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# THE LEGALPAD

News You Can Use  
Vol. II No. 2  
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**Editor's Note: I am pleased to publish the second issue of the second volume of "The Legal Pad," a quarterly newsletter for clients, associates, and friends of THE LAW OFFICE OF WESLEY SCOTT JONES, P.C.**

**This newsletter is intended to address basic aspects of the ever-changing and often complex topics of law that affect our everyday lives. I hope that you will enjoy this newsletter, and hopefully it will be "news you can use."**

**This quarter's legal focus is on LANDLORD-TENANT LAW (Part II).**

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## Introduction.

In the previous issue of The Legal Pad, Part I, I discussed the basic rights and responsibilities of a tenant and landlord with respect to residential lease agreements in North Carolina.

In this issue, I will address what remedies are available to an aggrieved tenant or landlord; that is, what you can do when the other party fails to meet their responsibilities under a residential lease agreement.

The following discussion is based in large part upon Chapter 42 of the North Carolina General Statutes, which determines the rights, obligations, and remedies of the parties to a rental agreement for a dwelling unit within this State.

## Summary Ejectment of Residential Tenants.

Article 3 of Chapter 42 is entitled Summary Ejectment and sets forth the procedures that a landlord must follow in removing a defaulting tenant.

Section 42-26 provides "Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part

thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases: (1) When a tenant in possession of real estate holds over after his term has expired. (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased."

The summary ejectment process starts with the filing of a Complaint in Summary Ejectment with the Clerk of Court (see attached sample on page 5).

Section 42-28 provides "When the lessor or his assignee files a complaint pursuant to G. S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays, to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed the jurisdictional amount established by G. S. 7A-210(1), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery."

Upon filing the complaint for summary ejectment, the complaint, along with a civil summons, must be delivered to the Sheriff for service of process upon the defendant (tenant).

Section 42-29 provides "The officer receiving the summons shall mail a copy of the summons and complaint to the defendant no later than the end of the next business day or as soon as practicable at the defendant's last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may, within five days of the issuance of the summons, attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful or does not result in service to the defendant, the officer shall make at least one visit to the place of abode of the defendant within five days of the issuance of the summons at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section."

After the complaint and summons have been served in accordance with the preceding sections, the landlord and tenant must appear for the scheduled

hearing before the Magistrate. As set forth in Section 42-30 and 31, "The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the plaintiff proves his case by a preponderance of the evidence, or the defendant admits the allegations of the complaint, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding the jurisdictional amount established by G. S. 7A-210(1), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and give judgment as he may find the fact to be. If the defendant by his answer denies any material allegation in the oath of the plaintiff, the magistrate shall hear the evidence and give judgment as he shall find the facts to be."

Finally Section 42-33 provides "If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed."

## Appeal of Magistrate's Decision by Tenant.

The judgement entered by the Magistrate may be appealed de novo to District Court. If this occurs, Section 42-34 provides "(a) Upon appeal to the district court, either party may demand that the case be tried at the first session of the court after the appeal is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it. (b) It shall be sufficient to stay execution of a judgment for ejectment that the defendant appellant sign an undertaking that he will pay into the office of the clerk of superior court the amount of the contract rent as it becomes due periodically after the judgment was entered and, where applicable, comply with subdivision (c) below. Any magistrate, clerk, or district court judge shall order stay of execution upon such undertaking. (c) In an ejectment action based upon alleged nonpayment of rent where the judgment is entered more than five working days before the day when the next rent will be due under the lease, the appellant shall make an additional undertaking to stay execution pending appeal. Such additional undertaking shall be the payment of the prorated rent for the days between the day that the judgment was entered and the next day when the rent will be due under the lease.... (e) Upon application of the plaintiff, the clerk of superior court shall pay to the plaintiff any amount of the rental payments paid by the defendant into the clerk's office which are not claimed by the defendant in any pleadings. (f) If the defendant fails to make a payment within five days of the due date

according to the undertaking and order staying execution, the clerk, upon application of the plaintiff, shall issue execution on the judgment for possession."

