

LANDLORD'S GUIDE TO SUMMARY EJECTMENT PROCEEDINGS IN NORTH CAROLINA

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What to do when making lease: Screen prospective Tenants by obtaining dates of birth and Social Security numbers for all adults. Check credit report, criminal records and references from prior landlords. Have Tenant sign a written lease which describes premises, term, rental amount, identifies all residents and gives Landlord/Agent right to evict the tenant for breach of the lease, such as non-payment of rent (a forfeiture clause). Have Tenant sign move in checklist whether or not repairs are requested. Maintain record that any requested repairs are completed by contractor's bill or by Tenant's signature acknowledging completion. You may charge late fees and complaint fees which are the greater of \$15.00 or 5% of the monthly rental. You may charge court appearance fees for 10% of the monthly rental for the first and 12% for the second court appearance. You may provide Tenant is not entitled to notice of default. You should specify that the Tenant is liable for accidental damage. You should provide that acceptance of partial payment is not a waiver of the right to evict. You may not provide that the Tenant accepts the premises "as is."

Comply with Fair Housing laws and Summary Ejectment Statutes. Do not discriminate against any person because of race, color, religion, sex, national origin, handicap status or familial status, i.e. being pregnant or having custody of children. Do not discriminate against Tenants who are victims of domestic violence, sexual assault or stalking. Residential Tenants can only be evicted in compliance with Chapter 42 of N.C. General Statutes, (hereinafter "GS") § 42

-25.6 - 42-36.2 and § 42-59 - 42-79. You cannot padlock their home, turn off their utilities or take possession of Tenant's property without following the statutory procedure. If you do so, the Landlord/Agent may be liable for punitive damages, treble damages and damages for emotional distress of the Tenant.

What to do when Tenant makes complaints about his/her unit, neighbors or common areas: Ask Tenants and neighbors to make all complaints in writing or make record yourself. Keep records of efforts to resolve complaints. Records should reflect who is making complaint, what complaint is about, date of complaint, fact of complaint conveyed to Tenant causing problem and efforts to resolve. Get copies of police records if possible. Photograph any damages to unit. Place these records in the individual Tenant's file so they can be located and used if necessary in court.

Notice of Default: Comply with all lease provisions for notice of default before filing ejectment action. If notice of default is sent for any reason, say "right to possession will be terminated," rather than "lease will be terminated." If you are terminating the lease, you lose the right to seek rental payments which might have been owing until end of term. Lease provisions including a forfeiture clause and a clause saying no notice will be given for non-payment of rent are enforceable. If lease has no forfeiture clause and no notice clause, GS 42-3 implies forfeiture ten days after demand for rent.

Who can bring action: Either the Landlord or his Agent may file a complaint for summary ejectment. If brought by an agent, the caption should read "_____, Owner by Agent, _____." The agent signing the complaint must have actual knowledge of the facts alleged in the complaint.

What are grounds for summary ejectment: (1) Tenant holding over after the expiration of the lease; (2) Tenant doing or failing to do any act which breaches the lease and ends their rights in the property; or most often (3) when the Tenant has failed to pay rent. You cannot evict the tenant if you have accepted a partial payment of rent unless your lease says you can. You cannot evict the tenant for failure to pay water and sewer charges. You cannot cut off a Tenant's electricity even if they fail to pay those charges. You cannot evict a tenant because she is a victim of domestic violence, sexual assault or stalking. You cannot evict a tenant in retaliation for repair requests, good faith complaint to governmental agencies, good faith exercise of rights under the lease or under the law, participation in a tenant's rights organization, or the government's issuance of a complaint concerning the premises.

