Summary Ejectment & Unconscionability: When Breach of the Lease Is Not Enough

North Carolina law permits summary ejectment from residential housing only for reasons specified in the statute. G.S. 42-25.6. In Eastern Carolina Regional Housing Authority v. Lofton, 767 S.E.2d 63 (2014), the North Carolina Court of Appeals decided a case—and created new law – related to one of the most common grounds for summary ejectment: breach of a lease condition which, according to the lease itself, triggers the landlord's right to declare the lease forfeited.

In its simplest form, a **forfeiture clause** says, "If the tenant does *X,* the landlord has the right to end the lease and recover possession of the rental property." The most common example of X, of course, is failure to pay rent, but the parties may identify any breach as grounds for forfeiture. Because the court is being asked in these cases to enforce the agreement of the parties, the central legal question is always the same: does the evidence show that the tenant did or failed to do something which, according to the lease itself, triggered the landlord's right to terminate the lease?

In Lofton, there was no question that the tenant breached the lease and that the lease provided for forfeiture as a result. The undisputed facts were that the tenant's babysitter was arrested at the tenant's apartment in possession of marijuana. A search of the premises revealed additional drugs, and the babysitter was charged with possession of marijuana with intent to sell and deliver. The lease provided for forfeiture if "any drug-related criminal activity [occurred] on or off the premises by . . . another person under tenant's control." The lease defined a person as being under the tenant's control if the person was "present on the premises at the time of the activity in question because of an invitation from tenant. . . . ." Nevertheless, the trial court denied plaintiff's claim for eviction and the Court of Appeals agreed. Why? Because the plaintiff "failed to show that summarily ejecting Defendant would not be unconscionable."

Before Lofton, there was some uncertainty about whether a landlord must show that the result of declaring a lease forfeited would not be unconscionable. The first suggestion of such a requirement appeared in 1967, in *Morris v. Austraw,* 269 N.C. 218. In *Morris*, the North Carolina Supreme Court included a quote from 32 *Am Jur.,* Landlord and Tenant Sec. 848, as follows:

"As has been said, the right to declare a forfeiture of a lease must be distinctly reserved; the proof of the happening of the event on which the right is to be exercised must be clear; the party entitled to do so must exercise his right promptly; and the result of enforcing the forfeiture must not be unconscionable."

Persons interested in summary ejectment law must have been intrigued by the Court's inclusion of this quote from a legal encyclopedia. None of the "four requirements" were involved in the *Morris* case, and none found clear affirmative support in North Carolina law at the time. No

state appellate court had used language like “distinctly reserved,” required “clear” proof, or focused on whether a landlord had acted “promptly” in the context of summary ejectment. Certainly, no case had suggested that the plaintiff had the burden of demonstrating that ejectment would not be unconscionable.

Almost thirty years later the “*Morris* requirements” reappeared in North Carolina case law. In *Charlotte Housing v. Fleming*, 123 N.C. App. 511 (1996), the Court stated that “in order to evict a tenant in North Carolina, a landlord must prove” the four elements identified in *Morris*. This language was picked up in a few other cases, but none of them relied on the quoted language in reaching their result. Finally, the Court of Appeals addressed the issue directly, pointing out that the four requirements set out in Morris originated in *Am Jur*, were not specifically adopted or approved by the Court, were unnecessary to the decision in the case, and were thus dicta. Durham Hosiery v. Morris, 217 N.C. App. 590 (2011). While the precise issue in the case involved the second “*Morris* requirement,” pertaining to the meaning of “clear” proof, the Court’s analysis was not so restricted and thus seemed to have finally disposed of the lingering questions raised by *Morris.*

If the Court were ever to adopt a requirement that eviction not be unconscionable, however, it is hard to imagine facts more compelling than those in *Lofton*. Ms. Lofton consented to the search of her premises and cooperated with police in investigation of the crime. She was not criminally charged, and the babysitter said Ms. Lofton had no idea he was storing drugs at her apartment. She had three small children, lost her job because she lost her babysitter, and had no other place to live. She had no history of criminal conduct, lease violations, or even complaints by her neighbors.

The *Lofton* Court found that eviction under these circumstances would be “shockingly unfair and unjust,” pointing out that the facts went beyond the typical “innocent tenant” situation. “The fact that the tenant is unaware of the criminal activity being engaged in . . . is only one aspect of a broader unconscionability analysis that would not, in each and every instance, preclude the eviction of an ‘innocent’ tenant.” Interestingly, the Court noted that “we have not been able to identify any case in which the extent to which a landlord did or did not satisfy the fourth criteria set out in *Morris* and its progeny has been addressed by either of North Carolina’s appellate courts.”

Read most narrowly, the rule established by *Lofton* is likely to be significant primarily in subsidized housing cases involving an “innocent tenant” in addition to other compelling facts. More broadly, the *Lofton* opinion may be read as resurrecting, to some uncertain degree, all four “*Morris* requirements,” with their common reminder that “our courts do not look with favor on lease forfeitures.” Stanley v. Harvey, 90 N.C. App. 535 (1988).