G.S. 42-3: The Landlord's Life Preserver

At common law a landlord confronted with a non-paying tenant had only one hope for regaining possession of rental property: a lease provision spelling out that the tenant's default would trigger the landlord's right to repossess the property (commonly referred to as a *forfeiture clause*). When the parties have agreed in advance to this consequence for failure to pay rent, an action for summary ejectment merely asks the court to enforce the agreement of the parties. The common law rule was that absent such agreement, the landlord was left to the unsatisfactory recourse of cutting his losses by terminating the lease as soon as possible and attempting to collect unpaid rent through an action for money owed -- with all of the attendant problems associated with the collection of money judgments.

The common law rule is still the rule when it comes to personal property. If you buy a car on the installment plan, the seller has no right to repossess the car if you default unless part of your agreement specifically gives the seller that right. But North Carolina long ago established a different rule for unwary landlords. GS 42-3, sometimes referred as the *statutory forfeiture provision*, allows landlords to file a summary ejectment action if the tenant misses a rent payment even though the rental agreement is silent on the consequences of default. The statute says:

In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease.

The North Carolina Supreme Court explained the purpose of this provision in *Ryan v. Reynolds*, 190 N.C. 563 (1925): "The statute was passed to protect landlords who made verbal or written leases and omitted in their contracts to make provision for re-entry on nonpayment of rent when due. The consequence was that often an insolvent lessee would avoid payment of rent, refuse to vacate, and stay on until his term expired." This "life preserver" is available only under certain circumstances, however, which are discussed in this post.

The landlord (or the landlord's agent) must demand the rent.

GS 42-3 (and its companion statute, GS 42-33) is concerned first and foremost with avoiding the situation in which a tenant fails to pay rent and continues to occupy the property. Allowing the landlord to recover the property in the absence of a contractual right to do so is a last resort—after efforts to obtain rent have failed. Thus the statute requires the landlord to (1) demand payment of the rent, and (2) wait ten days for the tenant to comply with the demand, before filing an action to recover possession. A landlord who is unaware of this statutory purpose may find the requirement perplexing. "Why should I demand payment from a tenant in default when the tenant is well-aware

that the rent is late?" It is important to understand that the purpose of the demand requirement is to maximize the likelihood that the landlord will actually be paid, by requiring the landlord to (1) specifically communicate to the non-paying tenant that the rent is late, must be paid, and that the consequences of failure to pay will be eviction, and (2) then give the tenant ten days to come up with the money.

What is required for an effective demand?

Snipes v. Snipes, 55 N.C. App. 408, *aff'd* 306 N.C. 373 (1982) is the only NC case to discuss the nature of the demand required by GS 42-3. In *Snipes* the landowner told the tenant that she "wanted to get all this business settled." The Court of Appeals found that insufficient, saying: "We hold that to constitute a 'demand' under N.C.G.S. 42-3, a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent is necessary. . . . The demand must be made with sufficient authority to place the lessee on notice that the lessor intends to exercise [the] statutory right to forfeiture for nonpayment of rent." It is interesting to note that *Snipes* suggests that a demand should communicate the landlord's intention to evict the tenant if payment is not made.

Timing of the demand

Sometimes questions arise about timing of the demand relative to filing an action for summary ejectment. One issue is whether a landlord can make demand in advance—before rent is late, or perhaps even in the lease at the outset of the tenancy. My opinion is that the plain language of the statute -- with its references to "past-due rent" and the tenant's failure to pay "within ten days after a demand is made" – establishes that the demand must be made after a rent payment comes due. Another question is whether the complaint itself may serve as a demand. Again, I believe the answer is no. The specific language of the statute provides that the landlord's right to seek summary ejectment comes into being only upon the tenant's"failure to pay rent within 10 days after a demand." In other words, on Day 9 the landlord has no legal right to seek to recover possession—that right hasn't come into existence yet. Absent specific extraordinary circumstances, the law does not permit a plaintiff to file a complaint seeking relief for defendant's anticipated future misbehavior. There are other, more pragmatic reasons for a rule requiring demand at least ten days before a complaint is filed; in light of the accelerated timetable for summary ejectment actions, many cases are likely to be calendared for trial before the ten-day period has passed!

What if the lease contains a forfeiture clause?

As a general rule, a landlord enjoys great benefit from a skillfully written forfeiture clause allowing the landlord to recover possession of rental property with a minimum of procedural requirements and triggered by whatever violations are of consequence to the landlord. Sometimes, though, such a landlord may encounter some obstacle to proving that she is entitled to summary ejectment pursuant to the terms of the lease. Can a landlord in this circumstance "switch grounds" to GS 42-3, saying in effect "Forget about the lease--I am prepared to demonstrate that I made demand

for the rent at least ten days before filing this action and that the rent has not been paid"?

The answer to this question, which comes up surprisingly often, is no. In *Charlotte Office Tower Associates v. Carolina SNS Corp.,* the Court of Appeals had this to say: "GS 42-3 [is] remedial in nature and will apply only where the parties' lease does not cover the issue of forfeiture of the lease term upon nonpayment of rent. Where the contracting parties have considered the issue, negotiated a response, and memorialized their response within the least, the trial court appropriately should decline to apply these statutory provisions. . . . The statute has no application to [such a] case." 89 NC App 697 (1988).

Any discussion of GS 42-3 is incomplete without discussion of a companion statute, GS 42-33, which gives a tenant the right to stop a summary ejectment action in its tracks by tendering the rent and court costs. Tender is an available defense only in actions for summary ejectment based on the statutory forfeiture provision, a rule that has generated considerable confusion for many years. I'll talk about the law related to tender in my next post.