How to Complete Summary Ejectment Complaint: Read the back of the Summary Ejectment Complaint form (AOC-CVM-201) available from the Clerk of Court or from the Administrative Office of the Courts website at www.nccourts.org and complete blocks as appropriate. As

long as your lease contains a forfeiture clause, you should usually check the third block of paragraph 3 (“The defendant breached a condition of the lease described below for which re-entry is specified”). Checking the third block may enable you to obtain judgment without further proof if Tenant fails to appear in court. Do not check block 1 which says, “The Defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the ten day grace period before filing the complaint.” Block 1 applies to landlords who do not have a forfeiture clause and allows the Tenant to avoid eviction by tendering in cash the rent and court costs before judgment. The Clerk will schedule a hearing no more than seven business days later. The Small Claims filing fee is now \$96.00. The Sheriff’s service fee is \$30.00 per defendant. Provide a stamped envelope addressed to the tenant for the Sheriff’s use.

Check Military Status: Check the military status of all Tenants via <https://www.dmdc.osd.mil/app/scra/> and complete the military status affidavit. (Form FCCOSC 501-597b rev 20150430 1005). The magistrate will not render judgment without it.

Tenant’s offer to pay rent: GS 42-33 says the ejectment action shall cease if Tenant pays or offers to pay the rent due and the court costs. Fortunately, this law does not apply if the lease specifically allows Landlord/Agent to terminate the lease for non-payment. Remember acceptance of rent generally waives your right to evict. Do not allow Tenants to

deposit rent payments directly into your bank accounts.

Suing for Damages: You may, but do not have to, sue for money damages. Note that if you do sue for money damages, the doctrine of *Res Judicata* will prevent you from filing a later action for additional damages, including rent which has not yet accrued. Usually, the Tenants are “judgment proof” and cannot pay any judgment anyway, so you are not losing very much. If you think the Tenant does have enough assets and you suspect significant repair costs or post eviction loss of rent, file one action for possession only. Wait until the amount of damages is known and bring a second suit for monetary damages. Please note that the three (3) year statute of limitations bars action three (3) years from date lease is breached. If money damages are sought in Small Claims Court, Magistrate can award no more than \$10,000.00. If you expect to collect more than \$10,000.00, you should sue in District or Superior Court. If the Sheriff does not serve the defendant personally or on an adult in the residence, but only by posting, the magistrate cannot award monetary damages. If you obtain a judgment for money damages and Tenant later makes full or partial payment to you, you must cause entry of partial or full satisfaction to be entered on the Clerk’s judgment book.

Coming to Court.

(1) BE ON TIME. Magistrate will dismiss case if Landlord/Agent does not appear when called. Magistrate often schedules several cases for 9:00 a.m. There is a list posted on

the wall outside their office and they usually follow that list. They have discretion to call cases from that list in any order and often will call a contested case later in the morning. This means you may be first, even if other cases are listed ahead of you. Beware of long lines at security entrances.

(2) Complete the caption and the description of the property on the judgment form which is on the table outside his office before entering his office.

(3) Affirmatively identify yourself as Landlord or as Agent for the owner. Magistrate wants to know that you know what you are talking about. Tell him you have personal knowledge of the facts and are familiar with the business records which will be introduced into evidence. Magistrate will dismiss a case if the only witness for the Landlord is merely a relative or neighbor of a “Mom and Pop” Landlord or an apartment complex’s maintenance man who knows nothing about the rent issues.

(4) Bring a copy of the lease and any notice of default or notice to vacate and show it to the Magistrate, especially the clause which says Landlord has right to terminate lease. While oral notice to default is sufficient unless the lease requires written notice, a written notice makes better evidence.

(5) State the amount of monthly rent and the total amount of rent and late fees in arrears.

(6) If you have a claim for damage to the property, bring photos of the damage and the expenses incurred in repairing it or at least the contractor’s estimate. It is helpful to show the damage did not exist at beginning of lease by the move in checklist, that all requested repairs were made, and that you are only charging for damages which are not routine wear and tear. It may also be helpful to have available records of routine wear and tear repair for which you are not seeking recovery to emphasize that the damages you are seeking are out of the ordinary.

