Premises

- RRAA (NCGS Ch. 42, Art. 5, 1977)

- Code compliance
- Put/keep in fit and habitable condition
- Keep common areas safe
- Facilities (plumbing/elec) & appliances
- CO/smoke detectors
- Remedy dozen “imminently dangerous”
conditions in reasonable time

- NCGS sec. 42-42(a) "Dirty Dozen"

Unsafe wiring, unsafe flooring/steps, unsafe ceilings/roof, unsafe chimney or flue, no potable water, no working locks on exterior doors, broken windows or ground level windows without locks, lack of heating, lack of toilet, lack of tub/shower, rodents, water-related mosquito/mold issues

- Tenant Notice Required for Repair?

- Not for problems at lease outset
- Written always preferable, but required only for non-emergency plumbing/electrical problems and for issues with CO and smoke detectors

- Waiver by Tenant?

- No – per NCGS 42-42(b)
 - Not explicit (lease terms)
 - Nor implied (acceptance of premises)

- Remedies for Tenant

- FRV defect free – FRV as is
- Consequential damages (items)
- Prospective rent abatement
- Unfair/deceptive trade practices

- Who can be liable as "landlord"?

- Owner
- Property managers
- Rental agents

Basis: NCGS sec. 42-40(3)
See Baker v. Rushing (1991)

- Tenant Obligations

- Smoke & CO detector fines for landlords & tenants (NCGS 42-44)
- NCGS 42-43 (clean/safe, trash disposal; written notice needed)
- Cannot unilaterally withhold rent (NCGS 42-44(c))

- Security Deposits

- TDSA (Ch. 42, Art. 6 of NCGS)
- Limited uses (rent, damage, etc.)
- Accounting at lease end (30/60)
- Max is 2 months rent for 1 yr term
- Max for month-to-month=1.5 mos

- Retaliatory Eviction

- Defense to summary ejection
- “Substantially in response” basis
- 12-month rolling protection period
- Protect good faith repair requests
- Cannot waive this remedy
- Holdover, rent nonpayment defeats

- Lead Paint Disclosure

- TSCA (federal law)
- Pre-1978 housing
- Notification of potential presence
- Approved brochure
- Provision of specific reports
- Language in lease, recordkeeping

- Tenants in Foreclosed Properties

- Pre-disclosure, opt-out - 45-21.17(4)
- Order for possession procedure
- PTFA (federal law) more strict
- “Sunset” recently – 12/31/14
- Term of bona-fide tenants protected
- 90 days minimum (at will, m-t-m)
- Exception for primary residence
- Bona-fide excludes relatives, < FMV

- Tenants under Leases with Options

- Protects “rent to own” tenants
- New NC law, Ch. 47G, NCGS (2010)
- Leases coupled w/purchase options
- Mandates key terms be included
- Mandates recording w/in 5 days
- Mandates 1 cure/12 months
- Remedy = Chapter 75 (UDTP)

- Notice Obligations (Routine Termination)

- Required for termination of periodic tenancies
- Advance notice is usually the issue
 - ▶ Lease governs if it specifies the notice period required
 - ▶ If lease doesn't specify period, NCGS 42-14 periods apply:
 - Year-to-year: ≥ 1 month before current year's end
 - Month-to-month: ≥ 7 days before current month's end
 - Week-to-week: ≥ 2 days before current week's end
 - Tenancy-at-will: Only “reasonable notice”
 - Mobile homes: ≥ 60 days (180 days for land use change)

Notice of Routine Termination

- If landlord allows tenant for fixed term of 1 year or more to hold over, absent guidance from lease, law presumes a year-to-year tenancy (unless lease specifies otherwise)
- If notice is botched and tenant can stay, tenant's lease obligations (e.g., to pay rent) still apply
- Notice may be alternative – directing tenant to sign a new lease or otherwise vacate at end of term
 - ▶ Cla-Mar Management v. Harris (1985)

Considerations for Notice

- “[C]ourts do not look with favor on lease forfeitures.”
→ Couch v. ADC Realty (1980)
- “[W]hen termination of a lease depends on notice, the notice must be given in strict compliance with the contract as to both time and contents.”
→ Stanley v. Harvey (1988)

Considerations for Notice

Ch. 75 claims (unfair and deceptive trade practices)

Possible merely for rental of a single residence.