Section 42-32 further states that "On appeal to the district court, the jury trying issues joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to the amount of rent in arrears, or which may have accrued, to the time of trial in the district court..."

Additionally, Section 42-35 states "If the proceedings before the magistrate are brought before a district court and quashed, or judgment is given against the plaintiff, the district or other court in which final judgment is given shall, if necessary, restore the defendant to the possession, and issue such writs as are proper for that purpose."

Finally, Section 42-36 states "If, by order of the magistrate, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal."

## Removing Tenant's Personal Property.

Usually the eviction process will involve not only removing the tenant, but also the tenant's personal possessions. This part of the eviction process should be accomplished by the local Sheriff's department, and not by the landlord.

Section 42-36.2 sets forth the procedure that the Sheriff must

follow. It provides "(a) Before removing a tenant's personal property from demised premises pursuant to a writ for possession of real property or an order, the sheriff shall give the tenant notice of the approximate time the writ will be executed. The time within which the sheriff shall have to execute the writ shall be no more than seven days from the sheriff's receipt thereof. The sheriff shall remove the tenant's property, as provided in the writ, no earlier than the time specified in the notice, unless: (1) The landlord, or his authorized agent, signs a statement saying that the tenant's property can remain on the premises, in which case the sheriff shall simply lock the premises; or (2) The landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant because the tenant has paid all court costs charged to him and has satisfied his indebtedness to the landlord.

Upon receipt of either statement by the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed a statement described in subdivision (2) of this subsection, the clerk shall make an entry of satisfaction on the judgment docket. If the sheriff padlocks, the costs of the proceeding shall be charged as part of the court costs. (b) When the sheriff removes the personal property of an evicted tenant from demised premises pursuant to a writ or order the tenant shall take possession of his property. If the tenant fails or refuses to take possession of his property, the sheriff may deliver the property to

any storage warehouse in the county, or in an adjoining county if no storage warehouse is located in that county, for storage. The sheriff may require the landlord to advance the cost of delivering the property to a storage warehouse plus the cost of one month's storage before delivering the property to a storage warehouse. If a landlord refuses to advance these costs when requested to do so by the sheriff, the sheriff shall not remove the tenant's property, but shall return the writ unexecuted to the issuing clerk of court with a notation thereon of his reason for not executing the writ.

Within 10 days of the landlord's being placed in lawful possession by execution of a writ of possession and upon the tenant's request within that 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. After the expiration of the 10-day period, the landlord may throw away, dispose of, or sell the property in accordance with the provisions of G. S. 42-25.9(g). If the tenant does not request release of the property within 10 days, all costs of summary ejectment, execution and storage proceedings shall be charged to the tenant as court costs and shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale."

## Tenant Remedies Against a Defaulting Landlord.

Tenants also have available to them certain remedies against a landlord who either breaches the rental contract, or who improperly follows the rules set forth above with respect to summary ejection.

With respect to a landlord's breach of the rental contract (see last issue), Section 42-44 states "(a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies or law and in equity... (c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so."

With respect to a landlord's failure to follow the rules imposed by the Tenant Security Deposit Act (see last issue), Section 42-55 states "If the landlord ... fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit..."

With respect to summary ejection proceedings, the remedies available to a tenant who has been improperly evicted are set out in Section 42-25.9 which states "(a) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or

damages for emotional distress. (b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G. S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2 the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress."

## Retaliatory Eviction.

Section 42-37.1 states "(a) It is the public policy of the State of North Carolina to protect tenants and other persons whose residence in the household is explicitly or implicitly known to the landlord, who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law: (1) A good faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair under G.S. 42-42; (2) A good faith complaint to a government agency about a landlord's alleged violation of any health or safety law, or any regulation, code, ordinance, or State or federal law that regulates premises used for dwelling purposes; (3) A government authority's issuance of a formal complaint to a landlord concerning premises rented by a tenant; (4) A good faith attempt to exercise, secure or enforce any

rights existing under a valid lease or rental agreement or under State or federal law; or (5) A good faith attempt to organize, join, or become otherwise involved with, any organization promoting or enforcing tenants' rights."