(7) IF THE TENANT APPEARS AT THE HEARING. You as the Landlord/Agent present your evidence first. You may call the Tenant as a witness, especially if he/she is the only witness to a necessary fact. The Tenant has the right to cross examine you and any witnesses you call. The Tenant presents his/her evidence after you are finished. You have the right to cross examine the Tenant and any other witnesses he/she may call. Be polite not only to the Magistrate but to the Tenant and all witnesses. Do not interrupt the Tenant when he/she is testifying even if they are lying or bringing up irrelevant matters. Respond by clear factual questions on cross examination. Avoid raising your voice or being argumentative. Stick to the most important facts and avoid unimportant disputes.

(8) Ask Tenant to admit each allegation of the complaint, especially that some amount of rent and late fees is unpaid.

Getting the Magistrate to find that a larger amount of arrears is undisputed will be helpful if the Tenant appeals the judgment. Ask the Magistrate to note on the judgment that the certain amount of arrears is undisputed.

(9) Rules of evidence are only loosely enforced. You may object to any witness claiming someone who is not in court said “x, y, & z.” If offered to prove “x, y, & z,” that is hearsay. It is not objectionable if the original speaker is present to confirm or refute having said “x, y, & z.” Witnesses should only testify to what they have personal knowledge of by their five senses. A witness may testify to facts contained in business records if the facts were obtained from a person with knowledge, if the records are kept in the course of a regularly conducted business, and it is the business’ regular practice to make the record.

(10) If you know that the Tenant claims that Landlord/Agent breached the lease, usually because they claim you failed to make requested repairs, make an informed decision whether or not to hire a lawyer at this point. Be especially concerned if the Tenant obtains an inspection by the Housing Authority. They tend to find “uninhabitable” conditions at every inspection, due to conditions as common as stuck windows or wobbly stair railings. Be also concerned if an attorney represents the Tenant. They commonly argue Tenant is entitled to rent abatement if unfit conditions are found, that Landlord/Agent’s collection of full rent is an Unfair Trade Practice and that you should pay punitive damages and

attorneys’ fees. Note a tenant may not unilaterally withhold rent prior to a judicial ruling and a tenant is not entitled to recover rent abatement if they did not pay rent. A magistrate may reduce the amount of rent owing if they determine the fair market rental of defective premises is below the lease rate. Many of my clients handle routine summary ejectments themselves but ask me to appear in contested matters like these.

AFTER THE HEARING. The magistrate will render judgment on the same day unless the parties agree otherwise or the case is considered complex. Complex cases may include issues involving criminal activity, Section 8 housing, public housing, counterclaims or issues other than nonpayment of rent. Upon rendition of judgment by the Magistrate, either party has ten (10) days to appeal for a new trial in the District Court. The Tenant has the benefit of an automatic stay preventing execution on the judgment during those ten (10) days. If no appeal is filed after ten days, you may seek issuance of a Writ of Possession from the Clerk of Court.

IF APPEAL IS FILED. The Tenant is required to pay to the Clerk the rent owing as determined by the Magistrate and must sign a bond that they will pay the contract amount of rent to the Clerk by the fifth (5th) day after the due date in the lease. If there is an amount of arrears which is undisputed, the Tenant will also have to pay that full amount upon making the appeal, unless he/she files as an indigent or

files a pleading that there is an actual dispute as to the arrearages. Landlord/Agent should ask the Clerk to disburse rent collected to him/her. If the Tenant fails to pay the rent bond to the Clerk or make monthly rent payments to the Clerk, the Landlord/Agent may then seek issuance of a Writ of Possession and removal of the tenant described below.