→ Stolflo v. Kernodle (1995)

Abandoned Property Obligations

- If tenant abandons or vacates premises voluntarily and leaves items of personal property behind:
 - ▶ For items worth \leq \$500, 45-29(d) allows donation to non-profit
 - ▶ Consult lease terms to see if they address disposition of items
 - ▶ Landlord can make written offer/demand for tenant to claim
 - ▶ For valuable items landlord should consider obtaining judgment for possession (allowing formal disposition options)
 - ▶ Landlord's liability for improper disposition of items is limited to actual damages (45-29(b))

Abandoned Property Obligations

- In connection with executing on a judgment for possession:
 - ▶ Sheriff removes items and tenant takes possession (42-36(b))
 - ▶ If tenant is not present at lockout or will not cooperate:
 - Landlord can have items locked in place (42-36(a)(1))
 - Landlord can have items removed to/stored at storage center
 - Landlord must hold items for at least 7 days* (was 10 days)
 - If tenant requests within 7 days* landlord must release items; if no request within 7 days, items are subjected to lien for costs
 - *Only 5 days (42-25.9(h)) for items worth $<$ \$500 (was \$100)
 - Non-profit donation option (45-29(d)) for items worth \leq \$500

Abandoned Property Obligations

- In connection with executing on a judgment for possession:
 - ▶ To dispose of items (total value \geq \$500), landlord must:
 - Make offer to tenant to release items (42-36(b); not 42-25.9(g))
 - Wait at least 7 days from date of execution/lockout (42-25.9(g))
 - Have not received timely request from tenant to retrieve items
 - If disposition is by sale, give tenant 7 days' pre-sale notice (and chance to retrieve items) by mail to last known address
 - Disburse any surplus from sale (net of rent owed, sale costs) to tenant if requested in writing within 7 days after sale
 - Surplus not claimed by tenant goes to county government

Commercial Landlord's Lien (44A-2(e))

- If commercial tenant's FFE remains in premises:
 - ▶ Applies to tenant's property (not tenant's customers' property)
 - ▶ Applies if landlord has "lawful claim for damages" and:
 - (i) tenant has vacated for at least 21 days following end of paid rental period; OR
 - (ii) landlord holds executable judgment for possession and tenant has vacated
 - ▶ Lien is for back rent, up to 60 days future rent (to date of public sale of items), costs of sale, damage to premises
 - ▶ Lien is subordinate to perfected security interests (e.g., lenders)
 - ▶ Lease terms may cover disposition of FFE (and can waive lien)
 - ▶ For items worth < \$100, charitable donation OK after 5 days

Local Ordinances

- Local ordinances can affect rights/obligations:
 - ▶ Local building/maintenance codes (IPMC) under 42-42(a)(1)
 - ▶ What can trigger inspection by local regulatory officials?
 - ▶ 2011 law (S.L. 2011-281) amended 153A-364 (counties) and 160A-424 (cities) to prohibit proactive periodic inspections
 - ▶ Now, inspections only for "reasonable cause" (reactive)
 - 2 or more violations in 12-month period
 - Complaint of substandard conditions/request for inspection
 - Officials have actual knowledge of unsafe condition
 - Code violations visible from exterior
 - ▶ Local governments cannot require "landlord permits" or fees

Summary Ejection in N.C.

• Tenant Communications

- Notice of Default
- Notice of Lease Termination
- Demand for Payment
- Notice of Exercise of Remedies

Basic Principles

1. Read the lease, know the lease.
2. Think ahead.
3. Put it in writing.

Considerations for Notice

1. Law does not presume need for writing, but many leases require it.
2. Evidentiary value of writing (cure issues).
3. Where to send notice.

Considerations for Notice

4. How to send notice.

N.C. law: Focus is on proof of issuance by landlord, not proof of receipt by tenant.

→ Main Street Shops v. Esquire Collections ('94)

Best: registered/certified mail, return receipt req.

Considerations for Notice

5. Better get it right.

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Notice of Default

- Is tenant in default?
 - Non-payment of rent
 - Operational default
 - Other lease condition
 - (e.g., unauthorized assignment or sublease)
- What is landlord's objective?
 - Legal action anticipated?

Demand for Rent

- Required to eject under NCGS 42-3 (implied right if lease does not address non-payment of rent)
- Must be specific
- Must be for all outstanding rent (full delinquency)
- Snipes v. Snipes (1982)
 - Demand must be a "clear, unequivocal statement"
 - Landlord "wanted to get all this business settled" was not adequate
 - Demand can be oral or written

Notice of Termination

- Required to eject under NCGS 42-26 (breach of lease condition or holding over) if termination isn't automatic
- Stanley v. Harvey (1988)
 - Notice must be affirmative.
 - Not enough to request that tenant vacate.

