

## Small Claims Magistrates: Don't Make These Mistakes in Summary Ejectment Cases!

After teaching and advising magistrates about landlord-tenant law for a little more than a decade, I've become familiar with their most common errors – which have, somewhat discouragingly, remained pretty much the same throughout that time. All of these errors arise from neglecting to independently analyze the requirements and defenses of each of the four grounds for eviction. Those grounds are briefly summarized below, followed by a list of errors most often made when magistrates confuse them. If you are such a magistrate, please consider having this blog post tattooed somewhere on your body:

### Ground #1: Breach of a lease condition for which reentry is specified. [GS 42-26\(a\)\(2\)](#).

When a landlord agrees in advance with a tenant that a particular breach by the tenant will authorize the landlord to terminate the lease and regain possession of the property, the small claims magistrate is being asked to do no more than enforce the contract between the parties. The landlord must demonstrate that (1) the lease contains a provision to this effect (a *forfeiture clause*), (2) that the tenant breached the lease in a manner triggering the landlord's right to terminate, and (3) that the landlord followed whatever procedure, if any, is specified in the lease for effectuating that right.

NOTE: This ground will hereinafter be referred to as *breach of a lease condition* for the sake of brevity, but remember that both parts are required for a valid forfeiture clause: (1) the lease identifies a lease provision or provisions, the breach of which (2) authorizes the landlord to "reenter," or in other words, to declare the lease forfeited.

### Ground #2: Failure to pay rent. [GS 42-3](#).

When a landlord fails to include a forfeiture clause in the lease, **Ground #1** obviously does not apply. Nothing else appearing, this landlord's only remedy for a non-paying tenant is to terminate the lease as soon as possible. Recognizing the injustice of this outcome, particularly in fixed-term leases for a year or more, the General Assembly enacted GS 42-43, the "landlord's life preserver" provision. This statute *implies* a forfeiture clause allowing the landlord to terminate the lease for non-payment of rent provided (1) the landlord made a clear and unequivocal demand for unpaid rent, and (2) waited at least ten days before filing a summary ejectment action. *Tender* (paying all rent owed and court costs in cash) at any point prior to judgment is a complete defense to summary ejectment. [GS 42-33](#).

NOTE: Grounds #1 and #2 are mutually exclusive. The lease either has or does not have a forfeiture clause triggered by failure to pay rent. If it does, Ground #1 applies. If it does not, Ground #2 applies. [Stanley v. Harvey, 90 NC App 535 \(1988\)](#). A landlord with a forfeiture clause in the

lease does not have the option of pretending otherwise and winning summary ejectment by satisfying the requirements of Ground #2.

### **Ground #3: Holding over.** [GS 42-26\(a\)\(1\)](#)

This ground for summary ejectment simply recognizes the rule that a tenant must leave rental property when the lease comes to an end. Thus, the landlord need prove only that (1) the lease has ended and (2) the tenant is still there. A lease for a fixed period ends when it says it ends: a one-year lease beginning on January 1 ends on December 31 with no additional action or notice required. A lease that repeats from period-to-period must be terminated by appropriate notice. The length and procedure for notice are established by the lease, and if the lease is silent, by [GS 42-14](#). [Cherry v. Whitehurst, 216 N.C. 340 \(1939\)](#). This ground at first appears deceptively simple, but when the lease provision for the termination procedure is confusing and/or one or both of the parties disregard the lease altogether, these SE cases can be some of the most difficult.

### **Ground #4: Criminal activity**

[GS Ch. 42, Art. 7](#), establishes a statutory ground for summary ejectment based on criminal activity. There are very few cases interpreting these statutes, and thus the relevant law is almost wholly contained in the statutory language. Unlike the other three grounds for summary ejectment, this ground is seldom confused with other grounds. Sometimes criminal activity is specifically addressed by a forfeiture clause in the lease, but Art. 7 continues to be relevant even then. GS 42-75.

[https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter\\_42/GS\\_42-75.pdf](https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_42/GS_42-75.pdf).

### **Common Errors**

1. Contrary to the beliefs of many folks involved in landlord-tenant law, there's no such thing as ten-day notice. It's a mythical beast that follows around the Emperor in his new clothes. A requirement that a landlord wishing to evict a tenant must first give a ten-day notice appears nowhere in case law or statutory law. My best guess is that this creature came into being when the ten-day demand requirement for Failure to Pay Rent was confused with the statutory notice required to terminate a lease related to Holding Over.

Another possible source of confusion arises from the practice of some landlords of giving a "Pay or Quit" notice, setting up two alternative grounds for eviction. A landlord is entitled to possession upon proving either ground, but whether a landlord has done so requires separate analysis of each ground. The "Pay" portion of the communication must be a demand for the rent satisfying the

10-day requirement to prevail on Failure to Pay Rent, while the “Quit” portion must satisfy the separate requirements of notice required to terminate the lease.

2. Tender is a defense to Failure to Pay Rent. It is not a defense to a summary ejectment action based on any other ground. A landlord who accepts payment, whether partial or full, may confront a defense based on waiver, but this doctrine is entirely separate from the legal doctrine of tender.
3. The “60-day-rule” for mobile home spaces applies only to SE actions based on holding over, and even then only when the lease itself does not provide for a different notice to terminate the lease. There is no legal requirement related to “sixty days” when the ground for SE is breach of a lease condition, failure to pay rent, or criminal activity.
4. The statute authorizing landlords to include a “no waiver” provision in the lease allowing them to accept partial rent payments while retaining the right to seek summary ejectment applies only to actions based on breach of a lease condition. [GS 42-26\(c\)](#).