Section 42-37.2 provides that "(a) If the court finds that an ejection action is retaliatory, as defined by this Article, it shall deny the request for ejection; provided, that a dismissal of the request for ejection shall not prevent the landlord from receiving payments for rent due or any other appropriate judgment."

## Final Thoughts.

It is important to note that the information discussed above is only a summary of the potential remedies available to an aggrieved landlord or tenant. Other remedies not inconsistent with Chapter 42 of the North Carolina General Statutes may be contained in a written lease agreement. Furthermore, remedies in addition to those set out in Chapter 42 may be available to an aggrieved party.

I hope this information has been helpful to you, and remember to be on the look out for the next issue of The Legal Pad.

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### Previous topics covered in The Legal Pad:

- 1) Corporations
- 2) Small Claims Actions
- 3) Social Host Liability
- 4) Landlord-Tenant Law (I)

**Note: To request free copies of previous issues, please call to leave your name and mailing address.**

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**COMPLAINT IN SUMMARY EJECTMENT**

NORTH CAROLINA

General Court of Justice  
District Court Division  
SMALL CLAIM

..... COUNTY

A.B., Plaintiff )  
v. )  
C.D., Defendant )

COMPLAINT

1. (Allegation of residence of parties)

2. Defendant entered into possession of a tract of land (briefly described) as a lessee of plaintiff (or as lessee of E.F. who, after making the lease, assigned his estate to the plaintiff); the term of defendant expired on the 1st day of June, 1965 (or his term has ceased by nonpayment of rent, or otherwise, as the fact may be); the plaintiff has demanded possession of the premises of the defendant, who refused to surrender it, but holds over; the estate of plaintiff is still subsisting, and the plaintiff is entitled to immediate possession.

3. Defendant owes plaintiff the sum of fifty dollars (\$50.00) for rent of the premises from the 1st of May, 1965, to the 1st day of June, 1965, and one hundred dollars (\$100.00) for the occupation of the premises since the 1st day of June, 1965 to the present.

Wherefore, plaintiff demands judgment against defendant that he be put in immediate possession of the premises, and that he recover the sum of one hundred and fifty dollars (\$150.00), interest and costs.

This ..... day of ....., 19...

.....  
(signed) A.B., Plaintiff  
(or E.F., Attorney for Plaintiff)

Service by mail is, is not, requested.

.....  
(signed) A.B., Plaintiff  
(or E.F., Attorney for Plaintiff)

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- |                                    |  |                              |
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| - Lien Filings and Defense         | - Corporate Formation                    | - Overdue Accounts           |
| - Collection of Overdue Accounts   | - Shareholder Agreements                 | - Promissory Notes           |
| - Building Disputes and Litigation | - Homeowner and Condominium Associations | - Homeowner Association Dues |
| - Foreclosures                     |  | - Foreclosures               |
| - Criminal Law                     | - Civil Litigation                       | -General Advice and Counsel  |
| - DWI                              | - Business and Commercial Litigation     | - Professional Service       |
| - Drug Charges                     | - Serious Accidents or Injuries          | - Reasonable Fees            |
| - Traffic Violations               | - District or Superior Court             | - Caring Advice              |
| - Juveniles                        | - Small Claims Court                     | - Solutions to Problems      |

#### **DISCLAIMER**

This newsletter was prepared by THE LAW OFFICE OF WESLEY SCOTT JONES, P.C. as a courtesy for my clients, associates and friends and is not intended to be a comprehensive statement of the law. North Carolina laws change frequently and such changes could affect the information in the newsletter. If you have specific questions with regard to any matter contained in this newsletter, I encourage you to consult with me or another attorney. An attorney-client relationship will be created only by individualized and personalized advice from me to a current or prospective client, and only after the signing of a Contract for Legal Services by all parties affected thereby.

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