Demand for Surrender

- Required to eject under NCGS 42-26 (breach of lease condition or holding over)

Demand for Money Owed

- Not about possession.
- About recovery of "reasonable attorneys' fees" under NCGS 6-21.2 if lease allows.
- NCGS 6-21.2 requires notice and 5 days for tenant to pay outstanding balance before presumptive attorneys' fees of 15% are recoverable
- WRI/Raleigh v. Shaikh (2007)
 - Commercial lease agreement is "evidence of indebtedness" triggering NCGS 6-21.2

What if Tenant Disappears?

- Before lease is to terminate routinely.
- Without any written explanation to landlord.
- Without clear indication tenant has vacated and will not return (e.g., items remain in the space).
- Get written confirmation of tenant's intent or bring summary ejectment action.

Basics (Jurisdiction)

1. Who are the parties (need L-T)?
2. Assignees (authorized?) and sublessees
3. Action for recovery of FRV (NCGS 42-4)
4. Reach of judgment for possession

Parties must be landlord and tenant:

1. Applicable to authorized assignee
2. Inapplicable to sublessee or unauthorized assignee
3. But order for possession applies against anyone claiming possession via lessee (Stone v. Guion, 1944).
4. Does not apply as to a trespasser, but NCGS 42-4 may allow action for "fair rental value" for three years back rent (SOL).
5. Does not apply to heir disputes, foreclosure, employee occupancy (self-storage, live-in caretakers), purchase contract disputes.

Basics (Jurisdiction)

1. Who is plaintiff?
2. Real party in interest (Rule 17(a)).
3. Sue in name of correct SPE.

• Plaintiff must be property owner:

1. Rule 17(a), real party in interest
2. Management company/agent cannot be named as plaintiff, but may sign complaint based on personal knowledge (NCGS 7A-223)
3. Must be correct local LLC (not parent company)
4. If defendant denies plaintiff's title to the premises, matter goes to district court per 7A-223.

Ongoing Possession Unclear?

1. Importance of legal determination.
2. Need to allege tenant "continues in possession of demised premises" (42-26)

What if Tenant Disappears?

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Jurisdiction (conduct triggering SE)

• Four bases:

1. Failure to pay rent (implied under NCGS 42-3)
2. Breach of lease condition for which re-entry is specified (42-26(2))
3. Holding over (NCGS 42-26(1))
4. Criminal activity (residential only; NCGS 42-63)

Ejectment for Failure to Pay Rent

- NCGS 42-3 (not in Article 3 of Chapter 42, but works in tandem with Article 3)
- Implied provision only; trumped by explicit lease provisions concerning non-payment of rent. See Stanley v. Harvey (1988)
- Applies to oral and written leases, but only if they require payment of rent at a definite time
- Implies right of reentry (lease forfeiture) for failure to pay rent

Ejectment for Failure to Pay Rent

- 10 days notice and opportunity to cure required following demand for payment of all overdue rent
- Defense of tender (NCGS 42-33) is available
- Cannot evict under Chapter 42 for non-payment of sub-metered water/sewer (NCGS 42-26(b))
- Landlord must apply payments to delinquent rent before delinquent sub-metered water/sewer, unless tenant requests to the contrary

Demand for Rent

- Required to eject under NCGS 42-3 (implied right if lease does not address non-payment of rent)
- Must be specific
- Must be for all outstanding rent (full delinquency)
- Snipes v. Snipes (1982)
 - ▶ Demand must be a “clear, unequivocal statement”
 - ▶ Landlord “wanted to get all this business settled” inadequate
 - ▶ Demand can be oral or written

Ejectment for Breach of Lease Condition

- NCGS 42-26(2)
- Must be a condition for which re-entry/lease termination is the specified remedy
- Common examples of such conditions: non-payment of rent; criminal activity; operational default
- This is the most common basis for summary ejectment

Ejectment for Breach of Lease Condition

- Termination for breach may be automatic or at landlord’s option
- If at landlord’s option, important for landlord to give notice of termination before bringing ejectment action
- Demand for surrender required (notice letter)

Notice of Termination

- Required to eject under NCGS 42-26 (breach of lease condition or holding over) if termination isn’t automatic
- Stanley v. Harvey (1988)
 - ▶ Notice must be affirmative.
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Ejectment for Tenant’s Holding Over

- NCGS 42-26(1)
- Must prove that lease terminated
- Usually there are notice issues
- Demand for surrender required (notice letter)
- Damages for holding over = “fair rental value”

Tenants Holding Over

- Notice of termination required?
- Prerequisite to summary ejectment
- Not enough to ask tenant to vacate
- Notice must be affirmative
- Stanley v. Harvey (1988)

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Ejectment for Criminal Activity