TRIAL IN DISTRICT COURT. The appeal to the District Court is treated as a brand new trial. Either party may request a jury trial. I do not recommend requesting a jury trial because it usually delays trial and many jurors may sympathize with a Tenant. Most of my clients retain me to appear on their behalf in any case appealed to District Court. The rules of evidence can be strictly enforced and usually there are significant contested issues including counterclaims for Unfair Trade Practices. It is common that Tenants file appeals for purposes of delay and fail to appear at the calendar calls in District Court. If Tenant does not show up, I will ask the Court, during the call of the docket, to dismiss the appeal. Be prepared to try the case when case is calendared for trial. If the Tenant is present, the judge may call the case for a non-jury trial later that day or later in the week, so I will ask that you and our witnesses be on standby. If the landlord is a corporation, it should be represented by an attorney.

EXECUTION PROCESS FOR THE WRIT OF POSSESSION. If the Tenant fails to appeal or fails to maintain his appeal by failing to pay rent to the Clerk within

five (5) business days after the lease due date, you may also seek a Writ of Possession. You should seek execution of the Writ within thirty (30) days after the judgment. If you wait more than thirty (30) days, you will have to sign an affidavit that you have not entered into a new lease with Tenant or accepted rental money from the Tenant for any period of time after the judgment. You may accept payments for rent arrearages and other prior damage, but make sure you document by receipt that the sum accepted is for old arrearages and old damages, not for rental accruing after the judgment. You obtain the Writ of Possession by paying Twenty-Five and NO/100 (\$25.00) Dollars to the Clerk and asking for the Writ. You can give the Clerk another check for Thirty and NO/100 (\$30.00) Dollars payable to the Forsyth County Sheriff and ask that they deliver the Writ to the Sheriff's office once they have completed it. The Sheriff is to execute the Writ no more than five (5) days from his receipt of the Writ. Before executing the Writ, the Sheriff gives notice to the Tenant stating the day the Writ will be executed. The Sheriff usually gives this notice by mailing a copy of the notice by first-class mail to the Tenant. You should provide a stamped envelope addressed to the Tenant's address. The Sheriff may also deliver a copy of the notice to the Tenant or by leaving a copy of the notice at the Tenant's home with a person of suitable age and discretion. The notice will inform the Tenant (1) that they should move immediately, (2) that if they fail to do so the Sheriff will evict them, (3) that the Landlord will lock their property inside, (4) that they must request the Landlord to return any

property, and (5) if they fail to request their property within the time set by G.S. 42-25.9 the Landlord may dispose of their property. You will need to meet the Sheriff at the designated time, sign a form confirming the lock out. Be prepared to change the locks.

DEALING WITH TENANT’S PROPERTY. If the Tenant fails to take possession of their property, you can either lock it in the unit or pay the Sheriff to store the property. For the Sheriff to store it, he will require the Landlord/Agent to advance the cost of delivering the property to a storage facility and one month’s storage. If you neither lock the property nor advance the costs of delivery and storage, the Sheriff cannot remove the property, but must return the Writ unexecuted to the Clerk. If you lock Tenant’s property on the premises, you have four alternate remedies.

(1) The most common remedy is to simply throw away or dispose of the tenant’s property as allowed by G.S. 42-36.2. There is no monetary limitation on this remedy but you must have offered to allow the Tenant to release the Tenant’s property and he must have failed to retrieve it during regular business hours within seven (7) days after execution of the Writ.

(2) GS 42-36.2 also permits you to conduct a sale of Tenant’s property in compliance with GS 42-25.9g. You must give the Tenant written notice by first class mail to the last known address seven (7) days before the sale which can

be public or private. The Notice must state the date, time and place of the sale and that surplus proceeds after payment of unpaid rent, damages, storage fees, and sale costs will be disbursed to the tenant. You must release the Tenant’s property to him during business hours or at an agreed time before the sale.

(3) GS 42-25(h) applies only to property with a total value of less than \$500.00. You may throw away or dispose property left five (5) days after the execution of the Writ. During the five (5) day period you must release the property to the Tenant during regular business hours or at an agreed time.