- NCGS 42-63 (Article 7, added 1995)
- Residential leases only (need for condition in commercial leases)
- Action need not be against lessee (complete vs. partial actions) and need not be specific to a unit
- Can be brought in magistrate’s or district court
- Triggered by drug activity (beyond possession) and activity threatening health/safety of other tenants

Jurisdiction – Advance Notice

- How quickly can landlord regain possession:
 1. Cure period after notice per lease or NCGS 42-3 (10 days)
 2. Summons to issue for trial within 7 business days of filing (42-28)
 3. No pre-trial discovery, motions, or responsive pleadings (answer)
 4. Trial cannot be continued > 30 days from filing unless all parties agree (7A-214); Judge shall not continue ejectment for > 5 days (or next court session if longer) absent consent of all parties (7A-223(b)).
 5. Judge must render judgment same day (5 business days if complex) per 7A-222(b).
 6. Cannot execute post-judgment pending 10-day appeal period; sheriff has 5 days to execute on writ (down from 7) once issued.

Jurisdiction – Amount Recoverable

- Magistrate’s Court:
 - \$10,000 jurisdictional limit per NCGS 7A-210(1) (up from \$5,000)
 - Claims for money owed (vs. possession) – bifurcation possible (NCGS 42-28), but splitting of claim for money owed is not. See Chrisalis Properties v. Separate Quarters (1990).

Jurisdiction–Alternatives for Commercial

- Only residential situations must use Chapter 42
 1. Speed issue (alternative is preliminary injunctive relief)
 1. District/Superior Court vs. Magistrate's Court
 2. Tenant entity cannot appear *pro se* beyond Magistrate's Court
 3. Counterclaim issue
 4. Self-help – Spinks v. Taylor, 303 N.C. 256 (1981)
 5. Risks of self-help; NCGS 42-25.6 prohibits for residential

The Complaint and Summons

- Magistrate's Court:
 1. Subunit of District Court (know your audience).
 2. Filing (\$96) and service (\$30 per defendant) fees.
 3. \$10,000 jurisdictional limit per NCGS 7A-210(1) (up from \$5,000)
 4. Action brought in county where property is located (NCGS 1-76); McCravy Stone (1985); but different if just for money owed.
 5. Service issues – posting of premises can suffice for purposes of possession (*in rem*) per NCGS 7A-217(4), but not for purposes of recovering a money judgment (*in personam*)

Pleading/Complaint

- Valid L-T relationship for premises in county
- Tenant remains in possession
- Tenant conduct in one of four categories
- Landlord demanded surrender/did not waive rights
 - waiver by accepting post-breach rent: Latta, 87 N.C. App. 616 (1987)
- Identification of premises

Service

- Clerk to issue summonses for trial within 7 business days (NCGS 42-28)
- Initial service by 1st class mail by next business day or soon as practicable using plaintiff's envelope (42-29)
- Follow-up by sheriff via phone/personal visit within five days of summons issuance (42-29) for personal service
- Posting if no personal service (NCGS 7A-217(4))

Trial/Burden of Proof

- Preponderance of the evidence standard
 - Durham Hosiery Mill L.P. v. Morris, 720 S.E.2d 426 (N.C. App. 2011)
- Magistrate Judge has wide discretion (background)
- Entitled to judgment on the pleadings for possession if defendant does not appear (NCGS 42-30)
- Who can present case/witnesses (non-attorney agent with direct knowledge)

Trial/Burden of Proof

- Evidence required for money judgment (damages)
- Can recover rent prorated to day of trial; can get money damages to end of term if lease allows (Holly Farm Foods v. Kuykendall, 114 N.C. App. 412 (1994)).
- Service issues – posting premises can suffice for purposes of possession (*in rem*) per NCGS 7A-217(4), but not for recovering money judgment (*in personam*)
- Defenses – tender (42-33), waiver (negate element)
- Judgment for Possession

After Judgment

- 10-day appeal period from entry of judgment
 - Automatic dismissal if appeal costs not paid within 10 days
- Appeal options/issues (*de novo*, bond requirements)
 - New 7A-228(d): Landlord can move to dismiss if tenant is lax
- Writ of possession (sheriff to execute within 5 days)
- NCGS 42-36.1A – Landlord affidavit required to execute on judgment for possession more than 30 days old, attesting to non-acceptance of rent or entry into lease post-judgment (added 1995)
- Tenant's "stuff" in premises

Bargaining Chips

- Payment plans (length, lump sum, interest, x-default)
- Attorneys' fees, confidentiality, financials, relocation
- Rent reductions (length, forfeit conditions, conf.)
- Additional security (deposit, escrow, guarantee, d/t)
- Voluntary vacating, termination right, cap on liability
- Bankruptcy alternative