(4) GS 42-25(d) permits you to delivered abandoned property worth \$750.00 or less to a non-profit organization providing free or nominal priced clothing and household furnishing if that organization agrees to identify and separately store the property for 30 days and agrees to release it to the Tenant for free during the 30 day period. You must post at the premises and mail by first class mail to the last known address notice advising where the property has been delivered. A presumption of abandonment arises if you post notice inside and out of the premises of suspected abandonment of the property. I know of no nonprofit organization in Forsyth County willing to separately store property.

In all events, I believe the best course is to allow the Tenant to retrieve their property as it saves you the expense of moving it and avoids the possibility of being sued for conversion. The next safest harbor is to conduct a public

to the premises, non-fulfillment of any rental period (except for termination by military personnel or victims of domestic abuse or stalking), payment of bills which have become a lien on the property, costs of re-renting, costs of removal and storage of Tenant's property, court costs for the eviction, and late, complaint filing and court appearance fees. If not applied for those purposes, the deposit must be returned to the Tenant within thirty (30) days of termination of the tenancy. Within that thirty (30) day period, Landlord/Agent must itemize any damage and provide an accounting to Tenant. You may not withhold for ordinary wear and tear nor for any sum exceeding actual damages. If all damages are not known, you must provide an interim accounting within thirty (30) days. A Landlord who willfully fails to comply with the deposit, bond and notice requirements forfeits his right to any part of the deposit. A Tenant may file suit to compel an accounting and recovery of the balance of the deposit, his actual damages and attorney's fees.

EARLY TERMINATION. Members of the Armed Forces who are required to move because of permanent change of station orders, premature discharge, or deployment for at least ninety (90) days may terminate their lease on thirty (30) days written notice with verification of the orders. Family members of deceased military personnel may likewise terminate a lease. Victims of domestic violence, sexual assault or stalking are protected from discrimination, may change their locks at their expense and, with a valid order of protection other than an ex parte order, a criminal restraint order or

Address Confidentiality Program card may terminate their leases on thirty (30) days written notice. These persons entitled to early termination are to pay pro-rated rent to the date of termination.

DISCLAIMER: THIS GENERAL SUMMARY OF LANDLORD TENANT LAW AND PROCEDURES IS NOT INTENDED AS LEGAL ADVICE. DIFFERENT LAWS APPLY TO MOBILE HOME TENANCIES. GOOD LEGAL COUNSEL CAN ONLY BE RENDERED AFTER REVIEW OF APPLICABLE LEASE DOCUMENTS AND THE FACTS OF A PARTICULAR CASE.

FIRM BIOGRAPHY

Bailey & Thomas, P.A. is a law firm with five practicing attorneys located in Winston-Salem, North Carolina which has established a reputation for integrity and personal service since 1955. Our founding partner Wesley Bailey obtained his undergraduate and law degree from Wake Forest University and was admitted to the bar in 1955. Wesley concentrates his practice in the areas of probate, trust and estate planning, corporate law and real estate. George S. Thomas obtained his undergraduate and law degrees from the University of North Carolina at Chapel Hill. George concentrates his practice in areas of commercial and residential real estate, corporate law, bankruptcy and collections. David W. Bailey, Jr. obtained his undergraduate degree from Duke University, his law degree from the University of North Carolina at Chapel Hill and was admitted to the bar in 1982. David concentrates his practice in estate planning and probate, insurance law, corporate law, and personal injury law. John R. Fonda obtained his undergraduate degree from the University of North Carolina at Chapel Hill, his law degree from Wake Forest University and was admitted to the bar in 1987. In addition to his work for commercial and residential landlords, John concentrates his practice in insurance law, personal injury law, and civil litigation. Roger W. Marion, Jr. obtained his undergraduate degree from Campbell University, his law degree from Wake Forest University and was admitted to the bar in 2005. Roger concentrates his practice in insurance law and civil litigation. E. Joe Joslyn, Jr. obtained his undergraduate degree from North Carolina State University, his law degree from Mercer University and was admitted to the bar in 2010. Joe concentrates his practice in estate planning and probate law, civil litigation and criminal/traffic law.



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